The Consumer Law Practice Series

Fair Debt Collection

TENTH EDITION

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1.1.1 About This Treatise

1.1.1.1 All Subscribers Have Access to the Digital and Print Version

Fair Debt Collection is available in both a print and digital version. Print revisions are released every few years and the digital version is updated more frequently, with all changes integrated into the text. The digital version also contains additional pleadings, practice tools, and primary source material, described at § 1.1.1.3, *infra*.

The digital version is available at www.nclc.org/library. It allows pinpoint searches of the book, easy navigation between subsections, and active links to external websites, other sections in the book and other National Consumer Law Center (NCLC) treatises. Material in the digital version can be copy/pasted, downloaded, printed, or emailed. The digital version also allows users to annotate, highlight, and bookmark text for their own use.

Clicking on "highlight updates" in the online version at the top of the screen will highlight digital-only additions to the treatise since release of the print book. This option also shows, in curly brackets at the beginning of footnotes, the corresponding footnote number in the print book of a digital footnote. Important law changes are shown on the digital version with red flags, and very recent updates with blue flags.

Subscription options are available as either digital-only or print + digital. Subscribers to print + digital subscriptions receive, as part of their subscription price and at no additional charge, any revised print edition that is released during their subscription period.

1.1.1.2 Organization of the Treatise

This treatise is designed to help lawyers and paralegals representing consumers who are victims of abusive debt collection practices. It may also be useful to debt collection professionals as a part of their legal compliance efforts.

The chapters of the treatise are divided as follows:

- Chapter 1 provides information about the types of entities involved in debt collection and an overview of the process of debt collection;
- Chapter 2 details how to prepare a suit for debt collection abuse;
- Chapters 3 through 12 discuss the federal Fair Debt Collection Practices Act (FDCPA) as follows:
  - Chapter 3 provides an overview of the development of the FDCPA, amendments, and regulatory authority;
  - Chapter 4 outlines coverage under the FDCPA;
  - Chapters 5 through 10 discuss claims under specific sections of the FDCPA;
  - Chapter 11 details FDCPA remedies and other issues arising in litigation; and
  - Chapter 12 summarizes different defenses and counterclaims likely be raised by debt collectors;
- Chapter 13 discusses claims in and related to bankruptcy;
- Chapter 14 outlines other possible federal claims consumers may wish to file;
- Chapter 15 discusses different tort remedies that may be available under state law; and
- Chapter 16 summarizes other state law remedies that may be available to consumers.

The appendices of this treatise include the following content:

- Appendix A contains the text of the FDCPA and the full text of a 1977 U.S. Senate report about the FDCPA;
- Appendix B contains the full text of Consumer Financial Protection Bureau (CFPB) Regulation F interpreting the FDCPA, with specific Official Interpretations integrated with the corresponding regulatory provision. The appendix also includes a table showing where significant Regulation F provisions are examined in this treatise, and also provides summaries of other CFPB interpretations and guidance on the FDCPA;
- Appendix C contains summaries of Federal Trade Commission advisory opinions and the staff commentary on the FDCPA, as well as a list of informal staff letters;
- Appendix D provides a state-by-state summary of state debt collection statutes;
- The print version of Appendix E includes twelve case summaries of FDCPA case decisions, organized by topic. The digital version now includes fifteen thousand;
- Appendix F describes practice aids, pleadings, and primary sources available online;
- Appendix G lists debt collection abbreviations; and
- Appendix H contains a list of websites related to debt collection.

1.1.1.3 Additional Pleadings, Primary Sources, and Practice Tools

The digital version of this treatise contains thousands of additional documents: Pleadings and Discovery, Practice Tools, and Primary Sources. These materials are listed at the bottom of the digital version's table of contents, available at www.nclc.org/library. (The table of contents is found on the digital version's left pane.)

All of these materials are searchable through the standard search box at the top of the screen or using the advanced

pleadings search link just above the search box. Search filters allow users to search only for pleadings, only for primary sources, or only for practice tools. Just like the chapters and appendices, these additional materials can be copy/pasted and downloaded and printed. Virtually all pleadings and discovery are available in Microsoft Word format, allowing easy adaptation for an actual case.

1.1.1.4 The FDCPA Case Connector

A special feature of *Fair Debt Collection's* digital version is the "FDCPA Case Connector" that allows rapid display of relevant case summaries from the over fifteen thousand summaries found in the digital version of Appendix E, *infra*. The digital version of Appendix E is a unique resource only found with this treatise—summaries by topic for all significant FDCPA decisions since the statute was first enacted.

The FDCPA Case Connector allows identification and display of relevant FDCPA case summaries by any combination of the plaintiff or defendant names, the court, the date range, the citation, key words, or the Appendix E subsection.

Once a summary is displayed, the FDCPA Case Connector allows immediate linking to other summaries for the same decision, other summaries on the same topic, and summaries of related decisions for that case. All decisions and summaries meeting a search criteria are displayed, and this listing or portions of it can be copy/pasted into documents.

1.1.1.5 How Sections in This Treatise Correspond to the FDCPA

Chapters 3 through 12, *infra*, of this treatise are devoted to the FDCPA, as are most of the appendices. With a few exceptions, this book follows the organization of the FDCPA.

Codified Heading at 15 U.S.C.	Treatise Section	Public Law Section	U.S.C. Section
Congressional findings and declaration of purpose	§ 3.1	§ 802	§ 1692
Definitions	Ch. 4	§ 803	§ 1692a
Acquisition of location information	§ 5.2	§ 804	§ 1692b
Communication in connection with debt collection	Ch. 5	§ 805	§ 1692c
Harassment or abuse	Ch. 6	§ 806	§ 1692d
False or misleading representations	Ch. 7	§ 807	§ 1692e
Unfair practices	Ch. 8	§ 808	§ 1692f
Validation of debts	Ch. 9	§ 809	§ 1692g
Multiple debts	§ 10.2	§ 810	§ 1692h
Legal actions by debt collectors	§ 10.3	§ 811	§ 1692*i*
Furnishing certain deceptive forms	§ 10.4	§ 812	§ 1692j
Civil liability	Chs. 11, 12	§ 813	§ 1692k
Administrative enforcement	§§ 3.2.1.1, 3.4.2.5, 3.4.4	§ 814	§ 1692*l*
Reports to Congress by the Commission	§ 3.4.4.1	§ 815	§ 1692m
Relation to State laws	§ 11.16	§ 816	§ 1692n
Exemption for State regulation	§§ 3.1, 3.4.4.2	§ 817	§ 1692o
Exception for certain bad check enforcement programs operated by private entities.	§ 4.8.11	§ 818	§ 1692p

1.1.1.6 How Sections in This Treatise Correspond to Regulation F

The Consumer Financial Protection Bureau has now, effective November 30, 2021, enacted Regulation F, interpreting the FDCPA.[1] The Regulation is reproduced at Appx. B.1.2, *infra*. While certain regulation provisions track the statutory language, other provisions and the Regulation's Official Interpretations provide new FDCPA interpretations.

The table below indicates subsections of this treatise that examine specific Regulation F provisions. The table also displays, where applicable, the corresponding FDCPA provision and the corresponding United State Code provision of the FDCPA.

1 12 C.F.R. Part 1006. *See* § 3.4.4.2, *infra*.

Reg. F Section	Treatise Section	Public Law Section	U.S.C. Section
§ 1006.1(a), Authority	§ 3.4.4	§ 814(d)	§ 1692l(d)
§ 1006.1(b), Purpose	§ 3.1	§ 802	§ 1692
§ 1006.1(c), Coverage	§ 4.8.12	§ 803(6)	§ 1692a(6)
§ 1006.2, Definitions	Ch. 4	§ 803	§ 1692a
§ 1006.2(b), Attempt to communicate	§ 4.2	n/a	n/a
§ 1006.2(d) Communicate or communication	§ 4.2	§ 803(2)	§ 1692a(2)
§ 1006.2(j) Limited-content message	§ 4.9	n/a	n/a
§ 1006.6, Communications in connection with debt collection	§§ 5.3 to 5.9	§ 805	§ 1692c
§ 1006.6(a), Definition (including deceased consumer)	§ 5.3.1	§ 805(d)	§ 1692c(d)
§ 1006.6(b)(1), Prohibitions regarding unusual or inconvenient times or places.	§ 5.4	§ 805(a)(1)	§ 1692c(a)(1)
§ 1006.6(b)(2), Prohibitions regarding consumer represented by an attorney.	§ 5.5	§ 805(a)(2)	§ 1692c(a)(2)
§ 1006.6(b)(3), Prohibitions regarding consumer's place of employment	§ 5.6	§ 805(a)(3)	§ 1692c(a)(3)
§ 1006(c), Communications with a consumer—after refusal to pay or cease communication notice	§ 5.8	§ 805(c)	§ 1692c(c)
§ 1006.6(d), Communications with third parties—	§ 5.7	§ 805(b)	§ 1692c(b)
§ 1006.6(e), Opt-out notice for electronic communications or attempts to communicate	§ 5.9	n/a	n/a
§ 1006.9, Debt collection practices in connection with the global COVID-19 pandemic	§ 7.4.12.2	n/a	n/a
§ 1006.10, Acquisition of location information	§ 5.2	§ 804	§ 1692b
§ 1006.14, Harassing, oppressive, or abusive conduct	Ch. 6	§ 806	§ 1692d
§ 1006.14(b), Repeated or continuous telephone calls or telephone conversations	§ 6.7.2	§ 806(5)	§ 1692d(5)
§ 1006.14(h), Prohibited communication media	§ 6.9	n/a	n/a
§ 1006.18, False, deceptive, or misleading representations or means	Ch. 7	§ 807	§ 1692e
§ 1006.18(d), Social media	§ 7.4.2	n/a	n/a
§ 1006.18(e), Disclosures required	§ 7.2.11	§ 807(11)	§ 1692e(11)
§ 1006.18(f), Assumed names	§ 7.2.14	§ 807(14)	§ 1692e(14)
§ 1006.22, Unfair or unconscionable means	Ch. 8	§ 808	§ 1692f
§ 1006.22(f)(3), Restrictions on use of certain media (emails sent to employer email addresses)	§ 8.10	n/a	n/a
§ 1006.22(f)(4), Restrictions on use of certain media (social media)	§ 8.11	n/a	n/a
§ 1006.22(g), Safe harbor for certain emails and text messages relating to the collection of a debt	§ 8.9	n/a	n/a
§ 1006.26, Collection of time-barred debts	§ 7.4.9	n/a	n/a
§ 1006.30(a), Required actions prior to furnishing information	§ 8.12	n/a	n/a
§ 1006.30(b), Prohibition on the sale, transfer for consideration, or placement for collection of certain debts	§ 8.13	n/a	n/a

Reg. F Section	Treatise Section	Public Law Section	U.S.C. Section
§ 1006.30(c), Multiple debts	§ 10.2	§ 810	§ 1692h
§ 1006.30(d), Legal actions by debt collectors	§ 10.3	§ 811	§ 1692i
§ 1006.30(e), Furnishing certain deceptive forms	§ 10.4	§ 812	§ 1692j
§ 1006.34, Notice for validation of debts	Ch. 9	§ 809	§ 1692g
§ 1006.34(a)(3), Itemization date	§ 9.4.2	n/a	n/a
§ 1006.34(c), Validation information	§ 9.4	§ 809(a)	§ 1692g(a)
§ 1006.34(d)(2), Safe harbor	§ 9.5.2	n/a	n/a
§ 1006.34(d)(3), Optional disclosures	§ 9.6	§ 809(a)	§ 1692g(a)
§ 1006.34(d)(4), Validation notices delivered electronically.	§ 9.5.3	n/a	n/a
§ 1006.34(e), Translation into other languages	§ 9.5.4	n/a	n/a
§ 1006.38, Disputes and requests for original-creditor information	§§ 9.10, 9.11	§ 809(b)	§ 1692g(b)
§ 1006.42, Sending required disclosures	§ 9.3	n/a	n/a
§ 1006.100, Record retention	§ 11.5.4.3	n/a	n/a
§ 1006.104, Relation to State laws	§ 11.16.1	§ 816	§ 1692n
§ 1006.108, Exemption for State regulation	§ 3.4.4	§ 817	§ 1692o
Appendix A to Part 1006—Procedures for State Application for Exemption from the Provisions of the Act	§ 3.4.4	§ 817	§ 1692o
Appendix B to Part 1006—Model Forms. B–1 Model Form for Validation Notice	§ 9.5.2	n/a	n/a
Appendix C to Part 1006—Issuance of Advisory Opinions	§ 3.4.4.3	§ 813(e)	§ 1692k(e)

1.1.1.7 Regulation F Treatment of Electronic Communications

The FDCPA does not specifically address electronic communication, and issues arise as to how FDCPA provisions apply to electronic communications between debt collectors and consumers. Regulation F clarifies that, in the definition of "communication," "any medium" includes email, text message, social media, or other electronic media.[2]

Regulation F includes new provisions relating to debt collector email, text message, and social media communications with the consumer, as well as consumer email, text message, or web portal communications with the debt collector. This subsection lists these provisions, with reference to other subsections of this treatise where these provisions are examined.

Restrictions on Debt Collector Use of Electronic Mediums to Collect Debts. Regulation F places the following restrictions on electronic communication in connection with collection of a debt:

- Debt collectors cannot send collection emails to a consumer's email address that the debt collector knows is provided to the consumer by the consumer's employer, unless the consumer's provision of the address to a debt collector has met certain conditions. *See* § 8.10, *infra.*
- Electronic communications intended for the consumer cannot be viewed by third parties. Regulation F provides a safe harbor if the debt collector acquires the email address or phone number for text messages using certain procedures and the collector has no knowledge that prior electronic communication at that email address has led to disclosure to a third party. *See* § 5.7.9, *infra.*
- The limits and presumptions as to a debt collector communicating at an unusual or inconvenient time apply to electronic communication. Electronic communication occurs when the debt collector sends it, not, for example, when the consumer receives or views it. *See* § 5.4.2, *infra.*
- Electronic communication media are not associated with a place, and usually their use does not violate the prohibition on contacting the consumer at an inconvenient place. Nevertheless, there is a violation if the debt collector knows that the communication will be received by the consumer at an unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer. *See* § 5.4.3, *infra.*
- Regulation F has no specific frequency standards for emails, text messages, or other electronic communications sent to

2 *See* § 4.7.1, *infra.*

consumers, but they are still subject to the general standard as to harassment. The total amount of cumulative communications, including electronic communications, can violate the general standard. *See* § 6.7.2.4, *infra*.

- Regulation F requires the debt collector to provide notice in any electronic communication to the consumer of the right to opt out of the specific medium of electronic communication, and requires the debt collector to disclose to the consumer a reasonable, simple, and free method to opt out of a specific mode of electronic communication. *See* § 5.9, *infra*.
- Where a consumer has opted out of a medium of electronic communications, the collector can communicate with the consumer through that medium only in limited circumstances. *See* § 6.9, *infra*.
- Regulation F prohibits debt collector use of social media in connection with collection of a debt when contacting the consumer or third parties (seeking location information), if a person's social media contacts or the general public can see the message. *See* § 8.11, *infra*.
- Debt collectors must disclose their identity as a debt collector when sending a private message, in connection with the collection of a debt, requesting to be added as one of the consumer's contacts on social media. *See* § 7.4.2, *infra*.
- When using social media to obtain the consumer's location information from a third party, the profile must accurately identify the debt collector's individual name. *See* § 7.4.3, *infra*.

Debt Collector Use of Electronic Mediums to Make Required Disclosures. Regulation F sets restrictions on a debt collector's use of electronic mediums to provide validation notices and other required disclosures:

- Electronic validation notices must include the right to opt out of that means of communication. *See* § 9.3.2.1, *infra*.
- Any electronic validation information in the initial communication or in a subsequent notice must be done in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later. *See* § 9.3.2.2, *infra*.
- When an electronic validation notice is sent after an initial communication, the debt collector must first have complied with E-SIGN's consumer consent provisions. *See* § 9.3.2.3, *infra*.
- Regulation F sets out optional guidelines as to the form for an electronic validation notice. *See* § 9.5.3, *infra*.
- After a consumer's request for verification of a debt or the identity of the original creditor, the debt collector response, if electronic, must be sent in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later. *See* § 9.8.1, *infra*.
- With the exception as to notice to the consumer that the consumer's dispute is duplicative, the debt collector, prior to an electronic response, must comply with E-SIGN's consumer consent provisions. *See* § 9.8.1, *infra*.

Consumer Use of Electronic Communication. Regulation F provides consumer rights, triggered by a consumer request of the debt collector. Regulation F establishes guidelines if such a consumer request is made electronically:

- A request for debt verification, to dispute a debt, or to seek the identity of the originating creditor can be made electronically through a medium of electronic communication that the collector uses to accept communications from consumers. *See* § 9.10.2, *infra*.
- A consumer can send a cease communication request electronically using a medium of electronic communication through which a debt collector accepts electronic communications from consumers. *See* § 5.8.2, *infra*.
- A consumer can opt out of a debt collector's email, text message, or other electronic method of debt collection. This opt out method must be reasonable, simple, and free. Regulation F Official Interpretations provide examples where the consumer's response is in the same electronic medium by which the collector's electronic communication was sent. *See* § 5.9, *infra*.

1.1.1.8 Defining "Debt Collector" in This Treatise

This treatise covers laws applicable to all types of debt collectors—creditors, first-party debt collectors, third-party debt collectors, debt buyers, collection attorneys, and the employees of each that make the phone calls asking for money. Unless the context indicates otherwise, the term "debt collector" or "collector" may be used in this treatise to mean any person collecting a debt.

However, some laws restrictively define the term "debt collector." Great care is thus required to determine parties are covered by the various laws described in this treatise. In Chapters 3 through 12, *infra*, the term "debt collector" is usually given the restricted, multi-layered meaning of that term in the Fair Debt Collection Practices Act.[3]

1.1.2 Topics Covered in Other NCLC Treatises

This treatise comprehensively covers affirmative litigation against abusive debt collectors, but it cannot cover all areas of consumer law. Other relevant manuals published by NCLC include:

- **Collection Actions** provides a comprehensive guide to consumer defenses, counterclaims, and other strategies in response to debt collection lawsuits filed against a consumer; this treatise also sets out extensive consumer rights to respond to postjudgment creditor remedies;
- **Fair Credit Reporting** discusses the Fair Credit Reporting Act and other laws applying to credit furnishers such as debt collectors;
- **Federal Deception Law** contains an extensive chapter analyzing all aspects of the Telephone Consumer Protection Act, which provides strong private remedies for robocalls

3 *See* § 4.7, *infra*.

and other unwanted calls; this treatise also examines the regulation of debt relief and debt settlement services;

- **Home Foreclosures** includes reverse mortgages, tax leins, condominium loans, land installment sales, and seizure of manufactured homes;
- **Mortgage Servicing and Loan Modifications** covers loan modification programs anr rights to deal with mortgage servicers;
- **Repossessions** deals with the seizure of personal property, including cars, manufactured homes, and personal property;
- **Student Loan Law** addresses collection of federal and private student loans;
- **Consumer Class Actions** provides step-by-step instructions on all aspects of bringing a consumer class action;
- **Consumer Arbitration Agreements** examines approaches to defeat a binding arbitration clause that a collector may rely on to avoid court litigation; and
- **Surviving Debt** provides guidance to consumers and advocates about how to deal with debt.

Additionally, NCLC maintains a digital collection of over 2000 consumer law pleadings that can be accessed at www.nclc.org/library for subscribers to Consumer Law Pleadings.

1.1.3 Trainings and Continuing Legal Education

National Consumer Law Center staff participates in a variety of in-person training events on fair debt collection laws. NCLC organizes the annual Consumer Rights Litigation Conference for consumer advocates. This conference generally provides sessions on fair debt collection issues. NCLC and the National Association of Consumer Advocates have sponsored a two-day training on fair debt collection issues annually since 2004. For more information about NCLC conferences and eligibility to attend, see our conference website.

NCLC staff also participate in other in-person trainings on this and other topics covered by our treatises. See our website to submit a training request form.

1.1.4 Debt Collection Webpage and Listservs

NCLC maintains a Debt Collection website. This website includes links to model statutes, policy analysis, testimony, webinars, and consumer resources.

NCLC also hosts a variety of listservs, including Debt Collection Policy and Fight Debt Scams. Information about subscribing to NCLC listservs is available online. The descriptions of each listserv contain information about who is eligible to join.

1.2 A Brief History of Debt Collection and Its Regulation in the United States

In the seventeenth and eighteenth centuries, one of the factors that propelled emigration from England to the American colonies was the harsh enforcement of early English bankruptcy laws.[4] Fear of debtors' prison—where debtors were kept without bedding, blankets, coal, or access to medical care until their debts could be paid[5]—drove "shiploads" of Englishmen to relocate to the colonies.[6] At the time, English bankruptcy laws gave the right of action to the creditor, not the debtor, and granted discharge only to merchants and traders.[7] By contrast, the early bankruptcy laws of the American colonies allowed for voluntary bankruptcy, taking the position that "it was the debtor, rather than the creditor who needed assistance."[8]

At the time the U.S. Constitution was drafted, discontent with Britain's practices surrounding debt was at its peak.[9] While the Constitution did not do away with debtors' prisons, it did grant the federal government the authority to issue bankruptcy laws.[10] The first bankruptcy statute, passed by near unanimous consent of Congress and signed into law by John Adams in 1800, allowed debtors to discharge their debts and provided for their release from prison upon surrender of nonexempt assets.[11] It also granted people the right to sue for damages if they had been erroneously accused of owing debt.[12]

Through most of the nineteenth century, the bulk of America's economy was subsistence agriculture.[13] Not much credit was available for farmers other than that offered by local merchants, who would sometimes barter goods for produce, or extend credit based on the promising crops of the farmer.[14] Farmers suffering crop failure would lose the ability to

4 Tracy Woodard, *Statutory Research Conundrum: 11 U.S.C. § 507(A)(7) in the United States Bankruptcy Code*, 41 Int'l J. of Legal Info. 179, 182 (Summer 2013).

5 Andrew J. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, 100 Com. L.J. 191, 213–214 (1995).

6 Tracy Woodard, *Statutory Research Conundrum: 11 U.S.C. § 507(A)(7) in the United States Bankruptcy Code*, 41 Int'l J. of Legal Info. 179, 182 (Summer 2013); Andrew J. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, 100 Com. L.J. 191, 215 (1995).

7 Andrew J. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, 100 Com. L.J. 191, 217 (1995).

8 *Id.* at 216.

9 *Id.* at 215.

10 U.S. Const. art. I, § 8, cl. 4 ("To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States").

11 Tracy Woodard, *Statutory Research Conundrum: 11 U.S.C. § 507(A)(7) in the United States Bankruptcy Code*, 41 Int'l J. of Legal Info. 179, 183 n.17 (Summer 2013).

12 *Id.* at 183 n.16.

13 Curtis P. Nettels, The Emergence of a National Economy, 1775–1815 (Holt, Rinehart and Winston 1962).

14 Paul W. Gates, The Farmers' Age: Agriculture, 1815–1860 (The Economic History of the United States, Volume III) (Holt, Rinehart,

barter or obtain credit for merchandise, and would frequently move their family westward seeking more favorable land and pastures.[15]

Debt collection and its regulation would come to play a significant role in the westward settlement of the United States.[16] For example, the Panic of 1819 touched off a depression that drove settlers to migrate to Texas, where they found refuge from debtors' prisons.[17] Texans recognized that "desperate fortunes had driven many of their countrymen to enwrap themselves in the protective folds of the Lone Star Flag,"[18] and established strong legal protections for borrowers.[19] Many of these legal protections survive to this day. For example, the Texas Constitution bans wage garnishment for most debts[20] and regulates home equity loans.[21]

In urban areas, the second half of the nineteenth century saw the rise of loan sharks who made high-interest, short-term loans.[22] Also known as "salary lenders," these individuals made loans to employees on a Monday that needed to be repaid that Friday. Annualized interest rates of more than 1000% were common and were frequently even higher for African-American borrowers.[23] A commonplace collection tactic was for creditors to "employ a 'bawler-out'—usually a woman with a stentorian voice and rich vocabulary" who would stand outside the borrower's workplace and loudly scold the borrower for failing to repay the loan.[24] Debt collectors not only used humiliation as a cudgel to induce borrowers to settle, but they also confronted relatives and friends.[25]

In the wake of the Panic of 1893 and the resulting economic depression, Congress enacted a new bankruptcy law.[26] The Bankruptcy Act of 1898 eased restrictions on discharge policies for borrowers, allowed for consumers to file for voluntary bankruptcy, and also provided protections against involuntary bankruptcy.[27] These reforms made it more difficult for creditors to use bankruptcy to collect debts.[28]

By the early 1900s, one in five American workers owed money to salary lenders.[29] In an attempt to curb salary lending and promote licensed lending, two-thirds of the states adopted versions of the Uniform Small Loan Law published in 1916.[30] Small loan businesses sprang up under the new laws.[31] Simultaneously, during the 1920s, corporations such as Sears, General Motors, and Steinway & Sons began making installment loans to purchase high-priced consumer goods like cars, washing machines, pianos, and sewing machines.[32] One survey in 1928 found that 41% of respondents purchased an item on installments.[33] Household debt rose steadily through the 1920s.[34]

In the 1930s, the consequences of defaulting on an installment contract were generally harsh.[35] Goods were repossessed if payments were thirty days late.[36] Items were resold but no surplus was returned to the consumer, resulting in a loss of wealth where large deposits and short repayment terms usually meant significant financial investment over a short period of time.[37]

In 1939, the American Collector's Association (now ACA International) was founded after the creation of some state-based groups in the 1920s and the Pacific Coast Association of Collection Agencies in 1924.[38] Debt collectors began to use the telephone to collect debts as early as the 1940s, and by the 1960s some collection agencies began to use automated systems to interact with debtors.[39] In the 1950s and 60s, groups

and Winston 1960).

15 *Id.*

16 During the Great Depression, for example, over 2.5 million destitute farmers moved West after losing their farms due to mounting debts and environmental crises like the Dust Bowl. Timothy Egan, The Worst Hard Time: The Untold Story of Those Who Survived the Great American Dust Bowl 104 (Houghton Mifflin, Co. 2006); Glenn Deane and Myron P. Gutmann, Blowin' Down the Road: Investigating Bilateral Causality between Dust Storms and Population in the Great Plains. Population Res. & Pol'y Rev., vol. 22, no. 4, 1 (Aug. 2003).

17 Mark E. Nackman, *Anglo-American Migrants to the West: Men of Broken Fortunes? The Case of Texas 1821–1846*, 5 Western Hist. Quarterly 441, 446 (1974).

18 *Id.* at 453.

19 *Id.* at 454.

20 Tex. Const. art. XVI, § 28.

21 Tex. Const. art. XVI, § 50(a)(6).

22 Christopher I. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 Fla. L. Rev. 807, 850–851 (2003).

23 *Id.* ("In a typical transaction, a debtor would borrow five dollars on Monday, and repay six on Friday. This 20% per week loan translates into a 1040% per annum rate. African-Americans borrowing in the South were often charged rates twice as high in the same type of transaction, where a loan of five dollars was repaid with seven at the end of the week.").

24 *Id.* at 854.

25 *Id.* at 857.

26 Bankruptcy Act of 1898, ch. 541, 30 Stat. 544.

27 Christopher I. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 Fla. L. Rev. 857–858 (2003).

28 *Id.*

29 *Id.* at 852.

30 A Short History of Payday Lending Law. The Pew Charitable Trusts (2012), *available at* www.pewtrusts.org.

31 Christopher I. Peterson, *Truth Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 Fla. L. Rev. 863 (2003).

32 *Id.* at 864.

33 Martha L. Olney, *Avoiding Default: The Role of Credit in the Consumption Collapse of 1930*, The Quarterly Journal of Economics, 114(1), 323 (1999).

34 Int'l Monetary Fund, World Economic Outlook: Growth Resuming, Dangers Remain, Figure 3.9. Foreclosures and Household Debt during the Great Depression in the United States (2012), *available at* https://www.imf.org.

35 Martha L. Olney, *Avoiding Default: The Role of Credit in the Consumption Collapse of 1930*, The Quarterly Journal of Economics, 114(1), 320, 27 (1999).

36 *Id.* at 320.

37 *Id.* at 320, 327.

38 Anne Rosso May, An Abridged History of ACA, Collector, Jan. 2019.

39 Deville, Joe. *Lived Economies of Default: Consumer Credit, Debt Collection and the Capture of Affect* 88 (Routledge 2015) (describing how, during the 1960s, the Credit Bureau of Greater Syracuse (CGBS) began to use IBM punch card machines to prepare collection notices and forwarding notices to out of state collection agencies that could assist with retrieving debts from those who moved out of their direct area of operations).

of creditors in a region began pooling information about consumers with delinquent accounts, forming early credit reporting companies.[40]

From 1938 to 1977, the federal government's primary tool to protect consumers from unfair or deceptive acts or practices by debt collectors was through enforcement actions brought by the Federal Trade Commission under section 5 of the FTC Act, 15 U.S.C. § 45.[41] In 1968, the National Conference of Commissioners on Uniform State Laws developed the Uniform Consumer Credit Code to remedy "impediments to the free flow of credit."[42]

Concerned about the Code's impact on consumers, fifty-five consumer experts gathered in June 1969 at a meeting co-sponsored by the newly formed National Consumer Law Center (NCLC).[43] As a result of that meeting, NCLC undertook the drafting of a National Consumer Act that was released in 1970.[44] The National Consumer Act served as a model for state reforms, including the Wisconsin Consumer Act in 1973.[45] State reform efforts and proposed revisions to the Uniform Consumer Credit Code informed NCLC's drafting of the Model Consumer Credit Act, which contained a section specifically addressing consumer protections in debt collection.[46]

While some states had amended their laws by the mid-1970s to protect consumers from abusive debt collection practices, "13 states, with 40 million citizens, ha[d] no debt collection laws" and "another 11 states . . . provide[d] little or no effective protection."[47] This left nearly forty percent of the American population without "meaningful protection from debt collection abuse."[48]

In 1975, Congressman Frank Annunzio of Chicago introduced a bill to protect consumers from abusive debt collection that bore a striking resemblance to NCLC's Model Consumer Credit Act. In 1977, after debate and amendment, the bill passed the House by one vote and the Senate by voice vote with bipartisan support in both houses. The Fair Debt Collection Practices Act (FDCPA) was signed by President Carter on September 20, 1977, and became law in 1978.[49] For more information about the passage of the 1977 Act and subsequent amendments, see § 3.4.2, *infra*.

Since the FDCPA's passage, many states have passed or amended state debt collection statutes. These state statutes are discussed in more detail in § 10.2 and Appx. D, *infra*.

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the Consumer Financial Protection Bureau (CFPB) and gave it enforcement and rule-making authority over debt collectors.[50] The Bureau subsequently enacted debt collection regulations effective November 30, 2021.[51]

1.3 Parties Commonly Involved in Debt Collection

1.3.1 Consumers

1.3.1.1 Overview

As used in this treatise, consumers are individuals who borrow money or purchase goods or services on credit for personal, rather than business debts.

Americans owe large amounts of money for consumer debts.[52] In the first quarter of 2021, the Federal Reserve Bank of New York reported that Americans owed $4.15 trillion in non-housing debt and $10.49 trillion for housing debt.[53] However, only a portion of this outstanding debt is delinquent.[54]

Contact with a debt collector is a common experience for Americans. In 2019, the CFPB estimated that third-party debt collectors contact at least 49 million consumers each year about a debt in collection.[55] A researcher at the Federal Reserve Bank of Philadelphia estimated that the third-party collections industry contacts Americans more than a billion

40 Mark Furletti, Federal Reserve Bank of Philadelphia, An Overview and History of Credit Reporting Payment Cards Center of the Federal Reserve Bank of Philadelphia 3–4 (2002), *available at* https://www.philadelphiafed.org.

41 CFPB, Debt Collection Practices (Regulation F), Proposed Rule, 84 Fed. Reg. 23,274, 23,278 (May 21, 2019).

42 Barbara A. Curran and David I. Fand, *An Analysis of the Uniform Consumer Credit Code*, 49 Neb. L. Rev. 727 (1970).

43 National Consumer Law Center, National Consumer Act: First Final Draft, Prefatory Note (Jan. 1970), *available at* https://www.nclc.org.

44 *Id.*

45 National Consumer Law Center, Model Consumer Credit Act, Introduction and Article 6 (1973), *available at* https://www.nclc.org; Edward J. Heiser, Jr., *Wisconsin Consumer Act—A Critical Analysis*, 57 Marq. L. Rev. 389, 390–391 (1974).

46 National Consumer Law Center, Model Consumer Credit Act, Introduction (1973), *available at* https://www.nclc.org.

47 S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*.

48 *Id.*

49 For a more detailed history of the enactment of the FDCPA, see § 3.4.2, *infra*.

50 15 U.S.C. § 1692*l*(d). *See* § 3.4.2.5, *infra*.

51 Debt Collection Practices (Regulation F), 85 Fed. Reg. 76,734 (Nov. 30, 2020); Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766 (Jan. 19, 2021).

52 While this discussion focuses on consumer debts, individuals may struggle with other types of debts, including criminal justice debts. For more about unique issues that may arise when representing individuals with criminal justice debts see National Consumer Law Center, Collection Actions Ch. 11 (5th ed. 2020), updated at www.nclc.org/library.

53 Fed. Reserve Bank of N.Y., Household Debt and Credit Report: Q2 2020 ($4.12 trillion for non-housing debt breaks down as: student loans ($1.54 trillion); auto loans ($1.34 trillion); credit card ($0.82 trillion) and other non-housing debt ($0.42 trillion)), *available at* https://www.newyorkfed.org.

54 *Id.* (percentage of debt that is 90+ days delinquent: 6.2% for student loans, 10% for credit cards, 7.7% for other non-housing debt, and 4.8% for auto loans, 1.2% for home equity lines of credit, and 0.6% for mortgages).

55 CFPB, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,384 (May 21, 2019).

times a year,[56] and the debt buyer Encore Capital Group, Inc. claims that twenty percent of American consumers either owe it money currently or have owed it money in the past.[57]

Millions of Americans have one or more debts in collection listed on their credit reports. In 2021, the CFPB reported that "26 percent of consumers have a third-party collection tradeline furnished to their credit report."[58] The Urban Institute reported that, in 2019, 68 million adult Americans with a credit report had one or more debts in collection reported in their credit files,[59] down from 71 million in 2017[60] and 77 million in 2013.[61] In contrast, TransUnion reported that the number of consumers with one or more collection trade lines increased from 66.8 million in 2009 to 79.1 million in 2018, with a high of 81.8 million in 2016 and a low of 63.2 million in 2015.[62]

In a nationally-representative survey of consumer experiences with debt collection conducted in 2015, the CFPB found that medical bills were the most common type of past-due debt[63] and credit or charge cards[64] were the most common types of loans for which consumers were contacted by debt collectors.

Debt is not evenly distributed around the country.[65] Even within a city or state, significant differences about the prevalence of debts exist at the neighborhood level.[66] A study by the Urban Institute concluded that, "people who live in neighborhoods with lower health insurance coverage, lower housing values and less homeownership, more delinquent mortgages and homes with negative equity, lower educational attainment, a higher share of African Americans and Hispanics, and higher unemployment rates are significantly more likely to have debt in collections."[67]

Lawmakers who originally enacted the Fair Debt Collection Practices Act recognized that most consumer delinquency is not voluntary, rejecting the myth that substantial numbers of consumers are deadbeats who refuse to pay their debts.[68] Frequently, the reason that consumers do

56 Robert Hunt, "Understanding the Model: The Life Cycle of a Debt," presented at FTC-CFPB Roundtable "Life of a Debt: Data Integrity in Debt Collection" (June 6, 2013).

57 Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Human Rights Watch, Jan. 2016). *See also* Encore Capital Group, Comments to Federal Communications Commission Re: CG Docket Nos. 18-152, 02-278 (Oct. 16, 2018) (noting that company works with one out of five American consumers).

58 CFPB, Fair Debt Collection Practices Act: CFPB Annual Report 2021 (Mar. 2021) (analyzing data from the Bureau's Consumer Credit Panel). *See also* Breno Braga, et al., Debt in America: An Interactive Map (Urban Institute, last updated Mar. 31, 2021) (nationally 29% of American adults with a credit report have one or more debts in collection in their credit files), *available at* https://apps.urban.org; CFPB, Market Snapshot: Third-Party Debt Collections Tradeline Reporting (July 2019) ("Between Q2 2004 and Q2 2018, the percentage of consumers in the sample with a third-party collections tradeline on their file never went below 27% or above 34%."), *available at* https://www.consumerfinance.gov; Breno Braga et al., Urban Institute, Local Conditions and Debt in Collections (June 2016) ("Nationally, we find that nearly one-third of Americans have a debt in collections recorded in their credit report."); Caroline Ratcliffe, Urban Institute, Delinquent Debt in America (July 2014) (35% of adults with credit files have debt in collections reported in their credit files).

59 Andrew Warren et al., Before COVID-19, 68 Million US Adults Had Debt in Collections. What Policies Could Help? (Urban Institute, Apr. 17, 2020), *available at* https://www.urban.org.

60 Hannah Hassani and Signe-Mary McKernan, 71 million US adults have debt in collections (Urban Institute, July 19, 2018), *available at* https://www.urban.org.

61 Caroline Ratcliffe, Urban Institute, Delinquent Debt in America (July 2014) (77 million American consumers had non-mortgage debts in collections reported in their credit files).

62 TransUnion, Challenges, Trends and Innovations: The State of Third-Party Collections (2019), *available at* https://solutions.transunion.com.

63 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt, Fig. 2 (Jan. 2017) (reporting types of past-due debt in collection as: medical bills (59%), telecommunications bills (37%); utility bills (28%); taxes (21%); legal judgment or expenses (14%); and rent (11%); noting that "Estimates are for consumers who were contacted about a debt in collection. Sums across columns may exceed 100 percent because consumers could report having been contacted about multiple types of debts.").

64 *Id.* at Fig. 1 (reporting types of loans in collection as: credit or charge (44%), student loan (28%), auto-purchase loan (18%); mortgage or HELOC (12%); and payday loan (11%); noting that "estimates are for consumers who were contacted about a debt in collection. Sums across columns may exceed 100 percent because consumers could report having been contacted about multiple types of debts").

65 *See* Breno Braga et al., Debt in America: An Interactive Map (Urban Institute, last updated Mar. 31, 2021) (visual representation of areas where debts in collection are more prevalent), *available at* https://apps.urban.org. *See also* Breno Braga et al., Local Conditions and Debt in Collections, Table A.1 (Urban Institute, June 2016); Caroline Ratcliffe, Delinquent Debt in America, Table A.1 (Urban Institute, July 2014).

66 New York City Department of Consumer Affairs, Unequal Burden: Black Borrowers and the Student Loan Debt Crisis (July 2020) ("In . . . predominantly Black and Hispanic neighborhoods [in New York City], approximately 16 percent of student loan debt holders have debt in collections compared to 8 percent of student loan debt holders in predominantly White and Asian neighborhoods."), *available at* https://www1.nyc.gov; Anmol Chaddha, The Concentration of Financial Disadvantage: Debt Conditions and Credit Report Data in Massachusetts Cities and Boston Neighborhoods (Fed. Reserve Bank of Boston, June 27, 2018) ("About 1 in 3 residents of Roxbury and Mattapan have debt collections on their credit reports, compared to just 5 percent in several higher-income Boston neighborhoods."), *available at* https://www.bostonfed.org; Breno Braga, et al., Local Conditions and Debt in Collections 1 (Urban Institute, June 2016); Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas, ProPublica, Oct. 8, 2015, *available at* https://static.propublica.org.

67 Breno Braga et al., Urban Institute, Local Conditions and Debt in Collections (June 2016).

68 The Report of the Committee on Banking, Housing and Urban Affairs stated:

> One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule. Prof. David Caplovitz, the foremost authority on debtors in default, testified that after years of research he has found that only 4 percent of all defaulting debtors fit the description of "deadbeat."

not pay what they owe is that they have fallen on hard times due to loss of a job, illness, injury, or loss of a breadwinner to illness, divorce, or death.[69] Income variability can also lead to difficulty paying bills or expenses.[70] A smaller portion of consumers overextend themselves financially so that their income and savings are only sufficient to keep up with some of their debts.[71]

This conclusion is supported by the National Commission on Consumer Finance which found that creditors list the willful refusal to pay as an extremely infrequent reason for default.

S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695 *and reproduced at* Appx. A.3, *infra*, citing David Caplovitz, Consumers in Trouble: A Study of Debtors in Default 54 (The Free Press 1974).

69 *See, e.g.*, CFPB, Insights from the Making Ends Meet Survey 3 (July 2020) ("Households that suffered a period of unemployment, reduced work hours, or an inability to work because of illness were nearly twice as likely to report having difficulty paying a bill or expense than households that had not experienced these events."), *available at* https://files.consumerfinance.gov; David U. Himmelstein, et al., Medical Bankruptcy: Still Common Despite the Affordable Care Act, American Journal of Public Health (Feb. 6, 2019) (respondents listed contributors to bankruptcy, including: income loss (77.8 %); medical expenses (58.5%); unaffordable mortgage or foreclosure (45%); student loans (25.4%); divorce/separation (24.4%) (multiple responses permitted)), *available at* https://ajph.aphapublications.org; Office of Pol'y Dev. & Res., U.S. Dept. of Housing & Urban Dev. Report to Congress on the Root Causes of the Foreclosure Crisis 15 (2010) ("It is generally understood that most borrowers become delinquent due to a change in their financial circumstances that make[s] them no longer able to meet their monthly mortgage obligations. These so called 'trigger events' commonly include job loss or other income curtailment, health problems, or divorce."); J. Michael Collins, *Exploring the Design of Financial Counseling for Mortgage Borrowers in Default*, 28 J. Fam. Econ. Issues 207, 213 tbl. 2 (2007) (showing job loss as the most common self-reported cause of mortgage nonpayment, followed by medical problems (affecting 28% of borrowers in default), unfair loan terms (20%), income reduction (20%), injury/accident (19%), home repair/improvement (19%), death in family (18%), and credit card management (15%)); Elizabeth Warren and Amelia Warren Tyagi, The Two-Income Trap: Why Middle-Class Parents Are (Still) Going Broke 81 (Basic Books 2016 ed.), *citing* 2001 Consumer Bankruptcy Project (87% of families with children cite job loss, medical problems, or divorce or separation as the reason for their divorce while the remaining 13% cite bad investment, crime victim, credit card overspending, natural disaster, other explanation, or no explanation); Barry Adler, Ben Polak, & Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. Legal Stud. 585, 589 (2000) ("Many scholars and reformers believe that the insolvency is exogenous: the consumer borrower becomes insolvent through no fault of his own, in consequence of job loss, illness, or the like."); Theresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, The Fragile Middle Class: Americans in Debt (Yale University Press 2000), *citing* 1991 Consumer Bankruptcy Project (respondents' reasons for filing for bankruptcy were: job (67.5%), family (22.1%), medical (19.3%), creditor problems (13.6%), other (13.6%), and housing (6.2%) (multiple responses permitted)).

70 CFPB, Insights from the Making Ends Meet Survey 8 (July 2020) (56% of survey respondents whose income varies a lot reported difficulty paying a bill or expense in the past year compared to 37% of respondents whose income is about the same every month), *available at* https://files.consumerfinance gov.

71 *See, e.g.*, David U. Himmelstein, et al., Medical Bankruptcy: Still Common Despite the Affordable Care Act, American Journal of Public Health (Feb. 6, 2019) (44.4% of survey respondents agreed that spending/living beyond means contributed to their bankruptcy), *available at* https://ajph.aphapublications.org; J. Michael Collins, *Exploring the Design of Financial Counseling for Mortgage Borrowers in Default*, 28 J. Fam. Econ. Issues 207, 213 tbl. 2 (2007) (showing that credit card management was only a self-reported cause of mortgage nonpayment for 15% of borrowers in default); Darryl E. Getter, *Contributing to the Delinquency of Borrowers*, 37 J. Consumer Aff. 86, 98–99 (2003) (examining whether delinquency was more attributable "to the unanticipated negative shocks that alter economic circumstance or to the size of the payment burden which could indicate that households may be "overextended" and concluding that "delinquency risk is more likely to increase as a result of unanticipated shocks to household wealth and unexpectedly low income").

1.3.1.2 Consumer Complaints about Debt Collection

Debt collection is a leading topic of consumer complaints to the Consumer Financial Protection Bureau[72] through its Consumer Complaint Database.[73] The most common types of debt collection complaints in 2020 were complaints about: attempts to collect debt not owed (49%), written notification about debt (20%), took or threatened to take negative or legal action (10%), and false statements or representations (10%).[74] These statistics are published annually.

The Consumer Financial Protection Bureau began accepting consumer debt collection complaints in 2013 and makes available online some of its data, including the complaint issue, the response, and the name of the debt collector.[75] Organizations have issued reports based on their own analysis of CFPB complaint data, which can be downloaded or manipulated online.[76] Consumers filing complaints at the CFPB also have the option of publicly sharing the narrative behind a complaint.[77]

In addition to its consumer debt collection complaint data, in 2017 the CFPB published the results of its survey of consumer experiences with debt collection, in which respondents

72 CFPB, Fair Debt Collection Practices Act: CFPB Annual Report 2021 (Mar. 2021) ("The Bureau received approximately 82,700 complaints about first-party and third-party debt collection in 2020, an increase of approximately 10 percent compared to 2019, making debt collection one of the most prevalent consumer complaint topics."), *available at* https://files.consumerfinance.gov.

73 *Available at* https://www.consumerfinance.gov.

74 CFPB, Fair Debt Collection Practices Act: CFPB Annual Report 2021 (Mar. 2021) ("The Bureau received approximately 82,700 complaints about first-party and third-party debt collection in 2020, an increase of approximately 10 percent compared to 2019, making debt collection one of the most prevalent consumer complaint topics."), *available at* https://files.consumerfinance.gov.

75 Consumer Complaint Database, *available at* https://www.consumerfinance.gov.

76 *See, e.g.*, Frontier Group and U.S. PIRG Education Fund, Debt Collectors: CFPB Data Reveal Consumer Complaints by Company (June 2018); Alliance for a Just Society, Unfair Deceptive & Abusive: Debt Collectors Profit from Aggressive Tactics (Jan. 2016), *available at* www.allianceforajustsociety.org; U.S. Public Interest Research Group, Debt Collectors, Debt Complaints (Feb. 2014), *available at* www.uspirg.org.

77 Press Release, CFPB Finalizes Policy to Give Consumers the Opportunity to Voice Publicly Complaints About Financial Companies (Mar. 19, 2015), *available at* www.consumerfinance.gov.

indicated that they had experienced a variety of debt collection problems.[78] For example, of respondents who had been contacted about a debt:

- 53% "indicated that the debt was not theirs, was owed by a family member, or was for the wrong amount";
- 63% "said they were contacted too often";
- 36% were called after 9 p.m. or before 8 a.m.; and
- 27% were threatened.[79]

The Federal Trade Commission is another federal agency that tracks debt collection complaints. The FTC does this by compiling and publishing consumer complaints from a variety of sources, including the CFPB, state law enforcement agencies, the Better Business Bureau, and other contributors to publish in its annual Consumer Sentinel Network Databook.[80] From 2015 to 2017, debt collection complaints were the most common type of consumer complaint compiled and reported in the Data Book.[81] In 2020, debt collection was the eighth most common source of complaints, with 120,190 complaints.[82]

The FTC does not report the breakdown of debt collection complaints in its Consumer Sentinel Network Data Book.[83] However, an analysis of information produced by the FTC in response to a Freedom of Information Act request found that in 2017 the most frequent types of law violations reported in the debt collection complaints compiled by the Consumer Sentinel Network were: calls after getting a "stop calling" notice, calls repeatedly, and making false representations about the debt.[84]

In addition to the CFPB and FTC, state law enforcement agencies may also share information related to consumer complaints about debt collection or be subject to state record requests for such information.[85] Organizations like the Better Business Bureau[86] and Consumer Federation of America[87] also publish consumer complaint statistics about debt collection.

Representatives of the collection industry have tried to diminish the significance of consumer complaint statistics as representing a small fraction of consumer interactions with debt collectors.[88] However, it is likely that consumer complaints that are reported in the sources described above represent a small fraction of actual consumer complaints. Even though the Consumer Sentinel Network reports compile complaints from different sources, these reports do not manage to compile complaints from every state law enforcement agency or the Better Business Bureau.[89] Moreover, not all consumers know that they can report problems to state or federal regulators. Some who know about this possibility do not file such complaints because they do not believe that filing a complaint will help, because they face barriers like limited English proficiency, or due to fears about interacting with government agencies because of immigration status. Additionally, many consumers complain in ways that go uncounted by the FTC and the CFPB, such as complaints directly to debt collectors or creditors instead of to regulators.[90]

1.3.1.3 Mental Health and Consumer Debt

Indebtedness is associated with poor mental health.[91] This relationship remains significant even after controlling for socioeconomic status and other factors.[92] Several studies have

78 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017).

79 *Id.* at 5, 46.

80 *See, e.g.,* FTC, Consumer Sentinel Network: Data Book 2020 (Feb. 2021), available at https://www.ftc.gov.

81 April Kuehnhoff and Ana Girón Vives, National Consumer Law Center, Consumer Complaints about Debt Collection: Analysis of Unpublished Data from the FTC 2 (Feb. 2019), *available at* https://www.nclc.org.

82 FTC, Consumer Sentinel Network: Data Book 2020 (Feb. 2021) (this number includes the debt collection complaints received from the CFPB), *available at* https://www.ftc.gov.

83 *See, e.g.,* FTC, Consumer Sentinel Network: Data Book 2020 (Feb. 2021), *available at* https://www.ftc.gov.

84 April Kuehnhoff and Ana Girón Vives, National Consumer Law Center, Consumer Complaints about Debt Collection: Analysis of Unpublished Data from the FTC 15 (Feb. 2019), *available at* https://www.nclc.org.

85 *See, e.g.,* Office of the Massachusetts Attorney General, List of Complaints Received by the Attorney General's Consumer Advocacy and Response Division (allowing the public to download complaint information), *available at* https://www.mass.gov.

86 Better Business Bureau, View BBB Complaint Statistics (compiling statistics from multiple years; complaints about "collection agencies" and "debt buyers" are reported separately).

87 *See, e.g.,* Consumer Federation of America, 2019 Consumer Complaint Survey Report (July 27, 2020), *available at* www.consumerfed.org (ranking credit and debt complaints fifth in its "annual survey of city, county and state consumer agencies").

88 *See, e.g.,* Josh Adams, A Review of Debt Collection Complaints Submitted to the Bureau of Consumer Financial Protection's Complaint Database in the First Half of 2018 (ACA International, Nov. 2018).

89 FTC, Consumer Sentinel Network: Data Book 2020 Appx. A3–A4 (Feb. 2021) (listing data contributors by state law enforcement agencies), available at https://www.ftc.gov (Feb. 2021).

90 See FTC, Annual Report 2011: Fair Debt Collection Practices Act 2–3 (Mar. 2011).

91 *See, e.g.,* Dyvonne Body, The Burden of Debt on Mental and Physical Health (The Aspen Institute, Aug. 2, 2018) (summarizing research); Thomas Richardson, Peter Elliott, & Ronald Roberts, *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 Clinical Psychol. Rev. 1148, 1153 (2013) (analyzing 65 studies and concluding there is "a statistically significant relationship between debt and presence of a mental disorder, depression, suicide completion, suicide contemplation or attempt, problem drinking, drug dependence, neurotic disorders (Depression, OCD, Panic, Phobia, GAD [Generalized Anxiety Disorder]), and psychotic disorders"); Sarah Brown, Karl Taylor, & Stephen Wheatley Price, *Debt and Distress: Evaluating the Psychological Cost of Credit*, 26 J. Econ. Psychol. 642, 647 (2005) ("there is considerable evidence of a strong statistical association between financial distress and severe psychological problems in the general population").

92 Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Aging & Health 673, 685 (2012) ("Indebtedness increases symptoms of depression, anxiety, and anger, above and beyond the influences of income, wealth, education, occupational status, employment, various controls, and earlier mental health."); R. Jenkins et al., *Debt, Income, and Mental Disorder in the General*

shown that debt is a risk factor for depression,[93] anxiety,[94] substance abuse,[95] and mental disorders.[96] The psychological burdens of carrying debt—including the fear of never being able to pay off debt and the stress of being contacted by collectors—lead to feelings of hopelessness, shame, and despair.[97] In addition, debt strains relationships and makes social support harder to come by.[98] Even the children of indebted adults show impaired socioemotional development.[99]

Indebtedness has also been shown to be a risk factor for suicidal ideation[100] and suicide completion.[101] A meta-analysis of several studies conducted in the United States, Hong Kong, Finland, and the United Kingdom found that people who commit suicide are nearly eight times more likely to have financial debt.[102] A study of adults in the UK found that people in debt were twice as likely to contemplate suicide.[103] Suicidal ideation is common enough that debt collectors frequently report encountering suicidal customers. A 2017 survey of debt collection organizations found that one in four frontline staff reported having spoken to at least one customer in the past year who seemed serious about committing suicide.[104]

Population, 38 Psychol. Med. 1485, 1485 (2008) ("The more debts people had, the more likely they were to have some form of mental disorder, even after adjustment for income and other sociodemographic variables."). *See also* K. A. McLaughlin et al., *Home Foreclosure and Risk of Psychiatric Morbidity During the Recent Financial Crisis*, 42 Psychol. Med. 1441, 1444 (2012) ("The association between foreclosure and symptoms of depression and anxiety was observed even after rigorous adjustment for sociodemographics, prior history of psychiatric disorder, and exposure to other financial stressors, including job loss.").

93 *See, e.g.*, Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Ageing & Health 673 (2012) (surveying 1463 adults in Florida and concluding that indebtedness is associated with symptoms of depression); K. A. McLaughlin et al., *Home Foreclosure and Risk of Psychiatric Morbidity During the Recent Financial Crisis*, 42 Psychol. Med. 1441 (2012) (surveying 1547 adults in Detroit and observing an association between home foreclosure and clinical symptoms of major depression); Craig Evan Pollack & Julia Lynch, *Health Status of People Undergoing Foreclosure in the Philadelphia Region*, 99 Am. J. Public Health 1833 (2009) (studying 250 Philadelphia-area residents undergoing mortgage foreclosure and finding that 36.7% met the screening criteria for major depression).

94 Patricia Drentea, *Age, Debt and Anxiety*, 41 J. Health & Soc. Behav. 243 (2000) (surveying 1037 Ohio adults and finding that anxiety is associated with being in default and that anxiety increases as the ratio of credit card debt to income grows); Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Ageing & Health 673 (2012); K. A. McLaughlin et al., *Home Foreclosure and Risk of Psychiatric Morbidity During the Recent Financial Crisis*, 42 Psychol. Med. 1441 (2012).

95 *See, e.g.*, R. Jenkins et al., *Debt, Income, and Mental Disorder in the General Population*, 38 Psychol. Med. 1485, 1490 (2008) ("The more debts people had, the more likely they were to have . . . alcohol dependency and drug dependency.").

96 *See, e.g.*, Elizabeth Sweet, Arijit Nandi, Emma K. Adam, & Thomas W. McDade, *The High Price of Debt: Household Financial Debt and its Impact on Mental and Physical Health*, 91 Soc. Sci. & Med. 94, 95 (2013) ("several empirical studies have found that financial strains such as personal debt and home foreclosures are strong predictors of depression, general psychological distress, mental disorders, suicidal ideation and behavior"); Thomas Richardson, Peter Elliott, & Ronald Roberts, *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 Clinical Psychol. Rev. 1148, 1154 (2013) ("Odds ratios demonstrate more than a three-fold risk of a mental disorder in those with debt, or alternatively a three-fold risk of debt in those with a mental disorder."); R. Jenkins et al., *Debt, Income, and Mental Disorder in the General Population*, 38 Psychol. Med. 1485, 1490 (2008) ("People with six or more separate debts had a six-fold increase in mental disorder after adjustment for income."); Simon Hatcher, *Debt and Deliberate Self-Poisoning*, 164 British J. of Psychiatry 111 (1994) ("Psychiatrists were more likely to diagnose mental illness in those in debt.").

97 *See* Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Aging & Health 673, 676 (2012) ("Indebtedness has negative mental health consequences for various reasons, possibly including the perception of not being able to get out of debt or the potential shame and anxiety resulting from defaulting on loans or declaring personal bankruptcy"). *See also* H. Meltzer et al., *Personal Debt and Suicidal Ideation*, 41 Psychol. Med. 771 (2011) ("Feelings of hopelessness partially mediated the relationship between debt and suicidal ideation.").

98 Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24 J. Aging & Health 673, 674 (2012) (arguing that worry about debt leads to "externalizing behaviors, such as irritability and conflict with others, and a general state of anger").

99 Lawrence M. Berger & Jason N. Houle, *Parental Debt and Children's Socioemotional Well-Being*, 137 Pediatrics 1, (2016) ("unsecured debt is negatively associated with socioemotional development, which may reflect limited financial resources to invest in children and/or parental financial stress").

100 H. Meltzer et al., *Personal Debt and Suicidal Ideation*, 41 Psychol. Med. 771, 776 (2011) (finding a "strong association of debt and suicidal ideation" after controlling for various sociodemographic and lifestyle factors); J. Hintikka et al., *Debt and Suicidal Behaviour in the Finnish General Population*, 98 Acta Psychiatr. Scand. 493, 493 (1998) ("difficulties in repaying debts were found to be a factor independently associated with suicidal ideation").

101 Richardson, Peter Elliott, & Ronald Roberts, *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 Clinical Psychol. Rev. 1148, 1154 (2013) (finding that across the four autopsy studies, 31% of suicide completers had debt whereas only 5% of control group individuals had debt). Debt is also a risk factor for suicide attempts. *See* Simon Hatcher, *Debt and Deliberate Self-Poisoning*, 164 British J. of Psychiatry 111, 111 (1994) (examining British hospital records, finding that 37% of self-harmers had problem debt, and concluding that individuals with debt were "more likely to harm themselves with greater suicidal intent and, after the episode, to report more symptoms of depression and hopelessness").

102 Richardson, Peter Elliott, & Ronald Roberts, *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 Clinical Psychol. Rev. 1148, 1154 (2013) (pooling together several studies and concluding that suicide completers have "nearly an eight-fold risk of debt").

103 H. Meltzer et al., *Personal Debt and Suicidal Ideation*, 41 Psychol. Med. 771 (2011) ("Those in debt were twice as likely to think about suicide, after controlling for sociodemographic, economic, social and lifestyle factors.").

104 Chris Fitch et al., Vulnerability: A Guide for Debt Collection 54 (Pers. Fin. Res. Ctr. 2017).

A 2016 study by the Federal Reserve Board of Atlanta found that "that individuals with better credit risk and smaller amounts of delinquent debt have a lower probability of mortality."[105]

1.3.1.4 Lower-Income Consumers and Debt Collection

Low- and moderate-income consumers are disproportionately impacted by debt collection activity. Faced with juggling pressing financial needs for immediate expenses, low-income consumers may engage in a variety of debt coping strategies for bills that they cannot pay in full such as: borrowing from others, using nonprofit assistance, paying with an earned income tax credit (EITC) refund, skipping or rotating payments, paying less than the minimum, paying off a bill with a credit card or loan, ignoring or rejecting certain debts, taking on extra work, or going without.[106]

In a national survey conducted in 2019, the CFPB found that respondents from households with lower annual incomes were significantly more likely to report having difficulty paying a bill or expense in the past year than respondents from higher income households; 62.4% of respondents from households earning $20,000 or less reported having trouble paying bills compared to 17.7% of respondents from households earning more than $100,000.[107]

The Urban Institute's December 2017 Well-Being and Basic Needs Survey found that consumers with family incomes between 100% and 199% of the federal poverty level (FPL) were mostly likely to report being contacted by a debt collector while those with incomes below FPL were the second most likely to be contacted.[108] The CFPB's 2015 survey of consumer experiences with debt collection found that the consumers earning less than $20,000 were three times more likely to have been contacted about a debt in collection than consumers earning over $70,000 per year.[109]

Of all consumers who had been contacted about a debt, the CFPB's 2015 survey found that those with lower household incomes were also more likely to have been sued.[110] In addition to being more likely to be sued on a debt, low-income consumers may be less likely to have a collection lawsuit decided in their favor. For example, one study concluded that higher median income was positively correlated with the rate of case dismissals.[111]

An analysis of national payroll data found that "[t]he average number of garnishments and garnishment rate for all types of garnishment is highest for those earning between $20K and $60K with more than sixty percent of employees with a

105 Laura M. Argys, Andrew I. Friedson, and M. Melinda Pitts, Killer Debt: The Impact of Debt on Mortality, Working Paper 2016-14 (Federal Reserve Bank of Atlanta, Nov. 2016).

106 Laura M. Tach & Sara Sternberg Green, *Robbing Peter to Pay Paul: Economic and Cultural Explanations for How Lower-Income Families Manage Debt*, 61 Social Problems 1 (Feb. 2014).

107 CFPB, Insights from the Making Ends Meet Survey 5 (July 2020), *available at* https://files.consumerfinance.gov. *See also* CFPB, Perceived Financial Preparedness, Saving Habits, and Financial Security (Sept. 2020), *available at* https://files.consumerfinance.gov.

108 K. Steven Brown and Breno Braga, Financial Distress among American Families: Evidence from the Well-Being and Basic Needs Survey 5 (Urban Institute, February 2019) (percentages of respondents contacted by a debt collector were 19.7% for those earning <100% FPL, 23.6% for those earning 100 to 199% FPL, 16.9% for those earning 200 to 399% FPL, and 6.5% for those earning 400% FPL or more). *See also* Breno Braga et al., Local Conditions and Debt in Collection 14, 23 (Urban Institute, June 2016) (reporting that median household income for consumers without debt in collection was $63,938, compared to median household income of $51,438 for someone with debt in collection; noting that "[p]eople living in more economically disadvantaged census tracts—defined by higher unemployment rate and lower per capita income—have more debt in collections").

109 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 15 (Jan. 2017) (52% of consumers with annual household incomes of less than $20,000, compared to 16% of respondents with household incomes over $70,000). *See also* FINRA Investor Education Foundation, Financial Capability in the United States 2016, p. 27 (July 2016) (25% of respondents to the 2015 National Financial Capability Study with incomes of less than $25,000 reported being contacted by a debt collection agency in the past year, compared to 18% of all survey respondents).

110 *Id.* at 28 (20% of consumers with annual household incomes of less than $20,000 and 16% of consumers with household incomes between $20,000 to $39,999 that had been contacted about a debt in collection were sued, compared to 12% of respondents with household incomes over $70,000). *See also* Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (analyzing debt collection lawsuits in Harris County, Texas justice courts from January 1, 2018, to June 30, 2020, and concluding that "the rates of debt collection lawsuits filed and judgments against defendants peak in census tracts with median household incomes of around $50,000"); Kate Owen, Presentation at the University of Nebraska at Omaha on "The High Cost of Being Poor" (Legal Aid of Nebraska, Oct. 21, 2016) (reporting that 56.3% of all judgments in Douglas County, Nebraska were against individuals residing in high poverty zip codes); Peter A. Holland, Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers (Mar. 2014) ("In Maryland, debt buyers disproportionately sued in jurisdictions with larger concentrations of poor people and racial minorities. For example, Prince George's County has only 15% of the [sic] Maryland's population, yet 23% of all debt buyer complaints were filed against Prince George's County residents."); Claudia Wilner & Nasoan Sheftel-Gomes, Neighborhood Economic Development Advocacy Project, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers 10 (2010) ("91% of people sued by debt buyers and 95% of people with default judgments entered against them live in low- or moderate-income communities."); Richard M. Hynes, Broke but Not Bankrupt: Consumer Debt Collection in State Courts, 60 Fla. L. Rev. 1, 42 (2008) (civil filings in Virginia were positively correlated with poverty).

111 Mary Spector and Ann Baddour, Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts, 67 Hastings Law Journal 1427, 1458 (June 2016) ("Median income appears to have the strongest correlation with the court outcome category of nonsuited or dismissed by plaintiff. From 2014 to 2015, the correlation increased from .30 to .40. The trend in correlation points to a pattern: the rate of nonsuits or dismissals increases as precinct median income increases.").

garnishment in this income range."[112] Prior analysis of national payroll data broke this salary range down even more, concluding that individuals earning between $25,000 and $40,000 had the highest rates of garnishment.[113]

Low-income consumers may also be less likely to file for bankruptcy or to obtain bankruptcy's promise of a fresh start than middle-class consumers.[114]

1.3.1.5 Race, Ethnicity, and Debt Collection

Racial and ethnic disparities exist with respect to who is in debt. As discussed below, these disparities exist at various stages in the lifecycle of a debt. Wealth and asset gaps might explain at least some of the observed disparities in debt collection.[115]

Who Is Behind on a Bill: In a national survey conducted in 2019, the CFPB found that Hispanic and African-American respondents were more likely to report having difficulty paying a bill or expense in the past year than non-Hispanic white or other respondents.[116] The CFPB notes that, "[t]he difference in the estimates between African American's and other groups persists even when controlling for income, age, gender, education, and rural status"[117] but that "Hispanics were somewhat more likely to report having difficulty paying a bill or an expense, but the difference is explained by other characteristics such as income and age."[118]

Data from the Federal Reserve shows that Black and Hispanic survey respondents in 2019 were less likely to be able to fully pay current month's bills than white respondents.[119] While those with more education were less likely to report that they could not fully pay the current month's bills, disparities persisted for each level of education.[120]

Who Files Debt Collection Complaints: Research by the FTC analyzing who files complaints found that people living in areas with a 50% or larger Black population have a higher rate of debt collection complaints as compared to people living in areas where the Black population is less than 5%.[121] In contrast, the rate for debt collection complaints was lower in communities with a 75% or larger Hispanic population as compared to communities with a Hispanic population of 5% or less.[122] Analyzing consumer complaints from 2020, the CFPB has also found higher complaint volumes from consumers living in predominantly minority counties.[123]

Who Has Debt Reported on a Credit Report: The Urban Institute's analysis of credit reporting data from December 2020 found that 39% of individuals with a credit report living in communities of color had one or more debts in collection on their credit report, compared to 24% of individual with a credit report living in white communities.[124] The data also shows disparities for specific types of debt, including: auto,[125] credit card,[126] medical,[127] and student

112 ADP Research Institute, The U.S. Wage Garnishment Landscape: Through the Lens of the Employer (2017).

113 ADP Research Institute, Garnishment The Untold Story (2014) (study of payroll data found the highest rates of garnishment (10%) among those earning between $25,000 and $40,000 with an 8.4% garnishment rate for those earning $15,000 to $24,999).

114 *See, e.g.,* Paul Kiel and Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, ProPublica, Sept. 27, 2017, at 11 (reporting that the discharge rate in Chapter 13 bankruptcies clearly rises with debtors' income for both black and white zip codes); Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 Fla. L. Rev. 1 (2008) ("This Article finds that few civil defendants file for bankruptcy, that civil litigation is concentrated in cities and counties with lower socio-economic characteristics, and that civil defendants in Virginia have a significantly lower rate of homeownership than the general population. In other words, the bankruptcy statistics exclude many defaulting and insolvent consumers, and these consumers may be disproportionately drawn from the more disadvantaged segments of society.").

115 *See* LaVoice, Jessica and Vamossy, Domonkos F., Racial Disparities in Debt Collection 26 (September 2019), *available at* https://ssrn.com ("a wealth gap of this size [$35,000 wealth gap not driven by housing equity] would explain almost all of our most conservative estimate of the judgment gap across black and non-black communities"); Breno Braga, et al., Urban Institute, Local Conditions and Debt in Collection, 24 (June 2016) (noting that the racial disparities identified in the study were consistent with literature documenting a racial wealth gap in the United States); Annie Waldman & Paul Kiel, *Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas*, ProPublica, Oct. 8, 2015, at 19 (noting that residents of majority Black census tracts were sued on debts that were, on average, smaller in size than residents of white census tracts and that this might be evidence of the impact of the wealth gap on debt collection, since white consumers might be able to pay small debts more readily than black consumers).

116 CFPB, Insights from the Making Ends Meet Survey 5 (July 2020) (64.9% of Black or African-American respondents, 47.4% of Hispanic respondents, 35% of non-Hispanic white respondents, and 33% of other respondents reported difficulty paying a bill or expense in the past year), available at https://files.consumerfinance.gov.

117 *Id.* at 6

118 *Id.* at 6, n.9. *See also id.* at 7.

119 Board of Governors of the Federal Reserve System, Report on the Economic Well-Being of U.S. Households in 2019, Fig. 16 (May 2020).

120 *Id.*

121 Devesh Raval, FTC, Which Communities Complain to Policymakers? Evidence from Consumer Sentinel 20 (July 2018), *available at* www.ftc.gov.

122 *Id* at 22.

123 CFPB, Complaint Bulletin: County-level demographic overview of consumer complaints (Apr. 2021).

124 Breno Braga, et al., Debt in America: An Interactive Map (Urban Institute, last updated Mar. 31, 2021) ("White communities and communities of color are based on zip codes where most residents are white (at least 60 percent of the population is white) or most residents are people of color (at least 60 percent of the population is of color)."), *available at* https://apps.urban.org. *See also* Breno Braga et al., Local Conditions and Debt in Collection 2, 14 (Urban Institute, June 2016) (debt in collection was more prevalent in areas with more African Americans and Latinos and less prevalent in areas with more non-Hispanic whites and Asians).

125 Breno Braga, et al., Debt in America: An Interactive Map (Urban Institute, last updated Mar. 2021) (listing the auto/retail loan delinquency rate as 3% in white communities versus 6% in communities of color), *available at* https://apps.urban.org.

126 Breno Braga, et al., Debt in America: An Interactive Map (Urban Institute, last updated Mar. 2021) (listing the credit card delinquency rate as 3% in white communities versus 5% in communities of color), *available at* https://apps.urban.org.

127 Breno Braga, et al., Debt in America: An Interactive Map (Urban Institute, last updated Mar. 2021) (listing the share with medical debt

loan[128] debts. In addition to national data, the Urban Institute's research includes information at the state and county level, which also shows evidence of racial disparities.[129] Other research analyzing credit reporting data has examined city-level data about the prevalence of debt collection.[130]

Who Is Contacted by a Collector: Racial and ethnic disparities are also evident in data about who is contacted about a debt. The CFPB's survey of consumer experiences with debt collection found that non-white[131] and Hispanic[132] respondents were more likely to report being contacted about a debt in collection than white and non-Hispanic respondents. These differences between white and non-white respondent contact rates lessened, but did not disappear, when controlling for income.[133]

Urban Institute tabulations of data from the December 2017 Well-Being and Basic Needs Survey found that the rate of contact by debt collectors was more than twice as high for non-Hispanic Blacks as it was for non-Hispanic whites.[134] Another nationally representative survey of households with credit card debt found that 71% of African-American middle-income households were called by bill collectors, compared to 50% of white middle-income households, despite similar rates of default and late payments.[135]

Who Is Sued on a Debt: Of those contacted about a debt, the CFPB's survey of consumer experiences with debt collection found that similar percentages reported having been sued.[136] However, as noted above, the survey also found that non-white and Hispanic respondents were more likely to have been contacted about a debt.

Other studies have found evidence of racial and ethnic disparities in the filing of collection lawsuits[137] and the quality

in collections as 13% in white communities versus 17% in communities of color), *available at* https://apps urban.org. *See also* Michael Karpman and Kyle J. Caswell, Urban Institute, Past-Due Medical Debt among Nonelderly Adults, 2012–2015, 7–8 (Mar. 2017) (30.9% of Black, non-Hispanic adults ages 18–64 reported past-due medical debt, compared to 23.6% of Hispanic respondents, 23.4% of white, non-Hispanic respondents, and 16.6% of "other race, non-Hispanic" in 2015); Jacqueline C. Wiltshire, Medical Debt and Related Financial Consequences Among Older African American and White Adults, Am. J. of Pub. Health (Apr. 14, 2016) (reporting that older African Americans had 2.6 times higher odds of having medical debt than did older whites, and older African Americans were more likely to be contacted by a collection agency and borrow money because of medical debt, while older whites were more likely to use savings).

128 Breno Braga, et al., Debt in America: An Interactive Map (Urban Institute, last updated Mar. 2021) (listing the share of student loan holders with student loan debt in default as 9% for white communities and 14% for communities of color), *available at* https://apps.urban.org. *See also* AAUW, Deeper in Debt: Women and Student Loans 19 (May 2017) (showing that black women had the highest mean cumulative undergraduate debts in 2011–2012, followed by Black men, Hispanic men, Hispanic women, white women, white men, Asian women, and Asian men), *available at* https://apps.urban.org; Ben Miller, New Federal Data Shows a Student Loan Crisis for African American Borrowers (Center for American Progress, Oct. 16, 2017) (for students entering college in 2003–2004, the median percentage of original student loan balance owed 12 years after college entry was 113% for African Americans, 83% for Latinos, and 65% for whites).

129 Breno Braga, et al., Debt in America: An Interactive Map (Urban Institute, last updated Mar. 2021), *available at* https://apps.urban.org.

130 *Compare* Anmol Chaddha, Federal Reserve Bank of Boston, The Concentration of Financial Disadvantage: Debt Conditions and Credit Report Data in Massachusetts Cities and Boston Neighborhoods 10, 12 (June 2018) (showing maps of Boston neighborhoods with the percent with at least one account 60+ days past due and percent with third party debt collections), *available at* https://www.bostonfed.org, *with* Boston Planning & Development Agency Research Division, Neighborhood Profiles (April 2019) (neighborhood profiles report data about race in each neighborhood), *available at* www.boston plans.org.

131 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt, 17 n.17, 18 (Jan. 2017) (44% of non-white respondents were contacted about a debt in collection, compared to 29% of white respondents; "[t]he non-white category includes individuals who self-identified alone or in combination as: Black or African American; American Indian or Alaska Native; Asian; or Native Hawaiian or other Pacific Islander"). *See also* FINRA Investor Education Foundation, Financial Capability in the United States 2016, p. 27 (July 2016) (31% of African American respondents to the 2015 National Financial Capability Study reported being contacted by a debt collection agency in the past year, compared to 18% of all survey respondents).

132 *Id.* at 18 (39% of Hispanic respondents were contacted about a debt in collection, compared to 31% of non-Hispanic respondents). *See also* Renato Rocha, Three Key Findings on Hispanics with Debt in Collection: Results from CFPB's Recent Survey (UnidosUS, Feb. 8 2017), *available at* http://blog.unidosus.org.

133 *Id.* at 18 n.18. ("the estimated difference for whites compared with non-whites narrows by roughly one-quarter when comparing consumers with similar incomes in a regression framework"; no regression analysis was reported for Hispanic and non-Hispanic respondents).

134 Email from Breno Braga, Urban Institute, to April Kuehnhoff, National Consumer Law Center (Mar. 5, 2019) (contact rate was 26.5% for non-Hispanic Blacks and 12.4% for non-Hispanic whites. While not statistically significant, the contact rate was 14% for Hispanics and 8.9% for non-Hispanics of other races). For more information about the source of the data see, Michael Karpman, et al., The Well Being and Basic Needs Survey: A New Data Source for Monitoring the Health and Well-Being of Individuals and Families (Urban Institute, Aug. 28, 2018).

135 Catherine Ruetschlin & Dedrick Asante-Muhammad, Demos and NAACP, The Challenge of Credit Card Debt for the African American Middle Class (Dec. 2013), *available at* www.demos.org.

136 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt, 28 (Jan. 2017) (14% of non-white consumers who were contacted about a debt reported being sued, compared to 16% of white consumers and 15% of Hispanic and non-Hispanic consumers of other races, who were contacted about a debt reported being sued).

137 Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (analyzing debt collection lawsuits in Harris County, Texas justice courts from January 1, 2018 to June 30, 2020 and concluding that the odds of being sued for a debt in tracts where the majority of residents are Black or Latino is 1.6 times higher than the odds for tracts where the majority of residents are white); Reinvestment Fund, Debt Collection in Philadelphia (Mar. 2021) (estimating that 49% of defendants in debt collection lawsuits filed between January 2016 and April 2020 were Black even though only 41% of Philadelphia households are Black), *available at* https://clsphila.org; Coalition for a Humane Hopkins, et al. Taking Neighbors to Court: Johns Hopkins Hospital Medical Debt Lawsuits (May 2019) ("Demographic data, including data on race,

of claims filed in those lawsuits.[138] One study in Philadelphia found that the average amount sought in claims filed against Black and Hispanic defendants were lower than the average in claims filed against white and Asian defendants.[139]

Who Has Judgments Entered Against Them in Collection Lawsuits: Studies have highlighted racial disparities regarding which consumers are likely to have judgments[140] or default judgments[141] entered against them in collection lawsuits.

Additionally, one study has found evidence that there are racial disparities in who is subject to wage garnishment post-judgment. In St. Louis, holding income constant, defendants living in majority Black census tracks were twenty percent more likely to be subject to garnishment proceedings after obtaining a judgment.[142]

Who Successfully Discharges Debt in Bankruptcy: Racial disparities are also evident in data about who is able to successfully discharge debt in bankruptcy. A study of national bankruptcy data found that "for debtors living in black areas, the odds of having a case dismissed [failing to achieve a bankruptcy discharge] were about twice as high as those of debtors living in white areas, controlling for the court district where the case was filed, income, and other financial characteristics of the debtor."[143]

1.3.1.6 Older Americans and Debt Collection

Among families headed by older Americans, the percentage who are in debt has increased in recent years.[144] Data from the Board of Governors of the Federal Reserve System showed that more than half of families with a reference person seventy-five or older were in debt in 2019, compared to less than a quarter of similar families in 1989.[145] Indebtedness of households with individuals age 65–74 has also increased.[146]

Rates of indebtedness have increased even more dramatically for certain types of debt. For example, the percentage of consumers age sixty and older with student loan debt

was available in more than 100 of the reviewed case files, revealing that 86% of defendants sued by Johns Hopkins Hospital in our sample set are African American."); Peter A. Holland, Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers (Mar. 2014) ("In Maryland, debt buyers disproportionately sued in jurisdictions with larger concentrations of poor people and racial minorities. For example, Prince George's County has only 15% of the [sic] Maryland's population, yet 23% of all debt buyer complaints were filed against Prince George's County residents."); Richard M. Hynes, Broke But Not Bankrupt: Consumer Debt Collection in State Courts, 60 Fla. L. Rev. 1, 3 (2008) (study of civil litigation in Virginia concluded that "civil litigation is disproportionately concentrated in cities and counties with lower median income and homeownership rates; higher incidences of poverty and crime; and higher concentrations of relatively young and minority residents").

138 The Legal Aid Society, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers (May 2010) (reporting that, in a sample of 451 legal hotline calls, 66% of debt collection cases against Black and Latino clients were "clearly meritless," as compared to 35% of all cases), *available at* www.neweconomynyc.org.

139 Reinvestment Fund, Debt Collection in Philadelphia (Mar. 2021) (average amounts claimed were: Asian defendants—$3264; white defendants—$3143; Black defendants—$2822; and Hispanic defendants—$2773), *available at* https://clsphila.org.

140 Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (analyzing debt collection lawsuits in Harris County, Texas justice courts from January 1, 2018 to June 30, 2020 and concluding that the odds of a person having a debt collection judgment against them is 1.6 times higher in census tracts where the majority of residents are Black than the odds in tracts where the majority of residents are white and 1.8 times higher in census tracts where the majority of residents are Latino); Annie Waldman & Paul Kiel, *Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas*, ProPublica, Oct. 8, 2015 (analysis of collection actions in St. Louis, Chicago, and Newark found that the risk of judgment was twice as high in majority Black census tracts compared to majority white census tracts, holding income constant). *See also* LaVoice, Jessica and Vamossy, Domonkos F., Racial Disparities in Debt Collection 26 (Sept. 2019) (researchers analyzing Waldman & Kiel's St. Louis data concluded that "there are 40% more debt collection judgments in majority black neighborhoods compared to non-black neighborhoods even after controlling for differences in incomes and credit scores"), *available at* https://ssrn.com.

141 Reinvestment Fund, Debt Collection in Philadelphia (Mar. 2021) ("cases involving Black defendants were somewhat more likely to end in a default—66% compared with 64% of cases with a White defendant"), *available at* https://clsphila.org; Mary Spector and Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 Hastings Law Journal 1427, 1458 (June 2016) (study in Texas also indicated "a somewhat higher likelihood of default judgments in precincts with a higher non-White population"); Annie Waldman & Paul Kiel, *Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas*, ProPublica, Oct. 8, 2015 ("Data from St. Louis indicated that suits against residents of majority black census tracts were more likely to result in default judgments or consent judgments"); Susan Shin & Claudia Wilner, The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality (New Economy Project, June 2013) (New York zip codes with highest concentration of default judgments include predominately non-white neighborhoods in Albany and Buffalo and middle income Black communities in Queens); The Legal Aid Society, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers (May 2010) (in a study of 457,322 lawsuits filed by debt buyers in New York City, 56% of default judgments were entered against consumers living in predominantly Black or Latino neighborhoods).

142 Annie Waldman & Paul Kiel, *Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas*, ProPublica, Oct. 8, 2015 (wage garnishment data was only available for St. Louis).

143 Paul Kiel and Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, ProPublica, Sept. 27, 2017, at 11.

144 *See, e.g.*, United States Government Accountability Office, Retirement Security: Debt Increased for Older Americans over Time, But the Implications Vary by Debt Type (Apr. 2021).

145 Board of Governors of the Federal Reserve System, Survey of Consumer Finances, 1989–2019: Debt by age of reference person (Sept. 28, 2020) (51.4% of households with a reference person 75 or older were in debt in 2019 compared to 21% in 1989), *available at* https://www.federalreserve.gov.

146 *Id.* (70% in 2019 compared to 49.7% in 1989).

quadrupled between 2005 and 2015.[147] Rates of delinquent and defaulted student loans have also increased among older borrowers[148] More older Americans also have mortgage debt.[149]

In addition to an increase in the percentage of older Americans who are in debt, the amount of indebtedness has also increased. The Federal Reserve Bank of New York reported that, from 2003 to 2015, the amount of real per capita debt at age sixty-five increased over eight-fold (886%) for student loans, 47% for debt secured by a home, and 29% for auto loans, while staying the same for credit card debt.[150]

Researchers have also found dramatic increases in the percent of bankruptcy filers who are older Americans—reporting a 392.6% increase in the percent of filers that are age 65–74 from 1991 to 2016 and a 996.9% increase in the percent of filers that are 75 or older in the same period.[151]

Despite these increases, the CFPB's survey of consumer experiences with debt collection found that older Americans were still less likely to report being contacted about a debt in collection than younger Americans.[152] In that survey, 19% of survey respondents 62 or older reported being contacted by a debt collector or creditor in the prior year, significantly fewer than the 42% of 35-49 year old respondents.[153]

A separate CFPB survey found that respondents 62 or older were less likely to report having difficulty paying for a bill or expense in the past twelve months than younger respondents.[154]

Debt collection is a common subject for complaints from older consumers to the CFPB.[155] In the CFPB's survey of consumer experiences with debt collection, 59% of those age sixty-two or older who were contacted about a debt cited an issue with a debt in collection, 40% disputed a debt, and 20% had been sued on a debt.[156]

Older Americans may acquire debt for different reasons or use different repayment strategies than younger Americans. For example, one study found that consumers fifty or older were more likely to have credit card debt related to car repair, home repairs, or because they helped pay the debts of relatives.[157] Another study reported that in order to pay their debts, seniors may engage in debt coping strategies such as forgoing home or car repairs, cutting pills, missing medical appointments, or skipping meals.[158]

Older Americans may also be more likely to be subject to certain collection tactics, such as efforts to collect the debt of a deceased family member[159] or attempts to get seniors to make debt payments from exempt government benefits.

Older adults with Alzheimer or other forms of dementia may be more likely to miss payments or suffer negative financial consequences even years before a formal diagnosis.[160]

147 CFPB, Snapshot of Older Consumers and Student Loan Debt 4 (Jan. 2017). *See also* Board of Governors of the Federal Reserve System, Survey of Consumer Finances, 1989–2019: Education installment loans by age of reference person (Sept. 28, 2020) (showing increase in rate of indebtedness from 0.9% in 1989 to 4.2% in 2019 for households with a reference person age 65–74 and from 0% to 1.8% for households with a reference person age 75 or older), *available at* https://www.federalreserve.gov; CFPB, Older Consumers and Student Loan Debt by State (Aug. 2017).

148 CFPB, Snapshot of Older Consumers and Student Loan Debt, 11 (Jan. 2017) ("The proportion of delinquent student loan debt held by borrowers age 60 and older increased from 7.4% to 12.5% from 2005 to 2012. Nearly 40% of federal student loan borrowers age 65 and older are in default.").

149 Board of Governors of the Federal Reserve System, Survey of Consumer Finances, 1989–2019: Education installment loans by age of reference person (Sept. 28, 2020) (showing increase in rate of indebtedness from 20.7% in 1989 to 33.2% in 2019 for households with a reference person age 65–74 and from 5.8% to 22.6% for households with a reference person age 75 or older), *available at* https://www.federalreserve.gov; CFPB, Snapshot of Older Consumer and Mortgage Debt (May 2014) (increasing percentage of older Americans owe a mortgage on their home).

150 Meta Brown, The Graying of American Debt (Fed. Reserve Bank of N.Y., Feb. 12, 2016). *See also* CFPB, Snapshot of Older Consumers and Student Loan Debt, 6 (Jan. 2017) ("average amount of student loan debt owed by borrowers age 60 and older roughly doubled from 2005 to 2015, increasing from $12,100 to $23,500").

151 Thorne, Deborah and Foohey, Pamela and Lawless, Robert M. and Porter, Katherine M., Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society (Aug. 5, 2018). Indiana Legal Studies Research Paper No. 406, *available at* https://ssrn.com.

152 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017), *available at* www.cfpb.gov. *See also* Breno Braga, et al., Local Conditions and Debt in Collections (Urban Institute, June 2016) ("People age 65 and older are the least likely to have debt in collections and have the lowest amounts of debt in collections.").

153 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 17 (Jan. 2017).

154 CFPB, Insights from the Making Ends Meet Survey 5 (July 2020) (25.1% of respondents 62 or older reported difficulty, as compared to 47% of respondents under 40 and 44.3% of respondents between 40 and 61), *available at* https://files.consumerfinance.gov.

155 CFPB, Monthly Complaint Report, Vol. 23 (May 2017) (showing 26,452 total complaints about mortgages and 25,561 total complaints about debt collection filed by those 62 or older). *See also* Gideon Wissman and Ed Mierzwinski, Older Consumers in the Financial Marketplace: An Analysis of Complaints and Results from the CFPB (U.S. PIRG Education Fund, Oct. 2017); CFPB, A snapshot of debt collection complaints submitted by older consumers (Nov. 2014).

156 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 25 (Jan. 2017).

157 Amy Traud, Demos, In the Red: Older Americans and Credit Card Debt, AARP Public Policy Institute (Jan. 2013), *available at* www.aarp.org.

158 Nat'l of Council on Aging, Older Adults and Debt: Trends, Trade-offs, and Tools to Help (2015), *available at* https://www.ncoa.org.

159 *See* CFPB, A snapshot of debt collection complaints submitted by older consumers (Nov. 2014). *See also* FTC, Debts and Deceased Relatives (July 2011), *available at* https://www.consumer.ftc.gov.

160 Lauren Hersch Nicholas, et al., Financial Presentation of Alzheimer Disease and Related Dementias, JAMA Internal Medicine (Nov. 30, 2020) (Medicare beneficiaries that developed dementia "were at significantly higher risk of payment delinquency compared with similar beneficiaries who never developed [dementia] beginning 6 years prior to diagnosis").

1.3.1.7 Servicemembers, Veterans, and Debt Collection

Consumer debt can negatively impact the careers of military personnel and some debt collectors attempt to use this to leverage payments from servicemembers.[161] The Consumer Financial Protection Bureau has highlighted a variety of abusive debt collection practices targeting members of the military, such as:

- Contacting the servicemember's military chain of command as a way to coerce payment;
- Putting a clause in the loan contract that the servicemember must grant the debt collector the right to contact the chain of command;
- Threatening punishment under the Uniform Code of Military Justice, threatening to have the servicemember reduced in rank, or threatening to have the servicemember's security clearance revoked; and
- Contacting a spouse after deployment of the servicemember and pressuring the spouse to repay right away without the benefit of communicating with the servicemember, or, in one particularly appalling instance, demanding that the widow of a servicemember killed in combat pay them immediately from the combat death gratuity.[162]

Other issues unique to servicemembers with debts in collection including the short turnaround time (usually sixty days) in which to address debts before risking problems with security clearance and the challenges that deployments present to repaying a debt.[163] The CFPB reports that "an average of 4,700 to 8,000 servicemembers are separated each year from the military for financial issues (e.g. losing their security clearance due to unpaid debts)."[164]

Debt collection was the second most common source of servicemember complaints to the CFPB in 2020.[165] Servicemembers were more likely to complain about debt collection than all consumers filing complaints at the CFPB.[166]

In 2015, 13% of servicemember complaints to the CFPB about debt collection focused on medical debt, with complaints originating primarily from veterans.[167] Veterans often believed that their health care was covered by VA health insurance, Medicare, or Medicaid and were surprised to later receive debt collection calls.[168]

In 2019, the CFPB estimated that servicemembers owed a total of more than 2.9 billion dollars in student debt.[169] Servicemembers may also face challenges accessing protections such as interest rate caps or military deferments for student loans.[170]

Servicemembers often experience extreme stress as a result of debts and debt collection. In a 2013 study, financial stress was found to be the second leading cause of suicide among fifty-seven Army Reserve suicides.[171]

A 2020 study by the CFPB also highlighted the problems with debt experienced by former servicemembers, reporting that "a sizeable fraction of young enlisted servicemembers go delinquent on debt or have severe derogatory marks appear on their credit record around the time they leave active duty" and that problems were most likely to arise among servicemembers who left before the end of their first contract for military service.[172]

1.3.1.8 Debt Collection and Consumers with Limited English Proficiency

In 2019, more than 25 million individuals, 8.2% of the U.S. population over age 5 spoke English less than "very well"[173] and are considered to have Limited English Proficiency (LEP).[174] LEP individuals use financial products and services, but those who are not proficient in English have greater difficulty navigating the marketplace and resolving challenges when they arise. Borrowers facing delinquency and default too often face an English-only system, creating additional barriers to responding to debt collection efforts and overcoming financial distress.

161 Holly Petraeus, CFPB, Are unpaid debts a military career-killer? (Jan. 9, 2015).

162 Written Testimony of Holly Petraeus before the Senate Committee on Banking, Housing and Urban Affairs (June 26, 2012). *See also* Consent Order, In the Matter of Navy Federal Credit Union (Oct. 11, 2016); CFPB, Servicemembers 2015: A Year in Review (Mar. 2016); Consent Order, In the Matter of Security National Automotive Acceptance Company (Oct. 28, 2015).

163 FTC, A Closer Look at the Military Consumer Financial Workshop (Feb. 2018).

164 CFPB, Office of Servicemember Affairs Annual Report 7 (Jan. 2019).

165 CFPB, Office of Servicemember Affairs Annual Report (May 2021) (22% of complaints submitted by servicemembers to the CFPB).

166 *Id.* (22% of complaints by servicemembers compared to 15% of complaints by non-servicemembers. *See also* CFPB, 50 State Snapshot of Servicemember Complaints: A Nationwide Look at Complaints (Oct. 2017) (39% of complaints by servicemembers, veterans, and their families are about debt collection, compared to 26% of complaints from non-servicemembers); CFPB, The Office of Servicemember Affairs: Charting our course through the military lifecycle (May 2017) ("As of April 1 2017, the CFPB handled approximately 31,500 debt collection complaints from military consumers, which is 42% percent of the entire servicemember complaint population compared to debt collection complaints from the entire consumer population totaling 27% of the entire consumer complaint population.").

167 CFPB, Servicemembers 2015: A Year in Review 9 (Mar. 2016).

168 *Id.*

169 CFPB, Office of Servicemember Affairs Annual Report, 15 (Jan. 2019).

170 *Id.*, citing CFPB, Overseas & Underserved: Student loan servicing and the cost to our men and women in uniform (July 2015).

171 Timothy L. Hale, Searching for Answers: A Panel Review of Army Reserve Suicides, Double Eagle 6 (Sept. 2014) (study examined primary stressors leading to suicide).

172 CFPB, Debt and Delinquency After Military Service: A Study of the Credit Records of Young Veterans in the First Year After Separation (Nov. 2020), available at https://www.consumerfinance.gov.

173 U.S. Census Bureau, 2019 American Community Survey 1-Year Estimates, American Community Survey tbl. S1601 (accessed Oct. 1, 2020), *available at* https://data.census.gov.

174 U.S. Census Bureau, *2010–2014 American Community Survey 5-Year Estimates*, American Community Survey Table B16001 (U.S. Census Bureau).

In 2019, the New York Department of Consumer Affairs conducted a survey of debt collectors licensed to collect debts in New York City regarding language translation services they provide.[175] The survey found that out of 517 collectors surveyed, 54% did not provide any services in languages other than English.[176] In contrast, the CFPB in a 2021 report about large credit card issuers found that "[a]ll surveyed credit card issuers had the capacity, within their collections function, to accommodate consumers with Limited English Proficiency or consumers who express the desire to communicate in a language other than English."[177]

New York's Department of Consumer Affairs also reported that 46% provided at least one service in a non-English language—including multilingual customer representatives, a translation line for telephone communications, or translated collection letters.[178] However, only 20% of debt collectors surveyed provided translated collection letters.[179]

The CFPB's survey of consumer experiences with debt collection showed that only 79% of consumers contacted about a debt in collection were able to communicate in their preferred language.[180] Given that a large majority of the respondents likely were native English speakers, the fact that over 20% of those surveyed were unable to communicate with a debt collector in their preferred language is significant.[181]

The joint FTC-CFPB Debt Collection and the Latino Community Roundtable in October 2014 highlighted debt collection challenges in LEP communities.[182] Participants reported that LEP debtors tend to be less likely to challenge any representations made by a debt collector, including the amount owed.[183] In addition, translation issues result in problems, such as LEP debtors believing that a caller from a "debt collection agency" is in fact from a government agency. Even when translated documents are provided, they may only be partially translated, failing to provide meaningful access while also concealing key facts about the situation.[184] CFPB,[185] FTC,[186] and Department of Justice[187] enforcement actions have also highlighted abusive debt collection practices targeting LEP consumers.

In 2013, about twenty-five percent of LEP individuals lived in households with an annual income below the official federal poverty line –nearly twice as high as the share of English-proficient persons.[188] Because LEP populations tend to experience poverty at much greater rates, they also are likely to face greater challenges paying their debts as discussed in § 1.3.1.4, *supra*.

1.3.2 Consumer Attorneys

The "Find an Attorney" feature on the National Association of Consumer Advocates' website[189] lists hundreds of lawyers with "debt collection" as one of their practice areas. The "debt collection" practice area includes both attorneys who specialize in defending consumers who have been sued in a collection action and those who sue debt collectors for violations of the Fair Debt Collection Practices Act and other state and federal consumer protection statutes.

Lawyers new to this practice area may wish to consult Chapter 2, *infra*, which discusses preparation of an FDCPA case. Section 1.1.3, *supra*, discusses trainings and continuing legal education and § 1.1.4, *supra*, discusses listserv resources.

1.3.3 Original Creditors

Original creditors are entities that provide extensions of credit such as banks, credit unions, student loan lenders,

175 N.Y.C. Dep't of Consumer Affairs, Lost in Translation: Findings from Examination of Language Access by Debt Collectors (Sept. 2019).

176 *Id.*

177 CFPB, The Consumer Credit Card Market 135 (Sept. 2021).

178 N.Y.C. Dep't of Consumer Affairs, Lost in Translation: Findings from Examination of Language Access by Debt Collectors (Sept. 2019).

179 *Id.*

180 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017), *available at* http://files.consumerfinance.gov.

181 The CFPB did not release the data for responses to the question "Is English your preferred language?" The CFPB noted that the 79% who communicated in their preferred language was lower than expected, although the CFPB believed that some respondents might have misunderstood the question. See *id.* at 47 n.34.

182 A video of the roundtable (as well as a Spanish language transcript) is available at www.consumerfinance.gov.

183 *Id.*

184 *Id.*

185 CFPB, Consent Order, In the Matter of American Express Centurion Bank and American Express Bank, FSB (Aug. 23, 2017) (respondents did not make the same collection offers available to customers with Spanish language preferences that they did to consumers who did not express a Spanish language preference).

186 FTC v. Centro Natural Corp., No. 14-23879-CIV (S.D. Fl. Oct. 20, 2014) ($1.5 million judgment against an abusive debt collection operation that targeted Spanish and English speakers, along with a complete ban on debt collection activity and other injunctive relief), complaint *available at* https://www.ftc.gov; FTC v. Rincon Mgmt. Services, L.L.C., No. 5:11-cv-01623-VAP-SP (C.D. Cal. Mar. 26, 2014) (monetary judgment of over $23 million against an abusive debt collection operation that targeted Spanish and English speakers, along with a complete ban on debt collection activity and other injunctive relief), complaint *available at* https://www.ftc.gov; FTC v. RTB Enterprises, Inc., No. 4:14-cv-01691 (S.D. Tex. June 19, 2014) (monetary judgment of $4 million against abusive Texas-based debt collector that targeted Spanish and English speakers), complaint *available at* https://www.ftc.gov.

187 Dept. of Justice, Three Peruvian Men Sentenced To Significant Terms Of Incarceration For Overseeing Call Centers That Threatened And Defrauded Spanish-Speaking U.S. Consumers (Sept. 3, 2020) (scheme targeted Spanish speakers with lies and threats to collect money not owed), *available at* https://www.justice.gov; Dept. of Justice, California Resident Pleads Guilty to Telemarketing Conspiracy to Defraud U.S. Consumers (Nov. 2019) (same), *available at* https://www.justice.gov; Dept. of Justice, Four Peruvians Sentenced For Overseeing Spanish-Speaking Call Centers That Threatened and Extorted U.S. Consumers (Sept. 4, 2019) (same), *available at* https://www.justice.gov.

188 Jie Zong and Jeanne Batalova, The Limited English Proficient Population in the United States, Migration Policy Institute (July 8, 2015), *available at* www.migrationpolicy.org.

189 www.consumeradvocates.org.

auto lenders, and payday lenders. Additionally, some original creditors provide goods or services on credit, such as utility companies, medical providers, and cell phone companies.

Original creditors frequently employ people in-house to collect on their delinquent accounts. In a survey of credit card issuers conducted by the CFPB, all respondents conducted at least some collection activity in-house.[190]

While original creditors collecting their own debts are not typically covered under the Fair Debt Collection Practices Act,[191] the CFPB has made clear that its authority to prohibit unfair, deceptive, or abusive acts or practices (UDAAPs) under the Dodd Frank Act extends to original creditors.[192] Moreover, original creditors collecting their own debts may be covered under state laws.[193]

1.3.4 Debt Buyers

1.3.4.1 Generally

Debt buyers are companies that purchase debts from original creditors, intermediaries, or other debt buyers. Debts are purchased for pennies on the dollar. The debt buyer may either try to collect the debts themselves, place them for collection with debt collectors, or sell the debts to other debt buyers.

In 2019, the CFPB estimated that there were 330 debt buyers in the United States, noting that many debt buyers also collect consumer debts owed to other owners.[194]

This sections below provide additional data about debt buyers. Their collection practices are discussed in § 1.4.7, *infra*.

1.3.4.2 Amount and Types of Debt Sold in the United States

Large scale debt buying began after the savings and loan crisis in the late 1980s and early 1990s.[195] Data from 1993 to 2013 from The Nilson Report (see table below) shows the dramatic growth in sales of consumer debt, which peaked in 2005. Unfortunately, there is no more recent data available from the Nilson Report.

Sales of Consumer Debt in Default 1993-2013 (in $ Billions, Face Value)*

Year	All Debt	Credit Card Debt
1993	6.0	0.7
1994	9.0	1.9
1995	12.1	4.4
1996	20.2	16.1
1997	22.9	19.5
1998	28.0	22.7
1999	39.1	30.3
2000	37.8	27.6
2001	53.8	37.1
2002	70.8	46.1
2003	67.8	57.3
2004	77.2	63.0
2005	127.8	88.4
2006	59.1	52.6
2007	91.1	68.2
2008	72.3	55.5
2009	59.7	44.2
2010	53.7	40.3
2011	64.0	51.5
2012	55.8	35.3
2013	98.0	18.9

* The Nilson Report: Issues 792 (July 2003); 806 (Mar. 2004); 835 (June 2005); 857 (May 2006); 880 (May 2007); 901 (April 2008); 921 (March 2009); 946 (Apr. 2010); 969 (Apr. 2011); 992 (Apr. 2012); 1019 (June 2013); 1041 (May 2014).

While the CFPB has not reported data about the total volume of debt sales, it has reported that the number of collection tradelines reported by debt buyers to credit bureaus was fifty percent higher in 2018 than in 2004, but down significantly from a peak in 2009.[196]

Reports about the credit card industry offer insight about the volume of credit card debt being sold. According to a CFPB survey of large credit card issuers, in 2019 and 2020, survey respondents sold "roughly 5 percent of total post-charge-off inventory" to debt buyers.[197] That is down from 12% of charged off debt in 2017 and 2018,[198] approximately 28% of charged off debt in 2015 and 2016,[199] and approximately 15% in 2014.[200]

CFPB reports also offer insights into the types of debts being collected by debt buyers. In a 2019 report, the CFPB

190 CFPB, The Consumer Credit Card Market 131 (Sept. 2021).

191 *But see* § 4.7.4, *infra* (discussing coverage for creditors using false names).

192 CFPB, Bulletin 2013-7: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013). *See also* Appx. B.3.2, *infra*.

193 *See* § 16.2.5 (coverage under state debt collection laws), § 16.3 (coverage under state UDAP laws), *infra*.

194 *See also* CFPB, Debt Collection Practices (Regulation F), Proposed Rule, 84 Fed. Reg. 23,274, 23393 (May 21, 2019).

195 FTC, The Structure and Practices of the Debt Buying Industry 12 (Jan. 2013), *citing* Rozanne M. Andersen & Andrew M. Beato, ACA Int'l, Comments of ACA International Regarding the Debt Collection Workshop 29 (June 6, 2007).

196 CFPB, Market Snapshot: Third-Party Debt Collections Tradeline Reporting (July 2019), *available at* https://www.consumerfinance.gov.

197 CFPB, The Consumer Credit Card Market 150 (Sept. 2021).

198 CFPB, The Consumer Credit Card Market 162 (Aug. 2019).

199 CFPB, The Consumer Credit Card Market 327 (Dec. 2017).

200 CFPB, The Consumer Credit Card Market 251 (Dec. 2015).

breaks down collection tradelines filed by debt buyers as follows: banking (37%), retail (28%), and financial (28%).[201] A 2017 CFPB study of three online debt marketplaces found that the breakdown of accounts being sold was payday loans (46%), credit card accounts (27%), and the remainder included medical debts, auto deficiencies, telecom, utility, and retail debts.[202]

A 2013 FTC study analyzed information about more than 5000 portfolios of debt containing more than ninety million accounts with a face value of almost $143 billion that had been purchased by nine debt buyers between 2006 and 2009.[203] This study found that the three most common types of accounts purchased were credit cards (45%), medical (28%), and telecom (15%).[204]

Testimony from the Office of the Comptroller of the Currency (OCC) in 2013 indicated that the nineteen largest banks sold about $37 billion a year in debt to debt buyers.[205] The OCC also found that the vast majority of debt sold by the nation's nineteen largest banks was credit card debt, but other debt sold included automobile, home equity, mortgage, and student loans.[206] It also reported that other non-bank entities sell different types of debt, such as cell phone, utilities, and medical debt.[207]

1.3.4.3 Average Price of Debt

Debt buyers purchase debt for pennies on the dollar, but the exact amount depends on a variety of factors such as the type of debt, the age of the debt, the number of times that it was previously placed for collection, and the amount of debt for sale in the market at that time.

A few government agencies have reported about the average price of debt sold. In 2013, the Office of the Comptroller of the Currency reported to Congress that charged-off debt was selling for between five and ten cents on the dollar for most types of debt sold.[208] That same year, in a report based on the review of 3400 debt portfolios containing a variety of debts that were purchased by debt buyers from July 1, 2006 to June 2, 2009, the Federal Trade Commission found that the average price of debt in those portfolios was four cents on the dollar.[209]

Data filed by publicly traded debt buyers like Encore Capital Group, Inc. and PRA Group Inc. also provide insight into the average price of debts purchased by debt buyers. Encore reported that the average purchase price was 11.3% of face value for 2020.[210] PRA reported an average purchase price of 13.5% of face value in 2020.[211]

The Consumer Financial Protection Bureau surveys credit card issuers and reports on the average price of credit card debt sold in its credit card market report every two years. The overall average price of credit card debt decreased from 12% to 11% between 2019 and 2020.[212] In 2018, the overall average price of credit card debt sold was 12% of face value,[213] approximately the same as the average price of debt sold in 2015 and 2016,[214] and higher than average prices of approximately 11% in 2014 and 8% in 2013.[215]

The price for debt that is older or has previously been placed for collection is typically lower.[216] For example, a CFPB survey of major credit card issuers found that between 2019 and 2020, the average price of credit card debt sold from originators to debt buyers soon after charge-off ("fresh debt") increased from 12% to 13%, while the average price for post-primary debt that was sold after one or more placements was 11%.[217] In 2018, the average price for credit card debt sold from originators to debt buyers soon after charge-off ("fresh debt") was approximately thirteen cents on the dollar, while the average price for post-primary debt that was sold after one or more placements was about nine cents on the dollar.[218]

In a 2017 CFPB report about online debt sales, the average price was less than one cent on the dollar for accounts that were typically over five years old and had often been sold

201 CFPB, Market Snapshot: Third-Party Debt Collections Tradeline Reporting (July 2019), *available at* https://www.consumerfinance.gov.

202 CFPB, Market Snapshot: Online Debt Sales 7 (Jan. 2017) (portfolios entered online marketplace between January and August 2015)

203 FTC, The Structure and Practices of the Debt Buying Industry 8, App. D (2013).

204 *Id.* at T-4.

205 Shining a Light on the Consumer Debt Industry: Hearing Before the Subcomm. on Financial Institutions & Consumer Prot., Senate Comm. on Banking, Hous., and Urban Affairs, 113th Cong. (July 17, 2013) (statement of the Office of the Comptroller of the Currency), *available online as companion material to this treatise.*

206 *Id.*

207 *Id.*

208 Shining a Light on the Consumer Debt Industry: Hearing Before the Subcomm. on Financial Institutions & Consumer Prot., Senate Comm. on Banking, Hous., and Urban Affairs, 113th Cong. (July 17, 2013) (statement of the Office of the Comptroller of the Currency), *available online as companion material to this treatise.*

209 FTC, The Structure and Practices of the Debt Buying Industry ii (2013).

210 Encore Capital Group, Inc. Annual Report on Form 10-K for 2020 at 32.

211 PRA Group, Inc. Annual Report on Form 10-K for 2020 at 58 ($905,118,000 in total purchase price / $6,707,293,000 face value * 100 = 13.5%).

212 CFPB, The Consumer Credit Card Market 151 (Sept. 2021).

213 CFPB, The Consumer Credit Card Market 163 (Aug. 2019).

214 CFPB, The Consumer Credit Card Market 329 (Dec. 2017).

215 CFPB, The Consumer Credit Card Market 256 (Dec. 2015).

216 FTC, The Structure and Practices of the Debt Buying Industry 23 (2013). *See also* David E. Reid, The Value of Resale on the Receivables Secondary Market (DBA Int'l, Apr. 2016) ("Nonperforming receivables are at their highest value at the point they first become delinquent to approximately 240 days of default.").

217 CFPB, The Consumer Credit Card Market 151 152 (Sept. 2021).

218 CFPB, The Consumer Credit Card Market 163–164 (Aug. 2019). *See also* CFPB, The Consumer Credit Card Market 329 (Dec. 2017) (reporting price of fresh debt versus post-primary debt); CFPB, Consumer Credit Card Market Report 258 (Dec. 2015) (reporting on price of fresh debt versus primary and secondary debt); U.S. Gov't Accountability Office, Credit Cards, GAO-09-748, 29 (Sept. 2009), *citing* Kaulkin Ginsberg, InsideARM (estimating price ranges for fresh, primary, secondary, tertiary, and quad debt for March 2007 and January 2009).

to two or more debt buyers.[219] The CFPB estimated that "the price of debt in the portfolios we reviewed decreases by an average of roughly 33% each year for the first five years after charge-off and roughly 29% each year for years 6–10."[220]

1.3.4.4 Age of Purchased Debt

The most comprehensive data available about the age of debts being collected by debt buyers comes from a 2013 FTC study of the debt-buying practices of some of the nation's largest debt buyers.[221] This study found that nearly twenty-five percent of debt acquired from the original creditor, and more than sixty percent of debt purchased from other debt buyers, was over three years old at the time of purchase.[222] More than thirty percent of the debt purchased from other debt buyers was over six years old.[223]

In a study of portfolios of debt for sale in an online marketplace, the CFPB found that the median age for a portfolio was five years after chargeoff.[224] The CFPB concluded that a "substantial portion" of accounts for sale were likely to be beyond the statute of limitations.[225]

Regardless of the age at the time of purchase, debts continue to age throughout the course of the collection process. Filings with the Security and Exchange Commission (SEC) demonstrate that some debt buyers are collecting on debts for a decade or more.[226]

1.3.4.5 Identifying Some of the Largest Debt Buyers

Using data from the Nilson Report, the FTC compiled a chart of the ten largest companies purchasing credit card debt from credit card issuers from 2005 to 2011.[227] In 2011, Sherman Financial Group, L.L.C. (subsidiaries include LVNV Funding, L.L.C. and Resurgent Capital Services, L.P.) ranked first, Encore Capital Group, Inc. (subsidiaries include Midland Funding, L.L.C. and Midland Credit Management, Inc.) ranked second, and Portfolio Recovery Associates (currently known as PRA Group, Inc.) ranked third.[228]

Unlike Sherman Financial, Encore Capital and PRA Group are both public companies whose filings with Security and Exchange Commission (SEC) provide information about the amount of debt these organizations purchase. For example, in 2020 Encore Capital purchased portfolios of debt with a face value of $5.8 billion[229] and PRA purchased portfolios of debt with a face value of $6.7 billion.[230] An analysis of 10-K filings by both companies from 2002 to 2015 found revenue growth of at least twenty percent every year during that period.[231] Encore claims that twenty percent of American consumers either owe it money currently or have owed it money in the past.[232]

Recent state and local studies of the number of lawsuits filed by certain debt buyers have consistently shown that Midland Funding and Portfolio Recovery are top filers.[233]

1.3.5 Debt Collection Agencies

1.3.5.1 First-Party Collection

Some creditors, like credit card issuers, hire "first-party" collectors, which the CFPB defines as "outside collectors who work under the name and direction of the creditor when collecting on delinquent debt."[234] Credit card issuers report paying "first-party" collectors on a "full-time employee" basis

219 CFPB, Market Snapshot: Online Debt Sales (Jan. 2017).

220 *Id.* at 5–6.

221 FTC, The Structure and Practices of the Debt Buying Industry, at T-7 (Jan. 2013).

222 *Id.*

223 *Id.*

224 CFPB, Market Snapshot: Online Debt Sales 11 (Jan. 2017).

225 *Id*

226 *See, e.g.*, PRA Group, Inc., Annual Report (Form 10-K), at 29 (Feb. 26, 2021) (reporting that, in 2020, the company received $18.8 million in payments on collection accounts purchased from 1996 to 2010); Encore Capital Grp., Annual Report (Form 10-K), at 46 (Feb. 24, 2021) (reporting that, in 2020, the company received more than $51 million in payments on collection accounts purchased prior to 2011).

227 FTC, The Structure and Practices of the Debt Buying Industry, at T-6 (Jan. 2013).

228 *Id.*

229 Encore Capital Grp., Annual Report (Form 10-K), at 50 (Feb. 24, 2021).

230 PRA Group, Inc., Annual Report (Form 10-K), at 58 (Feb. 26, 2021).

231 Lisa Stifler, Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions, Harv. L. and Pol'y R. Vol. 11-1, 96 (2017).

232 Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Human Rights Watch, Jan. 2016). *See also* Encore Capital Group, Comments to Federal Communications Commission Re: CG Docket Nos. 18-152, 02-278 (Oct. 16, 2018) (noting that company works with one out of five American consumers).

233 *See, e.g.*, Julia Barnard, et al., Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection Act (Center for Responsible Lending Oct. 2020) at Fig. 2 (listing top debt buyer filers in the five largest counties in California from 2012–2017); Testimony of April Kuehnhoff, National Consumer Law Center, Before the Massachusetts Joint Financial Services Committee in support of S.120/H.2811, An act relative to fairness in debt collection (Sept. 25, 2017) (statewide review of cases filed by debt buyers in Massachusetts for 2015 found that Midland Funding and Portfolio Recovery ranked first and second, with 32,009 lawsuits and 9,410 lawsuits, respectively); Ellen Harnick, Lisa Stifler, and Safa Sjadi, Center for Responsible Lending, Debt Buyers Hound Coloradans in Court for Debts They May Not Owe, Appx. 1 (Dec. 2016) (statewide review of cases filed by four debt buyers in Colorado for 2013–2015 found that Midland Funding ranked first with 22,121 lawsuits and Portfolio Recovery ranked second with 9,074 lawsuits); Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 15 (Human Rights Watch, Jan. 2016) (in New York state, debt buyers were four of the top ten filers in 2014; of these four, Midland Funding was first with 22,731 lawsuits, followed by Portfolio Recovery with 21,356); Peter Holland, "Junk Justice: A Statistical Analysis of 4400 Lawsuits Filed by Debt Buyers," 26 Loy. Consumer L. Rev. 179, 216 (2014) (in Maryland in 2013, Midland Funding was the top debt buyer filing in state courts with 9619 lawsuits, followed by Portfolio Recovery with 6608).

234 CFPB, The Consumer Credit Card Market 131 (Sept. 2021).

and not on contingency.[235] Some credit card issuers also used performance-based incentive payments.[236]

First-party collection is attractive to collection agencies seeking to argue that they are exempt from FDCPA coverage.[237] The exemption claims are based on an informal staff letter issued by the FTC in 2000 and later revised in 2002.[238] Key considerations according to the FTC's informal staff letter are whether the debt is in default when it is acquired and, for debts that are in default when acquired, whether the first-party collector is a "de facto" employee of the creditor.[239] As discussed in § 4.8.9.2, *infra*, the determination of when a debt is in default can be complicated.[240] *De facto* employees are discussed in § 4.8.1, *infra*. Moreover, even if there is no coverage under the FDCPA, first-party collectors may be covered under state laws as discussed in Chapter 16, *infra*.

1.3.5.2 Third-Party Collection

1.3.5.2.1 Introduction

Third-party debt collection agencies are hired to collect accounts that are owned by original creditors or debt buyers. They are "third-party" collectors because they collect in their own name for debts that are owned by other entities.

Debt collection agencies may specialize in a variety of ways. Some focus on the collection of debts in a particular state or region, or the collection of decedent debt. Some specialize in the collection of consumer debt, commercial debt, child support debt, or dishonored checks. Agencies collecting consumer debt may further specialize in areas such as medical, student loan, credit card, automobile, mortgage, or utility debts.

A report commissioned by the collection industry found that, in 2018, third-party debt collectors collected 11.1% of the $923 billion (face value) in total debts that were placed with them, and that the average account size was $574.[241]

In 2019, the CFPB estimated that third-party debt collectors contact at least 49 million consumers each year about a debt in collection.[242] A researcher at the Federal Reserve Bank of Philadelphia estimated that the third-party collections industry contacts Americans more than a billion times a year.[243]

In 2020, a survey of collection agencies conducted by TransUnion reported that, of accounts placed for collection, 28% were paid in full, 14% were settled in full, 26% had partial payment arrangements, and 32% were unpaid—including accounts returned to the creditor, valid disputes, and accounts otherwise open.[244]

The sections below provide additional data about third-party debt collectors. Their collection practices are discussed in § 1.4.6, *infra*.

1.3.5.2.2 Number, size, and distribution of collection agencies

Reports about the number of debt collection agencies and the number of people they employ in the United States differ. Using 2018 data, the U.S. Census reports that there were 3684 collection agencies employing 135,212 employees.[245] The CFPB reported that in 2019 the third-party debt collection market employed 141,000 people in approximately 6950 collection agencies.[246] A 2020 survey of third-party collection agencies by TransUnion reported that there were 6699 third-party debt collection firms in 2020 that employed 124,212 people.[247] Some differences may be due to changes over time and different definitions about who to count as a collection agency.[248]

235 *Id. See also* CFPB, The Consumer Credit Card Market 250 (Dec. 2015) ("Issuers reported that the average price for an onshore FTE was $4,915 per month. Offshore, it was $2,285 per month. Offshore locations include India and the Philippines.").

236 CFPB, The Consumer Credit Card Market 315 (Dec. 2017).

237 *See* Rozanne Anderson, Corporate Compliance Week Trivia Quiz for your Staff (Ontario Systems, Nov. 9, 2017), *available at* www.insidearm.com (listing as true the statement that "one way for a third-party collector to avoid liability under the Fair Debt Collection Practices Act is to operate invisibly as a first party collector").

238 DeMayo, FTC Informal Staff Letter (May 23, 2002); DeMayo, FTC Informal Staff Letter (May 1, 2000).

239 *Id.*

240 *See also* National Consumer Law Center, Collection Actions § 9.2.2.2 (5th ed. 2020), *updated at* www.nclc.org/library (discussing default in the context of medical debt).

241 Kaulkin Ginsberg, 2020 State of the Industry Report 1 (2020) (report commissioned by ACA International), *available at* https://www.acainternational.org.

242 CFPB, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,384 (May 21, 2019).

243 Robert Hunt, "Understanding the Model: The Life Cycle of a Debt," presented at FTC-CFPB Roundtable "Life of a Debt: Data Integrity in Debt Collection" (June 6, 2013).

244 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (based on data from 64 respondents), *available at* https://solutions.transunion.com.

245 U.S. Census Bureau, All Sectors: County Business Patterns by Legal Form of Organization and Employment Size Class for U.S., States, and Selected Geographies: 2018 (NAICS code 561440), *available at* https://data.census.gov.

246 CFPB, Fair Debt Collection Practices Act: Annual Report 2021 (Mar. 2021), *available at* https://files.consumerfinance.gov, *citing* Gabriel Schulman, Debt Collection Agencies in the US, IBIS World (Dec. 2020).

247 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

248 For example, TransUnion reports the existence of "non-employer firms" that "do not have employees on the payroll . . . but may hire contractors to collect debt or to fulfill other duties." TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2019) (reporting 4,497 non-employer firms in 2016), *available at* https://solutions.transunion.com. Some counts may exclude these non-employer firms. *See also* CFPB, Debt Collection Practices (Regulation F), Proposed Rule, 84 Fed. Reg. 23,274, 23393 (May 21, 2019) (noting that in 2012 the Census Bureau estimated that there were over 5000 collection agencies without employees).

Different sources have reported consolidation in the debt collection industry and a decline in the number of collection agencies over the years.[249]

More than seventy percent of collection agencies have fewer than twenty employees.[250] While small collection agencies are more numerous, firms with more than one hundred employees generate nearly two thirds of industry revenue.[251] Smaller collection agencies are more likely to work with local or regional clients.[252]

Collection agencies are not evenly distributed between states in the United States. Of the 3684 collection agencies identified by 2018 U.S. Census Bureau data, New York had the most (385), followed by California (375) and Texas (280).[253] Vermont (3) was the state with the fewest collection agencies, followed by Rhode Island (7), and Maine (8).[254]

1.3.5.2.3 Compensation for collection agencies and individual collectors

The Consumer Financial Protection Bureau's survey of large credit card issuers found that contingency fees that allow third-party collection agencies to retain a percentage of what they recover were the most common payment structure.[255] The average contingency fee was 15.7% in 2020, with a range of 9.5 to 23% with higher fees awarded for accounts that are believed to be more difficult to collect.[256] Most issuers also reported paying performance-based incentives.[257] An earlier survey reported that a small number of issuers paid third-party collectors on a full-time equivalency (FTE) basis.[258]

A report commissioned by the collection industry found that, in 2018, third-party debt collection agencies earned $12.5 billion in commission and fees.[259] A 2019 survey of collection agencies reported that "the most common commission rates for each debt type are in the 20% to 29% range."[260]

In addition to contingent collections, collection agencies and attorneys are sometimes retained for a flat rate to send a series of collection letters. As discussed in § 10.4, *infra*, certain flat-rating practices may violate the FDCPA.

The Bureau of Labor Statistics reported that in 2017 the mean hourly wage for bill and account collectors was $18.90, and the mean annual wage was $39,300.[261] The CFPB's 2016 survey of fifty-eight debt collectors reported that individual collection agents typically earn $10 to $11 per hour when they are new, or $13 to $20 per hour for more experienced collectors.[262] Both new and experienced collectors also earn "incentive pay" such as the "25 percent of contingency fees earned in excess of a certain threshold" that was provided as a commission by one respondent.[263] A training period of two to four weeks was common for new hires that contact consumers.[264] Respondents with 250 or more employees reported that turnover for collectors was between 75% and 100% annually.[265]

1.3.5.2.4 Types of debts collected

In a 2019 study of third-party collection tradelines, the CFPB found that the most common tradelines furnished by collection agencies to credit bureaus in 2018 were medical (66%), telecommunications (17%), and retail (11%).[266] However, in a 2019 study of the credit card market, the CFPB reported that financial services is the largest share of third-party debt

249 CFPB, Fair Debt Collection Practices Act: Annual Report 2021 (Mar. 2021) (reporting a decline in the number of collection agencies from 8,581 in 2015 to 6,969 in 2019), *available at* https://files.consumerfinance.gov; TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020) (reporting that the number of third-party debt collection firms decreased from 9891 in 2011 to 6699 in 2020), *available at* https://solutions.transunion.com.

250 U.S. Census Bureau, All Sectors: County Business Patterns by Legal Form of Organization and Employment Size Class for U.S., States, and Selected Geographies: 2018 (NAICS code 561440) (there were 1469 agencies with 1–4 employees, 613 agencies with 5–9 employees, and 527 agencies with 10–19 employees; thus, (1469+613+527) /3684 * 100 = 70.8%), *available at* https://data.census.gov.

251 CFPB, Study of third-party debt collection operations 6–7 (July 2016), *citing* U.S. Census Bureau (2012) (181 firms with 100 to 499 employees generated $3,007,472,000, 102 firms with more than 500 employees generated $4,804,633,00; total amount of revenue for all 3994 firms was $12,175,975,000; thus, ($3,007,472,000 + $4,804,633,000) /$12,175,975,000 * 100 = 64.2%). *See also* Viktar Fedaseyeu and Robert Hunt, Working Paper No. 14-7, The Economics of Debt Collection: Enforcement of Consumer Credit Contracts 10 (Fed. Reserve Bank of Philadelphia, Mar. 2014) (in 2007, the eight largest collection agencies generated less than 23.1% of collection industry revenue).

252 CFPB, Study of third-party debt collection operations 16 (July 2016) ("The smallest interviewee (excluding law firms) that reported working with national clients had 200 employees, and all but one of the respondents with more than 200 employees worked with at least some national clients.").

253 U.S. Census Bureau, All Sectors: County Business Patterns by Legal Form of Organization and Employment Size Class for U.S., States, and Selected Geographies: 2018 (NAICS code 561440), *available at* https://data.census.gov.

254 *Id.*

255 CFPB, The Consumer Credit Card Market 137 (Sept. 2021).

256 *Id.*

257 *Id.*

258 CFPB, The Consumer Credit Card Market 145 (Aug. 2019).

259 Kaulkin Ginsberg, 2020 State of the Industry Report 1 (2020), *available at* https://www.acainternational.org (report commissioned by ACA International) ($102.6 billion collected – $90.1 billion returned to creditors = $12.5 billion in commissions).

260 TransUnion, Challenges, Trends and Innovations: The State of Third-Party Collections (2019), *available at* https://solutions.transunion.com.

261 Bureau of Labor Statistics, U.S. Dept. of Labor, Occupational Employment and Wages, 43-3011 Bill and Account Collectors (May 2019), *available at* https://www.bls.gov.

262 CFPB, Study of third-party debt collection operations 17 (July 2016).

263 *Id.*

264 *Id.*

265 *Id.*

266 CFPB, Market Snapshot: Third-Party Debt Collections Tradeline Reporting (July 2019), *available at* https://www.consumerfinance.gov. *Compare* CFPB, Study of third-party debt collection operations 10 (July 2016) (In the CFPB's survey of fifty-eight third-party collectors in 2016, the three types of debts most commonly collected (each representing at least twenty percent of revenue) were medical debt, credit card debt, and student loans).

collection revenue, noting that credit card issuers may be issuing this information directly to credit bureaus.[267]

A 2020 TransUnion survey identified the top three types of outstanding collection balances as medical (51%), banking and financial services (19%), and utilities/telecom (12%).[268] Prior industry surveys have reported different types of debts in the top three spots.[269]

Nearly half of all collection agencies collected four or more types of debts, while nearly a quarter collected only one type.[270] Collection agencies also specialize in collect of debt at varying ages—ranging from prime to time-barred debt.[271]

1.3.5.2.5 Check diversion programs

"Check diversion" programs consist of a partnership between a collection agency and a district attorney. Typically, the collection agency sends consumers who have written a check that was dishonored by their bank a letter on the district attorney's letterhead, threatening criminal prosecution and jail time if the consumer does not pay the check plus high fees and tuition for enrolling in "financial responsibility" classes they may conduct. The fees they demand may exceed a small check by more than $150. The fee collected is typically split with the district attorney's office providing that office much needed revenue but often at the expense of the poorest and least sophisticated consumers.

The FDCPA requirements for these companies are discussed at § 4.8.11, *infra*. In addition, at least one state prohibits debt collectors from using a district attorney's letterhead or seal,[272] and the American Bar Association has issued a formal ethics opinion about the practice.[273]

1.3.6 Collection Attorneys

In 2019, the CFPB estimated that there were "1,000 law firms in the United States that either have as their principal purpose the collection of consumer debt or regularly collect consumer debt owed to others."[274] Searching Martindale for "creditors rights" as an area of practice returns 6604 law firms and 13,475 attorneys.[275] Separately, the National Creditors Bar Association (NCBA) states that its membership consists of "over 500 law firms and individual members, totaling approximately 2000 attorneys."[276]

The size of private law firms with collection practices range from a single attorney[277] to firms with dozens or even hundreds of attorneys.[278] Some of the largest firms are collection lawsuit mills that employ significantly more support staff than attorneys,[279] raising questions about meaningful attorney involvement.[280] The largest law firms may file tens of thousands of lawsuits in a single year[281] and may have thousands of

267 CFPB, The Consumer Credit Card Market 139 (Aug. 2019) (using 2018 IbisWorld data).

268 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

269 Kaulkin Ginsberg, 2020 State of the Industry Report 2 (2020) *available at* https://www.acainternational.org (report commissioned by ACA International) (report did not specify the percentages but appears to show health care, financial services, and other (including retail and personal services) as the three most common types of debt collected); Ernst & Young, The Impact of Third-Party Debt Collection on the US National and State Economies in 2016, 7 (Nov. 2017) (report commissioned by ACA International) (Health Care (46.8%), Student Loan (21.2%), Government (16.4%)); Ernst & Young, The Impact of Third-Party Debt Collection on the US National and State Economies in 2013, 7 (July 2014) (report commissioned by ACA International) (Health Care (37.9%), Student Loan (25.2%), Financial Services (12.9%)); Ernst & Young, The Impact of Third-Party Debt Collection on the US National and State Economies, 8 (Feb. 2012) (report commissioned by ACA International) (Health Care (52.2%), Credit Card/Financial (20%), Other (9.1%)).

270 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

271 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020) (reporting that 83% of survey respondents collected prime debt compared to 15% that collected time-barred debt), *available at* https://solutions.transunion.com.

272 *See* Or. Rev. Stat. §§ 135.925(9), 646.639(2)(p).

273 ABA Standing Committee on Ethics and Professional Responsibility. Formal Opinion No. 469 (Nov. 12, 2014) (unethical for prosecutor to lend its letterhead to collection agency that even implicitly threatens prosecution, unless lawyer in prosecutor's office determines prosecution is warranted or determines that letter complies with Model Rules 8.4(c) and 5.5(a) of Rules of Professional Conduct).

274 CFPB, Debt Collection Practices (Regulation F), Proposed Rule, 84 Fed. Reg. 23,274, 23,393 (May 21, 2019).

275 Martindale, www.martindale.com (searched May 25, 2021).

276 Nat'l Creditors Bar Ass'n, About Us, *available at* https://www.creditorsbar.org.

277 *See, e.g.*, Lannan v. Levy & White, 186 F. Supp. 3d 77, 83 n.1 (D. Mass. 2016) (stating that White was sole proprietor of Levy & White).

278 *See* CFPB v. Weltman, Weinberg & Reis Co., L.P.A., 2018 WL 3575882, at *7 (N.D. Ohio July 25, 2018) (law firm had 60 attorneys at time of testimony, but previously had 120–140 attorneys); CFPB v. Frederick J. Hanna & Assoc., Complaint, 14-cv-2211, ¶14 (N.D. Ga. July 14, 2014) (employing hundreds of people); CFPB, Study of third-party debt collection operations 14 (July 2016) (two of five collection law firms that responded to the CFPB's survey indicated that they employed more than 100 people).

279 *See In re* Pressler & Pressler, L.L.P., Consent Order, 2016-CFPB-0009, 5 (C.F.P.B. Apr. 25, 2016) (firm employed far more non-attorney support staff than attorneys); CFPB v. Frederick J. Hanna & Assoc., Complaint, 14-cv-2211, ¶14 (N.D. Ga. July 14, 2014) ("The Firm's non-attorney support staff has far outnumbered its attorneys. From 2009 through 2013, Defendants employed, at any given time, hundreds of non-attorney staff but only between 8 and 16 attorneys.").

280 *See* § 7.2.3, *infra*.

281 *See In re* Pressler & Pressler, L.L.P., Consent Order, 2016-CFPB-0009, 5 (C.F.P.B. Apr. 25, 2016) (filing more than 500,000 collection actions against consumers from 2009 to 2014); Commonwealth v. Lustig, Glaser & Wilson, P.C., Complaint ¶1 (Mass. Super. Ct. Dec. 21, 2015) (firm filed more than 100,000 collection lawsuits from 2011 through 2015); CFPB v. Frederick J. Hanna & Assoc., Complaint, 14-cv-2211, ¶13 (N.D. Ga. July 14, 2014) (law firm filed more than 350,000 collection lawsuits in Georgia from 2009 to 2013).

creditor clients[282] or thousands of accounts placed with them by a single client, typically a debt buyer.[283]

The CFPB describes compensation for collection attorneys as follows:

> Attorneys are usually paid a percentage of the amount collected but may also be paid on a per hour basis or a fixed amount. When a judgment is obtained and a debt collector is able to recover on that judgment, the debt collector generally is entitled to recover its court costs first from amounts collected from the consumer, with the remaining balance after this recovery used to determine and pay the collector's contingent fee. Note, however, that in a significant share of cases collectors are ultimately unable to recover on judgments.[284]

1.3.7 Consumer Locating Services, a.k.a. "Skip Tracers"

Some businesses, known pejoratively[285] as "skip tracers," specialize in locating consumers' contact information when the consumer has changed addresses, employment, or phone number. They will try to match the information they are given—such as Social Security number, name, former address, employer, etc.—to try to locate consumers for creditors, collection attorneys, and collection agencies.

These businesses use consumer reporting agency and other databases to find current home and work addresses, telephone numbers, and email addresses. They will also use less structured Internet sources, such as using search engines or social networking sites, to get leads. Some companies have also used false pretenses to obtain current consumer contact information.[286]

A 2020 survey of debt collection agencies found that 76% of respondents used "manual skip tracing" and 49% used "batch skip tracing."[287]

1.3.8 Consumer Reporting Agencies

Consumer reporting agencies are businesses that maintain files of information relevant to consumers' creditworthiness, employability, and insurability and disseminate that information to businesses dealing with consumers. A delinquent debt on a consumer's credit report lowers the consumer's credit rating making it harder to get worthwhile credit. A consumer with a delinquent debt listed on their credit report, and wanting credit to buy a car, get an affordable credit card, or buy a house, has a strong incentive to pay off the delinquent debt and get lower fees and interest on future credit. Employers and landlords may also review credit reports as part of the hiring or rental process.

The National Consumer Law Center's treatise, Fair Credit Reporting,[288] is the authoritative source for the law applying to consumer reporting agencies. There is a summary of credit reporting law as it applies to debt collection at § 14.6, *infra*. Section 7.2.8, *infra*, addresses 15 U.S.C. § 1692e(8), which often applies to debt collectors who use credit reporting to collect debts.

1.3.9 Debt Relief Services

There are legitimate credit counseling organizations that provide help to financially distressed consumers. However, there are also a wide variety of predatory debt relief scams.[289] Although the details differ, debt relief scams typically prey upon consumers by claiming that they can provide debt relief to financially distressed families and then failing to deliver any meaningful assistance, often at great cost to the consumer.

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282 CFPB v. Weltman, Weinberg & Reis Co., L.P.A., 2018 WL 3575882, at *4 (N.D. Ohio July 25, 2018) (law firm had 7000 creditor clients).

283 *In re* Encore Capital Grp., Inc., No. 2015-CFPB-0022, ¶48 (C.F.P.B. Sept. 9, 2015) (consent order), *available at* www.consumerfinance.gov ("Encore has placed tens of thousands of accounts with law firms staffed by fewer than ten attorneys."); *In re* Portfolio Recovery Associates, L.L.C., No. 2015-CFPB-0023, ¶46 (C.F.P.B. Sept. 9, 2015) (consent order), *available at* www.consumerfinance.gov ("PRA placed tens of thousands of Debts with Law Firms staffed by fewer than five attorneys.").

284 CFPB, Study of third-party debt collection operations 35 (July 2016).

285 The term is pejorative because most "skips" are actually people who have been forced to move to a different address because of their financial distress from unemployment, illness, or other hardships—not because they are trying to "skip" out on their debt.

286 *See, e.g.*, Romine v. Diversified Collection Services, Inc., 155 F.3d 1142 (9th Cir. 1998) (telecommunications company sent message asking consumer to call Western Union for message, then used caller ID technology to obtain consumer's unlisted telephone number for its debt collector client); Thompson v. Nat'l Credit Adjusters, L.L.C., 2012 WL 5372577 (D. Minn. Oct. 31, 2012) (letter fraudulently claimed that there was message for consumers in attempt to induce call from consumer and obtain phone number for collection purposes). *See also* Andrea Ryan, et al., A Brief History of US Consumer Finance, Working Paper 11-058 (Harvard Bus. School, 2010) ("In many communities, the local 'Welcome Wagon' collected credit information on new arrivals to the town."); United States v. Zats, 298 F.3d 182, 184 (3d Cir. 2002) (to obtain bank account information for garnishment, collection attorney "often engaged in a phone 'survey' in which he called the debtor, offered him or her a free gift for completing his survey, and then asked questions until he obtained enough information to identify the account"); LeVine, FTC Informal Staff Letter (Mar. 20, 1998); Stanley, FTC Informal Staff Letter (Sept. 13, 1996); Bergstrom, FTC Informal Staff Letter (Nov. 17, 1995); § 4.7.3, *infra*.

287 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

288 (9th ed. 2018), *updated at* www.nclc.org/library.

289 *See, e.g.*, National Consumer Law Center, Federal Deception Law § 11.2 (4th ed. 2022), *updated at* www.nclc.org/library (scams involving unsecured debts); National Consumer Law Center, Student Loan Law § 1.12.4 (6th ed. 2019), *updated at* www.nclc.org/library (student loan "debt relief" industry); National Consumer Law Center, Automobile Fraud § 4.8 (6th ed. 2018), *updated at* www.nclc.org/library (automobile sublease scams); National Consumer Law Center, Home Foreclosures Ch. 16 (2019), *updated at* www.nclc.org/library (foreclosure rescue scams).

1.4 How Debts Are Collected

1.4.1 Overview

This section provides a brief overview of some typical collection practices by different parties. Unless otherwise specified, this section is discussing the collection of unsecured credit card debts. The collection of secured debts like automobile loans and home mortgages involve a number of different practices.[290] The collection of other types of unsecured debts can have a number of important distinctions.[291]

1.4.2 Credit Reporting

Creditors and other collectors sometimes turn to consumer reporting agencies (CRAs) to obtain information such as a consumer's current address or to assess the collectability of their claim.[292] Some CRAs also offer monitoring services to debt collectors. For example, Experian offers the "Collection Triggers" program where debt collectors provide Experian with a list collection accounts, and Experian sends the debt collector a notification when the credit report of the consumer indicates the consumer is getting out of their financial crisis such as the listing of a new employer or line of credit.[293]

In addition to receiving information from CRAs, many debt collectors also furnish information to the CRAs. The CFPB reported that 898 debt collectors (including debt buyers and third-party collection agencies) had furnished third-party collection tradelines in the second quarter of 2018, down from nearly 2300 unique furnishers in 2004 and 2005.[294] Because debts may be re-assigned to different debt collectors or sold, the same account may be associated with multiple tradelines over time.[295]

In 2020, a TransUnion survey of collection agencies reported that 44% of respondents furnished to credit bureaus, although the percentage went up to 71% of larger respondents who collected one million or more accounts in the past twelve months.[296] Previously, in a 2016 CFPB report, 78% of third-party debt collectors surveyed by the CFPB reported furnishing data to credit bureaus.[297]

Currently, collectors sometimes use "passive" credit reporting or "parking" instead of active collection efforts like phone calls and letters.[298] Here the collector furnishes negative information to the CRAs without ever attempting to contact the consumer about the debt, waiting until the consumer discovers the negative information. Often, the consumer discovers the information when attempting to take out a loan and may simply pay off the small debt rather than taking time to dispute it. The CFPB's new debt collection regulations, effective November 30, 2021, will require notice to consumers about an alleged debt before the account can be reported to CRAs.[299] The FTC has already taken enforcement action against a debt collector "parking" debts on credit reports without notice to consumers.[300]

Some third-party debt collectors may choose not to furnish information to CRAs because they are worried about legal liability, because certain accounts are already reported by their clients, or because the amount in question is too small.[301] Debt collectors may also choose (or be required by clients) to wait a certain period of time before reporting new accounts to CRAs.[302]

1.4.3 Cancellation of Debt and Taxes

In some cases, consumers may be able to negotiate to reduce or eliminate an outstanding debt. Creditors and debt buyers that cancel or forgive a debt (or portion of a debt) worth at least $600 must file an information Form 1099-C with the Internal Revenue Service by March 31 of the following year, and must also send a copy to the consumer.[303] The principal of a cancelled or forgiven debt is generally considered taxable income to the consumer., although there are several important exceptions, including when the consumer disputes the debt, is insolvent, or is in bankruptcy.[304] Certain student loan debt

290 For more information about the collection of secured loans, see National Consumer Law Center, Home Foreclosures and Mortgage Servicing (2019), *updated at* www.nclc.org/library; National Consumer Law Center, Repossessions (10th ed. 2021), *updated at* www.nclc.org/library.

291 *See, e.g.*, National Consumer Law Center, Access to Utility Service (6th ed. 2018), *updated at* www.nclc.org/library; National Consumer Law Center, Collection Actions Ch. 9 (5th ed. 2020), *updated at* www.nclc.org/library (collection of medical debt); National Consumer Law Center, Student Loan Law (6th ed. 2019), *updated at* www.nclc.org/library (collection of student loans).

292 *See, e.g.*, Experian's Locate Debtors tool, *described at* www.experian.com; Experian's Debt Collection Services, *described at* www.experian.com.

293 *See* Experian's Collection Triggers program, *described at* www.experian.com. *See also* Equifax's Business Products, *described at* www.equifax.com. *See also* TransUnion's Account Prioritization, *described at* www.transunion.com ("When consumer data changes, or shifts in credit activity indicate a greater likelihood of recovery, TransUnion can notify you as soon as the next day.").

294 CFPB, Market Snapshot: Third-Party Debt Collections Tradeline Reporting (July 2019), *available at* https://www.consumerfinance.gov.

295 CFPB, Quarterly Consumer Credit Trends: Collection of Telecommunication Debt (Aug. 2018) (describing collection of telecom debt).

296 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

297 CFPB, Study of third-party debt collection operations 19 (July 2016).

298 *See* CFPB, Consumer credit reports: A study of medical and non-medical collections 35–36 (Dec. 2014).

299 12 C.F.R. § 1006.30(a) (effective Nov. 30, 2021). *See* § 8.12, *infra*.

300 FTC, FTC Stops Debt Collector's Alleged "Debt Parking" Scheme, Requires it to Delete Debts it Placed on Consumers' Credit Reports (Nov. 30, 2020), *available at* https://www.ftc.gov.

301 CFPB, Study of third-party debt collection operations 19 (July 2016).

302 *Id.* at 19–20.

303 Treas. Reg. § 1.6050P-1(a).

304 IRC § 108. *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.5.6 (12th ed. 2020), *updated at* www.nclc.org/library (litigation tax consequences for prevailing clients).

is also excluded.[305] There was also an exception for the mortgage indebtedness of a taxpayer's principal residence, but it expired on December 31, 2017 and has not yet been extended by Congress.[306] When the consumer receives a Form 1099-C, they must take affirmative steps to claim one of the above exemptions. Generally, the consumer uses a Form 982 and check the appropriate box in Part I. Most qualified tax return preparers should be familiar with this form. Cancellation of debt and taxes is discussed in more detail at § 11.14.2.5, *infra*.

1.4.4 Collection by Credit Card Issuers

1.4.4.1 Collection Prior to Charge-Off

In the Consumer Financial Protection Bureau's survey of large credit card issuers,[307] all respondents conducted at least some collection activity in-house on overdue credit card accounts after a consumer misses a payment.[308] These initial collection contacts may come in the form of letters, calls, emails, voicemails, or text messages reminding consumers of their outstanding balance. As described in § 1.4.5, *infra*, the majority of respondents also used first-party collectors for at least some of these early collection efforts.

In the same report, all survey respondents reported having at least some contact limits on their in-house collectors.[309] The CFPB summarized responses about contact limits as follows:[310]

- Phone calls: 3–11 per account per day;
- Postal mail: 1–4 per account per month;
- Voicemails: 1–2 per phone number per day; and
- Email: 2–3 per week.

In 2019 and 2020, large credit card issuers placed an average of 4% of accounts with third-party collectors pre-charge-off.[311] This figure represents a significant decline from 2018, when the CFPB found that large credit card issuers placed an average of 11% of accounts with third-party collectors pre-charge-off.[312]

Issuers tended to assign accounts that were "high risk" to third-party collectors, "including accounts in the later stages of delinquency, closed accounts, and accounts where no contact had been made with the primary account owner for an extended period of time" or accounts that required special handling as the result of a deceased accountholder, bankruptcy filing, or involvement of a debt settlement company.[313]

1.4.4.2 Charge-Off

When a credit card account is more than 180 days past due, it must generally be charged-off.[314] This means that the debt is no longer carried as an asset of value on the company's books, giving investors and lenders a more accurate picture of a company's net worth. Charge-off accounts are treated as an expense or a loss[315] to the creditor, but the charged-off debt is not canceled.[316] Any payment on the charged-off debt is then treated as income—a recovery on a bad debt—on the creditor's books.[317]

1.4.4.3 Collection After Charge-Off

A CFPB report has found that, after charge-off, large credit card issuers can either retain accounts for in-house collection, place accounts with third-party collection agencies, place them for litigation, sell them, or warehouse them.[318] Each approach is discussed briefly below. If one approach to collection is unsuccessful, a new approach may be attempted after a period of time.

After charge-off some credit card issuers continue to collect on the account in-house. The CFPB found that an average of 8% of post-charge-off accounts were being collected internally in 2019 and 2020,[319] down from an average of 22% in 2017 and 2018.[320] Survey respondents indicated that issuers might score accounts based on likelihood of payment or separate certain accounts that should not be placed with third-party collectors when determining which accounts to retain for internal collection.[321]

All survey respondents reported placing accounts with third-party collection agencies post-charge off,[322] with an average of 18% of post-charge-off accounts placed with

305 IRC § 108(f).
306 IRC § 108(a)(1)(E).
307 CFPB, The Consumer Credit Card Market 65 n.119 (Sept. 2020) ("data are provided by a set of larger issuers that make up the substantial majority of the credit card market").
308 *Id.* at 131.
309 *Id.* at 132.
310 *Id.* at 132, 134 (also discussing use of text messages but not providing any numerical contact limits on such messages).
311 CFPB, The Consumer Credit Card Market 136–137 (Sept. 2021).
312 CFPB, The Consumer Credit Card Market 145 (Aug. 2019).
313 CFPB, The Consumer Credit Card Market 133, 137 (Sept. 2021).
314 *See, e.g.*, CFPB, The Consumer Credit Card Market 44 n.79 (Sept. 2021). *citing* Off. of the Comptroller of the Currency, Policy Implementation—The Guidance Attached to this Bulletin Continues to Apply to Federal Savings Associations, OCC Bulletin 2000-20, (June 20, 2000) ("Accounts that remain delinquent for 180 days must be 'charged off,' meaning that the issuer can no longer consider the outstanding balance as an asset on its balance sheet. Delinquent accounts may have to be charged off prior to 180 days in certain circumstances as, for example, with a bankruptcy."); Fed. Fin. Insts. Examination Council, *Uniform Retail Credit Classification and Account Management Policy*, 65 Fed. Reg. 39,603 (June 12, 2000).
315 Credit card issuers may also declare accounts as losses for other reasons.
316 *See, e.g.*, Kelly v. Wolpoff & Abramson, L.L.P., 634 F. Supp. 2d 1202 (D. Colo. 2008) (fact that bank had "charged off" credit card debt after 180 days after delinquency was an accounting device required by federal regulations and did not "extinguish" debt, as plaintiff alleged, or alter right of defendant to collect it).
317 *See* 5000—FDIC Statements of Policy, Uniform Retail Credit Classification And Account Management Policy, *available at* www.fdic.gov.
318 CFPB, The Consumer Credit Card Market 144 (Sept. 2021).
319 *Id.* at 146.
320 CFPB, The Consumer Credit Card Market 154 (Aug. 2019).
321 CFPB, The Consumer Credit Card Market 137, 146 (Sept. 2021).
322 *Id.* at 146.

third-party collectors post-charge-off in 2019 and 2020.[323] As discussed in § 1.4.4.1, *supra*, credit card issuers might designate certain accounts for placement with third-party collectors because the accounts were deemed high risk or involved specialized collection. Details of third-party collection practices are discussed at § 1.4.6, *infra*.

All survey respondents engaged in litigation to collect charged-off accounts, though only a minority of credit card issuers also reported using litigation pre-charge-off.[324] The volume of new accounts placed in litigation declined during 2019 and 2020, due to pandemic-related considerations, including court closures, though this volume has increased since the survey period (albeit not to pre-pandemic levels).[325] Among credit card issuers that used litigation, the share of post-charge-off accounts that were placed for litigation ranged from a low of 5% to a high of 24%.[326] All issuers that litigate use an external network of collection attorneys, and a minority also use internal collection attorneys.[327] Accounts with high balances were more likely to be selected for litigation and issuers also reported considering account balance and likelihood of payment, as determined by employment income and availability of assets, when selecting accounts for litigation.[328] Some credit card issuers have filed hundreds of thousands of collection actions per year.[329]

Fewer than half of survey respondents sold debt to debt buyers in 2019 and 2020.[330] Credit card issuers reported selling debt to only seventeen different debt buyers in 2020.[331] Volume of credit card debt sold and price paid to purchase debts are discussed in §§ 1.3.4.2 and 1.3.4.3, *supra*. Terms of debt sales are discussed at § 1.4.7, *infra*.

Finally, all respondents used "warehousing," or ceasing collection on accounts that are deemed uncollectible or unlikely to be repaid, with an average of approximately 28% of overall post-charge-off accounts warehoused in 2019 and 2020.[332]

The CFPB found that surveyed credit card issuers recovered an average of 17% of the face value of debt charged off debt within a four-year period, with nearly two-thirds of the recovery occurring within the first two years after charge-off.[333] The CFPB also looked at recoveries from accounts placed in litigation and found an average recovery of 34% of the total judgment over a 48-month period since those judgments were issued.[334] The CFPB noted that higher rates of recovery on those litigated accounts might be due to selecting accounts with a higher ability to repay for litigation.[335]

1.4.5 Collection by First-Party Debt Collectors

Most large credit card issuers surveyed by the CFPB reported using first-party collectors to supplement in-house collection pre-charge-off.[336]

First-party collectors used the credit card issuers' case management system and call technology.[337] Accounts were typically allocated randomly between credit card issuers' in-house collectors and first-party collectors based on collector availability[338]

1.4.6 Collection by Third-Party Debt Collectors

1.4.6.1 Length of Placement

The CFPB's 2015 survey of credit card issuers found that creditors place credit card accounts with a collection agency for a specific length of time, that the length of time ranges "from several weeks to several years," and that the length of placement tends to increase with the age of the debt.[339]

Respondents to the CFPB's 2016 survey of third-party collectors indicated that larger creditors typically place accounts with collection agencies for a period of six months to a year, after which the accounts are returned to the creditor who may place the account with a new collection agency.[340] Smaller clients, however, are more likely to leave accounts with a client "indefinitely or until the statute of limitations for filing a lawsuit expires."[341]

1.4.6.2 Information Transferred at Placement

The CFPB's 2016 survey of third-party collectors found that when an account is placed with a third-party debt collection agency, collection agencies generally receive account information electronically via a secure site.[342] Typically, review of new accounts was limited to "using external data sources to identify accounts belonging to bankrupt or deceased consumers, and often also to identify address changes, consumers covered by the Servicemembers Civil Relief Act, and litigious

323 *Id.* at 145.
324 *Id.* at 153.
325 *Id.*
326 *Id.* at 154.
327 *Id.* at 153.
328 *Id.* at 153.
329 Paul Kiel, *At Capital One, Easy Credit and Abundant Lawsuits*, ProPublica, Dec. 28, 2015 (estimating that Capital One filed more than 500,000 lawsuits per year nationally between 2008 and 2010).
330 CFPB, The Consumer Credit Card Market 150 (Sept. 2021).
331 *Id.*
332 *Id.* at 145, 151.
333 *Id.* at 147 (based on debts charged off in the first quarter of 2017).
334 *Id.* at 154.
335 *Id.*
336 *Id.* at 131, 136.
337 *Id.*
338 *Id.* at 136.
339 CFPB, The Consumer Credit Card Market 245 (Dec. 2015). *See also* CFPB, The Consumer Credit Card Market 310 (Dec. 2017) ("The length of a placement is determined by the creditor, and placement periods tend to lengthen as debt ages.").
340 CFPB, Study of third-party debt collection operations 13 (July 2016).
341 *Id.*
342 CFPB, Study of third-party debt collection operations 22, 23 (July 2016) (chart also lists frequency with which certain information was provided).

consumers."[343] Although creditors may provide access to underlying account documentation, either by transferring documents or providing access to the creditor's own system, few respondents reviewed documentation to check the accuracy of their account information.[344] Some respondents only obtain documentation from clients when needed and not at placement.[345]

1.4.6.3 Methods of Consumer Contacts

A 2020 TransUnion survey of collection agencies reports that 59% of collectors communicate with consumers by email, 22% via text, and 2% via social media, compared to 93% by letter and 87% by manually dialed telephone calls.[346] As discussed, in § 1.4.4.1, *supra*, all large credit card issuers surveyed by the CFPB reported having at least some contact limits on their in-house collectors.[347] For more information about different communication technology used in debt collection, see § 1.5, *infra*.

In the CFPB's survey of third-party debt collectors, some survey respondents indicated that clients imposed requirements around call frequencies —either maximum or minimum numbers of collection calls.[348] Additionally, some collection agencies reported having their own internal policies regarding call limits.

1.4.6.4 Consumer Disputes and Requests for Verification

A collection industry survey of third-party debt collection agencies found that consumers requested verification for 18.1% of accounts, raised a dispute in 9.6% of accounts, and closed 47.8% of accounts because of a "valid dispute, wrong person, etc."[349]

1.4.6.5 Collection Procedures

A third-party collector's goal is to contact consumers and convince them to pay as much as possible as soon as possible. Collection agencies are racing against the clock imposed by their time limited placement (discussed in § 1.4.6.1, *supra*) and because consumers may be more likely to pay newer collection accounts.[350] Agencies may also be in a competition with other collection agencies through "champion-challenger" placement that pits two collection agencies against each other with the promise that the winner will receive a larger share of accounts for collection in the future.[351]

In order to enhance their ability to obtain payments, creditors are generally given authority to offer discounts on the face value of the debt. As the debt ages, the amount of the discount they are authorized to offer consumers may increase.[352]

A 2020 TransUnion survey of collection agencies found that nearly two-thirds of respondents reported always use letters for an initial contact with consumers while approximately one-third always use phone for initial communications.[353] Previously, in 2016, the CFPB found that more than ninety percent of respondents to its survey of third-party collectors, sent validation notices shortly after new accounts were placed with their collection agency, often within forty-eight hours.[354] That same CFPB survey found that 86% of respondents used a letter vendor to send postal mail.[355]

When debt collectors start placing calls, they may use a variety of telephone technologies, such as autodialers, to try to reach the consumer and collection management systems to track collection efforts. For a discussion of technology used in collection efforts, see § 1.5, *infra*.

Once collection agents reach consumers on the phone, they may have detailed procedures in place governing those interactions. For example, some collectors use scripts or "talk offs" (written or oral) to deal with frequent themes such as sickness or unemployment that come up in collection calls. Some collectors use abusive talk offs to ratchet up the pressure on consumers to make a payment.[356]

1.4.7 Collection by Debt Buyers

1.4.7.1 Mechanics of Debt Sales

A debt buyer typically purchases thousands of accounts per sale from a creditor or another debt buyer. This group of accounts is called a "portfolio." Debt may be grouped into portfolios based on type of accounts, length of time since

343 *Id.* at 22. *See also* § 1.5.5, *infra* (discussing "scrubbing" portfolios).

344 *Id.*

345 *Id.* at 23–24.

346 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

347 CFPB, The Consumer Credit Card Market 132 (Sept. 2021).

348 CFPB, Study of third-party debt collection operations 28–29 (July 2016).

349 Ernst & Young, The Impact of Third-Party Debt Collection on the US National and State Economies in 2016, p. 4–5 (Nov. 2017) (report commissioned by ACA International). *See also* TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020) ("Over a quarter of respondents report that at least 10% of accounts are disputed."), *available at* https://solutions.transunion.com; CFPB, Study of third-party debt collection operations 30 (July 2016) (summarizing a wide range of responses about frequency of consumer disputes).

350 TrueAccord Blog, What are accounts uncollectible? (Oct. 3, 2019) (collection agency data shows that "new accounts (those in collection for fewer than 90 days) are four times more likely to begin a payment plan than those who've been [in] collections for more than six months . . . [and] *eight times* more likely to begin paying off a debt than those who have been in debt for longer than two years."), *available at* https://blog.trueaccord.com.

351 CFPB, The Consumer Credit Card Market 310 (Dec. 2017).

352 *Id.*

353 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

354 CFPB, Study of third-party debt collection operations 28 (July 2016) (53/58 * 100 = 91.4%).

355 *Id.* at 32 (50/58 * 100 = 86.2%).

356 *See, e.g.*, Planet Money, Episode 574: The Buffalo Talk-Off (Nov. 16, 2016).

default, or the number of prior collection placements.[357] Sellers typically market portfolios of debt for sale and prospective buyers bid on those portfolios.[358] Average amounts paid to purchase debts are discussed at § 1.3.4.3, *supra*.

Once a price is agreed upon, the parties enter into a purchase and sale agreement that outlines the terms of debt sale between the creditor and debt buyer, including details about the accounts being sold, a description of prior collection placements, any representations and warranties, any limits on resale, and details about information that will be provided at sale or after sale.[359] The purchase and sale agreement will also spell out what if any right the debt buyer has to go back to the debt seller to obtain additional information about an account.[360]

Debt sales can involve either "spot" or "forward flow" portfolio sales.[361] A "spot" sale is a one-time purchase of a portfolio of debt while a "forward flow" sale involves multiple sales of debts at regular intervals and pre-arranged prices.[362] The purchase and sale agreement for a forward flow sale is often called the forward flow agreement.

When a particular portfolio of thousands of accounts is sold, the parties execute a bill of sale or other short assignment document. That document simply references the portfolio and the purchase and sale agreement. This one page document says that, "Seller, for value received and pursuant to the terms and conditions of the Purchase & Sale Agreement, hereby assigns all rights, title and interest of Seller to those receivables identified in the Sale File."[363]

At the time of sale, the debt buyer also receives a data file, which is an electronic spreadsheet that lists the thousands of specific consumer accounts being transferred, as well as any additional documentation that is being transferred.[364] The sale data file will have information about each account.

Once the purchase is complete, debt buyers may choose to collect debts in-house or to place accounts with third-party debt collectors or collection law firms.[365]

1.4.7.2 Representations and Warranties

Many sellers do not guarantee the accuracy of the data that they transfer to the first debt buyer. Instead of affirmative promises, many debt purchase and sale agreements specifically disclaim important aspects of the transaction.[366] For example, many sellers do not warrant that they have title to the accounts they sell, disclaim that the amounts listed as owed are correct, and disclaim compliance with applicable laws.[367] Moreover, some debt purchasing agreements state, "Buyer expressly acknowledges that . . . documentation may not exist with respect to the Loans purchased by Buyer."[368]

Although the CFPB reported that their review of some 2013–2015 debt sale agreements from credit card issuers included affirmative representations about title, compliance with consumer laws, and accuracy, they noted that in some cases these representations contained significant caveats such as "to the best of the seller's knowledge" or stated that records are "an accurate copy of the seller's records," rather than stating that the records were true and correct.[369] More recent CFPB reports about the credit card industry have not addressed representations and warranties.[370]

1.4.7.3 Account Information Available to Debt Buyers

Debt buyers may obtain very little information about the consumer debts that they buy. The FTC reviewed the types of information transferred in 3400 debt portfolios sales between 2006 and 2009, finding that important pieces of information were not transferred with the data file.[371] For example, only 30% of accounts contained information about the interest rate, only 11% listed the principal amount, only 37% contained information about finance charges and fees, and only 35% reported the date of first default.[372] The FTC also found that debt buyers almost never received documentation at the time of sale, finding that account statements and terms and conditions were only transmitted with 6% of accounts.[373] Moreover, debt buyers rarely received any dispute history or information about whether a prior dispute had been resolved.[374]

The FTC further found that, although sellers typically agreed to provide missing documents upon request for a certain percentage of accounts, debt buyers typically had to pay $5 to $10 per document after they exceeded that percent or after the time to request additional documentation ran out.[375] If the first purchaser sells debts to a second debt buyer, the seller typically has no obligation to provide documents to the

357 *See* FTC, The Structure and Practices of the Debt Buying Industry 17 (Jan. 2013).
358 *See id.* at 20–22.
359 *See, e.g., id.* at 17, 24–27.
360 *Id.* at 39–40.
361 *See id.* at C-2.
362 *See id.*
363 Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 Harv. J. on Legis. 41 (2015).
364 *See, e.g.*, FTC, The Structure and Practices of the Debt Buying Industry 35 (Jan. 2013).
365 *See, e.g.*, Pollak v. Portfolio Recovery Assoc., 285 F. Supp. 3d 812 (D.N.J. 2018) (summarizing debt buyer PRA's collection process).
366 Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 Harv. J. on Legis. 41 (2015); FTC, The Structure and Practices of the Debt Buying Industry (Jan. 2013).
367 *Id.*
368 Loan Sale Agreement between FIA Card Services and Cavalry SPV I, L.L.C. 31 (Oct. 29, 2008), *available at* http://dalie.org *and* http://perma.cc; Loan Sale Agreement between FIA Card Services and CACH, L.L.C. 31 (Apr. 14, 2010), *available at* http://dalie.org *and* http://perma.cc; Loan Sale Agreement between FIA Card Services and CACH, L.L.C. 29 (Aug. 11, 2009), *available at* http://dalie.org *and* http://perma.cc.
369 CFPB, The Consumer Credit Card Market (Dec. 2015).
370 *See* CFPB, The Consumer Credit Card Market (Sept. 2021); CFPB, The Consumer Credit Card Market (Aug. 2019); CFPB, The Consumer Credit Card Market (Dec. 2017).
371 FTC, The Structure and Practices of the Debt Buying Industry, at T-9 to T-10 (Jan. 2013).
372 *Id.*
373 *Id.* at T-11.
374 *Id.* at 37.
375 *Id.* at 39–40.

second debt buyer, who would have to submit any request for documents to the first debt buyer and ask them to transmit the request to the seller.[376]

In August 2014, the Office of the Comptroller of the Currency (OCC) issued guidance on debt sales to the banks and financial institutions that it regulates.[377] The Bulletin instructs banks to provide debt buyers with a signed contract and the last twelve account statements for each account.[378] It also requires banks to provide additional information such as details of any unresolved disputes and an itemization of the principle, interest and fees.[379]

In the CFPB's 2021 report about the credit card market, all surveyed credit card issuers that sold debt reported "that they provide buyers with key documents and account information at the time of sale, including the account's last twelve statements, amount and date of the last account payment, etc."[380]

Issuers reported that they may make additional documentation available upon request, including "cardholder agreements, written applications, affidavits, and earlier account statements."[381] A minority of respondents reported charging debt buyers a fee to access additional documentation after the sale.[382]

At this time, there are no regulations similar to the OCC guidance that applies more broadly to other types of debt sales. Thus, any improvements in information and documentation transfers observed in debts sales from banks may not be reflected in the practices of other debt sellers.

The lack of reliable information contributes to collection problems like collecting from or suing the wrong person or for the wrong amount or attempting to collect accounts that have already been paid or settled.

1.4.7.4 Chain of Title

In addition to original creditors selling debts, debt buyers may also choose to sell debts to other debt buyers. Debt that is sold multiple times may result in ambiguities as to which debt buyer owns the debt, making it difficult to establish an unbroken chain of ownership stretching from the original creditor. There can even be disputes as to who has proper title to a portfolio of debt.[383]

As discussed in § 1.4.7.3, *supra*, the increased separation between the entity suing on a debt and the original creditor means that the debt buyer plaintiff will also have difficulty obtaining documentation proving the underlying debt.

The CFPB found that credit card issuers were generally restricting the resale of credit card debt in a 2021 survey of large credit card issuers.[384] There is no indication of sellers of other types of debts adopting similar prohibitions.

1.4.8 Collection by Attorneys

When an account is placed with a law firm for collection, the law firm may be provided with limited information about the debt that may not include account-level documentation such as the operative contract, payment history, or collection history.[385]

Shortly after receiving the electronic data, law firms may use programs to "scrub"[386] their newly received files to identify accounts that belong to deceased individuals, those who have filed for bankruptcy, etc.[387]

While some clients may authorize the law firm to sue immediately after placement, others may require the law firm to make additional collection attempts first.[388] Additional collection attempts typically consist of one or more demand letters on law firm letterhead or additional collection calls using

376 *Id.* at 27–28.

377 Office of the Comptroller of the Currency, Risk Management Guidance, Bulletin 2014-37 (Aug. 4, 2014).

378 *Id.*

379 *Id.*

380 CFPB, The Consumer Credit Card Market 152 (Sept. 2021). An earlier report indicated that the documents and information included an itemized account of all amounts claimed, including principal, interest, and fees; special status indicators, such as attorney representation or cease and desist; and information relating to prior collection efforts. CFPB, The Consumer Credit Card Market 164 (Aug. 2019).

381 CFPB, The Consumer Credit Card Market 152 (Sept. 2021).

382 *Id.*

383 *See* Jake Halpern, *Inside the Dark, Lucrative World of Consumer Debt Collection*, N.Y. Times Magazine (Aug. 14, 2014) (describing a portfolio that was sold twice).

384 CFPB, The Consumer Credit Card Market 153 (Sept. 2021) (reporting that resale was "limited to special circumstances" (*e.g.*, the buyer exiting the market)).

385 *See In re* Pressler & Pressler, L.L.P., Consent Order, 2016-CFPB-0009, 5–6 (C.F.P.B. Apr. 25, 2016) ("Most accounts that are placed with Respondents for collection are transmitted through an electronic system using a collection software network such as 'You Got Claims' . . . For such electronically transmitted claims, Respondents normally received only either an Excel spreadsheet or a text file containing specific data regarding each account, or claim for a Debt. The data included in these submissions is provided in summary form only and documentation supporting the data was not included."); Commonwealth v. Lustig, Glaser & Wilson, P.C., Complaint ¶¶22–23 (Mass. Super. Ct. Dec. 21, 2015) (firm filed more than 100,000 collection lawsuits from 2011 through 2015) ("[T]he Lustig Firm regularly downloaded electronic information about alleged consumer debts from Debt Buyers in large batches . . . This information often consisted of little more than a summary electronic data file from the Debt Buyer. This summary data file was typically unaccompanied by meaningful account-level documentation—such as the original contract, monthly statements, a payment history, dispute history, and chain of title documentation—that would be necessary to establish the existence and accuracy of the debt."); Miller v. Upton, Cohen & Slamowitz, 687 F. Supp. 2d 86, 92–93 (E.D.N.Y. 2009) (creditor granted first law firm access to store's electronic files on account, but second law firm—where account was transferred to file suit—only had access to consumer's basic identifying information but not credit card agreement, consumer's correspondence, payment history, or information about prior collection efforts).

386 *See also* § 1.5.5, *infra* (discussing scrubbing).

387 *In re* Pressler & Pressler, L.L.P., Consent Order, 2016-CFPB-0009, 6 (C.F.P.B. Apr. 25, 2016).

388 CFPB, The Consumer Credit Card Market Report 253 (Dec. 2015). *See also* CFPB, Consumer Credit Card Market Report 326 (Dec. 2017) ("Pre-litigation strategy generally involves the issuer or attorney sending a collection letter, sometimes including a settlement offer, before initiating the legal process.").

the law firm's name. Relying on non-attorney support staff, some law firms do not require collection attorneys to review account information before these additional dunning letters are mailed or calls are made.[389] Such practices may mislead consumers about the extent of attorney involvement in these collection efforts.[390]

If the law firm does not reach a payment agreement with the consumer as a result of these initial contacts, the next step is typically filing a collection lawsuit. A large portion of debt collection lawsuits end in default judgments[391] or in settlements[392] with unrepresented consumers[393] at the court on the day of their hearing. As a result, a typical collection action is unlikely to be closely scrutinized in many jurisdictions.

A 2021 survey of large credit card issuers reported that many paused legal collection efforts in response to various pandemic-related state restrictions and court closures, though many issuers reported the resumption of filing lawsuits in the second half of 2020.[394] In addition, "[s]ome issuers reported expanding proactive settlement offer campaigns, along with lowering the settlement threshold by five to ten percent, in order to accommodate pandemic-impacted consumers."[395]

Potential violations of the FDCPA by collection attorneys related to their unique role in filing and litigating collection lawsuits include:

- Filing a collection lawsuit in the wrong venue;[396]
- Failing to provide mandatory disclosures where the initial communication was a formal pleading in a civil action;[397]
- Suing on a time-barred debt;[398]
- Misrepresenting the consumer's liability, the amount due, or the fees or charges that are due;[399]
- Misrepresenting the source of the collection letter or the attorney's involvement (for example, by allowing a collection agency to send out a demand letter over the name of an attorney);[400]
- Misleading representations as to the effect of litigation; and[401]
- Deceptive practices in state debt collection suits against consumers.[402]

In addition to violating state or federal consumer protection laws, the actions of collection attorneys may also violate ethical rules governing attorney conduct.[403]

1.4.9 Collection Lawsuits in State Court

1.4.9.1 Number of Debt Collection Lawsuits

In the CFPB's survey of consumer experiences with debt collection, fifteen percent of survey respondents who reported being contacted about a debt said that they had been sued by a creditor or debt collector in the previous year.[404] Since the CFPB estimated that more than seventy million Americans were contacted by a creditor or debt collector about a debt in collection in the prior year,[405] this would mean that more than ten million Americans were sued on a debt during that one-year period.[406]

The National Center for State Courts (NCSC) conducted a study "of all non-domestic civil cases disposed between July 1, 2012 and June 30, 2013 in 152 courts with civil jurisdiction in 10 urban counties"[407] This study found that 64% of all civil filings were contract cases, which consisted primarily of debt collection (37%), landlord/tenant (29%), and foreclosure (17%).[408] Moreover, an additional 16% of civil cases were small claims cases for $12,000 or less, many of which were "lower-value debt collection cases."[409] Summarizing its findings, the NCSC wrote that:

> "The vast majority of civil cases that remain in state courts are debt collection, landlord/tenant, foreclosure, and small claims cases. State courts are the preferred forum for plaintiffs in these cases for the simple reason that in most jurisdictions state courts hold a monopoly on procedures to enforce judgments. Securing a judgment from a court of competent jurisdiction is the mandatory first step to being able to initiate garnishment or asset seizure proceedings."[410]

Subsequent reports by the NCSC estimated that there were 15.4 million civil cases filed in state courts in 2015, of which 51% were contract cases and 16% were small claims cases.[411]

Studies in jurisdictions around the country have also found that state courts are inundated with high volumes of collection

389 *See* CFPB v. Weltman, Weinberg & Reis Co., L.P.A., 2018 WL 3575882, at *4 (N.D. Ohio July 25, 2018) (lawyers reviewed template but not individual accounts before demand letters are sent; firm mailed 4.2 million demand letters from July 21, 2011 to Oct. 31, 2017); CFPB v. Weltman, Weinberg, & Reis Co., L.P.A., Complaint, 17-cv-817, ¶¶ 23–24 (N.D. Ohio Apr. 17, 2017); Commonwealth v. Lustig, Glaser & Wilson, P.C., Complaint ¶ 26 (Mass. Super. Ct. Dec. 21, 2015).

390 *See* § 7.2.3, *infra*.

391 *See* § 1.4.9.4, *infra*.

392 *See* § 1.4.9.6, *infra*.

393 *See* § 1.4.9.5, *infra*.

394 CFPB, The Consumer Credit Card Market 156 (Sept. 2021).

395 *Id.*

396 *See* § 10.3, *infra*.

397 *See* § 9.4, *infra*.

398 *See* § 7.4.9, *infra*.

399 *See* § 7.2.2, *infra*.

400 *See* §§ 7.2.3, 10.4, *infra*.

401 *See* § 7.2.4, *infra*.

402 *See* § 7.4.10, *infra*.

403 *See* § 16.5.3, *infra*.

404 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 27 (Jan. 2017).

405 CFPB, CFPB Survey Finds Over One-In-Four Consumers Contacted By Debt Collectors Feel Threatened (Jan. 12, 2017).

406 70 * 0.15 * 100 = 10.5.

407 Paula Hannaford-Agor, et al., The Landscape of Civil Litigation in State Courts, at iii (Nat'l Center for State Courts, 2015) ("The 925,344 cases comprise approximately five percent (5%) of state civil caseloads nationally.").

408 *Id.* at 17, 19.

409 *Id.* at 17.

410 *Id* at v.

411 Nat'l Center for State Courts, Examining the Work of State Courts: An Overview of 2015 State Court Caseloads (2016).

lawsuits.[412] In 2021, The Debt Collection Lab began reporting debt collection lawsuit filings in multiple jurisdictions.[413]

Nationally, debt collection lawsuits also represent an increasing portion of the civil docket with the number of consumer debt lawsuits doubling from 12% to 24% of all civil cases from 1993 to 2013.[414] More recent evidence from specific states also shows that debt collection cases continue to represent a growing portion of the docket.[415]

412 *See, e.g.*, Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (424,336 debt collection cases filed in Texas courts in fiscal year 2019); Julia Barnard, et al., Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection Act (Center for Responsible Lending Oct. 2020) at Fig. 2 (287,710 collection lawsuits were filed in the five largest counties in California from 2012 to 2017); Utah Foundation, The Justice Gap: Addressing the Unmet Legal Needs of Lower-Income Utahns (Apr. 2020) (in 2019, 62,436 debt collection lawsuits were filed in Utah—62% of all civil cases), *available at* https://www.utahfoundation.org; New York City Bar, Report on Legislation by the Consumer Affairs Committee and Civil Court Committee RE: A.6909-B and S.4827-B (June 2019) (100,186 consumer credit lawsuits filed in New York City Civil Courts in 2018); Mary Spector and Ann Baddour, Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts, 67 Hastings L.J. 1427, 1446 (2016), *citing* Tex. Office of Court Admin., Annual Statistical Report for the Texas Judiciary: Fiscal Year 2015, 44 (2015) (in fiscal year 2015, 170,409 lawsuits were filed statewide in Texas to collect a debt); Paul Kiel, *For Nebraska's Poor, Get Sick and Get Sued*, ProPublica, Apr. 28, 2016 (in Nebraska, approximately 79,000 debt collection lawsuits were filed in 2013, and in New Mexico, 30,000 suits were filed); Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas, ProPublica, Oct. 8, 2015 (during a five year period there were 116,289 judgments in debt collection lawsuits in St. Louis City and County, Missouri; 278,566 in Cook County, Illinois; and 128,918 in Essex County, New Jersey), *available at* https://static.propublica.org; Jessica Mendoza, et al., Collection Claims Abuses Move Up to Higher Courts, Boston Globe, Mar. 28, 2015 (from 2004 to 2013, at least 1.2 million cases were filed in Massachusetts small claims and district court sessions by professional debt collectors), *available at* https://www.bostonglobe.com; Peter A. Holland, Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed By Debt Buyers, 26 Loy. Consumer L. Rev. 179 (2014) (reporting that debt buyers filed 40,796 lawsuits in 2009; 43,581 in 2010; 37,202 in 2011; 22,566 in 2012; and 24,317 in 2013), *available at* http://digitalcommons.law.umaryland.edu; Susan Shin and Claudia Wilner, The Debt Collection Racket in New York (New Economy Project, June 2013) (reporting that debt collectors filed 195,105 lawsuits against New Yorkers in 2011), *available at* www.neweconomynyc.org; Claudia Wilner and Nasoan Sheftel-Gomes, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers (Neighborhood Economic Development Advocacy Project, 2010) ("In New York City, debt collectors filed approximately 300,000 lawsuits per year between 2006 and 2008."), *available at* www.neweconomynyc.org.

413 Debt Collection Lab, Debt Collection Tracker (last visited May 26, 2021) (reporting that "in the 5 states and 216 counties we track, debt collectors filed 337,627 lawsuits from January 2020 to March 2021."), *available at* https://debtcollectionlab.org.

414 Erika Rickard, et al., How Debt Collectors Are Transforming the Business of State Courts: Lawsuit Trends Highlight Need to Modernize Civil Legal System 8 (The Pew Charitable Trusts, May 2020).

415 *Id.* at 9 (citing doubling of debt collection lawsuits in Texas from 2014 to 2018 and 48 percent increase in claims in Alaska from 2013 to 2018). *See also* Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (reporting that debt collection lawsuits increased 162% in Texas from 2014 to 2019).

1.4.9.2 Top Filers of Collection Lawsuits Against Consumers

While top filers vary depending on the jurisdiction, reports have highlighted types of plaintiffs as top filers of collection lawsuits against consumers in specific jurisdictions:

- Debt buyers;[416]

416 *See, e.g.*, Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (debt buyers filed at least 46% of debt collection lawsuits in Harris County, Texas justice courts from January 1, 2018 to June 30, 2020); Reinvestment Fund, Debt Collection in Philadelphia (Mar. 2021) (between January 2016 and April 2020 four debt buyers filed 56% of debt collection lawsuits in Philadelphia), *available at* https://clsphila.org; Julia Barnard, et al, Suing-to-Intimidate: New Evidence Confirms that Oportun Abuses and Intimidates Families in Court to Collect Small-Dollar Loan Debts in California Courts (Center for Responsible Lending, Mar. 2021) at Appx. A (showing five debt buyers among the top filers of debt collection lawsuits in Los Angeles County Superior Courts from 2018–2020); Julia Barnard, et al., Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection Act (Center for Responsible Lending, Oct. 2020) at Fig. 2 (45.7% of collection lawsuits filed in the five largest counties in California from 2012 to 2017 were filed by debt buyers); Lisa Stifler, et al., Undue Burden: The Impact of Abusive Debt Collection Practices in Oregon (Center for Responsible Lending, Apr. 2018) (between 2012 and 2016 debt buyers filed 24.6% of all civil cases in Oregon circuit courts), *available at* https://www.responsiblelending.org; Testimony of April Kuehnhoff, National Consumer Law Center, Before the Massachusetts Joint Financial Services Committee In support of S.120/H.2811, An act relative to fairness in debt collection (Sept. 25, 2017) (in 2015 in Massachusetts, lawsuits by nine debt buyers made up 43 percent of civil, small claims, and supplementary process filings); Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, Harvard Law and Policy Review Vol. 11-1, at 98 (2017) (analysis of 10-K filings by Encore Capital Group, Portfolio Recover Associates, and Square Two Financial concluded that "together [they] collected over one billion dollars annually in revenues from litigation" in 2013, 2014, and 2015); Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, ProPublica, May 5, 2016 (in three counties in Missouri in 2013, debt buyer filings accounted for 42% of lawsuits in 2013); Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 15 (Human Rights Watch, Jan. 2016) (in New York state, debt buyers were four of the top ten filers in 2014); Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas, ProPublica, Oct. 8, 2015 (reporting about debt buyer judgments in three jurisdictions), *available at* https://static.propublica.org; *In re* Encore Capital Group, No. 2015-CFPB-0022 (C.F.P.B. Sept. 9, 2015) (consent order) ("Encore has filed hundreds of thousands of lawsuits to collect Consumer Debt."), *available at* www.consumerfinance.gov; *In re* Portfolio Recovery Assoc., No. 2015-CFPB-0023 (C.F.P.B. Sept. 9, 2015) (consent order) ("In 2012 alone, PRA's internal and external counsel filed over 160,000 Debt Collection Lawsuits in state and local courts."), *available at* www.consumerfinance.gov; Susan Shin and Claudia Wilner, The Debt Collection Racket in New York 3 (New Economy Project, June 2013) (in 2011 in New York, debt buyers filed more than half of the 195,105 collection lawsuits), *available at* www.neweconomynyc.org; Portfolio Acquisitions, L.L.C. v. Feltman, 909 N.E.2d 876 (Ill. App. Ct. 2009) (brief of amici curiae Legal Assistance Found. of Metro. Chicago, Nat'l Ass'n of Consumer Advocates, and

- Banks and credit card companies;[417]
- Hospitals and other medical providers;[418]
- Utilities;[419]
- Small dollar and high-cost lenders; and[420]
- Auto lenders.[421]

1.4.9.3 Costs of Litigation

According to the Consumer Financial Protection Bureau's survey of third-party debt collectors, it cost between $35 and $499 to file a collection lawsuit, court service fees cost $10 to $50, the additional cost if the case went to trial was between $500 and $2000, and a garnishment cost the collector $30 per transaction.[422] In a study of Utah attorneys using a methodology developed by the National Center for State Courts, "the median cost per side to litigate a debt collection case through trial was $2698."[423]

ProPublica has argued that the lower cost of filing collection lawsuits in some locations is one of the factors contributing

Am. Ass'n of Retired Persons in support of defendant-appellee) (analysis of over 150,000 collection actions filed in Cook County, Illinois, in one year found that more than half were filed by debt buyers).

417 *See, e.g.*, Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (Capital One filed 9% of debt collection lawsuits in Harris County, Texas justice courts from January 1, 2018 to June 30, 2020); Reinvestment Fund, Debt Collection in Philadelphia (Mar. 2021) (between January 2016 and April 2020 five credit card companies filed 24% of debt collection lawsuits in Philadelphia), *available at* https://clsphila.org; Julia Barnard, et al, Suing-to-Intimidate: New Evidence Confirms that Oportun Abuses and Intimidates Families in Court to Collect Small-Dollar Loan Debts in California Courts (Center for Responsible Lending, Mar. 2021) at Appx. A (showing five credit card companies among the top filers of debt collection lawsuits in Los Angeles County Superior Courts from 2018 -2020); Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 15 (Human Rights Watch, Jan. 2016) (in New York state, credit card companies were two of the top ten filers in 2014); Paul Kiel, *At Capital One, Easy Credit and Abundant Lawsuits*, ProPublica, Dec. 28, 2015 (highlighting large numbers of collection lawsuits filed by Capitol One and other credit card companies). *See also* Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas, ProPublica, Oct. 8, 2015 (reporting about bank judgments in three jurisdictions), *available at* https://static.propublica.org.

418 *See, e.g.*, Amanda Dunker and Elisabeth Ryden Benjamin, Discharged into Debt: A Pandemic Update (Community Service Society Jan. 2021) (from March to November 2020, 55 non-profit hospitals in New York filed 4,000 lawsuits to collect medical debts); Wendie C Thomas, et al., *This Doctors Group is Owned by a Private Equity Firm and Repeatedly Sued the Poor Until We Called Them*, ProPublica, Nov. 27, 2019 (reporting 4800 lawsuits filed by Southeastern Emergency Physicians in Shelby County, TN since 2017), Jay Hancock and Elizabeth Lucas, *'UVA Has Ruined Us': Health System Sues Thousands of Patients, Seizing Paychecks And Claiming Homes*, Kaiser Health News, Sept. 10, 2019 (reporting that the University of Virginia Health System filed more than 36,000 debt collection lawsuits against consumers from 2012 to 2018); Wendi C. Thomas, *The Nonprofit Hospital That Makes Millions, Owns a Collection Agency and Relentlessly Sues the Poor*, ProPublica, June 27, 2019 (Methodist Le Bonheur Healthcare brought 8,300 lawsuits in Memphis for unpaid medical debt over a period of five years); William E. Bruhn, et al, Prevalence and Characteristics of Virginia Hospitals Suing Patients and Garnishing Wages for Unpaid Medical Bills, Journal of American Medicine (June 25, 2019) (identifying 20,054 collection lawsuits and 9,232 garnishment cases by Virginia hospitals in 2017), *available at* https://jamanetwork.com; Meredith Cohn and Lorraine Mirabella, *Johns Hopkins Hospital sues patients, many low income, for medical debt*, The Washington Post, May 20, 2019 (Johns Hopkins Hospital filed more than 2,400 lawsuits in Maryland courts since 2009 against consumers with unpaid medical bills); Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas, ProPublica, Oct. 8, 2015 (reporting about medical judgments in three jurisdictions), *available at* https://static.propublica.org; Paul Kiel, *From the E.R. to the Courtroom: How Nonprofit Hospitals Are Seizing Patients' Wages*, ProPublica, Dec. 19, 2014 (reporting about more than 11,000 lawsuits and 6,000 garnishments filed on behalf of Mosaic Life Care in St. Joseph, Missouri from 2009 to 2013).

419 *See, e.g.*, Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 15 (Human Rights Watch, Jan. 2016) (in New York state, utility companies were two of the top ten filers in 2014); Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas, ProPublica, Oct. 8, 2015 (reporting about utility judgments in St. Louis County), *available at* https://static.propublica.org.

420 *See, e.g.*, Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (Oportun filed 12% of debt collection lawsuits in Harris County, Texas justice courts from January 1, 2018 to June 30, 2020); Julia Barnard, et al, Suing-to-Intimidate: New Evidence Confirms that Oportun Abuses and Intimidates Families in Court to Collect Small-Dollar Loan Debts in California Courts (Center for Responsible Lending, Mar. 2021) at Appx. A (showing lender Oportun, Inc. as top filer of debt collection lawsuits in Los Angeles County Superior Courts from 2018–2020); Kiah Collier, et al., *The Loan Company That Sued Thousands of Low-Income Latinos During the Pandemic*, Pro Publica, Aug. 31, 2020 (Oportun, Inc. filed more than 47,000 lawsuits in Texas from May 2016 to July 2020); Raheem Hosseini, *Exclusive: the litigious debt collectors targeting Latinos during a pandemic*, The Guardian, Aug. 2, 2020 (Oportun, Inc. filed 30,000 collection lawsuits in 2019 and 14,000 in the first half of 2020 in 20 California counties); Christopher L. Peterson & David McNeill, Unwarranted: Small-Claims Court Arrest Warrants in Payday Loan Debt Collection (Feb. 2020) ("High-cost lenders dominated small-claims court dockets, accounting for over 68 percent of all small-claims court hearings."); Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas, ProPublica, Oct. 8, 2015 (reporting about high-cost lender judgments in two jurisdictions), *available at* https://static.propublica.org.

421 *See, e.g.*, Ryan Felton and Ishaan Jhaveri, How a Subprime Auto Lender Consumed Detroit With Debt and Turned Its Courthouse Into a Collection Agency, Jalopnik, Oct. 15, 2018 (reporting that subprime auto lender Credit Acceptance filed 12.18% of publicly available civil lawsuits in Detroit in 2017, up from 1.45% in 2007), *available at* https://jalopnik.com; Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas, ProPublica, Oct. 8, 2015 (reporting about auto lenders in three jurisdictions), *available at* https://static.propublica.org.

422 CFPB, Study of third-party debt collection operations 34 (July 2016).

423 Paula Hannaford-Agor, et al., The Landscape of Civil Litigation in State Courts 25 (National Center for State Courts, 2015), *citing* Paula Hannaford-Agor and Cynthia Lee, Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts 46–48 (Apr. 2015).

to the high number of lawsuits[424] or judgments[425] in those locations.

1.4.9.4 Default Judgments

When consumers do not appear in court for their collection lawsuits, the creditors that filed the lawsuits may be able to obtain default judgments—often without presenting any evidence and despite the fact that consumers may have legitimate defenses.

In the Consumer Financial Protection Bureaus' nationally representative survey of consumer experiences with debt collection, 74% of respondents who had been sued on a debt reported that they did not attended the court hearing.[426] In the CFPB's study of third-party debt buyers, respondents reported obtaining default judgments in sixty to ninety percent of their filed suits.[427]

Research by other groups confirms that a very high percentage of consumers do not respond to collection lawsuits[428] and that a high percentage of these collection lawsuits end in default judgments.[429] One study found that the rate of default judgments was higher for collection lawsuits brought by debt buyers than it was for other collection lawsuits.[430]

A scathing report by Human Rights Watch highlighted the role of the courts in issuing such a high volume of default judgments:

> Many courts routinely award default judgments to debt buyers . . . without scrutinizing the claims at issue. One Arizona justice of the peace aptly described this to Human Rights Watch as a "greased rail" process. Many individual courts issue thousands or even tens of thousands of no questions asked default judgments in favor of debt buyers every year.[431]

High default rates contribute to fast disposition times, enabling the court to churn through the high volume of collection lawsuits.[432] The National Center for State Courts found that 91% of debt collection contract cases were disposed of within 180 days.[433]

Consumer default does not mean that the consumer owes the debt. The consumer may never have received actual notice of the hearing[434] —potentially only learning of the collection

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424 Paul Kiel, *For Nebraska's Poor, Get Sick and Get Sued*, ProPublica, Apr. 28, 2016 (noting that Nebraska, with its $45 filing fee, had 79,000 lawsuits in 2013, compared to 30,000 in New Mexico where filing fees started at $77—despite similar populations).

425 Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, ProPublica, May 5, 2016 (illustrating a significantly higher rate of judgments in Essex County, New Jersey than in Cook County, Illinois; noting that it was three times more expensive to file a collection lawsuit in Cook County).

426 CFPB, Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 27 (Jan. 2017).

427 CFPB, Study of third-party debt collection operations, 18 (July 2016) (not including jurisdictions where the defendant's appearance in court is necessary before the court will enter a default judgment).

428 Peter Holland, *Junk Justice: A Statistical Analysis of 4400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179, 226 (2014) (comparing the results of seven prior studies between 1967 and 2010 and finding that between 70% and 94% of consumers "failed to respond" to collection lawsuits). *See also* FTC, Repairing a Broken System 7 (July 2010) ("panelists from throughout the country estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent"; collecting studies).

429 *See, e.g.*, Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (65% of all debt collection judgments in 2020 in Texas were default judgments); Reinvestment Fund, Debt Collection in Philadelphia (Mar. 2021) (65% of debt collection lawsuits filed between January 2016 and April 2020 ended with default judgments for the plaintiff), *available at* https://clsphila.org; Paula Hannaford-Agor & Brittany Kauffman, Preventing Whack-a-Mole Management of Consumer Debt Cases at 6, n.18 (National Center for State Courts, Feb. 2020) (citing default judgment statistics in Black Hawk County, IA small claims: 63.6%; Collin County, Tx justice of the peace court: 19.7%; and West Valley City, UT small claims: 44%), *available at* https://iaals.du.edu; Tom Feltner, et al., Debt by Default: Debt Collection Practices in Washington 2012–2016 (Center for Responsible Lending, Mar. 2019) ("Over 80% of all debt buyer cases reviewed resulted in default judgments in favor of the plaintiff."); Lisa Stifler, et al., Undue Burden: The Impact of Abusive Debt Collection Practices in Oregon (Center for Responsible Lending, Apr. 2018) (in random sample of 300 debt collection lawsuits filed by debt buyers in Oregon between 2014 and 2016, 43.7% of cases ended in default judgments), *available at* https://www.responsiblelending.org; Ellen Harnick, Lisa Stifler, and Safa Sjadi, Debt Buyers Hound Coloradans in Court for Debts They May Not Owe (Center for Responsible Lending, Dec. 2016) ("A review of 375 randomly selected cases filed by four debt buyers in the county courts in five Colorado counties from 2013 through 2015 revealed that 71 percent of the cases resulted in default judgments against the individuals sued."); Mary Spector and Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 Hastings Law Journal 1427, 1449 (2016) (in analysis of data for 40 Texas counties for fiscal year 2015, 31.6% of cases ended with default judgment); Susan Shin and Claudia Wilner, The Debt Collection Racket in New York, 3 (New Economy Project, June 2013) (42% of debt collection lawsuits in New York state resulted in default judgments); Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 257, 296 (2011) (39.46% of served cases in Dallas County ended with a default judgment for the plaintiff); Claudia Wilner & Nasoan Sheftel-Gomes, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers 6 (Neighborhood Economic Development Advocacy Project, 2010) (study of 336 cases filed by debt buyers in New York City found that 81% resulted in default judgments).

430 Susan Shin and Claudia Wilner, The Debt Collection Racket in New York 3 (New Economy Project, June 2013) ("Overall, 42% of debt collection lawsuits resulted in default judgments—but debt buyers obtained default judgments in an estimated 62% of their cases.").

431 Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Human Rights Watch, Jan. 2016).

432 *See* § 1.4.9.1, *supra*.

433 Paula Hannaford-Agor, et al., The Landscape of Civil Litigation in State Courts 30 (Nat'l Center for State Courts, 2015).

434 *See, e.g.*, Reinvestment Fund, Debt Collection in Philadelphia (Mar. 2021) (between January 2016 and April 2020 26% of debt collection lawsuits ended with a determination of "no service"), *available at* https://clsphila.org; Julia Barnard, et al., Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection Act (Center for Responsible Lending, Oct. 2020) at Fig. 13 (non-service was the most frequent reason for dismissal). *See also* National Consumer Law Center, Collection Actions § 12.3.11.1.2 (5th

action when wages or bank account are garnished to pay the default judgment—or may not have understood the notice that they received. They may not understand how to respond to the summons, feel intimidated by the legal process, fear deportation if they appear in court, be unable to access legal advice/representation, or think that appearing in court will not make any difference. Consumers who are elderly, ill, lack child care, have no transportation, or are unable to take time off of work also face barriers to appearing at the courthouse.

Researchers studying the types of communications with consumers that will decrease the rate of default judgments have had some success increasing both the answer rate and rate of consumers who appeared in court at the first hearing.[435]

1.4.9.5 Representation by Attorneys

Studies show that the overwhelming majority of consumers are unrepresented by an attorney when they are sued on a debt.[436] However, being represented by counsel in debt collection lawsuits dramatically improves outcomes for consumers,[437] including increasing the likelihood that the case

ed. 2020), *updated at* www.nclc.org/library (discussing fraudulent claims of service by the process server, also known as "sewer service").

435 Access to Justice Lab, Problem of Default, *available at* https://a2jlab.org.

436 *See* Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (92% of defendants had no lawyer in debt collection lawsuits in Harris County, Texas justice courts from January 1, 2018 to June 30, 2020); Reinvestment Fund, Debt Collection in Philadelphia (Mar. 2021) (94% of defendants were not represented at any point in the collection lawsuit), *available at* https://clsphila.org; Julia Barnard, et al., Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection Act (Center for Responsible Lending Oct. 2020) at Fig. 14 (98.3% of consumers were not represented by an attorney); Utah Foundation, The Justice Gap: Addressing the Unmet Legal Needs of Lower-Income Utahns (Apr. 2020) (in 2019, 2% of defendants in debt collection lawsuits were represented by an attorney), *available at* https://www.utahfoundation.org; Kiah Collier, et al, The Loan Company That Sued Thousands of Low-Income Latinos During the Pandemic, ProPublica, Aug. 31, 2020 (in 2019 in one county in Texas 105 defendants sued by Oportun obtained lawyers out of 7,600 cases, about 1.3%), *available at* https://www.propublica.org; New York City Bar, Report on Legislation by the Consumer Affairs Committee and Civil Court Committee RE: A.6909-B and S.4827-B (June 2019) (96% of defendants in consumer credit actions are not represented by counsel); Tom Feltner, et al., Debt by Default: Debt Collection Practices in Washington 2012–2016 (Center for Responsible Lending, Mar. 2019) (only 1.2% of defendants were represented by an attorney); Lisa Stifler, et al., Undue Burden: The Impact of Abusive Debt Collection Practices in Oregon (Center for Responsible Lending, Apr. 2018) (in a random sample of 300 debt collection lawsuits filed by debt buyers in Oregon between 2014 and 2016, only one consumer was represented by an attorney), *available at* https://www.responsiblelending.org; Testimony of April Kuehnhoff, National Consumer Law Center, Before the Massachusetts Joint Financial Services Committee In support of S.120/H.2811, An act relative to fairness in debt collection (Sept. 25, 2017), citing data collected by Erika Rickard, Associate Director of Field Research at Harvard Law School's Access to Justice Lab, in September 2017 using the Massachusetts Trial Court Electronic Case Access at http://www.masscourts.org (in four Massachusetts district court small claims sessions, the percentage of consumers sued to collect consumer debts who were represented by attorneys ranged from 0.3% to 1.4% in 2016); Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, ProPublica, May 5, 2016 (99% of defendants sued by New Jersey collection law firm Pressler & Pressler did not have attorneys; 97% of defendants in debt collection cases filed in New Jersey's lower level court in 2013 did not have attorneys; 91% of defendants in Missouri debt collection cases in 2013 did not have attorneys); Samantha Liss, *When a nonprofit health system outsources its ER, debt collectors follow*, St. Louis Post-Dispatch, Apr. 17, 2016 (reporting that in 1078 lawsuits filed by CP Medical in St. Louis, St. Louis County, and St. Charles County between December 2, 2014 and March 10, 2016, only 17 defendants had an attorney); Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Human Rights Watch, Jan. 2016) (consumers had legal representation in 3 out of 247 cases in a randomized sample of lawsuits filed in New York by debt buyers in 2013 that resulted in judgments); Utah State Courts, Supreme Court Task Force to Examine Limited Legal Licensing (Nov. 18, 2015) (98% of respondents were self represented in debt collection cases), *available at* http://www.utcourts.gov; Peter Holland, *Junk Justice: A Statistical Analysis of 4400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179 (2014) (consumers were represented by an attorney in only 2% of debt collection lawsuits in Maryland); Susan Shin & Claudia Wilner, The Debt Collection Racket in New York (New Economy Project, June 2013) (attorneys represented consumers in only 2% of debt collection cases filed in New York City); Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 257, 289 (2011) (fewer than 10% of defendants served in debt collection lawsuits were represented by an attorney in Dallas County, Texas); Claudia Wilner & Nasoan Sheftel-Gomes, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers 1 (Neighborhood Economic Development Advocacy Project, 2010) (only 1% of people sued by debt buyers in New York City are represented by counsel). *See also* Paula Hannaford-Agor, et al., The Landscape of Civil Litigation in State Courts 32 (National Center for State Courts, 2015) (noting that defendants were represented in 13% of small collection cases but not distinguishing between debt collection and other small claims cases).

437 *See* Reinvestment Fund, Debt Collection in Philadelphia (Mar. 2021) ("31% of cases where the defendant had representation ended in a judgment for the defendant (by plaintiff default or on the merits), compared with only 1% of cases where the defendant did not have representation"), *available at* https://clsphila.org; Mary Spector and Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 Hastings Law Journal 1427, 1463 (2016) (in cases where defendant was represented by an attorney, defendant won 25.92% of the time and plaintiff won 15.38% of the time; in cases where defendant was unrepresented, defendant won 12.73% of the time and plaintiff won 52.73% of the time); Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Human Rights Watch, Jan. 2016) ("Legal aid and consumer rights attorneys across several states told Human Rights Watch that they win the overwhelming majority of the cases they defend against debt buyers."); Peter Holland, *Junk Justice: A Statistical Analysis of 4400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179, 2011 (2014) ("Of the 13% of defendants who proceeded *pro se* . . . debt buyers obtained judgment by affidavit, consent, default, or trial 47% of the time, and recovered 62% of the amount sought in the complaints . . . Of the 2% of defendants who had a lawyer enter an appearance in the case, debt buyers obtained an affidavit, consent, or default judgment only 15% of the time, and recovered only 21% of the principal amount sought in the complaints."); Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 257, 297 (2011) (11% of cases ended with affirmative recovery for defendant, default judgment, or agreed judgment when

will simply be dismissed.[438] Having access to legal advice can also play a critical role in alerting clients to their rights prior to the filing of debt collection actions. Moreover, consumers without access to affordable legal services may turn to predatory debt relief scams for assistance,[439] often with disastrous financial results.

Unrepresented consumers have to navigate a variety of challenges that may include: filing a response to the complaint, answering discovery, and arguing their case before a judge or magistrate. Some defenses may be hard to identify without any legal training. Moreover, once identified, unrepresented consumers may find it hard to explain their defenses to a court. Judges may be reluctant to probe the plaintiffs' cases too much for fear of violating judicial neutrality or simply because they are so overwhelmed by the number of cases in their docket that they do not want to waste too much time responding to any single case.[440]

In contrast, plaintiffs in collection actions are almost always represented by counsel. Indeed, some states require that a corporation only appear in court through counsel and not through a non-attorney employee.[441] In a 2015 study of civil filings in ten urban areas, the National Center for State Courts found that "[s]mall claims dockets had an unexpectedly high proportion (76%) of plaintiffs who were represented by attorneys, which suggests that small claims courts, which were originally developed as a forum for self-represented litigants to obtain access to courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in lower-value debt collection cases."[442]

1.4.9.6 Hallway Conferences and Judgeless Courtrooms

When consumers do appear in court for their collection lawsuit, collection attorneys typically try to convince them to settle rather than appearing before the judge or magistrate. Court officials often direct consumers to speak to these attorneys.[443] Consumers may feel pressured to settle instead of disputing the debt in court.[444] Moreover, unrepresented consumers who are appearing in court for the first time are at a significant disadvantage against collection attorneys who have frequently represented creditors in hundreds or thousands of cases, often in the very same courtroom.[445] Consumers may not understand that these attorneys are not officers of the court or that the "advice" of these attorneys to settle is not necessarily in the consumer's best interest.[446]

Human Rights Watch has also reported on the existence of "judgeless" courtrooms in at least four states.[447] In one such courtroom in Philadelphia, consumers were summoned to a courtroom, where collection attorneys ran the proceedings, escorting consumers one at a time into a private meeting room at the back of the court to pressure them into entering repayment agreements.[448] Although an employee of the court was present, he never addressed the defendants or explained that they had a right to a hearing before a judge.[449] The trial

the consumer was represented by counsel as compared to 40% of cases that ended with affirmative recovery for defendant, default judgment, or agreed judgment when the consumer appeared *pro se*).

438 Julia Barnard, et al., Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection Act (Center for Responsible Lending Oct. 2020) at Fig. 14 (100% of cases where the consumer was represented ended in dismissal); Kiah Collier, et al, The Loan Company That Sued Thousands of Low-Income Latinos During the Pandemic, ProPublica, Aug. 31, 2020 (reporting that represented consumers had their cases "dropped 96% of the time before a ruling"), *available at* https://www.propublica.org; Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Human Rights Watch, Jan. 2016) ("Some attorneys reported that if they advanced a vigorous defense, debt buyers often simply dropped the case."); CFPB v. Frederick J. Hanna & Assoc., 114 F. Supp. 3d 1342, 1350 (N.D. Ga. 2015) (noting that "consumers who retained attorneys were almost four times more likely to have their cases dismissed" by defendant); Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 257, 297 (2011) (82% of cases were dismissed when the consumer was represented by counsel as compared to 53% of cases that were dismissed when the consumer appeared *pro se*).

439 *See* § 1.3.9, *supra*.

440 *See* Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 61–62 (Human Rights Watch, Jan. 2016).

441 National Consumer Law Center, Collection Actions § 3.3.8 (5th ed. 2020) (discussing state requirements that a collector retain an attorney to bring suit), *updated at* www.nclc.org/library.

442 Paula Hannaford-Agor, et al., The Landscape of Civil Litigation in State Courts, p. iv–v (National Center for State Courts, 2015). *See also* Texas Appleseed, Debt, Access to Justice and Racial Equity: An Analysis of Consumer Debt Collection Lawsuits in Texas and Recommended Reforms (Apr. 2021) (81% of plaintiffs suing to collect a debt had a lawyer in Harris County, Texas justice courts from January 1, 2018 to June 30, 2020); Testimony of April Kuehnhoff, National Consumer Law Center, Before the Massachusetts Joint Financial Services Committee In support of S.120/H.2811, An act relative to fairness in debt collection (September 25, 2017), citing data collected by Erika Rickard, Associate Director of Field Research at Harvard Law School's Access to Justice Lab, in September 2017 using the Massachusetts Trial Court Electronic Case Access at http://www.masscourts.org (a study of four Massachusetts district court small claims sessions found that, in cases filed to collect consumer debts, between 85.7% and 94.9% of plaintiffs were represented by an attorney in 2016).

443 *See, e.g.*, Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 54–57 (Human Rights Watch, Jan. 2016).

444 See, *id.*; Patrick Lunsford, Arm Data Exchange Standards Focus of FTC/CFPB Collection Roundtable (insideARM, June 7, 2013) (Maryland Assistant Attorney General accused collection industry of using conversations with consumers to "coerce" settlements).

445 *See* Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 53 (Human Rights Watch, Jan. 2016).

446 *See id.* at 56.

447 *Id.* at 57.

448 *Id.* at 58.

449 *Id.*

commissioner reported that defendants agreed to pay in eighty percent of cases.[450]

One study in Maryland found that the majority of consent judgments were for the full amount of the complaint.[451] Indeed, consumers may believe that their only option was agreeing to pay the full amount that they allegedly owe.[452]

1.4.10 Using Arbitration to Collect Consumer Debts

In the early 2000s, hundreds of thousands of debt collection suits were initiated in perfunctory arbitration proceedings before the National Arbitration Forum (NAF) where the NAF would receive a bare-bones complaint and issue default rulings without any hearing or additional evidence being submitted.[453] A state enforcement action[454] put a stop to National Arbitration Forum (NAF)'s use of arbitration proceedings in collection suits. The American Arbitration Association (AAA) has refused to conduct any arbitration seeking to collect a consumer debt.[455]

As discussed in NCLC's Collection Actions § 3.2.3 (5th ed. 2020), *updated at* www.nclc.org/library, creditors could still seek to utilize other arbitration forums to collect consumer debts. NCLC's Consumer Arbitration Agreements Ch. 12 (8th ed. 2020), *updated at* www.nclc.org/library, discusses strategies for representing consumers.

Alternatively, as discussed in Collection Actions § 3.2.4 (5th ed. 2020), *updated at* www.nclc.org/library, consumers may seek to invoke arbitration agreements after being sued in court.

Arbitration can also come up in the context of an FDCPA lawsuit and is discussed at § 11.3, *infra*.

1.4.11 Collection on the Judgment

Once a court judgment issues against the consumer, the judgment creditor is able to use a variety of powerful postjudgment remedies to collect from the judgment debtor. Specific remedies vary from state to state but may include garnishment of wages[456] or bank accounts,[457] liens on property,[458] or the ability to levy on personal property.[459] These collection tools are subject to state and federal limits that exempt certain income and property from collection.[460]

ADP, the nation's largest payroll company, analyzed payroll data for thirteen million employees, finding that 3% of all employees had wages taken for a consumer debt in 2013[461]—an estimated four million American workers.[462] A subsequent national study by ADP using 2016 payroll data found that a nearly identical 2.9% of all employees had wages garnished for consumer debts and student loans, and highlighted some states with much higher rates of wage garnishment.[463]

Another significant issue that consumers face postjudgment is the addition of fees and interests to the principal of the judgment.[464] According to the National Center for State Courts,

450 *Id.* at 59.

451 Peter Holland, *Junk Justice: A Statistical Analysis of 4400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179, 213–214 (2014) (for unrepresented consumers who did not file notice of intention to defend, 79% of consent judgments were for amount demanded in complaint; for self-represented consumers who did file notice of intention to defend, 69% of consent judgments were for full amount).

452 Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 55 (Human Rights Watch, Jan. 2016).

453 These abusive practices are discussed in more detail at National Consumer Law Center, Consumer Arbitration Agreements § 11.2 (8th ed. 2020), *updated at* www.nclc.org/library.

454 State v. Nat'l Arbitration Forum (Minn. Dist. Ct. Hennepin Cty. July 17, 2009) (consent judgment).

455 *See, e.g.*, Am. Arbitration Ass'n, Notice on Consumer Debt Collection Arbitrations, *available at* www.adr.org (describing AAA moratorium on consumer debt collection actions). *But see* CFPB, Arbitration Study § 5.6.4 (Mar. 2015) (identifying 24 filings during the relevant study period that likely conflicted with AAA's moratorium).

456 *See, e.g.*, Julia Barnard, et al., Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection Act (Center for Responsible Lending, Oct. 2020) at Fig. 16 (study about debt buyer lawsuits in California found that 27.3% of cases ended in wage garnishment); Robyn Dorsey and Marceline White, No Exit: How Maryland's Debt Collection Practices Deepen Poverty & Widen the Racial Wealth Gap (Maryland Consumer Rights Coalition, June 2018) (48,868 Marylanders faced wage garnishment in 2016); Ellen Harnick, Lisa Stifler, and Safa Sjadi, Debt Buyers Hound Coloradans in Court for Debts They May Not Owe (Center for Responsible Lending, Dec. 2016) (38% of collection lawsuits in a sample of 375 cases filed by debt buyers resulted in wage garnishment).

457 *See, e.g.*, Robyn Dorsey and Marceline White, No Exit: How Maryland's Debt Collection Practices Deepen Poverty & Widen the Racial Wealth Gap (Maryland Consumer Rights Coalition, June 2018) (27,744 Marylanders faced bank account seizures in 2016); Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, ProPublica, May 5, 2016 ("From 2009 through 2013, plaintiffs in Missouri took at least $48 million from debtors' bank accounts — about 14 percent of the $339 million garnished during those years, mostly through debtors' wages.").

458 *See, e.g.*, Lisa Stifler, et al., Undue Burden: The Impact of Abusive Debt Collection Practices in Oregon (Center for Responsible Lending, Apr. 2018) (in random sample of 300 debt collection lawsuits filed by debt buyers in Oregon between 2014 and 2016, liens were placed on property in 47.7% of cases), *available at* https://www.responsiblelending.org.

459 *See, e.g.*, Robyn Dorsey and Marceline White, No Exit: How Maryland's Debt Collection Practices Deepen Poverty & Widen the Racial Wealth Gap (Maryland Consumer Rights Coalition, June 2018) (27,744 Marylanders faced property garnishment in 2016).

460 *See generally* Carolyn Carter, No Fresh Start in 2020: Will States Let Debt Collectors Push Families Into Poverty In The Wake of a Pandemic? (National Consumer Law Center, Oct. 2020); National Consumer Law Center, Collection Actions Ch. 13 to 15 (5th ed. 2020), *updated at* www.nclc.org/library.

461 ADP Research Institute, Garnishment The Untold Story 8 (2014). *See also* ADP Research Institute, The U.S. Wage Garnishment Landscape: Through the Lens of the Employer 7 (2017) (study of wage garnishment with 2016 payroll data found that the rate of garnishment for consumer debt remained the same), *available at* https://www.adp.com.

462 Paul Kiel, *Unseen Toll: Wages of Millions Seized to Pay Past Debts*, ProPublica, Sept. 15, 2014.

463 ADP Research Institute, The U.S. Wage Garnishment Landscape: Through the Lens of the Employer (2017) (Indiana: 5.6%, Wisconsin: 4.3%, Michigan: 5%), *available at* https://www.adp.com.

464 *See, e.g.*, Julia Barnard, et al., Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection

"[t]he average (mean) postjudgment interest rate is 7.63%, but rates ranged considerably from 3.5% in New Jersey (1.5% for small claims cases) to 12% in Kentucky, Massachusetts, Rhode Island, and Vermont."[465] Additionally, some states apply compound rather than simple interest postjudgment, exacerbating the impact of postjudgment interest.[466]

In order to make use of these postjudgment remedies, states generally make postjudgment discovery proceedings available to creditors to force judgment debtors to answer questions about their assets. The creditor may have the right to issue interrogatories to the debtor, summon the debtor to a debtor's examination to answer questions in person, and issue a subpoena duces tecum requiring the debtor to produce assets or records.[467]

The ACLU reports that, "[i]n 44 states, judges—including district court civil judges, small-claims court judges, clerk-magistrates, and justices of the peace—are allowed to issue [civil] arrest warrants for failure to appear at postjudgment proceedings or for failure to provide information about finances."[468] As a result, judgment debtors may make payments—including using exempt income—to avoid arrest.

1.5 Use of Technology in Debt Collection

1.5.1 Collection Management System

Many collectors use sophisticated software to "maintain [ ] account-level information about debts in collection, make [ ] the information available to individual collectors, and track [ ] account activity such as calls made, the outcome of discussions with consumers, and payments made."[469] In a 2020 TransUnion survey of debt collection agencies, 73% reported using collection management software and 35% reported using compliance software.[470]

Debt collectors may enter coded comments in their database to summarize interactions with consumers. A list of common debt collector codes is found at Appendix G, *infra*.

In an effort to motivate individual debt collectors and maximize their productivity, collection agencies may adopt techniques from video games such as allowing agents to monitor their performance and set targets, "level-up" based on amount collected, see their rank within the collection agency, obtain badges that reward achievement, or engage in competitions between agents, teams, or offices.[471] Some agencies are also using gamification tactics as part of their compliance training.[472]

1.5.2 Websites and Portals

Many collectors maintain their own websites, which may need to be copied or downloaded (using software created for that purpose) in order to preserve the information for evidentiary purposes, since web pages change frequently at some sites. Older versions of a web page are often available on www.archive.org.

A 2020 TransUnion survey of collection agencies reported that 66% or respondents used online payment portals.[473] An earlier CFPB study of fifty-eight third-party collection agencies reported that 86% accepted payments online.[474]

Beyond accepting online payments, some collectors are using their websites to facilitate communication with consumers.[475] One survey of collectors reported that forty percent of respondents maintain a website that allows consumers to dispute debts electronically.[476] Respondents to a 2018 survey about the use of technology by collection agencies indicated that 9.3% of respondents used virtual negotiation technology.[477]

Collectors may also provide "live help" options that allow consumers to chat with collection agencies online rather than talking to someone over the phone. A 2020 survey of collection agencies reported that 11% were using chatbot, digital assistant, or other communication using AI.[478]

Act (Center for Responsible Lending, Oct. 2020) at Fig. 17 (Study in California found that interest on judgments ranged from $0 to $9012, attorney fees ranged from $0 to $2048, and court fees ranged from $0 to $949).

465 Paula Hannaford-Agor & Brittany Kauffman, Preventing Whack-a-Mole Management of Consumer Debt Cases at 9–10 (National Center for State Courts, Feb. 2020) (based on allowable postjudgment interest rate for each state effective May 23, 2019), *available at* https://iaals.du.edu.

466 Dalié Jiménez, Ending Perpetual Debts, Houston L. Rev. Vol. 55, No. 3, 617 (2018).

467 National Consumer Law Center, Collection Actions § 16.2.1 (5th ed. 2020), *updated at* www.nclc.org/library.

468 Jennifer Turner, American Civil Liberties Union, A Pound of Flesh: The Criminalization of Private Debt 6 (2018). *See also* National Consumer Law Center, Collection Actions § 16.2.3 (5th ed. 2020), *updated at* www.nclc.org/library; Am. Civil Liberties Union & Brennan Ctr. for Justice, Comment to CFPB Regarding Debt Collection Rulemaking, No. CFPB-2013-0033 (Feb. 28, 2014) (citing statistics about use of civil contempt), *available at* https://www.aclu.org.

469 CFPB, Study of third-party debt collection operations 24 (July 2016).

470 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

471 FidoTrack, Gamification: Supercharge Agent Production, *available at* www.fidotrack.com; Noble Systems, Noble Gamification Software Improves Productivity, *available at* www.noblesys.com.

472 Anne Resse May, "Achievement Unlocked: Compliance training gets an upgrade thanks to new tech tools" Collector, 10–11 (July 2018), *available at* online.collector.com.

473 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

474 CFPB, Study of third-party debt collection operations 33 (July 2016) (50/58 *100 = 86.2%).

475 *See, e.g.,* Aite, Beyond the Call Center: Emerging Strategies for Collecting Consumer Debt (Mar. 2019) (prepared for FICO) (discussing online self-service portals).

476 Josh Adams, Business Practices and Capabilities within the Debt Collection Industry (ACA International Nov. 2016).

477 BillingTree, Collection Agency Operations and Technology Survey (2018).

478 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

1.5.3 Telephone Technologies

In the CFPB's survey of fifty-eight third-party collection agencies, all respondents with more than thirteen collection agents reported providing a toll free number.[479]

Collection agencies may make audio recording of collection telephone calls.[480] Eighty-three percent of respondents to the CFPB's survey of third-party collection agencies reported that they recorded all calls with the majority keeping the recordings for two years or more.[481] Supervisors at some collection agencies purport to monitor some telephone calls directly while other use software to analyze calls.[482]

Collectors frequently use automatic telephone dialing systems ("autodialers") to dial thousands of numbers in a short period of time without human intervention.[483] Autodialer technology permits debt collectors to greatly increase their number of outgoing calls per day. Collectors using autodialer technology or prerecorded messages, must also comply with the Telephone Consumer Protection Act.[484] A survey of collection agencies in 2020 reported that 39% of respondents used an auto dialer.[485]

Interactive Voice Response or ("IVR") allows computers to recognize voice responses or numbers pressed on a landline phone or cellphone. A 2020 TransUnion survey of collectors reported that 28% of respondents use Interactive Voice Response technology.[486] This technology can be used by collectors for both outbound calls (*e.g.*, identifying when a call connects with a consumer and routing it to a live agent) and inbound calls (*e.g.*, accepting credit card payments from consumers over the phone).[487]

Some collectors are using virtual collection agents to answer calls with the hope that such technology can provide better natural language recognition and be trained to handle a greater variety of interactions with consumers.[488]

Some collectors are using mobile phones for bill payment. For example, one survey of collectors found that 18.7% were using "mobile device bill presentment and payment" and 13.3% were using QR code payment.[489]

As the name implies, "ringless voicemail" delivers prerecorded voicemail messages to voicemail boxes without causing phones to ring.[490] The phones then notify consumers that there is a voicemail message (based on the settings for the individual phone) and consumers can access the message. A 2020 survey of collection agencies found that 10% of respondents used ringless voicemail.[491] For more about ringless voicemail technology and possible violations of the Telephone Consumer Protection Act (TCPA), see Federal Deception Law § 6.3.2 (4th ed. 2022), *updated at* www.nclc.org/library.

Telephone systems are able to transmit to the recipient a fake caller identification or capturing caller identification from consumers. Both of these issues are discussed at § 14.3.3, *infra*.

1.5.4 Email, Text, and Social Media

A 2020 survey of collection agencies reports that 59% of collectors communicate with consumers by email, 22% via text, and 2% via social media, compared to 93% by letter and 87% by manually dialed telephone calls.[492]

Email, text, and social media communications are all addressed in the CFPB's debt collection regulations, effective November 30, 2021.[493] A summary of those provisions, found at § 1.1.1.7, *supra*, indicates the various sections of this treatise where those provisions are examined in more detail.

Previously, in 2016, the FTC warned about compliance issues related to the use of text messages and social media communications by debt collectors,[494] and the CFPB is a member of an interagency group that issued social media guidance in 2013.[495] New York state has also adopted regulations regarding debt collection emails.[496]

479 CFPB, Study of third-party debt collection operations 33 (July 2016).

480 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020) (59% of collection agencies reported recording calls), *available at* https://solutions.transunion.com.

481 CFPB, Study of third-party debt collection operations 24 (July 2016) (48/58 * 100 = 82.8%).

482 See discussion of speech analytics in § 1.5.5, *infra*.

483 For a discussion of the Telephone Consumer Protection Act's definition of autodialers, see § 14.3.2.3, *infra*, and National Consumer Law Center, Federal Deception Law § 6.3.4 (4th ed. 2022), *updated at* www.nclc.org/library.

484 National Consumer Law Center, Federal Deception Law § 6.3 (4th ed. 2022), *updated at* www.nclc.org/library.

485 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

486 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

487 Phil Britt, ARM Firms Leverage IVR Technology to Lower Costs (InsideArm, Sept. 14, 2009), *available at* https://www.insidearm.com.

488 Chris Repholz, The Rise of the Collector Bot (insideARM, June 12, 2020) ("Today, many types of calls [to MRS Associates] such as disputes, fraud, bankruptcy, and deceased notifications no longer are handled by a live agent"), *available at* insidearm.com. *See also* Interactions, Interactions Brings Coversational AI to Collections; Spurs Industry Transformation Amid Record Call Volume (July 22, 2020), *available at* http://interactions.com.

489 BillingTree, Collection Agency Operations and Technology Survey (2018).

490 *See* Silbaugh v. Censtar Energy Corp., 2018 WL 4558409 (N.D. Ohio Sept. 21, 2018) (describing ringless voicemail).

491 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

492 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

493 CFPB, Debt Collection Practices (Regulation F), 85 Fed. Reg. 76,734 (Nov. 30, 2021).

494 Colin Hector, Debt collectors: You may 'like' social media and texts, but are you complying with the law? (FTC, Mar. 28, 2016).

495 Federal Financial Institutions Examination Council, Social Media: Consumer Compliance Risk Management Guidance (Dec. 11, 2013), *available at* https://library.nclc org. *See* Appx. B.4, *infra*.

496 N.Y. Comp. Codes R & Regs. tit. 23, § 1.6.

Collectors using text messages must also comply with the Telephone Consumer Protection Act.[497] Electronic communications that replace writings must also comply with the federal E-Sign Act.[498]

1.5.5 Collection Analytics

Debt buyers and debt collectors regularly gather data about consumers and also about their own internal collection practices. Increasingly, they use analytics software to evaluate this data and make decisions based on their evaluation.

Services exist to help debt buyers make decisions regarding which debt portfolios to purchase[499] and provide real time portfolio monitoring that notifies collectors when specific information changes.[500] Portfolio analytics may also be used to score particular accounts so that debt collectors can target their collection efforts to the accounts that they believe are most likely to pay[501] or select specific criteria for particular collection techniques.[502] For consumer advocates, the use of analytics raise questions about privacy, disparate treatment based on demographic data like race or gender, and the potential for unauthorized use of credit report data.

Companies provide products that will "scrub" portfolios for certain types of accounts including: "bankruptcy, deceased, possible military indicator, cell phone, fraud, [and] litigious debtor."[503] Identified accounts may be marked for special treatment or excluded from collection.

Analytics can be used to personalize the content or tone of a collection communication, the mode of communication (phone call, letter, email, etc.), or even the specific debt collector assigned to contact that consumer.[504] Systems can also learn from engagement with prior communications (e.g., did the consumer click on the link in that email or sign up for a payment plan with a particular collector) in order to tailor future messages.[505]

Collectors can also use analytic software to record and evaluate collection calls. Speech analysis may either be conducted while the call is ongoing or performed on a recording after the fact.[506] Here is one company's description of its real-time speech analytics product:

> EurekaLive: CallMiner's real-time solution, using the same analytical technology to provide QA and alerts in real-time to supervisors and agents, monitoring in-progress calls for the presence or absence of specific language or acoustic characteristics such as escalation attempts, churn language, profanity, compliance scripts, or high emotion. EurekaLive Agent Assistant monitors every live call in real time (within 3–10 seconds), offering script compliance monitoring, emotion detection, next-best-action guidance, event alerting, and automated context-driven workflow initiation directly to agents.[507]

Debt collectors using speech analytics may have the ability to issue reports about individual agents that contain data such as the frequency with which they failed to provide required information, deviated from the script, or used prohibited

497 National Consumer Law Center, Federal Deception Law § 6.7 (4th ed. 2022), *updated at* www.nclc.org/library.

498 15 U.S.C. § 7001(c). *See also* National Consumer Law Center, Consumer Banking and Payments Law § 11.3 (6th ed. 2018), *updated at* www.nclc.org/library.

499 *See, e.g.*, Experian, Debt Portfolio Evaluator: Perceptive new analysis tool for debt buyers and debt sellers (Dec. 2008) (listing sample output data to be used in bidding on portfolios), *available at* www.experian.com; TransUnion, Identify portfolio risk and take action sooner (advertising "up-to-date estimations of portfolio value" for up to 300,000 records in less than 48 hours), *available at* www.transunion.com. *See also* Shane Shifflett and Justin Scheck, Most Big Debt Collectors Backed Off During the Pandemic. One Pressed Ahead., Wall St. J., Apr. 7, 2021 (mentioning Sherman Financial's use of computer analytics to estimate portfolio profitability).

500 *See, e.g.*, Aite, Beyond the Call Center: Emerging Strategies for Collecting Consumer Debt (Mar. 2019) (prepared for FICO) ("another important data point executives track is changes to individual borrowers' financial health, typically measured by changes either in credit risk scores or individual attributes contained within credit files"); Equifax, Collection Insights (2012) (providing a list of "triggers" that can be set up to monitor portfolios on a daily basis), *available at* www.equifax.com; Experian, Daily Monitoring of Collection Accounts (daily monitoring of selected "triggers"), *available at* www.experian.com; TransUnion, Account Prioritization, *available at* www.transunion.com.

501 *See, e.g.*, Aite, Beyond the Call Center: Emerging Strategies for Collecting Consumer Debt (Mar. 2019) (prepared for FICO) ("Some collectors have developed specialized scorecards for accounts deemed particularly high-risk, which include recommendations on the best recovery strategy."); TransUnion, CreditVision Recovery Scores ("Data elements not found in traditional models, such as balances, credit limits, past due summaries and 30 months of account history, provide a 360-degree view into how a consumer's behavior has trended over time. This insight enables you to identify and prioritize those most willing and able to pay—saving you time and money."), *available at* www.transunion.com.

502 *See, e.g.*, Aite, Beyond the Call Center: Emerging Strategies for Collecting Consumer Debt (Mar. 2019) (prepared for FICO) ("several debt collection executives note the importance of using analytics to determine which accounts should be placed with third-party collectors (and the optimal terms of such a placement) or sold"); ScoreData, Debt Management and Collection Analytics (Customer Segmentation) (Aug. 1, 2016) ("Our predictive solutions segment the customers using their demographics, collection data based on their risk profile but also do analysis to find the most suitable treatment for each segment."), *available at* www.scoredata.com.

503 *See, e.g.*, Experian, Identify Bankrupt, Possible Military, Deceased and Other High Risk Accounts Before It's Too Late (discussing FirstSweep), *available at* https://www.experian.com; TransUnion, Inventory Segmentation: Scrub your inventory to mitigate risk and enhance recoveries, *available at https://www.transunion.com*; CFPB v. Weltman, Weinberg & Reis Co., L.P.A., 2018 WL 3575882, at *4 (N.D. Ohio July 25, 2018) (describing law firm "scrubbing").

504 Robert J. Szczerba, *Which Industry Is Next For A.I. Disruption? The Answer Might Surprise You*, Forbes, Apr. 26, 2017.

505 Ryan Lawler, Collectly is moving debt collection online (TechCrunch, Mar. 28, 2017).

506 *Compare* Castel, Upload, Transcribe and EXPLORE Call Audio Recordings Easily, *available at* www.castel.com, *with* Castel, Castel DetectTM LIVE Speech Analytics, *available at* www.castel.com.

507 CallMiner, The Inner Circle Guide to Customer Contact Analytics (Aug. 2014), *available at* http://callminer.com.

terms.[508] Speech analytics software that transcribes recordings may be searchable for particular keywords.[509]

In the CFPB's survey of third-party collection agencies, seventeen out of fifty-eight respondents used speech analytics.[510] The smallest collection agency that reported using speech analytics had eighty-three employees.[511] In a 2020 survey of collection agencies, 18% reported using speech analytics.[512]

508 *See, e.g.*, FICO, FICO Engagement Analyzer ("Engagement Analyzer detects and reports compliance and policy violations in real time, with alerts for immediate corrective action. Managers use analytics to identify collectors who require additional compliance training."), *available at* www.fico.com; Nexidia, Remain compliant and avoid risk with Nexidia Interaction Analytics ("Analyze each and every interaction to quickly identify all occurrences or absences of mandatory disclosures or use of inappropriate language or behavior and track to an individual level."), *available at* www.nexidia.com.

509 *See, e.g.*, Castel, Upload, Transcribe and EXPLORE Call Audio Recordings Easily (calls are transcribed and may be searched for keywords), *available at* www.castel.com; Voci, Speech Analytics (product "automatically transcribes audio into searchable text"), *available at* https://vocitec.com.

510 CFPB, Study of third-party debt collection operations 34 (July 2016).

511 *Id.*

512 TransUnion, A Year of Pivots, Challenges and Opportunities: The Collections Industry in 2020 (2020), *available at* https://solutions.transunion.com.

Chapter 2 Overview of Initial Steps in Bringing an FDCPA Case

2.1 Introduction

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 to 1692p, and its implementing rules under Regulation F, 12 C.F.R. Part 1006 (effective November 30, 2021), provide powerful tools for consumers who have been harassed, abused, or treated unfairly by debt collectors. Bringing a claim under the FDCPA involves many different, complex steps. This chapter provides a brief overview of some of the initial steps an attorney must consider when bringing an FDCPA claim. Each section will provide citations to other chapters in this treatise that provide more detailed information about each topic.

2.2 Initial Interview

2.2.1 Strategy for Initial Interview

An initial interview with a prospective client who has been subjected to debt collection harassment may be lengthy. After debt collection contacts are identified as a core legal problem, all available documents must be gathered, the validity of the debt should be examined, damages ascertained, and the availability of witnesses explored. Only then is the lawyer in a position to assess the case properly, chart future action, and counsel the client. As a result, an initial interview may last an hour or longer. If the case is accepted, the interview should conclude with an explanation of the attorney's retainer and fees,[1] a cautious description of the consumer's claims, and a discussion of the debtor's responsibility on the underlying debt. The retainer, or another document, should include written settlement authority, including issues related to damages, costs, and attorney fees.

An attorney new to this area of practice should spend some time prior to the interview learning about abusive debt collection techniques to help clarify debt collection incidents that may have been confusing to the potential client. Reading Chapter 1, *supra*, is a good start. Reading 15 U.S.C. §§ 1692c to 1692i and Chapters 5 to 10 *infra*, would also be helpful. This treatise's digital version contains interview checklists that may be helpful as well. *See* Appendix F, *infra*, for instructions about how to access Practice Tools in online companion materials.

It is advisable to let the client control the interview's early stages. This allows the client to tell their story, builds the client's trust and confidence in the interviewer, and avoids repeated interruption of their narrative. After the client finishes, the lawyer should clarify the facts and start to determine the client's legal objectives. The client's goals and desires are paramount in determining the course of action. In formulating the direction to pursue, counsel must advise of the various remedies available.[2]

If an action for debtor harassment is consistent with the facts and the client's general objectives, questioning should begin to focus on the number, sequence, quality, and content of the collection contacts. If the client is uncertain of the dates of the contacts, it may be worthwhile to ask them to reconstruct the sequence of events beginning at the time the debt was incurred, then moving to payment difficulties, and then to collection contacts. Such reconstruction may be most easily accomplished by referring to the documents at hand, that is, collection letters. If any collection letters are missing, their availability and content should be determined. Asking the client to recall significant events such as birthdays, holidays, and anniversaries may help them further develop this chronology.

When dealing with a debt collection agency or collection attorney, the most promising remedies usually are provided by the FDCPA[3], state statutes[4], and in egregious cases, tort law.[5]

2.2.2 Questions to Uncover Damages

Once a sequence of events has been developed, the client should be instructed to describe fully the events during and after each harassing contact.[6] Probing questions should be asked to identify corroborating witnesses to the contacts and damages and to determine the availability of documentary evidence, such as dunning letters and their envelopes, and telephone, pharmacy, and doctor's bills. When the client describes a harassing collection contact, the interviewer should ask general questions about how the consumer felt immediately afterward, for example, "How did you feel when you put the receiver down after the phone call?" More detailed, probing questions are likely to provoke additional recollection, for example, "So you felt upset after you were called a liar on the telephone?"

Consumers abused by a debt collector may be very upset recalling the abuse. Lawyers untrained in dealing with clients' feelings directly may shy away from questions that may evoke strong emotions. However, such questions are essential to

1 For sample retainer agreements, see Appendix F, *infra*, for instructions about how to access the Practice Tools through online companion materials.

2 *See* §§ 11.1, 11.8, 11.9, 11.10, *infra*.

3 *See* Ch. 3 to 13, *infra*.

4 *See* §§ 16.2, 16.3, *infra*.

5 *See* Ch. 15, *infra*.

6 A sample series of questions useful in preparing client interviews is available online as companion material to this treatise. It should not be used as a questionnaire—clients will become more relaxed and express themselves better and more helpfully in the personal atmosphere of an extemporaneous initial interview than in an interview that appears to follow a highly structured format—but it may be helpful as a checklist.

determine the degree of emotional distress and injury suffered by a client.[7] If the client recalls intense emotional distress, they should be asked whether they cried, took medication, discussed the problem with a physician, friend, or anyone else, lost sleep, experienced nausea or vomiting, etc.[8] The names and phone numbers of potential witnesses who observed the distress should be obtained as they may be more convincing witnesses. All these questions are necessary to determine the existence and extent of compensable damages, which may be a prerequisite to some state causes of action.[9] Direct, probing questions should be asked after each collection contact is described. Section 1.3.1.3, *supra,* discusses the mental health effects of debt on consumers.

Clearly courts will award damages for emotional stress resulting from collection harassment.[10] However, many practitioners seem to neglect to make even a routine inquiry about the stress suffered by harassed debtors. Moreover, many harassed consumers will not volunteer information about such suffering, not realizing its legal relevance, not believing the lawyer will want to listen to such private suffering, not wanting to remind themselves of this painful experience, not willing to expose their vulnerability to harassment or what they may believe is emotional weakness, or because of their shame of being financially distressed.

Many practitioners seem to fear opening the floodgates of the discussion of such emotional issues due to time pressures or uncertainty about their ability to control an interview delving into intense emotions. And for many types of claims with which attorneys deal, stress damages are infrequent. However, delving into the client's suffering is central to the legal assessment of debtor harassment cases.

It is important to explore the full extent of emotional distress resulting from collection harassment while it is still fairly fresh in the client's mind. Most people will "bury" such unpleasant memories if counsel waits until just before trial to discuss them with the client. Questions should be framed about the stress surrounding each collection contact—its intensity, how it manifested itself, its duration, any witnesses of the stress, its treatment, including over-the-counter medications, and any other independent causes of the stress. Full and early inquiry about stress-related suffering will improve counsel's preparation of a debt collection harassment case, and will markedly increase damage settlements and awards.

Section 1.3.1.1, *supra,* discusses the extent of consumer debt in the U.S., including the amounts in default and the types of debt most consumer incur. Section 1.3.1.3, *supra,* examines the mental health consequences of consumer debt. For a detailed list of injuries and symptoms courts have found that are related to stress, see § 11.8.2.5, *infra.*

2.2.3 Examining the Validity of the Debt

After developing a chronology of collection contacts, details of each contact, and names, addresses, and telephone numbers of witnesses, the interviewer should examine the validity of the debt and possible defenses to its collection in appropriate cases.[11] This inquiry may uncover a defense to the client's liability, and also serves to assess the strength of the collection harassment claim. A dispute over the validity of a debt generally, and the collector's ability to collect the debt from the consumer, increases the judge's and jury's sympathy for the plaintiff in an action for debt collection harassment.[12]

In some cases, when the consumer's actual damages are too small to pursue or difficult to prove, analysis of the validity of the debt may not be cost effective. For example, the consumer may have an FDCPA claim for statutory damages. If that claim is filed in federal court[13], the validity of the debt would not be relevant. The time and cost of determining the legal validity of the debt may be more than the amount the consumer owes and therefore, it may not be worthwhile for the consumer to hire counsel to conduct such an inquiry. On the other hand, that inquiry may reveal additional legal claims that are valuable to both the consumer and their attorney.

Proof of the falsity of an allegation of indebtedness is a necessary element in one species of action for invasion of privacy (holding up to false light),[14] and may also be an issue in a defamation action[15] or the basis for a claim of deception.[16] A consumer's liability for a debt may be determinable from Truth in Lending disclosures, contracts, security agreements, payment books, receipts, ledger or journal entries, and similar materials.[17] These documents should be obtained from the client or creditor as soon as possible.[18] However, the inquiry into the validity of the purported debt should not cease here. The client must be asked to explain any defenses to the alleged

7 If the client is reticent and does not describe emotions in any detail, "reflecting" or "restating" responses often elicits greater detail. These responses simply restate the client's statement, for example, "So you felt angry (or embarrassed, or guilty, or sad) when you hung up?" Pause after the question until there is a response. This gives the client permission to discuss further these feelings. Reflecting can be carried a step further by characterizing the emotional response at a deeper level, for example, "You must have felt very angry (or very embarrassed, or guilty, or depressed) when you hung up." A client who is reticent in an interview is also likely to be reticent on the witness stand, thereby decreasing the chances for a substantial award of damages.

8 *See* § 2.6.2.2, *infra* (checklist of common injuries and losses).

9 *See* § 15.2, *infra.*

Under the Fair Debt Collection Practices Act, proof of actual damages is not a prerequisite to recover statutory damages. *See* § 11.9.2, *infra.*

In addition to out-of-pocket expenses and compensation for distress, an award of statutory damages may be made. *See* § 11.9, *infra.*

10 §§ 2.6, 11.8.2, 15.2, 16.2, 16.3, *infra.*

11 *See* National Consumer Law Center, Collections Actions Ch. 4 (5th ed. 2020), *updated at* www.nclc.org/library.

12 *See* § 11.4.2, *infra.*

13 Keep in mind that an allegation of concrete harm, not just a claim for statutory damages, is necessary for Article III standing in federal court. *See* § 11.15, *infra.*

14 *See* § 15.3.3, *infra.*

15 *See* § 15.5, *infra.*

16 *See* Ch. 7, § 16.3, *infra.*

17 *See e.g.,* National Consumer Law Center, Truth in Lending (10th ed. 2019), *updated at* www.nclc.org/library.

18 *See* § 11.5.4, *infra.*

obligation, such as the creditor's failure to perform, breach of warranty, mistaken identity, wrong amount, expiration of the statute of limitations, etc.

2.2.4 Clarifying the Client's Legal Objectives

After the initial discussion of liability, damages, and proof, the interviewer should be prepared to counsel the client. The purpose of this stage of counseling is to clarify the client's present objectives and shape their expectations for any case to be filed:

- Does the client only want to prevent future collection contacts?
- Does the client desire assistance in resolving the alleged debt?
- How important to the client and feasible is the rehabilitation of their credit rating?
- Is the client willing to sue, or are they willing to forego a recovery for the damages suffered?
- Is the client anxious about being a witness or involving their witnesses in court?
- Is the client willing to assert their consumer rights (requesting cessation of contacts, verification of the debt, recording or taking notes of debt collector's calls)?[19]
- If a class action were appropriate, would the client want to pursue a claim for the class if it might mean postponing their own recovery?
- If the case involves an important principle of law, is the client interested in pursuing that principle, or are they mainly interested in monetary relief?

These issues, with all their implications and ramifications, should be explored with the client as part of the counseling process. It may be important that some cases of debtor harassment be treated as test cases in order to promote favorable constructions of broad statutory or common law standards or to increase the accustomed level of monetary settlements. When defending a debt, the client's property may be protected by exemption laws, and the client may be judgment proof.[20] These considerations must be discussed with the client.

The FDCPA provides several important rights to consumers. These include:

- The right to terminate many future collection contacts;[21]
- The right to stop contacts at work if the employer prohibits them, for example, no personal calls during office hours or while on duty;[22]
- The right to stop contacts at work or elsewhere if they are inconvenient;[23]
- The right to obtain verification of a disputed or unfamiliar debt;[24] and
- The right to stop contacts by obtaining legal counsel.[25]

The assertion of these rights by the client should be discussed with the client.

The consumer should also be counseled on potential tax liability in the case.[26] When the money loaned is not paid back—that is, a debt is forgiven, cancelled, discharged, etc.—the borrowed money becomes income subject to federal income tax.[27] Most representation of consumers in debt collection harassment cases is under the FDCPA, state consumer protection laws, or tort law. Some lawyers have also been able to provide representation to consumers who are defendants in state debt collection suits on a contingent fee basis using state fee shifting statutes or similar statutes that make attorney fees clauses in the underlying contract reciprocal, available to the consumer's attorney if successful in the case.[28] Some other attorneys have found it viable to take such cases on a lump-sum fee basis with a subsequent consumer claim sometimes providing additional fees.

It is important to shape the consumers' expectations for their case at this point. Cases involving a great amount of abusive debt collection causing weeks of emotional distress may result in potential jury verdicts in five figures.[29] In egregious cases that number may rise to six figures. Potential clients may be aware of these potential damages from information on the Internet. It is important that the consumer expectations regarding damages not be unrealistically high at this point in the case.

The potential for increased damages in a case of debt collection abuse rises if the collectors are allowed to continue on their course while the consumer and their lawyer systematically develop information on the different debt collectors involved and their collection techniques. Some clients will not be able to endure continued collection and that decision will influence the nature of the case that may be brought. Other consumers will feel empowered by organizing the information, keeping telephone logs, notes, and recordings in states that allow recording.[30]

2.2.5 Careful Case Selection

Lawyers considering handling a fair debt collection case should proceed carefully after interviewing potential consumer

19 *See* §§ 2.4.1, 5.8, Ch. 9, *infra*.
20 *See* National Consumer Law Center, Collection Actions (5th ed. 2020), *updated at* www.nclc.org/library.
21 *See* § 5.8, *infra*.
22 *See* § 5.6, *infra*.
23 *See* § 5.4, *infra*.
24 *See* Ch. 9, *infra*.
25 *See* § 5.5, *infra*.
26 *See* § 11.14, *infra*.
27 *Id.*
28 *See* National Consumer Law Center, Collection Actions § 17.1.3 (5th ed. 2020), *updated at* www.nclc.org/library; Cal. Civ. Code § 1717 (West); Conn. Gen. Stat. § 42-150bb; Fla. Stat. § 57.105(7); Haw. Rev. Stat. § 607-14; Mont. Code Ann. § 28-3-704; N.H. Rev. Stat. Ann. § 361-C:2; N.Y. Gen. Oblig. Law § 5-327 (McKinney); Or. Rev. Stat. § 20.096; Utah Code Ann. § 78B-5-826 (West); Wash. Rev. Code § 4.84.330.
29 *See* § 11.8.2, *infra*.
30 *See* § 11.5.2, *infra*.

clients. Many debt collectors and judges will closely examine the consumer's background and conduct, and the consumer's lawyer should not be surprised in that regard. Are there sufficient incontrovertible facts, or is further investigation required to assess the strength of the case being considered? What blemishes exist in the consumer's records or history—a bankruptcy, outstanding suits or judgments, aliases, other outstanding fair debt claims, arrest, or criminal convictions? Such matters do not disqualify the consumer from the protections of the FDCPA, but they are better addressed in candid interviews with the consumer's lawyer rather than first coming to light in a deposition, a motion, or a trial. Copies of the consumer's credit reports, which can be obtained free each year by the consumer, may be informative. Lawyers new to representing consumers in this area should look for clear violations that are well supported by the case law in their circuit and seek co-counsel experienced in the FDCPA practice at least for their initial cases.[31]

Care should be taken to probe the client's story to avoid embarrassment, and potential sanctions, if the client fabricated some part of the FDCPA claim or concealed their own misbehavior in dealing with the creditor or debt collector. While the FDCPA focuses on misconduct by debt collectors, not the consumer's conduct, some judges and juries will react negatively to consumers who appear to be unlawfully gaming the financial and legal systems.[32]

2.2.6 Developing a Plaintiffs' Fair Debt Collection Practice

There are a number of ways to develop a plaintiffs' fair debt collection law practice. Touch base with the members of the National Association of Consumer Advocates (NACA)[33] in the area to talk about the pros and cons of that practice locally. They are likely to be a source of referrals or co-counseling. Explore client referral relationships with consumer bankruptcy attorneys when they send you their bankruptcy client's fair debt collection claims.[34] Join legal services and bar referral panels. Establish a website. Create a profile in LinkedIn.com. Join NACA, attend their webinars, and participate in the FDCPA and other listservs. Come to the annual conferences sponsored by NCLC and NACA on these topics. Once you have developed some expertise, become a CLE speaker.

2.3 Bankruptcy and Fair Debt Collection Practices Claims

Special attention needs to be given to the bankruptcy implications of an FDCPA claim that arose before or during a consumer's bankruptcy. Dismissal of the FDCPA claims and possibly sanctions may threaten the unwary consumer attorney in this situation. The steps that need to be taken are discussed at § 13.3, *infra*.

2.4 Stopping Debt Harassment Without Litigation or Bankruptcy

2.4.1 Overview

Consumer attorneys can help solve their clients' distress from debt collection abuses without committing the full legal resources required for a lawsuit or bankruptcy. Whether strategies short of suit are appropriate in any given situation depends upon the client's objectives, the nature of the abuse (for example, whether the harassment is aberrant or routine for that collector), the damages suffered, and issues of efficiency (for example, litigation provides greater deterrence). This section details five strategies to combat collection harassment short of pursuing a lawsuit or declaring bankruptcy and includes a framework for evaluating these strategies. Of special note are model letters accompanying three of these strategies. Some excellent tips for vetting a debt collector and avoiding a scam when the consumer does not recognize the debt are on the Federal Trade Commission's website[35] and the website of the Consumer Financial Protection Bureau (CFPB).[36]

2.4.2 Directing the Collector to Stop Dunning Contacts

The simplest strategy to try to stop debt collection harassment is for the consumer to notify the debt collector in writing[37] that the consumer refuses to pay the debt or that the consumer wishes the debt collector to cease further communication with the consumer. In addition, under Regulation F § 1006.14(h) (effective November 30, 2021), a consumer can stop certain types of contact and states "a debt collector must not communicate or attempt to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person."[38]

The FDCPA requires collection agencies and attorneys to stop dunning consumers after a written request asking the collector to cease collection contacts or stating the debt is not owed.[39] Creditors collecting their own debts, unlike collection agencies, debt buyers, and collection attorneys, generally are

31 A directory of consumer lawyers is available at www.consumeradvocates.org and is searchable by areas of practice and state.

32 *See* § 12.7.4, *infra*.

33 *See* www.consumeradvocates.org.

34 A directory of consumer bankruptcy attorneys is available at www.nacba.org.

35 Dan Dwyer, "Don't recognize that debt? Here's what to do" (Dec. 8, 2015), *available at* https://www.consumer.ftc.gov.

36 Courtney-Rose Dantus, "How to tell the difference between a legitimate debt collector and scammers" (Nov. 20, 2019), *available at* https://www.consumerfinance.gov.

37 *See* § 5.8, *infra*. This can also be done electronically if the debt collector accepts that method of communications from consumers. *See* Reg. F § 1006.6 (c)(1) (effective Nov. 30, 2021).

38 Reg. F § 1006.14(h); § 6.9, *infra*.

39 15 U.S.C. § 1692c(c); § 5.8, *infra*.

not covered by the FDCPA,[40] and thus do not have to honor such written requests. Nevertheless, creditors often do comply with such requests.

The consumer should keep a copy of the written request. Immediately following is an example of such a letter. The CFPB website also contains five recommended templates for consumers with debt collection grievances.

Example of Consumer's Letter Requesting Collector to Stop Dunning Contacts

Sam Consumer
10 Cherry Lane
Flint, MI 10886

[Date]

ABC Collection Agency
1 Main Street
Flint, MI 10887[41]

Dear Sir or Madam:

I am writing to request that you stop communications to me about account number (000723) with Amy's Department Store. The Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(c), requires that you honor my request.

[Consider adding the following or a similar description of the consumer's situation:]

This is not my debt.

or

I paid this debt in full on [date].

or

I am living on $____/month which comes from [name of government benefit(s)]. I believe that all my income is exempt from collection and creditors may not garnish this pay.

You should be aware that your employees have engaged in illegal collection practices. For example, I received a phone call at 6:30 a.m. from one of them last week. Later that day, I was called by the same person at my training program which does not permit personal phone calls except for emergencies. My family and I were very upset by these tactics.

Your cooperation will be appreciated.

Very truly yours,
Sam Consumer

While the FDCPA does not require debtors to give any reason for requesting that collectors cease their contacts, it may be to the consumer's benefit to inform the collector of the consumer's financial situation. This may cause the collector to focus collection efforts on consumers with greater ability to pay, and this information may forestall a lawsuit or a negative report to a credit reporting agency. Information about previous abusive contacts provides a foundation for increasing a damage award should suit by the consumer become necessary; this information may also result in the collector reviewing and improving its compliance with the FDCPA.

If this, or another letter of the consumer, acknowledges the debt, the applicable state statute of limitations may begin to run anew.[42] This is usually against the consumer's interest. Statutes of limitations limit the number of years within which a debt may be collected. They generally run from the time of default, the last payment, or the last acknowledgment of the debt. Thus, an acknowledgment or partial payment may start the statute of limitations running all over again depending on the relevant state law. If much of this period has expired, the debt should not be casually acknowledged, and that part of the above letter should be rewritten. Statutes of limitations vary widely from state to state, from a few years, to four or five years, to ten or more years, and may involve complicated layers of choice-of-law rules.[43]

The advantages of sending a copy of this letter, or a letter notifying the creditor about the misconduct by its collector, to the creditor probably outweigh the disadvantages in most cases. The creditor may not support abusive collection tactics and may require the collector to improve its collection methods. This letter may later establish that the creditor was aware of the collector's misbehavior, enhancing the creditor's liability in a future case.

Collection agencies and collection attorneys sometimes take the position that it is unlawful and unethical for the consumer's attorney to contact the collector's client, the creditor. They argue that it is unlawful interference with the collector's contractual relationship with the creditor.[44] This argument ignores that the consumer already has a preexisting contractual relationship with the creditor and that the collector's abuse is probably outside of the collector's contractual relationship with the creditor. While the collector's arguments are generally without merit, responding to the collector's claims requires time, and that may outweigh the benefit to a particular consumer of copying the creditor.

2.4.3 *Notifying the Collector That Bank Account Is Exempt from Seizure*

Some types of income, such as Social Security and public assistance benefits, are exempt from creditors' postjudgment remedies and that exemption follows those funds into bank accounts in most circumstances.[45] However, it is not unusual for a creditor to have those funds frozen until the debtor establishes the exemption in court. Freezing the account of a low-income household can be devastating even for a short time as there are usually no reserves for medications, rent, food, heat, etc.

40 *See* § 4.7, *infra*.

41 Consumers sending a letter by mail can use certified mail, return receipt requested, and add the certified mail receipt number to the letter. This will provide the date the collector received the letter.

42 *See* National Consumer Law Center, Collection Actions § 3.7 (5th ed. 2020), *updated at* www.nclc.org/library.

43 National Consumer Law Center, Collection Actions § 3.7.3 (5th ed. 2020), *updated at* www.nclc.org/library.

44 *See generally* § 15.4, *infra*.

45 National Consumer Law Center, Collection Actions Ch. 14 (5th ed. 2020), *updated at* www.nclc.org/library.

NCLC's Collection Actions Ch. 14 (5th ed. 2020), *updated at* www.nclc.org/library, examines laws that protect debtors' income from creditors and provides an analysis of the protections afforded exempt sources of income when they are deposited into bank accounts.

2.4.4 Proposing a Workout Agreement

Probably the most common consumer strategy (but not necessarily the best) is to work out payments with those collectors who have most effectively harassed them. Many collection agencies and some creditors will take an initial position that they must receive payment of the balance in full. They will urge the consumer to borrow from a loan company or relatives to pay off the debt. But if the debt is not secured with collateral and has a low interest rate or no interest (for example, a medical bill), it is to the consumer's financial advantage to stretch out the payments on this debt so that secured debts and debts with higher interest or late charges may be paid first.[46] Usually the collector will eventually agree to an installment plan that is realistic for the consumer.

Creditor leniency is likely to be greatest when local employment is good and interest rates are low. This is because creditors price their credit with an expectation of a certain level of delinquencies. Creditors usually expect that repayment problems will be unavoidable for one to three percent of their customers even in good times. When local unemployment increases, a creditor's delinquencies will usually rise above the expected level, and the creditor will become stricter because its profits are squeezed. Creditors are also stricter in their handling of delinquent borrowers when the cost of money that the creditor borrows is high or is rising. The primary leverage for the consumer in obtaining a realistic payment plan is the consumer's financial distress. "You can't get blood from a turnip," is a common collector's saying.

Consumers should avoid the trap of giving a collector a postdated check as part of a workout agreement. Writing a check without sufficient funds to cover it is a crime in some states.[47] Giving a collector a postdated check with the possibility that the check will not be covered provides the collector the even greater leverage of threatening or pursuing criminal prosecution.[48] The check also identifies the bank account which the debt collector may attach or garnish. Unscrupulous debt collectors sometimes use the account and routing numbers to make unauthorized electronic withdrawals from consumer's accounts.[49]

Borrowing money (for example, a small loan, consolidation loan, credit card advance, or second mortgage) to make payments to an abusive collector is another frequent trap for consumers. Such borrowing often results in the consumer paying higher finance charges, being faced with installments which are no more realistic, and being required to put up new collateral. Borrowing at low interest rates to stretch out payments well beyond the original debt may provide relief to consumers. However, many financially distressed consumers do not successfully arrange low-cost loans that may be offered by a local bank or credit union, but refinance at worse terms than the original loan through a national bank, credit card issuer, or other high-cost lender.

Most troubling, a consumer who enters into a workout agreement, may forego defenses and offsetting legal claims related to the original debt. For example, if a debt is for a $500 car repair bill and the consumer has good reason to believe only $200 worth of work was done, the consumer should use this dispute to reduce the total claim before agreeing to installments. While it takes a trained lawyer to recognize most legal defenses and claims, consumers should be able to decide whether the seller performed as promised and whether the product or services provided the benefits reasonably expected. If not, that dissatisfaction should be used in the negotiation of the workout plan. In most consumer transactions, claims and defenses related to underlying sales transactions may be raised against the financier and the collector.[50]

2.4.5 Complaining to Consumer Protection Agencies

Another strategy to stop collection harassment is for the consumer (or lawyer) to write an e-mail or letters to state and federal agencies responsible for enforcing the laws against debt collection abuse. While the government agency is not likely to investigate unless it has other complaints against the same collector (which probably cannot be known beforehand), sending the collector a copy of the complaint letter may produce good results.

A complaint should be submitted to the Consumer Financial Protection Bureau online via www.consumerfinance.gov. The CFPB will forward the complaint to the company and then convey the responses to the consumer.

Whether copies to state regulatory agencies (for example, state banking department, collection agency licensor, attorney general's office) are also effective should be evaluated on a local basis. If your state reports debt collection licensing information to the National Multi-State Licensing System (NMLS), you may be able to use consumer access portal (https://www.nmlsconsumeraccess.org) to look up the name of the debt collector and then follow the links for your state to file a complaint with the licensing entity.

46 *See* National Consumer Law Center, NCLC Guide to Surviving Debt Ch. 1 (2021).

47 *See* National Consumer Law Center, Collection Actions Ch. 8 (5th ed. 2020), *updated at* www.nclc.org/library.

48 Criminal bad check laws often do not apply to postdated checks and checks written for preexisting debts. National Consumer Law Center, Collection Actions Ch. 8 (5th ed. 2020), *updated at* www.nclc.org/library.

49 *See* National Consumer Law Center, Consumer Banking and Payments Law Ch. 5 (6th ed. 2018), *updated at* www.nclc.org/library.

50 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices Ch. 5 (10th ed. 2021), *updated at* www.nclc.org/library.

2.4.6 Complaining About Billing Errors

If collection letters ask for more than is due or some other possible mistake is on the bill (for example, wrong account, wrong person, insurance paid the bill), the consumer should write to the collector and request that the mistake be corrected. The FDCPA requires debt collection agencies and lawyers (but generally not creditors)[51] to stop collection efforts until they provide verification of the debt, as long as the consumer's written request was mailed within thirty days of the consumer receiving notice of the right to dispute the debt.[52] If the debt collector has inaccurately reported the debt to a credit reporting agency, both the debt collector and the reporting agency should be requested in writing to make a correction.[53]

If the dispute involves a revolving account, a credit card account, or an electronic transfer of money, federal regulations specify that if a consumer, within sixty days of receiving an erroneous bill, sends a letter to the creditor indicating the billing error, the creditor must reexamine the bill.[54] Even when federal and state law do not require the collector to investigate the error, some collectors will probably still pause their collection efforts to investigate.

2.4.7 Lawyer Letter Requesting the Collector to Stop Contacts

A more intensive strategy to stop collection harassment is for the consumer's lawyer to write the collector requesting the collector to stop contacting the consumer. As described at § 2.5.7.6, *infra*, demand letters should not be sent to debt collectors unless the debt collector's SLAPP suit practice or policy is known.

Many consumers suffering temporary financial distress go to lawyers for a bankruptcy when all they actually need is relief from a few abusive bill collectors collecting unsecured debts. When that is the case, letters written by the consumer like that reproduced at § 2.4.2, *supra*, may dispose of the problem without the costs of legal assistance. When those letters do not stop the abuse, a letter from a lawyer often will. In a case of debt collector harassment, the consumer may be best off waiting to document the abuse before the attorney's letter is sent.

The FDCPA requires collection agencies and lawyers to stop contacting a consumer known to be represented by a lawyer as long as the lawyer responds to the collection agency's inquiries.[55] Creditors, although not covered by the FDCPA, will also usually honor such requests from a debtor's lawyer.[56] In addition, lawyers representing the creditor are generally bound by legal ethics not to contact a person represented by another lawyer. Below are two examples of attorney's letters requesting that a collector stop collection contacts.

Examples of Lawyer's Letters Requesting Collector to Stop Contacts

[Date]

ABC Collection Agency
1 Main St.
Flint, MI 10887
VIA FACSIMILE: 771-345-6789

RE: Sam Consumer
Account No.: 00723
Amount alleged due: $
Alleged creditor:
File No.: 523

Dear Sir or Madam:

Please be advised that I represent the above-named individual, who has recently received a debt collection communication from your company, on the above referenced and all other claims of indebtedness.[57]

Pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., you are hereby directed to:

1. *Cease all further communication with my client pursuant to 15 U.S.C. § 1692c(c), and*
2. *Provide the undersigned with verification of the purported debt.*
3. *Provide the undersigned with the name and address of the original creditor, if different from the current creditor.*

Until advised otherwise, you should mark this matter as "disputed." I anticipate your cooperation herein.

Sincerely,
Bob Lawyer
Attorney at Law

BL/dp
cc: Sam Consumer

A letter laying the foundation for increased tort and punitive damages follows.

[Date]

ABC Collection Agency
1 Main Street
Flint, MI 10887

RE: Account of [Sam Consumer]; Account No. 00723

Dear Sir or Madam:

Please be advised that I represent [Sam Consumer] with regard to the above and all other existing claims and

51 *See* § 4.7, *infra*.
52 15 U.S.C. § 1692g, *discussed at* Ch. 9, *infra*.
53 *See* § 14.6, *infra*.
54 12 C.F.R. §§ 1005, 1026.13 [§§ 205, 226.13], *discussed in* National Consumer Law Center, Truth in Lending § 7.9 (10th ed. 2019), *updated at* www.nclc.org/library.
55 15 U.S.C. § 1692c(a)(2), *discussed at* § 5.5.3, *infra*.
56 Creditor may be subject to a state prohibition against contacting a represented consumer. *See generally* § 16.2.4.3.3, *infra*.
57 Indication that the consumer is represented by legal counsel on all debts will provide greater protection than limiting representation to a specific obligation. *See* § 5.5, *infra*.

indebtedness.[58] *You are advised to direct any future contacts regarding this or other accounts of my client to me. You should cease all contacts with my client immediately pursuant to 15 U.S.C. § 1692c(c).*

This is to advise you that [Sam Consumer] was injured in December and is temporarily unable to work. Because of this, they will not be able to address any claims you may have until they recover—probably sometime after February. In the meantime, you are requested to forbear from taking any steps to collect this claim without contacting me.

You should also be advised that I have been informed that your employees have been engaged in abusive collection tactics. These include: (1) _____; (2) _____; (3) _____. As a result, my client and their family have suffered severe emotional distress. Any future contacts will surely aggravate that distress.

You should also be advised that my client does not believe your claim is justified. [State dispute of debt if any.]

Because of my client's condition, it is unnecessary for you to make routine collection calls to me.

Thank you for your cooperation in forbearing on this matter during this period of financial stress for my client.

Very truly yours,
Bob Lawyer

cc: Consumer Financial Protection Bureau
P.O. Box 4503
Iowa City, Iowa 52244

Note that the letter is sent by date-stamped facsimile, as it is the quicker and usually most reliable method. As noted in § 2.4.2, *supra*, it can also be sent electronically in some cases. It could also be sent certified mail, return receipt requested. The signed and dated return receipt card will pinpoint the date upon which the collector learned of the consumer's legal representation. This return receipt card will prevent the debt collector from denying knowledge of the attorney's involvement. Should the collector contact the consumer after the attorney's letter has been received, as evidenced by the signed and dated return receipt card, a violation of the FDCPA has occurred.[59] This attorney's letter also requests the collector to provide verification of the debt. The debt collector must cease further collection efforts until it obtains verification and mails that information to the consumer.[60]

2.4.8 Evaluating Strategies for Harassed Debtors

Whether a harassed debtor should use one or more of the five strategies discussed above, or whether that debtor instead should document the collection misconduct and institute suit or file bankruptcy will depend upon a number of considerations. For example:

Client's objectives

- Is the client legally responsible for the debt?
- Is the client's financial distress temporary (for example, temporary layoff), permanent (for example, physical disability), or of unknown duration (for example, permanent layoff, recently divorced)?
- Is the client collection proof?
- Do the debt collector's communications with the client violate the Fair Debt Collection Practices Act and/or state law?
- Has the client and the family suffered significant emotional distress or out-of-pocket expense?
- Is the client aware of the possible value of actual and statutory damages?
- Would the client be willing to pursue these damages and/or declaratory or injunctive relief, for example, would the client be willing to appear at depositions and trial?

Collector's behavior

- Is this the aberrant behavior of a collection employee which will be stopped when brought to a supervisor's attention?
- Is this abuse the result of the collector's mistake, for example, erroneously identifying client as able to pay the bill?
- Is this abuse a result of the collector's routine collection strategy?
- Does the debt collector have a valid bona fide error defense to violations of the Fair Debt Collections Practices Act?[61]

Efficiency

- Does the collector's behavior indicate that it will not alter its behavior in response to letters?
- Will the collector honor the individual client's letter but continue the practice against other debtors, generating additional debtor complaints and suffering?
- Does the collector have insurance or sufficient assets to satisfy a damage award?[62]
- If a claim is available under the Fair Debt Collection Practices Act or state statute, is the case one that an attorney will pursue for a contingent fee?
- Is bankruptcy an appropriate approach for the client?[63]

2.5 Preparation of a Suit for Damages

2.5.1 Client's Recording of Phone Calls

When legal, evidence of collection abuse and of the client's credibility might be obtained by the consumer recording a collection telephone call. This option is only available in certain states, because in other states recording a phone call without

58 *Id.*
59 15 U.S.C. § 1692c(a)(2), *discussed at* § 5.5.3, *infra.*
60 15 U.S.C. § 1692g(b), *discussed at* § 9.10, *infra.*
61 15 U.S.C. § 1692k(c), *discussed at* § 12.2, *infra.*
62 Fellow NACA members may have helpful information on this point. *See* www.consumeradvocates.org for more information about how to join.
63 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 6 (12th ed. 2020), *updated at* www.nclc.org/library.

consent is a criminal offense. There are also legal ethical considerations if an attorney advises the client to record a telephone call. These issues are explored at § 11.5.2, *infra*.

Of course, the client can ask the collector's permission to record the call. Another option is for the client to take notes of any conversation with a collector. A reliable third person can call the collector and ask for the collector's explanation of the calls, and this may confirm the client's version of their content. A former collection employee of the agency may be able to confirm the company's telephone practices.

Moreover, larger debt collectors record many of their debt collection calls and are increasingly able to retrieve many of those calls when sued. Under Regulation F § 1006.100(b) (effective November 30, 2021), a debt collector that records calls must retain the recordings for three years after the date of each telephone call.[64] The difficulty of obtaining such recordings through discovery may depend on the individual collector. Note that a recording kept by the collector may in fact be used to exonerate the collector.

Clients should also save any collector messages left on the consumer's voicemail. As examined at § 11.5.2, *infra*, such message may be introduced at trial. In addition, the client should be advised to save all of a collector's emails, texts, and letters.

2.5.2 Client's Written Statement

Because it may be a long time between the initial interview and trial, it is a good idea to obtain a statement of the client's story, signed by the client. The statement may be used at trial to refresh the client's memory.[65] The effect of this statement on the client-attorney privilege and the work product rule is beyond the scope of this subsection but should be considered by counsel.[66]

2.5.3 Some Fee-Generating Debt Collection Cases Must Be Referred to Private Lawyers by Legal Services Corporation Grantees

Debt collection harassment cases that are truly "fee-generating" may have to be referred to private attorneys pursuant to the Legal Services Act[67] and implementing regulations.[68] Increasing numbers of private attorneys have been accepting clients on a contingent-fee basis in debt collection abuse cases,[69] although there are generally far more cases than there are attorneys willing to take them. This requirement is intended to expand the availability of legal counsel to the poor when their cases are truly fee-generating. The regulations contain detailed provisions describing which cases are not fee-generating; these provisions may be supplemented by letters from the General Counsel of the Legal Services Corporation.

Legal Services attorneys interviewing clients with debt collection harassment claims should carefully review Legal Services Corporation regulations. The Corporation requires a legal services attorney to enter into a written retainer agreement with the client.[70]

2.5.4 Developing the Case Chronology of Events

An important first step in developing a case for debtor harassment is preparing a chronology of the events involved in the harassment. Events seemingly insignificant to the claim may prove significant later, may aid a witness's memory, or may indicate discrepancies in evidence. There are usually a substantial number of documents connected with a consumer transaction; these are particularly useful for pinpointing significant dates in a chronology.

2.5.5 The Collector's Documents and Other Sources of Evidence

Information about the dates and amounts of payments should be obtained from the creditor, collection agency, or attorney. These records, telephone logs, e-mails between collector and creditor, and recordings of telephone conversations may be central to the issue of liability on the purported debt. How to obtain this information, how to interpret collector codes and other short-hand, and how to use this information in a trial are discussed at § 11.5.3, *infra*.

The debt collector may provide the court with its records, such as call logs or collector's notes, to show that a contact alleged by the consumer did not occur.[71] The consumer's call log or notes or detailed memory could create a triable issue in such a situation. The consumer lawyer could also depose the debt collector to find out if it maintains multiple call logs and the instances in which their calls with consumers are not captured in their call logs.

The next step is to get statements from sympathetic witnesses while events (and a sense of outrage) are still fresh in their minds. Family members, friends, fellow employees (or the client's employer) and the client's physician should be interviewed if they witnessed collection contacts or injuries

64 *See* §§ 11.5.2, 11.5.4.3, *infra*.
65 *See* Fed. R. Evid. 612, 803(5).
66 *See* Fed. R. Evid. 501.
67 42 U.S.C. § 2996f(b)(1).
68 45 C.F.R. § 1609.
69 *See* www.consumeradvocates.org for lists of attorneys willing to take such cases.
70 *See* 45 C.F.R. § 1611.8(a).
71 As of November 30, 2021, debt collectors must retain evidence of both compliance or noncompliance with the FDCPA and Regulation F starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt. For phone recordings, the debt collector must retain the recordings for three years after the dates of the telephone calls. However, a debt collector is not required to create or maintain additional records to evidence compliance or record calls, but only must retain applicable records, including call recordings, that are already created in the ordinary course of its business. Reg. F Official Interpretations § 100(a)-2. *See* § 11.5.4.3, *infra*.

suffered—for example, emotional distress—by the client. If the case involves abusive telephone calls, a complaint could be sent to the local telephone company requesting an investigation and retention of the records of the collector's telephone calls to and from the consumer and the third parties involved during the relevant period of time.[72]

2.5.6 Pattern or Practice Evidence

Other victims who have suffered similar abuses from a debt collector may be appropriate witnesses. As described in more detail at § 11.6.5, *infra*, other victims' testimony may be introduced: to show a pattern or practice of abusive conduct; to show the debt collector's knowledge or intent; to show the malice required for punitive damages; to support a maximum statutory damage award; or to establish circumstantial evidence to authenticate an anonymous phone call. Even if the testimony of other victims is not admitted in the trial, the other victims' information can be useful in understanding the collector's practices, allowing the attorney to be more effective in seeking discovery and cross-examining collector witnesses.

2.5.7 Pleadings

2.5.7.1 Importance of State Claims

State claims may offer punitive,[73] multiple, or statutory damages in addition to the relief offered by the FDCPA. Even when the FDCPA applies to a case, local law may supplement it or be more favorable to the consumer.[74] For example, a collector may violate a state law for which the FDCPA does not provide a parallel prohibition.

Since the FDCPA provides very limited preemption of state law and encourages state regulation of debt collectors,[75] actions under the FDCPA and under state law may usually be joined and pursued simultaneously. The online companion material to this treatise provides sample complaints as well as complaints from filed cases alleging FDCPA and supplemental state claims. Those sample complaints are supplemented by sample discovery, depositions, memoranda of law, motions, jury instructions, briefs, etc.

While this treatise surveys a very wide range of potential legal remedies for debt collection abuse, it cannot fully address variations in local law, which must be independently researched.

2.5.7.2 Choice of Federal or State Court

The choice of filing in federal or state court is dominated by local considerations. In some locales, there is little reason to prefer federal judges over state judges, either for judicial ability or for sympathy in actions against debt collectors. State discovery and procedural rules are often so similar to federal rules as to eliminate this as a consideration. The relative backlog of cases on federal and state dockets varies greatly from locale to locale. Choice of forum will affect the rules and practice for drafting pleadings.[76]

2.5.7.3 Specificity of Pleading

In pleading an FDCPA claim, the consumer attorney should consider two separate requirements. One is to establish concrete harm or injury in fact sufficient to meet the Article III federal court standing requirement. This requirement is discussed in detail at § 11.15, *infra*. In addition, the consumer's pleading must be sufficiently specific as to the nature of the FDCPA violation. The specificity requirement is examined at § 11.6.1, *infra*.

2.5.7.4 Avoiding Dismissal

Failure to state a cause of action will result in the dismissal of the complaint and, when the court deems the claim entirely frivolous, sanctions.[77] Failure to join an indispensable party may also result in the dismissal of the litigation.[78] Section 11.6.1, *infra*, provides an analysis of the specificity of pleadings necessary to survive dismissal.

2.5.7.5 Structuring the Case

2.5.7.5.1 Requesting a jury trial and joining additional parties

Generally, debtors should request jury trials in debt collection harassment cases.[79] Differences among courts as to the makeup, procedures, and delay in obtaining a jury may dictate the debtor's choice of forum. The potential for and advantages of joining additional plaintiffs or defendants should be thoroughly considered at this juncture.[80]

2.5.7.5.2 FDCPA as a counterclaim

Consumers may decide that the better strategy is to raise their fair debt collection claim defensively as a counterclaim to a suit on the debt filed by the creditor or its collector.[81] One advantage of this approach is that it may create more leverage in negotiating a reduced amount of the debt. Disadvantages may include that the FDCPA claims will not apply to the creditor and a state court judge may not be familiar with the FDCPA.

72 *See* § 14.3, *infra*.
73 *See* § 11.9, *infra*.
74 *See* Ch. 16, *infra*.
75 *See* § 11.16, *infra*.
76 Also keep in mind, as discussed in detail in § 11.15, *infra*, that the consumer must have suffered a concrete harm as a result of the violation to have Article III standing in federal court.
77 *See* § 12.10, *infra*.
78 Fed. R. Civ. P. 19. *See also* § 11.2.5, *infra*.
79 *See* § 11.4.5, *infra*.
80 *See* §§ 11.2.4, 11.2.5, 11.4.1 to 11.4.4, *infra*.
81 *See* § 11.2.1, *infra*.

2.5.7.5.3 The burden of persuasion of exceptions to FDCPA violations falls on the defendant

While the FDCPA prohibits many forms of collector misrepresentations and abusive conduct, it makes certain exceptions to those prohibitions, allowing the collector to engage in those practices. In general, as described at § 11.6.6, *infra*, the collector has the burden of proof to show that an exception applies.

2.5.7.5.4 Filing an FDCPA class action

The decision to file a complaint as a class action is often faced most squarely after the initial investigation and research are completed.[82] If a class action is consistent with the client's objectives and the program's or firm's priorities, additional inquiry should be made to determine if adequate legal and financial resources are available for the particular case. A lawyer without the necessary resources may need to bring in another firm to meet that need. An attorney with little class experience must bring in co-counsel with class experience.[83]

2.5.7.6 Do Not Send Demand Letters to Unknown Debt Collectors

Many experienced consumer attorneys do not send demand letters before filing an FDCPA suit. This is the result of some debt collectors responding to FDCPA demand letters with a Strategic Lawsuit Against Public Participation ("SLAPP" suit) against the consumer in the state where the debt collector received the demand letter.[84] Those debt collectors believe that the consumer's demand letter supports long-arm jurisdiction in the recipient's state.[85] Joining NACA will give the consumer attorney a network to help determine whether a SLAPP suit strategy is used by a particular debt collector.

With other debt collectors, demand letters may lead to quicker settlements or clarification of the facts. For example, when it is not clear whether the collector meets the threshold test of regularly collecting debt to be covered by the FDCPA,[86] a demand letter may lead to a conversation which may inform the consumer's attorney on the issue. The failure of the collector to respond makes it harder for the debt collector to later complain about it being sued when it was not covered by the FDCPA.

2.5.7.7 Sample Complaints

The online companion material to this treatise contains sample complaints and examples of other FDCPA complaints filed by practitioners.

2.5.7.8 Proper Service

Attention should be paid to obtaining proper service of process on an attorney collector. Service on the attorney at the address on the attorney's collection letter may not be valid if the attorney does not maintain offices at that address.[87] The attorney's address can be checked through the state bar association as well as lawyer directories and other sources.

There are a number of additional approaches to determining the collector's address for service of a summons and complaint. State debt collector regulators frequently post contact information about debt collectors on their website. Some regulators post much more. For example, the Minnesota regulator posts debt collection employee names.

Many states license debt collection agencies and the licensing authority should have information about an agency's address, sometimes on a website. The names of a registered agent and officers of the company is usually available from the Secretary of State in the state in which the collection agency was incorporated, which may or may not be the same as the state where it receives mail. Because collection employees often use fake names while collecting a debt, it may be necessary to sue them as "John Doe a.k.a. Robert Smith," and discovery may be needed to obtain the information necessary to serve them.[88] If the consumer misidentifies the defendant and the intended defendant is aware of the mistake, an amended complaint will relate back to the date of the original complaint.[89]

If the collector's address is a post office address, the post office will provide a Freedom of Information Action (FOIA) form to obtain the name and address of the post office box renter.

2.5.7.9 Debt Collectors' Defensive Strategies

Defensive strategies of debt collectors are the focus of many other sections of this treatise.[90] In addition, defendants' using a kitchen sink approach to pleading inapplicable defenses may result in the defenses being struck at a preliminary stage.[91]

2.5.8 Mandatory Arbitration of Consumers' Claims

Creditors, debt buyers, or those collecting on behalf of creditors or debt buyers often seek to enforce a mandatory arbitration clause found in the credit agreement between the original creditor and the consumer. These clauses require debtors to

82 *See* National Consumer Law Center, Consumer Class Actions Ch. 1 (10th ed. 2020), *updated at* www.nclc.org/library; § 11.11, *infra*.

83 *See* National Consumer Law Center, Consumer Class Actions Ch. 1 (10th ed. 2020), *updated at* www.nclc.org/library; § 11.11.2.2.5, *infra*.

84 *See* § 15.1.3.3, *infra*.

85 *See* § 11.2.2, *infra*.

86 *See* § 4.7.3, *infra*.

87 *See* Gunkel v. Secure One, Inc., 2007 WL 1319286 (E.D. Tenn. May 4, 2007) (service of defendant's managing agent, as well as additional addresses linked to Secure One, Inc. listed in the parties' filings, was authorized by the Fed. R. Civ. P. and appropriate).

88 *See* § 11.4.4.1, *infra*.

89 *See* Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 130 S. Ct. 2485, 177 L. Ed. 2d 48 (2010).

90 *See* § 11.3 (mandatory arbitration), § 11.7.1 (offers of judgment); Ch. 12 (defense strategies in FDCPA cases), *infra*.

91 *See* Appx E.3.6.2, *infra*.

bring legal claims in private arbitration as opposed to litigation in court.

Section 11.3, *infra*, surveys the arguments consumers can make to defeat a motion to compel arbitration of an FDCPA cause of action or state law collection abuse claim.

Far more detail on all these subjects than is presented at § 11.3, *infra*, is found in NCLC's Consumer Arbitration Agreements (8th ed. 2020), *updated at* www.nclc.org/library, which also contains sample briefs and other key documents.

An essential first step in resisting an arbitration agreement, though, is demanding that the defendant produce the arbitration agreement. A collection agency or attorney or debt buyer will have to obtain that agreement from the original creditor, show that the consumer bringing the action had consented to that specific agreement, and that the defendant has the right to enforce that agreement.

2.5.9 Discovery

Interrogatories, admissions, and a request for production of documents should be filed with the complaint or soon thereafter to maintain the momentum of the case and to obtain critical evidence while it is still fresh and available. Sample discovery requests and depositions are included with this treatises' digital version, under "Pleadings and Discovery." Section 11.5.4, *infra*, examines what information to seek, what discovery is permissible, what limits there are on discovery from the collector, the applicability of protective orders, and tactics to compel the collector to respond.

2.5.10 Prepare for Trial at the Beginning of the Case

Most debtor harassment cases are settled by negotiations prior to trial. A lawyer who has not successfully tried a case of this type should know what can be accomplished at trial before negotiating a settlement.[92] It is essential to know the probable range of damages that may be awarded in a case of this type before entering into negotiations. Section 11.8, *infra*, details common injuries and awards for debt collection abuses.[93] An attorney who has completed the steps discussed up to this point should be in a good position for negotiation.

2.5.11 FDCPA Claims Are Frequently Determined by Summary Judgment

In FDCPA suits and in actions under state debt collection statutes, the legal proscription may be so clear and narrow, particularly when liability may be established by a debt collection letter or other document, that factual issues can be determined early in a case. In such cases, liability issues may be decided by partial summary judgment, and only the issue of the damages may need to be tried or negotiated.[94] A sample motion and supporting memoranda on summary judgment are available online as companion material to this treatise. The online companion material to this treatise also contains documents from filed cases related to summary judgment.

2.5.12 Jury Trials Advised

As described in § 11.4.5, *infra*, there are benefits to seeking a jury trial in an FDCPA or other debt collection harassment case. Section 11.4.5, *infra*, also discusses the consumer's right to a jury, issues the jury can decide, and preparing for a jury trial.

2.5.13 Offers of Judgment or Settlement in Individual Actions

Section 11.7, *infra*, examines some of the complex issues that arise where a debt collector makes an offer of judgment or settlement.

A number of issues relate to use of offers of judgment. Section 11.11.4.2, *infra*, discusses the use of Rule 68 in class actions to settle the claim of the named FDCPA plaintiff and provide the foundation for the defendant to argue that the settlement moots the class action.[95]

2.4.14 Pitfalls with Using Surveys and Experts on Deception

One of the biggest impediments to using survey evidence in FDCPA cases is the high cost of an expert designing and conducting the survey. See the discussion at § 11.6.3, *infra*.

In addition to the hurdle created by the high cost of a survey, there is a risk that the expensive survey once presented will not be accepted into evidence. See § 11.6.3, *infra*, for examples of when courts have and have not allowed surveys into evidence, and for a discussion of problems with the survey methodology and sample sizes.

An alternative to survey evidence may be testimony from an expert who may base testimony on an analysis of representations and practices short of conducting a full survey. Examples of the type of analysis an expert might conduct and limits on expert testimony are considered at § 11.6.4, *infra*.

2.6 Proving the Nature, Cause, and Value of Actual Damages

2.6.1 Maximizing Damage Awards

A working knowledge of the law and practice of proving damages is crucial in both the negotiation and the trial stage of

92 *See* §§ 11.8, 11.9, 11.10, *infra* (discussion of damages).

93 *See also* Appx. E.3.1, *infra*.

94 *See* § 11.8.6.1, *infra*. Some care needs to be exercised to avoid a court misconstruing a motion for partial summary judgment to be a record of no damages suffered by the consumer.

95 *See also* Appx. E.3.6.3, *infra*.

a debt collection abuse case. An attorney who has not developed the evidence of damages in a case has little idea of where to start and terminate negotiations. A discussion of damages is found at §§ 11.8, 11.9, and 11.10, *infra*.

Successful negotiation or trial of the damages issues in a debtor harassment case has important repercussions beyond the individual case: it sets a standard for future settlements in similar cases. Favorable settlements or awards of damages that are publicized also may deter future misconduct by collectors throughout the affected community. Large settlements or awards increase the legal resources available to low-income consumers by increasing the financial incentive for more private lawyers to become involved in debtor harassment cases. A consumer attorney obtaining large awards will be sought by consumers seeking representation and by attorneys seeking co-counsel.

2.6.2 *Actual Damages in Collection Abuse Cases*

2.6.2.1 General Principles

A common and costly mistake made by an attorney in a debt collection abuse case is to pay insufficient attention to the nature and extent of the client's actual damages. Ask about the stress the consumer suffered and how long the distress continued. When the abuse is egregious and the resulting distress, lasted many days the damages may be valued in five figures. In the extreme case the value may go to six figures or more.[96] Conversely, if stress is the only actual damage and is not significant, a consumer may not have standing to bring a claim in federal court, as explained in detail in § 11.15, *infra*.

2.6.2.2 Common Types of Compensable Injuries Resulting from Debt Collector Misconduct

2.6.2.2.1 Introduction

Types of injuries for which consumers have obtained damages in typical abusive debt collection situations are listed below. More detail with case citations is found at § 11.8, *infra*. Whether these injuries are legally compensable in a particular case may depend upon the type of legal claim.[97]

2.6.2.2.2 Emotional distress injuries arising from debt collector misconduct

As discussed in § 11.8.2, *infra*, injuries and symptoms related to stress include shock, crying, loss of sleep, insomnia, nightmares, night sweats, anxiety, nervousness, fear, worry, loss of happiness, severe distress, hypertension, loss of concentration, instability, hysteria, trembling, irritability, humiliation, embarrassment, intimidation, loss of the tranquility of old age, indignation, future anxiety, pain, suffering, emotional or mental distress, paranoia, difficulty relating to others, anger, severe headaches, increased temper, adrenaline, and conflict with a spouse. Case citations where damages were awarded for these injuries are set out at § 11.8.2, *infra*.

2.6.2.2.3 Medical conditions arising from debt collection abuses

Medical conditions are also related to debt collection abuses, such as loss of appetite, nausea, vomiting, sensitive stomach, loss of weight, tooth pain where debt collector took funds saved for dental work, ulcers, diabetic flare-ups, miscarriage, heart attack, heart palpitations, angina, chest constrictions, becoming bedridden, pain and suffering, shortness of breath, headaches, dizziness, fainting, blacking out, skin eruptions and great pain from shingles, aggravated existing illness, and extended illness. See § 11.8.3, *infra*, for further discussion and case citations where damages were awarded for each of those medical conditions.

2.6.2.2.4 Out-of-pocket losses

Section 11.8.4, *infra*, sets out a discussion and court decisions regarding various types of out-of-pocket losses caused by debt collection violations, including loss of job, income, work time or leave from a job; impairment of job advancement; medical or counseling expenses; medication or special diet; telephone charges; payments on an invalid claim or a debt barred by a statute of limitations; transportation expenses; conversion of consumer's property; and the amount of a tax refund intercepted to pay a student loan that had been discharged in bankruptcy and accountant fees for filing for the return of the intercepted funds. Other out of pocket losses with case citation support at § 11.8.4, *infra*, relate to bank overdraft charges and other fees; reduced credit rating; attorney fees incurred defending a prior suit; bank fees; a filing fee to answer a time-barred debt collection complaint and the costs for mailing that answer to the debt collector by certified mail, and a consumer's payment to a debt collector made as a result of harassment, false threat of jail, or other FDCPA violation.

2.6.2.2.5 Injuries to personal relations

Section 11.8.5, *infra*, sets out various case decisions awarding damages for injury to the following type of relations: injury to reputation; harm to credit rating, loss of access to credit and to employment; loss of privacy; loss of consortium; strain to marriage; strain with family; demotion by employer; and humiliation.

2.6.2.3 Using FDCPA Damages to Settle a Debt

A claim for damages may be used to leverage a reduction of the collector's claim. Issues concerning whether to use an FDCPA claim in negotiations to reduce the amount due on a debt are considered at § 11.8.1.2, *infra*. In some situations, there are reasons not to do so. Where the FDCPA claims are

96 *See* § 11.8.2.5, *infra*.

97 *See* § 11.8, Chs. 15, 16, *infra*.

used to reduce the amount owed, that subsection also considers suggested aspects of a resulting settlement.

2.6.3 Evidence Establishing an Injury's Existence, Cause and Value

A key question in recovering actual damages is how extensive the evidence of consumer injury must be. There are different standards as to adequate proof that there is an injury and the dollar value of that injury. In fact, evidence of the dollar value of the injury is often unnecessary. The trier of fact may attach dollar amounts to some injuries (nausea, headaches, or anxiety, for example), without any proof of their value. This may be done through witness testimony on the existence, cause, and extent of the injury and the arguments of counsel, the jurors' experience and very general legal standards.

These issues are examined at § 11.8.6, *infra*.

2.6.4 Compensable Emotional Stress and Other Losses Vary Among States

Types of compensable injuries and losses vary from state to state and among different causes of action. For debt collection violations, a key source of actual damages relates to the consumer's emotional stress. The law in this area both for state law claims and under the FDCPA is examined at § 11.8.2, *infra*.

2.6.5 Causation Is an Important Element in the Proof of Damages

Issues of causation must be considered in seeking actual damages in debt collection cases. Consumers suffering from abusive debt collection tactics are often in a financially distressed position which is stressful in itself. Injuries may have resulted from another traumatic event, such as illness, marital problems, or loss of employment. Establishing the debt collection violation as a sufficient cause to support an actual damages award is discussed at § 11.8.7, *infra*.

2.6.6 Preparing for a Jury Trial of an FDCPA Case

Section 11.4.5, *infra*, examines the best practices in demanding a jury trial, the utility of mock juries, and the requirement for providing the judge with proposed *voir dire* questions, jury instructions, and a special verdict sheet. Section 11.4.5, *infra*, explains that the jury does not determine the attorney fee award.

2.6.7 Establishing Deception

The Seventh Circuit has uniquely imposed a burden on consumers of proving deception by expert testimony, preferably supported by consumer survey testimony. Difficulties with conducting surveys are discussed at § 11.6.3, *infra*. Recent Seventh Circuit decisions have retreated from the survey requirement, and other Circuits have different views. This is discussed at § 7.3.8 and § 11.6.3, *infra*.

2.7 Punitive Damages

2.7.1 Overview

While punitive damages awards may be unavailable for FDCPA violations, they are available in most states for certain tort claims. Such claims have special applicability to debt collection harassment and are considered at § 11.10.3, *infra*.

2.7.2 FCRA Punitive Damages Awards Against Debt Collectors

Certain Fair Credit Reporting Act (FCRA) provisions apply to debt collectors, and the FCRA explicitly provides for punitive damages for certain types of violations. As a result, the FCRA can be an important claim in a debt collection case, and the availability of punitive damages in such cases is examined at § 11.10.2, *infra*.

2.8 Consumer Claims Against Collector's Professional Liability Insurer

It can be difficult to collect a judgment from an undercapitalized debt collector. If the collection agency is insured, that may be one way to collect on the judgment. This is discussed at § 11.4.4.4, *infra*.

2.9 Creditor's and Debt Collector's Liability for Acts of Their Employees, Collection Agency, or Attorney

Courts reach different conclusions as to whether a creditor is liable for the unlawful collection acts of an employee, the collection agency, repossession company or attorney hired by the creditor. This case law is examined at § 11.4.4, *infra*. Creditors themselves are generally not covered by the FDCPA, but a creditor may fit within the definition of "debt collector" and be controlled by the Act when it "uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts."[98] State law may provide claims against the creditor.[99]

The FDCPA though generally holds debt collectors, such as collection agencies and debt buyers, responsible for violations of their employees, collection lawyers and any collection agencies they hire.[100]

98 15 U.S.C. § 1692a(6), *discussed at* § 4.7.4, *infra*. *See also* § 10.4, *infra*.
99 *See* Chs. 15, 16, *infra*.
100 *See* § 11.4.4.3, *infra*.

2.10 Keeping Time Records for Awards of Attorney Fees

The FDCPA and state deceptive practices act and other state laws provide for attorney fees for a prevailing consumer. FDCPA attorney fees, including time record requirements, are examined at § 11.13, *infra*. As discussed in detail in § 11.14, *infra*, counsel should be aware of any tax consequences to a consumer when awarded attorney fees in a settlement or judgment. Counsel for a consumer should keep accurate and contemporaneous records of time spent on a debt collection case, indicating the purpose or activity to which the time was devoted.

2.11 Injunctions, Administrative Agency Complaints, and Community Education

There are situations involving debt collection abuse in which an action for damages is not appropriate. This may be because the consumer suffered no actionable damages or because the difficulty of establishing damages makes the probability of recovery slight. It may be that individual actions for damages are not among a program's or lawyer's priorities and successful referral to another lawyer is unlikely. The client may be unwilling to pursue damages. An award of damages may not seem likely to deter what appears to be a pattern of community-wide abuse. The most common reason is that the collector may be judgment proof. For whatever reason, a course of action in addition to or in lieu of a suit for damages may be appropriate. Individual or class actions for injunctive relief from abusive debt collection behavior have been or may be brought under several theories.[101]

A complaint to the Consumer Financial Protection Bureau or state administrative agency may result in a response from the debt collector, an investigation, an agency order to cease the abusive practice, or revocation of the abuser's commercial license.[102] Even though many administrative agencies ration their resources by not acting on single complaints, it is worthwhile to file complaints with them so that enough accumulate to convince the agency of the need to act, to dispel complacency within the agency arising from a lack of complaints, and to develop the complaint data on which legislative and administrative decisions may later hinge.

As discussed above, a letter from a lawyer to a collection agency or creditor is usually successful in terminating future contact with a particular client.[103]

For the most part, the significant rights provided by the FDCPA to consumers are not required to be disclosed to them.[104] State statutes may also provide important rights. Unless consumers are made aware of these rights through community education, they may never learn of them and may suffer needlessly. Since these rights may be exercised independently of counsel, they are particularly appropriate for community education. Another theme of importance for community education is the need to retain dunning letters, envelopes, contracts, and other documents and to take complete notes of collection contacts in order to preserve evidence necessary for a suit.

2.12 Careful Evaluation of Appealing Adverse Lower Court FDCPA Decisions

Some circuit court panels have little empathy for consumers who are struggling with debt, debt collectors, and the anxiety and other problems that are often associated with financial struggles. In considering the appeal of an adverse lower court decision, a fundamental consideration is how the consumer's case will present to an appellate panel that does not come to the case with some empathy for a struggling consumer.

If the case was dismissed on the pleadings, was the complaint drafted to be compelling to such an appellate panel, or is it focused on the technical requirements of the FDCPA? Is it likely to strike the appellate panel as significant or as a small-dollar case that takes up their precious time? This analysis is a challenging task for a lawyer who has agreed to take a consumer's FDCPA case and put effort into developing a case, only to have it rejected by the trial court. There is a risk in appealing any case, but the risk of creating bad law for a large number of struggling consumers in the circuit is particularly high in FDCPA appeals.

The best course is to obtain the advice of disinterested, experienced, and successful FDCPA appellate counsel. This is commonly available in the breaks at the National Consumer Law Center's Consumer Rights Litigation Conference in the fall and the Fair Debt Collection Practices Conference in the spring, and by telephone with the National Consumer Law Center's Litigation Project or with members of the National Association of Consumer Advocates who specialize in FDCPA appeals.

2.13 Consumers Representing Themselves in Court

Consumers representing themselves in court must overcome tremendous hurdles. Unless the *pro se* consumer is legally trained, in addition to learning the FDCPA, they must master the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the local court's rules, and often other state and federal laws that are related to their claim. Unrepresented consumers lack the objectivity that a good lawyer could bring to their case. They cannot speak about the plaintiff in the third person, a serious handicap if there are emotional distress damages involved. They face the prejudice in many courts

101 *See* §§ 11.12, 15.6.2, 16.2 to 16.5, 16.7, *infra*.
102 *See* § 2.4.5, *supra*.
103 *See* § 2.4, *supra*.
104 *But see* Ch. 9, *infra*.

expressed by the old adage that a client who has themselves for a lawyer is represented by a fool.

There are increasing numbers of lawyers available to represent consumers with strong fair debt collection cases. What makes a strong case varies from state to state and court to court. Checking with one of the experienced or advanced lawyers in the www.consumeradvocates.org directory of FDCPA lawyers is a great reality check regarding the strength of a claim, and could be the beginning of a good attorney-client relationship. In an unusual ruling, one court granted a *pro se* consumer's motion for the appointment of counsel to represent her in her FDCPA suit, alleging that the plaintiff in a foreclosure action did not have an assignment of the debt.[105]

Most of *pro se* cases are dismissed early in the proceeding for failure to adequately plead a legal claim in their complaint or for bringing their case against a company to which the FDCPA does not apply. Very few of these cases seem to achieve the results sought by the plaintiffs.

Penalties may be imposed by the courts on anyone bringing any FDCPA suit that is brought in bad faith and to harass the defendant under 15 U.S.C. § 1692k(a)(3).[106] Those penalties include the defendant's costs and attorney fees.[107]

105 *See* Greenfield v. Kluever & Platt, L.L.C., 2010 WL 604830 (N.D. Ill. Feb. 16, 2010) (appointing counsel, since her complaint alleged "complex" issues).

106 *See* § 12.8, *infra*.

107 *Id. See* Appx. E.3.6.4, *infra*.

Chapter 3 Overview of the Fair Debt Collection Practices Act

3.1 Scope, Purpose, and Effective Date

The Fair Debt Collection Practices Act[1] (the Act or FDCPA) promotes ethical business practices by debt collectors.[2] The Act was the result of compromises that resulted in its bipartisan support and support by both the major debt collection trade associations involved and consumer organizations.[3] The FDCPA applies to debt collector's activities in forty-nine states; Maine's substantially similar law applies to collection activities in Maine.[4]

The FDCPA's influence is significantly broader. Several states have adopted statutes[5] largely mirroring the Act's broad standards and detailed proscriptions, but that apply to all collectors of debts. The Act also affects the development of case law dealing with torts that may be committed in the course of abusive collection efforts.[6] The Act's detailed provisions and the case law construing those provisions are likely to be used for guidance by state courts in states with debt collection statutes that contain similar standards.[7]

The Act is limited in coverage. The term "debt collector" is defined by several tiers of definition within the FDCPA; it generally includes debt collection agencies, debt buyers whose principal purpose is the collection of debts, collection lawyers, mortgage servicing companies that obtain servicing rights after default, creditors using false names or collecting for other creditors, repossession companies, and suppliers or designers of deceptive forms.[8] The term generally excludes creditors collecting their own debts. The FDCPA establishes general standards of proscribed conduct, defines and restricts abusive collection acts (in detail), and provides specific rights for consumers. General standards of proscribed conduct protect a consumer from invasion of privacy,[9] harassment,[10] abuse,[11] false or deceptive representations,[12] and unfair or unconscionable collection methods.[13]

Specifically prohibited debt collection acts include late night[14] or repetitive phone calls[15] and false threats of legal action.[16] The Act gives a consumer the right to require a collector to stop all collection contacts.[17] It requires a collector to deal with a consumer's attorney when the consumer has one.[18] It gives a consumer the right to require a collector to verify the debt it is attempting to collect.[19] Debt collectors must provide two types of notices to consumers under the FDCPA.[20]

Congress specified the three purposes for the FDCPA: 1) "to eliminate abusive debt collection practices by debt collectors," 2) "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged," and 3) "to promote consistent State action to protect consumers against debt collection abuses."[21] Debt collection regulations enacted by the Consumer Financial Protection Bureau (the CFPB) in Regulation F (effective November 30, 2021) reiterated these statutory statements of purpose and also added additional statements of purpose for the regulations: 1) "to ensure that certain features of debt collection are disclosed fully, accurately, and effectively to consumers in a manner that permits consumers to understand the

1 15 U.S.C. §§ 1692 to 1692*p*.

2 S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *available online as companion material to this treatise and reproduced at* Appx. A.3, *infra*. *See also* Anne Rosso, "The Fair Debt Collection Practices Act's introduction sparked intense debate across the country" (Collector Magazine June 2014) (discussing ACA's 1977 decision to support FDCPA).

3 *See, e.g.*, The Fair Debt Collection Practices Act: Hearings Before the Senate Subcomm. on Consumer Affairs of the Comm. on Banking, Hous. and Urban Affairs, 95th Cong., 1st Sess. (1977), *available online as companion material to this treatise.*

4 Maine was granted an exemption from the FDCPA by the Federal Trade Commission (FTC) pursuant to the FTC's authority under 15 U.S C. § 1692*o*. 60 Fed. Reg. 66,972 (Dec. 27, 1995) (effective Mar. 26, 1996). *See also* § 3.4.4.2, *infra*.

5 *E.g.*, Cal. Civ. Code §§ 1788 to 1788.32 (West); Colo. Rev. Stat. §§ 12-14-101 to 12-14-137; Me. Stat. tit. 32, §§ 11,001 to 11,054. *See also* Massachusetts Attorney General's regulations at 940 Mass. Code Regs. § 7.00; Appx. D, *infra*.

6 *See* Ch. 15, *infra*. *See also In re* Scheck, 574 N.Y.S.2d 372 (N.Y. App. Div. 1991) (collection employees' violation of FDCPA while acting in lawyer's name was considered in lawyer's one-year suspension for violating N.Y. Code of Professional Responsibility). *But see* Conboy v. AT&T Corp., 84 F. Supp. 2d 492 (S.D.N.Y. 2000) (violation of FDCPA does not automatically state claim for intentional infliction of emotional distress absent conduct so extreme or outrageous as to give rise to tortious liability; calling plaintiffs at unusual hours in attempt to collect their adult daughter-in-law's debt did not rise to that level), *aff'd*, 241 F.3d 242 (2d Cir. 2001).

7 *See* Porter v. Somers, 1993 WL 280118 (Conn. Super. Ct. July 12, 1993) (15 U.S.C. § 1692f(1) prohibition against collecting amount not permitted by law supported claim under state consumer protection act (UDAP) that such conduct was unfair). *See also* Gamby v. Equifax Info. Serv. L.L.C., 462 Fed. Appx. 552 (6th Cir. 2012) (used similarity of FDCPA to construe Michigan debt collection statute); *In re* Zenner, 560 S.E.2d 406 (S.C. 2002) (reprimanding attorney for loaning his name to lay collection agency that engaged in unauthorized practice of law and abusive debt collection).

8 *See* § 10.4, *infra*.

9 *See* Ch. 5, *infra*.

10 *See* Ch. 6, *infra*.

11 *Id.*

12 *See* Ch. 7, *infra*.

13 *See* Ch. 8, *infra*.

14 *See* § 5.4.2, *infra*.

15 *See* § 6.7, *infra*.

16 *See* § 7.2.5, *infra*.

17 *See* § 5.8, *infra*.

18 *See* § 5.5, *infra*.

19 *See* Ch. 9, *infra*.

20 *See* § 7.2.11, Ch 9, *infra*.

21 15 U.S.C. § 1692(e).

costs, benefits, and risks associated with debt collection, in light of the facts and circumstances" and 2) creation of record retention requirements "to enable the Bureau to administer and carry out the purposes of the FDCPA, the Dodd-Frank Act, and this part, as well as to prevent evasions thereof . . . [and] facilitate supervision of debt collectors and the assessment and detection of risks to consumers."[22]

The Act became effective on March 20, 1978.[23] The first substantive amendment to the FDCPA in 1986 repealed an exemption for most attorneys and broadened the Act's coverage to apply to attorneys who regularly collect consumer debts for creditors or collection agencies.[24] The second amendment, passed in 1996, altered the debt collection notice.[25] The third amendment, passed in 2006, altered some of the rules for giving debt verification notices and provided a potential exemption for district attorneys' closely supervised check collection agencies.[26] The fourth amendment in 2010 gave enforcement and rulemaking authority to the newly created federal Consumer Financial Protection Bureau.[27]

3.2 General Principles of Construction of the Act

3.2.1 Act Protects Least Sophisticated Consumers

3.2.1.1 Origin of Least Sophisticated Consumer Standard

After the enactment of the FDCPA, courts had to determine what legal standard to use when deciding whether a debt collector had violated the Act: a "reasonable consumer" standard or a standard focused on protecting "less experienced" consumers as adopted by Federal Trade Commission Act ("FTC Act") cases.[28]

In deciding which standard to apply, the Eleventh Circuit in *Jeter v. Credit Bureau, Inc.*[29] noted that unfair and deceptive debt practices have been the frequent subject of FTC enforcement action, that Congress found that existing law was inadequate to deal with debt collection abuses, and that under FDCPA § 1692*l*(a) a violation of the FDCPA is a violation of the FTC Act. The court concluded that Congress would not have intended to create two legal standards, but rather intended to build upon the existing protections. Citing the support of the majority of other courts to consider the issue at that time, the *Jeter* court rejected the "reasonable consumer" standard in favor of the FTC Act standard, which it described as a "least sophisticated consumer" standard.

3.2.1.2 Least Sophisticated Consumer vs. Unsophisticated Consumer

In 1994, the Seventh Circuit modified the label for the standard, adopting an "unsophisticated consumer" label instead of the "least sophisticated consumer":

> Literally, the least sophisticated consumer is not merely "below average," he is the very last rung on the sophistication ladder. Stated another way, he is the single most unsophisticated consumer who exists. Even assuming that he would be willing to do so, such a consumer would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion. Courts which use the "least sophisticated consumer" test, however, routinely blend in the element of reasonableness.[30]

The Eighth[31] and First[32] Circuits have joined the Seventh in using the "unsophisticated consumer" standard. The least sophisticated consumer standard is used in the Second,[33] Third,[34] Fourth,[35] Sixth,[36] Ninth,[37] and Eleventh[38] Circuits. Two unpublished cases in the Tenth Circuit have cited to the least sophisticated consumer standard, although no official standard has been adopted by that circuit.[39] The Fifth Circuit has opted not to choose between the standards.[40]

22 12 C.F.R. § 1006.1(b).
23 *See* § 3.4.2.1, *infra*.
24 *See* § 3.4.2.2, *infra*.
25 *See* § 3.4.2.3, *infra*.
26 *See* § 3.4.2.4, *infra*.
27 *See* § 3.4.2.5, *infra*.
28 *See, e.g.*, Fed. Trade Comm'n v. Standard Educ. Society, 302 U.S. 112, 116, 58 S. Ct. 113, 115, 82 L. Ed. 141 (1937) (discussing the application of FTC ACT and noting that "[t]he fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious."); Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985) ("The FTC Act was enacted to protect unsophisticated consumers, not only 'reasonable consumers' who could otherwise protect themselves in the market place.").
29 Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985).
30 Gammon v. GC Services, 27 F.3d 1254, 1257 (7th Cir. 1994). *See also* Preston v. Midland Credit Mgmt., Inc., 948 F.3d 772, 784 (7th Cir. 2020) ("We evaluate § 1692e claims under the unsophisticated consumer standard and ask whether someone of modest education and limited commercial savvy would likely be deceived by the letter.").
31 *E.g.*, Klein v. Affiliated Grp., Inc., 994 F.3d 913, 917 (8th Cir. 2021).
32 *See* Pollard v. Law Office of Mandy L. Spaulding, 766 F.3d 98, 103 (1st Cir. 2014). *See also* Rocha v. Zwicker & Assoc., 474 F. Supp. 3d 388, 392 (D. Mass. 2020).
33 *E.g.*, Wagner v. Chiari & Ilecki, L.L.P., 973 F.3d 154, 165 (2d Cir. 2020).
34 *E.g.*, Hopkins v. Collecto, Inc., 994 F.3d 117, 121 (3d Cir. 2021).
35 *E.g.*, Elyazidi v. SunTrust Bank, 780 F.3d 227, 234 (4th Cir. 2015).
36 *E.g.*, Cagayat v. United Collection Bur., Inc., 952 F.3d 749, 756 (6th Cir. 2020).
37 *E.g.*, Kaiser v. Cascade Cap., L.L.C., 989 F.3d 1127, 1136 (9th Cir. 2021).
38 *E.g.*, Pinson v. JPMorgan Chase Bank, 942 F.3d 1200, 1209 (11th Cir. 2019).
39 Fouts v. Express Recovery Services, Inc., 602 Fed. Appx. 417 (10th Cir. 2015); Ferree v. Marianos, 129 F.3d 130 (10th Cir. 1997). *See also* Dikeman v. Nat'l Educators, Inc., 81 F.3d 949, 954 (10th Cir.1996) (noting that "the [FDCPA] is . . . designed to protect such consumers as may not have the sophistication to appreciate the significance of debt collection communications").
40 Peter v. GC Services, L.P., 310 F.3d 344, 349 n.1 (5th Cir. 2002). *See also* Manuel v. Merchants & Pro. Bur., Inc., 956 F.3d 822, 826 (5th Cir. 2020) (citing both standards in single case without making distinction between them).

Several appellate courts have explained that these two standards are essentially the same.[41] However, the Seventh Circuit has held that "because we have rejected the least sophisticated consumer standard, a letter must be confusing to a significant fraction of the population."[42] For simplicity, this manual refers to the "least sophisticated consumer" standard as encompassing both the "least sophisticated" and "unsophisticated" consumer standard.

3.2.1.3 Least Sophisticated Consumer Standard Applies to Multiple Types of FDCPA Claims

To accomplish the consumer protection purpose of the FDCPA, the courts most often apply a "least sophisticated" or "unsophisticated" consumer standard to analyze many of the protections of the Fair Debt Collection Practices Act.[43] Specifically, courts have applied this standard to claims made under FDCPA §§ 1692e,[44] 1692f,[45] and 1692g.[46] Some courts have used an analogous "more susceptible consumer" standard for FDCPA § 1692d claims,[47] while other courts have used the least sophisticated consumer standard to evaluate these claims.[48] In the context of the waiver of cease communication rights under FDCPA § 1692c(c), courts have considered whether the least sophisticated consumer would have understood that they were waiving their rights.[49]

3.2.1.4 Applying the Least Sophisticated Consumer Test

Courts have described the least sophisticated consumer standard as objective[50] and have stated that the standard "pays no attention to the circumstances of the particular debtor in question, and asks only whether the *hypothetical* least sophisticated consumer could reasonably interpret the representation in a way that is inaccurate."[51]

However, in order to recover on an FDCPA claim in federal court, plaintiffs must be able to establish Article III constitutional standing, as discussed in § 11.15, *infra*. In order to satisfy the injury-in-fact element of standing in federal court,[52] the

41 Hopkins v. Collecto, Inc., 994 F.3d 117, 121 (3d Cir. 2021) (two tests are "functionally equivalent"); Pollard v. Law Office of Mandy L. Spaulding, 766 F.3d 98, 103 n.4 (1st Cir. 2014) (stating that "there appears to be little difference" between the two standards); Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055, 1061, n.2 (9th Cir. 2011) ("The Seventh Circuit employs an 'unsophisticated debtor' standard, which appears to differ from the majority test only in semantics."); Peter v. GC Services, L.P., 310 F.3d 344, 349 n.1 (5th Cir.2002) ("Because the difference between the standards is de minimis at most, we again opt not to choose between these standards.").

42 Johnson v. Enhanced Recovery Co., 961 F.3d 975, 984 (7th Cir. 2020). *But see* Avila v. Rubin, 84 F.3d 222, 227 (7th Cir. 1996) ("*Gammon* does not significantly change the *substance* of the 'least sophisticated consumer' standard as it had been routinely *applied* by courts. Instead, *Gammon* concluded that the term 'unsophisticated consumer' is a simpler and less confusing formulation of a standard designed to protect those of below-average sophistication or intelligence.").

43 *See, e.g.*, Appx. E.2.4.1.1, E.2.6.1, *infra* (collecting cases applying least sophisticated consumer standard).

44 *See, e.g.*, Cortez v. Forster & Garbus, L.L.P., 999 F.3d 151, 154 (2d Cir. 2021); Smith v. Stewart, Zlimen & Jungers, Ltd., 990 F.3d 640, 644 (8th Cir. 2021); Degroot v. Client Services, Inc., 977 F.3d 656, 660 (7th Cir. 2020); Manuel v. Merchants & Pro. Bur., Inc., 956 F.3d 822, 826 (5th Cir. 2020); Afewerki v. Anaya Law Grp., 868 F.3d 771, 775 (9th Cir. 2017); Eades v. Kennedy, P.C. Law Offices, 799 F.3d 161, 173 (2d Cir. 2015); Jensen v. Pressler & Pressler, 791 F.3d 413, 418 (3d Cir. 2015); Caceres v. McCalla Raymer, L.L.C., 755 F.3d 1299, 1303 (11th Cir. 2014). *Cf.* Sheriff v. Gillie, 578 U.S. 843, 136 S. Ct. 1594, 1602, 194 L. Ed. 2d 625, n.6 (2016) ("Because we conclude that the letters sent by petitioners were truthful, we need not consider the parties' arguments as to whether a false or misleading statement must be material to violate the FDCPA, or whether a potentially false or misleading statement should be viewed from the perspective of 'the least sophisticated consumer,' Brief for Respondent Gillie et al. 57, or '[t]he average consumer who has defaulted on a debt,' Brief for Petitioners 41.") (alteration in original). *See also* § 7.2.4, *infra*.

45 *See, e.g.*, Manuel v. Merchants & Pro. Bur., Inc., 956 F.3d 822, 826 (5th Cir. 2020); Holzman v. Malcolm S. Gerald & Assoc., Inc., 920 F.3d 1264, 1269 (11th Cir. 2019); Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1308 (11th Cir. 2015); Currier v. First Resolution Inv. Corp., 762 F.3d 529, 533 (6th Cir. 2014); McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010, 1019 (7th Cir. 2014); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011). *See also* § 8.1.5, *infra*.

46 *See, e.g.*, Bryan v. Credit Control, L.L.C., 954 F.3d 576, 581 (2d Cir. 2020); Smith v. Simm Assoc., Inc., 926 F.3d 377, 380 (7th Cir. 2019); Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984, 991 (9th Cir. 2017); Pollard v. Law Office of Mandy L. Spaulding, 766 F.3d 98, 104 (1st Cir. 2014); Caprio v. Healthcare Revenue Recovery Grp., L.L.C., 709 F.3d 142, 149 (3d Cir. 2013), *abrogated by* Riccio v. Sentry Credit, Inc., 954 F.3d 582 (3d Cir. 2020); Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504, 509 (6th Cir. 2007); Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3d Cir. 2000), *as amended* (Sept. 7, 2000). *See also* Appx. E.2.6.1, *infra* (collecting § 1692g cases using least sophisticated consumer and other general standards).

47 *E.g.*, Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1305 (11th Cir. 2015). *See also* § 6.2.4, *infra*.

48 *E.g.*, Levins v. Healthcare Revenue Recovery Grp. L.L.C., 902 F.3d 274, 283 (3d Cir. 2018); Guerrero v. RJM Acquisitions L.L.C., 499 F.3d 926, 934 (9th Cir. 2007); Harvey v. Great Seneca Fin. Corp., 453 F.3d 324, 330 (6th Cir. 2006)

49 *E.g.*, Scheffler v. Gurstel Chargo, P.A., 902 F.3d 757, 762 (8th Cir. 2018); Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1171 (9th Cir. 2006). *See also* § 5.8.3, *infra*.

50 *See, e.g.*, Cagayat v. United Collection Bur., Inc., 952 F.3d 749, 756 (6th Cir. 2020); Wagner v. Chiari & Ilecki, L.L.P., 973 F.3d 154, 165 (2d Cir. 2020); Schultz v. Midland Credit Mgmt., Inc., 905 F.3d 159 (3d Cir. 2018); Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75, 85 (2d Cir. 2018); Afewerki v. Anaya Law Grp., 868 F.3d 771, 775 (9th Cir. 2017); Russell v. Absolute Collection Services, Inc., 763 F.3d 385, 394 (4th Cir. 2014); Lox v. CDA, Ltd., 689 F.3d 818, 826 (7th Cir. 2012).

51 Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128, 135 (2d Cir. 2017). *See also* Holzman v. Malcolm S. Gerald & Assoc., Inc., 920 F.3d 1264, 1269 (11th Cir. 2019) ("[A] debt collector violates § 1692e by making a representation in a collection letter that would be deceptive or misleading to the 'least sophisticated' recipient of the letter. Likewise, a collection practice violates § 1692f if it would be unfair or unconscionable as applied to the 'least sophisticated' debtor subjected to the practice.").

52 State court standing requirements vary. *See* Thomas B. Bennett, The Paradox of Exclusive State-Court Jurisdiction over Federal Claims, 105 Minn. L. Rev. 1211, 1233 (2021) (map showing which states have adopted Article III standing formulation of *Lujan v. Defenders of Wildlife*); Wyatt Sassman, A Survey of Constitutional Standing in State Courts, 8 Ky. J. Equine, Agric. & Nat. Res. L. 349 (2015) (state-by-state

plaintiff will need to establish that they were harmed—harm to a hypothetical least sophisticated consumer will not be sufficient.[53] Once standing has been established, courts will evaluate the harm to the consumer using the least sophisticated consumer standard. For example, if the plaintiff was in fact deceived, the fact that the plaintiff fell for something that a more sophisticated consumer would have seen through is not a bar to liability if the act would have deceived the least sophisticated consumer.

Although the least sophisticated consumer standard is more protective than the reasonable consumer standard,[54] the courts have generally inserted a reasonableness requirement for the application of the "least sophisticated consumer" standard.[55] For example, the Second Circuit explained that the "least sophisticated consumer . . . lacks the sophistication of the average consumer and may be naive about the law, but is rational and possesses a rudimentary amount of information about the world."[56]

The least sophisticated consumer test also excludes interpretations of collection communications that are "bizarre or idiosyncratic."[57]

The Seventh Circuit holds that a "significant fraction" of consumers must be confused or deceived by the collection activity at issue,[58] which can be established by extrinsic evidence such as consumer surveys where the language is not obviously false, deceptive, or misleading.[59] To judge comprehension by unsophisticated consumers, the Seventh Circuit has looked to "the average consumer in the lowest quartile (or some other substantial bottom fraction) of consumer competence," but noted in *dicta* that "if the debt collector has targeted a particularly vulnerable group—say, consumers who he knows have a poor command of English—the benchmark for deciding whether the communication is deceptive would be the competence of the substantial bottom fraction of that group."[60]

The courts have split on whether a communication is deceptive or misleading to the least sophisticated consumer is a matter of law, fact, or mixed law and fact.[61]

For circuits that have adopted materiality,[62] the least sophisticated consumer standard is also connected to the determination of whether a violation of the FDCPA is material.[63]

survey). Harm to a hypothetical least sophisticated consumer may still be sufficient when pursuing FDCPA claims in some state courts, but it is critical to carefully to assess state standing requirements.

53 *See* Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1002 (11th Cir. 2020) ("a statutory violation that poses a risk of concrete harm to consumers in general, but not to the individual plaintiff, cannot fairly be described as causing a particularized injury to the plaintiff"; cited favorably by *TransUnion L.L.C. v. Ramirez*); Frank v. Autovest, L.L.C., 961 F.3d 1185, 1190 (D.C. Cir. 2020) ("After *Spokeo*, a plaintiff must demonstrate a subjective—that is, an actual—personal injury for standing even when his merits argument turns on the perspective of an objective, unsophisticated consumer."); Casillas v. Madison Avenue Assoc., Inc., 926 F.3d 329, 336 n.3 (7th Cir. 2019) ("Casillas insists that the 'unsophisticated consumer' standard, which we have applied elsewhere in our precedent, means that standing exists whenever a debt-collection letter might have misled a naive consumer. But the 'unsophisticated consumer' standard is a rule for interpreting a debt-collection letter to determine whether it is misleading. It is not a rule permitting those who have not been injured to vindicate the rights of those who have."). *See also* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2211, ___L. Ed. 2d ___(2021) ("mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a separate concrete harm"); § 11.15.2.2.6, *infra*.

54 *See, e.g.*, Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3d Cir. 2000), *as amended* (Sept. 7, 2000). *See also* § 3.2.1.1, *supra* (discussing origin of least sophisticated consumer standard).

55 *See, e.g.*, Smith v. Stewart, Zlimen & Jungers, Ltd., 990 F.3d 640, 644 (8th Cir. 2021); Wagner v. Chiari & Ilecki, L.L.P., 973 F.3d 154, 165 (2d Cir. 2020); Zablocki v. Merchants Credit Guide Co., 968 F.3d 620, 625 (7th Cir. 2020) (view alleged conduct "through the eyes of an unsophisticated but reasonable consumer"); Levins v. Healthcare Revenue Recovery Grp. L.L.C., 902 F.3d 274, 280 (3d Cir. 2018) (standard "preserves a quotient of reasonableness"); Davis v. Hollins Law, 832 F.3d 962, 964 (9th Cir. 2016) (noting in that courts "have carefully preserved the concept of reasonableness"); Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268, 1275 (11th Cir. 2016) ("preserving a quotient of reasonableness"); Elyazidi v. SunTrust Bank, 780 F.3d 227, 234 (4th Cir. 2015) ("assuming a quotient of reasonableness"); Buchanan v. Northland Grp., Inc., 776 F.3d 393 (6th Cir. 2015) (FDCPA protects consumers from practices that would mislead the "reasonable unsophisticated consumer").

56 Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P. 875 F.3d 128, 135 (2d Cir. 2017). *See also* Johnson v. Enhanced Recovery Co., 961 F.3d 975, 982 (7th Cir. 2020) ("Our hypothetical unsophisticated debtor is uninformed, naive, and trusting, but does possess rudimentary knowledge about the financial world, and is wise enough to read collection notices with added care.").

57 *See, e.g.*, Smith v. Stewart, Zlimen & Jungers, Ltd., 990 F.3d 640, 644 (8th Cir. 2021); Holzman v. Malcolm S. Gerald & Assoc., Inc., 920 F.3d 1264, 1269 (11th Cir. 2019); Boucher v. Fin. Sys. of Green Bay, Inc., 880 F.3d 362, 366 (7th Cir. 2018).

58 *See, e.g.*, McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010, 1020 (7th Cir. 2014); Lox v. CDA, Ltd., 689 F.3d 818, 822 (7th Cir. 2012).

59 *See, e.g.*, Johnson v. Enhanced Recovery Co., 961 F.3d 975 (7th Cir. 2020).

60 Evory v. Nat'l Action Fin. Services, Inc., 505 F.3d 769, 774 (7th Cir. 2007). *See also* § 14.8, *infra* (discriminatory collection tactics based on race, other prohibited categories).

61 *See* § 7.3.6, *infra*.

62 See §§ 7.3.9, 8.1.5, *infra*.

63 Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75, 85 (2d Cir. 2018). *See also* Afewerki v. Anaya Law Grp., 868 F.3d 771, 775 (9th Cir. 2017) (discussing materiality as "corollary" to least sophisticated consumer standard); Jensen v. Pressler & Pressler, 791 F.3d 413, 418 (3d Cir. 2015) (same); Gillie v. Law Office of Eric A. Jones, L.L.C., 785 F.3d 1091, 1107 (6th Cir. 2015) ("[M]ateriality in the FDCPA context is no more than a restatement of the above-referenced standard: a false representation or act is material if it has the tendency to confuse the least sophisticated consumer."), *rev'd and remanded on other grounds sub nom.* Sheriff v. Gillie, 578 U.S. 843, 136 S. Ct. 1594, 1602, 194 L. Ed. 2d 625 (2016); Elyazidi v. SunTrust Bank, 780 F.3d 227, 234 (4th Cir. 2015) ("a representation must be material, which is to say, it must be 'important in the sense that [it] could objectively affect the least sophisticated consumer's decision making.'"); § 7.3.9 (discussing materiality), Appx. E.2.4.1.2 (collecting cases about materiality), *infra*.

3.2.1.5 Standard for Communications to Bankruptcy Trustees and Consumer Attorneys

Although the Supreme Court declined to directly address the "least sophisticated consumer" standard,[64] in *Midland Funding, L.L.C. v. Johnson*[65] it used a different standard for the narrow purpose of assessing whether a statement that was made to a bankruptcy trustee and a consumer was "misleading" under FDCPA § 1692e. The majority looked to forty year old case law about whether a law firm's advertisement was misleading, concluding that "to determine whether a statement is misleading normally 'requires consideration of the legal sophistication of its audience.'" The court noted that the audience in the *Johnson* case included the Chapter 13 bankruptcy trustee:

> [W]ho must examine proofs of claim and, where appropriate, pose an objection, . . . including any timeliness objection . . . And that trustee is likely to understand that, as the Code says, a proof of claim is a statement by the creditor that he or she has a right to payment subject to disallowance (including disallowance based upon, and following, the trustee's objection for untimeliness.) (We do not address the appropriate standard in ordinary civil litigation).[66]

The appellate courts have split on how the FDCPA and this standard is to be applied if the consumer is represented by a lawyer. This is discussed at §§ 7.3.7 and 8.1.5, *infra*.

3.2.2 *Interaction of the FDCPA with State Law*

The FDCPA and state law interact in a number of ways. Violation of state laws may be a factor in determining whether there has been a violation of the FDCPA.[67] As discussed in § 11.16.1, *infra*, the FDCPA directly addresses state law preemption. Finally, § 3.3, *infra*, discusses constitutional challenges to the FDCPA, including those that have been raised under the Commerce Clause and the Tenth Amendment.

3.2.3 *Waiver of FDCPA Protections Disfavored*

The Ninth Circuit has stated that consumers generally may not waive their rights under the FDCPA:

> Out of an abundance of caution, we further note what should be obvious: a consumer's consent cannot waive protection from the practices the FDCPA seeks to eliminate, such as false, misleading, harassing or abusive communications. Permitting such a waiver would violate the public policy goals pursued by the FDCPA.[68]

A few lower courts have held that consumers cannot waive their rights under FDCPA §§ 1692e,[69] 1692g(a),[70] and 1692*i*.[71]

Even where waiver is possible under the specific statutory provision, any consent by the consumer to a modification of their FDCPA rights should be narrowly limited to match the intent of the consumer and the context in which consent was given. For example, the Ninth Circuit held that it would enforce "a waiver of the cease communication directive only where the least sophisticated debtor would understand that he or she was waiving his or her rights under [15 U.S.C.] § 1692c(c)."[72]

64 Sheriff v. Gillie, 578 U.S. 843, 136 S. Ct. 1594, 1602, 194 L. Ed. 2d 625, n.6 (2016) ("Because we conclude that the letters sent by petitioners were truthful, we need not consider the parties' arguments as to whether a false or misleading statement must be material to violate the FDCPA, or whether a potentially false or misleading statement should be viewed from the perspective of 'the least sophisticated consumer,' Brief for Respondent Gillie et al. 57, or '[t]he average consumer who has defaulted on a debt,' Brief for Petitioners 41.").

65 Midland Funding, L.L.C. v. Johnson, ___ U.S. ___, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017). *See also* § 13.7.3, *infra* (discussing proof of claims in bankruptcy and *Midland Funding, L.L.C. v. Johnson*).

66 Midland Funding, L.L.C. v. Johnson, ___ U.S. ___, 137 S. Ct. 1407, 1413, 197 L. Ed. 2d 790 (2017).

67 *See, e.g.*, §§ 7.4.13, 8.2.1.5, *infra*.

68 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1171 n.5 (9th Cir. 2006).

69 Malone v. Accounts Receivable Resources, Inc., 408 F. Supp. 3d 1335, 1345 (S.D. Fla. 2019) (consumer didn't waive right to bring claims under § 1692e by failing to dispute debt); Johnson v. Eaton, 873 F. Supp. 1019, 1028 (M.D. La. 1995) (finding "no basis in law or fact" for collector's argument that consumer waived FDCPA rights to protections from false or misleading communications).

70 Spears v. Brennan, 745 N.E.2d 862 (Ind. Ct. App. 2001) (no waiver of verification rights when consumer's attorney agreed to hearing date before 30 days had run and then consumer and attorney defaulted; court noted that § 1692g(a) is "in the nature of a statutory tort which is completed once the debt collector undercuts the thirty-day debt validation period or implies the debtor does not have thirty days from receipt of the debt collection notice to dispute the validity of the debt").

71 Blakemore v. Pekay, 895 F. Supp. 972, 983 (N.D. Ill. 1995) (no waiver even though consumer appeared at wrong venue and entered into consent judgment); Oglesby v. Rotche, 1993 WL 460841, at *10 (N.D. Ill. Nov. 5, 1993) (no waiver where consumer appeared in wrong venue and defended against law; court noted that § 1692*i* is "in the nature of a statutory tort which is completed upon the filing of an action in an improper venue").

72 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1170 -1171 (9th Cir. 2006). *See also* Curtis v. Caine & Weiner Co., 2016 WL 520987 (E.D. Mo. Feb. 10, 2016) (contrary to collector's assertion, consumer's initiation of telephone call to debt collector is insufficient by itself to demonstrate consumer's consent to collector's subsequent unlawful request to represented consumer for payment plan); Istre v. Miramed Revenue Grp., L.L.C., 2015 WL 1020015 (E.D. Mo. Mar. 9, 2015) (rejecting collection agency's consent defense based upon fact that telephone conversation was initiated by consumer from attorney's office with attorney present, since undisputed material facts established that no consent was given by either consumer or his counsel; clear language of § 1692c(a) indicates that required consent must occur before alleged violation occurred ("prior consent") and be express—not merely implied ("given directly to the debt collector")); West v. Abendroth & Russell Law Firm, 45 F. Supp. 3d 959 (N.D. Iowa 2014) (consumer's executed power of attorney with debt settlement company entitled debt collection law firm to discuss debt

Moreover, the Ninth Circuit "decline[d] to create a rule that by waiving the protection of [FDCPA] section 1692c(c) as to one debt collector, a debtor waives that protection with regard to any other debt collector with which that debt collector may be collaborating to collect the same debt."[73]

Concepts of waiver may also come up in defenses like claim or issue preclusion (*res judicata* and collateral estoppel). These are discussed at § 12.6.2, *infra*.

3.2.4 Strict Liability Under the FDCPA

The FDCPA generally is a "strict liability" statute[74] unless an FDCPA provision explicitly requires intent or knowledge, or the debt collector successfully establishes a bona fide error defense.[75] The FDCPA follows the strict liability model of the Truth in Lending Act[76] and the Federal Trade Commission Act.[77]

A debt collector is responsible under most provisions of the FDCPA for a deviation from the FDCPA's requirements without regard to intent or knowledge or the willfulness of the violation.[78] However, liability under certain provisions is expressly conditioned on the debt collector's intent[79] or knowledge.[80]

The Ninth Circuit noted that the fact that "Congress took care to require an element of knowledge or intent in certain portions of the FDCPA where it deemed such a requirement necessary further supports our conclusion that [15 U.S.C.] § 1692k(c) generally makes the FDCPA a strict liability statute."[81]

While intent is not required to establish most FDCPA violations, lack of intent is one element of a bona fide error defense[82] or a defense based on compliance with an advisory opinion.[83] Also, intent may be considered by the court in determining FDCPA statutory damages.[84]

When collectors seek to assert a bona fide error defense to avoid strict liability, a variety of issues may come up, including: reasonable reliance on the creditor's information; whether the mistake was a mistake of fact or law; and whether the collector maintained reasonable procedures. These are all discussed at § 12.2, *infra*.

with company). *Cf.* Backlund v. Messerli & Kramer, P.A., 964 F. Supp. 2d 1010 (D. Minn. 2013). *But cf.* Robinson v. I.C. Sys., Inc., 2016 WL 6462278 (E.D.N.Y. Nov. 1, 2016) (granting debt collector summary judgment on other grounds while, in *dicta*, questioning whether consumer's limited power of attorney with credit counselor permitted debt collector to discuss consumer's debt with counselor).

73 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1171 (9th Cir. 2006).

74 *E.g.*, Kaiser v. Cascade Cap., L.L.C., 989 F.3d 1127, 1130 (9th Cir. 2021); Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128, 134 (2d Cir. 2017); Oliva v. Blatt, Hasenmiller, Leibsker & Moore L.L.C., 864 F.3d 492, 502 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1283, 200 L. Ed. 2d 469 (2018); Stratton v. Portfolio Recovery Assoc., 770 F.3d 443 (6th Cir. 2014); Crawford v. LVNV Funding, L.L.C., 758 F.3d 1254, 1259 n.4 (11th Cir. 2014); Glover v. F.D.I.C., 698 F.3d 139 (3d Cir. 2012); McLean v. Ray, 488 Fed. Appx. 677 (4th Cir. 2012); Picht v. John R. Hawks, Ltd., 236 F.3d 446, 451 (8th Cir. 2001). *See also* 15 U.S.C. § 1692k ("Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable"); Appx. E.2.4.1.3, *infra* (compiling cases on strict liability).

75 *E.g.*, Kaiser v. Cascade Cap., L.L.C., 989 F.3d 1127, 1139 (9th Cir. 2021) ("the bona fide error defense is the statute's narrow exception to strict liability"); Crawford v. LVNV Funding, L.L.C., 758 F.3d 1254, 1259 n.4 (11th Cir. 2014) (same); Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 438 (6th Cir. 2008) ("An exception to strict liability exists only where a debt collector commits a violation resulting from a 'bona fide error.'"); Picht v. Jon R. Hawks, Ltd., 236 F.3d 446, 451 (8th Cir. 2001) ("The bona fide error defense exists as an exception to the strict liability imposed upon debt collectors by the FDCPA."); Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996). *See also* § 12.2, *infra* (discussing bona fide error defense).

76 15 U.S.C. § 1640. *See* National Consumer Law Center, Truth in Lending § 1.5.2.3 (10th ed. 2019), *updated at* www.nclc.org/library.

77 15 U.S.C. § 45. *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 4.2.4 to 4.2.20 (10th ed. 2021), *updated at* www.nclc.org/library.

78 *See, e.g.*, Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128, 134 (2d Cir. 2017) ("plaintiff does not need to show intentional conduct on the part of the debt collector"); Afewerki v. Anaya Law Grp., 868 F.3d 771, 777 n.3 (9th Cir. 2017) ("the FDCPA is a strict liability statute that makes debt collectors liable for violations that are not knowing or intentional"); Wise v. Zwicker & Assoc., 780 F.3d 710 (6th Cir. 2015) ("a plaintiff does not need to prove knowledge or intent to establish liability, nor must he show actual damages"); Russell v. Absolute Collection Services, Inc., 763 F.3d 385 (4th Cir. 2014) ("A debtor generally is not required to show an intentional or knowing violation on the part of the debt collector to recover damages under the FDCPA."); Wahl v. Midland Credit Mgmt., Inc., 556 F.3d 643, 646 (7th Cir. 2009) ("a collector need not be deliberate, reckless, or even negligent to trigger liability").

79 *E.g.*, 15 U.S.C. §§ 1692d(5), 1692e(4), 1692e(5), 1692e(7).

80 *E.g.*, 15 U.S.C. §§ 1692b(6), 1692c(a)(1), 1692c(a)(2), 1692c(a)(3), 1692e(8).

81 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1176 n.11 (9th Cir. 2006). *See also* H.R. 5294, 95th Cong. (1977) (as reported Mar. 29, 1977) (draft of FDCPA that considered language requiring willful and knowing violations in order to establish criminal not civil liability—proposed language was not adopted), *available online as companion material to this treatise.*

82 15 U.S.C. § 1692k(c). *See* § 12.2, *infra* (discussing bona fide error defense).

83 15 U.S.C. § 1692k(e). *See* § 3.4.4.3, *infra* (discussing advisory opinions). *See also* Owen v. I.C. Sys., Inc., 629 F.3d 1263, 1271 n.9 (11th Cir. 2011) ("The FDCPA contains another exception to the strict liability rule, providing that debt collectors will not be liable for 'any act done or omitted in good faith in conformity with any advisory opinion of the . . . Commission.' 15 U.S.C. § 1692k(e).").

84 15 U.S.C. §§ 1692k(b)(1), 1692k(b)(2). *See* §§ 11.9.1, 11.9.2, *infra* (discussing calculation of statutory damages).

3.2.5 Liberal Interpretation of the FDCPA

The FDCPA is a remedial statute[85] and should be "liberally" or "broadly" construed.[86]

3.2.6 Debtors Deserve Reasonable and Civil Treatment

"A basic tenet of the [FDCPA] is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve 'the right to be treated in a reasonable and civil manner.'"[87]

> [T]he legislative history indicates clearly that it is exactly such a person, i.e., one who has contracted for goods or services and is unable to pay for them, that Congress intended to protect. Congress' presumption in enacting the FDCPA was that the vast majority of those who would enjoy the protection of the Act would not be "deadbeats." Congress found that in most cases consumers undertake these obligations fully intending to repay them.[88]

85 *See, e.g.*, Urbina v. Nat'l Bus. Factors Inc., 979 F.3d 758, 763 (9th Cir. 2020); Manuel v. Merchants & Pro. Bur., Inc., 956 F.3d 822, 826 (5th Cir. 2020); DiNaples v. MRS BPO, L.L.C., 934 F.3d 275, 281 (3d Cir. 2019); Gillie v. Law Office of Eric A. Jones, L.L.C., 785 F.3d 1091, 1098 (6th Cir. 2015), *judgment vacated sub nom.* Jones v. Gillie, ___ U.S. ___, 136 S. Ct. 2446, 195 L. Ed. 2d 260 (2016); Russell v. Absolute Collection Services, Inc., 763 F.3d 385 (4th Cir. 2014); Gutierrez v. AT&T Broadband, L.L.C., 382 F.3d 725, 741 (7th Cir. 2004); Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002). *See also* Appx. E.1.7.1, *infra* (collecting cases addressing purpose and general interpretation of FDCPA).

86 *See, e.g.*, Urbina v. Nat'l Bus. Factors Inc., 979 F.3d 758, 763 (9th Cir. 2020); Wagner v. Chiari & Ilecki, L.L.P., 973 F.3d 154, 165 (2d Cir. 2020); Manuel v. Merchants & Pro. Bur., Inc., 956 F.3d 822, 826 (5th Cir. 2020); DiNaples v. MRS BPO, L.L.C., 934 F.3d 275, 281 (3d Cir. 2019); Agrelo v. Affinity Mgmt. Services, L.L.C., 841 F.3d 944, 950 (11th Cir. 2016); Stratton v. Portfolio Recovery Assoc., 770 F.3d 443 (6th Cir. 2014); McMillan v. Collection Professionals Inc., 455 F.3d 754, 757 (7th Cir. 2006); Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002); Picht v. Hawks, 77 F. Supp. 2d 1041, 1043 (D. Minn. 1999), *aff'd*, 236 F.3d 446 (8th Cir. 2001). *See also* Appx. A.3, Appx. E.1.7.1, *infra* (collecting cases addressing purpose and general interpretation of FDCPA); S. Rep. No. 382, 95th Cong. 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 ("In addition to [the] specific prohibitions, this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.").

87 Fed. Trade Comm'n v. Check Enf't, 502 F.3d 159, 169 (3d Cir. 2007); McMillan v. Collection Prof'ls Inc., 455 F.3d 754, 762 n.10 (7th Cir. 2006). *See also* Baker v. G.C. Services Corp., 677 F.2d 775, 777 (9th Cir. 1982) *citing* 123 Cong. Rec. 10241 (1977) ("Representative Frank Annunzio, chairman of the subcommittee that reported out the bill, stated during debate '(t)hat every individual, whether or not he owes the debt, has a right to be treated in a reasonable and civil manner.'"); Jeter v. Credit Bur., Inc., 760 F.2d 1168, 1178 (11th Cir. 1985) (quoting same statement by Representative Frank Annunzio).

88 Zimmerman v. HBO Affiliate Grp., 834 F.2d 1163, 1168 (3d Cir. 1987).

3.3 Constitutionality of the FDCPA

The FDCPA's constitutionality has been upheld against claims that it violated the:

- Commerce Clause;[89]
- First Amendment (generally)[90] and (Petition Clause);[91]
- Fifth Amendment (Due Process Clause);[92]
- Tenth Amendment;[93] and

89 Hartman v. Great Seneca Fin. Corp., 569 F.3d 606 (6th Cir. 2009) (section 1692e's prohibition on false, deceptive, or misleading statements did not violate the commerce clause; it did not alter state law); Garcia-Contreras v. Brock & Scott, P.L.L.C., 2010 WL 4962940 (M.D.N.C. Nov. 30, 2010), *adopted in relevant part*, 775 F. Supp. 2d 808 (M.D.N.C. 2011) (rejecting argument that FDCPA exceeded Congress' Commerce Clause authority); Kelly v. Great Seneca Fin. Corp., 443 F. Supp. 2d 954 (S.D. Ohio 2005) (rejecting collectors' argument that FDCPA is unconstitutional exercise of congressional powers in violation of Tenth Amendment or the Commerce Clause); Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 655 (S.D. Ohio 2004) (same).

90 United States v. Cent. Adjustment Bureau, Inc., 823 F.2d 880, 881 (5th Cir. 1987) ("Deceptive commercial speech does not merit first amendment protection."); Berg v. Merchants Ass'n Collection Div., Inc., 586 F. Supp. 2d 1336 (S.D. Fla. 2008) (FDCPA's prohibition barring collectors from leaving prerecorded voicemail collection messages that are heard by unauthorized third parties does not violate the First Amendment since the prohibition "is narrowly tailored to serve the significant governmental interest of protecting consumers' privacy" and "[d]ebt collectors have several alternative channels of communication available to them, including live conversation via telephone, in person communication, and postal mail"). *See also* Barr v. Am. Ass'n of Political Consultants, Inc., ___U.S. ___, 140 S. Ct. 2335, ___L. Ed. 2d ___(2020) (rejecting argument that finding government-debt exception in TCPA to be unconstitutional content-based restriction on speech would make FDCPA unconstitutional); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 130 S. Ct. 1605, 1624 n.21, 176 L. Ed. 2d 519 (2010) (declining to address dissent's view that Court's decision "creates serious concerns . . . for First Amendment Rights"; issue was not briefed or properly before Court).

91 Hartman v. Great Seneca Fin. Corp., 569 F.3d 606 (6th Cir. 2009) (section 1692e's prohibition on false, deceptive, or misleading statements did not violate Petition Clause of the First Amendment; allegedly false statement made during litigation not immunized by Petition Clause). *See also* § 12.6.6.2, *infra*.

92 Hartman v. Great Seneca Fin. Corp., 569 F.3d 606 (6th Cir. 2009) (section 1692e's prohibition on false, deceptive, or misleading statements is not unconstitutionally vague or overbroad, because statute provides adequate notice and there is no assertion of arbitrary enforcement); United States v. Cent. Adjustment Bur., Inc., 823 F.2d 880, 881 (5th Cir. 1987) ("Use of the term 'deceptive' does not make the Act unconstitutionally vague on its face. Central Adjustment has not shown that the Act is impermissibly vague in its applications."); Linehan v. Allianceone Receivables Mgmt., Inc., 2016 WL 4765839 (W.D. Wash. Sept. 13, 2016) (section 1692i does not violate due process by its vagueness and ambiguity); CFPB v. Frederick J. Hanna & Assoc., 114 F. Supp. 3d 1342 (N.D. Ga. 2015) (rejecting defendants' argument that applying meaningful attorney involvement standard for complaints under § 1692e(3) would render FDCPA unconstitutionally vague); Garcia-Contreras v. Brock & Scott, P.L.L.C., 2010 WL 4962940 (M.D.N.C. Nov. 30, 2010), *adopted in relevant part*, 775 F. Supp. 2d 808 (M.D.N.C. 2011) (rejecting arguments that FDCPA violates Fifth Amendment Due Process Clause).

93 Linehan v. Allianceone Receivables Mgmt., Inc., 2016 WL 4765839 (W.D. Wash. Sept. 13, 2016) (section 1692i does not violate the Tenth Amendment); Kelly v. Great Seneca Fin. Corp., 443 F. Supp. 2d 954

- Fourteenth Amendment (Equal Protection Clause).[94]

In addition to constitutional challenges of the FDCPA itself, constitutional issues such as plaintiff's Article III constitutional standing,[95] the sovereign immunity of states under the Eleventh Amendment,[96] or First Amendment defenses[97] based on litigation, witness immunity, or the right to petition the government may be raised in FDCPA cases.

3.4 Sources of Law Interpreting the FDCPA

3.4.1 Construing the Language of the Act

The language of the FDCPA is the first point of reference in any action under the Act.[98] Congress spent years crafting the final language and policies of the FDCPA.[99] Ignoring the carefully chosen language of the FDCPA would frustrate congressional will and authority.[100] Moreover, as "a 'comprehensive and reticulated' statutory scheme, involving clear definitions, precise requirements, and particularized remedies," the courts should not impose common law limitations onto the FDCPA.[101]

The text of the FDCPA includes congressional findings and purposes.[102] When interpreting unclear or ambiguous parts of the FDCPA, courts should give effect to these.[103] However, the titles in the FDCPA are not part of the law enacted by Congress, having been added by the Law Revision Counsel after enactment, and thus not entitled to consideration in construing the Act.[104]

Congress also recognized its inability to foresee or define all possible types of collection abuses and drafted portions of the FDCPA broadly to allow judicial proscription of unforeseen types of improper collection conduct.[105] When addressing misconduct not specifically proscribed by the Act, courts should apply the Act's general proscriptions,[106] recognize its remedial purposes,[107] and carry out the findings and purposes specified in FDCPA § 1692.

In some cases, courts need to look beyond the plain language of the FDCPA[108] and may consider legislative history.[109] The next section contains brief discussions of the legislative history of the FDCPA and its subsequent amendments. Legislative history materials are available online as companion materials to this treatise.

(S.D. Ohio 2005) (rejecting collectors' argument that FDCPA is unconstitutional exercise of congressional powers in violation of Tenth Amendment or Commerce Clause); Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 655 (S.D. Ohio 2004) (same).

94 United States v. Cent. Adjustment Bur., Inc., 823 F.2d 880, 880 881 (5th Cir. 1987) (FDCPA "does not violate the equal protection clause by limiting its coverage to independent debt collectors. Because the purpose of the Act is to prevent abusive debt-collection practices and Congress identified independent debt collectors as the 'prime source of egregious collection practices,' there is clearly a rational relationship between the Act's distinction among debt collectors and the underlying state interest").

95 *See* § 11.15, *infra*.

96 *See* § 12.6.5, *infra*.

97 *See* § 12.6.6, *infra*.

98 Rotkiske v. Klemm, ___ U.S. ___, 140 S. Ct. 355, 360, 205 L. Ed. 2d 291 (2019) (beginning with analysis of statutory language); Henson v. Santander Consumer USA Inc., ___ U.S. ___, 137 S. Ct. 1718, 1721, 198 L. Ed. 2d 177 (2017) ("[W]e begin, as we must, with a careful examination of the statutory text").

99 *See* § 3.4.2, *infra*.

100 *See* Rotkiske v. Klemm, ___ U.S. ___, 140 S. Ct. 355, 360, 205 L. Ed. 2d 291 (2019) ("We must presume that Congress says in a statute what it means and means in a statute what it says there."); Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1031, 203 L. Ed. 2d 390 (2019) ("the Court must enforce the statute that Congress enacted"); Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268 (11th Cir. 2016) ("we must construe [a] statute to give effect, if possible, to every word and clause"); Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992) (FDCPA is "an extraordinarily broad statute" and must be enforced "as Congress has written it").

101 Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 233 (4th Cir. 2007) ("It is clear that Congress meant not to incorporate common law immunities in this area, such as they may be, but to overwrite them, defining the scope of liability and immunity entirely by statute."). *See also* Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055, 1068 (9th Cir. 2011) ("we cannot reject the statutory text in order to imply common law limitations").

102 15 U.S.C. § 1692.

103 *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 618–619, 130 S. Ct. 1605, 1632, 176 L. Ed. 2d 519 (2010) (Breyer concurring; "When construing a federal statute, courts should be mindful of the effect of the interpretation on congressional purposes explicit in the statutory text.").

104 *See* Mangum v. Action Collection Serv., Inc., 575 F.3d 935 (9th Cir. 2009) *abrogated on other grounds*, Rotkiske v. Klemm, ___ U.S. ___, 140 S. Ct. 355, 205 L. Ed. 2d 291 (2019).

105 S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra* ("this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed").

106 *See* § 6.2, *infra* (discussing § 1692d's general prohibition on harassing, oppressive, and abusive conduct), § 7.3, *infra* (discussing § 1692e's general prohibition on false, deceptive, or misleading representations), § 8.2, *infra* (discussing § 1692f's general prohibition on unfair or unconscionable collection practices).

107 *See* § 3.2.5, *supra*.

108 *See, e.g.*, Hernandez v. Williams, Zinman & Parham P.C., 829 F.3d 1068, 1072–1073 (9th Cir. 2016) (laying out steps court took in construing meaning of statutory provision under FDCPA).

109 *See, e.g.*, Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1037, 203 L. Ed. 2d 390 (2019) (noting that legislative history supports court's interpretation); Midland Funding, L.L.C. v. Johnson, ___ U.S. ___, 137 S. Ct. 1407, 1418 n.4, 197 L. Ed. 2d 790 (2017) (considering legislative history when interpreting § 1692f). *But cf.* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 596, 130 S. Ct. 1605, 1620, 176 L. Ed. 2d 519 (2010) (declining "to give controlling weight" to "isolated passage" in Senate Report); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992) (sparse legislative history has relatively little persuasive weight in comparison to plain meaning of statute).

3.4.2 Legislative History

3.4.2.1 1977 Act

The FDCPA was signed at a White House ceremony on September 20, 1977, and became law on March 20, 1978. Because the bill that became the FDCPA was drafted by the Senate, the most useful piece of legislative history is Senate Report 382,[110] which describes the provisions of the bill and the intentions of its drafters. This report was written by the Senate Committee on Banking, Housing, and Urban Affairs (the Senate Banking Committee) to accompany the bill adopted by the Senate in August 1977, and by the House shortly thereafter. House legislative activity is also important because much of the language and most of the structure of the Act were shaped in the House during three years of frequent rewriting and debate. In fact, the Senate and its committees acted only after the House had passed its own version of the FDCPA.

Two House reports accompanied two earlier bills that were separately voted upon by the House before the final bill was formulated in the Senate. One House bill was defeated under unusual circumstances in July 1976. A description of this bill, together with the bill's text, is contained in House Report 1202.[111] The other document, House Report 131,[112] was written to describe the bill eventually reported to the Senate after adoption with amendments in March 1977. The two House reports must be used with care, because many alterations were made prior to passage of the final version of the Act.

The legislative history of specific portions of the FDCPA may sometimes be gleaned only by carefully reading the many staff and committee drafts and revisions of this legislation. The success of litigation occasionally hinges on the particular wording or meaning of a small passage of the Act. To aid this research, a detailed chronology of the legislative history of the FDCPA is set forth below. Substantive changes in the legislation are discussed at Chapters 4 to 12, *infra,* in connection with the discussion of the relevant provision of the Act.

Congressman Frank Annunzio (D-Ill.) was primarily responsible for passage of the FDCPA. On October 10, 1975, he introduced the first debt collection bill, H.R. 10191, on behalf of a bipartisan group of members of the Subcommittee on Consumer Affairs of the House Committee on Banking, Currency, and Housing (the House Consumer Affairs Subcommittee).[113] As chairman of this subcommittee, Congressman Annunzio shepherded the original bill and its successors through several redrafts and through years of debate and negotiation. This bill contained features and proscriptions which are now law. The bill, however, did not survive the first session of the 94th Congress, which adjourned without public consideration of H.R. 10191.

On February 19, 1976, Congressman Annunzio introduced H.R. 11969,[114] a modification of H.R. 10191. Many of the basic approaches of H.R. 11969 were similar to the present Act, although many details were undecided. Hearings were conducted by the House Consumer Affairs Subcommittee on March 30 and 31 and April 6 and 7, 1976.[115]

A new bill, H.R. 13720, cosponsored by Congressman Annunzio and five other members of the subcommittee, was introduced on May 12, 1976.[116] The full House Committee on Banking, Currency, and Housing (the House Banking Committee) met in executive session on May 25, 1976 and, by a 21 to 3 vote, passed H.R. 13720 with amendments.[117]

H.R. 13720 came to the floor of the House on July 19, 1976, under a special rule requiring a two-thirds vote for passage. After debate, the bill failed by fifty votes to muster the necessary margin.[118] The bill was again brought to the floor of the House. It passed, 239 to 162, after a technical amendment and an amendment (not carried forward in Senate bills)[119] excluding intrastate debt collectors. The bill was reported to the Senate the next day and referred to the Senate Banking Committee.

On September 21, 1976, Senator Joseph Biden (D-Del.), Chairman of the Consumer Affairs Subcommittee of the Senate Committee on Banking, Housing, and Urban Affairs (the Senate Consumer Affairs Subcommittee), introduced S. 3838, which paralleled most H.R. 13720 provisions, but differed in many details. Senator Biden, noting passage of the House bill, remarked that his bill would have to be considered early in the next Congress, because too little time remained in the 94th Congress.[120]

In the 95th Congress, bills introduced in both Houses worked their way through committee and floor votes. H.R. 29, a redraft of H.R. 13720 was introduced by Congressman

110 S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *available online as companion material to this treatise and reproduced at* Appx. A.3, *infra.*

111 H. Rep. No. 1202, 94th Cong., 2d Sess. (1976), *available online as companion material to this treatise.*

112 H. Rep. No. 131, 95th Cong., 1st Sess. (1977), *available online as companion material to this treatise.*

113 H.R. 10191, 94th Cong. (1975), *available online as companion material to this treatise.*

114 H.R. 11969, 95th Cong. (1976), *available online as companion material to this treatise.*

115 The Debt Collection Practices Act: Hearings on H.R. 11969 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Hous., 94th Cong., 2d Sess. (1976), *available online as companion material to this treatise.*

116 This version of H.R. 13720 is contained in H.R. Rep. No. 1202, 94th Cong., 2d Sess. (1976), *available online as companion material to this treatise.*

117 H.R. Rep. No. 1202, 94th Cong., 2d Sess. (1976), *available online as companion material to this treatise.* This report must be cited with care because it does not include many subsequent amendments that led to final passage of the Act.

118 The actual vote was 201 in favor, 175 opposed. 122 Cong. Rec. H7,304 to H7,318 (daily ed. July 19, 1976), *available online as companion material to this treatise.*

119 122 Cong. Rec. H7,787 to H7,798 (daily ed. July 27, 1976), *available online as companion material to this treatise.*

120 122 Cong. Rec. S16,273 (daily ed. Sept. 21, 1976), *available online as companion material to this treatise.*

Annunzio on January 4, 1977.[121] The House Consumer Affairs Subcommittee held hearings on H.R. 29 on March 8, 9, and 10, 1977.[122] On March 22, 1977, the subcommittee met, amended the bill, and unanimously recommended it (as amended) to the full House Banking Committee.

The amended bill was renumbered H.R. 5294 and was considered by the full House Banking Committee on March 29, 1977. It was amended and reported to the full House by a 35 to 8 committee vote. The committee amendments were largely technical; the few substantive amendments were not contained in the Senate bills.[123] On April 4, 1977, the full House debated and passed the bill by a 199 to 198 vote.[124] The House reported the bill to the Senate on April 6, 1977.

Meanwhile, three bills were introduced in the Senate. Senator Biden introduced S. 656.[125] S. 918 was introduced by Senator Donald Riegle (D-Mich.), who had replaced Senator Biden as chairman of the Consumer Affairs Subcommittee of the Senate Banking Committee.[126] S. 918 was drafted using S. 656, as the starting point, and was very similar in language to the Act. Senator Jake Garn (R-Utah) introduced S. 1130, a more industry-oriented bill.[127] Few of the provisions unique to the Garn bill were included in the Act. The Senate Consumer Affairs Subcommittee held hearings on the three Senate bills and the House bill on May 12 and 13, 1977,[128] and Robert Hobbs, a staff attorney at the National Consumer Law Center, presented testimony on behalf of NCLC's low-income clients.

The Senate Banking Committee approved an amended version of H.R. 5294,[129] sending it back to the House of Representatives on August 2, 1977, together with a report about the legislation.[130] The most dramatic change made by the Committee was the deletion of a mandatory minimum $100 civil liability for violations of the Act[131] The full Senate passed this version by a voice vote without debate or additional amendments.[132]

The House passed the Senate version of H.R. 5294 without change and with very little debate.[133] The bill was signed by President Carter on September 20, 1977,[134] and became effective six months later, on March 20, 1978.

3.4.2.2 1986 Amendment

The coverage of attorneys by the Fair Debt Collection Practices Act was expanded by Congress in 1986.[135] An attorney who regularly collects consumer debts is now subject to all provisions of the FDCPA.[136] The 1986 amendment deleted the language which had exempted attorneys acting "as an attorney on behalf of and in the name of a client."[137] Proposals to limit this FDCPA amendment were defeated in the House.[138]

3.4.2.3 1996 Amendment

The 1996 amendment reduced the number of times a collector had to provide a debt collection warning from requiring it in all communications to requiring it only in the first one or two communications.[139] The 1996 amendment also added the requirement that each communication to the consumer disclose that it is from a debt collector.[140]

The 1996 amendment was tacked onto a much larger bill late in the legislative process.[141] There were no hearings or reports regarding the 1996 amendment. Bills proposing additional amendments were introduced in each year since, but did not garner the support necessary for passage until 2006.

3.4.2.4 2006 Amendments

On October 13, 2006, President George W. Bush signed into law four amendments to the FDCPA as part of The Financial Services Regulatory Relief Act of 2006.[142] These amendments passed with bipartisan support, despite opposition from consumer groups.

121 H.R. 29, 95th Cong. (1977), *available online as companion material to this treatise.*

122 The Fair Debt Collection Practices Act: Hearings on H.R. 29 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong. (1st Sess. 1977), *available online as companion material to this treatise.*

123 H.R. Rep. No. 131, 95th Cong., 1st Sess. (1977), *available online as companion material to this treatise.*

124 123 Cong. Rec. H2,919 (daily ed. Apr. 4, 1977), *available online as companion material to this treatise.*

125 123 Cong. Rec. S2,380 (daily ed. Feb. 7, 1977), *available online as companion material to this treatise.*

126 123 Cong. Rec. S3,484 (daily ed. Mar. 4, 1977), *available online as companion material to this treatise.*

127 123 Cong. Rec. S4,884 (daily ed. Mar. 25, 1977), *available online as companion material to this treatise.*

128 The Fair Debt Collection Practices Act: Hearings Before the Senate Subcomm. on Consumer Affairs of the Comm. on Banking, Hous. and Urban Affairs, 95th Cong., 1st Sess. (1977), *available online as companion material to this treatise.*

129 H.R. 5294, 95th Cong. (1977) (as reported Aug. 2, 1977), *available online as companion material to this treatise.*

130 S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *available online as companion material to this treatise and reproduced at* Appx. A.3, *infra.*

131 S. Rep. No. 382, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *available online as companion material to this treatise and reproduced at* Appx. A.3, *infra.*

132 123 Cong. Rec. S13,851 (daily ed. Aug. 5, 1977), *available online as companion material to this treatise.*

133 123 Cong. Rec. H8,993 (daily ed. Sept. 8, 1977), *available online as companion material to this treatise.*

134 Remarks of the President of the United States at the bill signing ceremony, *available online as a companion material to this treatise.*

135 Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986).

136 *See* § 4.7.3.3, *infra.*

137 *See* § 4.8.6, *infra.*

138 *See* H.R. Rep. No. 405, 99th Cong., 2d Sess. 11 (Nov. 26, 1985), *reprinted in* 1986 U.S.C.C.A.N. 1752.

139 *See* § 7.2.11, *infra.*

140 *Id.*

141 *See* Pub. L. No. 104-208, 110 Stat. 3009-[1243], the Omnibus Consolidated Appropriations Act of 1997 § 2305.

142 Pub. L. No. 109-351, 120 Stat. 1966 (Oct. 13, 2006).

One amendment potentially exempts check collection agencies from the FDCPA, in narrow circumstances when they are operating under the close supervision of a district attorney under an agreement to collect consumers' dishonored checks owed to retail merchants.[143] This amendment was supported by the National Association of District Attorneys and opposed by the ACA International as well as consumer groups.

The three other amendments affect consumers' debt verification rights, the informal dispute resolution device provided by FDCPA § 1692g.[144] Two amendments narrow the situations in which debt verification rights may be available to consumers. The first change amends the FDCPA to provide that the filing of a formal pleading in a civil suit is not an initial communication triggering debt verification rights.[145] The second change narrowing verification rights provides that certain legally required notices debt collectors send to consumers are not initial communications triggering consumers' debt verification rights.[146]

The final 2006 FDCPA amendment codified the extensive case law that some collection activities may continue during the thirty-day period that the consumer has the right to request debt verification, as long as the collection activities are not inconsistent with the consumer's right to debt verification or overshadow the right.[147]

The amendments were passed by the Senate after the Senate considerably tightened up a bill passed by the House.[148]

3.4.2.5 2010 Amendment

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) creating a new Consumer Financial Protection Bureau (CFPB) was signed into law on July 21, 2010.[149] Title X of the Dodd-Frank Act, the Consumer Financial Protection Act, contains the CFPB's authority.

Effective July 21, 2011,[150] the Dodd-Frank Act amended section 1692*l* of the FDCPA to grant the CFPB authority to prescribe rules "with respect to the collection of debts by debt collectors, as defined in this subchapter."[151] Before rulemaking authority was vested in the CFPB, the FDCPA had prohibited the FTC or any other agency from issuing rules under the Act.[152]

The 2010 amendment also transferred authority to issue advisory opinions under FDCPA § 1692k(e) from the FTC[153] to the CFPB.[154]

3.4.3 Case Developments

Thousands of judicial decisions citing the FDCPA are available using services such as Westlaw[155] and LexisNexis. Many of those decisions are summarized in the online FDCPA Case Connector,[156] reproduced in Appendix E, *infra*, and are cited throughout the chapters of this book. Some of these cases are available through free online websites such as Google Scholar.

Lawyers obtaining favorable decisions under the Act should recommend publication to the court's clerk. Alternatively, attorneys can submit cases directly to LexisNexis and Westlaw for inclusion in their databases by emailing Westlaw at west.attysubmissions@thomson.com and LexisNexis at Source.Acquisition@LexisNexis.com.

3.4.4 Interpretation and Enforcement of the FDCPA by Federal Agencies

3.4.4.1 Overview

The Consumer Financial Protection Bureau (CFPB) has been interpreting and enforcing the FDCPA since it was established by the Dodd-Frank Act,[157] and the Federal Trade Commission (FTC) has been interpreting and enforcing the FDCPA since the law was enacted in 1977.

This section briefly discusses the ways that the two agencies have used their authority to interpret the statute. Each section will begin with a discussion of the CFPB and conclude with any relevant information about the FTC. Court deference to various agency interpretations is discussed in § 3.4.4.4, *infra*.

For more details about each agency's FDCPA-related work, the CFPB issues an annual report[158] and the FTC sends an annual letter to the CFPB summarizing its activity.[159]

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143 *See* § 4.8.11, *infra*.

144 *See generally* Ch. 9, *infra*.

145 *See* § 9.2.2, *infra*.

146 *Id.*

147 *See* § 9.8.1, *infra*.

148 *Cf.* H.R. 3505, 109th Cong. 2d Sess. §§ 901, 902 (2006), *available at* www.congress.gov.

149 Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

150 The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1089(4) (July 21, 2010), *amending* 15 U.S.C. § 1692*l*(d) (hereinafter the "Dodd-Frank Act"). The Dodd-Frank Act section 1100G specifies an effective date for this and other Title X provisions as of the "designated transfer date." 75 Fed. Reg. 57,252 (Sept. 20, 2010) sets the designated transfer date as July 21, 2011.

151 15 U.S.C. § 1692*l*(d).

152 As enacted by Pub. L. No. 95-109, 91 Stat. 874 (Sept. 20, 1977), 15 U.S.C. § 1692*l*(d) read "[n]either the Commission nor any other agency referred to in subsection (b) of this section may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this subchapter." *But see* § 3.4.4.2, *infra* (discussing regulations issued under § 1692o, which created exception to previous prohibition on agency rulemaking).

153 Pub. L. No. 95-109, 91 Stat. 874 (Sept. 20, 1977); 15 U.S.C. § 1692k(e).

154 Pub. L. No. 111-203, tit. X, § 1089(1), 124 Stat. 1376 (July 21, 2010); 15 U.S.C. § 1692k(e).

155 On Westlaw, NCLC builds FDCPA searches using the basic search: 15 +2 (u.s.c. u.s.c.a. u.s.c.s.) +2 1692! & da(aft 01/01/2021). The exclamation mark in "1692!" might be replaced with a particular subsection to narrow a search, or a keyword may be added as a search term.

156 For more information about how to access the FDCPA Case Connector, see § 1.1.1.4, *supra*.

157 Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

158 *See, e.g.*, CFPB, Fair Debt Collection Practices Act: CFPB Annual Report 2021 (Mar. 2021), *available at* www.consumerfinance.gov. *See also* 15 U.S.C. § 1692m(a) (requiring CFPB to make annual reports to Congress about its activities under FDCPA).

159 *See, e.g.*, Letter from April J. Tabor, Secretary, Fed. Trade Comm'n, to David Uejio, Acting Director, CFPB (Feb. 19, 2021), *available at* www.ftc.gov. *See also* 15 U.S.C. § 1692m(b) (authorizing CFPB to request

3.4.4.2 Regulations

As discussed in § 3.4.2.5, *supra,* effective July 21, 2011,[160] the Dodd-Frank Act amended the FDCPA to grant the CFPB broad authority to prescribe rules "with respect to the collection of debts by debt collectors, as defined in this subchapter,"[161] an authority denied to the FTC by Congress.[162]In 2013 the CFPB announced its Advanced Notice of Proposed Rulemaking regarding Debt Collection.[163] In July 2016, the CFPB released an outline of ideas under consideration for the debt collection rulemaking.[164] Proposed regulations were issued in May 2019[165] and supplemental proposed regulations were published in March 2020.[166] Materials related to the drafting of the debt collection regulations, Regulation F, are collected in the companion materials for this manual.

On November 30, 2020, the CFPB published part one of the final debt collection rules focused on debt collection communications.[167] The most significant provisions:

- Set out a presumption that a certain number of calls per week is or is not an FDCPA violation (with factors that can rebut those presumptions);
- Permit certain use of electronic communications to provide disclosures required under the FDCPA or to collect a debt;
- Give consumers the right to ask a collector orally to stop calling;
- Require notice of the right to opt out of electronic communications in every message;
- Provide a safe harbor from FDCPA liability for third-party disclosures when communicating with a consumer by email or text message where the email address or phone number were obtained using specified methods; and
- Define certain limited debt collector voice mail messages left for consumers as outside the FDCPA's scope.

On January 19, 2021, the CFPB published part two of the final debt collection rules focused on debt collection disclosures.[168]

This part of the rules, among other things:

- Sets out information that a debt collector must provide to a consumer at the outset of debt collection communications and provides a model notice containing such information;
- Prohibits debt collectors from bringing or threatening to bring a legal action against a consumer to collect a time-barred debt; and
- Requires debt collectors to take certain actions before furnishing information about a consumer's alleged debt to a consumer reporting agency.

Collectively, these two parts comprise Regulation F (effective November 30, 2021) and are based on the CFPB's authority under the FDCPA, the Dodd-Frank Act, and the E-SIGN Act.[169] In addition to the text of the regulations themselves, the Bureau also published official interpretations to Regulation F under the same authority.[170] The Bureau also publishes unofficial materials related to Regulation F, such as its Small Entity Compliance Guide, on its webpage for Compliance Resources.[171]

Debt collection regulations issued under FDCPA § 1692o[172] were originally codified at 12 C.F.R. §§ 1006.1 to 1006.8. Under Regulation F, they have been amended and relocated to 12 C.F.R. § 1006.108 and Appendix A to Part 1006 (effective November 30, 2021). These regulations set out procedures for state application for exemptions from the FDCPA's substantive provisions, but do not allow exemption from the FDCPA's

"the views of any other Federal agency which exercises enforcement functions under section 1692*l* of this title").

160 Pub. L. No. 111-203 § 1089(4) (July 21, 2010), *amending* 15 U.S.C. § 1692*l*(d). The Dodd-Frank Act's § 1100G specifies an effective date for this and other Title X provisions as of the "designated transfer date." 75 Fed. Reg. 57,252 (Sept. 20, 2010) sets the designated transfer date as July 21, 2011.

161 15 U.S.C. § 1692*l*(d).

162 As enacted in 1977 by Pub. L. No. 95-109, 91 Stat. 874 (Sept. 20, 1977), 15 U.S.C. § 1692*l*(d) read: "[n]either the Commission nor any other agency referred to in subsection (b) of this section may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this subchapter." *But see* 15 U.S.C. § 1692o, which called for the creation of regulations under this section of the statute before the authorization of broad rulemaking authority. These regulations are discussed above in this section.

163 68 Fed. Reg. 67,848 (Nov. 12, 2013), *available online as companion material to this treatise.*

164 CFPB, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered (July 28, 2016), *available online as companion material to this treatise.*

165 Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274 (May 19, 2019), *available online as companion material to this treatise.*

166 Debt Collection Practices (Regulation F), 85 Fed. Reg. 12,672 (Mar. 3, 2020), *available online as companion material to this treatise.*

167 Debt Collection Practices (Regulation F), 85 Fed. Reg. 76,734 (Nov. 30, 2020), *available online as companion material to this treatise.*

168 Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766 (Jan. 19, 2021), *available online as companion material to this treatise.*

169 12 C.F.R. § 1006.1(a) (specifying legal authority for Regulation F as "sections 814(d) and 817 of the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692*l*(d), 1692o; title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. 5481 et seq.; and paragraph (b)(1) of section 104 of the Electronic Signatures in Global and National Commerce Act (E-SIGN Act), 15 U.S.C. 7004.").

170 Supplement I to Part 1006, comment I-1.

171 *Available at* https://www.consumerfinance.gov.

172 The 2010 amendment to the FDCPA transferred authority over these regulations from the FTC to the CFPB.

As enacted by Pub. L. No. 95-109, 91 Stat. 874 (Sept. 20, 1977), 15 U.S.C. § 1692o read: "the [Federal Trade] Commission shall by regulation exempt from the requirements of this title any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement."

Currently, 15 U.S.C. § 1692o says, "The [Consumer Financial Protection] Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement."

private or federal enforcement provisions.[173] Only the state of Maine has been granted an FDCPA exemption from the FDCPA's substantive requirements.[174] Thus, collectors in Maine must comply with the state's substantive provisions, but private litigants still can enforce violations of the Maine law in federal court using FDCPA remedies.[175]

On April 22, 2021, the CFPB also issued Interim Final Rules on Debt Collection Practices in Connection With the Global COVID–19 Pandemic (Regulation F).[176] The interim final rules prohibit debt collectors from filing an eviction for non-payment of rent without providing information about the eviction moratorium issued by the Centers for Disease Control and Prevention in response to the global COVID-19 pandemic, which was in effect through July 31, 2021.[177] The rule also prohibits misrepresentations about consumers' eligibility for protection under such moratorium. The rule took effect on May 3, 2021, and is codified at 12 C.F.R. § 1006.9.

The CFPB maintains a website with debt collection regulations and commentary at https://www.consumerfinance.gov. This website shows current, historical, and future (if there are regulations that have not yet taken effect) views of Regulation F.

3.4.4.3 Advisory Opinions

The FDCPA states that debt collectors may rely upon a formal advisory opinion as a complete defense in a private suit.[178] As discussed in § 3.4.2.5, *supra*, the 2010 amendment transferred authority to issue advisory opinions under FDCPA § 1692k(e) from the FTC[179] to the CFPB.[180]

Appendix C to Regulation F (effective November 30, 2021) lists advisory opinions issued by the CFPB. At the time of publication, only one advisory opinion was listed.[181] This advisory opinion is summarized at Appx. B.2.2, *infra*.

The CFPB has not adopted the FTC's prior advisory opinions. As a result, the FTC's advisory opinions no longer provide a safe harbor under FDCPA § 1692k(e), which now specifically references "any act done or omitted in good faith in conformity with any advisory opinion of the *Bureau*."[182] Advisory opinions issued by the FTC will likely still have persuasive authority.[183] The FTC's four FDCPA advisory opinions are reproduced at Appx. C.1, *infra*.

3.4.4.4 Guidance, Staff Commentary, and Informal Letters

The CFPB occasionally issues guidance bulletins interpreting the FDCPA on topics that are identified during the CFPB's supervisory work. The CFPB was one of the agencies that joined the Interagency Statement Clarifying the Role of Supervisory Guidance, which explained that "supervisory guidance does not have the force and effect of law . . . [it] articulates the agencies' general views regarding appropriate practices for a given subject area."[184] CFPB guidance on the FDCPA are discussed in Appendix B, *infra*. The full text of CFPB guidance are available as companion materials to the online version of this treatise.

Prior to the passage of the Dodd-Frank Act,[185] which created the CFPB and gave it broad authority to issue regulations under the FDCPA, the FTC issued a variety of sub-regulatory guidance materials. In 1988, the FTC issued its Staff Commentary on the FDCPA, which is reproduced at Appendix C.2, *infra*.[186] Although it is still cited sometimes by courts, the FTC appears to have removed the Staff Commentary from its website. The Commentary was not voted on by the FTC Commissioners

173 Version in effect through November 29, 2021: 12 C.F.R. § 1006.6(d) ("No exemption shall extend to the civil liability provisions of section 813 of the Act. After an exemption is granted, the requirements of the applicable state law shall constitute the requirements of sections 803 through 812 of the Act, except to the extent such state law imposes requirements not imposed by the Act or this part.").

Version of the regulations scheduled to take effect on November 30, 2021: 12 C.F.R. § 1006.108 (a) ("Any State may apply to the Bureau for a determination that, under the laws of that State, any class of debt collection practices within that State is subject to requirements that are substantially similar to those imposed under sections 803 through 812 of the Act (15 U.S.C. 1692a through 1692j) and the corresponding provisions of this part, and that there is adequate provision for State enforcement of such requirements."). *See also* 12 C.F.R. § 1006, Appx. A(1)(b)(3).

174 60 Fed. Reg. 66,972 (Dec. 27, 1995). *See* Shock v. CDI Affiliated Serv., Inc., 2010 WL 672148 (D. Idaho Feb. 20, 2010) (Idaho has not been granted exemption).

175 Shapiro v. Haenn, 176 F. Supp. 2d 42 (D. Me. 2002) (Maine's exemption did not eliminate a consumer's private right of action or federal court jurisdiction). *See also* Maxwell v. Arrow Fin. Serv., L.L.C., 2004 WL 719278 (N.D. Ill. Mar. 31, 2004) (a class composed of only Maine residents may be maintained for violation of the Maine version of the FDCPA). *Cf.* Marcoux v. Szwed, 2015 WL 7705790 (D. Me. Nov. 27, 2015), *adopted*, 2016 WL 74407 (D. Me. Jan. 6, 2016) (rejecting motion to dismiss alleged violations of substantive FDCPA provisions despite state exemption).

176 Debt Collection Practices (Regulation F), 86 Fed. Reg. 21,163 (Apr. 22, 2021). *See also* April Kuehnhoff, Effective May 3 New Federal Debt Collection Rule on Eviction Practices (National Consumer Law Center Digital Library, Apr. 28, 2021), *available at* https://library.nclc.org.

177 Centers for Disease Control and Prevention, Dep't of Health & Human Services, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 (June 24, 2021), *available at* https://www.cdc.gov.

178 15 U.S.C. § 1692k(e), discussed at § 12.4, *infra*.

179 Pub. L. No. 95-109, 91 Stat. 874 (Sept. 20, 1977); 15 U.S.C. § 1692k(e).

180 Pub. L. No. 111-203, tit. X, § 1089(1), 124 Stat. 1376 (July 21, 2010); 15 U.S.C. § 1692k(e).

181 Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 71,977 (Oct. 19, 2016).

182 15 U.S.C. § 1692k(e) (emphasis added).

183 *See* § 3.4.4.8, *infra* (discussing deference to federal agency interpretations of FDCPA).

184 Board of Governors of the Federal Reserve System, et al., Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018).

185 *See* § 3.4.2.5, *supra*.

186 53 Fed. Reg. 50,097 (Dec. 13, 1988), *reproduced at* Appx. C.2, *infra*.

and is explicitly not binding on the FTC, the public, or the courts.[187] It is "based primarily on issues discussed in informal staff letters responding to public requests for interpretations and on the Commission's enforcement program, subsequent to the FDCPA's enactment."[188]

From 1977 until 2002, the FTC staff also advised debt collectors, attorneys, and consumers of its policies and interpretations of the Act through hundreds of informal staff letters.[189] These letters were not approved by the FTC Commissioners.[190] Although the Staff Commentary superseded the staff's views in prior informal staff letters,[191] the FTC continued to cite prior staff letters after the Commentary was published.[192] Additionally, some positions in staff letters are antagonistic with positions in other letters,[193] or even with the clear language of the FDCPA. Like the staff commentary, the FTC appears to have removed the informal staff letters from its website.

The FTC, on July 27, 2011, also issued guidelines for conduct that the FTC will sanction regarding collecting debts from decedent's estates.[194]

Unlike advisory opinions discussed at § 3.4.4.3, *supra*, debt collectors cannot rely on the different types of CFPB and FTC guidance discussed in this section as a defense pursuant to FDCPA § 1692k(e).[195]

3.4.4.5 Supervision and Enforcement

The CFPB has supervisory authority over larger participants in the consumer debt collection market. "A nonbank covered person is a larger participant of the consumer debt collection market if the nonbank covered person's annual receipts resulting from consumer debt collection are more than $10 million."[196] The CFPB regularly publishes "Supervisory Highlights" that summarize the types of violations identified in recent examinations.[197] These publications are useful tools for understanding how the CFPB interprets the FDCPA in otherwise private collection industry supervision.

The CFPB and the FTC have joint authority to enforce compliance with the FDCPA.[198] The Dodd-Frank Act requires the two agencies to negotiate coordination and cooperation with each other.[199] Consent orders, complaints, and court orders from previous enforcement actions are available at the CFPB and FTC websites.[200] Additionally, the FTC maintains an online list of companies and individuals who have been banned from debt collection.[201]

The CFPB also has enforcement authority over unfair, deceptive, or abusive acts or practices (UDAAPs) in the collection of consumer debts.[202] "Original creditors and other covered persons and service providers under the Dodd-Frank Act involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act."[203]

The FTC may treat an FDCPA violation as a violation of the Federal Trade Commission Act.[204] This enables the FTC to issue an administrative cease and desist order or to obtain a consent decree for a violation of the FDCPA.[205]

The FTC may also treat an FDCPA violation as a violation of an FTC trade regulation rule.[206]

Various federal agencies are also responsible for enforcing the FDCPA in regard to the financial institutions or other

187 53 Fed. Reg. 50,097, 50,101 (Dec. 13, 1988), *reproduced at* Appx. C.2, *infra*. *See also* Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) (FTC's Staff Commentary not binding on Commission or public and not entitled to deference when it conflicts with FDCPA's plain language).

188 53 Fed. Reg. 50,097, 50,101 (Dec. 13, 1988), *reproduced at* Appx. C.2, *infra*.

189 More recent letters are reproduced in chronological order at Appendix C.3, *infra*. All of the letters are indexed in Appendix C.3, *infra*, and the full text is available online under Primary Sources in the NCLC Digital Library. At least some of these letters are also available through Westlaw under Federal Materials, Federal Administrative Decisions & Guidance, Federal Trade Commission, Opinions, by searching for the individual letter.

190 *See* 15 U.S.C. § 1692k(e); § 3.4.4.1, *supra*, § 12.4.2, *infra*.

191 53 Fed. Reg. 50,097, 50,097 (Dec. 13, 1988), *reproduced at* Appx. C.2, *infra*.

192 *See, e.g.*, Brown, FTC Informal Staff Letter (Feb. 14, 1989); Shibley, FTC Informal Staff Letter (Dec. 14, 1988).

193 *Compare* Schorr, FTC Informal Staff Letter (July 27, 1981) (interpreting 15 U.S.C. § 1692f(1) to require contracts to specify amount or manner of calculating collection fees before they were collectible in conformance with FDCPA), *with* Carter, FTC Informal Staff Letter (June 8, 1982) (stating that contractual provision for "reasonable collection fee" did not violate FDCPA, as long as it did not violate state law).

94 *See* § 5.2.9.2, *infra*.

95 *See* 15 U.S.C. § 1692k(e); § 12.4, *infra*.

196 12 C.F.R. § 1090.105(b).

197 *See, e.g.*, CFPB, Supervisory Highlights, Issue 24, Summer 2021 (June 2021), *available at* https://files.consumerfinance.gov.

198 15 U.S.C. § 1692*l*. *See also* 12 U.S.C. §§ 5563, 5565; 15 U.S.C. § 53(b).

199 Pub. L. No. 111-203 § 1024(c)(3) (July 21, 2010).

200 www.consumerfinance.gov; www.ftc.gov.

201 *See* Fed. Trade Comm'n, Banned Debt Collectors, *available at* www.ftc.gov.

202 CFPB, Bulletin 2013-7: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013).

203 *Id.* (citing Pub. L. No. 111-203, §§ 1002, 1031, 1036(a) (July 21, 2010), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a): "It is also prohibited for any person, even if not a covered person or service provider, to knowingly or recklessly provide substantial assistance to a covered person or service provider in violating section 1031 of the Dodd-Frank Act. *See* Dodd-Frank Act, § 1036(a)(3), 12 U.S.C. § 5536(a)(3)").

204 15 U.S.C. § 1692*l*(a) ("For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act.").

205 *See* Fed. Trade Comm'n, A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority (July 2008), *available at* www.ftc.gov.

206 15 U.S.C. § 1692*l*(a) ("All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this subchapter . . . including the power to enforce the provisions of this subchapter, in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.").

entities they regulate.[207] These agencies are empowered by FDCPA § 1692*l*(c) to enforce the Act using their powers under other statutes under which they operate. Such statutory powers might allow periodic audits and examinations, license reviews, or charter reviews of the financial institutions.[208]

3.4.4.6 Amicus Briefs

The CFPB and the FTC provide interpretations of the FDCPA through amicus briefs, sometimes jointly and sometimes separately. Copies of CFPB and FTC amicus briefs are available as companion materials to the online version of this treatise.

3.4.4.7 Reports and Consumer Education Materials

The CFPB and the FTC also interpret the FDCPA through research and publications, such as consumer education materials available on their websites.[209]

CFPB reports about debt collection include:

- Debt and Delinquency After Military Service (Nov. 2020);
- The Consumer Credit Card Market (Aug. 2019) (see section 7 on credit card debt collection);
- Market Snapshot: Third-Party Debt Collections Tradeline Reporting (July 2019);
- Quarterly Consumer Credit Trends: Collection of Telecommunication Debt (Aug. 2018);
- The Effect of Debt Collection Laws on Access to Credit (Jan. 2018);
- The Consumer Credit Card Market (Dec. 2017) (see section 8 on credit card debt collection);
- Older Consumers and Student Loan Debt by State: New Data on the Burden of Student Loan Debt on Older Consumers (Aug. 2017);
- Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017);
- Market Snapshot: Online Debt Sales (Jan. 2017);
- Snapshot of Older Consumers and Student Loan Debt (Jan. 2017);
- Study of Third-Party Debt Collection Operations (July 2016);
- The Consumer Credit Card Market (Dec. 2015) (see section 8 on credit card debt collection);
- Consumer Credit Reports: A Study of Medical and Non-Medical Collections (Dec. 2014);
- A Snapshot of Debt Collection Complaints Submitted by Older Consumers (Nov. 2014); and
- Data Point: Medical Debt and Credit Scores (May 2014).

FTC reports about debt collection include:

- The Structure and Practices of the Debt Buying Industry (Jan. 2013);
- Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010); and
- Collecting Consumer Debts: The Challenges of Change, a Workshop Report (Feb. 2009).[210]

3.4.4.8 Deference to Federal Agency Interpretations of the FDCPA

Final FDCPA regulations (effective November 30, 2021) are entitled to *Chevron* deference,[211] and the agency's interpretation of its own regulations will be entitled to *Auer* deference[212] when the language of the regulation is ambiguous.[213]

Other CFPB and FTC interpretations of the FDCPA are "entitled to respect" to the extent that they have the "power to persuade."[214] The Supreme Court has stated that "considerable respect is due the interpretation given [a] statute by the officers or agency charged with its administration."[215]

Courts have found different types of sub-regulatory agency interpretations of the FDCPA persuasive. Below are some

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207 15 U.S.C. § 1692*l*(b).

The following lists the financial institutions and the corresponding federal regulatory agencies: banks (Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation); federally chartered credit unions (National Credit Union Administration); interstate shippers, movers, and airline companies (Secretary of Transportation); certain agricultural creditors (United States Department of Agriculture).

208 *E.g.*, 12 U.S.C. § 1756 (federal credit unions must report to and are subject to examination by the National Credit Union Administration).

209 www.consumerfinance.gov; www.ftc.gov.

210 This report made proposals to strengthen the FDCPA, including: increasing maximum statutory damages; disclosing to consumers that consumer's written dispute of debt during dispute period will require debt collector to suspend collecting debt until it investigates and responds to dispute; disclosing to consumers that collector must cease contacting consumer if requested in writing; and requiring debt collectors to obtain "express verifiable consumer authorization" before taking payments electronically from consumer's deposit accounts.

211 Gonzales v. Oregon, 546 U.S. 243, 255–256, 126 S. Ct. 904, 914–915, 163 L. Ed. 2d 748 (2006) ("Deference in accordance with [*Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)] . . . is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

212 Chase Bank v. McCoy, 562 U.S. 195, 208, 131 S. Ct. 871, 880, 178 L. Ed. 2d 716 (2011) ("Under *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), we defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is "plainly erroneous or inconsistent with the regulation.").

213 *See, e.g.*, Christensen v. Harris Cty., 529 U.S. 576, 588, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous.").

214 Gonzales v. Oregon, 546 U.S. 243, 255–256, 126 S. Ct. 904, 914–915, 163 L. Ed. 2d 748 (2006), *quoting* Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). *See also* Carter v. First Nat. Collection Bur., Inc., 135 F. Supp. 3d 565, 573 (S.D. Tex. 2015) ("Although the Court is not compelled to defer to the agencies' view, the FTC's and CFPB's judgment is to be given great weight by reviewing courts, as these agencies are often in a better position than are courts to determine when a practice is deceptive within the meaning of the [FDCPA].").

215 *See, e.g.*, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980).

examples of court decisions addressing whether particular agency actions are persuasive:

- Debt collection regulations prior to the effective date;[216]
- Proposed debt collection regulations;[217]
- Outline of proposals under consideration for the debt collection rulemaking;[218]
- FTC's Staff Commentary;[219]
- FTC staff letters;[220]
- Enforcement efforts and consent decrees;[221]
- Amicus briefs; and[222]
- Reports.[223]

Moreover, courts may permit findings from government consent orders to be cited in pleadings. As one court explained:

> When facts concerning a defendant's scheme activity are peculiarly within that defendant's knowledge, a plaintiff victimized by that scheme may plead upon information and belief facts drawn from a government agency's investigative findings concerning the scheme.[224]

216 Hopkins v. Collecto, Inc., 994 F.3d 117, 122 n.5 (3d Cir. 2021) (citing without reference to their level of deference);Kaiser v. Cascade Cap., L.L.C., 989 F.3d 1127, 1136 (9th Cir. 2021) (noting that collector's argument was "inconsistent with the CFPB's final rule").

217 Manuel v. Merchants & Pro. Bur., Inc., 956 F.3d 822, 829 n. 36 (5th Cir. 2020) (noting proposed time-barred debt disclosure).

218 Gunther v. Midland Credit Mgmt., Inc., 2018 WL 4621764, at *8 n.8 (D. Utah Sept. 26, 2018); White v. First Step Grp. L.L.C., 2017 WL 4181121 (E.D. Cal. Sept. 20, 2017). *But see* Pierre v. Midland Credit Mgmt., Inc., 2018 WL 723278 (N.D. Ill. Feb. 5, 2018).

219 Levins v. Healthcare Revenue Recovery Grp. L.L.C., 902 F.3d 274, 281 (3d Cir. 2018) (noting that FTC's discussion of an issue was a "sound interpretation" which the court adopted as its own); Ray v. McCullough Payne & Haan, L.L.C., 838 F.3d 1107, 1112 (11th Cir. 2016) (noting that the FTC's reading in its Commentary supported the court's reasoning); Brown v. Van Ru Credit Corp., 804 F.3d 740 (6th Cir. 2015) ("[N]onbinding commentary of the Federal Trade Commission lends further support"); Gulley v. Markoff & Krasny, 664 F.3d 1073, 1075 (7th Cir. 2011) (staff commentary entitled to "respectful consideration," but not *Chevron* deference); Hawthorne v. Mac Adjustments, Inc., 140 F.3d 1367 (11th Cir. 1998) (FTC Staff Commentary was "accorded considerable weight"); Jordan v. Kent Recovery Serv., Inc., 731 F. Supp. 652, 658 (D. Del. 1990) ("Although its 'precedential value' is 'limited by the restrictive interpretative power given to [the FTC] under the FDCPA', the Commentary lends 'some weight.'"). *But see* Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) (FTC's Staff Commentary is not entitled to deference where it conflicts with FDCPA's plain language); Schweizer v. Trans Union Corp., 136 F.3d 233, 238 (2d Cir. 1998) (noting that passage from FTC's Staff Commentary cited by district court was not sound guidance); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992) (declining to adopt FTC's position where its Staff Commentary and staff letter conflict with plain language of FDCPA).

220 *See, e.g.*, Carter v. AMC, L.L.C., 645 F.3d 840, 844 (7th Cir. 2011) (FTC staff letters are "entitled to respectful consideration"); Pressley v. Capitol Credit & Collection Serv., Inc., 760 F.2d 922 (9th Cir. 1985) (citing FTC staff letter to Congress as support court's position, while recognizing limited precedential value of such letters); Ewers v. Rainmaker Recovery 3, Inc., 393 F. Supp. 3d 614, 621 (E.D. Mich. 2019) (FTC letter entitled to respect to extent it has power to persuade). *But see* Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992) (informal advisory opinions of FTC that debt collection warning of § 1692e(11) need not be repeated in subsequent letters were unpersuasive and need not be followed when in conflict with unambiguous command of statute); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992) (declining to adopt the FTC's position where its Staff Commentary and staff letter conflict with plain language of FDCPA); Hulshizer v. Global Credit Serv., Inc., 728 F.2d 1037 (8th Cir. 1984) (collector's reliance on FTC staff letter was not a defense to the violation of 15 U.S.C. § 1692e(11)); Staub v. Harris, 626 F.2d 275 (3d Cir. 1980) (rejecting reasoning of informal FTC staff letter).

21 Genova v. Total Card, Inc., 193 F. Supp. 3d 360 (D.N.J. 2016) (taking judicial notice of and deferring to language in consent decrees filed by the CFPB and FTC); Delgado v. Capital Mgmt. Serv. L.P., 2013 WL 1194708 (C.D. Ill. Mar. 22, 2013) (FTC reports and enforcement efforts persuasive), *aff'd sub nom.* McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010 (7th Cir. 2014); Kinkade v. Estate Info. Services, L.L.C., 2011 WL 4511397 (E.D.N.Y. Sept. 28, 2012) (FTC's Statement of Policy on collection of decedent debts not binding, but considering it to extent it is persuasive). *See also* Goodman v. Asset Acceptance L.L.C., 428 F. Supp. 3d 526, 533 (D. Colo. 2019) (citing time-barred debt disclosure language consented to by CFPB and FTC in enforcement actions as support for decision); Valle v. First Nat'l Collection Bur., Inc., 252 F. Supp. 3d 1332, 1341 (S.D. Fla. 2017) (same). *But see* Pierre v. Midland Credit Mgmt., Inc., 2018 WL 723278 (N.D. Ill. Feb. 5, 2018) (collecting Northern District of Illinois cases concluding that FTC and CFPB consent decrees are entitled to no deference); White v. First Step Grp. L.L.C., 2017 WL 4181121 (E.D. Cal. Sept. 20, 2017) (consent decree entitled to limited weight because it represents compromise position, especially where it conflicts with other agency statements).

222 McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010 (7th Cir. 2014) (finding CFPB and FTC amicus brief persuasive and adopted their arguments on consumers' lack of understanding of details of statutes of limitations); Carter v. First Nat'l. Collection Bur., Inc., 135 F. Supp. 3d 565, 573 (S.D. Tex. 2015) (same). *Cf.* Hernandez v. Williams, Zinman & Parham P.C., 829 F.3d 1068, 1080 (9th Cir. 2016) (no need to determine whether to defer to agency amicus or amount of deference, because court independently arrived at same conclusion as CFPB and FTC). *But see* Vien-Phuong Thi Ho v. ReconTrust Co., NA, 858 F.3d 568, 576 n.10 (9th Cir.), *cert. denied sub nom.* Ho v. ReconTrust Co., 138 S. Ct. 504, 199 L. Ed. 2d 385 (2017) (majority was not persuaded by CFPB's interpretation of FDCPA in its amicus brief and did not defer to it); Bourgeois v. Ocwen Loan Servicing, 2016 WL 245526 (S.D. Cal. Jan. 21, 2016) (amicus brief filed by CFPB not entitled to *Chevron* deference, persuasive value not considered); Masson v. Selene Fin. L.P., 2013 WL 271256 (N.D. Cal. Jan. 24, 2013) (distinguishing CFPB amicus position as being based on different facts); Aguiar v. Wells Fargo Bank, 2012 WL 5915124 (N.D. Cal. Nov. 26, 2012) (same and noting that amicus briefs are not entitled to *Auer* deference).

223 Gunther v. Midland Credit Mgmt., Inc., 2018 WL 4621764, at *8 n.8 (D. Utah Sept. 26, 2018) (citing FTC and CFPB reports as supporting court's holding); White v. First Step Grp. L.L.C., 2017 WL 4181121 (E.D. Cal. Sept. 20, 2017) (FTC reports persuasive); Carter v. First Nat'l Collection Bur., Inc., 135 F. Supp. 3d 565, 573 (S.D. Tex. 2015) (FTC reports persuasive); Delgado v. Capital Mgmt. Serv. L.P., 2013 WL 1194708 (C.D. Ill. Mar. 22, 2013) (FTC reports and enforcement efforts persuasive), *aff'd sub nom.* McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010 (7th Cir. 2014); McRill v. Nationwide Credit, Inc. 2012 WL 6727974 (C.D. Ill. Dec. 6, 2012) (same). *But see* Harris v. Total Card, Inc., 2013 WL 5221631 (N.D. Ill. 2013) (no deference due to FTC report where plaintiff did not explain whether the Commission adopted the views stated in the report).

224 Toohey v. Portfolio Recovery Assoc., 2017 WL 2271548, at *3 (S.D.N.Y. May 12, 2017) (allowing plaintiff's pleadings to rely on a CFPB consent order).

Chapter 4 Coverage and Definitions, FDCPA § 1692a

4.1 Introduction

This chapter examines ten key terms that typically determine the FDCPA's coverage: attempt to communicate, communication, connection with collection of a debt, consumer, creditor, debt, debt collector, limited-content message, person, and state. All but "connection with collection of a debt" are defined in FDCPA § 1692a or Regulation F (effective November 30, 2021)[1].

One must carefully parse many of these definitions, because they rarely follow common usage. For example, "consumer" is not limited to someone who takes out a debt for consumer purposes; instead, a consumer is any natural person obligated or allegedly obligated on a debt. "Creditor" includes not just the original creditor, but, in most instances, a debt buyer. Only certain communications are "communications." A "debt" excludes certain debts one would assume are debts. The "debt collector" definition is complex, depending on four different conditions and then subject to ten exclusions. The definition of some of these defined terms in turn depends on other defined terms, particularly depending on the term "debt."

4.2 Communication, FDCPA § 1692a(2); Attempt to Communicate, Reg. F § 1006.2(b)

4.2.1 Overview

> The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.[2]

The term "communication" is defined broadly in 15 U.S.C. § 1692a(2) as conveying information regarding a debt directly or indirectly to any person through any medium. The term is frequently used throughout the FDCPA, in sections 1692b, 1692c, 1692e, 1692f, and 1692g. Because these FDCPA provisions refer to communication by a debt collector, the term "communication" has no application in the FDCPA to communications by others, such as by a court.[3]

Regulation F (effective November 30, 2021) introduces a new definition for "attempt to communicate":

> Attempt to communicate means any act to initiate a communication or other contact about a debt with any person through any medium, including by soliciting a response from such person. An attempt to communicate includes leaving a limited-content message, as defined in paragraph (j) of this section.[4]

Attempt to communicate includes the use of any medium, so this term applies not only to telephone calls, but also to texts, emails, social media direct messages, and other electronic communications.[5] It includes attempts that simply ask the consumer to respond.

The new definition of "attempt to communicate" allows the CFPB to clarify that certain regulations[6] and official interpretations[7] apply even when there is no communication.[8]

Attempt to communicate is also an important definition as it relates to limited-content messages. As described at § 4.9, *infra*, a limited-content message is a voicemail message that complies with Reg. F § 1002.2(j). The CFPB finds such a voicemail message does not convey information regarding a debt and is, therefore, not a "communication" for purposes of Regulation F,[9] but still finds it to be an "attempt to

1 12 C.F.R. Part 1006.

2 15 U.S.C. § 1692a(2). *See also* Reg. F § 1006.2(d). *Compare* S. 656, 95th Cong. 1st Sess. § 802(i), 123 Cong. Rec. 52,380 (daily ed. Feb. 7, 1977) ("[t]he term 'communication' means conveying information directly or indirectly to any person through any medium, except with respect to section 804(a)(3) [limiting contact to twice in seven days], the term 'communication' means actual contact with the consumer which includes a brief statement in any manner of the present intentions of the consumer with respect to the repayment of the debt"), *with* S. 918, 95th Cong., 1st Sess. § 803(i), 123 Cong. Rec. 53,484 (daily ed. Mar. 4, 1977) ("[t]he term 'communication' means conveying information directly or indirectly to any person through any medium"), *and* Senate Comm. Print No. 1 95th Cong., 1st Sess. § 803(2) (1977) (same as present language).

3 *Hardin v. Finkelstein, Kern, Steinberg & Cunningham, P.C.*, 707 Fed. Appx. 855 (6th Cir. 2017).

4 Reg F § 1006.2(b).

5 *See* § 4.2.4, *infra*.

6 *See, e.g.*, Reg. F § 1006.6(b)(1), *discussed at* § 5.4, *infra*; Reg. F § 1006.6(b)(2), *discussed at* § 5.5, *infra*; Reg. F § 1006.6(b)(3), *discussed at* § 5.6, *infra*; Reg. F § 1006.6(c), *discussed at* § 5.8, *infra*; Reg. F § 1006.6(e), *discussed at* § 5.9, *infra*; Reg. F § 1006.14(h), *discussed at* § 6.9, *infra*; Reg. F § 1006.18(f), *discussed at* § 7.2.14.3, *infra*; Reg. F § 1006.22(f)(3), *discussed at* § 8.10, *infra*; Reg. F § 1006.22(f)(4), *discussed at* § 8.11, *infra*.

7 *See, e.g.*, Reg. F Official Interpretations § 2(j)-2, *discussed at* § 4.9, *infra*; Reg. F Official Interpretations § 6(e)-1, *discussed at* § 5.9, *infra*; Reg. F Official Interpretations § 14(a)-2, *discussed at* § 6.2, *infra*; Reg. F Official Interpretations § 14(b)(2)(i)-1.i (and numerous other official interpretations of Reg. F § 1006.14(b)), *discussed at* § 6.7.2, *infra*; Reg. F Official Interpretations § 18(e)(1)-1, *discussed at* § 7.2.11.1, *infra*; Reg. F Official Interpretations § 100(a)-1, *discussed at* § 11.5.4.2, *infra*.

8 85 Fed. Reg. 76,734, 76,743 (Nov. 30, 2020) ("The Bureau finds that certain messages or activity discussed by commenters, such as telephone calls that do not result in a voicemail message or conversation with a consumer, should be considered attempts to communicate. These messages or activity may raise consumer protection concerns that provisions of the final rule regulating attempts to communicate are designed to address. For example, a debt collector might call a consumer to discuss the consumer's debt at a time that the consumer has designated as inconvenient but fail to reach the consumer because the consumer declines to answer the telephone.").

9 Reg. F Official Interpretations § 2(d)-2.

communicate" and thus covered by a number of Regulation F provisions.[10]

4.2.2 Conveying Information Regarding a Debt Directly or Indirectly

To be considered a "communication" under the FDCPA and Regulation F (effective November 30, 2021), information regarding a debt must be conveyed directly or indirectly to any person.[11]

A number of courts have found that information regarding a debt is not conveyed directly or indirectly to any person where a communication is never received by a person.[12] Courts have found the same for unanswered phone calls where no message is left.[13] However, some courts have found that an unanswered phone call that displayed the debt collector's name and phone number was a communication, if the consumer had communicated previously with the collector.[14]

Under Reg. F § 1006.2(b), unanswered or unreceived communications may qualify as an attempt to communicate. Regulation F has clarified that numerous provisions in the regulations also apply to attempts to communicate.[15]

The Fifth, Sixth, and Seventh Circuits have expressed the idea that, at a minimum, the collector must imply that a debt exists in order to qualify as a communication.[16] Subsequent cases have cited and employed this principle to find a communication in regard to a debt.[17]

Where an email includes the sender's name (that does not imply a debt collector), the sender's email address, and that there is a secure message attached, this has been found not to be regarding a debt because there is no implication that the email is regarding a debt.[18] The secure attachment, if opened, could be seen to be a communication, but not the email itself.[19] Another court found that a voicemail was not regarding a debt where it was merely a series of beeps, a series of numbers that might be a phone number, and a "thank you."[20]

The Tenth Circuit construed "communication" as not including a debt collector's fax to a debtor's employer requesting verification of the consumer's employment, where the fax did not indicate or imply it was from a debt collector or indicate it was in regards to a debt.[21] The same can be the case with requests of third parties for the debtor's location information, where the request does not reveal its purpose or that that requester is a debt collector.[22]

4.2.3 Conveying Information Not Required for Attempt to Communicate

In Regulation F (effective November 30, 2021), conveying information regarding a debt is not an element of the definition of "attempt to communicate," which instead requires "any act to initiate a communication or other contact."[23] An attempt to communicate must also be "about a debt," which is discussed in more detail at § 4.2.5, *infra*.

10 Reg. F § 1006.2(b).

11 15 U.S.C. § 1692a(2); Reg. F § 1006.2(d).

12 Davis v. Phelan Hallinan & Diamond, P.C., 687 Fed. Appx. 140 (3d Cir. 2017); Seaworth v. Messerli, 2010 WL 3613821 (D. Minn. Sept. 7, 2010), *aff'd*, 414 Fed. Appx. 882 (8th Cir. 2011).

13 *See* Chapin v. Credit Control Services, Inc., 2020 WL 1898340 (S.D. Tex. Feb. 11, 2020) (calls that went unanswered and where no message was left were not communications); McClintock v. Credit Serv., Inc., 2018 WL 2197745, at *3 (W.D. Mich. Mar. 28, 2018) (consumer failed to allege "what information regarding a debt was conveyed by the unanswered telephone calls"); Messick v. Messerli & Kramer, P.A., 2016 WL 1180169 (D. Minn. Mar. 25, 2016) (unanswered call by collector seeking to determine contact information of consumer's attorney did not qualify as "communication"); Wilfong v. Persolve, L.L.C., 2011 WL 2678925 (D. Or. June 2, 2011), *adopted*, 2011 WL 2601559 (D. Or. June 30, 2011) (receipt of an unanswered telephone call did not constitute a "communication").

14 *See* Litt v. Portfolio Recovery Assoc., 146 F. Supp. 3d 857 (E.D. Mich. 2015); Cerrato v. Solomon & Solomon, 909 F. Supp. 2d 139 (D. Conn. 2012); Makreas v. Moore Law Grp., A.P.C., 2011 WL 4803005 (N.D. Cal. Oct. 11, 2011).

15 *See* § 4.2.1, *supra* (listing sections of Regulation F that apply to attempts to communicate).

16 *See* Fontana v. HOVG L.L.C., 989 F.3d 338, 342 (5th Cir. 2021) ("to indirectly convey information regarding a debt, a conversation or message would need to, at the very least, imply that a debt existed"); Lavallee v. Med-1 Solutions, L.L.C., 932 F.3d 1049, 1055 (7th Cir. 2019) ("to constitute a communication under the Act, a message must at least *imply* the existence of a debt"); Brown v. Van Ru Credit Corp., 804 F.3d 740 (6th Cir. 2015) ("To convey information regarding a debt, a communication must at a minimum imply the existence of a debt."). *See also* Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1177 (10th Cir. 2011), *aff'd on other grounds*, 568 U.S. 371, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013) (fax message could not "reasonably be construed to imply a debt").

17 *See* James v. Ocwen Loan Servicing, L.L.C., 2017 WL 6336760, at *11 (S.D. Ohio Dec. 12, 2017) (phone calls "unquestionably implied the existence of a debt" in light of the relationship between the parties prior to such calls), *adopted*, 2018 WL 1173035 (S.D. Ohio Mar. 6, 2018); Mahjub v. Rent Recover of Better NOI, L.L.C., 2017 WL 951366, at *6 (N.D. Ill. Mar. 8, 2017) (faxed form was "plausibly a communication because the form could be reasonably construed as implying the existence of a debt").

18 Lavallee v. Med-1 Solutions, L.L.C., 932 F.3d 1049 (7th Cir. 2019).

19 *Id.*

20 Lynch v. Fin. Recovery Serv. of Minn., Inc., 2013 WL 11971263, at *3 (S.D. Fla. Sept. 30, 2013). *See also* § 4.9, *infra* (discussing limited-content messages).

21 Marx v. General Revenue Corp., 668 F.3d 1174 (10th Cir. 2011), *aff'd on other grounds*, 568 U.S. 371, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013).

22 Scribner v. Works & Lentz, Inc., 655 Fed. Appx. 702 (10th Cir. 2016); Brown v. Van Ru Credit Corp., 804 F.3d 740 (6th Cir. 2015) (message for payroll department); Thompson v. Nationwide Debt Mgmt. Solutions, L.L.C., 2017 WL 4574566 (N.D. Ohio Oct. 13, 2017); Gearman v. Heldenbrand, 2015 WL 5255335 (D. Minn. Sept. 9, 2015) (voicemail left with landlord); Evankavitch v. Green Tree Servicing, L.L.C., 979 F. Supp. 2d 535 (M.D. Pa. 2013); Hanson v. Green Tree Servicing, L.L.C., 2013 WL 4504290 (D. Minn. Aug. 23, 2013) (brother); Sedillos v. United Collection Bur., Inc., 2012 WL 13081649, at *10 (D.N.M. Mar. 20, 2012) (collector's giving message to consumer's father asking consumer to call collection agency was not "communication" under FDCPA, because it conveyed no information regarding son's debt, directly or indirectly).

23 Reg. F § 1006.2(b).

The Official Interpretations of Regulation F explain that, "[a]n act to initiate a communication or other contact about a debt is an attempt to communicate regardless of whether the attempt, if successful, would be a communication that conveys information regarding a debt directly or indirectly to any person."[24]

One example is where a collector places a telephone call to a person about a debt. Regardless of whether the debt collector reaches the person, the debt collector has attempted to communicate with the person.[25] The other example is where the same collector leaves a voicemail message. Regardless of whether the voicemail message consists solely of a limited-content message or includes content that conveys, directly or indirectly, information about a debt, the debt collector has attempted to communicate with the person.[26]

Since the attempt to communicate need not convey information regarding a debt, it is a broad concept applying to voicemail messages, unanswered calls, unopened emails, unread text messages, and unseen direct messages via social media.[27] However, there are still types of contact that would not be considered an attempt to communicate. The supplemental information for Regulation F states that "general marketing and advertising directed to groups of consumers or the general public, or personal communications, should not be considered attempts to communicate."[28]

4.2.4 *"Any Person Through Any Medium"*

A communication or an attempt to communicate can be one sent to "any person."[29] There is no requirement that the communication be conveyed to a person owing the debt or even to a natural person.[30]

A communication sent to the consumer's attorney is sent to "any person,"[31] and that communication also can be viewed as sent to the consumer indirectly.[32] Cases limiting FDCPA coverage as to representations sent to the consumer's attorneys do not find the representation not to be a communication, but instead that a cease communication letter does not apply to communications to the consumer's attorney,[33] that the FDCPA does not apply to misrepresentations to an attorney,[34] or that the least sophisticated consumer standard does not apply to communications to an attorney.[35] Courts recognize explicitly or implicitly that the communications with the attorney are still communications.[36]

As noted, a "communication" need not be directed to the consumer or the consumer's attorney.[37] Postjudgment communications with the consumer's bank are communications.[38] Issues may arise as to whether a collector's furnishing of information to a consumer reporting agency is a communication in connection with collection of a debt,[39] or is an initial communication to a consumer,[40] but there should be no question that it is a "communication." Moreover, communications directed to someone other than the consumer can be seen as indirect communications to the consumer.[41]

24 Reg. F Official Interpretations § 2(b)-1.

25 Reg. F Official Interpretations § 2(b)-1(i).

26 Reg. F Official Interpretations § 2(b)-1(ii).

27 *See* § 4.2.1, *supra* (listing relevant provisions in Regulation F that reference "attempt to communicate").

28 85 Fed. Reg. 76,734, 76,743 (Nov. 30, 2020).

29 15 U.S.C. § 1692(a)(2); Reg. F § 1006.2(b), (d).

30 *See* § 4.10, *infra*, (discussing the definition of "person").

31 Miljkovic v. Shafritz & Dinkin, P.A. 791 F.3d 1291 (11th Cir. 2015); Simon v. FIA Card Services, 732 F.3d 259, 262–263, 265 266 (3d Cir. 2013); Allen *ex rel.* Martin v. LaSalle Bank, 629 F.3d 364 (3d Cir. Jan. 12, 2011); Evory v. Nat'l Action Fin. Serv., Inc., 505 F.3d 769 (7th Cir. 2007); Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 232–233 (4th Cir. 2007); Richmond v. Higgins, 435 F.3d 825, 828 (8th Cir. 2006); Dikeman v. Nat'l Educators, Inc., 81 F.3d 949, 954 (10th Cir. 1996); Young v. NPAS, Inc., 361 F. Supp. 3d 1171 (D. Utah 2019); Setton v. Cohen Hurkin Ehrenfeld Pomerantz & Tenenbum, L.L.P., 2014 WL 4724704 (E.D.N.Y. Sept. 22, 2014). *See also* Ogbin v. Fein, Such, Kahn & Shepard, P.C., 414 Fed. Appx. 456, 458 (3d Cir. 2011); White v. Fein, Such and Crane, L.L.P., 2015 WL 6455142 (W.D.N.Y. Oct. 26, 2015).

32 Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268 (11th Cir. 2016); Allen *ex rel.* Martin v. LaSalle Bank, 629 F.3d 364 (3d Cir. Jan. 12, 2011); Evory v. Nat'l Action Fin. Serv., Inc., 505 F.3d 769 (7th Cir. 2007 Evory v. Nat'l Action Fin. Serv., Inc., 505 F.3d 769 (7th Cir. 2007); Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 232–233 (4th Cir. 2007); Lemire v. Wolpoff & Abramson, L.L.P., 256 F.R D. 321, 326 (D. Conn. 2009) (granting class certification and observing "the legal convention that communications with a represented party's attorney are tantamount to communications with the party herself"). *See also* Young v. NPAS, Inc., 361 F. Supp. 3d 1171 (D. Utah 2019) (not clear whether medical debt collector's "Attorney Representation Form" letter sent to consumer's attorney was communication with consumer in connection with collection of debt, or just communication with consumer's attorney; jury could find either way).

33 Guerrero v. RJM Acquisitions L.L.C., 499 F.3d 926 (9th Cir. Aug. 23, 2007).

34 Kropelnicki v. Siegel, 290 F.3d 118 (2d Cir. 2002); Wright v. Phelan, Hallinan & Schmieg, L.L.P., 2010 WL 786536 (E.D. Pa. Mar. 8, 2010); Kline v. Mortg. Elec. Sec. Sys., 2009 WL 6093372 (S.D. Ohio Nov. 24, 2009), *adopted*, 2010 WL 1133452 (S.D. Ohio Mar. 22, 2010); Abraham v. Trauner, Cohen & Thomas, L.L.P., 2009 WL 10712043 (N.D. Ga. Nov. 23, 2009); Massa v. I.C. Sys., Inc., 2007 WL 2316470 (S.D. Ind. Aug. 10, 2007) (letters from debt collector to consumer's attorney are not actionable under FDCPA).

35 *See* § 7.3.6, *infra*. *See also* Evory v. Nat'l Action Fin. Serv., Inc., 505 F.3d 769 (7th Cir. 2007).

36 Guerrero v. RJM Acquisitions L.L.C., 499 F.3d 926 (9th Cir. 2007); Evory v. Nat'l Action Fin. Serv., Inc., 505 F.3d 769 (7th Cir. 2007); Kline v. Mortg. Elec. Sec. Sys., 2009 WL 6093372 (S.D. Ohio Nov. 24, 2009), *adopted*, 2010 WL 1133452 (S.D. Ohio Mar. 22, 2010).

37 *See* Chung v. Lamb, 2016 WL 1028320 (D. Colo. Mar. 15, 2016).

38 Barrows v. Petrie & Stocking, S.C., 2008 WL 3540405 (W.D. Wis. Aug. 13, 2008).

39 *See* § 4.3.1, *infra*.

40 Sinclair v. United Collection Bu., Inc., 2013 WL 12131263 (E.D. Mich. Dec. 26, 2013); Ekhlas v. NCO Fin. Sys., Inc., 2013 WL 6190660 (C.D. Cal. Nov. 25, 2013); Toth v. Cavalry Portfolio Serv., L.L.C., 2013 WL 5658168 (D. Nev. Oct. 16, 2013); Edeh v. Aargon Collection Agency, L.L.C., 2011 WL 2963855 (D. Minn. June 20, 2011), *adopted*, 2011 WL 2910750 (D. Minn. July 20, 2011). *See also* § 1006.30(a), *discussed at* § 8.12, *infra* (discussing required actions prior to furnishing information).

41 *See* Rivera v. IC Sys., Inc., 2018 WL 1466405 (S.D. Cal. Mar. 26, 2018) (conversations with wife indirectly included her husband); Anderson v. Gamache & Myers, P.C., 2007 WL 4365745 (E.D. Mo. Dec. 10, 2007) (communication to consumer's mediation service was communication to consumer).

With respect to the "any medium" element of the definition, the Official Interpretations to Regulation F (effective November 30, 2021) clarify that:

> "Any medium" includes any oral, written, electronic, or other medium. For example, a communication may occur in person or by telephone, audio recording, paper document, mail, email, text message, social media, or other electronic media.[42]

While this clarification specifically applies to the definition of communication, the term "any medium" in the "attempt to communicate" definition should also be interpreted broadly.

4.2.5 *"Regarding a Debt" and "About a Debt"*

The FDCPA definition of communication requires that it convey "information regarding a debt." Regulation F (effective November 30, 2021) defines "attempt to communicate" as any act to initiate a communication or other contact "about a debt."[43] This section looks at the two standards used in these related definitions and also compares them to a third standard, "in connection with collection of a debt," which is a key term as to the FDCPA's coverage in numerous sections of the Act.[44]

The Official Interpretations of Regulation F provides guidance to interpret "information regarding a debt," stating that a limited-content message complying with the requirements discussed at § 4.9, *infra*, does not convey information regarding a debt, and that a debt collector who provides marketing or advertising to a person owing or allegedly owing a debt is not communicating regarding a debt as long as the communication does not contain information about a specific debt or debts.[45]

In contrast, the definition of "attempt to communicate" specifically includes limited-content messages.[46] As with the interpretation of communication, supplemental information for Regulation F discussing the definition of "attempt to communicate" states that "general marketing and advertising directed to groups of consumers or the general public, or personal communications, should not be considered attempts to communicate."[47] In contrast to the definition of communication, which requires "information regarding a debt," the definition of attempt to communicate does not require conveying such information as discussed in § 4.2.3, *supra*.

"Regarding a debt" is a broader phrase than "in connection with the collection of a debt." "Regarding a debt" need not be regarding collection of the debt, just regarding the debt. Because the statute's "in connection with collection of a debt" is the narrower phrase, court decisions typically focus on this requirement for coverage for FDCPA provisions requiring a communication be both "in connection with collection of a debt" and "regarding a debt."

If it is "in connection with collection of a debt," then the statement is certainly "regarding a debt" or "about a debt."

An express request for payment is a communication even if the collector has a second purpose in the communication not related to the debt.[48] The communication need not even reference a debt, if the purpose is to eventually collect a debt.[49] The past communications between the parties can also provide an indication that a communication is regarding a debt.[50]

The definition of communication does not require that that the information be regarding a defaulted debt, but only regarding a debt. A monthly billing statement is a communication regarding a debt.[51] A communication is regarding a debt when it is regarding a security interest and no demand is made for payment, since the security interest is securing a debt.[52] Enforcement of the security interest is to recover payment on a debt;[53] regarding a security interest is indirectly regarding a debt.

A statement that the suit for rent and eviction would be dismissed if the tenant vacated the premises is regarding a debt.[54] A collector's communication to the consumer is still regarding a debt even if in response to a consumer inquiry regarding the

42 Reg. F Official Interpretations § 2(d)-1.
43 Reg. F § 1006.2(b).
44 *See* § 4.3, *infra*.
45 Reg. F Official Interpretations § 2(d)-2.
46 Reg. F § 1006.2(b).
47 85 Fed. Reg. 76,734, 76,743 (Nov. 30, 2020).
48 *See, e.g.*, Reese v. Ellis, Painter, Ratterree & Adams, L.L.P., 678 F.3d 1211, 1218 (11th Cir. 2012).
49 Prendergast v. First Choice Assets, L.L.C., 317 F. Supp. 3d 1018 (N.D. Ill. 2018) (no reference to debt, but call was to confirm consumer's address to later send debt collection letter); Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. Feb. 20, 2018) (message left on consumer's door to call number was communication if motivation behind message was debt collection); Foster v. Green Tree Servicing, L.L.C., 2017 WL 5151354 (M.D. Fla. Nov. 3, 2017) (same); Russell v. SN Servicing Corp., 2017 WL 1449211 (N.D. W. Va. Apr. 21, 2017). *See also* § 4.3, *infra*.
50 *See* James v. Ocwen Loan Servicing, L.L.C., 2017 WL 6336760 (S.D. Ohio Dec. 12, 2017), *adopted*, 2018 WL 1173035 (S.D. Ohio Mar. 6, 2018).
51 *See* Tran v. SN Servicing Corp., 2018 WL 1141355 (E.D. Pa. Mar. 2, 2018) (monthly mortgage statements); Block v. Seneca Mortg. Servicing, 221 F. Supp. 3d 559 (D.N.J. 2016); Leahy-Fernandez v. Bayview Loan Servicing, L.L.C., 159 F. Supp. 3d 1294 (M.D. Fla. 2016) (monthly billing statements were attempts to collect bankruptcy-discharged debt and bankruptcy disclosure did not shield loan servicer); Langley v. Statebridge Co., 2014 WL 7336787, at *2 (D.N.J. Dec. 22, 2014) (monthly mortgage statements covered).
52 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1040, 203 L. Ed. 2d 390 (2019) (nonjudicial foreclosure is in connection with collection of a debt); Glazer v. Chase Home Fin. L.L.C., 704 F.3d 453 (6th Cir. 2013) (judicial foreclosure is in connection with collection of a debt). *See generally* § 4.3.4, *infra*.
53 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1040, 203 L. Ed. 2d 390 (2019); Glazer v. Chase Home Fin. L.L.C., 704 F.3d 453, 463 (6th Cir. 2013).
54 *See* Gonzalez v. Law Office of Allen Robert King, 195 F. Supp. 3d 1118 (C.D. Cal. 2016).

debt.[55] The collector's response may not always be in connection with collection of a debt,[56] but it is still regarding a debt.

A statement to a third party referencing "an important personal matter" has been found not to be "about a debt", even where the debt collector's name was stated, since providing that name does not indirectly convey any information regarding a debt, and does not necessarily imply that a debt exists.[57]

A collector's communication in response to the consumer's claim of a FDCPA violation has been held to be not regarding a debt, since it is in regard to whether federal law has been violated.[58]

4.2.6 *Voicemail and Messages for Third Parties*

For purposes of Regulation F (effective November 30, 2021), a debt collector does not convey information regarding a debt if the debt collector leaves the consumer a voicemail message that is a limited-content message,[59] as defined in Reg. F § 1006.2(j).[60]

However, "[i]f a voicemail message includes content other than the specific items described in § 1006.2(j)(1) and (2), and such other content directly or indirectly conveys any information about a debt, the message is a communication."[61] Thus, pre-Regulation F case law on voicemails may still be valid precedent when the message is not a limited-content message.[62]

If a message is knowingly left for a third party, it is not a limited-content message.[63] Such messages may be deemed communications if they convey information regarding a debt directly or indirectly to any person.[64] A message left with a third party may also violate other provisions of the FDCPA, such as section 1692c(b), discussed at § 5.7, *infra*.

Prior to Regulation F, courts generally did not require that a voicemail message intended for the debtor directly or indirectly convey information in regard to a debt as long as the unstated purpose of a call is regarding a debt.[65]

Some courts, though, do not find that a message is a communication if it does not explicitly or implicitly indicate it is in regard to a debt.[66]

For additional discussion of voicemail messages, see § 4.9, *infra* (limited-content messages), § 5.7.8, *infra* (voicemails and the prohibition on third-party disclosures under § 1692c(b)), § 6.8, *infra* (voicemails and meaningful disclosure of caller's identity under § 1692d(6)), and § 7.2.11.2, *infra* (whether voicemail is a communication for § 1692e(11) disclosures).

4.3 Connection with Collection of a Debt

4.3.1 *Overview; No Payment Need Be Demanded*

"In connection with collection of a debt" is a key term as to the FDCPA's coverage. FDCPA §§ 1692c, 1692d, 1692e and 1692g apply only to actions "in connection with collection of a debt." Section 1692f prohibits certain "means to collect or attempt to collect any debt." The Act does not define "in

55 *See* Caddle v. Manley Deas Klochalski, L.L.C., 2018 WL 3752877 (E.D. Pa. Aug. 8, 2018); Mannarino v. Ocwen Loan Servicing, L.L.C., 2018 WL 1526558 (D.N.J. Mar. 28, 2018); Chlubicki v. Pennymac Loan Serv., L.L.C., 2018 WL 1251986, at *3 (M.D. Pa. Mar. 12, 2018); Trunzo v. Citi Mortg., 876 F. Supp. 2d 521 (W.D. Pa. 2012). *See also* Edwards v. BC Serv., Inc. 2019 WL 6726232, at *8 (D. Colo. Dec. 10, 2019); Mansoorian v. Brock & Scott, P.L.L.C., 2018 WL 6413484 (M.D. Fla. Dec. 6, 2018); Price-Richardson v. DCN Holdings, Inc., 2018 WL 902167 (D. Md. Feb. 15, 2018). *But see* Boyd v. J.E. Robert Co., 2010 WL 5772892, at *13 (E.D.N.Y. Mar. 31, 2010), *adopted*, 2011 WL 477547 (E.D.N.Y. Feb. 2, 2011).

56 Stuart v. Udren Law Offices P.C., 25 F. Supp. 3d 504 (M.D. Pa. 2014); Cano v. Deutsche Bank Nat'l Tr. Co., 2013 WL 3930087 (E.D. La. July 29, 2013); Gorham-Dimaggio v. Countrywide Home Loans, Inc., 2005 WL 2098068, at *2 (N.D.N.Y. Aug. 30, 2005).

57 Fontana v. HOVG L.L.C., 989 F.3d 338, 342 (5th Cir. 2021) (stating that "the average consumer likely would not know that Bay Area Credit Service is a debt collection agency, and even though the company's name includes the word 'Credit,' . . . that word 'refers to a category of financial activities far broader than debt collection' and would not necessarily imply the existence of a debt").

58 Geiger v. Creditors Interchange, Inc., 2003 WL 1465404 (6th Cir. Mar. 19, 2003). *See also* Jackson-Spells v. Francis, 45 F. Supp. 2d 496 (D. Md. 1999), *aff'd*, 198 F.3d 236 (4th Cir. Oct. 6, 1999) (communications concerning consumer's replevin action).

59 Reg. F Official Interpretations § 2(d)-2.

60 *See* § 4.9, *infra*.

61 Reg. F Official Interpretations § 2(j)-1. *See* Reg. F Official Interpretations § 2(j)(2)-1 ("a reference to an agent with the 'credit card receivables group' is not a limited-content message").

62 *See, e.g.*, Hart v. Credit Control, L.L.C., 871 F.3d 1255 (11th Cir. 2017) (voicemail message that stated it was a call from a debt collector was a communication); Hosseinzadeh v. M.R.S. Assoc., Inc., 387 F. Supp. 2d 1104 (C.D. Cal. 2005) (answering machine message stating that "very important information to discuss with you in reference to a file that has been forwarded to my office that involves you personally" was a communication). *See also* Leyse v. Corporate Collection Serv., Inc., 2006 WL 2708451 (S.D.N.Y. Sept. 18, 2006) (prerecorded message about "very important matter" was a communication).

63 Reg. F Official Interpretation § 2(j)-1. *See* § 4.9, *infra*.

64 *See, e.g.*, Scaccia v. Pioneer Credit Recovery, Inc., 2018 WL 1701953 (W.D.N.Y. Jan. 22, 2018) (message left with co-worker that identifies name of caller's organization that clearly indicates it is debt collector was communication).

65 Hultman v. Prof'l Choice Recovery, Inc., 2017 WL 2963869 (D. Neb. June 9, 2017); Pisarz v. GC Serv. L.P., 2017 WL 1102636 (D.N.J. Mar. 24, 2017); Rhodes v. Nat'l Collection Sys., Inc., 2016 WL 6472112 (D. Colo. Oct. 31, 2016); Zarichny v. Complete Payment Recovery Serv., Inc., 80 F. Supp. 3d 610 (E.D. Pa. 2015); Inman v. NCO Fin. Sys., Inc., 2009 WL 3415281 (E.D. Pa. Oct. 21, 2009); Mark v. J.C. Christensen & Assoc., Inc., 2009 WL 2407700 (D. Minn. Aug. 4, 2009); Belin v. Litton Loan Serv., L.P., 2006 WL 1992410 (M.D. Fla. July 14, 2006); Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643 (S.D.N.Y. 2006). *See also* Marisco v. NCO Fin. Sys., Inc., 946 F. Supp. 2d 287 (E.D.N.Y. 2013); Whatley v. Creditwatch Serv., Ltd., 2012 WL 2885640 (E.D. Tex. July 13, 2012), *adopted*, 2012 WL 3151261 (E.D. Tex. Aug. 2, 2012); Gilmore v. Account Mgmt., Inc., 2009 WL 2848278 (N.D. Ga. Apr. 27, 2009), *rev'd on other grounds*, 2009 WL 4826953 (11th Cir. Dec. 16, 2009); Costa v. Nat'l Action Fin. Serv., 634 F. Supp. 2d 1069 (E.D. Cal. 2007).

66 *See* Brody v. Genpact Serv., L.L.C., 980 F. Supp. 2d 817 (E.D. Mich. 2013).

connection with collection" or "collection of a debt," but does define "debt."[67]

For many FDCPA provisions to apply, the person must be both a debt collector and the specific action must be in connection with collection of a debt. "Debt collector" depends in most cases on the person's general activities—whether the collector regularly collects consumer debts, or in the alternative its principal purpose is debt collection. "In connection with collection of a debt" relates to the collector's conduct or representations involved in that collector's relationship to a specific consumer.

Several circuits hold that "for a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor."[68] However, a number of courts have held that a request for payment is not the only factor determining the FDCPA's application to a communication.[69]

In a decision that was subsequently vacated for an *en banc* hearing to address the plaintiff's standing,[70] the Eleventh Circuit held that "the phrase 'in connection with the collection of any debt' in § 1692c(b) must mean something more than a mere demand for payment."[71] The court distinguished between cases involving FDCPA §§ 1692c(b) and 1692e. Noting that these sections operate differently and contain different language, the court chided the lower court for having been "led astray by its reliance on decisions interpreting section 1692e,"[72] and it also noted that imposing a blanket "demand for payment" requirement would "render superfluous" the exceptions contained in section 1692c(b), which allows for certain communications to be made with specified third parties.[73]

Other courts agree that a communication can be in connection with collection of a debt even though no payment is demanded.[74] For example, a debt collector communication indicating the amount due and how to obtain payoff amounts or to make payments is in connection with collection of a debt even though no demand is made for payment.[75] A communication may imply a demand for payment when it includes certain elements, such as the amount of the debt, the method by which the debt may be paid, contact information for sending payment, and an express statement that the communication is for the purpose of collecting a debt.[76]

Communications that do not immediately seek to collect a debt, but instead whose purpose is to further the collector's ability to collect the debt can be in connection with collection of a debt.[77] If the collector would not have sent a document if it were not collecting a debt, then the document being sent is in connection with collection of a debt.[78] A person's actions can be in connection with collection even though that person does not engage in the actual collection, as long as that person is assisting in collection of a debt.[79]

An offer of settlement or restructuring a loan is in connection with collection of a debt.[80] Communications dealing with

67 *See* § 4.6, *infra*.

68 *See, e.g.*, McIvor v. Credit Control Services, Inc., 773 F.3d 909, 914 (8th Cir. 2014); Simon v. FIA Card Services, 732 F.3d 259, 266–267 (3d Cir. 2013); Grden v. Leikin Ingber & Winters P.C., 643 F.3d 169, 173 (6th Cir. 2011).

69 *See, e.g.*, Gburek v. Litton Loan Servicing L.P., 614 F.3d 380, 385 (7th Cir. 2010) ("absence of a demand for payment was just one of several factors" in determining whether communication was made in connection with collection of debt); Wright v. Ocwen Loan Servicing, L.L.C., 2013 WL 5532687 (E.D. Mich. Oct. 7, 2013). *See also* Beeks v. ALS Lien Services, 2014 WL 7785745 (C.D. Cal. Feb. 18, 2014) (request to call about balance was violation). *Cf.* Roth v. CitiMortgage Inc., 2013 WL 5205775 (E.D.N.Y. Sept. 11, 2013) (defendant's correspondence responded to plaintiff's complaint to state agency did not seek payment or mention status of loan and was not "in connection with the collection of any debt"); Lucero v. Cenlar, 2015 WL 519911, at *2 (W.D. Wash. Feb. 9, 2015) (communications related to a potential loan workout are not "in connection with the collection of any debt" for purposes of § 1692c(a)).

70 Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1103 (11th Cir. 2021), *vacating* 17 F.4th 1016 (11th Cir. 2021). *See* § 11.15, *infra* (discussing standing).

71 Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1036 (11th Cir. 2021), *vacating & superseding upon reh'g* 994 F.3d 1341 (11th Cir. 2021), *vacated on other grounds pending en banc resolution (seeking briefing only on standing)*, 17 F.4th 1103 (11th Cir. 2021).

72 *Id.*

73 *Id.* ("Communications with four of the six excepted parties—a consumer reporting agency, the creditor, the attorney of the creditor, and the attorney of the debt collector—would *never* include a demand for payment.").

74 Hart v. FCI Lender Services, Inc., 797 F.3d 219, 226–227 (2d Cir. 2015); McLaughlin v. Phelan Hallinan & Schmieg, L.L.P., 756 F.3d 240 (3d Cir. 2014); Gburek v. Litton Loan Servicing L.P., 614 F.3d 380 (7th Cir. 2010).

75 McLaughlin v. Phelan Hallinan & Schmieg, L.L.P., 756 F.3d 240 (3d Cir. 2014). *See also* Simon v. FIA Card Serv., 732 F.3d 259 (3d Cir. 2013) (settlement offer to avoid adversary proceeding in bankruptcy was "in connection with collection of a debt"); Gburek v. Litton Loan Servicing L.P., 614 F.3d 380, 386 (7th Cir. 2010) (letter requesting financial information to initiate discussion of foreclosure alternatives is "in connection with collection of a debt"); Mansoorian v. Brock & Scott, P.L.L.C., 2018 WL 6413484 (M.D. Fla. Dec. 6, 2018); Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. Feb. 20, 2018); Foster v. Green Tree Servicing, L.L.C., 2017 WL 5151354 (M.D. Fla. Nov. 3, 2017). *But see* Bailey v. Sec. Nat'l Servicing Corp., 154 F.3d 384, 389 (7th Cir. 1998) (after finding that a servicer is not a debt collector when acquiring servicing rights when an account was not in default, court went a seemingly unnecessary and questionable step further, finding that the servicer's notice of future payments due was not in connection with collection of a debt).

76 *See* Pinson v. Albertelli Law Partners L.L.C., 618 Fed. Appx. 551, 554 (11th Cir. 2015); Ponder v. Ocwen Loan Servicing, L.L.C., 2020 WL 4550934 (N.D. Ga. Apr. 23, 2020), *adopted*, 2021 WL 5027495 (N.D. Ga. Aug. 4, 2021).

77 McLaughlin v. Phelan Hallinan & Schmieg, L.L.P., 756 F.3d 240 (3d Cir. 2014); Gburek v. Litton Loan Servicing L.P., 614 F.3d 380 (7th Cir. 2010).

78 Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009).

79 *Siwulec v. J.M. Adjustment Services, L.L.C.*, 465 Fed. Appx. 200 (3d Cir. 2012) (collector went to consumer's home and held phone for consumer to speak to creditor); *Romine v. Diversified Collection Services, Inc.*, 155 F.3d 1142 (9th Cir. 1998) (skip-tracing ruse).

80 George v. Wright, Lerch & Litow, L.L.P., 2016 WL 6963990 (S.D. Ind. Nov. 29, 2016); Gregory v. Home Retention Serv., Inc., 2014 WL 6676008 (D.N.J. Nov. 24, 2014).

loan modifications are in connection with a debt.[81] Information exploring the consumer's payment options can be in connection with collection of a debt.[82] A collector's offer of refinancing is in connection with collection of a debt.[83] While it does not seek to collect the debt, the purpose of the refinancing is to provide funds so that the debt can be collected. Filing a proof of claim in a bankruptcy proceeding is in connection with collection of a debt.[84]

The connection with collection of a debt can be found based on the parties' relationship and the purpose and context of the communication.[85] Even if the collector does not view a communication as being in connection with collection, the determination can be made from the perspective of the consumer, and not from the collector's point of view.[86]

For example, while a servicer might be complying with federal law requiring notice of a change in servicer, a consumer could look at the references to debt collection in the correspondence and view it as in connection with collection of a debt.[87] Depending on how viewed by the consumer, a communication can be in connection with collection of a debt even though the communication expressly states it is not collecting on a debt,[88] where the communication indicates the debt is being waived,[89] or the demand indicates it does not apply if the consumer has filed a bankruptcy.[90] A communication stating that it is from a debt collector who is attempting to collect a debt can be seen as in connection with collection of debt whatever the collector's motive in the communication.[91] But mere reference to a creditor or information relating to a consumer's account does not establish that the communication is in connection with a debt.[92]

Of course, a determination can also be made that the collector views a communication as an attempt to collect a debt, and then it is in connection with collection, without a finding as to how the consumer views the communication.[93] A communication can be in connection with collection of a debt even if the consumer does not realize that is the case, as long at the communication is in furtherance of the collection attempt.[94]

Contacts can also be in connection with collection of a debt even though the contact is with a person who is not obligated on the debt.[95] There need not even be a communication with a consumer as long as the action is in furtherance of collection of a debt. Filing an assignment of judgment that misrepresented the amount owed was conduct taken in connection with the collection of any debt.[96] Reporting a debt to a consumer reporting agency can be in connection with collection of a debt.[97] On the other hand, courts have found that responding to a consumer reporting agency's request to reinvestigate a debt is not in connection with collection.[98]

A ministerial response to a consumer's inquiry might not be in connection with collection of a debt—where the consumer initiates the inquiry and the collector has no intent to use its response to collect the debt.[99] The same may be the case

81 Gburek v. Litton Loan Servicing L.P., 614 F.3d 380 (7th Cir. 2010). *See also* Williams v. Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 1582515, at 9 (D. Conn. Mar. 31, 2018). *But see* Farquharson v. Citibank, 664 Fed. Appx. 793 (11th Cir. 2016) (notification of eligibility for loan modification with no demand for payment).

82 Gburek v. Litton Loan Servicing L.P., 614 F.3d 380 (7th Cir. 2010). *But see Santoro v. CTC Foreclosure Serv.*, 12 Fed. Appx. 476, 480 (9th Cir. 2001) ("A letter suggesting loan workout options is not seeking to collect the debt.").

83 Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007).

84 Crawford v. LVNV Funding, L.L.C.,758 F.3d 1254, 1262 (11th Cir. 2014).

85 Gburek v. Litton Loan Servicing L.P., 614 F.3d 380 at 385 (7th Cir. 2010). *See also* Hamilton v. LoanCare, L.L.C., 2019 WL 3973132 (N.D. Ill. Aug. 22, 2019) (waiver of deficiency could be in connection with collection of a debt); Price v. Seterus, Inc., 2016 WL 1392331 (N.D. Ill. Apr. 8, 2016); Malik v. Kim, 2016 WL 4709076 (N.D. Ill. Sept. 8, 2016); O'Quin v. Bank of Am., 2012 WL 13019163 (D. Ariz. Sept. 10, 2012).

86 Hart v. FCI Lender Services, Inc., 797 F.3d 219, 225 (2d Cir. 2015); Gburek v. Litton Loan Servicing L.P., 614 F.3d 380, 385 (7th Cir. 2010).

87 Hart v. FCI Lender Services, Inc., 797 F.3d 219, 225 (2d Cir. 2015); Gburek v. Litton Loan Servicing L.P., 614 F.3d 380. 385 (7th Cir. 2010). *See also* Green v. Specialized Loan Servicing, L.L.C., 2016 WL 3963255 (W.D. Wis. July 21, 2016). *But see* Muller v. Midland Funding, L.L.C., 2015 WL 2412361 (S.D. Fla. May 20, 2015); Mabbitt v. Midwestern Audit Serv., Inc., 2008 WL 723507 (E.D. Mich. Mar. 17, 2008) (letter only informed consumer that balance was transferred from one account to another).

88 Price v. Seterus, Inc., 2016 WL 1392331 (N.D. Ill. Apr. 8, 2016).

89 Hamilton v. LoanCare, L.L.C., 2019 WL 3973132 (N.D. Ill. Aug. 22, 2019) (waiving deficiency already extinguished through bankruptcy).

90 Green v. Specialized Loan Servicing, L.L.C., 2016 WL 3963255 (W.D. Wis. July 21, 2016) (other factors outweighed the bankruptcy disclaimer); Harrer v. Bayview Loan Servicing, L.L.C., 2016 WL 6995559 (N.D. Ill. Nov. 30, 2016).

91 Logan v. Greenspoon Marder, P.A., 2013 WL 2473038 (S.D. Fla. June 10, 2013). *But see* Heinz v. Carrington Mortg. Services, L.L.C., 3 F.4th 1107, 1114 (8th Cir. 2021) (letter's boilerplate debt collection language by itself did not establish letter was in connection with collection of debt).

92 Collazo v. Resurgent Capital Services, L.P., 443 F. Supp. 3d 398, 404 (W.D.N.Y. 2020).

93 Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769 (7th Cir. 2003).

94 Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009).

95 *See* Russell v. Goldman Roth Acquisitions, L.L.C., 847 F. Supp. 2d 994 (W.D. Mich. 2012); Sparks v. Phillips & Cohen Assoc., Ltd., 641 F. Supp. 2d 1234 (S.D. Ala. 2008) (contacts with deceased debtor's relatives). *See also* McClanahan v. Medicredit, Inc., 2020 WL 6204419 (M.D. Tenn. Oct. 22, 2020) (genuine issue of material fact as to whether collection agency's response to CFPB to defend against consumer's complaint was "in connection with the collection of any debt"). *But see* Volden v. Innovative Fin. Sys., Inc., 440 F.3d 947 (8th Cir. 2006) (though collector made false representation, that representation was made to third party, not to consumer, so not in connection with collection of debt).

96 Powell v. Palisades Acquisition XVI, L.L.C., 782 F.3d 119 (4th Cir. 2014).

97 McIvor v. Credit Control Services, Inc., 773 F.3d 909, 915 (8th Cir. 2014) (voluntary reporting of disputed debt recognized as in connection with collection of debt); Escobar v. Midland Credit Mgmt., 2020 WL 5411574, at *5 (D. Conn. Sept. 9, 2020) (even consumer who believed his account was fully settled could reasonably interpret communications with CRAs as attempt to collect debt).

98 McIvor v. Credit Control Services, Inc., 773 F.3d 909, 915 (8th Cir. 2014) (noting that such a response is required for collector to comply with dispute procedure in FCRA).

99 Grden v. Leiken, Ingber & Winters, P.C., 643 F.3d 169 (6th Cir. 2011); Bryant v Hope Credit Union, 2020 WL 3103974, at *3 (S.D. Miss.

when the collector is merely responding to legitimate inquiries from third parties with no intent to use its response to collect a debt.[100] On the other hand, the fact that the collector is responding to the consumer's inquiry does not prevent a communication from being in furtherance of collection of a debt—it depends on the nature of the collector's response.[101]

The Seventh Circuit found a letter not in connection with collection of a debt where it was responding to a tenant's demand for return of the security deposit. The letter in response said it was not collecting a debt, told the tenant not to send money, and only explained why the security deposit was not returned.[102] Although informing a student that the collector is withholding a transcript until a debt is paid can be in connection with collection of a debt, a court found this not to be the case where the collector never communicated this to the student until after the student inquired as to the transcript.[103]

Some collector communications are not in furtherance of debt collection and would not be viewed as such by the consumer. The collector's communications concerning the consumer's FDCPA lawsuit against the collector are not seeking to collect a debt, but to defend a litigation brought by the consumer.[104] A court has found a letter warning of the consequences of lack of legal representation not to be in connection with collection of a debt.[105]

Informing the consumer that insurance is placed on the collateral is just notice that the collateral is being protected, as long as no attempt is made to seek payment during that communication.[106] When a debt is in dispute, sending the consumer's attorney the underlying documents in the matter without a demand for payment was found not to be in connection with collection.[107] Where a letter advising the consumer that their dispute has been received invites them to call with any questions, but does not demand payment, it is not in connection with collection of a debt.[108]

After a debt is settled and paid to the creditor, sending the IRS a Form 1099-C may be regarding a debt, but many courts have found this not in connection with collection of a debt, since the collector is no longer seeking to collect a debt.[109] Similarly, after a debt is paid, it is not in connection with

June 11, 2020) (responding to debtor's inquiries about payment options was not in connection with collection of debt); Woody v. Aurora Commercial Corp., 2018 WL 1884826 (W.D. Tenn. Apr. 19, 2019) (servicers' responses to borrower's debt validation requests without further demands for payment were not debt collection activities), *aff'd*, 779 Fed. Appx. 348 (6th Cir. 2019); McElveen v. Westport Recovery Corp., 310 F. Supp. 3d 1374 (S.D. Fla. Mar. 13, 2018) (statement sent in response to consumer's request for amount owed where not part of strategy to make payment more likely); Abernathy v. Cont'l Serv. Grp., Inc., 2018 WL 3370524 (D. Nev. July 9, 2018) (contents of letters sent in response to consumer's dispute showed that they were not attempting to collect debt); Chung v. U.S. Bank, 250 F. Supp. 3d 658, 682 (D. Haw. 2017) (merely acknowledging consumer's inquiry); Genid v. Fed. Nat'l Mortg. Ass'n, 2016 WL 4150455 (D.N.J. Aug. 2, 2016) (where former homeowners sought repurchase information and servicer indicated that information was under review, animating purpose of servicer's communication was not to collect debt); Harris v. Stellar Recovery, 2015 WL 4041719 (D. Utah July 1, 2015); Araujo v. PennyMac Loan Serv., L.L.C., 2015 WL 5664259 (E.D.N.Y. Sept. 23, 2015) (sending requested document). *See also* Pinson v. Albertelli Law Partners L.L.C., 618 Fed. Appx. 551, 554 (11th Cir. 2015) (first letter merely asked for additional information regarding consumer's request); Mathieson v. Wells Fargo Bank, 524 F. Supp. 3d 1246 (M.D. Fla. 2021); McGee v. Piper Fin. Services, L.L.C., 2020 WL 5548779 (N.D. Ga. July 7, 2020) (letter sent in response to request for verification of debt gave several qualifying and clarifying comments about debt, did not expressly demand payment, did not include any terms of payment or deadlines, did not threaten adverse consequences if consumer did not pay, and did not instruct how to pay), *adopted*, 2020 WL 5551022 (N.D. Ga. Aug. 7, 2020); Block v. Seneca Mortg. Servicing, 221 F. Supp. 3d 559 (D.N.J. 2016) (servicer responded to consumer's request by granting a permanent modification).

100 Cooper v. F.A. Mgmt. Solutions, Inc., 2007 WL 4326800 (M.D. Fla. Dec. 7, 2007) (responding to inquiry from bar examiner).

101 Pinson v. Albertelli Law Partners L.L.C., 618 Fed. Appx. 551, 554 (11th Cir. 2015) (response indicated amount due and how to pay so contained implicit demand for payment); Bender v. Elmore & Throop, P.C., ___F. Supp. 3d ___, 2021 WL 1215057, at *5 (D. Md. Mar. 30, 2021) (debtor initiated general communication, but collection attorney steered discussion to collection); Odneal v. Midwest Recovery Sys., L.L.C., 2020 WL 1974375 (N.D. Ind. Apr. 24, 2020) (in response to debtors' disputing credit reports, debt collector directed debtors to web portal that facilitated payment of stale debts); Mansoorian v. Brock & Scott, P.L.L.C., 2018 WL 6413484 (M.D. Fla. Dec. 6, 2018); Malik v. Kim, 2016 WL 4709076 (N.D. Ill. Sept. 8, 2016); O'Quin v. Bank of Am., 2012 WL 13019163 (D. Ariz. Sept. 10, 2012); Pettway v. Harmon Law Offices, P.C., 2005 WL 2365331 (D. Mass. Sept. 27, 2005). *See also* Solis v. Commonwealth Fin. Sys., Inc., 2020 WL 2523047 (E.D.N.Y. May 15, 2020) (even assuming that consumer requested information from collection agency, letter could have been sent for more than one reason and be subject to FDCPA if one of those purposes was in connection with collection of debt); Tinsley v. Consumer Adjustment Co., 2020 WL 1558105, at *5 (C.D. Ill. Apr. 1, 2020) (payment portal is communication in connection with collection of debt).

102 McCready v. Jacobsen, 2007 WL 1224616 (7th Cir. Apr. 25, 2007).

103 Mesa v. Boston Portfolio Advisors, Inc., 2015 WL 4380759 (S.D. Fla. July 16, 2015).

104 Ray v. Nelson & Frankenberger, P.C., 2014 WL 4385128 (S.D. Ind. Sept. 3, 2014). *See also* Geiger v. Creditors Interchange, Inc., 2003 WL 1465404 (6th Cir. Mar. 19, 2003).

105 Brand v. Caliber Home Loans, Inc., 2018 WL 4898572 (N.D. Ill. Oct. 9, 2018).

106 McNamee v. Nationstar Mortg. L.L.C., 2021 WL 201189 (S.D. Ohio Jan. 20, 2021) (mortgage servicer's communication about force-placed insurance not in furtherance of debt collection); Mohr v. Newrez, L.L.C., 448 F. Supp. 3d 956 (N.D. Ind. 2020) (notice of potential force-placed insurance required by RESPA); Chung v. U.S. Bank, 250 F. Supp. 3d 658, 682 (D. Haw. 2017); Burns v. Seterus, Inc., 2017 WL 104735, at *3 (W.D.N.Y. Jan. 11, 2017); Dyer v. Select Portfolio Servicing, Inc., 108 F. Supp. 3d 1278, 1282 (M.D. Fla. 2015).

107 Humphreys v. Budget Rent-a-Car Sys. Inc., 2017 WL 6497285 (E.D. Pa. Dec. 19, 2017) (letter itemizing damages to a totaled rental vehicle sent to the consumer's attorney).

108 Lupia v. Medicredit, Inc., 445 F. Supp. 3d 1271, 1282 (D. Colo. 2020) ("Not even a wholly unsophisticated consumer could believe she was being asked to pay a debt when the letter is read in whole and in context, especially not when that consumer already had contested the validity of that debt and invited the debt collector to contact her in writing regarding its efforts to resolve the dispute.").

109 Posso v. Asta Funding Inc., 2007 WL 3374400 (N.D. Ill. Nov. 9, 2007). *See also* Shaffer v. Servis One, Inc., 347 F. Supp. 3d 1039, 1047 (M.D. Fla. 2018); Altenburg v. Caliber Home Loans, Inc., 2017 WL 2733803 (D. Md. June 26, 2017); Dues v. Capital One, 2011 WL 3799762 (E.D. Mich. Aug. 8, 2011), *adopted*, 2011 WL 3799712 (E.D. Mich. Aug. 29, 2011).

collection of a debt to respond to the consumer's inquiry by informing the consumer that the debt is paid.[110] To respond to the consumer's demand to release a lien is not in connection with collection of a debt where the collector states it has already released the lien and that no lien is justified.[111]

The interplay of the FDCPA and the Bankruptcy Code has led the Seventh Circuit to find that not every inquiry to a debtor as to whether a bankruptcy has been filed is in connection with collection of a debt. While such an inquiry could be in such a connection, depending on the facts, the inquiry could be a legitimate attempt to avoid violation of the Bankruptcy Code's automatic stay.[112] Likewise, postbankruptcy communications stating that they were contacting the debtor about their monetary obligations would be viewed by the least sophisticated consumer as a demand for payment even though they included disclaimers and the debt was no longer owed, and thus were still in connection with collection of a debt.[113]

4.3.2 Is a Required Notice in Connection with Collection?

Whether a notice required by state or federal law is in connection with collection of a debt will depend on the nature of the notice and how closely it is linked to debt collection efforts.[114] The fact that a notice is required by law does not prevent the notice from being in connection with collection of a debt, if the substance of the notice relates to collection of a debt.

A state law-required notice is in connection with collection of a debt if it warns the consumer that if a default is not cured, then the home will be foreclosed upon.[115] A written notice can be in connection with collection of a debt, even if the notice in isolation might not appear to be in connection with a collection, where the notice is sent in the same envelope or almost the same day as a letter seeking collection of a debt.[116]

Prior to the Supreme Court's 2019 ruling in *Obduskey* that foreclosure is in a form of debt collection,[117] courts came to differing conclusions whether a state-required foreclosure notice was in connection with collection of a debt where the notice did not demand payment or explain how payment could be made, and only disclosed the risk or specifics of a pending foreclosure.[118] After *Obduskey*, such a notice should be seen as in connection with collection of a debt. For example, a court had no trouble finding that a state-mandated notice to a patient of a hospital lien was in connection with collection of a debt, even though no demand was made for payment.[119]

While a privacy notice on its own might not be sent in connection with collection of a debt,[120] it can be in connection with collection where it threatens third-party contacts if the debt is not paid.[121] A court has also found that a statement on a state-required notice that "this is an attempt to collect a debt" indicates that the notice is in connection with collection of a debt.[122]

RESPA and TILA regulations require that mortgage servicers provide notices and statements to borrowers under specific circumstances. For example, RESPA requires notices upon transfer of mortgage servicing rights.[123] Under TILA regulations, servicers must send borrowers periodic (generally monthly) statements of their account status.[124] The Second Circuit has ruled that a notice of a change in mortgage servicer as required by RESPA is in connection with collection of a

110 Henderson v. N.A.R., Inc., 2011 WL 2312170 (D. Utah June 10, 2011). *See also* Johnson v. Brock & Scott, P.L.L.C., 2013 WL 6058199 (E.D.N.C. Nov. 15, 2013) (defendant erroneously replied to consumer inquiry that she did not owe the debt).

111 Atwood v. Cohen & Slamowitz L.L.P., 716 Fed. Appx. 50 (2d Cir. 2017).

112 Buckley v. Bass & Assoc., 249 F.3d 678 (7th Cir. 2001). *See also* § 13.2.4, *infra*.

113 Harrer v. Bayview Loan Servicing, L.L.C., 2016 WL 6995559 (N.D. Ill. Nov. 30, 2016).

114 *Cf.* Braunstein v. Marsh Landing Cmty. Ass'n at Estero, Inc., 2020 WL 2329941 (M.D. Fla. May 11, 2020) (trier of fact could conclude that least sophisticated consumer would find letters that informed consumer of violations of homeowners' association regulations, of its intent to record lien for non-payment of delinquent account, and of its recording of lien were either communications in "an effort to collect a debt" or, instead, were statutory notices providing information required by state law).

115 *See* Goodrow v. Friedman & MacFadyen, P.A., 788 F. Supp. 2d 464 (E.D. Va. 2011).

116 Ruth v. Triumph P'ship, 577 F.3d 790 (7th Cir. 2009). *See also* Snyder v. Ocwen Loan Servicing, L.L.C., 2015 WL 1910989 (N.D. Ill. Apr. 27, 2015) (where notice that mortgage was transferred was mailed the same day as § 1692g notice that was clearly sent in connection with debt, context would suggest that transfer letter was also sent in connection with debt); Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007).

117 *See* § 4.3.4, *infra*.

118 *Compare* Saint Vil v. Perimeter Mortg. Funding Corp., 630 Fed. Appx. 928 (11th Cir. 2015) (no demand for payment, and thus not in connection to collection), *and* Moore v. Commonwealth Trs., L.L.C., 2010 WL 4272984 (E.D. Va. Oct. 25, 2010) (notice of time and place of foreclosure), *with* Ademiluyi v. PennyMac Mortg. Inv. Tr. Holdings I, L.L.C., 929 F. Supp. 2d 502 (D. Md. 2013) (while notice did not seek to collect debt, it was in connection with such collection).

119 Garner v. ClaimAssist, L.L.C., 2017 WL 1093276, at *14 (D. Md. Mar. 22, 2017).

120 Carlvin v. Ditech Fin. L.L.C., 237 F. Supp. 3d 753, 761 (N.D. Ill. 2017); Olson v. Midland Funding, L.L.C., 578 Fed. Appx. 248 (4th Cir. 2014); Carlvin v. Ditech Fin. L.L.C., 2017 WL 635151 (N.D. Ill. Feb. 16, 2017); Venechanos v. Green Tree Servicing, L.L.C., 2015 WL 4356326 (M.D. Pa. July 14, 2015) (where consumer did not allege that privacy rights notice was sent in same envelope as collection letter, it was implausible that animating purpose of privacy rights notice was to induce payment).

121 Hernandez v. Midland Credit Mgmt., Inc., 2006 WL 695451 (N.D. Ill. Mar. 14, 2006). *See also* Stricklin v. Jefferson Capital Sys., L.L.C., 2011 WL 5325735 (S.D. Ill. Nov. 3, 2011) (cannot decide on pleadings because privacy notice includes information suggestive of debt collection).

122 Cohn v. New Century Fin. Serv., Inc., 2016 WL 4016993 (E.D.N.Y. June 7, 2016) (notice mandated by state law prior to entry of default judgment covered by FDCPA). *But see* Maximiliano v. Portfolio Recovery Assoc., 2017 WL 6388918 (S.D. Fla. Aug. 7, 2017).

123 12 U.S.C. § 2605(b); 12 C.F.R. § 1024.33. *See* National Consumer Law Center, Mortgage Servicing and Loan Modifications § 3.4 (2019), *updated at* www.nclc.org/library.

124 15 U.S.C. § 1638(f); 12 C.F.R. § 1026.41. *See* National Consumer Law Center, Mortgage Servicing and Loan Modifications § 4.2.5 (2019), *updated at* www.nclc.org/library.

debt,[125] but most other courts find the notice to be purely informational where there is no request for payment.[126] But even where a simple notice of change in servicers is found not in connection with collection, the notice becomes in connection with collection if the notice contains misleading information about amounts due and explicitly or implicitly demands payment.[127]

Monthly mortgage account statements, even when required to comply with TILA, are in connection with collection of a debt.[128] When periodic statements are a vehicle for false or misleading content or demand payment, they can violate the FDCPA.[129] Mortgage servicers are especially prone to include inaccurate and misleading content in periodic statements sent to former bankruptcy debtors. FDCPA claims involving post-bankruptcy periodic statements are discussed at § 13.7.2.8, *infra*. Mortgage servicers have argued that periodic account statements sent to comply with TILA were informational and not in connection with collection of a debt. Certain courts have accepted this argument, particularly when the statements omitted demands for payment.[130] Several decisions relied on a

125 Hart v. FCI Lender Services, Inc., 797 F.3d 219, 226 (2d Cir. 2015).

126 Vilinsky v. Phelan Hallinan & Diamond, P.C., 640 Fed. Appx. 139 (3d Cir. 2016); Goodson v. Bank of Am., 600 Fed. Appx. 422 (6th Cir. 2015); Owens-Benniefield v. Nationstar Mortg. L.L.C., 258 F. Supp. 3d 1300 (M.D. Fla. 2017); Wood v. Citibank, 2015 WL 3561494 (M.D. Fla. June 5, 2015); Hernandez v. Dyck-O'Neal, Inc., 2015 WL 2094263 (M.D. Fla. May 5, 2015); Allison v. Ocwen Loan Servicing, L.L.C., 2014 WL 4809411 (W.D. Ky. Sept. 26, 2014); Clark v. Green Tree Servicing L.L.C., 69 F. Supp. 3d 1203 (D. Colo. 2014); Goodson v. Bank of Am., 2014 WL 940492 (M.D. Tenn. Mar. 10, 2014), *aff'd*, 600 Fed. Appx. 422 (6th Cir. 2015); Parker v. Midland Credit Mgmt., Inc., 874 F. Supp. 2d 1353 (M.D. Fla. 2012); Sowl v. OneWest Bank, 2011 WL 13244561 (W.D. Wis. Mar. 3, 2011) (notice regarding transfer of servicing rights as result of merger was not communication).

127 Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521 (D.N.J. July 27, 2017) (having to comply with both RESPA and FDCPA did not excuse servicer's actions in creating confusion in describing payments in FDCPA validation letter and RESPA servicing transfer letter sent a few days apart); Baptiste v. Carrington Mortg. Services, L.L.C., 2017 WL 2861670 (E.D.N.Y. July 5, 2017) (RESPA servicing transfer notice violates § 1692e(10) through misleading disclosure of payment amount). *See also* Weber v. Seterus, Inc., 2018 WL 1519163 (N.D. Ill. Mar. 28, 2018) (servicer's response to RESPA Notice of Error considered action in connection with collection of debt where stated amount due and advised about paying delinquency).

128 Tabb v. Ocwen Loan Servicing, L.L.C., 798 Fed. Appx. 726 (3d Cir. 2020) (given obscure placement of disclaimers, least sophisticated consumer could find periodic statements were demands for payment); Culver v. PHH Mortg. Corp., 2021 WL 2659796, at *4 (M.D. Fla. June 28, 2021) (statements listed total amount due, referred to late fees, and identified sender as debt collector); McNamee v. Nationstar Mortg. L.L.C., 2021 WL 201189 (S.D. Ohio Jan. 20, 2021) (payment information overshadowed debt collection disclaimers); Pagan v. Rushmore Loan Mortg. Services L.L.C., 2020 WL 7398788, at *5 (N.D. Ill. Dec. 17, 2020) (only basis for relationship between servicer and borrower was loan in default and monthly statement identified debt collection purpose); Evans v. Select Portfolio Servicing, Inc., 2020 WL 5848619, at *9 (E.D.N.Y. Sept. 30, 2020) (emphasizing debt collector warning language added to notice); Izmirligil v. Select Portfolio Servicing, Inc., 2020 WL 1941319, at *11 (E.D.N.Y. Apr. 22, 2020) (statements included address for remitting funds, payment due date, and identified document as for debt collection purpose); Folkerts v. Seterus, Inc., 2019 WL 1227790, at *13 (N.D. Ill. Mar. 15, 2019) ("Although the account statements do not 'demand' payment per se, they look and feel like bills"); Lilly v. Bayview Loan Servicing, L.L.C., 2017 WL 4410040 (M.D. Fla. Oct. 4, 2017) (debt collection was animating purpose of servicer's statements; statements listed amount due and demanded payment); Sellers v. Rushmore Loan Mgmt. Services, L.L.C., 2017 WL 1683613, at *6 (M.D. Fla. May 3, 2017) (court must review monthly statements in context, label as not for debt collection purposes not determinative). *See also* Leahy-Fernandez v. Bayview Loan Servicing, L. L.C., 159 F. Supp. 3d 1294, 1303–1304 (M.D. Fla. 2016); Goodin v. Bank of Am., 114 F. Supp. 3d 1197, 1206 n.10 (M.D. Fla. 2015); Patton v. Ocwen Loan Servicing, 2011 WL 1706889, at *5 (M.D. Fla. May 5, 2011).

129 Rivera v. Bayview Loan Servicing, 2020 WL 1508328 (E.D. Pa. Mar. 30, 2020) (refusing to dismiss FDCPA claims alleging monthly account statements demanded payment of inflated sums); Roche v. Rushmore Loan Mgmt. Services, L.L.C., 2020 WL 1452346 at *8–9 (S.D. Fla. Mar. 25, 2020) (periodic statements listed fees that became due if scheduled payments not made and identified servicer as debt collector); Miller v. Carrington Mortg. Services, L.L.C., 2019 WL 2871141 (D. Mass. July 3, 2019) (content of periodic statements, including accompanying payment coupons with due dates, made them communication for collection of debt); Mohamad v. Wells Fargo Bank, 2019 WL 2425194, at *6 (M.D. Fla. May 16, 2019) ("However, when the mortgage statement includes debt collection language in addition to that which is required by TILA, those statements may constitute debt collection activity that is subject to the FDCPA."), *adopted*, 2019 WL 2423638 (M.D. Fla. June 10, 2019); Muhammad v. Carrington Mortg. Services, L.L.C., 2019 WL 1259353 (S.D. Fla. Mar. 19, 2019) (servicer added content to model forms that included directions for payments and designation that statement was for debt collection purposes); Lear v. Select Portfolio, Inc., 309 F. Supp. 3d 1237 (S.D. Fla. 2018) (monthly statements included additional information not required by model form, demanded payments, and gave instructions for payment); France v. Ditech Fin., L.L.C., 2018 WL 1695405 (M.D. Fla. Apr. 6, 2018) (merely stating amount due by certain date on monthly statement would not violate FDCPA, but representing late fee as due when loan had been accelerated was not authorized by loan documents); Foster v. Green Tree Servicing, L.L.C., 2017 WL 5151354 (M.D. Fla. Nov. 3, 2017) (monthly statements included information beyond model form, including payment coupons, due dates and notice about reinstatement); Jackson v. Carrington Mortg. Services, L.L.C., 2017 WL 4347382 (S.D. Fla. Sept. 29, 2017) (inclusion of payment coupons). *See also* Grant v. Ocwen Loan Servicing, L.L.C., 2019 WL 367648 (M.D. Fla. Jan. 30, 2019) (approving class settlement with maximum FDCPA statutory damages for claims involving TILA monthly statements).

130 Graham v. Caliber Home Loans, Inc., 2021 WL 2557502, at *7 (N.D. Ga. Mar. 9, 2021) (finding disavowal of payment purpose on face of statements persuasive); Jones v. New Penn Fin., L.L.C., 2020 WL 8771252 (E.D.N.Y. Nov. 13, 2020), *adopted*, 2021 WL 405888 (E.D.N.Y. Feb. 5, 2021) (use of model TILA periodic statement form with no additional demand language); Lamirand v. Fay Servicing, L.L.C., 2020 WL 6134356 (M.D. Fla. Oct. 19, 2020) (periodic statements substantially mimicked the model TILA form); Czaban v. Bayview Loan Servicing, L.L.C., 2019 WL 5690633, at *2 (N.D. Fla. Nov. 1, 2019) (periodic statements did not include "strong demands" for payment); Shaffer v. Servis One, Inc., 347 F. Supp. 3d 1039, 1046 (M.D. Fla. 2018) (monthly statement tracking Regulation Z model form and including payment coupon not communication in connection with collection of debt); Green v. Specialized Loan Servicing, L.L.C., 280 F. Supp. 3d 1349 (M.D. Fla. 2017) (periodic statement was not debt collection communication, servicer did not add demands for payment beyond what form called for); Antoine v. Carrington Mortg. Services, L.L.C., 2017 WL 3404389 (S.D. Fla. Aug. 8, 2017) (monthly statement sent under TILA did not violate FDCPA); Brown v. Select Portfolio Servicing, Inc., 2017 WL 1157253 (S.D. Fla. Mar. 24, 2017) (no violation with use of CFPB model form); Hill v. DLJ Mortg. Capital, Inc., 2016 WL 5818540, at

misinterpretation of a CFPB Guidance that created a narrow exception to the periodic statement obligation in order to avoid conflicts with the FDCPA.[131]

Sending the annual escrow statement required by federal law had been held not in connection with collection of a debt.[132] Disclosing a servicemember's rights to legal protections and relief under the Servicemembers Civil Relief Act has been found not to be in connection with collection of a debt.[133]

4.3.3 Collection Litigation

The Supreme Court has ruled that collection litigation is debt collection,[134] so that conduct in connection with collection litigation is also in connection with collection of a debt. Consequently, pleadings, affidavits, and other filings and actions in connection with litigation in a collection action are in connection with debt collection.[135]

FDCPA § 1692e(11) exempts legal pleadings from a specific disclosure requirement,[136] providing additional evidence that the FDCPA's other provisions apply to legal pleadings.

At least in the Seventh Circuit, it may be important to allege that the conduct or statement in the collection litigation misled or otherwise violated the rights of the consumer.[137]

*8 9 (E.D.N.Y. Oct. 5, 2016), *aff'd* 689 Fed. Appx. 97(2d Cir. 2017) (no demand for payment in statements). *See also* Alhassid v. Nationstar Mortg. L.L.C., 771 Fed. Appx. 965 (11th Cir. 2019) (monthly statements related to reverse mortgage did not demand payment).

131 A CFPB Guidance created a compliance exception only for periodic statements that would potentially violate the "cease communication" duties of FDCPA § 1692c(c). CFPB Bulletin 2013-12, Implementation Guidance for Certain Mortgage Servicing Rules, 2013 WL 9001249 (C.F.P.B. Oct. 15, 2013). Courts have applied the Guidance well beyond this limited scope. Estate of Morgan v. BWW Law Group, L.L.C., 2019 WL 2880984, at *5 (D. Md. July 3, 2019) (sending statement to counsel rather than debtor fell within CFPB guidance to FDCPA liability; "the CFPB opinion provides reasonable guidance, and Plaintiffs have failed to adequately allege debt collection activity beyond the federal notice requirement"); Daniels v. Select Portfolio Services, Inc., 2018 WL 6618463 (M.D. Fla. Dec. 18, 2018) (referencing CFPB guidance, monthly mortgage statements in compliance with TILA not debt collection); Zavala v. Select Portfolio Servicing Inc., 2018 WL 6198685, at *3 (S.D. Fla. Nov. 28, 2018); Mills v. Select Portfolio Servicing, Inc., 2018 WL 5113001 (S.D. Fla. Oct. 19, 2018) (referring to Guidance to hold that if statement contains content that complies with TILA, statement does not violate FDCPA); Jones v. Select Portfolio Servicing, Inc., 2018 WL 2316636, at *3 (S.D. Fla. May 2, 2018) ("Courts in this circuit have followed the CFPB guidance in the context of monthly mortgage statements by holding that if the monthly mortgage statements were sent pursuant to TILA, they are not 'communication in connection with the collection of a debt' under the FDCPA."). *But compare* Pagan v. Rushmore Loan Mortg. Services L.L.C., 2020 WL 7398788, at *5 (N.D. Ill. Dec. 17, 2020) (content of monthly statement made it in connection with collection of debt, CFPB Guidance irrelevant to determination); Lear v. Select Portfolio Servicing, Inc., 309 F. Supp. 3d 1237, 1239–1240 (S.D. Fla. 2018) (mortgage servicers can comply with both TILA and FDCPA, no preemption of FDCPA by TILA); France v. Ditech Fin., L.L.C., 2018 WL 1695405, at *6 (M.D. Fla. Apr. 6, 2018) (distinguishing CFPB Guidance, including in properly formulated periodic statement claim for late fees that were not contractually allowed can trigger FDCPA liability); Foster v. Green Tree Servicing, L.L.C., 2017 WL 5151354, at *6 (M.D. Fla. Nov. 3, 2017) (rejecting contention that CFPB Guidance shielded servicer from FDCPA liability for including debt collection language not required by TILA); Mackiewicz v. Nationstar Mortg., L.L.C., 2015 WL 13814879, at *5 (M.D. Fla. June 25, 2015).

132 Gagnon v. JPMorgan Chase Bank, 563 B.R. 835 (N.D. Ill. 2017) (mortgage servicer's annual escrow account disclosure not attempt to collect debt); Sajdak v. New Penn Fin., L.L.C., 281 F. Supp. 3d 740 (N.D. Ill. 2017) (RESPA annual escrow account disclosure statement containing projections of shortage not sent in connection with collection of debt; identified amounts due in future, but does not ask for payment).

133 Krechner v. Nationstar Mortg. L.L.C., 2015 WL 9260055 (E.D. Pa. Dec. 18, 2015).

134 Heintz v. Jenkins, 514 U.S. 291, 294, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995).

135 Marquez v. Weinstein, Pinson & Riley, P.S., 836 F.3d 808, 811 (7th Cir. 2016) (legal pleadings); Kaymark v. Bank of Am., 783 F.3d 168, 177 (3d Cir. 2015) (foreclosure complaint); Powers v. Credit Mgmt. Services, Inc., 776 F.3d 567, 573–574 (8th Cir. 2015); Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291 (11th Cir. 2015) (attorney's sworn statement in garnishment proceeding); Stratton v. Portfolio Recovery Assoc., 770 F.3d 443, 449–450 (6th Cir. 2014), *as amended* (Dec. 11, 2014); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 951 (9th Cir. 2011) (discovery); Donohue v. Quick Collect, Inc., 592 F.3d 1027 (9th Cir. 2010) (state court debt collection complaint is communication subject to FDCPA); Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 231 (4th Cir. 2007); Goldman v. Cohen, 445 F.3d 152, 155–156 (2d Cir. 2006); Todd v. Weltman, Weinberg & Reis, Co., L.P.A., 434 F.3d 432, 434 (6th Cir. 2006) (affidavit in proceeding involving bank account garnishment); Merrill v. Transworld Sys., Inc., 2020 WL 8474736, at *8 (W.D. Mich. Dec. 1, 2020), *adopted*, 2021 WL 210715 (W.D. Mich. Jan. 21, 2021) (allowing claim against mortgage subservicer based on false statements in affidavits prepared by subservicer's counsel for debt collection litigation); Viernes v. DNF Assoc., 475 F. Supp. 3d 1119, 1121 (D. Haw. 2020); Lizarraga-Davis v. Transworld Sys., Inc., 2019 WL 8263436 (N.D. Cal. Aug. 29, 2019); Heyer v. Pierce & Assoc., 2017 WL 75739 (N.D. Ill. Jan. 9, 2017) (notice of foreclosure sale); Butler v. J.r.S-I, Inc., 2016 WL 1298780 (N.D. Ill. Apr. 4, 2016); Fritz v. Resurgent Capital Serv., L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013); Anderson v. Frederick J. Hanna & Assoc., 361 F. Supp. 2d 1379 (N.D. Ga. 2005) (debt collector's argument that lawsuit to collect debt was not "collection activity" was patently frivolous); Mezines, FTC Formal Advisory Opinion (Mar. 31, 2000), *reproduced at* Appx. C, *infra*.

136 *See* § 7.2.11.4, *infra*.

137 O'Rourke v. Palisades Acquisition XVI, L.L.C., 635 F.3d 938 (7th 2011) (FDCPA does not extend to collector's communications with state court judge). *See also* Ciesniewski v. Aries Capital Partners, Inc., 2020 WL 1493019 (S.D. Ind. Mar. 27, 2020), *reconsideration denied*, 2020 WL 7319070 (S.D. Inc. Dec. 11, 2020); Markette v. HSBC Bank, 2018 WL 1695368 (N.D. Ill. Apr. 6, 2018); Webb v. Law Office of Ira T. Nevel, L.L.C., 2016 WL 946962 (N.D. Ill. Mar. 14, 2016) (representations made to state court judge are not actionable under FDCPA in Seventh Circuit). *But see* Hartman v. Great Seneca Fin. Corp., 569 F.3d 606, 618 (6th Cir. 2009) (reversing grant of summary judgment to debt collector, finding genuine issue of material fact as to whether calling an Exhibit to the state court Complain an "account" would have misled the least sophisticated consumer); Schendzielos v. Borenstein, 2016 WL 614473 (D. Colo. Feb. 16, 2016) (FDCPA applies to false pleading, motions, and representations made to a state court judge that would be material to unsophisticated consumer sued by debt collector); Todd v. Weltman, Weinberg & Reis, Co., L.P.A., 348 F. Supp. 2d 903 (S.D.

4.3.4 Foreclosures and Repossessions

In 2019, the Supreme Court clearly stated that enforcement of a security interest through even a nonjudicial foreclosure (even where no deficiency is sought) is in connection with collection of a debt: "foreclosure is a means of collecting a debt. And a business pursuing nonjudicial foreclosures would, under the capacious language of the Act's primary definition, be one that 'regularly collects or attempts to collect, directly or indirectly, debts.' "[138] While an enforcement of a security interest results in payment to the creditor from sale of the property and not as a payment from the consumer, the Supreme Court stated:

> But nothing in the primary definition requires that payment on a debt come "from a debtor." The statute speaks simply of the "collection of any debts . . . owed or due." § 1692a(6). Moreover, the provision sweeps in both "direc[t]" and "indirec[t]" debt collection. *Ibid.* So, even if nonjudicial foreclosure were not a *direct* attempt to collect a debt, because it aims to collect on a consumer's obligation by way of enforcing a security interest, it would be an *indirect* attempt to collect a debt."[139]

Clearly, an indirect collection of a debt is "in connection with collection of a debt."[140]

The same logic applies to repossessions of vehicles and other personal property. The *Obduskey* Court stated: "The same may well be true of repo activity, a form of security interest enforcement, as the point of repossessing property that secures a debt is to collect some or all of the value of the defaulted debt . . . We are also unmoved by Obduskey's argument that repossession would not fall under the primary definition [of regularly collecting a debt] . . ."[141]

Communications about loss mitigation and loan modifications, particularly when a borrower is in default or facing foreclosure, are in connection with collection of a debt.[142] However, certain courts have ignored this context and found that loss mitigation communications without express demands

Ohio 2004) (misrepresentation to state court in filing was misrepresentation to debtor who would be served with filing), *aff'd*, 434 F.3d 432 (6th Cir. 2006).

138 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029 at 1036, 203 L. Ed. 2d 390 (2019). *See also* McCray v. Fed. Home Loan Mortg. Corp., 839 F.3d 354 (4th Cir. 2016).

139 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029 at 1036, 1037, 203 L. Ed. 2d 390 (2019).

140 *See also* In re Holyfield, 740 Fed. Appx. 695, 697 (11th Cir. 2018) (letter giving notice of nonjudicial foreclosure sale was a communication "in connection with the collection of [a] debt"); Kaymark v. Bank of Am., 783 F.3d 168 (3d Cir. 2015); Glazer v. Chase Home Fin. L.L.C., 704 F.3d 453 (6th Cir. 2013); Maynard v. Cannon, 401 Fed. Appx. 389 (10th Cir. 2010); Sevela v. Kozeny & McCubbin, L.C. 2019 WL 2066924 (D. Neb. May 2, 2019) (foreclosure law firm's § 1692g validation letter was communication in connection with collection of debt); Ellison v. Fullett Rosenlund Anderson P.C., 347 F. Supp. 3d 370, 376–377 (N.D. Ill. 2018) (foreclosure firm's notice was demand for payment even though labeled as "In Rem Notice and Demand for Possession"); Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 1582515, at *10 (D. Conn. Mar. 31, 2018) (personal liability on debt not required for communication to be in connection with collection of debt); Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340 (E.D. Mich. Nov. 2, 2017) (animating purpose of notice commencing nonjudicial foreclosure to induce payment); Heyer v. Pierce & Assoc., 2017 WL 75739 (N.D. Ill. Jan. 9, 2017).

141 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029 at 1037, 203 L. Ed. 2d 390 (2019).

142 Allen *ex rel.* Martin v. LaSalle Bank, 629 F.3d 364 (3d Cir. 2011); Gburek v. Litton Loan Servicing L.P., 614 F.3d 380 (7th Cir. 2010); Graham v. Caliber Home Loans, Inc., 2021 WL 2557502 (N.D. Ga. Mar. 9, 2021) (loss mitigation application with references to debtor's past due mortgage payments was in connection with debt collection); Carbone v. Gross Polowy L.L.C., 2019 WL 1114899, at *5 (E.D.N.Y. Mar. 11, 2019) (foreclosure attorney's letter was in connection with collection of debt; "[l]etter implicitly demands repayment of the debt, albeit under revised terms, and threatens Plaintiffs with foreclosure, or continuation of a foreclosure action, should they fail to comply"); Lucas v. New Penn Fin., L.L.C., 2019 WL 404033, at *6 (D. Mass. Jan. 31, 2019) (servicer's activities in connection with loss mitigation could be debt collection); Santo v. U.S. Bank Nat'l Assoc., 2018 WL 4680090, at *5–6 (M.D. Pa. Sept. 28, 2018) (communications between borrower and servicer over loan modification); Gritters v. Ocwen Loan Servicing, L.L.C., 2018 WL 1784134 (N.D. Ill. Apr. 13, 2018) (law firm's solicitation for loss mitigation was sent in connection with collection of debt, construed as invitation to settle debt and avoid foreclosure); France v. Ditech Fin., L.L.C., 2018 WL 1695405 (M.D. Fla. Apr. 6, 2018) (borrower's general allegations that servicer's loss mitigation letters were sent in attempt to induce payment of debt sufficient to defeat motion to dismiss); Williams v. Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 1582515 (D. Conn. Mar. 31, 2018) (communications about loan modification to avoid foreclosure may be in connection with collection of debt, even though borrower no longer personally liable for mortgage debt due to bankruptcy discharge); Petraglia v. U.S. Bank, 2017 WL 6514601 (D.N.J. Dec. 20, 2017) (reinstatement agreement was well within parameters of debt collection activity); Foster v. Green Tree Servicing, L.L.C., 2017 WL 5151354 (M.D. Fla. Nov. 3, 2017) (servicer's loss mitigation letters referred to modifications and forbearance as attempts to "find a solution" to default); Pearson v. Specialized Loan Servicing, L.L.C., 2017 WL 3167648 (E.D. Tenn. July 24, 2017) (communications about loan modification application can have debt collection as their animating purpose); Whalen v. Specialized Loan Servicing, L.L.C., 155 F. Supp. 3d 905 (W.D. Wis. 2016) (servicer's loss mitigation letter was in connection with collection of debt, despite contention sent to comply with RESPA servicing rules); Caprel v. Specialized Loan Servicing, Inc., 2016 WL 4678313 (N.D. Ill. Sept. 7, 2016) (servicer's solicitation for loan modification was action to collect money); Matmanivong v. National Creditors Connection, Inc., 79 F. Supp. 3d 864 (N.D. Ill. 2015) (loss mitigation contractor's activities were in collection with collection of debts); Paulsen v. Blommer Peterman, S.C., 2015 WL 1486546 (W.D. Wis. Mar. 31, 2015) (letter threatening foreclosure, while also offering to discuss foreclosure alternatives, qualified as communication related to debt collection); Gregory v. Home Retention Services, Inc., 2014 WL 6676008 (D.N.J. Nov. 24, 2014); Riley v. Home Retention Services, Inc., 2014 WL 11906643 (S.D. Fla. Oct. 23, 2014) (servicer's implementation of loan modification which required borrower to make trial plan payments and capitalized accrued fees constituted demands for payment); Crespo v. Butler & Hosch, P.A., 2014 WL 11531360 (S.D. Fla. Mar. 21, 2014) (law firm's loss mitigation solicitation letter sent while foreclosure pending and describing itself as action to collect debt qualified as in connection with collection of debt); Magness v. Walled Lake Credit Bur., L.L.C., 2014 WL 12610219 (E.D. Pa. Feb. 18, 2014) (loss mitigation solicitations can constitute debt collection); Wright v. Ocwen Loan Servicing, L.L.C., 2013 WL 5532687 (E.D. Mich. Oct. 7, 2013); Simpson v. Safeguard Props., L.L.C., 2013 WL 2642143 (N.D. Ill. June 12, 2013); Crespo v. Brachfeld Law Grp., 2011 WL 4527804 (S.D. Fla. Sept. 28, 2011).

for payment were not in connection with debt collection.[143] Payoff statements are in connection with debt collection, because they facilitate payments.[144] Communications from law firms and mortgage servicers that respond to FDCPA validation letters [45] and set out terms of repayment are similarly in connection with collection of a debt.[146]

4.3.5 Property Preservation Contractors

Servicers hire property preservation contactors to visit homes in foreclosure to confirm that the property is occupied, leave door hangers or other notices instructing the homeowner to contact the servicer, and enter the home and perform work to secure the property. When that is all a contractor does, courts may find that the contractor is only engaged in property preservation or serve merely as "messengers," and their practices are not in "connection with collection of a debt."[147] To

143 Heinz v. Carrington Mortg. Services, L.L.C., 3 F.4th 1107 (8th Cir. 2021) (series of letters from servicer about status of loss mitigation application not in connection with collection of debt; no demands for payment or statements of amount due); Tabb v. Ocwen Loan Servicing, L.L.C., 798 Fed. Appx. 726, 728 (3d Cir. 2020) (servicer responding to borrower's inquiry about loss mitigation not in connection with collection of debt); Farquharson v. Citibank, 664 Fed. Appx. 793 (11th Cir. 2016) (servicer's communications about loss mitigation not related to collection of debt); Mathieson v. Wells Fargo Bank, __F. Supp. 3d ___, 2021 WL 877698 (M.D. Fla. Mar. 9, 2021) (filing of motion to cancel nonjudicial foreclosure sale and continuing of loss mitigation review not in connection with collection of debt); Helman v. Udren Law Offices, P.C., 85 F. Supp. 3d 1319 (S.D. Fla. 2014) (letter sent by mortgage servicer suggesting alternative to foreclosure that would pay off mortgage did not involve debt collection activity); Kennedy v. Wells Fargo Bank, 2011 WL 4526085 (C.D. Cal. Sept. 28, 2011) (contact by lender or loan servicer for purpose of restructuring payments on debt is not "collection of a debt" when lender or servicer did not demand payment); Kevelighan v. Trott & Trott, P.C., 2011 WL 2111977, at *4 (E.D. Mich. May 26, 2011) ("[r]esponding to a borrower's request for information concerning reinstatement does not constitute 'debt collection' under the FDCPA"), *aff'd*, 498 Fed. Appx. 469 (6th Cir. 2012). *See also* Weiner v. Rushmore Loan Mgmt. Services, L.L.C., 424 F. Supp. 3d 163 (D. Mass. 2019) (whether servicer's loss mitigation communications were in connection with collection of debt involved disputed facts and could not be determined on summary judgment).

144 Dawoudi v. Nationstar Mortg. L.L.C., 448 F. Supp. 3d 918, 926 (N.D. Ill. 2020) (servicer's payoff statement was sent in connection with collection of debt; letter threatened foreclosure and referred to servicer as debt collector); Izmirligil v. Select Portfolio Servicing, Inc., 2020 WL 1941319, at *11 (E.D.N.Y. Apr. 22, 2020) (in connection with collection of debt found where payoff statement identified servicer as debt collector, provided address for how debtor could "remit funds," and included payment due date; FDCPA claim dismissed on other grounds).

145 Sevela v. Kozeny & McCubbin, L.C. 2019 WL 2066924 (D. Neb. May 2, 2019) (foreclosure law firm's § 1692g validation letter to borrower was communication in connection with collection of debt); Sciortino Bankruptcy Estate v. Shapiro Pendergast & Hasty, L.L.P., 2019 WL 7496253 (N.D. Ga. Nov. 27, 2019), *adopted*, 2019 WL 7493533 (N.D. Ga. Dec. 17, 2019) (foreclosure firm's § 1692g letter could be construed as sent in connection with collection of debt). *But see* Woody v. Aurora Commercial Corp., 2018 WL 1884826 (W.D. Tenn. Apr. 19, 2018) (servicers' responses to borrower's debt validation requests without further demands for payment were not debt collection activities).

146 Reese v. Ellis, Painter, Ratterree & Adams, L.L.P., 678 F.3d 1211 (11th Cir. 2012) (law firm's letters describing account status asked for payment); Birster v. Am. Home Mortg. Servicing, Inc., 481 Fed. Appx. 579 (11th Cir. 2012) (servicer communicated with homeowner about payments as well as conducted foreclosure); Parente v. Fay Servicing, L.L.C., 2020 WL 1182714, at *3 (N.D. Ill. Mar. 12, 2020) (servicer's letters can be in connection with collection of debt despite post-bankruptcy collection disclaimers); Roche v. Rushmore Loan Mortg. Services, L.L.C., 2020 WL 1452346 (S.D. Fla. Mar. 25, 2020) (notice of amount due); *In re* Trevino, 615 B.R. 108 (Bankr. S.D. Tex. Jan. 31, 2020) (servicer's notice of assessment of charge in chapter 13 case pursuant to Fed. R. Bankr. P. 3002.1 was act in connection with collection of debt); Ellison v. Fullett Rosenlund Anderson P.C., 347 F. Supp. 3d 370, 376–377 (N.D. Ill. 2018) (foreclosure firm's notice was demand for payment, even though labeled as "In Rem Notice and Demand for Possession"); James v. Ocwen Loan Servicing, L.L.C., 2017 WL 6336760 (S.D. Ohio Dec. 12, 2017) (unanswered phone calls from servicer can be construed as in connection with collection of debt when viewed in context of entire collection history); Owens-Benniefield v. Nationstar Mortg., L.L.C., 258 F. Supp. 3d 1300, 1309 (M.D. Fla. 2017) (servicer's letter contained demand for payment and highlighted repercussion from non-payment, i.e., acceleration, so qualified as in connection with collection of debt); Foster v. Green Tree Servicing, L.L.C., 2017 WL 5151354 (M.D. Fla. Nov. 3, 2017) (servicer's voicemails were in connection with collection of debt); Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340 (E.D. Mich. Nov. 2, 2017) ("animating purpose of the communication" from foreclosure law firm was to induce payment); Paulsen v. Blommer Peterman, S.C., 2015 WL 1486546 (W.D. Wis. Mar. 31, 2015); Randall v. Paul, 897 N.W.2d 842 (Minn. Ct. App. 2017) (lien enforcement notice indicated amount due and listed creditor address, under objective "animating purpose" standard fact finder could decide notice made payment of debt more likely). *See also* Corona v. PNC Fin. Services Group, Inc., 2021 WL 1218258, at *4 (C.D. Cal. Mar. 16, 2021) (applying California Rosenthal Act, convenience fee charge notice was in connection with debt collection, because directed at payment of outstanding mortgage debt); Parks v. RoundPoint Mortg. Servicing Corp., 2019 WL 1519303 (S.D. W. Va. Apr. 8, 2019) (applying West Virginia debt collection statute, mortgage servicer's phone calls to borrower, even when not answered, were in connection with collection of debt). *But see* Shaffer v. Servis One, Inc., 347 F. Supp. 3d 1039, 1047 (M.D. Fla. 2018) (servicer's sending borrower an IRS Form 1099-C was not debt collection).

147 Thompson v. Five Bros. Mortg. Co. Services & Securing, Inc., 800 Fed. Appx. 369 (6th Cir. 2020) (post-foreclosure sale redemption period had expired, so no debt collection acts involved); Schlaf v. Safeguard Prop., L.L.C., 899 F.3d 459, 470 (7th Cir. 2018) ("Safeguard does not deliver any communications that contain information about the debt or past due payments, does not collect homeowners' contact information, and does not 'urge alleged debtors, in person, to call the creditor while they watched.'"); Kinlock v. Wells Fargo Bank, 636 Fed. Appx. 785 (11th Cir. 2016) (where mortgage had been foreclosed, acts were to regain possession of property and not collect debt); Auld v. New Penn Fin. L.L.C., 2020 WL 3577618 (D. Minn. July 1, 2020) (inspectors did not communicate about debts and inspectors' contract with servicer prohibited them from such communication); Fed. Nat'l Mortg. Ass'n v. Obradovich, 2020 WL 2767578 (N.D. Ill. May 28, 2020) (activities of Safeguard and its contractor limited to property preservation); Hochroth v. Ally Bank, 461 F. Supp. 3d 986, 1009 (D. Haw. 2020) (Five Brothers did not engage in any acts involving collection of money); Cohen v. Ditech Fin., L.L.C., 342 F. Supp. 3d 460, 467 (S.D.N.Y. 2018) (not engaged in debt collection activities in leaving doorhangers with message to contact servicer), *later op. at* 342 F. Supp. 3d 460 (S.D.N.Y. 2018); Kraft v. Wells Fargo, 2017 WL 3229066 (D.N.J. July 31, 2017) (actions of servicer's contractor, who locked debtor out, damaged property, and posted notices on property, were carried out in contractor's role in asset management and not as debt collector); Amelina v. Manufacturers & Traders Tr. Co., 2015 WL 7272224 (S.D. Cal. Nov. 17, 2015); Gordon v. Bank of N.Y. Mellon Corp., 964 F. Supp. 2d 937, 948–949 (N.D. Ind.

counter this, FDCPA plaintiffs have claimed that this activity instead meets the limited-purpose definition of a debt collector as one whose principal purpose is enforcement of security interests, so at to be liable under FDCPA § 1692f(6),[148] but such arguments have generally been unsuccessful.[149]

Nevertheless, property preservation contractors often have a larger role that more clearly involves debt collection.[150] They may enter into direct discussions with borrowers about loan repayment, direct borrowers to servicer staff responsible for payment arrangement, or discuss terms for surrendering possession of the property. The test for whether property preservation contractor's actions were in connection with the collection of a debt looks at the specific facts of each communication as well as the context.[151]

4.3.6 Evictions

Persons hired before rent is past due on a residential rental property to manage the property are excluded from the definition of debt collector, even when later collecting rent or pursuing evictions.[152] On the other hand, others hired after rent is overdue to collect on the rent and evict the tenant if necessary can be FDCPA debt collectors,[153] and their actions seeking either eviction or collection of past due rent can be in connection with collection of a debt.[154] Often the very purpose of an eviction action is to use the threat of eviction to recover back rent.[155] Sending notice that an eviction action is imminent if payment is not made is also in connection with debt collection.[156]

On the other hand, courts may find conduct not to be in connection with collection of a debt where a collector does not seek back rent or other charges, and merely seeks to force the consumer to vacate the property.[157] This can occur where a homeowner is still in residence after a foreclosure, where a tenant has discharged the back-rent obligation in bankruptcy, or where the tenant has overstayed in the property. While the

2013) (debtors failed to allege that contractor's actions in securing and winterizing home were debt collection actions).

148 *See* § 4.7.5, *infra*.

149 Hunte v. Safeguard Prop. Mgmt., L.L.C., 255 F. Supp. 3d 722 (N.D. Ill. 2017); Alqaq v. CitiMortgage, Inc., 2014 WL 1689685 (N.D. Ill. Apr. 29, 2014) (principal purpose was to secure and winterize the property); Nielson v. Safeguard Prop., L.L.C., 2017 WL 5196011 (Mich. Ct. App. Nov. 9, 2017) (unpublished). *But see* Fed. Nat'l Mortg. Ass'n v. Obradovich, 2020 WL 2767578 (N.D. Ill. May 28, 2020) (servicer that hired property preservation contractors who breached peace by self-help eviction potentially liable under § 1692f(6)); Bywater v. Wells Fargo Bank, 2014 WL 1256103 (N.D. Ill. Mar. 24, 2014) (home preservation company's misconduct was within § 1692f(6)).

150 Siwulec v. J.M. Adjustment Services, L.L.C., 465 Fed. Appx. 200 (3d Cir. 2012) (contractors provided investigation servicers to mortgage servicers to further a debt collection); Griffin v. Safeguard Props. Mgmt., L.L.C., 2019 WL 3252217, at *2 (N.D. Ill. July 19, 2019); Foster v. Green Tree Serving, L.L.C., 2017 WL 5151354 (M.D. Fla. Nov. 3, 2017) (door hanger left at residence telling borrower to contact servicer and giving toll free number were for debt collection purposes); Quinn v. Specialized Loan Servicing, L.L.C., 2016 WL 4264967 (N.D. Ill. Aug. 11, 2016) (door hangers with message to call servicer's regular debt collection department, not property inspection and maintenance unit; inspectors visited more frequently than was necessary for property preservation and conducted visits in deliberately conspicuous manner that debtors alleged was done in order to harass and embarrass them); Fielding v. FCC Fin., L.L.C., 2015 WL 12532741 (M.D. Tenn. Jan. 22, 2015) (visits were indirect attempt to collect debt), *adopted*, 2015 WL 3892058 (W.D. Tenn. June 24, 2015); Simpson v. Safeguard Prop., L.L.C., 2013 WL 2642143 (N.D. Ill. June 12, 2013) (entities that contact consumers attempting to facilitate communication with creditors can be debt collectors), *later decision*, Simpson v Safeguard Prop., L.L.C., 2017 WL 4310674 (N.D. Ill. Sept. 28, 2017) (factual issue whether servicers directed contractors primarily to delinquent borrowers to encourage payment).

151 Griffin v. Safeguard Props. Mgmt., L.L.C., 2020 WL 6118572, at *3 (N.D. Ill. Oct. 16, 2020) (factual disputes about agency relationships among various subcontractors precluded summary judgment for defendants); Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. Feb. 20, 2018) (disputed fact issue going to servicer's "animating purpose" in leaving door hanger notices instructing homeowner to contact servicer).

152 *See* § 4.8.9, *infra*.

153 *See* § 4.7.3.5, *infra*.

154 *See* Gonzalez v. Law Office of Allen Robert King, 195 F. Supp. 3d 1118 (C.D. Cal. 2016); Riley v. Giguiere, 2008 WL 436943 (E.D. Cal. Feb. 14, 2008) (eviction actions including demand for payment). *See also* Martinez v. Dennis P. Block & Assoc., 2020 WL 8483771 (C.D. Cal. Dec. 14, 2020) (letter warning that eviction would affect consumer's credit and future ability to rent and failing to clearly state that past due rent was deferred went beyond seeking mere possession and plausibly constituted attempt to collect debt).

155 *See, e.g.*, Hodges v. Sasil Corp., 915 A.2d 1 (N.J. 2007).

156 *See* Romea v. Heiberger & Assoc., 163 F.3d 111 (2d Cir. 1998).

157 Morgan v. Carrington Mortg. Services, 719 Fed. Appx. 735 (10th Cir. 2017) (post-foreclosure eviction proceedings, including cash for keys offer and service of writ of possession, did not involve actions to collect a debt); Todaro v. Reimer, Arnovitz, Chernek, & Jeffrey Co., 704 Fed. Appx. 440, 443 (6th Cir. 2017) ("Where the debt has been extinguished in a foreclosure sale . . . there no longer exists a debt to enforce and any post-foreclosure activity cannot be considered debt collection covered by the FDCPA."); Adams v. Schneider, 2020 WL 5411378, at *3 (E.D. Wash. Sept. 9, 2020) (granting summary judgment for attorney who filed underlying state court unlawful detainer action, because plaintiff "was living at the residence rent free and without a lease" and thus "there was no 'transaction' establishing a debt"); Lucore v. Zeff, 2018 WL 1101099 (S.D. Cal. Feb. 26, 2018) (lawyer's post-foreclosure sale demands that borrower vacate property without any request for payment were not actions to collect the mortgage debt); Carrington Mortg. Services, L.L.C. v. Dye, 2016 WL 4766484, at *3 (M.D. Ga. Sept. 12, 2016); Bonfiglio v. Citifinancial Servicing, L.L.C., 2015 WL 5612194 (N.D. Ill. Sept. 23, 2015); Hutsler v. Shapiro & Kreisman, L.L.C., 2014 WL 2452977 (E.D. Mo. June 2, 2014) (eviction post-foreclosure); Conlin v. Trott & Trott, P.C., 2014 WL 1746155 (E.D. Mich. Apr. 30, 2014) (eviction after foreclosure); Keys v. Pearson Affiliated, Inc., 2013 WL 12205581 (C.D. Cal. May 14, 2013) (unlawful detainer actions against tenants are not debt collection activities because they seek to recover property, not money); Bond v. U.S. Bank, 2010 WL 1265852 (E.D. Mich. Mar. 29, 2010) (personal liability for mortgage debt discharged in bankruptcy); Baer v. Harmon Law Offices, P.C., 2009 WL 102698 (D. Mass. Jan. 14, 2009) (no request for money while seeking to end tenancy). *Cf.* Amin v. Del Plata Inv. Group, L.L.C., 2020 WL 3256862, at *4 (S.D. Fla. June. 15, 2020) (denying motion to dismiss, because FDCPA applies to attempt to collect back rent and evict tenant undertaken by attorney following state law procedures; "A factfinder can determine the intent behind Law Firm's actions—that is, whether it was *only* for eviction of Tenants, or whether it sought to collect back rent, first.").

FDCPA includes a special-purpose definition of debt collector that covers a person whose principal purpose is enforcement of a security interest, there is no similar provision for a person who solely seeks to end a tenancy.

4.4 Consumer, FDCPA § 1692a(3)

> The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.[158]

The definition of "consumer" in FDCPA § 1692a(3) applies to any natural person obligated or allegedly obligated on a debt. A "consumer" need not incur a debt for consumer purposes—that limit is found in the definition of "debt."[159] A consumer is just one who allegedly owes a debt.

A person not liable on a debt is still a consumer if the debt collector alleges the consumer is liable on the debt. A person can be a consumer even though denying owing the debt,[160] such as where the consumer claims the collector is dunning the wrong person,[161] or that the consumer is an identity theft victim.[162]

Unlike the definition of consumer found in section 1692a(3), FDCPA § 1692c(d) defines consumer more broadly to include certain persons related to the person allegedly owing the debt, but this definition is only for purposes of section 1692(c).[163] For FDCPA § 1692(c) only, "consumer" is expanded to include the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.[164] For other FDCPA provisions, use of the term "consumer" is limited just to individuals allegedly owing on a debt.

"Consumer" is a person allegedly obligated on a debt, while "person" includes not just the alleged debtor but also those not allegedly obligated on a debt, including relatives,[165] roommates,[166] a car passenger during the car's contested repossession,[167] neighbors,[168] and anyone else.[169] A consumer must be a natural person, so that other legal entities that owe debts, such as corporations, cannot be a consumer.[170]

The FDCPA distinguishes between a "consumer" and a "person."[171] "Person" is not defined in the FDCPA, but it is defined in Regulation F.[172] Regulation F (effective November 30, 2021) tracks the U.S. Code definition of "person" as including "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[173] Thus, "persons" as used in the FDCPA need not be natural persons. A debt collector violating an FDCPA provision applying to a "person" can be liable to these other legal entities,[174] as long as the collection activity involves a debt, as defined by the FDCPA.[175]

One question is whether a person continues to be a consumer after dying. A deceased's estate should be a "person" and a deceased's family member is a "consumer" if the collector alleges that the family member owes the deceased's debts. But is a deceased person a "consumer"—that is, a natural person to whom a debt is allegedly owed? The FDCPA explicitly provides at section 1692c(d) that, only for purposes of section 1692(c), "consumer" includes the consumer's executor or administrator.[176] In that case, the plaintiff should not claim to be a "consumer" in an individual capacity, only as an executor or administrator of the estate.[177]

Prior to Regulation F, courts noted that FDCPA § 1692c(d) did not answer the question for purposes of other FDCPA provisions that refer to "consumer," where the collector's conduct takes place after the consumer has died.[178] Regulation F clarifies that consumer "means any natural person, whether living

158 15 U.S.C. § 1692a(3). *See also* Reg. F § 1006.2(e).

159 *See* § 4.6, *infra*.

160 *See, e.g.*, Loja v. Main St. Acquisition Corp., 906 F.3d 680, 683 (7th Cir. 2018); Dunham v. Portfolio Recovery Assoc., 663 F.3d 997 (8th Cir. 2011); Torres v. LVNV Funding, L.L.C., 2018 WL 1508535 (N.D. Ill. Mar. 27, 2018); Gonzalez v. Law Firm of Sam Chandra, APC, 2013 WL 4758944 (E.D. Wash. Sept. 4, 2013).

161 Dunham v. Portfolio Recovery Assoc., 663 F.3d 997 (8th Cir. 2011); Gonzalez v. Allied Collection Serv., Inc., 2018 WL 715359 (D. Nev. Feb. 5, 2018); Hedayati v. The Perry Law Firm, 2017 WL 4864491 (C.D. Cal. Oct. 27, 2017) (debtor's brother with same first and last names); Koval v. Harris & Harris, Ltd., 2017 WL 1321152 (N.D. Ill. Apr. 5, 2017) (close family member); Davis v. Midland Funding, L.L.C., 41 F. Supp. 3d 919 (E.D. Cal. 2014).

162 *See, e.g.*, Beltran v. Confidential Serv., Inc., 2009 WL 10672193 (S.D. Cal. Oct. 23, 2009).

163 The expanded definition is found at FDCPA § 1692c(d) and is not mentioned in the general definition of consumer at FDCPA § 1692a(3). Regulation F, for clarity, references in its general definition of consumer the fact that a broader definition applies for FDCPA § 1692c. *See* Reg. F § 1006.2(e).

164 See the discussion of this expanded definition at § 5.10, *infra*.

165 *See, e.g.*, Rawlinson v. Law Office of William M. Rudow, L.L.C., 460 Fed. Appx. 254 (4th Cir. 2012); Muir v. Navy Fed. Credit Union, 529 F.3d 1100 (D.C. Cir. 2008) (son of debtor); Montgomery v. Huntington Bank, 346 F.3d 693 (6th Cir. 2003) (son of debtor).

166 *See* Horowitz v. GC Serv. L.P., 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016).

167 *See* Aviles v. Wayside Auto Body, Inc., 49 F. Supp. 3d 216 (D. Conn. 2014).

168 *See* Todd v. Collecto, Inc., 731 F.3d 734, 737 (7th Cir. 2013).

169 *See, e.g.*, § 5.2, *infra* (discussing § 1692b, which applies to communications to "any person").

170 *See* FTC Official Staff Commentary § 803(3)-1, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

171 *See* Valhalla Inv. Props, L.L.C. v. 502, L.L.C., 456 F. Supp. 3d 939, 946 (M.D. Tenn. 2020), *aff'd*, 832 Fed. Appx. 413 (6th Cir. 2020) (distinguishing FDCPA's treatment of "consumer" and "person").

172 Reg. F § 1006.2(k). *See also* § 4.10, *infra*.

173 1 U.S.C. § 1.

174 *See* Anarion Invs. L.L.C. v. Carrington Mortg. Services, L.L.C., 794 F.3d 568 (6th Cir. 2015).

175 *See* § 4.6, *infra*.

176 *See* § 5.10, *infra*. (discussing FDCPA § 1692c(d), the parallel provision at Reg. F § 1006.6(a), and the expanded definitions of these terms created by the relevant Official Interpretations).

177 *See* Hall v. Nationstar Mortg., L.L.C., 255 F. Supp. 3d 625 (E.D. Pa. 2015); Barasch v. Estate Info. Serv., L.L.C., 2009 WL 2900261 (E.D.N.Y. Sept. 3, 2009).

178 *See* Wright v. Fin. Serv. of Norwalk, Inc., 22 F.3d 647, 650 (6th Cir. 1997) (majority assumes that estate is a consumer, while dissent finds estate is not a natural person); Kaschak v. Raritan Valley Collection Agency, 1989 WL 255498 (D.N.J. May 23, 1989) (appears to view the executrix as a consumer); Riveria v. MAB Collections, Inc., 682 F. Supp. 174 (W.D.N.Y. 1988) (same).

or deceased."[179] The Regulation F supplemental information states:

> [I]nterpreting the term consumer in § 1006.2(e) to include deceased natural persons is supported by more than concern for a decedent's privacy; it also clarifies debt collector's obligations to a consumer and, in turn, to those authorized to act on the consumer's behalf, if the consumer has died.[180]

There are no further restrictions on the definition of a consumer—just that a natural person allegedly owes a debt, as debt is defined by the FDCPA. A person is still a consumer if the person has no defense to liability on the debt,[181] the debt was incurred through the consumer's fraud,[182] or the individual is sophisticated.[183] A lawyer can be a "consumer."[184]

4.5 Creditor, FDCPA § 1692a(4)

> The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.[185]

In other words, a creditor is someone who "offers or extends credit creating a debt" or "to whom a debt is owed." The definition excludes those who obtain a debt by assignment or transfer after default to facilitate collection "for another."

As discussed later in this chapter, the term "creditor" appears in relations to the definition of debt collector in four ways:

- A debt collector "includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts";[186]
- Debt collector excludes any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;[187]
- Debt collector excludes a nonprofit organization that "performs bona fide consumer credit counseling . . . by receiving payments from such consumers and distributing such amounts to creditors;"[188] and
- Debt collector excludes "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor."[189]

The term "creditor" also appears in a variety of other sections of the FDCPA discussed in subsequent chapters.[190]

4.6 Debt, FDCPA § 1692a(5)

4.6.1 Overview

> The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.[191]

The FDCPA definition of "debt" is critical to the Act's coverage.[192] The same person collecting on a variety of obligations need comply with the FDCPA only with respect to those obligations that fit within the FDCPA definition of "debt."

The FDCPA's definition of debt has five parts. First, a debt is an obligation or alleged obligation of a "consumer." "Consumer" is a defined term, as a natural person who is obligated or allegedly obligated to pay a debt.[193] A debt thus involves an obligation of a natural person and not that of a corporation or other legal entity.[194] On the other hand, unlike in other consumer statutes, the term "consumer" has no additional meaning, so that it does not require, for example, that the person purchase goods or services for personal use. That limitation is found elsewhere in the definition of "debt."

Second, a debt is either an obligation or an "alleged obligation," so that the term applies if the consumer does not, in fact, owe the debt or if the debt collector alleges there is a debt

179 Reg. F § 1006.2(e).

180 86 Fed. Reg. 5766, 5773 (Jan. 19, 2021).

181 *See* Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998) ("the FDCPA is designed to protect consumers from unscrupulous antics of debt collectors, irrespective of whether a valid debt actually exists"); McCartney v. First City Bank, 970 F.2d 45, 46 (5th Cir. 1992); Baker v. G.C. Serv. Corp., 677 F.2d 775, 777 (9th Cir. 1982).

182 Fed. Trade Comm'n v. Check Inv'rs, Inc., 502 F.3d 159, 171 (3d Cir. 2007) ("it is clear that Congress realized that some people who write 'bad checks' do so knowingly and willfully and that their conduct is fraudulent. It is just as clear that Congress enacted a definition of 'consumer' that did not exclude such persons from the protections they would otherwise be afforded under the FDCPA."). *Accord* Bass v. Stolper, Koritzinsky, Brewster & Neider, 111 F.3d 1322 (7th Cir. 1997).

183 Benzemann v. Citibank, 806 F.3d 98, 100 (2d Cir. 2015).

184 *See* Cole v. Charleston, 2009 WL 123472 (E.D. Pa. Jan. 15, 2009) (simply because plaintiff happens to be lawyer does not mean that he or she should be precluded from protection by FDCPA).

185 15 U.S.C. § 1692a(4). Reg. F § 1006.2(g) tracks the statutory definition with only minor, non-substantive language changes for clarity.

186 15 U.S.C. § 1692a(6). *See* § 4.7.4, *infra*.

187 15 U.S.C. § 1692a(6)(A). *See* § 4.8.1, *infra*.

188 15 U.S.C. § 1692a(6)(E). *See* § 4.8.5, *infra*.

189 15 U.S.C. § 1692a(6)(F)(iv). *See* § 4.8.10, *infra*.

190 *See* § 1692c, *discussed at* Chapter 5, *infra*; § 1692e, *discussed at* Chapter 7, *infra*; § 1692g, *discussed at* Chapter 9, *infra*; and § 1692j, *discussed at* Chapter 10, *infra*.

191 15 U.S.C. § 1692a(5). Reg. F § 1006.2(h) tracks the statutory definition with only minor, non-substantive language changes for clarity.

192 While FDCPA § 1692b does not state it is in connection with a debt, it is in connection with the acquisition of location information about a "consumer," and "consumer" is defined as one obligated or allegedly obligated to pay a debt. *See* 15 U.S.C. § 1692a(3).

193 15 U.S.C. § 1692a(3). *See* § 4.4, *supra*.

194 *See* Reg. F Official Interpretations § 2(h)-1.

and the consumer denies it.[195] Examples of such alleged debts within the Act's definition include fees and costs that the consumer disputes as owed,[196] where the debt is void,[197] where no amount is due,[198] where the collector contacts the wrong person,[199] where the debt was settled or paid in full,[200] and where the debt was discharged in bankruptcy.[201]

Third, a debt is an obligation to pay money. A debt is not one that is discharged by a consumer's performance of an action, instead of payment of money.[202]

Fourth, a debt is an obligation or an alleged obligation arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes. This requirement is often a key issue in FDCPA litigation, and is examined in detail at §§ 4.6.2 to 4.6.5, *infra*.

Fifth, a debt includes both one reduced to a court judgment and one that has not been reduced to judgment. While a covered debt is still covered if reduced to judgment, a debt that does not fall within the FDCPA definition of "debt" does not become covered just because it has been reduced to judgment.[203]

As long as a debt meets these five conditions, it is a debt for purposes of the FDCPA. There are no other restrictions on an obligation being a debt. For example, an obligation is a covered debt even if incurred through a consumer's misrepresentation or fraud.[204]

4.6.2 *Arising Out of a Transaction Involving Money, Property, Insurance, or Services*

To fall under the FDCPA definition of debt, an obligation must arise "out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." This definition is similar to the Truth in Lending Act (TILA) definition of "consumer": "the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes."[205] Of course, the TILA definition applies to "consumer" and the FDCPA definition applies to "debt." The FDCPA definition also adds insurance.

Under the FDCPA, a debt need not be directly for personal, family, or household purposes, as long as it arises relating to a transaction involving credit, personal or real property, insurance or services, where those items are primarily for personal, family, or household purposes. If a home was purchased as a residence, the mortgage debt is covered even if the consumer instead changes the home's use to a commercial rental[206] or the consumer no longer lives there because of a marital separation.[207] If a debt involves condominium or homeowner association fees for a residence rented out for commercial purposes, the debt is still covered if the residence was initially purchased for personal purposes.[208]

195 *See* Loja v. Main St. Acquisition Corp., 906 F.3d 680, 684 (7th Cir. 2018) (interpreting the same language found in § 1692a(3)).

196 Shula v. Lawent, 359 F.3d 489, 491 (7th Cir. 2004).

197 McCartney v. First City Bank, 970 F.2d 45 (5th Cir. 1992).

198 Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003).

199 Black v. AFNI, Inc., 2018 WL 3546193 (D.N.J. July 23, 2018); Gonzalez v. Law Firm of Sam Chandra, APC, 2013 WL 4758944 (E.D. Wash. Sept. 4, 2013); Strouse v. Enhanced Recovery Co., L.L.C., 956 F. Supp. 2d 627 (E.D. Pa. 2013); Bodur v. Palisades Collection, L.L.C., 829 F. Supp. 2d 246 (S.D.N.Y. 2011).

200 Diaz v. G. Reynold Sims & Assoc., 2011 WL 17620 (E.D. Mich. Jan. 4, 2011); Fetters v. Paragon Way, Inc., 2010 WL 5174989 (M.D. Pa. Dec. 15, 2010; Fausto v. Credigy Serv. Corp., 598 F. Supp. 2d 1049 (N.D. Cal. 2009).

201 Fedotov v. Peter T. Roach & Assoc., 354 F. Supp. 2d 471 (S.D.N.Y. 2005); Degrosiellier v. Solomon & Solomon, P.C., 2001 WL 1217181 (N.D.N.Y. Sept. 27, 2001); Peeples v. Blatt, 2001 WL 921731 (N.D. Ill. Aug. 15, 2001).

202 *See* Barnett v. Homeowner Mgmt. Serv., Inc., 2017 WL 8186604 (N.D. Ga. Jan. 9, 2017), *adopted*, 2017 WL 8186598 (N.D. Ga. Feb. 9, 2017) (purpose of contact was for homeowner to comply with association rules and install fencing); Rael v. Davis, 2006 WL 2346396 (S.D. Ind. Aug. 11, 2006) (obligation to remove a swimming pool is not a debt). *See also* Ohuche v. Bank of Am., 2013 WL 12100763 (N.D. Ga. Feb. 25, 2013) (potential short sale is not an obligation by consumer to pay money); Thomas v. Ernest Barrientos, P.C., 2006 WL 1096764 (N.D. Tex. Apr. 26, 2006) (demanding return of RTO furniture not collecting on a debt); FTC Official Staff Commentary § 803(5)-2, *reproduced at* Appx. C.2, *infra* (requirement to keep insurance on collateral).

203 *See* Beal v. Himmel & Bernstein, L.L.P., 615 F. Supp. 2d 214 (S.D.N.Y. 2009) (judgment to pay legal fees incurred in post-divorce litigation was not "debt"); Cook v. Hamrick, 278 F. Supp. 2d 1202 (D. Colo. 2003) (attorney fee claim was not based on lease but eviction); Goist v. United States Bur. of Prisons, 2002 WL 32079467 (D.S.C. July 31, 2002) (criminal restitution debt not consumer transaction), *aff'd*, 54 Fed. Appx. 159 (4th Cir. 2003); McCarthy v. Rosenthal, 1996 WL 249991 (D. Md. Jan. 5, 1996).

204 *See* Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007); Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998) (no exception where consumer entered intending to defraud other party); Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322, 1330 (7th Cir. 1997) ("Absent an explicit showing that Congress intended a fraud exception to the Act, the wrong occasioned by debtor fraud is more appropriately redressed under the statutory and common law remedies already in place, not by a judicially created exception that selectively gives a green light to the very abuses proscribed by the Act.").

205 15 U.S.C. § 1602(h). *See* National Consumer Law Center, Truth in Lending § 2.2.3 (10th ed. 2019), *updated at* www.nclc.org/library.

206 *See* Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000) (owner purchased house to live in but rented it when he relocated); Chung v. U.S. Bank, 250 F. Supp. 3d 658, 682 (D. Haw. 2017). *But cf.* Zwicky v. Carlson & Assoc., Ltd., 2011 WL 6203058 (D. Minn. Dec. 13, 2011) (no FDCPA debt where transaction did not relate to initial personal purchase of a condominium but to repairs ordered after use had become commercial).

207 Wong v. Phelan Hallinan & Diamond, P.C., 2015 WL 3938605 (D.N.J. June 25, 2015).

208 Haddad v. Alexander, Zelmanski, Danner & Fioritto, P.L.L.C., 698 F.3d 290 (6th Cir. 2012) (condominium purchased initially for personal use and later leased to others; assessment when leased to others is still a covered debt); Beeks v. ALS Lien Serv., 2014 WL 7785745 (C.D. Cal. Feb. 18, 2014); Vasilakos v. Blitt & Gaines, P.C., 2013 WL 4047634 (N.D. Ill. Aug. 8, 2013); Sunga v. Broome, 2010 WL 3198925 (E.D. Va. Aug. 12, 2010).

A deficiency debt after a home foreclosure or car repossession is a covered debt as long as the home mortgage or car loan arose out of transaction for personal purposes.[209] Even if the original debt merges into a judgment, the debt does not lose its status for purposes of the FDCPA.[210] A covered debt does not lose its status as arising from a covered transaction where its settlement changes the timing or amount of the debt's payment obligation.[211]

If the debt arises from renting a vehicle, subsequent obligations for damaging the vehicle arise out of the rental and are a covered debt, even if damaging someone's property might not on its own fall within the FDCPA definition of debt.[212] If there is an insurance transaction, then the insurer's claim for subrogation against the insured's child who was an accident victim arose from the insurance transaction.[213] Where a consumer enters into an education loan for personal purposes, a cosigner's obligation is also a covered debt, even if the cosigner's purpose could be viewed as not personal.[214]

Covered debts include any that arose out of real property transactions for personal use, including debts for home mortgages,[215] rent,[216] condominium and homeowner association fees,[217] or a vacation time share.[218] Debts are covered if they arose out of transactions for personal property transactions for personal use, such as motor vehicle purchases or leases.[219] Debts are covered if they arose from transactions for services for personal purposes, such as medical,[220] educational[221] or personal moving[222] services. Utility bills based on usage involve either a good or a service.[223] Debts related to insurance transactions are explicitly covered.[224] This includes a bail bond.[225]

For a debt to arise from a transaction, the transaction need not involve a credit obligation—only an obligation.[226] This is

209 Brunner v. Clearspring Loan Serv., Inc., 2018 WL 7268146 (M.D. Fla. Oct. 2, 2018); Huthsing v. Law Offices of Daniel C. Consuegra, P.L., 2015 WL 6777466 (M.D. Fla. Oct. 27, 2015); Kabir v. Freedman Anselmo Lindberg L.L.C., 2015 WL 4730053 (N.D. Ill. Aug. 10, 2015); Hernandez v. Dyck-O'Neal, Inc., 2015 WL 2094263 (M.D. Fla. May 5, 2015); Rojas v. Law Offices of Daniel C. Consuegra, P.L., 142 F. Supp. 3d 1206 (M.D. Fla. 2015); Baggett v. Law Offices of Daniel C. Consuegra, P.L., 2015 WL 1707479 (M.D. Fla. Apr. 15, 2015).

210 Huthsing v. Law Offices of Daniel C. Consuegra, P.L., 2015 WL 6777466 (M.D. Fla. Oct. 27, 2015); Hernandez v. Dyck-O'Neal, Inc., 2015 WL 2094263 (M.D. Fla. May 5, 2015); Rojas v. Law Offices of Daniel C. Consuegra, P.L., 142 F. Supp. 3d 1206 (M.D. Fla. 2015); Baggett v. Law Offices of Daniel C. Consuegra, P.L., 2015 WL 1707479 (M.D. Fla. Apr. 15, 2015).

211 *See* Munoz v. Cal. Bus. Bur., Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016) (settlement agreement on consumer debt does not transform nature of debt into non-consumer debt).

212 *See* Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997). *See also* DeNicolo v. Hertz Corp., 2020 WL 5816365 (N.D. Cal. Sept. 30, 2020) (denying summary judgment for collection agency that attempted to recover costs of repair to rental car that consumer used on business trip and for personal purpose as well, creating triable factual question).

213 Hamilton v. United Healthcare, Inc., 310 F.3d 385 (5th Cir. 2002), *aff'd*, 104 Fed. Appx. 942 (5th Cir. 2004). *Cf.* Calogero v. Shows, Cali & Walsh, L.L.P., 970 F.3d 576, 584 (5th Cir. 2020) (grant-giving organization's subrogation claim for reimbursement of alleged grant overpayment arose out of homeowner-grantee's direct voluntary acceptance of program's terms, especially given that there was "no unrelated, separate contract at issue").

214 Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961 (D. Minn. 2019).

215 *See* § 4.6.4, *infra*.

216 *E.g.*, Romea v. Heiberger & Assoc., 163 F.3d 111 (2d Cir. 1998); Martinez v. Dennis P. Block & Assoc., 2020 WL 8483771 (C.D. Cal. Dec. 14, 2020); Livingstone v. Haddon Point Manager, L.L.C., 2020 WL 902218 (D.N.J. Feb. 25, 2020); Sexton v. Poulsen and Skousen P.C., 372 F. Supp. 3d 1307 (D. Utah 2019); Lipscomb v. The Raddatz Law Firm, P.L.L.C., 109 F. Supp. 3d 251 (D.D.C. 2015); Smith v. Nat'l Credit Sys., Inc., 2014 WL 2003025 (N.D. Ga. May 15, 2014).

217 *See* McNair v. Maxwell & Morgan P.C., 893 F.3d 680, 683 (9th Cir. 2018); Mahmoud v. De Moss Owners Ass'n, Inc., 865 F.3d 322 (5th Cir. 2017); Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984 (9th Cir. 2017) (overdue HOA assessment fee was a debt); Agrelo v. Affinity Mgmt. Serv., L.L.C., 841 F.3d 944 (11th Cir. 2016) (contractual obligation to pay assessment to homeowner's association is a debt under Florida state version of FDCPA; although assessment stems from a fine, debt is covered because it arose from consumer contract and not solely by operation of law or as a result of tort damages); Haddad v. Alexander, Zelmanski, Danner & Fioritto, P.L.L.C., 698 F.3d 290 (6th Cir. 2012); Ladick v. Van Gemert, 146 F.3d 1205 (10th Cir. 1998); Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997).

218 Herbert v. Monterey Fin. Serv., Inc., 863 F. Supp. 76 (D. Conn. 1994).

219 *See* Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997) (truck rental); Yelin v. Swartz, 790 F. Supp. 2d 331 (E.D. Pa. 2011) (rental car leased for personal purposes); Deplae v. Reg'l Acceptance Corp., 2010 WL 2270785 (E.D. Tenn. June 3, 2010).

220 *E.g.*, Young v. NPAS, Inc., 361 F. Supp. 3d 1171(D. Utah 2019); Encarnacion v. Fin. Corp. of Am., 2018 WL 6250944 (M.D. Fla. Nov. 14, 2018), *adopted*, 2018 WL 6249679 (M.D. Fla. Nov. 29, 2018); FTC Official Staff Commentary § 803(5)-1, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

221 *See* Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961 (D. Minn. 2019); Urquiaga v. Fin. Bus. & Consumer Solutions, Inc., 2016 WL 6877735 (S.D. Fla. Nov. 22, 2016); Cutler *ex rel.* Jay v. Sallie Mae, Inc., 2014 WL 7745878 (C.D. Cal. Sept. 9, 2014); Smith v. Progressive Fin. Serv., Inc., 2013 WL 3995004 (D. Or. Aug. 1, 2013); FTC Official Staff Commentary § 803(5)-1, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

222 *See* McDaniel v. Cent. Oregon & Pac. R.R., Inc., 2019 WL 6050266, at *1 (M.D. Tenn. Nov. 15, 2019) (loan for personal job relocation expenses may not be business loan).

223 Piper v. Portnoff Law Assoc., 396 F.3d 227 (3d Cir. 2005) (debts for municipal water and sewer were covered debts for services); Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000) (municipal water and sewer bills); Evans v. Bull City Fin. Solutions, Inc., 2018 WL 3468390 (N.D. Ga. June 26, 2018) (gas and electric service), *adopted*, 2018 WL 3458559 (N.D. Ga. July 18, 2018); Garrett v. Credit Prot. Ass'n, L.P., 2017 WL 3193759 (M.D. Fla. July 27, 2017) (home internet, phone, and cable services); Harney v. Kramer & Frank, P.C., 2017 WL 1477145 (E.D. Mo. Apr. 24, 2017) (sewer fees); Gulisano v. J.A. Cambece Law Office, 2016 WL 7536097 (S.D. Fla. Aug. 8, 2016) (telephone services).

224 Hamilton v. United Healthcare, Inc., 310 F.3d 385 (5th Cir. 2002) (subrogation claim from an insurer for reimbursement for medical payments to its insured was "debt" under FDCPA), *aff'd*, 104 Fed. Appx. 942 (5th Cir. 2004); Correa v. Rowley, 1997 WL 714858 (E.D. La. Nov. 14, 1997) (car insurance).

225 Barlow v. Safety Nat'l Cas. Corp., 856 F. Supp. 2d 828 (M.D. La. 2012).

226 Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007); Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000); Duffy v. Landberg, 133 F.3d 1120 (8th Cir. 1998); Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350 (10th Cir. 1998); Romea v. Heiberger &

consistent with the FDCPA's legislative history.[227] Thus when a consumer enters into a covered transaction and pays using a dishonored check,[228] the debt based on the check's insufficient funds is a covered FDCPA debt, even though there is no credit transaction.[229] When a consumer rents property with cash, and damages the property, there is still a transaction and a debt arising from the transaction.[230] When rent is due in advance, and no credit is extended, a rental is still a transaction and a debt arises out of such a transaction.[231] Fees that a mortgage servicer assesses in connection with "convenience" payments made by phone are incidental to payment of the main mortgage debt and are therefore covered debts.[232]

4.6.3 Debts Not Involving Transactions

The FDCPA definition of debt applies to obligations arising out of a transaction involving money, property, insurance, or services. Consequently, an obligation is not a FDCPA covered debt if the debt does not arise out of such a transaction.

Courts generally find that tax debts are not obligations arising out of a transaction involving money, property, insurance, or services, so the FDCPA does not apply.[233] But a separate federal statute provides that the FDCPA does apply to debts owed to the IRS when private collectors (as opposed to IRS employees) collect on federal tax debts.[234]

Questions arise as to whether certain municipal charges are taxes or charges for services. In general, if the charge, such as a municipal utility charge, is based on usage, it is a covered debt.[235] But if the size of a water or sewer charge or a trash collection fee is not based on usage, but based on ownership of a particular type of property, this is more akin to a tax, and courts may find that it does not involve a covered transaction.[236]

A transaction typically is found not to be involved in the imposition of a fine for violation of a government requirement,

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Assoc., 163 F.3d 111 (2d Cir. 1998); Charles v. Lundgren & Assoc., P.C., 119 1120 (8th Cir. 1998); Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350 (10th Cir. 1998); Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997); Charles v. Lundgren & Assoc., P.C., 119 F.3d 739 (9th Cir. 1997); Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997); Lipscomb v. The Raddatz Law Firm, P.L.L.C., 109 F. Supp. 3d 251 (D.D.C. 2015) (majority of circuits hold that extension of credit is not required for obligation to constitute "debt" under FDCPA; rent, including overdue fees for water service, was consumer debt).

227 *See* Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997) (describing legislative history in this regard).

228 Of course, for a debt relating to a dishonored check to be covered, the consumer must allege that the check was related to a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes. *See* Arnold v. Truemper, 833 F. Supp. 678 (N.D. Ill. 1993).

229 Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007); Duffy v. Landberg, 133 F.3d 1120 (8th Cir. 1998); Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350 (10th Cir. 1998); Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997); Charles v. Lundgren & Assoc., P.C., 119 F.3d 739 (9th Cir. 1997); Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997) (obligation for damage to rental property did not involve credit; FTC Official Staff Commentary § 803(5)-1, *discussed at* § 3.4.4.4, *supra, reproduced at* Appx. C.2, *infra*.

230 *See* Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997) (obligation for damage to rental property did not involve credit); Yelin v. Swartz, 790 F. Supp. 2d 331 (E.D. Pa. 2011) (amount that consumer allegedly owed arising from an automobile accident involving a rental car leased for personal purposes was a "debt" because obligation was not a matter of tort liability, but imposed by rental agreement, a contract). *See also* Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997) (condominium assessments).

231 Romea v. Heiberger & Assoc., 163 F.3d 111 (2d Cir. 1998); Lipscomb v. The Raddatz Law Firm, P.L.L.C., 109 F. Supp. 3d 251 (D.D.C. 2015).

232 Langston v. Gateway Mortg. Group, L.L.C., 2021 WL 234358, at *3 (C.D. Cal. Jan. 15, 2021); Elbert v. Roundpoint Mortg. Servicing Corp., 2020 WL 6940941 (N.D. Cal. Nov. 25, 2020) (mortgage obligation is debt and convenience fee is charge incidental to collection of that debt); Lembeck v. Arvest Cent. Mortg. Co., 498 F. Supp. 3d 1134, 1137 (N.D. Cal. 2020) (borrower's purpose in incurring fee is to make mortgage payment); Fusco v. Ocwen Loan Servicing, L.L.C., 2020 WL 2519978, at *2 (S.D. Fla. Mar. 2, 2020) (analogizing convenience fee to dishonored check charge). *But see* Lish v. Amerihome Mortg. Co., L.L.C., 2020 WL 6688597, at *5 (C.D. Cal. Nov. 10, 2020) (applying Florida debt collection laws, convenience fees not debt being collected by debt collector); Bardak v. Ocwen Loan Servicing, L.L.C., 2020 WL 5104523 (M.D. Fla. Aug. 12, 2020); Estate of Campbell v. Ocwen Loan Servicing, L.L.C., 467 F. Supp. 3d 1262, 1262 (S.D. Fla. 2020) ("Here, it is not contested that Defendant is a debt collector when recouping Plaintiff's defaulted mortgage payments. But *that* is the debt that exists in this case—the defaulted mortgage payments. Plaintiff's argument that the convenience fees are part of the debt too, or at a minimum, incidental to the debt, is unpersuasive."); Turner v. PHH Mortg. Corp., 467 F. Supp. 3d 1244 (M.D. Fla. 2020) (mortgage servicer's convenience fee not debt, because not owed to another and mortgage not in default when payment made; court confuses definitions of "debt" and "debt collector").

233 Dressler v. Equifax, Inc., 805 Fed. Appx. 968, 973 (11th Cir. 2020) ("Because tax obligations do not arise from business dealings or other consumer transactions they are not 'debts' under the FDCPA."); Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000) (property tax does not arise from purchase of property, but from ownership of property); Beggs v. Rossi, 145 F.3d 511 (2d Cir. 1998) (per curiam); Staub v. Harris, 626 F.2d 275, 278 (3d Cir. 1980); Carley v. Tomball Indep. School Dist., 2018 WL 6172529 (S.D. Tex. Nov. 26, 2018) (property tax debt not covered); Bunting v. Phillips Lytle L.L.P., 2011 WL 2516933 (N.D.N.Y. June 23, 2011) (property tax liens); Andrews v. Director, IRS, Ogden Utah, 2010 WL 2510578 (D. Colo. Apr. 20, 2010); Israel v. Everson, 2005 WL 3277981 (S.D. Iowa Oct. 14, 2005) (back taxes not "debt"), *aff'd*, 210 Fed. Appx. 549 (8th Cir. 2006); Mathis v. United States *ex rel.* C.I.R., 2003 WL 1950071 (D.S.D. Mar. 19, 2003); Mortland v. I.R.S., 2003 WL 21791249 (W.D. Tex. June 24, 2003). FTC Official Staff Commentary § 803(5)-2, *discussed at* § 3.4.4.4, *supra, reproduced at* Appx. C.2, *infra*.

234 *See* 26 U.S.C. § 6306(e), *discussed at* § 14.10, *infra*. ("The provisions of the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.) shall apply to any qualified tax collection contract, except to the extent superseded by section 6304, section 7602(c), or by any other provision of this title").

235 Piper v. Portnoff Law Assoc., 396 F.3d 227 (3d Cir. 2005); Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000).

236 Boyd v. J.E. Robert Co., 765 F.3d 123 (2d Cir. 2014). *See also* Singh v. NYCTL 2009-A Tr., 2016 WL 3962009 (S.D.N.Y. July 20, 2016) (liens for mandatory water and sewer service were not debts); Reilly v. Northeast Revenue Serv., L.L.C., 2013 WL 3974181, at *5 (M.D. Pa. Aug. 1, 2013) (city's mandatory refuse disposal fee imposed by ordinance is not "debt" because it "is more akin to a tax").

such as a motor vehicle moving violation fine.[237] The same is the case with court-ordered restitution[238] and contempt sanctions.[239] Municipal fines for failure to comply with vehicle parking requirements are generally considered not to involve a covered transaction.[240] Courts may also find no transaction where a government entity imposes involuntary fees, that is, where the consumer does not request a service, such as where a fee is assessed when the police respond to an accident.[241]

But a debt involving a government fee can be a covered transaction where it arises from a service requested by the consumer. For example, paying for a driver's license can be a transaction primarily for personal use, so that collection on an insufficient funds check for payment of that fee involves an FDCPA debt.[242]

Whether non-payment of highway tolls involves a debt may depend on a number of factors, such as whether the consumer has a contractual relationship with a government entity to use a transponder and also the stated purpose of the highway tolls. A number of courts find that highway tolls involve transactions,[243] but not transactions for services for personal, family, or household purposes, because the tolls are to maintain the roads or serve other governmental purposes.[244] Other courts find that tolls are transactions for a service for personal purposes—transport on a particular stretch of highway.[245]

Some questionable court decisions find no transaction where private entities assess their own fines or fees without the consumer's agreement.[246] But such fine or fees may very well arise out of a covered transaction, and thus should be covered debts. For example, homeowner association fees should be covered debts because they arise out of the purchase of a home and a transaction to join the homeowner association.[247]

A debt arising from a consumer entering into a transaction with a private lot for parking services is a covered debt.[248] On the other hand, if someone uses a parking lot without agreeing to pay for the service, there may be no transaction and no FDCPA debt.

A tort obligation arising out of a covered transaction is a covered FDCPA debt.[249] But if the tort claim does not arise under a covered transaction, the obligation is not a FDCPA debt.[250] Obligations arising out of the theft of goods or services

237 *See* Gulley v. Markoff & Krasny, 664 F.3d 1073 (7th Cir. 2011) (non-consensual municipal fines); United States v. Phillips, 110 Fed. Appx. 431 (5th Cir. Oct. 21, 2004) (criminal fines and assessments); Herrera v. AllianceOne Receivable Mgmt., Inc., 2015 WL 3796123 (S.D. Cal. June 18, 2015) (traffic fines); Worley v. Mun. Collections of Am., Inc., 2015 WL 890878 (N.D. Ill. Feb. 27, 2015) (municipal fines); Stubbs v. City of Ctr. Point, Ala., 988 F. Supp. 2d 1270 (N.D. Ala. 2013) (traffic ticket); Bell v. Providence Cmty. Corrections, Inc., 2011 WL 2218600 (M.D. Tenn. June 7, 2011) (fees and charges were part of commitment and probation order); Reid v. Am. Traffic Solutions, Inc., 2010 WL 5289108 (S.D. Ill. Dec. 20, 2010) (traffic violations); Mills v. City of Springfield, Mo., 2010 WL 3526208 (W.D. Mo. Sept. 3, 2010) (traffic ticket); Williams v. Redflex Traffic Sys., Inc., 2008 WL 782540 (E.D. Tenn. Mar. 20, 2008) (traffic ticket), *aff'd on other grounds*, 582 F.3d 617 (6th Cir. 2009); Harper v. Collection Bur., Inc., 2007 WL 4287293 (W.D. Wash. Dec. 4, 2007) (court fine resulting from arrest); Betts v. Equifax Credit Info. Serv., Inc., 245 F. Supp. 2d 1130 (W.D. Wash. 2003) (impounding of abandoned car at direction of police); FTC Official Staff Commentary § 803(5)-2, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

238 Ewing v. Carter, 2014 WL 1516332 (N.D. W. Va. Apr. 17, 2014) (court-ordered restitution), *aff'd*, 583 Fed. Appx. 278 (4th Cir. 2014); Skeberdis v. Kinnally, 2018 WL 3068379 (N.D. Ill. June 21, 2018); Geiger v. Fed. Bur. of Prisons, 487 F. Supp. 2d 1155 (C.D. Cal. 2007); *In re* Pohlman, 2018 WL 3854137 (Bankr. D. Idaho Aug. 10, 2018) (restitution obligation to state to pay for his hospital bill while incarcerated by state was not "debt").

239 Barela v. Reed, 210 F.3d 381 (9th Cir. 2000).

240 Grumet v. Prof'l Account Mgmt., L.L.C., 2013 WL 12382693 (N.D. Ga. Dec. 18, 2013); Gibson v. Prof'l Account Mgmt., 2011 WL 6019958 (E.D. Mich. Dec. 1, 2011); Waters v. Howard Sommers Towing, Inc., 2011 WL 1375292 (C.D. Cal. Apr. 11, 2011). *See also* Berger v. Philadelphia Parking Auth., 2019 WL 4466997, at *7 (E.D. Pa. Sept. 18, 2019) (charges relating to vehicle impoundment for unpaid parking fines).

241 Moore v. Cost Recovery Corp. L.L.C., 2008 WL 11347988 (E.D. Tex. June 10, 2008)

242 Dibb v. Allianceone Receivables Mgmt., Inc., 2015 WL 8970778 (W.D. Wash. Dec. 16, 2015).

243 *But see* Yazo v. Law Enf't Sys., Inc., 2008 WL 4852965, at *3 (C.D. Cal. Nov. 7, 2008) (use of toll road without paying is not transaction, but theft).

244 *See* St. Pierre v. Retrieval-Masters Credit Bur., Inc., 898 F.3d 351, 363 (3d Cir. 2018); Johnson v. Linebarger, Goggan, Blair & Sampson L.L.P., 2019 WL 5887452, at *3 (S.D.N.Y. Nov. 12, 2019); Lowenbien v. Transworld Sys., Inc., 2019 WL 3081095, at *2 (E.D.N.Y. July 15, 2019).

245 *See* Yunker v. AllianceOne Receivables Mgmt., Inc., 2011 WL 13239460 (S.D. Fla. July 19, 2011). *See also* Brown v. Transurban USA, Inc., 144 F. Supp. 3d 809 (E.D. Va. 2015).

246 *See* Mlnarik v. Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., 2014 WL 6657747 (N.D. Cal. Nov. 21, 2014); Berg v. Ayesh, 2014 WL 2603890 (D. Kan. June 11, 2014); Durso v. Summer Brook Preserve Homeowners Ass'n, 641 F. Supp. 2d 1256 (M.D. Fla. 2008).

247 Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984, 989 (9th Cir. 2017) (obligation to pay the assessment fee was a covered debt because it "relates to her household and arises from her membership in the HOA"); McDaniels v. Equityexperts.com, L.L.C., 2020 WL 7408761, at *7 (N.D. Ga. June 24, 2020), *adopted*, 2020 WL 7408764 (N.D. Ga. July 13, 2020) (finding HOA assessments were debts arising from condominium association declaration, but dismissing complaint on other grounds). *But see* Spiegel v. Kim, 952 F.3d 844 (7th Cir. 2020) (fees that arose due to unit owner's conduct as board member of condo association are not debt under FDCPA).

248 Franklin v. Parking Revenue Recovery Services, Inc., 832 F.3d 741, 744 (7th Cir. 2016).

249 *See* Cutler *ex rel.* Jay v. Sallie Mae, Inc., 2014 WL 7745878 (C.D. Cal. Sept. 9, 2014) (student's fraud in student loan obligation); Heritage Pac. Fin., L.L.C. v. Monroy, 156 Cal. Rptr. 3d 26 (Cal. Ct. App. 2013). *But see* Rodolakis v. Safety Ins. Co., 327 F. Supp. 3d 274 (D. Mass. Aug. 17, 2018) (insurance company's subrogation claim against own insured not a FDCPA debt).

250 Parham v. Seattle Serv. Bur., Inc., 656 Fed. Appx. 474 (11th Cir. 2016) (tort obligation arising from an auto accident); Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1371 (11th Cir. 1998) (tort claim arising from an accident); Lynch v. Hommell, 2018 WL 2717289 (N.D. Ohio. June 5, 2018) (claims arising from automobile accident); Schaefer v. Seattle Serv. Bur., Inc., 2015 WL 9031511 (M.D. Fla. Dec. 16, 2015) (tort claim involving car crash); Kazmi v. CCS Commercial, L.L.C., 2015 WL 4392836 (D.N.J. July 15, 2015) (automobile accident); Foster v. Amarnek, 2014 WL 1961245 (M.D. Tenn. May 14, 2014) (automobile accident); Horowitz v. Meyer v. Credit Collection Serv., 2013 WL 84929 (N.D. Ohio Jan. 7, 2013) (automobile accident); Luna v. Summit Collection Serv., 2011 WL 5190525 (D. Nev. Oct. 27, 2011)

are not covered debts because stealing is not entering into a transaction with the victim.[251]

State- or court-ordered child support obligations are not obligations pursuant to a transaction, so they are not FDCPA debts.[252] The same is the case for debts arising from a court order that one spouse pay the other as part of a divorce.[253] On the other hand, where an individual voluntarily agrees to be liable for the nursing home obligations of a spouse, that obligation does arise from a transaction involving services for personal, family, or household purposes.[254]

4.6.4 *Transactions Primarily for Personal, Family, or Household Purposes*

In bringing a FDCPA claim, a prudent consumer attorney alleges with some specificity the evidence that there is a debt that arises from a transaction entered into primarily for personal, family, or household purposes.[255] The consumer must eventually prove by a preponderance of the evidence that the FDCPA violation pertains to a covered debt.[256]

The consumer need not provide such proof if the collector alleges that the debt involves a transaction for those purposes. The definition at FDCPA § 1692a(5) includes an "*alleged* obligation arising out of transaction . . . primarily for personal, family, or household purposes." If the debt collector alleges that an obligation arises out of a transaction for those purposes, then it is a covered debt, even if the debt does not arise from such a transaction.[257]

A critical distinction is whether a transaction is primarily for personal, family, or household purposes, or whether the debt is not covered because it arises out of a transaction for business[258] or agricultural purposes. The transaction need not be exclusively for personal, family, or household purposes, only "primarily" for such purposes.

A motor vehicle used only 5% of the time for business purposes involves a covered transaction because the vehicle is primarily for personal use.[259] A home mortgage can be for personal purposes even where the home is rented out for part of the year,[260] or where the intent is to eventually live in the home, even though it is first rented for a period of years.[261] A credit card debt can be primarily for personal, family and household purposes even though taken out as a business use card, if the vast majority of card charges were for consumer purposes.[262] A loan can be primarily for personal, family or household purposes where only a small percentage of the loan proceeds

(court judgment based on tort claim); Williams v. Allocated Bus. Mgmt., L.L.C., 2010 WL 2330371 (N.D. Ill. June 8, 2010) (auto accident damages); Capitol Records, Inc. v. Weed, 2008 WL 1820667 (D. Ariz. Apr. 22, 2008) (damages for unlawfully downloading copyrighted music); Ledbetter v. Comcast Cable Commc'ns, Inc., 2005 WL 2030799 (W.D. Wash. Aug. 22, 2005) (demand for money for copyright infringement); FTC Official Staff Commentary § 803(5)-2, *discussed at* § 3.4.4.4, *supra, reproduced at* Appx. C.2, *infra*.

251 Zimmerman v. HBO Affiliate Grp., 834 F.2d 1163 (3d Cir. 1987) (theft of television signals); Beauvoir v. Israel, 2014 WL 3882212 (E.D.N.Y. Aug. 7, 2014) (theft by evading gas meter); Black v. Goodwill Industries of Orange Cty., 2014 WL 12596425 (C.D. Cal. Feb. 3, 2014) (private agreement to pay amount after accused of shoplifting). *See also* Fleming v. Pickard, 581 F.3d 922 (9th Cir. 2009) (sale of retailer's stolen merchandise); Hadnot v. Ackerman, 2020 WL 3491055 (N.D. Tex. June. 25, 2020) (misappropriation of another's inheritance).

252 Mabe v. G.C. Serv. L.P., 32 F.3d 86 (4th Cir. 1994). *Accord* Okoro v. Garner, 21 Fed. Appx. 486 (7th Cir. 2001); Zamanzada v. Clayton, 2013 WL 5566133 (D. Utah Oct. 2013) (obligation to pay attorney fees in a child support case not FDCPA debts); Adymy v. Erie County Child Support Enf't Unit, 2006 WL 1174322 (W.D.N.Y. May 2, 2006); Reno v. SupportKids, Inc., 2004 WL 828150 (D. Minn. Apr. 13, 2004); Raffaele v. Marrama, 164 F. Supp. 2d 224 (D. Mass. 2001); Campbell v. Baldwin, 90 F. Supp. 2d 754 (E.D. Tex. 2000); Brown v. Child Support Advocates, 878 F. Supp. 1451, 1454 (D. Utah 1994); Battye v. Child Support Serv., Inc., 873 F. Supp. 103 (N.D. Ill. 1994).

253 Beal v. Himmel & Bernstein, L.L.P., 615 F. Supp. 2d 214 (S.D.N.Y. 2009) (legal fees incurred in post-divorce litigation not "debt"); Hicken v. Arnold, Anderson & Dove, 137 F. Supp. 2d 1141 (D. Minn. 2001). *See also* Victor v. Petrousky, 2019 WL 11502528 (M.D. Fla. Aug. 26, 2019) (claim for reimbursement of child's tutoring expenses under divorce agreement not consumer transaction).

254 Eades v. Kennedy, PC Law Offices, 799 F.3d 161, 170 (2d Cir. 2015). *But see* Benbrooks v. Voigt, Rode & Boxeth, L.L.C., 2015 WL 4601193 (D. Minn. July 30, 2015) (obligation of son for parent's debt not for personal, family or household purposes where son acting as power of attorney pursuant to state law).

255 *See* Garcia v. Jenkins Babb L.L.P., 569 Fed. Appx. 274 (5th Cir. 2014); Walker v. Lyons, Doughty & Veldhuis, P.C., 2019 WL 1227792 (S.D. Ohio Mar. 15, 2019); Rhein v. Forster, Garbus & Garbus, L.L.P., 2018 WL 4639194 (D.N.J. Sept. 27, 2018); Popa v. Winn Law Grp., 2017 WL 6016567 (C.D. Cal. Dec. 4, 2017); Scally v. Ditech Fin., L.L.C., 2017 WL 5614604 (S.D. Cal. Nov. 21, 2017). *Cf.* Blair v. Fed. Pacific Credit Co, L.L.C., 2021 WL 236582, at *4 (D.N.J. Jan. 25, 2021) (granting motion to dismiss where only clue to nature of debt was listing of "Verizon" as "original creditor," since court could not speculate as to household nature of such debt consistent with standards of Rule 12(b)(6)); Villalobos v. Meyer Njus Tanick, P.A., 2019 WL 3562663 (N.D. Ill. Aug. 5, 2019) (allegations in complaint concerning personal use of credit card found sufficient).

256 Jones v. Portfolio Recovery Assoc., 796 Fed. Appx. 821 (5th Cir. 2019). *See also* Schweitzer v. Northland Grp. Inc., 2014 WL 5782991 (S.D. Fla. Nov. 6, 2014); Valek v. Stellar Recovery, Inc., 2014 WL 1028916 (W.D. Mich. Mar. 17, 2014); Lujan v. Global Credit and Collection Corp., 2011 WL 2890216 (D. Colo. July 19, 2011).

257 Morgovsky v. Creditors' Collection Serv., 12 F.3d 28 (9th Cir. 1993).

258 S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra* ("[t]his bill applies only to debts contracted by consumers for personal, family, or household purposes, it has no application to the collection of commercial accounts") *See also* 123 Cong. Rec. S4888 (daily ed. Mar. 25, 1977) (remarks of Sen. Garn).

259 Altergott v. Modern Collection Techniques, 1994 WL 319229 (N.D. Ill. June 23, 1994).

260 *See* Dautrich v. Nationstar Mortg., L.L.C., 2018 WL 3201786, at *8 (D.N.J. June 29, 2018).

261 Sayeed v. Cheatham Farms Master Homeowners' Ass'n, 2019 WL 2949028, at *2 (C.D. Cal. Apr. 16, 2019) (purchase of second residence to which they intended to move and rented for years was incurred "primarily for personal, family, or household purposes").

262 Romischer v. Mann Bracken, L.L.C., 2010 WL 11647282 (N.D. Ga. Jan. 27, 2010), *adopted*, 2010 WL 11647323 (N.D. Ga. Feb. 22, 2010); Moss v. Cavalry Inv., L.L.C., 2004 WL 2106523 (N.D. Tex. Sept. 20, 2004) (needed additional fact-finding where business card used for both business and consumer purchases). *See also* Randolph v. Crown Asset Mgmt., L.L.C., 254 F.R.D. 513 (N.D. Ill. 2008) ($60 business related expense included in $12,602.69 credit card debt).

are applied to business purposes.[263] A signing bonus that is required to be returned to an employer under certain circumstances was a covered debt where the money from the bonus was used for medical expenses and household expenses.[264]

The consumer's actual purpose in the transaction is determinative, not the creditor's intent in extending credit.[265] The stated purpose of the transaction is not always determinative either,[266] nor is a consumer's past payments on a debt using a business account,[267] or the fact that the consumer owns a business somewhat related to the transaction.[268]

The consumer's own sworn statement, deposition, or testimony that a transaction was primarily for personal, family, or household purposes is evidence of that fact.[269] Although the transaction's own description of the nature of the debt is not always determinative, that a credit agreement states that the credit is primarily for personal, family, or household purposes should be determinative unless there is strong countervailing evidence.[270] The nature of a transaction can also be critical evidence of the transaction's purpose.[271]

Where the creditor furnished information about the debt to a consumer reporting agency, and the consumer's credit report listed that trade line as an individual account, the report was sufficient to raise a question of fact as to whether the debt involved a consumer transaction.[272] That a collector seeks to collect from an individual and not a business entity may not be evidence that the transaction was for personal, family or household purposes,[273] but it is such evidence if the credit was issued to a consumer in the consumer's individual status and not as a business entity.[274]

The collector's own admission that it only collects consumer debt and not business debt is also persuasive,[275] but may not be determinative.[276] Also not determinative is that the debt collector has complied with FDCPA disclosure requirements.[277]

263 Graham v. Manley Deas Kochalski L.L.C., 2009 WL 891743 (S.D. Ohio Mar. 31, 2009) (refinancing was primarily for household purposes where only 10% of proceeds were used for investment purposes).

264 Wadsworth v. Kross, Lieberman & Stone, Inc., 2019 WL 8405215 (N.D. Ill. Feb. 1, 2019), *rev'd & remanded on other grounds*, 12 F.4th 665 (7th Cir. 2021).

265 Slenk v. Transworld Sys., 236 F.3d 1072 (9th Cir. 2001); Bloom v. I.C. Sys., Inc., 972 F.2d 1067 (9th Cir. 1992); Ellis v. Phillips & Cohen Assoc., 2016 WL 3566981, at *3 (N.D. Cal. June 30, 2016); Ordinario v. LVNV Funding, L.L.C., 2016 WL 852843 (S.D. Cal. Mar. 4, 2016) (purpose unclear where account was opened in business's name, but consumer provided some evidence of personal use); Garcia v. LVNV Funding L.L.C., 2009 WL 3079962 (W.D. Tex. Sept. 18, 2009); Perk v. Worden, 475 F. Supp. 2d 565 (E.D. Va. 2007) (corporate credit card used for personal purchases); Nix v. Welch & White, 2001 WL 826558 (D. Del. July 18, 2001) (borrower's intended use of loan proceeds, not lender's expectations, determined), *rev'd on other grounds*, 55 Fed. Appx. 71 (3d Cir. 2003).

266 Slenk v. Transworld Sys., 236 F.3d 1072 (9th Cir. 2001); Bloom v. I.C. Sys., Inc., 972 F.2d 1067 (9th Cir. 1992); Ellis v. Phillips & Cohen Assoc., 2016 WL 3566981, at *3 (N.D. Cal. June 30, 2016); Davis v. Hollins Law, 968 F. Supp. 2d 1072 (E.D. Cal. 2013) (business credit card could still be used primarily for personal purposes); Moss v. Cavalry Inv., L.L.C., 2004 WL 2106523 (N.D. Tex. Sept. 20, 2004) (card used for both business and consumer purchases); *In re* Reinke, 2011 WL 5079561 (Bankr. W.D. Wash. Oct. 26, 2011) (transaction was an investment although it was described in documents as purchase of a residence). *See also* Smith v. EVB, 438 Fed. Appx. 176 (4th Cir. 2011) (although first loan was for commercial purposes, second loan's substance showed that it was for personal purposes).

267 Coleman v. Berman & Rabin, P.A., 2015 WL 4524599 (E.D. Mo. July 27, 2015).

268 Slenk v. Transworld Sys., 236 F.3d 1072 (9th Cir. 2001); Pape v. Amos Fin. L.L.C., 2014 WL 839273 (D. Conn. Mar. 4, 2014).

269 *See* Jones v. Portfolio Recovery Assoc., 796 Fed. Appx. 821 (5th Cir. 2019); Duarte v. Client Serv., Inc., 2019 WL 4572941, at *3 (N.D. Ill. Sept. 20, 2019); Torres v. LVNV Funding, L.L.C., 2018 WL 1508535 (N.D. Ill. Mar. 27, 2018); Pierre v. Midland Credit Mgmt., Inc., 2018 WL 723278 (N.D. Ill. Feb. 5, 2018); Currier v. PDL Recovery Grp., L.L.C., 2017 WL 712887 (E.D. Mich. Feb. 23, 2017); Washington v. Portfolio Recovery Assoc., 211 F. Supp. 3d 1041 (N.D. Ill. 2016); Bowse v. Portfolio Recovery Assoc., 218 F. Supp. 3d 745 (N.D. Ill. 2016); Hamburger v. Northland Group., Inc., 2015 WL 631066 (M.D. Pa. Feb. 12, 2015); Collins v. Erin Capital Mgmt., L.L.C., 991 F. Supp. 2d 1195 (S.D. Fla. 2013) (consumer attested that all credit card charges were for personal or household goods and services); Herbert v. Monterey Fin. Serv., Inc., 863 F. Supp. 76 (D. Conn. 1994).

270 *See* Bitah v. Global Collection Serv., Inc., 968 F. Supp. 618 (D.N.M. 1997); Dorsey v. Morgan, 760 F. Supp. 509 (D. Md. 1991). *See also* Beasley v. Blatt, 1994 WL 362185 (N.D. Ill. July 11, 1994) (court looked at various aspects of written documents to help determine was for personal use).

271 *See* Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961 (D. Minn. 2019) (educational loans are for personal use); Encarnacion v. Fin. Corp. of Am., 2018 WL 6250944 (M.D. Fla. Nov. 14, 2018), *adopted*, 2018 WL 6249679 (M.D. Fla. Nov. 29, 2018) (medical services incurred by a child can only be for a personal purpose); Williams v. Receivable Recovery Serv., L.L.C., 2017 WL 8316935 (N.D. Ga. July 27, 2017) (orthodontics services); Aurandt v. Brown, 2017 WL 1215451 (W.D. Pa. Mar. 31, 2017) (payday loan likely used for personal, family or household purposes); Cunha v. LVNV Funding, L.L.C., 2015 WL 5737134 (D. Mass. Sept. 30, 2015) (reasonable to infer personal, family, household purposes based upon seller (Best Buy) and small amount of alleged debt). *See also* Higgens v. Trident Asset Mgmt., L.L.C., 2017 WL 2628404 (S.D. Fla. June 16, 2017) (medical bill); Smith v. Progressive Fin. Serv., Inc., 2013 WL 3995004 (D. Or. Aug. 1, 2013) (student loan); Ross v. Northland Grp., Inc., 2011 WL 13233441, at *2 (D. Minn. Feb. 9, 2011) ("This argument borders on the frivolous. Montgomery Ward is a department store selling consumer goods.").

272 *See* Good v. FFCC Columbus, Inc., 2015 WL 11122105 (S.D. Ohio Aug. 17, 2015).

273 Burton v. Kohn Law Firm, S.C., 934 F.3d 572, 581 (7th Cir. 2019); Matin v. Fulton, Friedman & Gullace L.L.P., 826 F. Supp. 2d 808 (E.D. Pa. 2011).

274 Pantoja v. Portfolio Recovery Assoc., L.L.C., 78 F. Supp. 3d 743 (N.D. Ill. 2015).

275 McBeth v. Credit Prot. Ass'n, L.P., 2015 WL 4429324 (M.D. Fla. July 20, 2015); Laufman v. Phillips & Burns, Inc., 2008 WL 190604 (M.D. Fla. Jan. 22, 2008). *Cf.* Garcia v. Rauch-Milliken Int'l, Inc., 2020 WL 3579201, at *3 (W.D. Tex. Feb. 14, 2020) (evidence in form of yellow page advertisements that defendant was "commercial collection agency representing a variety of credit grantors providing goods and services only in a commercial context" demonstrated that obligation was not "debt" subject to FDCPA), *adopted*, 2020 WL 3579822 (W.D. Tex. Mar. 4, 2020).

276 Pape v. Amos Fin. L.L.C., 2014 WL 839273 (D. Conn. Mar. 4, 2014). *See also* Burton v. Kohn Law Firm, S.C., 934 F.3d 572, 581 (7th Cir. 2019) (advertising that collect consumer debts not determinative).

277 *See, e.g.*, Burton v. Kohn Law Firm, S.C., 934 F.3d 572, 581 (7th Cir. 2019); Bunting v. Phillips Lytle L.L.P., 2011 WL 2516933 (N.D.N.Y. June 23, 2011).

One area of confusion can be where a debt arises from a transaction involving debts for investment services or investments. Many families engage in financial planning for retirement and thus a business investment arguably can be for personal or family purposes. A number of courts[278] have used as guidance standards set out in related precedent under the Truth in Lending Act (TILA).[279] For example, the Ninth Circuit, in a TILA case, used these standards to determine if an investment is for consumer purposes:

- How closely related the consumer's primary occupation is to the nature of the investment;
- Whether the consumer will personally manage the investment;
- Whether the investment returns a large percentage of the consumer's income;
- The amount of the investment;
- The consumer's statement of purpose for the investment.[280]

Other courts may be less likely to view investment transactions as being primarily for a personal purpose.[281]

Generally, residential property purchased solely to rent to others, and where the consumer has no intent ever to live in the property, is a business transaction.[282] Moreover, if the consumer's purpose is commercial and most units are rented, with the consumer residing in only one of multiple units for a limited period of time, the transaction is not primarily for personal purposes.[283] But a court has found that a rental to family members could be a covered debt because the transaction was primarily for family purposes.[284] That a consumer rents a residence for personal purposes is not affected by the fact that the rent includes services the consumer must perform.[285]

A series of transactions can have some transactions with a business purpose and others with a personal purpose, and the transaction most closely related to the debt will determine whether the debt is covered under the FDCPA. The Eleventh Circuit found a personal purpose for a debt owed to PayPal arising from the consumer's setting up a personal PayPal account, even though the debt also arose from the consumer's acting as a commercial seller. The transaction opening a PayPal account was most closely related to the debt owed to PayPal.[286]

Collection calls regarding a business debt are sometimes considered excluded even if placed to the person's home.[287] But the collection of a business debt against the wrong person at that person's home may be protected by the FDCPA.[288] Courts have found that the seeking payment from the employee rather than the employer indicated that the transaction was for personal use.[289]

Not considered a consumer debt are:

- A purchase by a sole proprietor;[290]
- A business startup loan;[291]
- A $10 million real estate development loan;[292]

278 *See* Thomson v. Prof'l Foreclosure Corp., 2000 WL 34335866 (E.D. Wash. Sept. 25, 2000), *aff'd*, 86 Fed. Appx. 352 (9th Cir. 2004); Hunter v. Washington Mut. Bank, 2012 WL 715270 (E.D. Tenn. Mar. 1, 2012); Kawa v. U.S. Bank, 2009 WL 700593 (D. Neb. Mar. 13, 2009); Allen v. BRT Util. Corp., 1996 WL 776583 (D. Conn. Oct. 24, 1996).

279 *See* National Consumer Law Center, Truth in Lending §§ 2.4.2.2.1, 2.4.2.2.2, 2.4.2.2.3 (10th ed. 2019), *updated at* www.nclc.org/library.

280 *See* Thorns v. Sundance Props., 726 F.2d 1417, 1419 (9th Cir. 1984).

281 *See* Gowing v. Royal Bank, 100 F.3d 962 (9th Cir. 1996). *See also* Sparlin v. Select Portfolio Servicing, Inc., 2012 WL 527486 (D. Ariz. Feb. 17, 2012).

282 *See* In re Baroni, 2015 WL 6956664 (B.A.P. 9th Cir. Nov. 10, 2015); Johnson v. Wells Fargo Home Mortg., Inc., 2007 WL 3226153 (D. Nev. Oct. 29, 2007).

283 Hunter v. Washington Mut. Bank, 2012 WL 715270 (E.D. Tenn. Mar. 1, 2012).

284 Allen v. BRT Util. Corp., 1996 WL 776583 (D. Conn. Oct. 24, 1996) (water service debt for residential condominium owned by plaintiffs, who did not live in condominium but rented it to family members).

285 Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017).

286 Oppenheim v. I.C. Sys., Inc., 627 F.3d 833 (11th Cir. 2010).

287 *See* Berry v. Sugarman, 2010 WL 1032643 (N.D. Ohio Mar. 17, 2010); Elwood v. Cobra Collection Agency, 2007 WL 4270806 (S.D. Miss. Dec. 3, 2007) (proprietor who personally guaranteed business debt was not consumer); Calo-Rivera v. Banco Popular, 2006 WL 1514377 (D. P.R. May 31, 2006) (debt incurred for business purpose was exempt from FDCPA; personal guarantor not protected by FDCPA); Dean v. Gillette, 2005 WL 1631093, at *3 (D. Kan. July 11, 2005) ("the mere fact that [lawyer] sought to recover the debt from plaintiff personally has no bearing on the [business] nature of the transaction underlying the debt").

288 *See* Alston v. Cavalry Portfolio Serv., L.L.C., 2013 WL 665036 (D. Md. Feb. 22, 2013) (*pro se* consumer's allegations that credit card was in his personal name and reported to his personal credit report did not create plausible inference that subject of debt was for personal, family, or household purposes). *But see* Dixon v. Golden-Masano-Bradley, Law Firm, 2007 WL 933757 (3d Cir. Mar. 28, 2007) (promissory note stated that proceeds of note "WILL NOT be used for personal, family or household purposes" and thus obligation was not FDCPA consumer debt); Schram v. Federated Fin. Corp., 2007 WL 1238863 (E.D. Mich. Apr. 27, 2007) (FDCPA does not apply to credit card used for business purposes)

289 *See* Fagan v. Lawrence Nathan Assoc., Inc., 957 F. Supp. 2d 784 (E.D. La. 2013) (collector sought payment from member of law firm for business car rental that was used primarily for personal purposes); Brown v. Palisades Collection, L.L.C., 2011 WL 2532909 (S.D. Ind. June 24, 2011) (where letter attached to plaintiff's complaint was addressed to him in personal capacity, rather than in corporate or business capacity, this was enough to give plausibility to his allegation that debt was consumer debt). *Cf.* Booth v. Mee, Mee & Hoge, P.L.L.C., 2010 WL 988473 (W.D. Okla. Mar. 15, 2010) (equipment leased for, but not used in, business not covered by FDCPA).

290 Hobbs v. Duggins, 318 Fed. Appx. 375 (6th Cir. 2009) (legal fees owed as result of cabling company's debt); Absolute Power Sys., Inc. v. Cummins, Inc., 2016 WL 6897782 (D.N.J. Nov. 23, 2016) (dismissing FDCPA claims arising from commercial contract dispute because primary purpose of debt was to pay judgment arising from commercial activity); Peters v. Coface Collections, Inc., 2014 WL 1259778 (D. Ariz. Mar. 27, 2014) (individual held himself out as business and where collection agency collected only commercial accounts); Hammerman v. GB Collects, L.L.C., 2013 WL 5816499 (D. Md. Oct. 28, 2013) (nonpayment of employee group insurance).

291 *See* Lingo v. Dep't of Cmty. & Econ. Dev., 195 Fed. Appx. 891 (11th Cir. Sept. 11, 2006). *See also* Conboy v. United States Small Bus. Admin., 992 F.3d 153 (3d Cir. 2021) (affirming summary judgment for collector where debt was commercial loan from US Small Business Administration that did not qualify as consumer debt under § 1692a(5)).

292 *See* First Gibraltar Bank v. Smith, 62 F.3d 133 (5th Cir. 1995). *See also* Hua v. Wells Fargo Bank, 2017 WL 5624878 (E.D. Pa. Nov. 22, 2017) (investment property that was rented out to others); Hua v. Lehman

- A venture capital investment;[293]
- A business equipment lease[294] or purchase;[295]
- A business credit card debt;[296]
- Rent paid for a residential property lease;[297]
- A bill from a court reporter to a lawyer;[298]
- The mortgage on a condominium used for rental income, not as residence;[299]
- The purchase of unemployment insurance for a nanny;[300]
- A debt arising out of an individual's employment contract;[301]
- A personal obligation on a business guaranty;[302]
- An overpayment of wages;[303] and
- Employment compensation claims.[304]

4.6.5 Where Consumer Has No Knowledge of Nature of Alleged Debt

A consumer's proof that a transaction was primarily for personal, family, or household purposes is complicated where the collector is collecting from someone who was never involved with the debt— where the collector has mixed up the obligor's identity or the consumer is an identity theft victim. The consumer has no knowledge of the debt, and so cannot testify from personal knowledge as to the purpose of the underlying transaction.

Some courts still place the burden on the consumer to show the purpose of the underlying transaction,[305] particularly where evidence is weak that someone else owes the debt and the debt appears to be commercial in nature.[306] But courts may rule otherwise, if the consumer first presents evidence that the debt does not belong to the consumer.[307] In that case, courts may take the circumstances into consideration in reviewing the consumer's evidence of the debt's nature,[308] or, where nothing points to a debt not involving a personal transaction, place the burden on the collector to prove the debt is not covered.[309] The collector has more information on the debt than the consumer and placing the burden on the collector is most consistent with the FDCPA's purposes.

Whatever approach a court takes, a prudent consumer attorney, despite the difficulty, should present as much evidence as possible both as to the likely consumer nature of the debt and that the collector is seeking payment from the wrong consumer. Courts should be generous in allowing extensive discovery to help prove this case, and not grant a motion to dismiss prematurely.[310] On the other hand, a consumer making no

XS Tr. Mortg. Pass-Through Certificates, Series 2007-7N, 2017 WL 4240911 (E.D. Pa. Sept. 25, 2017) (commercial loan); Zirk v. Nationstar Mortg., 2017 WL 3402970 (W.D. Wis. Aug. 8, 2017) (debt securing rental property).

293 *See* Henderson v. Wells Fargo Bank, 73 Fed. R. Serv. 3d 636 (W.D.N.C. 2009) (mortgage loans on commercial property); Dunn v. Meridian Mortg., 2009 WL 1165396 (W.D. Va. May 1, 2009) (loan to improve investment business properties), *aff'd per curiam*, 334 Fed. Appx. 566 (4th Cir. 2009); Kattula v. Jade, 2008 WL 495298 (E.D. Mich. Feb. 20, 2008) (commercial loan to purchase truck stop); Fleet Nat'l Bank v. Baker, 2003 WL 21088516 (D. Mass. May 7, 2003) (parties had referred to transaction as commercial real estate loan).

294 *See* Hardy v. Joseph I. Sussman, P.C., 953 F. Supp. 2d 102 (D.D.C. 2013); Booth v. Mee, Mee & Hoge, P.L.L.C., 2010 WL 988473 (W.D. Okla. Mar. 15, 2010) (equipment leased for, even if not used in, business).

295 *See* Scarola Malone & Zubatov L.L.P. v. McCarthy, Burgess & Wolff, 638 Fed. Appx. 100 (2d Cir. 2016) (business telephone account); Saylor v. Pinnacle Credit Serv., L.L.C., 667 Fed. Appx. 829 (4th Cir. 2016), affirming 118 F. Supp. 3d 881 (E.D. Va. 2015) (purchase of carpenter's supplies).

296 *See* Hattaway v. Homeland Cmty. Bank, 2013 WL 12237375 (E.D. Tenn. Mar. 27, 2013) (farm loan was not consumer debt); Olsen v. Wolpoff & Abramson, L.L.P., 2008 WL 11355505 (E.D. Mich. Apr. 11, 2008) (business credit card used primarily for commercial purposes). *See also* JH Kaspar Oil Co. v. Newton & Assoc., L.L.C., 2008 WL 819094 (E.D. La. Mar. 25, 2008) (debts owed by commercial customers).

297 *See* Drew v. Ocwen Loan Servicing, L.L.C., 2015 WL 5637569 (M.D. Fla. Sept. 17, 2015); Loschiavo v. Bank of Am., 2015 WL 3742491 (N.D. Ohio June 15, 2015).

298 *See* Cronin v. Oakes, 2014 WL 7398949 (E.D. Pa. Dec. 30, 2014). *See also* Graham v. Tasa Grp., Inc., 2015 WL 875228 (N.D. Ala. Mar. 2, 2015) (expert witness services for law practice).

299 *See* Connelly v. Ekimoto & Morris, L.L.C., 2018 WL 4016429 (D. Haw. Aug. 22, 2018).

300 *See* Berman v. G.C. Serv. L.P., 146 F.3d 482 (7th Cir. 1998).

301 *See* Derbin v. Keith M. Nathanson, P.L.L.C., 2013 WL 5490176 (M.D. Fla. Sept. 30, 2013).

302 *See* Lyon v. Am. Recovery Serv., Inc., 2016 WL 4680130 (N.D. Ohio Sept. 6, 2016) (collector's view of personal nature of debt did not affect that determination). *See also* Paushok v. Ganbold, 2021 WL 1063206 (S.D.N.Y. Mar. 18, 2021); Downing v. IOU Cent., Inc., 2019 WL 3502915 (N.D. Ga. May 29, 2019) (magistrate judge recommended dismissal of FDCPA claims because underlying debt out of commercial loan transaction and *res judicata* applied to state judgment where plaintiff unsuccessfully alleged his signature was forgery), *adopted*, 2020 WL 7409660 (N.D. Ga. Mar. 25, 2020).

303 Orenbuch v. Leopold, Gross & Sommers, 586 F. Supp. 2d 105 (E.D.N.Y. 2008).

304 *See* Surber v. McCarthy, Burgess & Wolff, Inc., 634 Fed. Appx. 292 (11th Cir. 2015) (chargeback for unearned commissions on sales of insurance did not arise from consumer transaction); 1077 Madison Street, L.L.C. v. Smith, 2015 WL 5793427 (E.D.N.Y. Sept. 30, 2015); Shkreli v. JPMorgan Chase Bank, 2015 WL 1408840 (S.D.N.Y. Mar. 27, 2015).

305 *See* Burton v. Kohn Law Firm, S.C., 934 F.3d 572 (7th Cir. 2019); Strauss v. CBE Grp., Inc., 173 F. Supp. 3d 1302 (S.D. Fla. 2016); Anderson v. AFNI, Inc., 2011 WL 1808779 (E.D. Pa. May 11, 2011); Garcia v. LVNV Funding L.L.C., 2009 WL 3079962 (W.D. Tex. Sept. 18, 2009).

306 *See* Horton v. Trans Union, L.L.C., 2015 WL 1055776 (E.D. Pa. Mar. 10, 2015).

307 *See* Bodur v. Palisades Collection, L.L.C., 829 F. Supp. 2d 246 (S.D.N.Y. 2011).

308 Martin v. Allied Interstate, L.L.C., 192 F. Supp. 3d 1296 (S.D. Fla. 2016); Belcher v. Cent. Credit Serv., Inc., 2011 WL 13229640 (N.D. Ala. June 22, 2011). *See also* Gendelberg v. Warfield, 2021 WL 1224831, at *6 (E.D.N.Y. Mar. 31, 2021) (debt that debtor denied owing was for residential air conditioner, and therefore consumer debt even though shipped to business address); Black v. AFNI, Inc., 2018 WL 3546193 (D.N.J. July 23, 2018).

309 *See* Kilpakis v. JPMorgan Chase Fin. Co., L.L.C., 229 F. Supp. 3d 133, 145 (E.D.N.Y. 2017); Davis v. Midland Funding, L.L.C., 41 F. Supp. 3d 919 (E.D. Cal. 2014); Collins v. Portfolio Recovery Assoc., L.L.C., 2013 WL 9805805 (E.D. Tenn. June 7, 2013); Gonzalez v. L. Firm of Sam Chandra, APC, 2013 WL 4758944 (E.D. Wash. Sept. 4, 2013); Bodur v. Palisades Collection, L.L.C., 829 F. Supp. 2d 246 (S.D.N.Y. 2011).

310 *See* Black v. AFNI, Inc., 2016 WL 4249491 (D.N.J. Aug. 10, 2016) (allowing discovery despite risk might unlawfully disclose third party's personal information); Corson v. Accounts Receivable Mgmt., Inc.,

attempt to prove the underlying transaction was for personal purposes may find the case dismissed.[311]

Debt collectors may object to the consumer's discovery seeking information on the individual who does in fact owe the debt, citing the FDCPA's limits on communicating about a debt to third parties. This in itself could be viewed as an admission that the debt is covered by the FDCPA.[312] That the collector does not cooperate in discovery and could not locate the correct consumer also weighs in the consumer's favor in limiting the extent of the evidence the consumer need submit to at least get to trial.[313]

4.7 Debt Collector, FDCPA § 1692a(6)

4.7.1 Overview

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include . . .[314]

The FDCPA's substantive provisions place obligations or restrictions only on "debt collectors," as defined in the Act. Only one provision applies more broadly—section 1692j applies to any person who designs, compiles, or furnishes "any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt . . ."[315]

The definition of debt collector has four major components. The first is what is sometimes called the general definition, that a debt collector is either a person who regularly collects debts owed to another or a person whose principal purpose is to collect debts.[316] Second, a creditor collecting its own debts is still a debt collector, even if its principal purpose is not to collect debts, if it uses a name other than its own.[317] Third, an entity whose principal purpose is the enforcement of security interests qualifies for coverage as a debt collector for purposes of FDCPA § 1692f(6).[318]

Finally, even if the entity qualifies as a debt collector under the general definition above, there are ten statutory exclusions from the definition of debt collector:

- Officers or employees of the person who owns the debt;[319]
- An entity collecting for a commonly owned or affiliated entity;[320]
- Government officers or employees collecting debts in their official duties;[321]
- A person serving legal process;[322]
- Nonprofit consumer credit counselors;[323]
- Those collecting based on a fiduciary or escrow relationship;[324]
- The creditor originator collecting for another;[325]
- When a debt was obtained for servicing purposes, before it is in default;[326]
- Secured parties involving commercial credit;[327] and
- Private bad check diversion programs meeting certain criteria.[328]

In addition, Regulation F (effective November 30, 2021) excludes from the coverage of Regulation F (but not from coverage of the FDCPA) those debt collectors outside the CFPB's authority.[329]

It is prudent not to plead a simple conclusory statement that an FDCPA defendant is a debt collector, but to plead with more specificity the elements making it a collector.[330]

2013 WL 4047577 (D.N.J. Aug. 9, 2013); Browne v. Portfolio Recovery Assoc., Inc., 2013 WL 871966 (S.D. Tex. Mar. 7, 2013).

311 Toroussian v. Asset Acceptance, L.L.C., 2013 WL 5524831 (C.D. Cal. Oct. 4, 2013); Garcia v. LVNV Funding L.L.C., 2009 WL 3079962 (W.D. Tex. Sept. 18, 2009). *See also* Lutman v. Harvard Collection Serv., Inc., 2015 WL 4664296 (M.D. Fla. Aug. 6, 2015).

312 Estes v. Love, Beal & Nixon, P.C., 2015 WL 4508601, at *5 (N.D. Okla. July 24, 2015).

313 Estes v. Love, Beal & Nixon, P.C., 2015 WL 4508601, at *5 (N.D. Okla. July 24, 2015).

314 15 U.S.C. § 1692a(6) (exceptions not reproduced here, but discussed in § 4.8, *infra*). Reg. F § 1006.2(*i*)(1) essentially tracks this language with minor, non-substantive changes for clarity.

315 Section 1692j is examined at § 10.4, *infra*.

316 *See* §§ 4.7.2, 4.7.3, *infra*.

317 *See* § 4.7.4, *infra*.

318 *See* § 4.7.5, *infra*.

319 *See* § 4.8.1, *infra*.

320 *See* § 4.8.2, *infra*.

321 *See* § 4.8.3, *infra*.

322 *See* § 4.8.4, *infra*.

323 *See* § 4.8.5, *infra*.

324 *See* § 4.8.7, *infra*.

325 *See* § 4.8.8, *infra*.

326 *See* § 4.8.9, *infra*.

327 *See* § 4.8.10, *infra*.

328 *See* § 4.8.11, *infra*.

329 *See* § 4.8.12, *infra*.

330 *See* Bates v. Green Farms Condo. Ass'n, 958 F.3d 470, 480–481 (6th Cir. 2020) (granting motion to dismiss where complaint did not aver facts about the nature of the law firm's and condominium management company's business); Husain v. Bank of Am., 2020 WL 777293, at *5 (N.D. Ill. Feb. 18, 2020) (dismissing FDCPA claims that described servicer in conclusory manner under "principal purpose" debt collector definition and did not allege servicer regularly collected debts for others); Shallenburg v. PNC Bank, 2020 WL 555447, at *7 (M.D. Fla. Feb. 4, 2020) (dismissing FDCPA claim against foreclosure firm because complaint only paraphrased statutory debt collector definition). *See also* Zuniga v. Jacobs, 2020 WL 168106, at *3 (S.D. Fla. Jan. 13, 2020) (denying borrower's summary judgment motion where, despite reference to defendant law firm's activity through court docket

4.7.2 *Principal Purpose Being Debt Collection*

4.7.2.1 Generally

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts . . .[331]

As discussed at § 4.7.1, *supra*, under the FDCPA's general definition of debt collector an entity can be a debt collector either by being in a business the principal purpose of which is the collecting or debts or regularly collecting debts owed to another.[332] The person does not have to meet both requirements since the statute uses the word "or" between the two prongs.

Almost always, when debts are owed to another, it is easier to show that the collector regularly collects debt than to show that its principal business is debt collection. "Regularly" is a looser standard than "principal purpose," and the evidence to prove it may be easier to obtain. However, the Supreme Court held that the "regularly collects" prong is not applicable when an entity is collecting its own debts, because the "regularly collects" prong requires that the person regularly collect "debts owed or due or asserted to be owed or due another."[333]

Thus, for entities like debt buyers that own the debt they are collecting, the "principal purpose" prong of the debt collection definition is critical.[334] The Official Interpretations of Regulation F (effective November 30, 2021) put it this way:

> A person who collects or attempts to collect defaulted debts that the person has purchased, but who does not collect or attempt to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another, and who does not have a business the principal purpose of which is the collection of debts, is not a debt collector as defined in § 1006.2(i).[335]

The "principal purpose" definition looks to whether debt collection is *the* principal purpose of the business, not *a* principal purpose.[336] For example, banks for which debt collection is just one of many parts of the business do not have debt collection as the principal purpose of their business.[337] Even where a creditor's only business involves extending credit, the principal purpose of such a creditor is likely not to be the collection of debts, but the earning of interest and fees from the money loaned.

An entity acquiring credit accounts by merger or acquisition of a major part of another creditor's business is also unlikely to have debt collection as a principal purpose.[338] The entity more likely (but not necessarily) will have as its principal purpose extending credit or even conducting some other line of business.

Where a credit-seller immediately assigns its credit accounts to a financer, the assignor's principal purpose will be to sell goods or services. The financer's principal purpose will be to extend credit or perhaps to make profits off its purchase of the debt from the credit-seller.[339]

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entries and firm's website, disputed issues of fact remained as to extent and make-up of firm's debt collection activities). *But see In re* Vazquez, 2020 WL 557320, at *4 (Bankr. D. P.R. Feb. 3, 2020) (denying dismissal of FDCPA claims against foreclosure firm at pleading stage; complaint did not allege that foreclosure firm had been hired exclusively to carry out nonjudicial foreclosure).

331 15 U.S.C. § 1692a(6).

Almost every draft version of the FDCPA, as well as the final Act, included the "principal business" phrase in its definition of "debt collector." *See* Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Hous., 94th Cong., 2d Sess., Subcomm. Print No. 1 (Feb. 1976); H.R. 11969, 94th Cong. 2d Sess. (Feb. 19, 1976).

332 *See, e.g.,* Henson v. Santander Consumer USA, Inc., 817 F.3d 131, 136 (4th Cir. 2016), *aff'd*, ___ U.S. ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017); Barbato v. Greystone Alliance, L.L.C., 916 F.3d 260 (3d Cir. Feb. 22, 2019); Tepper v. Amos Fin., L.L.C., 898 F.3d 364, 370 (3d Cir. 2018) ("'Any debts' . . . stands in contrast to 'debts owed or due . . . another,' which limits only the 'regularly collects' definition."); James v. Wadas, 724 F.3d 1312, 1317 (10th Cir. 2013); Schlegel v. Wells Fargo Bank, 720 F.3d 1204, 1208 (9th Cir. 2013); Hester v. Graham, Bright & Smith, 289 Fed. Appx. 35, 41 (5th Cir. 2008); Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 61 (2d Cir. 2004); Skinner v. LVNV Funding, 2018 WL 319320, at *3 (N.D. Ill. Jan. 8, 2018) ("the limitation that a debt must be 'owed or due another,' central to the Court's reasoning in Henson, follows the 'or' in the definition and thus applies only to the second regularly collects definition").

333 *See* Henson v. Santander Consumer USA, Inc., 817 F.3d 131, 136 (4th Cir. 2016), *aff'd*, ___ U.S. ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017).

334 For more about coverage of debt buyers, see § 4.7.2.2, *infra*.

335 *See* Reg. F Official Interpretations § 2(i)-1.

336 *See, e.g.,* Reygadas v. DNF Assoc., 2019 WL 2146603, at *2 (W.D. Ark. May 16, 2019) (citing Merriam-Webster's Dictionary (Online 2019); noting the word "principal" is defined as "most important, consequential, or influential"), *vacated and remanded on other grounds*, 982 F.3d 1119 (8th Cir. 2020).

337 *See, e.g.,* Ahmed v. Wells Fargo Bank, 432 F.3d 556 (E.D. Pa. 2020); Shallenburg v. PNC Bank, 2020 WL 555447, at *8 (M.D. Fla. Feb. 4, 2020); Stone v. JPMorgan Chase Bank, 415 F. Supp. 3d 628, 633 (E.D. Pa. 2019).

338 *See, e.g.,* Ashley Gill v. Wells Fargo Bank, 2016 WL 3579227, at *5 (S.D. Ala. June 28, 2016) (bank that obtained debt through a series of mergers was not a covered debt collector; "An entity that is attempting to collect a debt on its own behalf is not a debt collector unless its business' principal purpose is to collect debts or it regularly collects debt of another. Plaintiffs have failed to show either."); Moore v. Bank of Am., 2014 WL 12859897 (N.D. Ga. Apr. 15, 2014) (no showing that defendant was debt collector where there were no facts alleged regarding principal purpose of its business and defendant was successor by merger to plaintiff's former servicer and creditor), *adopted*, 2014 WL 12859892 (N.D. Ga. May 8, 2014).

339 *See, e.g.,* Johnson v. Santander Consumer USA, 2018 WL 3061920, at *5 (W.D. Tenn. Apr. 6, 2018) ("Johnson bought the Tahoe from CarMax on September 17, 2012, and financed the purchase by executing a Retail Installment Contract, which was immediately assigned to Santander via language in the contract itself. Under the contract, Johnson agreed to make payments to Santander. Thus, until it sold the contract to CFAM, Santander owned the contract and was servicing a debt that it owned and which it had acquired immediately upon execution of the contract and before Johnson's default. Therefore, Santander is not a debt collector and the FDCPA does not apply."); Scott v. Chrome Capital, L.L.C., 2016 WL 7638135 (D.S.C. July 25, 2016) (defendant that was immediately assigned lease agreement that it funded and

On the other hand, as discussed at § 4.7.2.2, *infra*, courts regularly find that debt buyers are debt collectors under the "principal purpose" prong. Debt collection as a principal purpose can be collection of any type of account that falls within the FDCPA's definition of "debt."[340] But a person is not a debt collector when the principal purpose is collecting obligations the FDCPA does not define as being a "debt."

The principal purpose need not be the collection of debts acquired when in default principal purpose applies to the collection of "any debts." This means all debts, including debts acquired from another, in default or otherwise, or owed to the collecting entity.[341]

To be a principal purpose debt collector, the person must "use[] any instrumentality of interstate commerce or the mails." Due to the use of the telephone, the mails, or the Internet in their business, this requirement is easily met for most principal purpose debt collectors.[342]

4.7.2.2 Debt Buyer's Principal Purpose

In *Henson v. Santander Consumer USA Inc.*,[343] the Supreme Court held that a debt buyer is not one that collects debts "owed or due another," because it owns the debts after purchasing them. The Court left open that a debt buyer can qualify as a debt collector if its principal purpose is the collection of debts, and numerous courts have since found that debt buyers are debt collectors under the principal purpose prong.[344] Thus, for FDCPA coverage of debt buyers, the key question is whether the debt buyer's principal purpose is debt collection.

Courts generally find debt buyers and similar entities to have a principal purpose of debt collection where a high percentage of its business, resources, or expenses is devoted to debt collection,[345] or where a high percentage of business revenue or profit is derived from debt collection.[346] Courts may also look to how the business describes itself on its website,[347] the number of collection lawsuits it files,[348] or that the business

financed was not debt collector under FDCPA); Corea v. Riverbank Acceptance, Inc., 2005 WL 8155869 (S.D. Fla. June 15, 2005) (finance company that was immediately assigned installment sales contract was not debt collector under FDCPA where contract disclosed intent to assign). *See also* Rajapakse v. Credit Acceptance Corp., 2019 WL 8167796 (6th Cir. Aug. 28, 2019) (defendant that was assigned vehicle loan on date of origination could not be considered debt collector under FDCPA because loan was not in default at time of assignment). *Cf.* James v. Ford Motor Credit Co., 842 F. Supp 1202, 1206 (D. Minn. 1994 ("Automobile finance companies which make loans to automobile purchasers do not have as their principal business purpose the collection of debts and they do not generally collect debts due to others.").

340 *See* 15 U.S.C. § 1692a(5); § 4.6, *supra*.

341 Davidson v. Capital One Bank, 797 F.3d 1309, 1316 n.8 (11th Cir. 2015).

342 *See* Tepper v. Amos Fin., L.L.C., 898 F.3d 364, 370 (3d Cir. 2018) (debt buyer "uses the mails and wires for its business"); Muir v. AM Solutions, L.L.C., 2019 WL 3530521 (E.D. Pa. Aug. 1, 2019); Fed. Trade Comm'n v. Swatsworth, 2018 WL 4016312, at *7 (W.D.N.C. Aug. 22, 2018); Guzman v. Mel S. Harris & Assoc., 2018 WL 1665252 (S.D.N.Y. Mar. 22, 2018) (causing a process server to mail a copy of the complaint was use of the mails no requirement that such use be direct by the collector. Alternatively, wiring money to investors and law firm satisfied the requirement); Cohen v. Dave's Towing Serv., Inc., 2015 WL 136679 (W.D. Ky. Jan. 9, 2015) (repossession company). *But see* Johnson v. Redstone Fed. Credit Union, 2020 WL 3640000 (N.D. Ala. July. 6, 2020) (house flippers who bought judgment lien from credit union did not use interstate commerce or the mail to collect debt, but rather used local sheriff to levy property); Thompson v. Five Bros. Mortg. Co. Serv. & Securing Inc., 2019 WL 2051798 (W.D. Mich. May 9, 2019) (no interstate commerce where Michigan contractor entered home in Michigan, with no mailing and no telephone use), *aff'd*, 800 Fed. Appx. 369 (6th Cir. 2020).

343 ___ U.S. ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017).

344 *See, e.g.*, Reygadas v. DNF Assoc., 982 F.3d 1119 (8th Cir. 2020); Barbato v. Greystone Alliance, L.L.C., 916 F.3d 260 (3d Cir. 2019); Tepper v. Amos Fin., L.L.C., 898 F.3d 364 (3d Cir. 2018). *See also* McAdory v. M.N.S. & Assoc., 952 F.3d 1089 (9th Cir. 2020) (complaint sufficiently alleged debt buyer was debt collector). At the end of this section there is a list of decisions by the name of the debt buyer.

345 *See* Barbato v. Greystone Alliance, L.L.C., 916 F.3d 260, 268 (3d Cir. 2019) ("Crown's only business is the purchasing of debts for the purpose of collecting on those debts, and, as Crown candidly acknowledged at oral argument, without the collection of those debts, Crown would cease to exist."); Tepper v. Amos Fin., L.L.C., 898 F.3d 364 (3d Cir. 2018) (debt buyer admitted that its "sole business is collecting debts it has purchased"); F.T.C. v. Check Investors, Inc., 502 F.3d 159, 174 (3d Cir. 2007) ("Check Investors acquired the defaulted checks *only for* collection purposes." (emphasis added)); Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 404 (3d Cir. 2000) (motion for summary judgment stated that defendant "exists *solely for* the purpose of holding claims for delinquent taxes and municipal obligations" (emphasis added)); Linder v. Eason, 2018 WL 3816763 (C.D. Cal. June 29, 2018) (trust's sole revenue source and activity were related to collecting on state court judgments against debtors); Torres v. LVNV Funding, L.L.C., 2018 WL 1508535 (N.D. Ill. Mar. 27, 2018); Skinner v. LVNV Funding, 2018 WL 319320 (N.D. Ill. Jan. 8, 2018) (insufficient evidence of percentage of collector's operations that involved debt collection). *See also* Wheeler v. Midland Funding L.L.C., 2020 WL 1469449 (N.D. Ill. Mar. 26, 2020) (where there was no evidence that Midland Funding had any business purpose other than to purchase and collect debts, inference raised that it is debt collector under FDCPA, but this was not conclusive truth). *But see* Pavone v. Citicorp Credit Serv., Inc., 60 F. Supp. 2d 1040, 1047 (S.D. Cal. 1997), *aff'd*, 172 F.3d 876 (9th Cir. 1999) ("principal purpose" test not satisfied where less than one quarter of business expenses were for its debt collection operations).

346 *See* McAdory v. M.N.S. & Assoc., 952 F.3d 1089, 1091 (9th Cir. 2020); Scott v. Jones, 964 F.2d 314, 316 (4th Cir. 1992) (70–80% of lawyer's legal fees related to debt collection); Schafer v. Allied Interstate L.L.C., 2019 WL 2710272 (W.D. Mich. June 28, 2019) (99% of revenues came from debt collection performed by others on its behalf); Long v. Pendrick Capital Partners II, L.L.C., 374 F. Supp. 3d 515, 536 (D. Md. 2019); Mitchell v. LVNV Funding, L.L.C., 2017 WL 6406594 (N.D. Ind. Dec. 15, 2017).

347 Norman v. Allied Interstate, L.L.C., 310 F. Supp. 3d 509, 515 (E.D. Pa. 2018) (sufficient pleading where LVNV's website describes it as buyer of consumer debt and fails to list any other form of commercial activity); Chenault v. Credit Corp. Solutions, Inc., 2017 WL 5971727 (E.D. Penn. Dec. 1, 2017) (website stated that it is debt collector).

348 Page v. Forster & Garbus, L.L.P., 2019 WL 5696108, at *6 (E.D.N.Y. June 17, 2019); Skinner v. LVNV Funding, 2018 WL 319320 (N.D. Ill. Jan. 8, 2018) (list of hundreds of collection lawsuits filed by defendant insufficient to establish principal purpose where no evidence presented about percent of business dedicated to debt collection); McMahon v. LVNV Funding, L.L.C., 301 F. Supp. 3d 866, 884 (N.D. Ill. 2018); Mitchell v. LVNV Funding, L.L.C., 2017 WL 6406594, at *6 (N.D. Ind. Dec. 15, 2017) ("LVNV files thousands of collection lawsuits in its name"); Sykes v. Mel Harris & Assoc., 757 F. Supp. 2d 413, 423

is licensed as a debt collector.[349] Perhaps even more instructive is how the business describes itself when filing for a license.[350] A debt buyer might even admit that debt collection is its principal purpose by indicating that its business is purchasing defaulted debts and collecting on them.[351] Of course, that the entity engages in no other business than debt buying is also persuasive,[352] as is the fact that an entity has no employees and where its contracts all relate to debt collection.[353]

Some debt buyers have claimed that they are "passive" collectors because they have no employees and contract out for all services. A debt buyer can have a principal purpose of debt collection even if it does not directly collect its debts, but instead contracts with others to collect debts on its behalf.[354]

The statutory definition does not even refer to "collecting debts" but only to a principal purpose of "debt collection."[355]

The Third Circuit rejected a debt buyer's argument that it could not be a debt collector because it was a creditor, stating that "an entity that satisfies both [the definition of creditor and the definition of principal purpose debt collector] is within the Act's reach."[356]

FDCPA § 1692a(6)(F)(iii) excludes from the debt collector definition debts acquired prior to default, but such exemption only applies to the collection of debts *owed to another.* When an entity is collecting *its own debts*—as is the case with a debt buyer, the exclusion does not apply. Nowhere else does the FDCPA require that the principal purpose be collecting debts acquired after default.

However, obtaining debts solely after they are in default does not guarantee that the entity's principal purpose is debt collection.[357] On the other hand, entities that purchase debts in default often do have as a principal purpose the collection of those debts.

Since *Henson,* courts have concluded that each of the following debt buyers is or could be found by a jury to be a debt collector under the "principal purpose" prong:

- Amos Financial, L.L.C.;[358]
- Credit Corp Solutions Inc.;[359]
- Crown Asset Management, L.L.C.;[360]

(S.D.N.Y. 2010) (complaint alleged that defendants "are principally in the business of buying defaulted debts and seeking to collect on them, as they have filed more than 100,000 debt collection actions in state courts"). *See also* Dorrian v. LVNV Funding, L.L.C., 94 N.E.3d 370 (Mass. 2018) (noting number of lawsuits filed and reports sent to credit bureau, but not discussing this in principal purpose analysis).

349 Torres v. LVNV Funding, L.L.C., 2018 WL 1508535 (N.D. Ill. Mar. 27, 2018) (holds collection agency license); Chenault v. Credit Corp. Solutions, Inc., 2017 WL 5971727 (E.D. Penn. Dec. 1, 2017) (licensed as collection agency). *But see* Skinner v. LVNV Funding, 2018 WL 319320 (N.D. Ill. Jan. 8, 2018) (licensed as debt collector insufficient to establish principal purpose where no evidence about percent of business dedicated to debt collection).

350 Mitchell v. LVNV Funding, L.L.C., 2017 WL 6406594 (N.D. Ind. Dec. 15, 2017).

351 Schweer v. HOVG, L.L.C., 2017 WL 2906504 (M.D. Penn. July 7, 2017). *See also* Muir v. AM Solutions, L.L.C., 2019 WL 3530521 (E.D. Pa. Aug. 1, 2019); Long v. Pendrick Capital Partners II, L.L.C., 374 F. Supp. 3d 515, 536 (D. Md. 2019); Torres v. LVNV Funding, L.L.C., 2018 WL 1508535 (N.D. Ill. Mar. 27, 2018).

352 Rivas v. Midland Funding L.L.C., 398 F. Supp. 3d 1294, 1303 (S.D. Fla. 2019), *aff'd,* 842 Fed. Appx. 483 (11th Cir. 2021); Muir v. AM Solutions, L.L.C., 2019 WL 3530521 (E.D. Pa. Aug. 1, 2019); Torres v. LVNV Funding, L.L.C., 2018 WL 1508535 (N.D. Ill. Mar. 27, 2018); Norman v. Allied Interstate, L.L.C., 310 F. Supp. 3d 509, 515 (E.D. Pa. 2018); Mitchell v. LVNV Funding, L.L.C., 2017 WL 6406594 (N.D. Ind. Dec. 15, 2017).

353 *See* Reygadas v. DNF Assoc., 982 F.3d 1119, 1125 (8th Cir. 2020) ("The foreseeable and logical consequence of hiring lawyers and debt collection agencies to collect debts DNF has purchased is itself evidence of purpose."); Bielawski v. Midland Funding L.L.C., 2019 WL 4278042, at *10 (N.D. Ill. Sept. 10, 2019). *See also* Thompson v. Resurgent Capital Serv., L.P., 2015 WL 1486974, at *24 (N.D. Ala. Mar. 31, 2015) (finding defendant PYOD's principal purpose was collection of debts where "[its] entire *raison d'etre* is to act as a vessel for the assignment of defaulted debts formally purchased by its parent, Sherman, for the sole purpose of facilitating efforts by Resurgent or other corporate affiliates to collect on PYOD's behalf").

354 McAdory v. M.N.S. & Assoc., 952 F.3d 1089, 1090 (9th Cir. 2020); Reygadas v. DNF Assoc., 982 F.3d 1119, 1125 (8th Cir. 2020); Barbato v. Greystone Alliance, L.L.C., 916 F.3d 260, 261 (3d Cir. 2019); Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 403–404 (3d Cir. 2000); Jackson v. JTM Capital Mgmt., L.L.C., 2021 WL 1238565, at *6 (D. Md. Apr. 2, 2021); Long v. Pendrick Capital Partners II, L.L.C., 374 F. Supp. 3d 515, 536 (D. Md. 2019); Mullery v. JTM Capital Mgmt., L.L.C., 2019 WL 2135484 (W.D.N.Y. May 16, 2019); Carlo v. Midwest Recovery Sys., L.L.C., 2018 WL 5267163, at *2 (N.D. Ohio Oct. 23, 2018); Norman v. Allied Interstate, L.L.C., 2018 WL 2383099 (E.D. Pa. May 25, 2018); Polanco v. NCO Portfolio Mgmt., Inc., 132 F. Supp. 3d 567 (S.D.N.Y. 2015) (collected through attorneys). *See also* McMahon v. LVNV Funding, L.L.C., 301 F. Supp. 3d 866, 884 (N.D. Ill. 2018); Thompson v. Resurgent Capital Serv., L.P., 2015 WL 1486974, at *24 (N.D. Ala. Mar. 31, 2015) ("[its] entire *raison d'etre* is to act as a vessel for the assignment of defaulted debts formally purchased by its parent, Sherman, for the sole purpose of facilitating efforts by Resurgent or other corporate affiliates to collect on PYOD's behalf"); Plummer v. Atl. Credit & Fin., Inc., 66 F. Supp. 3d 484 (S.D.N.Y. 2014). *But see* Kasalo v. Trident Asset Mgmt., L.L.C., 53 F. Supp. 3d 1072, 1079 (N.D. Ill. 2014).

355 McAdory v. M.N.S. & Assoc., 952 F.3d 1089, 1090 (9th Cir. 2020); Barbato v. Greystone Alliance, L.L.C., 916 F.3d 260 (3d Cir. 2019).

356 Tepper v. Amos Fin., L.L.C., 898 F.3d 364 (3d Cir. 2018). *Accord* Barbato v. Greystone Alliance, L.L.C., 916 F.3d 260 (3d Cir. 2019). *See also* Henson v. Santander Consumer USA, Inc., ___ U.S. ___, 137 S. Ct. 1718, 1724, 198 L. Ed. 2d 177 (2017) (not deciding if the defendant debt buyer is a debt collector under the principal purpose test even but noting that it could qualify as a creditor "under the statute's plain terms"); Reygadas v. DNF Assoc., 982 F.3d 1119, 1125 (8th Cir. 2020) (rejecting debt buyer's argument that it cannot be debt collector because it is creditor).

357 Henson v. Santander Consumer USA, Inc., ___ U.S. ___, 137 S. Ct. 1718, 1724, 198 L. Ed. 2d 177 (2017); Tepper v. Amos Fin., L.L.C., 898 F.3d 364, 371 (3d Cir. 2018) ("Whether an entity acquired the debts it collects after they became defaulted does not resolve whether that entity is a debt collector."); Kurtzman v. Nationstar Mortg. L.L.C., 709 Fed. Appx. 655, 659 (11th Cir. 2017) ("a non-originating debt holder [does not qualify as] a 'debt collector' for purposes of the FDCPA solely because the debt was in default at the time it was acquired"); Bank of N.Y. Mellon Tr. Co. v. Henderson, 862 F.3d 29, 34 (D.C. Cir. 2017) ("That the debt was already in default when the Bank purchased it did not make the Bank a debt collector.").

358 Tepper v. Amos Fin., L.L.C., 898 F.3d 364, 370 (3d Cir. 2018).

359 Chenault v. Credit Corp. Solutions, Inc., 2017 WL 5971727 (E.D. Pa. Dec. 1, 2017).

360 Barbato v. Greystone Alliance, L.L.C., 916 F.3d 260 (3d Cir. 2019).

- DNF Associates L.L.C.;[361]
- JTM Capital Management;[362]
- LR Credit 13, L.L.C.;[363]
- LVNV Funding, L.L.C.;[364]
- Midland Funding;[365]
- Pendrick Capital Partners, L.L.C.; and[366]
- Union Adjustment Co., Inc.[367]

Depending on their business models, certain buyers of distressed mortgage loans also meet this "principal purpose" standard.[368]

4.7.3 *Regularly Collecting Debts Owed to Another*

4.7.3.1 Generally

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.[369]

Unless excluded by another FDCPA provision,[370] a person who directly or indirectly regularly collects debts owed to another is a debt collector. The FDCPA also defines a debt collector as one whose principal business is debt collection, but one has to meet only one of these two prongs to be a debt collector since the two prongs are separated by "or."[371]

A party who regularly collect debts for another is a debt collector even if debt collection is not its principal business. On the other hand, the "regularly collects" prong applies only to those collecting debts *owed to another*, so that where a party is collecting on its own debt (such as a debt buyer),[372] the "principal business" prong would be the appropriate one to utilize.

A debt collector is one who regularly collects "debts," so that the debt collector must regularly collect "debts," as that term is defined in the FDCPA.[373] For example, regularly collecting business debts is not sufficient to make one an FDCPA debt collector. But a person is a debt collector if they regularly collect consumer debts, even if they also regularly or even principally collect business debts. The person's principal business can even be unrelated to debt collection, such as the practice of law or credit reporting, as long as the person regularly collects consumer debts owed to another.[374]

The consumer has the burden of pleading and proving that a party regularly collects debts owed to another.[375] But the consumer has a right to discovery to determine that fact.[376] The legislative history indicates "The requirement that debt collection be done 'regularly' would exclude a person who collects a debt for another in an isolated instance, but would include those who collect for others in the regular course of business."[377] There must be some proof that the instance of

361 Reygadas v DNF Assoc., 982 F.3d 1119, 1125 (8th Cir. 2020). *See also* McAdory v. M.N.S. & Assoc., 952 F.3d 1089 (9th Cir. 2020) (complaint sufficiently alleged debt buyer was debt collector).

362 Jackson v. JTM Capital Mgmt., L.L.C., 2021 WL 1238565 (D. Md. Apr. 2, 2021).

363 Guzman v. Mel S. Harris & Assoc., 2018 WL 1665252 (S.D.N.Y. Mar. 22, 2018).

364 Torres v. LVNV Funding, L.L.C., 2018 WL 1508535 (N.D Ill Mar. 27, 2018). *See also* Norman v. Allied Interstate, L.L.C., 2018 WL 2383099 (E.D. Pa. May 25, 2018; McMahon v. LVNV Funding, L.L.C., 301 F. Supp. 3d 866, 884 (N.D. Ill. 2018) ("a reasonable juror could reach a verdict in favor of plaintiff on the question of whether the principal purpose of LVNV's business is debt collection"); Mitchell v. LVNV Funding, L.L.C., 2017 WL 6406594, at *4–5 (N.D. Ind. Dec. 15, 2017) (same).

365 Rivas v. Midland Funding L.L.C., 398 F. Supp. 3d 1294, 1303 (S.D. Fla. 2019), *aff'd*, 842 Fed. Appx. 483 (11th Cir. 2021). *See also* Bradley v. Selip & Stylianou, L.L.P., 2018 WL 4958964, at *5 (W.D.N.Y. Oct. 15, 2018).

366 Schweer v. HOVG, L.L.C., 2017 WL 2906504, at *5 (M.D. Pa. July 7, 2017) (defendant Pendrick Capital Partners stipulated that principal purpose of business "is to buy defaulted debts and thereafter attempt to collect those debts" and that defendant was a debt collector under the FDCPA). *See also* Long v. Pendrick Capital Partners II, L.L.C., 374 F. Supp. 3d 515, 536 (D. Md. 2019).

367 Covarrubias v. Zee Law Group, 2017 WL 6570281 (Cal. Ct. App. Dec. 22, 2017) (unpublished).

368 Rivera v. Bayview Loan Servicing, 2020 WL 1508328, at *4 (E.D. Pa. Mar. 30, 2020); Williams v. Partners for Payment Relief Inc., 2020 WL 973753 (N.D. Ohio Feb. 28, 2020) (refusing to dismiss complaint which averred generally that company owning mortgage loan collected debts as its principal purpose); Muir v. AM Solutions, L.L.C., 2019 WL 3530521 (E.D. Pa. Aug. 1, 2019) (complaint appropriately alleged distressed loan purchaser was debt collector); Tepper v Amos Fin., L.L.C., 2017 WL 3446886, at *8 (E.D. Pa. Aug. 11, 2017) ("[d]efendant's business focuses exclusively on acquiring and servicing non-performing and semi-performing loans"), *aff'd*, 898 F.3d 364 (3d Cir. 2018).

369 15 U.S.C. § 1692a(6).

370 *See* § 4 8, *infra*.

371 *See, e.g.*, Henson v. Santander Consumer USA, Inc., 817 F.3d 131, 136 (4th Cir. 2016), *aff'd*, ___ U.S. ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017); Barbato v. Greystone Alliance, L.L.C., 916 F.3d 260 (3d Cir. Feb. 22, 2019). *See also* § 4.7.1, *supra*.

372 Henson v. Santander Consumer USA, Inc., ___ U.S. ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017). *See* § 4.7.2.2, *supra*.

373 *See* § 4.6, *supra*.

374 *See* Wesley v. Calvary Inv., L.L.C., 2006 WL 1285020 (E.D. Pa. May 9, 2006) (data furnisher); Durkin v. Equifax Check Serv., Inc., 2002 WL 31426397 (N.D. Ill. Oct. 28, 2002) (check authorization/guarantee service); Sutton, FTC Informal Staff Letter (Oct. 23, 1986) (credit reporting agency). *See also* Greaves v. Ann Davis Assoc. Inc., 2015 WL 668227 (D.N.J. Feb. 17, 2015) (real estate broker).

375 *See, e.g.*, Acosta v. James A. Gustino, P.A., 646 Fed. Appx. 723 (11th Cir. Mar. 22, 2016); Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 60 (2d Cir. 2004); Cicalo v. McCalla Raymer Leibert Pierce, L.L.C., 2018 WL 1514245, at *1 (D. Conn. Mar. 27, 2018) (dismissing consumer's complaint where consumer provided no evidence about the number and frequency of debt collection communications); Hingston v. Quick Collect, Inc., 2016 WL 4059158 (D. Or. July 28, 2016).

376 Ferrante v. Law Offices of Lewisohn & Lewisohn, 2016 WL 8711075 (E.D.N.Y. July 15, 2016). *See also* Crawley v. CACH, L.L.C., 2019 WL 6841803, at *1 (W.D. Pa. Dec. 16, 2019).

377 S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697 *and reproduced at* Appx. A.3, *infra*.

debt collection that is involved in a case is not an isolated instance.[378]

Regularly does not mean frequently or as a substantial part of a person's business.[379] For example, a person who collects on debts 145 times a year and has a system in place to handle collections is regularly collecting even though collection work is only a very small percentage of the person's business.[380]

The Second Circuit has announced these factors to determine regularity:

> (1) [T]he absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations. Facts relating to the role debt collection work plays in the practice as a whole should also be considered to the extent they bear on the question of regularity of debt collection activity (debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas such work constituting 1% of an individual lawyer's practice might not). Whether the law practice seeks debt collection business by marketing itself as having debt collection expertise may also be an indicator of the regularity of collection as a part of the practice.[381]

Most cases considering the meaning of "regularly" deal with whether a law firm regularly collects debts, and these cases are analyzed at § 4.7.3.3, *infra*.

A person is not automatically a debt collector even when including a disclosure that it is a debt collector or sending a validation notice.[382] Nevertheless, such a disclosure is a factor in a court's determination.[383] Evidence of experience in the field of collecting debts,[384] and the person's marketing of debt collection services[385] can also be factors.

Different types of entities meet the definition of debt collector, and not just collection agencies. Debt collector includes attorneys regularly collecting consumer debts.[386] Foreclosure attorneys and repossession companies can be debt collectors, but FDCPA coverage can be limited if their principal purpose is enforcement of security interests, as discussed at § 4.7.5, *infra*. A mortgage servicer that obtains servicing rights after default and its loss mitigation servicer can be debt collectors.[387]

Parties obtaining location information for debt collectors can be considered debt collectors, since parties that "indirectly" collect debts can be debt collectors.[388] But other courts find that "skip tracers" are not debt collectors.[389]

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378 *See, e.g.*, Waterston v. Advance Bur. of Collections L.L.P., 2019 WL 438486 (M.D. Ga. Feb. 4, 2019) (single instance of debt collecting activity); Hampton v. Steen, 2014 WL 5496454 (D. Or. Oct. 28, 2014) (did not indicate that the collector collected any other debts); Calhoun v. Certegy Check Serv., Inc., 2014 WL 4146886 (M.D. Fla. Aug. 20, 2014) (did not indicate that the check casher engaged in collecting any other debts); Richardson v. Calmes, 2006 WL 8432831, at *6 (M.D. La. Aug. 11, 2006) (low volume of local police engaging in private debt collection activities for a friend).

379 *See, e.g.*, Oppong v. First Union Mortg. Corp., 215 Fed. Appx. 114 (3d Cir. 2007) (Wells Fargo's collection of debt was regular, even though small percentage of its activities); Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004); Wells v. LF Noll, Inc., 2019 WL 5596409, at *8 (N.D. Iowa Oct. 30, 2019) (issue is not dollar volume, but number of instances of collection); Dina v. Cuda & Assoc., 950 F. Supp. 2d 396 (D. Conn. 2013) (debt buyer filed over 1000 collection lawsuits in state); Carter v. Countrywide Home Loans, Inc., 2009 WL 2742560 (E.D. Va. Aug. 25, 2009) (mortgage servicer that asserted that only 0.21% of its business was related loans obtained in default, but its volume of $2 billion of loans met the "regularly" requirement).

380 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004).

381 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004).

382 *See* Saint Vil v. Perimeter Mortg. Funding Corp., 630 Fed. Appx. 928 (11th Cir. 2015); Gburek v. Litton Loan Servicing, L.P., 614 F.3d 380 (7th Cir. 2010); Jones v. Fay Servicing, L.L.C., 2020 WL 569771, at *4 (D. Kan. Feb. 5, 2020); Griffin v. Robichaux, 2019 WL 6879758, at *4 (E.D. La. Dec. 17, 2019) (collection attorney's admission to regularly collecting did not make her debt collector in absence of evidence that she regularly collected consumer debts); Keyes v. Perry Law, 2018 WL 7502041 (M.D. Fla. Nov. 20, 2018); Owens-Benniefield v. Nationstar Mortg., L.L.C., 258 F. Supp. 3d 1300 (M.D. Fla. 2017).

383 *See, e.g.*, Gburek v. Litton Loan Servicing, L.P., 614 F.3d 380 (7th Cir. 2010); Owens-Benniefield v. Nationstar Mortg., L.L.C., 258 F. Supp. 3d 1300 (M.D. Fla. 2017); Balogun v. Winn Law Group, 2017 WL 6940558 (C.D. Cal. Sept. 26, 2017); Myers v. Americollect, Inc., 194 F. Supp. 3d 839 (E.D. Wis. 2016); Green v. Specialized Loan Servicing, L.L.C., 2016 WL 3963255 (W.D. Wis. July 21, 2016); Sanchez v. Jackson, 2016 WL 6833974 (N.D. Ill. Nov. 21, 2016); Hooks v. Forman Holt Eliades & Ravin L.L.C., 2015 WL 5333513 (S.D.N.Y. Sept. 14, 2015); Gregory v. Home Retention Serv., Inc., 2014 WL 6676008 (D.N.J. Nov. 24, 2014); Loveless v. Bank of Am., 2014 WL 4437576 (M.D. Pa. Sept. 9, 2014); Wyant v. Nationstar Mortg., L.L.C., 2014 WL 3446633 (W.D. La. June 10, 2014), *adopted in part, rejected in part on other grounds by* 2014 WL 4146351 (W.D. La. Aug. 19, 2014); McFadden v. Fla. Foreclosure Attorneys P.L.L.C., 2014 WL 12623693 (M.D. Fla. July 7, 2014); Deutsche Bank Tr. Co. Americas v. Garst, 989 F. Supp. 2d 1194 (N.D. Ala. 2013); ToroToroussian v. Asset Acceptance, L.L.C., 2013 WL 5524831 (C.D. Cal. Oct. 4, 2013).

384 *See* Greaves v. Ann Davis Assoc., Inc., 2015 WL 668227 (D.N.J. Feb. 17, 2015).

385 *See* Simpson v. Safeguard Props., L.L.C., 2013 WL 2642143 (N.D. Ill. June 12, 2013).

386 *See* § 4.7.3.3, *infra*.

387 *See* § 4.8.9, *infra*.

388 Romine v. Diversified Collection Serv., Inc., 155 F.3d 1142 (9th Cir. 1998) (entity collecting telephone numbers for collectors to use); Silva v. Nat'l Telewire Corp., 2000 WL 1466149 (D.N.H. Jan. 3, 2000) (same).

389 *See* Demaestri v. Verifacts Inc., 2012 WL 1192758, at *7 (D. Colo. Mar. 16, 2012) (does not consider whether skip tracer indirectly collects debts); Baker v. Trans Union L.L.C., 2010 WL 2104622 (D. Ariz. May 25, 2010) (location service's conduct appeared to be nothing more than "mere information gathering"). *See also* Goldstein v. Chrysler

Courts also find insufficient evidence of regularly collecting debts where companies merely perform such services as printing and mailing letters for debt collectors.[390] An FDCPA provision excludes process servers from the definition of debt collector,[391] and at least one court appears to exclude them as well for not collecting debts.[392] Courts have found an entity that merely processes payments for a debt collector not to be debt collector,[393] nor a data processor for an employer when it processes a garnishment order sent to the employer.[394] A company that only files liens against real property, but does not otherwise contact the consumer, has been found not to be a debt collector.[395]

4.7.3.2 Requirement that Debts Are Owed to Another

The "regularly collects" prong of the definition of debt collector applies only to those collecting debts owed to another, and not to persons collecting their own debts. In *Henson v. Santander Consumer USA Inc.*,[396] the Supreme Court held that a person collecting debts after purchasing those debts is collecting its own debts and is not collecting debts owed or due another. As a result, the "regularly collects" prong does not apply to debt buyers.[397]

It may be necessary to delve beneath the surface of the transaction to determine if the debt is owed to another. Just because a consumer's payment on a debt is made payable to a party collecting on the debt does not mean that the collector owns the debt and is not collecting for another.[398] So, too, just because an entity is an originating creditor does not mean it cannot collect debts owed to another. For example, if two originating creditors have an agreement to regularly collect each other's debts, then each would be acting as a debt collector in collecting the other's debts.[399] Nevertheless, the FDCPA has an exemption where a creditor who originates a debt seeks to collect that debt after assigning that debt to another.[400]

Whether an entity owns a debt can become complicated when the debt involves a mortgage loan. The entity servicing a mortgage loan may be servicing its own debt, but more often is servicing a debt owed to another. To determine if the servicer is the owner, federal law allows the consumer to send the servicer a Request for Information to identify the loan's owner,[401] which may show that the servicer is not the debt owner, and instead collecting for another.[402] On the other hand, a party not acting as a servicer, but as a trustee for the securitization trust owning the loan may be acting for the trust, and thus collecting debts owed to itself.[403]

The entity in whose name a foreclosure is instituted is not necessarily the mortgage loan owner. Fannie Mae and Freddie Mac require that promissory notes and mortgages they guarantee be transferred to a servicer just prior to foreclosure so that the servicer can conduct the foreclosure in its own name,[404] and this practice is common throughout the industry. Servicers receive these transfers of enforcement rights temporarily and solely to meet requirements of state foreclosure laws. By contract, the prior owner of the loan remains the true beneficiary of the obligation during the foreclosure. By virtue of these temporary transfers of enforcement rights, the servicers do not become the loan owners.[405]

Another area where ownership is complicated involves federal student loans issued before July 1, 2010. Effective July 1, 2010, all federal student loans have been issued under the Direct Loan program, where the United States owns the debt. Any party other than the United States collecting on the loan is collecting for another.

Fin. Co., 276 F. Supp. 2d 687, 690 (E.D. Mich. 2003) (service locating cars for auto lender not a debt collector).

390 Aquino v. Credit Control Serv., 4 F. Supp. 2d 927 (N.D. Cal. 1998); Powell v. Computer Credit, Inc., 975 F. Supp. 1034 (S.D. Ohio 1997), *aff'd*, 1998 WL 773989 (6th Cir. Oct. 15, 1998); Laubach v. Arrow Serv. Bur., Inc., 987 F. Supp. 625 (N.D. Ill. 1997) (merely merged labels, printed, and mailed collection agency's letters); Trull v. Lason Sys., Inc., 982 F. Supp. 600 (N.D. Ill. 1997) (same).

391 *See* § 4.8.4, *infra*.

392 *See* Larroza v. Resurgence Capital, L.L.C., 2018 WL 2118134 (N.D. Ill. May 8, 2018).

393 *See* Hughes v. United Debt Holding, L.L.C., 2018 WL 3970143 (N.D. Ill. Aug. 20, 2018).

394 *See* McGown v. Silverman & Borenstein, P.L.L.C., 2014 WL 545903 (D. Del. Feb. 7, 2014), *adopted as modified by* 2014 WL 1623773 (D. Del. Apr. 23, 2014).

395 Jordan v Tucker Albin and Assoc., Inc., 2019 WL 4647339 (E.D.N.Y. Sept. 24, 2019).

396 ___ U.S. ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017).

397 *But see* § 4.7.2.2, *supra* (discussing coverage under "principal purpose" prong of general definition).

398 *See* Kelly v. Montgomery Lynch & Assoc., Inc., 2008 WL 1775251 (N.D. Ohio Apr. 15, 2008).

399 S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*. *See also* FTC Official Staff Commentary § 803(6)-3, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

400 *See* § 4.8.8, *infra*.

401 12 C.F.R. § 1024.36. *See* National Consumer Law Center, Mortgage Servicing and Loan Modifications § 3.3.4 (2019), *updated at* www.nclc.org/library.

402 *See* Beard v. Ocwen Loan Servicing, L.L.C., 2018 WL 638455 (M.D. Pa. Jan. 31, 2018). *See also* Bridge v. Ocwen Fed. Bank, 681 F.3d 355 (6th Cir. 2012).

403 Johnson-Gellineau v. Steine & Assoc., 2019 WL 2647598, at *7 (S.D.N.Y. June 27, 2019), *aff'd*, 837 Fed. Appx. 8 (2d Cir. 2020) (trustee for pool of securitized mortgage debt is a creditor).

404 *See* National Consumer Law Center, Home Foreclosures § 4.3.1 (2019), *updated at* www.nclc.org/library (special issues related to GSE servicers).

405 Beard v. Ocwen Loan Servicing, L.L.C., 2018 WL 638455 (M.D. Pa. Jan. 31, 2018). *See also* Best v. Fed. Nat'l Mortg. Ass'n, 450 F. Supp. 3d 606 (D. Md. 2020) (allowing § 1692g claim against law firm that identified servicer instead of Fannie Mae as owner of the loan in foreclosure action); Gritters v. Ocwen Loan Servicing, L.L.C., 2018 WL 1784134 (N.D. Ill. Apr. 13, 2018) (law firm's disclosure of servicer as owner of loan was deceptive and misleading when Freddie Mac was true owner of loan); Visceglie v. Seterus, Inc., 2017 WL 4862230 (M.D. Fla. Apr. 27, 2017) (borrower stated § 1692e claim based on law firm's false allegation in foreclosure complaint that Fannie Mae was holder of note); Sciortino v. Barrett Daffin Frappie Levin & Brock, L.L.P., 9 F. Supp. 3d 1322 (N.D. Ga. 2013) (servicer Nationstar was collecting on behalf of "true creditor" Fannie Mae when it threatened to foreclose).

But before July 1, 2010, most federal student loans were issued under the Federal Family Education Loan (FFEL) program. Loans were owned by banks, and when the loan became delinquent, ownership would be transferred to a guaranty agency, which might eventually turn over ownership of the student loan to the United States as the ultimate insurer. If the guaranty agency owns the student loan on which it is collecting, then it is not collecting on a debt owed to another, and the "regularly collects" prong does not apply.[406]

If the guaranty agency is acting as a servicer or collector on loans that are owned by the United States, then it is regularly collecting debts owed to another.[407] It will most certainly obtain the account after it is in default, so the exclusion for servicers obtaining an account before default will not apply.[408] But other exclusions from the definition of debt collector may still apply, such as that it is acting as a fiduciary.[409]

A default guarantee insurer may pay off a creditor on the consumer's default, and acquires the debt as part of the requirement for paying the claim. The insurer then suing the consumer is collecting on a debt owed to it, and not owed to another.[410]

4.7.3.3 Attorneys Regularly Collecting Debts

Congress, in 1986, eliminated the FDCPA's exemption for attorneys.[411] Moreover, the Supreme Court finds attorney conduct in collection litigation to be debt collection.[412] As a result, an attorney or law firm is a debt collector if the attorney or firm regularly collects consumer debts owed to another—through communications, settlements, or litigation.[413]

An attorney who regularly collects debts for one client is a debt collector, and this status remains even when it collects debts for others only irregularly. If an attorney in a firm meets the definition of a debt collector, then the individual and not just the firm can be a debt collector and liable under the Act.[414] If an attorney in a firm regularly collects debts, then the firm can also be a debt collector, because the firm regularly collects debts.[415]

Consumers need not rely on the "principal purpose" prong to prove the attorney is a debt collector. Since the attorney is collecting debts owed to another, the consumer need only show the attorney or firm regularly collects debts.[416] There is much litigation over how much attorney collection is necessary to meet the standard of "regularly." While some courts find collection not regular when it is below a certain percentage of a law firm's revenues,[417] the better view held by several circuits is to look at the whole picture:[418] number, frequency, pattern of collection communications, staff and systems assigned to collections work, and an ongoing relationship with a creditor.[419]

A law firm's marketing of collection services and information on its website are also relevant.[420] Check not only the firm's website, but the firm's profile[421] and listings of those with licenses, registrations, or practice areas as collection agencies or collection attorneys.[422] While not conclusive, the

406 *See* Cadiz v. Educ. Credit Mgmt. Corp., 2019 WL 4254484 (N.D. Ill. Feb. 21, 2019) (guaranty agency owns debt and principal purpose is not debt collection).

407 Games v. Cavazos, 737 F. Supp. 1368 (D. Del. 1990) (when loan turned back to Department of Education, was collecting debt owed to another).

408 *See* § 4.8.9, *infra*.

409 *See* § 4.8.7, *infra*.

410 *See* Arencibia v. Mortg. Guaranty Ins. Corp., 659 Fed. Appx. 564 (11th Cir. 2016), *aff'g*, 2015 WL 7076691 (M.D. Fla. Nov. 13, 2015); Vasquez v. Allstate Ins. Co., 937 F. Supp. 773 (N.D. Ill. 1996) (insurer bringing claim under its right of subrogation is collecting debt owed to it).

411 Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986). *See also* § 3.4.2.2, *supra*, § 4.8.6, *infra*.

412 *See* § 4.3.3, *supra*.

413 *See* Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989).

414 Mayall v. The Randall Firm, P.L.L.C., 2019 WL 4696283, at *5 (D. Utah Sept. 26, 2019); Egli v. Bass, 1998 WL 560270 (N.D. Ill. Aug. 26, 1998).

415 Note, too, that partners in a firm can also be liable for the acts of their other partners, so that the firm is liable even if only one partner is a debt collector. *See* Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000).

416 Garrett v. Derbes, 110 F.3d 317, 318 (5th Cir. 1997).

417 Argentieri v. Fisher Landscapes, Inc., 15 F. Supp. 2d 55 (D. Mass. 1998), *later op.*, 27 F. Supp. 2d 84 (D. Mass. 1998) (0.4% of time in debt collection matters insufficient); Scannell v. Gunnoe & Assoc., 1997 1764768 (S.D. Ohio Mar. 28, 1997) (0.5% of law firm's cases insufficient to show that firm regularly collected debts); Hartl v. Presbrey & Assoc., 1996 WL 529339 (N.D. Ill. Sept. 16, 1996) (insufficient where less than 1% of firm's business involved debt collection).

418 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 62–63 (2d Cir. 2004); Garrett v. Derbes, 110 F.3d 317 (5th Cir. 1997). *See also* James v. Wadas, 724 F.3d 1312 (10th Cir. 2013) (adopting a test based on numerous factors, but finding not regular collection); Schroyer v. Frankel, 197 F.3d 1170 (6th Cir. 1999) (not regular where represented debtors in many of the collection cases, other cases involved business debts, the limited amount of collection cases, and the nature of clients); Rico v. Eveland, 2020 WL 7414016 (D. Utah. Dec. 17, 2020) (applying *James* factors and finding that firm did not regularly engage in debt collection); Cashman v. Ricigliano, 2004 WL 1920798 (D. Conn. Aug. 25, 2004) (written agreement with collection agency and set up special address and telephone line for collection efforts).

419 Dichiara v. Pelsinger, 2010 WL 3613798 (D. Conn. Aug. 30, 2010) (contract with collection agency to act as its attorney).

420 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 62–63 (2d Cir. 2004); Evans v. Bull City Fin. Solutions, Inc., 2018 WL 3468390 (N.D. Ga. June 26, 2018), *adopted*, 2018 WL 3458559 (N.D. Ga. July 18, 2018) (court took judicial notice of agency's website); Carlisle v. Nat'l Commercial Serv., Inc., 2017 WL 1075088, at *5 (N.D. Ga. Feb. 22, 2017) ("this Court takes judicial notice of NCS's website which includes facts showing that NCS regularly attempts to collect debts owed to others."), *aff'd on other grounds*, Carlisle v. Nat'l Commercial Serv., Inc., 722 Fed. Appx. 864 (11th Cir. 2018); Gulisano v. J.A. Cambece Law Office, 2016 WL 7536097 (S.D. Fla. Aug. 8, 2016); Haynes v. McCalla Raymer, L.L.C., 2013 WL 2452241 (N.D. Ga. June 5, 2013); Kirk v. Gobel, 622 F. Supp. 2d 1039 (E.D. Wash. 2009) (attorney advertised himself as collection lawyer); Kaiser v. Braje & Nelson, L.L.P., 2006 WL 1285143 (N.D. Ind. May 5, 2006); Derenick v. Cohn, 2004 WL 5598428 (E.D. Tenn. Aug. 10, 2004) (attorney held himself out as having twenty-five years of experience in creditors' rights). *See also* Blanton v. RoundPoint Mortg. Servicing Corp., 825 Fed. Appx. 369 (7th Cir. 2020) ("collection matters" on website refer to collection of commercial debt).

421 Fuller v. Becker & Poliakoff, P.A., 192 F. Supp. 2d 1361 (M.D. Fla. 2002).

422 *See, e.g.*, Gulisano v. J.A. Cambece Law Office, 2016 WL 7536097 (S.D. Fla. Aug. 8, 2016).

law firm's self-identification as a debt collector in its communications to consumers supports a finding the firm is a covered debt collector.[423]

A firm can be a debt collector even if only a small percentage of the firm's revenues come from debt collection.[424] An attorney may meet the "regularly collects" test if debt collection is a minor, but regular part of the attorney's practice,[425] or if the attorney collects debts more than a handful of times in a year.[426]

This is consistent with the legislative history around the 1985 FDCPA amendment repealing the attorney exclusion. Both sides in the floor debate conceded that the amendment would make the Act apply not only to those lawyers who have collection practices, but also to those "who collect on an occasional basis" and "the small law firm which collects debts incidentally to the general practice of law."[427] Congress voted down amendments that would have required a covered attorney to have a "substantial" debt collection practice.[428]

Courts have no problem finding regular debt collection activity when an attorney sends out notices to consumers or institutes collection lawsuits roughly 50 or 100 times a year, despite that being a small percentage of a firm's revenues.[429] Consistently doing collection work for a client can be enough to make one a collector.[430]

On the other hand, an isolated collection case does not make a lawyer a debt collector.[431] Courts have found that an attorney is not regularly collecting debts where the attorney handles only 10 or 25 collection matters each year, and where those cases are a very small percentage of the firm's work.[432]

4.7.3.4 Enforcement of Security Interests As Debt Collection

The Supreme Court in *Obduskey* acknowledged that even a nonjudicial foreclosure of a mortgage is the collection of a debt.[433] The Court explained that, at a minimum, someone

423 Timberlake v. Robertson, Anschutz & Schneid, P.L., 2020 WL 2039722, at *3 (M.D. Fla. Apr. 28, 2020).

424 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004); Garrett v. Derbes, 110 F.3d 317, 318 (5th Cir. 1997); Crossley v. Lieberman, 868 F.2d 566, 569 (3d Cir. 1989) ("any attorney who engages in collection activities more than a handful of times per year must comply with the FDCPA"); Stojanovski v. Strobl & Manoogian, 783 F. Supp. 319 (E.D. Mich. 1992) (law firm which collected debts only 4% of cases).

425 *See* James v. Wadas, 724 F.3d 1312 (10th Cir. 2013); Garrett v. Derbes, 110 F.3d 317 (5th Cir. 1997) (639 cases in nine months represented 0.5% of his practice); Gatter v. Richland Holdings, Inc., 2016 WL 1384787 (D. Nev. Apr. 6, 2016) (less than 5% of law firm's business); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990) (attorney who represented four collection agencies even though debt collection was merely incidental to his primary law practice).

426 *See* Crossley v. Lieberman, 868 F.2d 566, 569 (3d Cir. 1989).

427 131 Cong. Rec. H10534–H10536 (daily ed. Dec. 2, 1985) (remark of Reps. Annunzio and Hiler).

428 H. Rep. No. 99-405, at 11 (Nov. 25, 1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1760–1761.

429 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004) 145 notices were sent during a year as part of an ongoing relationship with a creditor, despite the collection work constituting less than 0.5%); Rani v. Drobenare, 2020 WL 6370249, at *6 (E.D.N.Y. Aug. 19, 2020) (complaint survives motion to dismiss with reference to attached debt collection letter and averment that letter is "materially consistent with dozens, if not hundreds of other debt collection letters" that firm sent to consumers who owed back rent), *adopted*, 2020 WL 5417555 (E.D.N.Y. Sept. 9, 2020); Gatter v. Richland Holdings, Inc., 2016 WL 1384787 (D. Nev. Apr. 6, 2016) (filing of at least 200 debt collection suits over three years satisfies "regularly" requirement); Kaiser v. Braje & Nelson, L.L.P., 2006 WL 1285143 (N.D. Ind. May 5, 2006); Cashman v. Ricigliano, 2004 WL 1920798 (D. Conn. Aug. 25, 2004) (90 letters in five months pursuant to written agreement with collection agency, set up special address and telephone line for collection efforts, and sued some 53 consumers); Silva v. Mid Atl. Mgmt. Corp., 277 F. Supp. 2d 460 (E.D. Pa. 2003) (law firm consistently accepted some 10 debt collection matters every year even though was less than 1% of total activity). *See also* Hester v. Graham, Bright & Smith, P.C., 289 Fed. Appx. 35 (5th Cir. 2008) (over previous two years, attempted to collect debts on 450 occasions for four clients and filed nearly 200 collection suits); Garrett v. Derbes, 110 F.3d 317 (5th Cir. 1997) (attorney who collected against 639 different individuals in nine-month period satisfied requirement although only represented 0.5% of his practice); Derenick v. Cohn, 2004 WL 5598428 (E.D. Tenn. Aug. 10, 2004) (attorney filed 277 collection actions).

430 Flamm v. Sarner & Assoc., P.C., 2006 WL 43770 (E.D. Pa. Jan. 3, 2006) (consistently represented one client, even though collection practice was t 3% of revenue, and where collection practice was even smaller percent of clientele); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990) (attorney who represented four collection agencies even though debt collection was merely incidental to his primary law practice).

431 James v. Wadas, 724 F.3d 1312 (10th Cir. 2013) (over legal career represented only one collection client, never sent out a collection demand letter, over the preceding ten years she filed a total of only six to eight debt collection cases out of a total of 1789 cases, and that in the preceding year she generated a total of $1700 from her collection practice); Moda v. Aronoff, 2017 WL 4286832 (C.D. Cal. Sept. 27, 2017) (sued businesses for unlawful detainer two or three times a year); Lynch v. Custom Welding & Repair, Inc., 142 F. Supp. 3d 814 (N.D. Iowa 2015) (only evidence of attorney handling collections was the case before the court); Plummer v. Gordon, 193 F. Supp. 2d 460 (D. Conn. 2002); Mertes v. Devitt, 734 F. Supp. 872, 874 (W.D. Wis. 1990) (less than two collection cases a year over ten years not regular).

432 Reyes v. Steeg Law, L.L.C., 760 Fed. Appx. 285 (5th Cir. Jan. 17, 2019) (over three years, sent 36 letters); Roller v. Herrera, 2019 WL 4605555 (D. Or. Sept. 23, 2019) (six matters over several years that at most constituted 0.5% of workload and revenues); Burke v. Lawrence & Lawrence, P.L.L.C., 2018 WL 1440837 (W.D. Ky. Mar. 22, 2018) (seven to eight collection matters annually, which represented six to seven percent of firm's legal matters); Gauntner v. Doyle, 554 F. Supp. 2d 779, 783 (N.D. Ohio 2008) ("pursued 4–9 debt collection matters per year, constituting an average of 6.8% of his overall practice during that time period"); Agarwal v. Catanzarite, 2007 WL 9771100 (N.D. Ohio Sept. 12, 2007) (five cases in past three years involved debt collection); Corbett v. Wolfgang, 2006 WL 3231257 (S.D. Ohio Nov. 6, 2006) (filed 29 foreclosure cases during course of year, and that debt collection was less than 1% of his cases); Camara v. Fleury, 285 F. Supp. 2d 90 (D. Mass. 2003) (30 active cases comprising 4.57% of practice); Mladenovich v. Cannonito, 1998 WL 42281 (N.D. Ill. Jan. 30, 1998) (20 cases); Von Schmidt v. Kratter, 9 F. Supp. 2d 100 (D. Conn. 1997) (29 matters over two years). *See also* White v. Simonson & Cohen P.C., 23 F. Supp. 2d 273 (E.D.N.Y. 1998) (35 identical letters on same day with no ongoing relationship with creditor and no ensuing lawsuits).

433 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1036, 203 L. Ed. 2d 390 (2019) ("if the FDCPA contained *only* the primary definition, a business engaged in nonjudicial foreclosure

who conducts a foreclosure is indirectly attempting to collect a debt. A person who regularly facilitates foreclosures therefore is one who regularly collects debts: "even if nonjudicial foreclosure were not a *direct* attempt to collect a debt, because it aims to collect on a consumer's obligation by way of enforcing a security interest, it would be an *indirect* attempt to collect a debt" (emphasis in original).[434]

The Court rejected the analyses of the Ninth and Tenth circuits, which had held that nonjudicial foreclosures did not involve the collection of a debt.[435] Before *Obduskey*, most other circuits had found the conduct of a nonjudicial foreclosure to be debt collection,[436] and the Ninth Circuit had found judicial foreclosures to be collection of a debt.[437]

As discussed at § 4.7.5, *infra*, *Obduskey* requires special treatment for debt collectors whose principal purpose is nonjudicial foreclosures. But *Obduskey* indicates that the term debt collector applies to all others regularly engaged in nonjudicial foreclosures where the mortgage loan is owed to another.

Those enforcing judicial foreclosures are even more clearly collecting a debt because a judicial foreclosure involves determination not only of title to the realty, but also a judicial determination of the amount of the debt owed.[438] There is also no question that a person who regularly demands payment is regularly collecting on a debt, even if that demand is related to a judicial or nonjudicial foreclosure.[439]

Those involved in repossession of personal property are also engaged in debt collection, as explained by the Supreme Court: "if the Act contained only the primary definition, enforcement of a security interest would at least be an indirect collection of a debt. The same may well be true of repo activity, a form of security-interest enforcement, as the point of repossessing property that secures a debt is to collect some or all of the value of the defaulted debt."[440] Older lower court decisions finding the opposite are thus no longer good precedent.[441]

While a towing company thus can be a debt collector if it regularly repossesses cars where the car loan is owed to another, *Obduskey* comes into play if the towing company's principal purpose is repossessing cars, as examined at § 4.7.5, *infra*. In addition, if a towing company is collecting its own towing and storage fees for tows unrelated to repossessions, then it is not collecting debts owed to another, and its principal purpose is towing and not debt collection.[442] On the other hand, if a towing company regularly collects for parking fees owed to another before it will release the vehicle, then the company can be a debt collector.[443]

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proceedings would qualify as a debt collector for all purposes" (emphasis in original)).

434 *Id. See also* McCray v. Fed. Home Loan Mortg. Corp., 839 F.3d 354 (4th Cir. 2016).

435 Obduskey v. Wells Fargo, 879 F.3d 1216, 1221 (10th Cir. 2018) ("[e]ntities engaged in non-judicial foreclosure actions in Colorado are not debt collectors under the FDCPA"); Ho v. ReconTrust Co., 858 F.3d 568, 572 (9th Cir. 2017) ("Because the money collected from a trustee's sale is not money owed by a consumer, it isn't 'debt' as defined by the FDCPA."), *cert. denied*, 138 S. Ct. 504 (2017). *See also* Best v. Ocwen Loan Servicing, L.L.C., 279 Cal. Rptr. 3d 69, 75 (Cal. Ct. App. 2021) (describing as "absurd" former position of federal courts within Ninth Circuit that he object of foreclosure is not to obtain payment); Benko v. Quality Loan Serv. Corp., 454 P.3d 1263, 1267 n.4 (Nev. 2019) (noting that, in *Obduskey*, the Supreme Court rejected the body of Ninth Circuit law which held that a business enforcing a security interest through nonjudicial was not collecting a debt).

436 *See, e.g.*, Weaver v. Boriskin, 751 Fed. Appx. 96 (2d Cir. 2018) (judicial foreclosure not determining the deficiency); Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75 (2d Cir. 2018); Kaymark v. Bank of Am., 783 F.3d 168, 179 (3d Cir. 2015); Glazer v. Chase Home Fin., L.L.C., 704 F.3d 453, 461 (6th Cir. 2013); Wallace v. Wash. Mut. Bank, 683 F.3d 323 (6th Cir. 2012); Reese v. Ellis, Painter, Ratterree & Adams, L.L.P., 678 F.3d 1211 (11th Cir. 2012); Bourff v. Rubin Lublin, L.L.C., 674 F.3d 1238 (11th Cir. 2012); Allen *ex rel.* Martin v. LaSalle Bank, 629 F.3d 364 (3d Cir. 2011); Minnifield v. Johnson & Freedman, L.L.C., 448 Fed. Appx. 914 (11th Cir. 2011); Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504 (6th Cir. 2007); Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006); Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006). *See also* Gburek v. Litton Loan Servicing L.P., 614 F.3d 380 (7th Cir. 2010) (implicitly recognizing the FDCPA's full applicability to judicial foreclosures).

437 McNair v. Maxwell & Morgan P.C., 893 F.3d 680 (9th Cir. 2018).

438 *See* § 4.7.5.2.2, *infra*. *See also* McNair v. Maxwell & Morgan P.C., 893 F.3d 680 (9th Cir. 2018); Weaver v. Boriskin, 751 Fed. Appx. 96 (2d Cir. 2018); Kaymark v. Bank of Am., 783 F.3d 168 (3d Cir. 2015); Glazer v. Chase Home Fin. L.L.C., 704 F.3d 453 (6th Cir. 2013). *But see* Barnes v. Routh Crabtree Olsen P.C., 963 F.3d 993 (2020), *discussed at* § 4.7.5.2.2, *infra*.

439 *See, e.g.*, Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984 (9th Cir. 2017) (overdue assessment to homeowner's association was a debt and law firm attempting to collect it was a debt collector); Reese v. Ellis, Painter, Ratterree & Adams, L.L.P., 678 F.3d 1211 (11th Cir. 2012) (foreclosure firms was debt collector as it demanded payment of the balance of note secured by security deed and repeatedly stated that it was a debt collector); Allen *ex rel.* Martin v. LaSalle Bank, 629 F.3d 364 (3d Cir. 2011) (FDCPA applied to request for illegal mortgage collection fees); Smith Carbone v. Gross Polowy L.L.C., 2019 WL 1114899 (E.D.N.Y. Mar. 11, 2019) (FDCPA violation where foreclosure attorney sent mortgagor letter offering loan modification as alternative to foreclosure); Johnson v. Fay Servicing, L.L.C., 2018 WL 5262078, at *10–11 (N.D. Ga. July 2, 2018) (thousands of demands for payment, regularly enforced deficiency claims, and sent plaintiff form notices that characterized firm as debt collector), *adopted*, 2018 WL 5262049 (N.D. Ga. Sept. 19, 2018); Crosby v. Brock & Scott, P.L.L.C., 2018 WL 2027735 (M.D. Ga. May 1, 2018) (rejecting foreclosure law firm's claim that it was only enforcing security interest where firm's letter to debtor could be viewed as effort to collect debt); Amesbury v. Baker, Braverman & Barbadoro, P.C., 252 F. Supp. 3d 125 (D. R.I. May 10, 2017) (foreclosure law firm sending out demand letters can be debt collectors).

440 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 203 L. Ed. 2d 390 (2019). *See also* Rawlinson v. Law Office of William M. Rudow, L.L.C., 460 Fed. Appx. 254 (4th Cir. 2012).

441 *See, e.g.*, Montgomery v. Huntington Bank, 346 F.3d 693, 700 (6th Cir. 2003); Brooks v. Leon's Quality Adjusters, Inc., 2016 WL 4539967 (E.D. Cal. Aug. 30, 2016); Morris v. Equi First Corp., 2011 WL 1337404 (M.D. Tenn. Apr. 7, 2011), *adopted*, 2011 WL 1884602 (M.D. Tenn. May 18, 2011).

442 *See* Washington v. Ritter, Lien Sales, Inc., 2019 WL 6790687, at *6 (C.D. Cal. Sept. 16, 2019); *In re* Petralia, 559 B.R. 275 (Bankr. D. Mass. Sept. 30, 2016).

443 *Cf.* Cohen v. Dave's Towing Serv., Inc., 2015 WL 136679 (W.D. Ky. Jan. 9, 2015).

4.7.3.5 Landlord-Tenant Collections and Evictions

Persons hired before rent is past due on a residential rental property to manage that property are excluded from the definition of debt collector, even when later collecting rent or pursuing evictions.[444] On the other hand, third parties hired to collect overdue rent are clearly debt collectors—regularly collecting debts owed to another.[445] The result is no different if someone is hired to both evict tenants and collect past due rent.[446] Sending notice that an eviction action is imminent is also debt collection, making the person regularly sending such notices for another a debt collector.[447]

A person should also be a debt collector if the person regularly brings eviction actions seeking both the tenant's removal from the property and recovery of back rent or other charges.[448] On the other hand, courts may find that a person is not collecting on a debt if the person is merely seeking the tenant's removal after a foreclosure or the tenant's bankruptcy, or, otherwise, with no attempt to collect back due rent or other monies due.[449]

Even if there is no specific attempt to collect monies due in a particular case, the person is still a debt collector if the person in other matters regularly seeks both eviction and back rent or other charges. In the case before the court, the issue may be whether the debt collector's actions are in connection with collection of a debt,[450] but a person is a debt collector if, in other matters, the person regularly seeks rent or other monies.[451]

4.7.3.6 Debt Collector Employees, Managers, Officers

An officer or employee of a debt collection agency that regularly collects debts meets the definition of "any person" that regularly collects debts owed to another.[452] The FDCPA exempts employees or officers of "creditors" and government entities from the definition of debt collector.[453] But employees and officers of a collection agency are not covered by these exclusions.

The "regularly collects" prong of the debt collector definition includes those who directly or *indirectly* engage in debt collection. An officer, manager, or other supervisor is a debt collector if that individual establishes or implements policies or procedures, drafts form communications, or supervises, trains, reviews or manages those directly engaged in debt collection.[454]

444 *See* § 4.8.9, *infra*.

445 *See* Sanz v. Fernandez, 633 F. Supp. 2d 1356 (S.D. Fla. 2009).

446 *See* Sanchez v. Law Office of Lance E. Armo, 2021 WL 1214559 (E.D. Cal. Mar. 31, 2021), *adopted*, 2021 WL 2292779 (E.D. Cal. June 4, 2021); Gonzalez v. Law Office of Allen Robert King, 195 F. Supp. 3d 1118 (C.D. Cal. 2016); Riley v. Giguiere, 2008 WL 436943 (E.D. Cal. Feb. 14, 2008) (eviction attorney was debt collector).

447 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004); Romea v. Heiberger & Assoc., 163 F.3d 111, 115 (2d Cir. 1998).

448 *See, e.g.*, Hodges v. Sasil Corp., 915 A.2d 1 (N.J. 2007).

449 Carrington Mortg. Services, L.L.C. v. Dye, 2016 WL 4766484, at *3 (M.D. Ga. Sept. 12, 2016); Bonfiglio v. Citifinancial Servicing, L.L.C., 2015 WL 5612194 (N.D. Ill. Sept. 23, 2015); Hutsler v. Shapiro & Kreisman, L.L.C., 2014 WL 2452977 (E.D. Mo. June 2, 2014) (eviction post-foreclosure); Conlin v. Trott & Trott, P.C., 2014 WL 1746155 (E.D. Mich. Apr. 30, 2014) (eviction post-foreclosure); Keys v. Pearson Affiliated, Inc., 2013 WL 12205581 (C.D. Cal. May 14, 2013) (unlawful detainer actions against tenants are not debt collection activities because they seek to recover property, not money); Kalnoki v. First Am. LoanStar Tr. Serv. L.L.C., 2012 WL 3962516, at *3 (E.D. Cal. Sept. 10, 2012); Bond v. U.S. Bank, 2010 WL 1265852 (E.D. Mich. Mar. 29, 2010) (personal liability for mortgage debt discharged in bankruptcy); Baer v. Harmon Law Offices, P.C., 2009 WL 102698 (D. Mass. Jan. 14, 2009) (no request for money while seeking to end tenancy). *See also* Adams v. Schneider, 2020 WL 5411378, at *3 (E.D. Wash. Sept. 9, 2020) (granting summary judgment for attorney who filed underlying state court unlawful detainer action, because plaintiff "was living at the residence rent free and without a lease" and thus "there was no 'transaction' establishing a debt"). *Cf.* Martinez v. Dennis P. Block & Assoc., 2020 WL 8483771 (C.D. Cal. Dec. 14, 2020) (letter warning that eviction would affect consumer's credit and future ability to rent, and failing to clearly state that past due rent was deferred, went beyond seeking mere possession and plausibly constituted attempt to collect debt).

450 *See* § 4.3, *supra*.

451 *See* Kaltenbach v. Richards, 464 F.3d 524, 529 (5th Cir. 2006).

452 Cruz v. Int'l Collection Corp., 673 F.3d 991 (9th Cir. 2012); Garcia v. Creditors Specialty Serv., Inc., 2016 WL 6778681 (N.D. Cal. Nov. 16, 2016) (owner/president personally called debtors); Mayfield v. Asta Funding, Inc., 95 F. Supp. 3d 685 (S.D.N.Y. 2015); Gerstle v. Nat'l Credit Adjusters, L.L.C., 76 F. Supp. 3d 503 (S.D.N.Y. 2015); Collins v. Portfolio Recovery Assoc., L.L.C., 2013 WL 9805805 (E.D. Tenn. June 7, 2013); Weakley v. Redline Recovery Serv., L.L.C., 723 F. Supp. 2d 1341 (S.D. Cal. 2010); Robinson v. Managed Accounts Receivables Corp., 654 F. Supp. 2d 1051 (C.D. Cal. 2009); Krapf v. Prof'l Collection Serv., Inc., 525 F. Supp. 2d 324 (E.D.N.Y. 2007); del Campo v. Kennedy, 491 F. Supp. 2d 891 (N.D. Cal. 2006) (whether collector's employee is also debt collector depends on whether employee's activities were sufficient to be considered "material participation"), *aff'd on other grounds*, 517 F.3d 1070 (9th Cir. 2008); Belin v. Litton Loan Serv., L.P., 2006 WL 1992410 (M.D. Fla. July 14, 2006) (liability of employees who engaged in allegedly unlawful misconduct); Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 369 F. Supp. 2d 353 (E.D.N.Y. 2005); Clark v. Quick Collect, Inc., 2005 WL 1586862 (D. Or. June 30, 2005). *But see* Kreisler v. Latino Union, Inc., 2007 WL 1118408 (N.D. Ill. Apr. 12, 2007) (employees cannot be liable); McKinney v. Cadleway Props., Inc., 2006 WL 3490433 (N.D. Ill. Dec. 4, 2006), *rev'd on other grounds*, 548 F.3d 496 (7th Cir. 2008) (employee contacting consumer not liable).

453 *See* §§ 4.8.1, 4.8.3, *infra*.

454 Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 211 F.3d 1057 (7th Cir. 2000); Camacho v. Credit Control Services, Inc., 480 F. Supp. 3d 303 (D. Mass. 2020); Currier v. PDL Recovery Grp., L.L.C., 2017 WL 712887 (E.D. Mich. Feb. 23, 2017) (supervised payment receipts); Martin v. Trott Law, P.C., 198 F. Supp. 3d 794, 812 (E.D. Mich. 2016); Phillips v. Archstone Simi Valley L.L.C., 2016 WL 400100 (C.D. Cal. Feb. 1, 2016) (law firm's partner involved in guiding or overseeing associates in litigation); Bentkowsky v. Benchmark Recovery, Inc., 2015 WL 502948 (N.D. Cal. Feb. 3, 2015) (drafted collection letter); Schmidt v. Synergentic Comme'ns, Inc., 2015 WL 248635 (M.D. Fla. Jan. 20, 2015) (control debt collection); Legg v. HK Craig & Assoc., 2014 WL 12603172 (S.D. Fla. July 9, 2014) (consumer need not pierce the corporate veil in order to hold a principal personally liable for his actions as a debt collector where he is actively involved in supervising the debt collection); Alonso v. Blackstone Fin. Grp., L.L.C., 2013 WL 6843597 (E.D. Cal. Dec. 20, 2013) (owner trained all collectors and created their scripts, and participated in collection activity); Del Campo v. Mealing, 2013 WL 4764975 (N.D. Cal. Sept. 5, 2013); Smyth v. Merchants Credit Corp., 2012 WL 588744 (W.D. Wash.

Clearly a supervisor or manager actually signing collection letters can be a debt collector.[455]

A separate issue is whether an owner, partner, or shareholder who does not meet the FDCPA definition of debt collector can be personally liable for the acts of a debt collection agency. This liability will turn on the form of the agency's organization (e.g., L.L.C., sole proprietorship, partnership), state law, and the nature of the individual's relationship to the agency, such as whether the corporate veil should be pierced.[456]

4.7.4 Creditor or Debt Buyer's Use of a False Name

> . . . the term ["debt collector"] includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.[457]

A "creditor"[458] is a debt collector even if debt collection is not its principal purpose if it uses a name other than its own in collecting debts, indicating that a different person is the collector. Thus, anyone collecting its own debts is a debt collector if it uses a false name indicating a separate person is involved, whether the collector is an originating creditor or a debt buyer.[459]

The false name provision applies even when a name is not literally false, as long as an unsophisticated consumer would consider it false.[460] Courts also have found that use of a false name need not be explicit, but implicit in the creditor's actions. For example, where a creditor's employee in contacting the consumer denies working for the creditor, the implication is that a third party is doing the collection.[461]

A creditor is a debt collector when it uses a name "not its own." Wells Fargo was found to be a debt collector when it collected under the name "America's Servicing Company."[462] A creditor using the name of a fake law firm or a fake collection agency makes it a debt collector.[463] It is even enough that an unsophisticated consumer would view a communication

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Feb. 22, 2012); Henggeler v. Brumbaugh & Quandahl, P.C., 2012 WL 2855104 (D. Neb. July 5, 2012) (complaint alleged that they "personally designed, implemented, directed, and supervised the collection practices and policies of Brumbaugh & Quandahl, including the design and text of the letters and the procedures for their use"); Versteeg v. Bennett, Deloney & Noyes, P.C., 775 F. Supp. 2d 1316 (D. Wyo. 2011); Yentin v. Michaels, Louis & Assoc., Inc., 2011 WL 4104675 (E.D. Pa. Sept. 15, 2011); Arlozynski v. Rubin & Debski, P.A., 710 F. Supp. 2d 1308 (M.D. Fla. 2010); del Campo v. Am. Corrective Counseling Serv., Inc., 718 F. Supp. 2d 1116 (N.D. Cal. 2010) (officers actively involved in day-to-day operations); Carvana v. MFG Fin., Inc., 2008 WL 2468539 (D. Utah June 17, 2008) (corporate form does not protect officers, directors, or shareholders from individual liability if personally involved); York Gee Au Chan v. N. Am. Collectors, Inc., 2006 WL 778642 (N.D. Cal. Mar. 24, 2006) (set and approved policies, practices, and procedures and directed unlawful activities); Albanese v. Portnoff Law Assoc., Ltd. 301 F. Supp. 2d 389 (E.D. Pa. 2004) (law firm's president, with duties of supervision and overall responsibility); Alaska Tr., L.L.C. v. Ambridge, 372 P.3d 207 (Alaska 2016). *See also* Cruz v. Int'l Collection Corp, 673 F.3d 991 (9th Cir. 2012) (owner involved in every aspect of collection, including direct collection actions); Reynolds v. Credit Mgmt. Serv., Inc., 2016 WL 756469 (D. Neb. Feb. 25, 2016). *But see* Iler v. Law Offices of Fishman & Townley, P.C., 2013 WL 6331288 (E.D. Mich. Dec. 4, 2013) (no liability where in charge of policymaking and management); Staats v. Accounts Recovery Bur., Inc., 2012 WL 2400445 (S.D. Ind. June 25, 2012). *But cf* Pettit v. Retrieval Masters Creditors Bur., Inc., 211 F.3d 1057 (7th Cir. 2000) (loosely worded *dicta* could be seen as saying the contrary).

455 Kettel v. Phillips, 2015 WL 12781037 (S.D. Fla. Jan. 26, 2015); Wilson v. NACM-Oregon Serv. Co., 2013 WL 6780627 (D. Or. Dec. 19, 2013) (managing attorney was a debt collector when she signed a writ of garnishment when there was not judgment to support the writ); Battle v. Gladstone Law Grp., P.A., 951 F. Supp. 2d 1310 (S.D. Fla. 2013) (signed complaint in collection action); Albanese v. Portnoff Law Assoc., Ltd. 301 F. Supp. 2d 389 (E.D. Pa. 2004) (attorney who signed letters).

456 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1201–1202 (11th Cir. 2010) (applying Ohio partnership law to find partner liable for acts of the partnership); Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872, 876 (7th Cir. 2000) (liability of partners); Weiss v. Sherloq Revenue Solutions, Inc., 2021 WL 965810 (S.D. N.Y. Mar. 12, 2021) (finding no alter ego liability); Blair v. Green Square Co. L.L.C., 2020 WL 6827247 (S.D. Ind. Nov. 20, 2020) (denied default judgment against individual defendant who allegedly "was responsible for setting the policies and procedures related to the collection practices," because Seventh Circuit allows individual FDCPA liability only where corporate veil is pierced); Lanteri v. Credit Prot. Ass'n, L.P., 2020 WL 3200076 (S.D. Ind. June. 15, 2020) (general partner who was 1% owner of collection agency was jointly and severally liable under FDCPA pursuant to state's partnership law); Smith v. GC Serv. L.P., 2018 WL 1864929 (S.D. Ind. Apr. 17, 2018) (as general partners of debt buyer GC Services, investors' group partners could be held vicariously liable for partnership's violations of FDCPA); Powers v. Credit Mgmt. Serv., Inc., 2016 WL 612251 (D. Neb. Feb. 2, 2016) (directors and shareholders who do not personally participate in collection have liability only if the corporate veil is pierced); Murdoch v. Rosenberg & Assoc., L.L.C., 2013 WL 1209144 (D. Md. Mar. 22, 2013) (limited liability collection law firm's managing partner could not be held personally liable for the conduct of the firm by virtue of her position); Hooks v. Forman Holt Eliades & Ravin L.L.C., 2012 WL 3322637 (S.D.N.Y. Aug. 13, 2012), *rev'd on other grounds*, 717 F.3d 282 (2d Cir. 2013) (complaint made no specific allegations to establish his status as a debt collector and derivative liability was unavailable under applicable state law). *See also* Reygadas v. DNF Assoc., 982 F.3d 1119, 1126 (8th Cir. 2020) (evidence of scope of agency insufficient to establish debt buyer's FDCPA liability for acts of its debt collector); Jenkins v. Puckett and Redford P.L.L.C., 2020 WL 4517933, at *9 (W.D. Wash. Aug. 3, 2020) (individual employees of debt collector can be held personally liable under FDCPA without piercing corporate veil).

457 15 U.S.C. § 1692a(6). The "false names" sentence first appeared in House Consumer Affairs Subcommittee prints in April 1976. It was present in all the major Senate bills. See S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*.

458 15 U.S.C. § 1692a(4). *See* § 4.5, *infra*.

459 Vincent v. Money Store, 736 F.3d 88 (2d Cir. 2013) (assignee a debt collector because it used a false name).

460 Catencamp v. Cendant Timeshare Resort Group-Consumer Fin., Inc., 471 F.3d 780 (7th Cir. 2006); Maguire v. Citicorp Retail Services, Inc., 147 F.3d 232 (2d Cir. 1998).

461 Kempf v. Famous Barr Co., 676 F. Supp. 937 (E.D. Mo. 1988).

462 *See* Kilpakis v. JPMorgan Chase Fin. Co., 229 F. Supp. 3d 133 (E.D.N.Y. 2017); Pimental v. Wells Fargo Bank, 2016 WL 70016 (D.R.I. Jan. 6, 2016).

463 Catencamp v. Cendant Timeshare Resort Group-Consumer Fin., Inc., 471 F.3d 780 (7th Cir. 2006); Fed. Trade Comm'n v. LoanPointe, L.L.C., 2011 WL 4348304 (D. Utah Sept. 16, 2011) (payday lender used a false name), *aff'd*, 525 Fed. Appx. 696 (10th Cir. 2013); Daley v. Provena Hosps., 88 F. Supp. 2d 881 (N.D. Ill. 2000); Dorsey v. Morgan, 760 F.

as coming from an outside attorney where a letter from an in-house attorney just has the attorney's name and the word "attorney" in the communication.[464] Improper use of a third-party name is not limited to law firm and collection agency names. A creditor becomes a debt collector when the creditor's employee pretends to be a police officer.[465]

A debt owner's use of a name not registered with a state as an alternative business name may indicate a false name. However, a creditor may not be using a false name when it consistently uses a business name in dealing with all its customers (not just those in collection) rather than its incorporated name,[466] changes its business name,[467] or uses a name very close to its incorporated name.[468]

Reference to a division within a creditor, such as a creditor's recovery department, is not a false name if the name of the creditor is included.[469] But a communication from a department within the creditor can make the creditor a debt collector if the least sophisticated consumer would believe that the internal department is a third-party collector.[470] For example, a communication from Citicorp only identified as from Debtor Assistance can be viewed as using a false name.[471]

Even though a parent company owned the creditor, an unsophisticated consumer could believe that use of the parent's name in combination with the words "check recovery service" implied a third party and not a division of the creditor.[472] But a creditor may not be viewed as using a false name when the collection is under the name of a separate corporate entity in whom the creditor has an ownership stake, but where that entity acts independently, using only its own name, the activities of two entities did not form single economic enterprise, and the creditor did not control the other entity's debt collection activities.[473] The separate entity, though, can be the debt collector.

Other times, a creditor collects under the name of a real third-party collection agency or a law firm, but it is really the creditor doing the collection, and the collection agency or law firm is only nominally involved.[474] Thus a false name may be involved where a creditor hires a "flat rate collector" (paid a flat amount per letter sent irrespective of the outcome) whose only role is to mail out letters for the creditor under the flat rate collector's letterhead, and that collector engages in no bona fide efforts to collect the creditor's debts.[475]

Similarly, a creditor falsely uses a law firm's name when it pays the law firm a flat rate to help draft a template for collection letters and to mail the letters on the law firm letterhead,

Supp. 509 (D. Md. 1991) (dunning letters appear to be from outside counsel), Nitzkin v. Craig, 922 N.W.2d 676 (Mich. Ct. App. 2018).

464 Laws v. Cheslock, 1999 WL 160236 (N.D. Ill. Mar. 9, 1999); Britton v. Weiss, 1989 WL 148663 (N.D.N.Y. Dec. 8, 1989).

465 *See, e.g.*, Aurandt v. Brown, 2017 WL 1215451 (W.D. Pa. Mar. 31, 2017).

466 Gutierrez v. AT&T Broadband, L.L.C., 382 F.3d 725 (7th Cir. 2004) (South Chicago Cable, Inc. did business as "AT&T Broadband" in the origination and collection of accounts); Wolfe v. Bank One Corp., 433 F. Supp 2d 845 (N.D. Ohio 2005) (Bank One making calls in the name of United Mileage Plus); Dickenson v. Townside TV & Appliance, Inc., 770 F. Supp. 1122 (S.D. W. Va. 1990). *See also* Scalabrini v. PMAB, L.L.C., 2020 WL 1049167, at *4–5 (S.D.N.Y. Mar. 3, 2020).

467 Porter v. Wachovia Dealer Serv., Inc., 63 U.C.C. Rep. Serv. 2d 979 (D. Or. 2007) (consumer's originating creditor, WFS Financial, which in course of parties' dealings notified consumer that it changed its name to Wachovia Dealer Serv., remained an exempt creditor).

468 Williams v. HSBC Bank, 2014 WL 12616751, at *2 (W.D. Mo. June 30, 2014) ("It is difficult for this Court to fathom how Plaintiffs could credibly contend that a creditor with the name HSBC Bank USA, N.A. would try to deceive the Plaintiffs by use of the name 'CIBM HSBC BANK USA'"); Allgood v. West Asset Mgmt., Inc., 2013 WL 6234691 (D. Nev. Dec. 2, 2013) ("USAA" appeared in both names); Schaffhauser v. Citibank, 2007 WL 2752141 (M.D. Pa. Sept. 19, 2007) (using name combinations that all included word "Citibank" would not confuse least sophisticated consumer); Friedman v. Rubinstein, 1997 WL 757875 (N.D. Ill. Dec. 1, 1997) (initial dealings in name "Caesars Palace" and subsequent suit in name "Desert Palace, Inc., d.b.a. Caesars Palace"); Young v. Lehigh Corp., 1989 WL 117960 (N.D. Ill. Sept. 28, 1989) (Lehigh Country Club's use of name of its parent corporation, Lehigh Corp., would not indicate that third party was attempting to collect debts).

469 Hunnell-Villines v. Hartford Life & Accident Ins. Co., 2020 WL 374688, at *2–3 (D. Kan. Jan. 23, 2020) (letter in name of insurance company department, Receivable Mgmt. Services); Bongiovanni v. World Fin. Network Nat'l Bank Recovery, 2013 WL 142080 (W.D. Wash. Jan. 11, 2013); Mahan v. Lab. Corp. of Am., 2011 WL 836674 (S.D. Ala. Mar. 9, 2011); Sheldon v. Unum Life Ins. Co., 2007 WL 3124535 (D. Neb. Oct. 23, 2007). *See also* Saenz v. Buckeye Check Cashing of Ill., 2016 WL 5080747 (N.D. Ill. Sept. 20, 2016) (on creditor's letterhead, letter stated debt transferred to "our office for our collection"); Medica Self-Insured v. Tenet Healthcare Corp., 2007 WL 1385589 (D. Minn. May 4, 2007) (informed consumer that it was creditor's collection department); Gorham-Dimaggio v. Countrywide Home Loans, Inc., 2005 WL 2098068 (N.D.N.Y. Aug. 30, 2005) (referred to internal loan counseling department).

470 Maguire v. Citicorp Retail Services, Inc., 147 F.3d 232, 237 (2d Cir. 1998); Smith v. Univ. Cmty. Hosp., Inc., 2019 WL 4194802, at *3 (M.D. Fla. Sept. 4, 2019) (reasonable jury could find that Patient Financial Services presented itself as third-party debt collector rather than division of the creditor); Fleming v. Greystar Mgmt. Serv., L.P., 2016 WL 4491846 (E.D. Wash. Aug. 25, 2016); Torres v. Kroger Co., 2012 WL 1836100 (D. Colo. May 21, 2012); Sheldon v. Unum Life Ins. Co., 2006 WL 1288774 (D. Neb. May 9, 2006). *See also* Pippert v. Niece, 518 F. Supp. 2d 1265 (D. Or. 2007); FTC Official Staff Commentary § 803(6)-3, *discussed at* § 3.4.4.4, *supra, reproduced at* Appx. C.2, *infra*.

471 Maguire v. Citicorp Retail Services, Inc., 147 F.3d 232, 237 (2d Cir. 1998). See also Sheldon v. Unum Life Ins. Co., 2006 WL 1288774 (D. Neb. May 9, 2006).

472 Torres v. Kroger Co., 2012 WL 1836100 (D. Colo. May 21, 2012).

473 *See* Allen v. Nelnet, Inc., 2007 WL 2786432 (D. Colo. Sept. 24, 2007). *See also* Harrison v. NBD Inc., 968 F. Supp. 837 (E.D.N.Y. 1997).

474 *See* Magness v. Walled Lake Credit Bur., L.L.C., 2014 WL 12610219 (E.D. Pa. Feb. 18, 2014) (Bank of America used third-party collector's name, but creditor did all collecting).

475 *See* Vincent v. Money Store, 736 F.3d 88 (2d Cir. 2013); Nielsen v. Dickerson, 307 F.3d 623, 634 639 (7th Cir. 2002); Burns v. Ross Stuart & Dawson, Inc., 2016 WL 7013007 (E.D. Mich. Dec. 1, 2016); Canterbury v. Columbia Gas, 2001 WL 1681132 (S.D. Ohio Sept. 25, 2001); Domico v. Etan Indus., 1998 WL 765058 (N.D. Ill. Oct. 26, 1998); Denkers v. United Compucred Collections, Inc., 1996 WL 724784 (N.D. Cal. Nov. 27, 1996); Fratto v. Citibank, 1996 WL 554549 (N.D. Ill. Sept. 25, 1996). *See also* Haber v. Bank of Am., 2014 WL 2921659 (E.D. Pa. June 27, 2014) (question of fact whether servicer only nominally involved).

with the creditor retaining the account files.[476] But a creditor is not a collector where the law firm whose name is used is more intimately involved in the collection.[477]

4.7.5 *Special Treatment of Those Enforcing Security Interests As Their Principal Purpose*

4.7.5.1 Generally

> For the purpose of section 1692f(6) of this title, such term ["debt collector"] also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.[478]

The above-quoted sentence contained in the definition of "debt collector" is commonly called the "limited-purpose" definition, juxtaposed to what is called the "primary definition" or "general definition" —regularly collecting debts owed or due another[479] or debt collection as a "principal purpose."[480] The limited-purpose definition subjects those whose principal purpose is conducting repossessions or nonjudicial foreclosure to the proscriptions in FDCPA § 1692f(6)[481] relating to specific unfair or unconscionable means of enforcing security interests. Since the substantive prohibitions of FDCPA § 1692f(6) also apply to debt collectors generally, they apply to any person fitting the primary definition of debt collector, whether or not they fit the special-purpose definition of debt collector.[482]

In *Obduskey v. McCarthy & Holthus L.L.P.*, the Supreme Court examined how the limited-purpose definition relates to the general definition in the context of a nonjudicial foreclosure.[483] The Court held that enforcement of a security interest is debt collection, so that one regularly enforcing such interests for another meets the general definition of a debt collector.

Nevertheless, where a person's principal purpose is conducting nonjudicial foreclosures, the limited-purpose definition controls, so that only the proscriptions in FDCPA § 1692f(6) apply to the collector when it engages in no more than the steps for a nonjudicial foreclosure as required by state law. According to the Court, "the word 'also,' [in the limited purpose definition] strongly suggested that one who did no more than enforce security interests did not fall within the scope of the general definition."[484]

In other words, a person whose principal purpose is enforcement of security interests and who does no more than take steps set out by state law to enforce a security interest must comply with FDPCA § 1692f(6), but it is not a debt collector for purposes of the FDCPA's other provisions applicable to debt collectors generally. This ruling overturned or limited holdings by a number of circuits that found the limited-purpose definition only expanded coverage rather than limited the general definition.[485] Instead, the Supreme Court sided with other circuits primarily from Western states, where nonjudicial foreclosure of deeds of trust is the predominant method of foreclosure,[486] and where in many of these states the lender waives any claim to a deficiency judgment by choosing to proceed with a nonjudicial foreclosure.[487]

Obduskey has implications not just for law firms whose principal business is nonjudicial foreclosures, but for any entity whose principal business is the nonjudicial enforcement of security interests. Courts are likely to see *Obduskey* as precedent applicable to repossession companies or others whose principal business involves self-help repossession of motor vehicles or other personal property. These companies must comply with FDCPA § 1692f(6),[488] but may not have to comply with other FDCPA provisions. As described at § 4.7.5.2.2, *infra*, *Obduskey* does not limit the exposure of those whose principal purpose is conducting judicial foreclosures, who regularly conduct judicial foreclosures, or who regularly collect unsecured debts for others in addition to conducting foreclosures. All FDCPA provisions would apply to them.

Section 4.7.5.2, *infra*, examines whether a person's principal purpose is enforcement of security interests; failure of

476 Vincent v. Money Store, 736 F.3d 88 (2d Cir. 2013); Nielsen v. Dickerson, 307 F.3d 623, 634–639 (7th Cir. 2002). *See also* Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232 (5th Cir. 1997) (law firm did not even send letters out on law firm stationary); Young v. Citicorp Retail Serv., Inc., 1997 WL 280508 (D. Conn. May 19, 1997).

477 Pearson v. Pea River Elec. Co-op., Inc., 2014 WL 6895181 (M.D. Ala. Dec. 5, 2014); Cangelosi v. New Orleans Hurricane Shutter & Window, L.L.C., 2013 WL 395138 (E.D. La. Jan. 31, 2013); Villarreal v. Snow, 1996 WL 473386 (N.D. Ill. Aug. 19, 1996).

478 15 U.S.C. § 1692a(6). Proscriptions concerning the enforcement of security interests first appeared in S. 918, 95th Cong., 1st Sess. § 808(7) (1977); 123 Cong. Rec. S3485 (daily ed. Mar. 4, 1977).

479 *See* § 4.7.3, *supra*.

480 *See* § 4.7.2, *supra*.

481 15 U.S.C. § 1692f(6), *discussed at* § 8.6, *infra*.

482 *See* Dowers v. Nationstar Mortg. L.L.C., 2018 WL 4566665 (D. Nev. Sept. 24, 2018) (mortgage servicer that regularly collects debts subject to § 1692f(6)'s substantive prohibitions when conducting nonjudicial foreclosure even though enforcement of security interests is not its principal purpose).

483 ___ U.S. ___, 139 S. Ct. 1029, 203 L. Ed. 2d 390 (2019).

484 *Id.*

485 *See* Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75 (2d Cir. 2018); McCray v. Fed. Home Loan Mortg. Corp., 839 F.3d 354, 360 (4th Cir. 2016); Kaymark v. Bank of Am., 783 F.3d 168, 179 (3d Cir. 2015); Glazer v. Chase Home Fin., L.L.C., 704 F.3d 453, 461 (6th Cir. 2013); Reese v. Ellis, Painter, Ratterree & Adams, L.L.P., 678 F.3d 1211 (11th Cir. 2012); Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006).

486 *See* Obduskey v. Wells Fargo, 879 F.3d 1216 (10th Cir. 2018), *aff'd*, ___ U.S. ___, 139 S. Ct. 1029, 203 L. Ed. 2d 390 (2019); Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2016).

487 *See* National Consumer Law Center, Home Foreclosures Appx. E (2019), *updated at* www.nclc.org/library (summary of state foreclosure laws). In other states where nonjudicial procedures are the predominant means of foreclosure, deficiency claims are allowed after a nonjudicial sale.

488 *See* Rivera v. Dealer Funding, L.L.C., 178 F. Supp. 3d 272 (E.D. Pa. 2016); Dallman v. Felt & Lukes, L.L.C., 2013 WL 6628996 (W.D. Wis. Dec. 17, 2013); Buzzell v. Citizens Auto. Fin., Inc., 802 F. Supp. 2d 1014 (D. Minn. 2011); Seibel v. Soc'y Lease, Inc., 969 F. Supp. 713 (M.D. Fla. 1997); Clark v. Auto Recovery Bur., Inc., 889 F. Supp. 543 (D. Conn. 1994); Ghartey v. Chrysler Credit Corp., 1992 WL 373479 (E.D.N.Y. Nov. 23, 1992).

a collector to offer that proof will likely indicate that the person is subject to all FDCPA provisions, and not just section 1692f(6). Section 4.7.5.3, *infra*, examines an important qualifier in *Obduskey*, that a collector escapes the FDCPA's full coverage only when it is following the required steps for a nonjudicial foreclosure or repossession, and it does nothing more. Regardless of its principal purpose, the collector falls outside the limited-purpose definition once its activities go beyond the steps necessary to conduct the nonjudicial foreclosure or repossession. The additional conduct may be subject to the full scope of the FDCPA.

4.7.5.2 Security Interest Enforcement As Principal Purpose

4.7.5.2.1 Introduction

Few entities meet the standard of having enforcement of security interests as a principal purpose necessary to be covered only under the limited-purpose definition. If a person engages in various forms of debt collection, and not just enforcement on secured debts, the person's primary purpose may not be enforcement of security interests. It is irrelevant that a person's principal purpose in dealing with a specific consumer is enforcing a security interest; the principal purpose of a person's overall activities must be the enforcement of security interests.

If the collector's goal is recovery of the amount due, then its principal purpose is not enforcing security interests. Even if a person only deals with secured debts, that may not be enough if the purpose is collection of money on the underlying debts, and not solely transferring title of the residence or possession of personal property.[489] The person must show that the principal purpose is the transferring of title, possession, or control of collateral from the consumer—the act of conducting nonjudicial foreclosure proceedings or seizures pursuant to a self-help repossession.

Obduskey states its holding as applying where a "business is engaged in no more than the kind of security-interest enforcement at issue here—nonjudicial foreclosure proceedings."[490] In *Obduskey* "the only basis alleged for concluding that McCarthy is a debt collector under the Act is its role in nonjudicial foreclosure proceedings."[491] "Proceedings" is narrower than the overall collection on a defaulted mortgage, referring to only the steps necessary to conduct a nonjudicial foreclosure.

Obduskey also states "We here confront only steps required by state law, we need not consider what other conduct (related to, but not required for, enforcement of a security interest) might transform a security-interest enforcer into a debt collector subject to the main coverage of the Act."[492] That is, to fit within the limited-purpose definition, the collector's principal purpose must be to enforce security interests, and, as discussed at § 4.7.5.3, *infra*, the collector's activity must have been limited to an action required to conduct a nonjudicial foreclosure under state law.

The limited-purpose "debt collector" definition found in FDCPA § 1692a(6) has no counterpart under many state debt collection laws. Because mortgages represent an obligation to pay a debt, those who carry out foreclosures may be subject to a wide range of unfair debt collection claims under state debt collection statutes.[493]

4.7.5.2.2 Conduct of judicial foreclosures

While the *Obduskey* Court left for another day the question of whether those who enforce mortgages through judicial procedures are subject to all FDCPA provisions,[494] courts after *Obduskey* consistently find that they are subject to all FDCPA provisions.[495] This means that a multi-state foreclosure law

489 *See, e.g.*, Brown v. Wells Fargo Bank, 2020 WL 89694 (N.D. Iowa Jan. 7, 2020) (law firm sent demand letter that included claim for attorney fees); Sevela v. Kozeny & McCubbin, L.C. 2019 WL 2066924 (D. Neb. May 2, 2019) (distinguishing *Obduskey* because collection letter not part of process to enforce security interest); Weiner v. Rushmore Loan Mgmt. Services, L.L.C., 424 F. Supp. 3d 163, 167 (D. Mass. 2019) (Rushmore is "undoubtedly" a debt collector under § 1692a(6)'s primary definition because the servicer did not only participate in the foreclosure but also routinely serviced the loan). *See also* Cordeiro v. Carrington Mortg. Services, L.L.C., 2020 WL 3404742 (D.R.I. June 19, 2020) (limited-purpose definition did not apply when foreclosure law firm demanded use and occupancy charges in post-foreclosure eviction).

490 Obduskey v. McCarthy & Holthus L.L.P., 139 S. Ct. 1029, 1031, 203 L. Ed. 2d 390 (2019).

491 *Id.*

492 *Id.*, 139 S. Ct. at 1040.

493 Torliatt v. Ocwen Loan Servicing, L.L.C., 2020 WL 4495480, at *2 (N.D. Cal. June 22, 2020); Best v. Ocwen Loan Servicing, L.L.C., 64 Cal. App. 5th 568, 279 Cal. Rptr. 3d 69 (Cal. Ct. App. 2021) (California Rosenthal Act applies to parties conducting nonjudicial foreclosures without restrictions found by *Obduskey*); Davidson v. Seterus, Inc., 21 Cal. App. 5th 283, 290, 230 Cal. Rptr. 3d 441, 455 (Cal. Ct. App. 2018) (limitations from FDCPA's "debt collector" definition do not apply to Rosenthal Act's coverage of mortgage servicers).

494 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1039, 203 L. Ed. 2d 390 (2019).

495 Williams v. Partners for Payment Relief Inc., 2020 WL 973753, at *6 (N.D. Ohio Feb. 28, 2020) (court must follow Sixth Circuit precedent, *Obduskey* does not limit FDCPA application to Ohio judicial foreclosure); Bronstein v. Bayview Loan Servicing, L.L.C., 2020 WL 703652, at *6 (E.D. Pa. Feb. 11, 2020) (rejects application of *Obduskey* to Pennsylvania's judicial foreclosure); Brown v. Wells Fargo Bank, 2020 WL 89694 (N.D. Iowa Jan. 7, 2020) (*Obduskey* not applicable to judicial foreclosure, even where plaintiff waives deficiency claim); Woodard v. Bank of N.Y. Mellon, 2020 WL 61038, at *8 (D. Or. Jan. 6, 2020) (Ninth Circuit precedent holding FDCPA broadly applicable to judicial foreclosures not affected by *Obduskey*); Lloyd v. Pluese, Becker, Saltzman, L.L.C., 2019 WL 6113859, at *2 (D.N.J. Nov. 18, 2019) ("Indeed, the few courts to have considered *Obduskey* . . . since it was decided have read the decision narrowly, and have specifically distinguished judicial foreclosures from nonjudicial foreclosures."); Berg v. McCalla Raymer Leibert Pierce, L.L.C., 2019 WL 5592720, at *4 (N.D. Ill. Oct. 30, 2019); Gold v. Shapiro, Dicaro & Barak, L.L.C., 2019 WL 4752093, at *6 (E.D.N.Y. Sept. 30, 2019) (*Obduskey* did not abrogate Second Circuit precedent holding that full scope of FDCPA applies to New York judicial foreclosures); Berg v. McCalla Raymer Leibert Pierce, L.L.C., 2019 WL 5592720, at *4 (N.D. Ill. Oct. 30,

firm may not have a principal purpose of enforcing security interests where it conducts nonjudicial foreclosures in some states, and judicial foreclosures in others.

Applying section 1692f(6), but not other FDCPA provisions to those who conduct judicial foreclosures, would make no sense considering that section 1692f(6) applies only to "taking or threatening to take any nonjudicial action to effect dispossession or disablement of property." Congress' intent surely is not that certain debt collectors would only be subject to a provision not applicable to them.

In *Obduskey*, the Supreme Court referred to the availability of deficiency judgments as a "potentially relevant" distinction between judicial and non-judicial foreclosures.[496] Unlike nonjudicial foreclosures, in the typical judicial foreclosure, the court enters a judgment of foreclosure that includes a monetary sum representing the unpaid principal balance. This judicial determination plays a key role in determining any personal deficiency liability to which the debtor will be exposed.[497] That one creditor remedy is a sale of the property to recover the judgment debt[498] does not change the fact that the lawsuit is seeking to collect on a debt, not just to enforce a security interest.

Nevertheless, some judicial foreclosures do not involve a potential deficiency. Examples include a judicial tax sale, a foreclosure after bankruptcy that has discharged the personal obligation on a debt, where the creditor has waived any deficiency, and where state law prohibits a deficiency. Courts, though, find that a person does not have security interest enforcement as a principal purpose where it conducts judicial foreclosures, including even those that cannot lead to a deficiency.[499] Moreover, to determine whether its principal purpose is only enforcement of security interests, the question is not whether an individual judicial foreclosure seeks a deficiency, but whether the collector consistently seeks foreclosures without seeking a deficiency.

The Ninth Circuit's decision in *Barnes v. Routh Crabtree Olsen P.C.*[500] shows why it is important to focus on the appropriate FDCPA definition when analyzing coverage of foreclosures. In rejecting FDCPA claims arising from a judicial foreclosure, the *Barnes* court omitted any analysis of the defendant mortgage servicer and law firm's principal purpose and their other activities. Instead, the court focused on the concept of "debt collection," a term not defined by the FDCPA.[501] According to the *Barnes* court, a foreclosure that did not seek to recover a deficiency claim was not "debt collection" because it did not involve collection of money directly from the borrower.[502] It is true that earlier decisions from the Ninth Circuit took this position.[503] Underlying those decisions, adopted by the *Barnes* court, was the misconception that a foreclosure does not involve collection of a debt, because the money comes from the sale of the property and not directly from the debtor. The Supreme Court, in *Obduskey*, considered this argument and rejected it.[504] In focusing on the "debt collection" term, the *Barnes* court ignored this aspect of the Supreme Court's analysis. Courts in the Ninth Circuit following *Barnes* may find that a person whose principal purpose is conducting judicial foreclosures exclusively in Oregon and not engaged in other collection work can be subject only to the limited-purpose debt collector definition.[505]

2019) (Obduskey did not affect FDCPA liability of law firm that conducts judicial foreclosures); Flowers v. Baltax 2017, L.L.C., 2019 WL 3501584, at *4 (D. Md. Aug. 1, 2019) (*Obduskey* limited to nonjudicial foreclosures); Werner v. Selene Fin., L.L.C., 2019 WL 1316465, at *4 n.9 (S.D.N.Y. Mar. 22, 2019) (*Obduskey* did not affect FDCPA liability of law firm that conducts judicial foreclosures). *See also* Ward v. Bank of Am., 2019 WL 2103124, at *8 (W.D. Wash. May 14, 2019).

496 Obduskey v. McCarthy & Holthus L.L.P., ___U.S. ___, 139 S. Ct. 1029, 1039, 203 L. Ed. 2d 390 (2019). *See also* Obduskey v. Wells Fargo, 879 F.3d 1216, 1221 (10th Cir. 2018) (referring to the right to collect a deficiency claim as a personal liability of the mortgagor as the "obvious and critical difference between judicial and nonjudicial foreclosures"); Ho v. ReconTrust Co., 858 F.3d 568, 581 n.2 (9th Cir. 2016) (availability of deficiency judgments is "the principal difference between a judicial and nonjudicial foreclosure").

497 *See, e.g.*, Ward v. Bank of Am., 2019 WL 2103124, at *8 (W.D. Wash. May 14, 2019); Brunner v. Clearspring Loan Services, Inc., 2018 WL 7268146 (M.D. Fla. Oct. 2, 2018) (mortgage deficiency claim is a debt for purposes of the FDCPA).

498 National Consumer Law Center, Home Foreclosures § 10.4 (2019), *updated at* www.nclc.org/library (discussing formula for calculation of deficiency claims under various state laws).

499 Brown v. Wells Fargo Bank, 2020 WL 89694 (N.D. Iowa Jan. 7, 2020) (although waived deficiency, law firm sent a demand letter that included a claim for attorney's fees); Flowers v. Baltax 2017, L.L.C., 2019 WL 3501584 (D. Md. Aug. 1, 2019) (judicial tax sales). *See generally* Lavi M. Ben Dor, *Finality and Foreclosure: Determining A Homeowner's Ability to Appeal in Mortgage Foreclosure Cases*, 168 U. Pa. L. Rev. 1745, 1765 (2020) (majority rule applied to judicial foreclosures by federal and state courts is that judgment finding liability, setting amount owed, and ordering foreclosure sale is final and appealable, because it fixes liability even though further executions measures may be needed to collect).

500 963 F.3d 993 (9th Cir. 2020).

501 *Id.* at 1001 ("A judicial foreclosure proceeding is not a form of debt collection when the proceeding does not include a request for a deficiency judgment or some other effort to recover the remaining debt.").

502 *Id.* at 998.

503 *See* Ho v. ReconTrust Co., 858 F.3d 568, 572 (9th Cir. 2017), *cert denied*, 138 S. Ct. 504 (2017) ("Because the money collected from a trustee's sale is not money owed by a consumer, it isn't 'debt' as defined by the FDCPA.").

504 The *Obduskey* Court found unambiguously that "foreclosure is a means of collecting a debt." Obduskey v. McCarthy & Holthus L.L.P., ___U.S. ___, 139 S. Ct. 1029, 1036, 203 L. Ed. 2d 390 (2019). Rejecting the contention that collection of a covered debt must come "from the debtor," the *Obduskey* Court countered, "even if nonjudicial foreclosure were not a *direct* attempt to collect a debt, because it aims to collect on a consumer's obligation by way of enforcing a security interest, it would be an *indirect* attempt to collect a debt" (emphasis in original). *Id.* at 1036–1037. *See also* Best v. Ocwen Loan Servicing, L.L.C., 279 Cal. Rptr. 3d 69, 75 (Cal. Ct. App. 2021) (*Obduskey* "effectively overruled" the lower court rulings holding that foreclosure is not "debt collection"); Benko v. Quality Loan Serv. Corp., 454 P3d 1263, 1267 n.4 (Nev. 2019) (noting that Supreme Court in *Obduskey* rejected body of Ninth Circuit law that held enforcing security interest through foreclosure was not debt collection).

505 *See* Smith v. Bank of N.Y. Mellon, 2021 WL 1788395 (W.D. Wash. May 5, 2021) (applying *Barnes* to limit FDCPA's application to Washington judicial foreclosure, noting that plaintiff presented no facts showing defendants sought deficiency and no evidence regarding

4.7.5.2.3 *Mortgage servicers, foreclosure trustees, foreclosure law firms*

Most mortgage servicers do not have foreclosures as a principal purpose. Servicers spend most of their time managing loans that are not in default, collecting timely payments, managing escrow accounts, and providing accounting services to borrowers and investors.[506] Servicers regularly file and collect on proofs of claims in bankruptcy cases where many borrowers are not in default on the mortgage loan. Some specialized servicers focus on foreclosures, and then an issue will be whether their purpose is primarily the conduct of nonjudicial foreclosures or broader activities, including loan modifications, collection of payments, and the conduct of judicial foreclosures. Servicers can be debt collectors, even though they act through attorneys or other companies in collecting debts. Principles of vicarious liability can make both a servicer that is a debt collector and its attorneys liable under the FDCPA.[507]

Courts have routinely found that the FDCPA applies to mortgage servicers' activities related to collection of payments and foreclosures.[508] Because servicers engage in such a wide range of activities, the Supreme Court's *Obduskey* ruling should not change the basic analysis that has found mortgage servicers subject to broad coverage under the FDCPA.

One significant exception to the FDCPA's general coverage of mortgage servicers comes into play when the loan was not in default when the servicer took over its servicing.[509] The FDCPA § 1692a(6)(F)(iii) exception to the "debt collector" definition is discussed extensively at § 4.8.9, *infra*. The existence of the FDCPA § 1692a(6)(F)(iii) exception is itself an indication that Congress intended full FDCPA coverage of mortgage servicers when the exception does not apply. Congressional drafters specifically expressed their intent for the FDCPA to apply to mortgage servicers that obtained their

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defendants' broader debt collection activities under primary debt collector definition). *See also* Kunin v. Lang Law, Ltd., 2021 WL 83549 (N.D. Ill. Jan. 11, 2021) (*Barnes* applied to bar FDCPA claim involving judicial replevin action to seize boat where no monetary claim raised); Rivin v. Patrick K. Willis Co., 2020 WL 8365251, at *4 (C.D. Cal. Dec. 4, 2020) (*Barnes* does not preclude § 1692f(6) claim arising from nonjudicial vehicle repossession involving breach of peace).

506 The Real Estate Settlement Procedures Act ("RESPA") defines mortgage "servicing" as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, including amounts for escrow accounts . . . and making payment to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan document or servicing contract." 12 C.F.R. § 1024.2. *See* CW Capital Asset Mgmt., L.L.C. v. Chicago Props., L.L.C., 610 F.3d 497 (7th Cir. 2010); *In re* Alcide, 450 B.R. 526 (Bankr. E.D. Pa. 2011); National Consumer Law Center, Home Foreclosures § 4.2.1 (2019), *updated at* www.nclc.org/library (general discussion of mortgage servicer's role in foreclosures).

507 Roche v. Rushmore Loan Mgmt. Services, L.L.C., 2020 WL 1452346 (S.D. Fla. Mar. 25, 2020) (vicarious liability can make servicer liable under FDCPA for communications by servicer's law firm to debtor); *In re* Bernadin, 610 B.R. 787 (Bankr. E.D. Pa 2019); Moody v. PennyMac Loan Services, L.L.C., 2019 WL 7596261 (D.N.H. Nov. 12, 2019). *See also* § 11.4.4, *infra*.

508 Wallace v. Wash. Mut. Bank, 683 F.3d 323 (6th Cir. 2012); Birster v. Am. Home Mortg. Servicing, Inc., 481 Fed. Appx. 579 (11th Cir. 2012) (servicer communicated with homeowner about payments as well as conducted foreclosure); Gburek v. Litton Loan Servicing L.P., 614 F.3d 380, 386 (7th Cir. 2010); Goldsmith v. Ocwen Fin. Corp., 2021 WL 816453, at *6 (E.D. Pa. Mar. 3, 2021) (Ocwen routinely identified itself in communications as debt collector and performed debt collection activities); Rhodeman v. Ocwen Loan Servicing, L.L.C., 2019 WL 5955368, at *15 (C.D. Cal. Nov. 12, 2019), *reconsideration denied*, 2020 WL 1698709 (C.D. Cal. Apr. 3, 2020) (refusing to dismiss § 1692e claims against servicer for demanding unauthorized inspection and loan modification fees); Roche v. Rushmore Loan Mgmt. Services, L.L.C., 2020 WL 1452346 (S.D. Fla. Mar. 25, 2020) (servicer's communications through its attorney with represented borrower violated § 1692c); Flournoy v. Rushmore Loan Mgmt. Services, L.L.C., 2020 WL 1285504, at *2 (D. Md. Mar. 17, 2020) (allowing § 1692e claim against servicer for seeking attorney fees not legitimately incurred); Moody v. PennyMac Loan Services, L.L.C., 2019 WL 7596261 (D.N.H. Nov. 12, 2019) (servicer, as principal, liable under FDCPA for actions of its agent, a law firm); Childress v. Bank of Am., 2019 WL 3767464 (E.D. Ky. Aug. 9, 2019) (allowing § 1692c(a)(2) claim against servicer for communicating with represented borrower); Weiner v. Rushmore Loan Mgmt. Services, L.L.C., 424 F. Supp. 3d 163, 167 (D. Mass. 2019) (Rushmore is "undoubtedly" a debt collector under § 1692a(6)'s primary definition because the servicer did not only participate in the foreclosure but also routinely serviced the loan); Fisher v. Seterus, Inc., 2019 WL 5865605, at *4 (D. Minn. Oct. 21, 2019), *adopted*, 2019 WL 5865449 (D. Minn. Nov. 8, 2019) (servicer routinely threatened acceleration action it did not intend to take); Werner v. Selene Fin., L.L.C., 2019 WL 1316465 (S.D.N.Y. Mar. 22, 2019) (claim stated under § 1692e based on servicer's letter demanding payment contrary to terms of modification agreement); Folkerts v. Seterus, Inc., 2019 WL 1227790 (N.D. Ill. Mar. 15, 2019) (entering summary judgment for borrower against mortgage servicer on § 1692c(a)(2) claims involving contact with represented borrower and denying servicer's summary judgment on § 1692d and § 1692e claims); Tabb v. Ocwen Loan Servicing, L.L.C., 2019 WL 1012004 (D. Del. Mar. 4, 2019) (denying motion to dismiss; servicer identified itself as "debt collector" in multiple communications to borrower), *aff'd in part, vac'd in part, remanded in part*, 798 Fed. Appx. 726 (3rd Cir. 2020); Lucas v. New Penn Fin., L.L.C., 2019 WL 404033, at *6 (D. Mass. Jan. 31, 2019) (servicer's activities in connection with loss mitigation can be debt collection under FDCPA); Odsather v. Fay Servicing, L.L.C., 2018 WL 6696688 (W.D. Wash. Dec. 20, 2018) (§ 1692e(8) violation where servicer failed to communicate borrower's dispute of deficiency debt to credit reporting companies); Bauer v. Roundpoint Mortg. Servicing Corp., 2018 WL 5388206, at *5 (N.D. Ill. Oct. 29, 2018) (allowing claim against servicer for threatening judicial foreclosure on time-barred mortgage debt); Heejoon Chung v. U.S. Bank, 250 F. Supp. 3d 658, 685 (D. Haw. 2017); McCleary v. DLJ Mortg. Capital, Inc., 2017 WL 4542054, at *15 (S.D. Ala. Oct. 11, 2017) (servicer covered when acquired servicing of loan in default); Moore v. Seterus, Inc., 2016 WL 7374651 (S.D. Ala. Dec. 16, 2016) (servicer is covered debt collector where it forecloses regularly but foreclosures not its principal business activity); Mello v. Walled Lake Credit Bur., L.L.C., 2013 WL 12077491 (S.D. Fla. Oct. 17, 2013) (servicer identified itself as debt collector in communications with borrower); Marchisio v. Carrington Mortg. Services, L.L.C., 2012 WL 12897471 (S.D. Fla. Nov. 29, 2012) (servicer registered as "debt collector" with state and engaged in debt collection activities regularly); Warren v. Wells Fargo Bank, 2015 WL 6393111 (W.D. Pa. Oct. 21, 2015); Pike v. Bank of Am., 2015 WL 3824390 (N.D. Ohio June 19, 2015); Justice v. Ocwen Loan Servicing, 2015 WL 235738 (S.D. Ohio Jan. 16, 2015). *See generally* § 7.4.11, *infra*, summarizing claims for deceptive practices involving mortgage servicing. *See* Appx. E.1.2.2.3.1, *infra*.

509 15 U.S.C. § 1692a(6)(F)(iii).

servicing rights after default: "Finally, the committee does not intend the definition to cover the activities of . . . mortgage service companies and others who service outstanding debts for others, *so long as the debts were not in default when taken for servicing. . . .*"[510]

Under another but less frequently applicable exception, servicers may also be exempted from FDCPA coverage when a servicer owns the loan that it services, often referred to as an "in portfolio" loan. In such a case, the servicer may argue that it is the "creditor,"[511] and not a debt collector. More often, though, the mortgage servicer is collecting on loans originated and owned by an unrelated entity. In case of uncertainty, advocates should confirm the identity of a loan's owner before bringing an FDCPA claim against a mortgage servicer. The Request for Information procedures available under the RESPA rules authorize the borrower to address an inquiry about ownership of the loan to a mortgage servicer.[512]

In certain nonjudicial foreclosures states, the security instrument designates a third-party trustee to conduct a public sale of the property in the event the borrower defaults, acting fairly toward both the lender and borrower. When the loan is headed to foreclosure, the lender typically "substitutes" a new entity to act as trustee—a company that deals exclusively with the conduct of foreclosure sales, a foreclosure law firm, or, in Colorado, a government official. The substitute trustee records foreclosure notices as required by state law and conducts the sale. The trustee communicates information about the sale to the borrower, and, depending upon local law, may perform a range of other functions that involve communications with the homeowner about the debt. Much litigation about the application of the limited-purpose definition relates to these substitute foreclosure trustees,[513] and the issue will be whether the activities in question involve necessary steps for a nonjudicial foreclosure.[514]

Prior to *Obduskey,* courts of appeals often found that law firms conducting foreclosures were debt collectors subject to the FDCPA.[515] Lower courts routinely made similar findings.[516]

510 S. Rep. No. 95-382, at 3–4 (Aug. 2, 1977) (emphasis added), *available at* Appx. A.3, *infra.*

511 The term "creditor" is defined in 15 U.S.C. § 1692a(4).

512 12 C.F.R. § 1024.36. *See* National Consumer Law Center, Mortgage Servicing and Loan Modifications § 3.3.4 (2019), *updated at* www.nclc.org/library.

513 *See, e.g.,* Ho v. ReconTrust Co., 858 F.3d 568, 573 n.5 (9th Cir. 2017) ("a trustee of a deed of trust might become a 'debt collector' under the general definition if he did something *in addition* to the actions required to enforce a security interest" (emphasis in original)); Jones v. Bank of Am., 2019 WL 3017612, at *6 (D. Ariz. July 10, 2019) (following *Obduskey,* foreclosure trustee not debt collector under primary definition); Sevela v. Kozeny & McCubbin, L.C. 2019 WL 2066924 (D. Neb. May 2, 2019) (primary definition applies to trustee because collection letter not part of the process to enforce the security interest); Fitzgerald v. Bosco Credit, L.L.C., 2016 WL 3844333 (N.D. Cal. July 15, 2016) (trustee carrying out trustee duties not debt collector), *subsequent decision,* 2017 WL 3602482 (N.D. Cal. Aug. 21, 2017); Trotter v. Bayview Loan Serv., 2015 WL 8966926 (D. Idaho Dec. 15, 2015); Wagner v. Nat'l Default Servicing Corp., 2015 WL 3626506 (D. Nev. June 10, 2015); Long v. Wells Fargo Bank, 2015 WL 1268279 (D. Utah Mar. 19, 2015); Natividad v. Wells Fargo Bank, 2013 WL 2299601 (N.D. Cal. May 24, 2013) (notice of default was communication required by law to enforce security interest); Von Brincken v. GMAC Mortg., 2013 WL 322909 (E.D. Cal. Jan. 25, 2013); Reynolds v. Homecomings Fin. Network, Inc. 2013 WL 315221 (D. Nev. Jan. 25, 2013), *aff'd,* 599 Fed. Appx. 802 (9th Cir. 2015); Zinni v. Jackson White, P.C., 2012 WL 869008 (D. Ariz. Mar. 14, 2012); Duran v. Aurora Loan Serv., 2009 WL 230985 (E.D. Cal. Jan. 30, 2009); Fong v. Prof'l Foreclosure Corp., 2005 WL 3134059 (W.D. Wash. Nov. 22, 2005). *See also* Burnett v. Mortg. Elec. Registration Sys., Inc., 706 F.3d 1231, 1236 (10th Cir. 2013) (trustee under deed of trust is covered as one in a "business the principal purpose of which is the enforcement of security interests," referencing 15 U.S.C. § 1692a(6)); Ruffner v. Quality Loan Serv. Corp. of Washington, 2021 WL 1414205, at *4 (D. Or. Apr. 12, 2021) (possible § 1692f(6) claim against trustee for conducting nonjudicial foreclosure without authority to enforce note); White v. U.S. Bank, 2018 WL 4431416 (W.D. Tenn. Sept. 14, 2018) (foreclosure trustee violates § 1692f(6) by conducting sale while borrower's application for loss mitigation was pending); Memmott v. OneWest Bank, 2011 WL 1560985 (D. Or. Feb. 9, 2011), *adopted as modified by* 2011 WL 1559298 (D. Or. Apr. 25, 2011) (notice of default an action taken in actual pursuit of foreclosure).

514 *See* § 4.7.5.3, *infra.*

515 In re Holyfield, 740 Fed. Appx. 695, 697–698 (11th Cir. 2018) (law firm was debt collector based on complaint's averment that firm appeared frequently on docket in foreclosure cases in local courts); Carlin v. Davidson Fink L.L.P., 852 F.3d 207 (2d Cir. 2017) (foreclosure firm's § 1692g letter gave vague and misleading information about amounts owed and dates due); McCray v. Fed. Home Loan Mortg. Corp., 839 F.3d 354 (4th Cir. 2016) (foreclosure attorneys subject to FDCPA in providing cure statement and sending § 1692e(11) notice; rejecting § 1692a(6)(F)(i) fiduciary exception); Kaymark v. Bank of Am., 783 F.3d 168 (3d Cir. 2015) (foreclosure firm's communication in form of complaint for judicial foreclosure could be basis for FDCPA claim); Mellentine v. Ameriquest Mortg. Co., 515 Fed. Appx. 419 (6th Cir. 2013) (law firm's status as debt collector was sufficiently alleged where firm (1) "held itself out as a debt collector," (2) worked on behalf of company to whom plaintiffs owed debt, (3) specialized in foreclosures, and (4) had specific information regarding their mortgage debt); Reese v. Ellis, Painter, Ratterree & Adams, L.L.P., 678 F.3d 1211 (11th Cir. 2012) (foreclosure firm was debt collector as it demanded payment of balance of note secured by security deed and repeatedly stated that it was debt collector); Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006) (attorney foreclosing on manufactured home subject to FDCPA in failing to provide notice of debt verification rights). *See also* McNair v. Maxwell & Morgan P.C., 893 F.3d 680 (9th Cir. 2018) (foreclosure law firm conducting judicial foreclosure under Arizona law subject to FDCPA for seeking fees to which not entitled); Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984 (9th Cir. 2017) (overdue assessment to homeowner's association was debt and law firm attempting to collect it was debt collector). *See generally* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) (law firm did not dispute FDCPA applied to its § 1692g debt verification rights notice sent in connection with foreclosure lawsuit).

516 Smith Carbone v. Gross Polowy L.L.C., 2019 WL 1114899 (E.D.N.Y. Mar. 11, 2019) (FDCPA violation where foreclosure attorney sent mortgagor letter offering loan modification as alternative to foreclosure and suggesting foreclosure had commenced when it had not); Mansoorian v. Brock & Scott, P.L.L.C., 2018 WL 6413484, at *2–3 (M.D. Fla. Dec. 6, 2018) (allowing claims that foreclosure firm's letters violated § 1692e and § 1692f by including sums for unauthorized fees); Johnson v. Fay Servicing, L.L.C., 2018 WL 5262078, at *10–11 (N.D. Ga. July 2, 2018) (*pro se* plaintiff's allegations that foreclosure firm mailed thousands of demands for payment, regularly enforced deficiency claims, and sent plaintiff form notices that characterized firm as debt collector satisfied "debt collector" pleading requirement), *adopted,* 2018 WL

Unless the law firm has enforcement of security interests as its principal purpose and the actions in question were required to conduct a nonjudicial foreclosure, *Obduskey* does not affect the law firm's debt collector status.[517] Law firms and attorneys can be debt collectors in connection with pleadings and other documents filed with judicial foreclosure proceedings.[518]

4.7.5.2.4 Evidence of purposes beyond security enforcement

One source to show that a law firm or other entity's purpose is broader than enforcement of a security interest is the person's website that may flaunt a broad range of activities.[519] Information on a law firm's broad range of activities (including judicial foreclosures) also can be found on court docket entries, Westlaw or Lexis.[520] A servicer's annual reports and other regulatory filings may give a more accurate picture of the scope of the company's business than its assertions in litigation.

Publicly available information may show that relatively few cases in which a law firm or servicer initiates a foreclosure end with a foreclosure sale. In a large portion of cases, the firm or servicer likely plays a role in effectuating cures, settlements, and other alternatives to a foreclosure sale, all of which constitute regular debt collection activity. A very small portion of the entity's time may be spent carrying out the mechanical tasks required by state law to conduct a nonjudicial foreclosure sale.

Discovery can reveal the portion of the company's overall work devoted to foreclosures, and, of that portion, the breakdown of time spent conducting a nonjudicial foreclosure proceeding compared to other collection activities related to mortgage debt. Seek details of a company's role in collecting overdue mortgage payments and in communications with borrowers about payment of their loans. A law firm's retainer agreements also may provide useful information.

4.7.5.3 *Obduskey* Ruling Limited to Steps Required to Enforce Security Interest

4.7.5.3.1 Introduction

In its short decision, *Obduskey* explicitly states no fewer than four times that its holding is that the FDCPA does not generally apply where collectors "are engaged in no more than security-interest enforcement."[521] The Court based its ruling on the case before it on the assumption that the foreclosure law firm's challenged conduct in the case was "required under state law."[522] "The only basis alleged for concluding that [the

5262049 (N.D. Ga. Sept. 19, 2018); Scott v. Albertelli Law Partners, L.L.C., 2018 WL 3730892 (S.D. Fla. June 27, 2018) (attorneys' work in the context of foreclosure litigation is debt collection for FDCPA purposes, allowing claims to proceed for failing to cease collection after § 1692g letter), *adopted*, 2018 WL 5098837 (S.D. Fla. Aug. 27, 2018); Crosby v. Brock & Scott, P.L.L.C., 2018 WL 2027735 (M.D. Ga. May 1, 2018) (rejecting foreclosure law firm's claim that it was only enforcing security interest where firm's letter to debtor could be viewed as effort to collect debt); Strader v. U.S. Bank, 2018 WL 741425 (W.D. Pa. Feb. 7, 2018) (FDCPA applies to foreclosure attorneys, rejecting defense of common law litigation privilege); Amesbury v. Baker, Braverman & Barbadoro, P.C., 252 F. Supp. 3d 125 (D. R.I. May 10, 2017) (foreclosure law firm sending out demand letters can be debt collectors); Visceglie v. Seterus, Inc., 2017 WL 4862230 (M.D. Fla. Apr. 27, 2017) (allowing claims against law firm for falsely certifying foreclosing plaintiff's authority to foreclose); Hoffman v. Phelan Hallinan, L.L.P., 2016 WL 4089163 (E.D. Pa. Aug. 2, 2016) (FDCPA covers attorneys engaged in debt collection litigation, and foreclosure qualifies as debt collection); Hall v. MLG, P.A., 981 F. Supp. 2d 1267 (S.D. Fla. 2013); Graveling v. BankUnited, 970 F. Supp. 2d 12431 (N.D. Ala. 2013); Everett v. Shaheen, Jacobs & Ross, P.C., 2011 WL 4837510 (E.D. Mich. Sept. 27, 2011) (foreclosing attorney who sent a demand for payment was within FDCPA), *adopted*, 2011 WL 4837317 (E.D. Mich. Oct. 12, 2011); Malowney v. Zacur, Graham & Costis, P.A., 2011 WL 1655572 (M.D. Fla. May 2, 2011) (foreclosure attorneys' fee demands subjected them to FDCPA claims beyond those under § 1692f(6)); Pettway v. Harmon Law Offices, P.C., 2005 WL 2365331 (D. Mass. Sept. 27, 2005) (foreclosure firm acted as debt collector when it solicited borrowers to pay off underlying mortgages). *See also* State *ex rel.* Coffman v. Robert J. Hopp & Assoc., 422 P.3d 617 (Colo. App. 2018) (foreclosure firm violated Colorado Fair Debt Collection Practices Act by assessing unauthorized foreclosure costs to borrowers' accounts).

517 Williams v. Partners for Payment Relief Inc., 2020 WL 973753 (N.D. Ohio Feb. 28, 2020) (allowing FDCPA claim against law firm that filed foreclosure complaint for a plaintiff that did not have authority to foreclose); Gary v. Hladik Onorato & Federman, L.L.P., 2020 WL 871330 (W.D. Pa. Feb. 21, 2020) (allowing § 1692e claim against foreclosure law firm that filed complaint for recovery of interest amounts not authorized under state licensing law); Berg v. McCalla Raymer Leibert Pierce, L.L.C., 2019 WL 5592720, at *4 (N.D. Ill. Oct. 30, 2019) (*Obduskey* did not affect existing law subjecting law firms that conduct judicial foreclosures to full FDCPA liability); Smith v. Bank of N.Y. Mellon, 2019 WL 2994695 (W.D. Wash. July 9, 2019) (foreclosure law firm violated FDCPA in filing time-barred judicial foreclosure complaint); Tevere v. Weltman, Weinberg & Reis, Co., L.P.A., 2019 WL 2341389 (N.D. Ill. June 3, 2019) (summary judgment against foreclosure firm under §§ 1692e, 1692f for repeat filing of same claim contrary to state law).

518 Speights-Carnegie v. Blackstone Condo. Ass'n, 2018 WL 1519158 (N.D. Ill. Mar. 28, 2018) (improper claims for attorney fees, repair costs, and late charges asserted in state court condominium foreclosure pleadings were false representations in violation of § 1692e(2)); Machles v. McCabe, Weisberg & Conway, P.C., 2017 WL 5172516 (E.D. Pa. Nov. 7, 2017) (attorneys' false statements in pleadings, including in affirmative defenses, going to authority to foreclose and service of statutory notice were material and had potential to confuse borrower about status of loan). *See also* Randall v. Paul, 897 N.W.2d 842 (Minn. Ct. App. 2017) (debt collector attorney can comply with both state statute on enforcing mechanic's liens and FDCPA).

519 *See, e.g.*, Brown v. Wells Fargo Bank, 2020 WL 89694, at *3 (N.D. Iowa Jan. 7, 2020) (firm's website states firm specializes in third-party collections); Hunter v. Wash. Mut. Bank, 2010 WL 2507038 (E.D. Tenn. June 16, 2010) (considering firm's website description of its work and self-identification as debt collector in its communications with borrower).

520 In re Holyfield, 740 Fed Appx. 695, 697–698 (11th Cir. 2018) (firm appeared frequently on the docket in foreclosure cases). *See also* Brown v. Shapiro & Kreisman, L.L.C., 2021 WL 2763854, at *3 (S.D. Tex. Apr. 27, 2021) (summary judgment in favor of defendant law firm improper where disputed facts raised as to nature of firm's activities, including involvement in judicial and nonjudicial foreclosures).

521 Obduskey v. McCarthy & Holthus L.L.P., 139 S. Ct. 1029 at 1033, 1037, 1040, 203 L. Ed. 2d 390 (2019).

522 *Id.* at 1039. Based on the parties' arguments, the *Obduskey* Court incorrectly assumed that the defendant law firm's initial communication with the borrower (an attempt to comply with FDCPA § 1692g)

law firm] is a debt collector under the Act is its role in nonjudicial foreclosure proceedings."[523]

The Court went on to limit its holding:

> This is not to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls; enforcing a security interest does not grant an actor blanket immunity from the Act. But given that we here confront only steps required by state law, we need not consider what *other* conduct (related to, but not required for, enforcement of a security interest) might transform a security-interest enforcer into a debt collector subject to the main coverage of the Act.[524]

Consequently, a collector whose principal purpose is enforcement of a security interest and who does no more than follow "only steps required by state law" for such enforcement escapes liability for FDCPA provisions other than those in section 1692f(6). A collector may be subject to the complete Act when it engages in other conduct that state law does not require as necessary steps to enforce a security interest.[525]

This limitation is significant because under most states' mortgage foreclosure laws, only a few discrete actions are required to conduct a nonjudicial foreclosure. Typically, a state statute requires that a foreclosing party first record and serve some type of notice of default.[526] The foreclosing party must then serve, advertise, and sometimes post notice of the foreclosure auction.[527] Other requirements focus on the conduct of the sale itself, the bidding process, and conveyance of title to a buyer. All other acts and communications in connection with collection of the mortgage debt fall outside the limitation prescribed by the Supreme Court.

The record in *Obduskey* is quite unusual, where the Court assumed that the foreclosure law firm in the case took no actions in connection with collection of the mortgage debt other than those required by state law to enforce the security interest. In a typical foreclosure, the foreclosure firm communicates frequently with mortgagors in default, both in writing and verbally. Law firms respond to mortgagors' inquiries, communicate about loss mitigation, request payments, and provide information about the extent of the debt.

Post *Obduskey*, where the consumer alleges that the challenged conduct is not required by state law,[528] courts consistently find persons whose principal purpose is security interest enforcement are still subject to the FDCPA's full scope.[529] For

was a notice required under state foreclosure law. The § 1692g debt collector initial contact letter is mandated by the FDCPA and is not a necessary step in any state's foreclosure law. Post-*Obduskey*, courts made aware of this distinction have allowed debtors to proceed with claims asserting violations of § 1692g by parties that proceeded with a nonjudicial foreclosure contrary to the FDCPA's debt validation protections. Best v. Fed. Nat'l Mortg. Ass'n, 450 F. Supp. 3d 606, 633 (D. Md. 2020) (trustee had obligation to respond to verification request before proceeding to serve notices of foreclosure sale under state law); Sciortino Bankruptcy Estate v. Shapiro Pendergast & Hasty, L.L.P., 2019 WL 7496253 at *5 (N.D. Ga Nov. 27, 2019), *adopted*, 2019 WL 7493533 (N.D. Ga. Dec. 17, 2019); Sevela v. Kozeny & McCubbin, L.C. 2019 WL 2066924 (D. Neb. May 2, 2019). *See also* Brown v. Wells Fargo Bank, 2020 WL 89694, at *3 (N.D. Iowa Jan. 7, 2020) (allowing § 1692g overshadowing claim in context of judicial foreclosure).

523 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1038, 203 L. Ed. 2d 390 (2019).

524 *Id.* at 1039, 1040.

525 *See* Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2017); Gagnon v. Hal P. Gazaway & Assoc., 2019 WL 4539926, at *2 (D. Alaska Sept. 19, 2019 (*Obduskey* "makes clear that the requirement of state law was central to its holding that the letter at issue there did not subject the law firm to the full range of the FDCPA"); Eastman v. NPL Capital, L.L.C., 2019 WL 1596142, at *3 (D. Colo. Apr. 15, 2019) (post-*Obduskey* decision granting leave to amend complaint to specify that debt collector's actions were outside requirements to foreclose under Colorado law, court noting, "I am doubtful that repeated phone calls and communications with a homeowner's parents are required to pursue a nonjudicial foreclosure under Colorado state law"); Moody v. PennyMac Loan Services, L.L.C., 2019 WL 7596261 (D.N.H. Nov. 12, 2019) (distinguishing *Obduskey* where challenged conduct involved servicer's efforts to collect deficiency six months after foreclosure).

526 *See* National Consumer Law Center, Home Foreclosures Appx. E (2019), *updated at* www.nclc.org/library (describing steps necessary to foreclose under law of each state).

527 *See* National Consumer Law Center, Home Foreclosures § 5.5 (2019), *updated at* www.nclc.org/library (discussing various types of notices required under state foreclosure laws). *See* Heagerty v. AMIP Mgmt., L.L.C., 2021 WL 2587720 (N.D. Ga. Apr. 20, 2021) (mag.; applying *Obduskey* to limit FDCPA coverage, two notices of sale sent by law firm were required by state nonjudicial foreclosure statutes).

528 *See* Bates v. Green Farms Condo. Ass'n, 958 F.3d 470, 482–483 (6th Cir. 2020) (complaint did not specifically aver that defendants' actions fell outside scope of required foreclosure procedures).

529 Brown v. Shapiro & Kreisman, L.L.C., 2021 WL 2763854, at *3 (S.D. Tex. Apr. 27, 2021) (denying summary judgment to law firm where it conceded that letters it sent to plaintiff were not required by Missouri law as part of state's foreclosure procedure); Walker v. Hill, 2021 WL 1062238, at *12 (E.D. Va. Mar. 19, 2021) (law firm engaged in variety of servicing activities with respect to debtor's loan before initiating Virginia nonjudicial foreclosure, precluding *Obduskey* limits); Hullett v. Plunkett Cooney P.C., 2020 WL 2176880, at *4 (W.D. Mich. Mar. 16, 2020) (law firm's validation letter containing demands for payment not a requirement to foreclose under state law); Brown v. Wells Fargo Bank, 2020 WL 89694, at *5 (N.D. Iowa Jan. 7, 2020) (law firm's demand for payment sent prior to initiation of foreclosure was not a "necessary antecedent step" to foreclose under Iowa law); Woodard v. Bank of N.Y. Mellon, 2020 WL 61038, at *8 (D. Or. Jan. 6, 2020) (allegation that foreclosure firm violated FDCPA by not responding to validation letter and sending letter of intent to proceed with foreclosure sale did not describe acts required under Oregon law to foreclose); Best v. Fed. Nat'l Mortg. Ass'n, 450 F. Supp. 3d 606, 629–639 (D. Md. 2020) (threatening foreclosure before permitted by state law); Beane v. RPW Legal Services, P.L.L.C., 378 F. Supp. 3d 948 (W.D. Wash. 2019) (allowing claims under §§ 1692e(11) and 1692(g) against attorney representing condo association for not identifying himself as debt collector and not specifying amount owed); Sciortino Bankruptcy Estate v. Shapiro Pendergast & Hasty, L.L.P., 2019 WL 7496253, at *5 (N.D. Ga Nov. 27, 2019), *adopted*, 2019 WL 7493533 (N.D. Ga. Dec. 17, 2019) (law firm's initial communication validation notice under § 1692g not a requirement of state foreclosure law); Moody v. PennyMac Loan Services, L.L.C., 2019 WL 7596261 (D.N.H. Nov. 12, 2019) (actions to collect a deficiency six months after foreclosure not necessary to enforce security interest); Gagnon v. Hal P. Gazaway and Assoc., L.L.C., 2019 WL 4539926 (D. Alaska Sept. 19, 2019) (law firm subject to broad FDCPA coverage where violative notice at issue was not required step in Alaska nonjudicial foreclosure process); Cooke v. Carrington Mortg. Services, 2019 WL 3241128, at *2 (D. Md. July 17, 2019) (borrower's claims involve "a variety of conduct

example, this includes a foreclosure trustee sending a notice required by state law, but the notice also threatened a foreclosure sale before a date when the sale could take place under state law.[530] Another example involves a mortgage servicer's attempt to collect an inflated amount, threatening to foreclose without intending to do so, and contacting the borrower's parents in order to further debt collection.[531]

The full scope of the FDCPA should apply when content is added to a statutory notice or modifies the substance of a required text.[532] Omission of required information from a statutory notice can create similar problems. Under many state laws, a defective notice may render a foreclosure sale voidable, or even void.[533]

beyond standard procedures in a nonjudicial foreclosure, including contradicting her right to dispute the debt, collecting or threatening to collect an inflated mortgage reinstatement amount, threatening to foreclose on her property before it was permitted by law, and misrepresenting its compliance with the terms of the deed of trust."); Sevela v. Kozeny & McCubbin, L.C. 2019 WL 2066924, at *4 (D. Neb. May 2, 2019) (distinguishing *Obduskey*, finding that foreclosure law firm violates § 1692g by sending defective notice of validation rights, as letter "was not required by Nebraska nonjudicial foreclosure law and went beyond providing FDCPA disclosures by misstating who could assume the debt valid if not disputed within thirty days"); Eastman v. NPL Capital, L.L.C., 2019 WL 1596142 (D. Colo. Apr. 15, 2019) (seeking inflated amount and threatening to foreclosure with intent to do so). *But see* Garland v. Orlans P.C., 2020 WL 2542036 (E.D. Mich. May 19, 2020), *aff'd on other grounds*, 999 F.3d 432 (6th Cir. 2021) (ignoring *Obduskey's* limitation to acts required to foreclose); Harris v. NewRez, L.L.C., 2019 WL 3254800 (W.D. Tenn. July 19, 2019) (treating facts alleged as identical to *Obduskey*, dismissing FDCPA claim alleging law firm proceeded to initiate nonjudicial foreclosure without complying with § 1692g); Nguyen v Fed. Home Loan Mortg. Corp., 2019 WL 6887206 (D. Or. Nov. 21, 2019), *adopted*, 2019 WL 6879732 (D. Or. Dec. 17, 2019) (dismissing § 1692e claim against undefined mix of defendants carrying out nonjudicial foreclosure, no discussion of whether acts in question were required to foreclose under state law).

530 Best v. Fed. Nat'l Mortg. Ass'n, 450 F. Supp. 3d 606, 629–630 (D. Md. 2020); Cooke v. Carrington Mortg. Services, 2019 WL 3241128 (D. Md. July 17, 2019).

531 Eastman v. NPL Capital, L.L.C., 2019 WL 1596142 (D. Colo. Apr. 15, 2019).

532 Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340, at *1 (E.D. Mich. Nov. 2, 2017) ("[plaintiffs] allege that the information in the foreclosure notice went beyond he requirements of the Michigan Foreclosure Statute, in violation of the FDCPA and the RCPA [the Michigan Collection Practices Act]"); Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798, 810 811 (E.D. Mich. Aug. 14, 2017) ("[plaintiffs'] claims concern information *not* required under the Michigan statute"; "plaintiffs have stated a plausible theory that the defendant abused Michigan's foreclosure-by-advertisement statute by including extra information as a means to publicly disseminate private facts about the plaintiffs' indebtedness to shame them into paying"); Salewske v. Trott & Trott P.C., 2017 WL 2888998, at *7 (E.D. Mich. July 7, 2017) (debt collectors could not add whatever content they wished, no matter how abusive, false, or misleading, to a notice authorized by a state statute and claim a "complete defense to FDCPA liability"). *But see* Brian v. Gislason & Hunter L.L.P., 2021 WL 101132, *2 (D. Minn. Jan. 12, 2021) (rejecting two claims of § 1692e violations where notices sent to third parties were required by state foreclosure statute).

533 *See* National Consumer Law Center, Home Foreclosures § 5.5.2.6 (2019), *updated at* www.nclc.org/library.

4.7.5.3.2 *Conduct only* related to *required steps to enforce a security interest*

Prior to *Obduskey*, certain courts limited the FDCPA's applicability to section 1692f(6) even where a person whose principal purpose of nonjudicial foreclosures engaged in any conduct related to or in some way furthering a foreclosure, and not just required by state law.[534] This view is no longer viable after *Obduskey*.[535]

The *Obduskey* Court was concerned with the FDCPA's application where it would interfere with nonjudicial foreclosure sales in cases where the only thing the debt collector did was attempt to comply in good faith with the steps required to foreclose under state law.[536] Sweeping into the limited-purpose exception all debt collection activities that are merely "related to" a mortgage debt does not implicate this concern over federal interference with core state foreclosure procedures.[537] Where conduct is not required by state law, debt collectors can avoid FDCPA liability and still comply with state law by, for example, keeping false and misleading content out of their notices.[538]

Moreover, the "related to" standard is overly vague. The steps required to conduct a foreclosure sale under state law are set out in statutes and are well-defined by decades of case law. On the other hand, "related to" a mortgage debt or foreclosure is vague and overly expansive.

Obduskey can be read as explicitly rejecting the "related standard." The Court pointed out that an attorney who made

534 *See, e.g.*, McNamara v. Wells Fargo Bank, 2018 WL 6137599, at *4 (C.D. Cal. May 22, 2018) ("actions taken to facilitate a nonjudicial foreclosure sale do not constitute 'debt collection' within the meaning of the FDCPA"); Bushlow v. MTC Fin., 2018 WL 1745803, at *5 (N.D. Cal. Apr. 11, 2018) (defendant "just engaging in the normal work of a trustee"), *aff'd*, 771 Fed. Appx. 375 (9th Cir. 2019); Manos v. MTC Fin., 2017 WL 8236356, at *5 (C.D. Cal. Dec. 21, 2017) (all allegations concerning trustee and servicer "concern actions taken to facilitate foreclosure, not collect a debt"; all communications were related to default and foreclosure); Arias v. Select Portfolio Serv., 2017 WL 6447890, at *6 (E.D. Cal. Dec. 18, 2017) (all servicer's communications were limited to foreclosure process); Bybee v. Bank of Am., 2017 WL 4322392 (D. Mont. Sept. 28, 2017) (RESPA notices were communications related to enforcement of security interest); Martinez v. Trinity Fin. Services, L.L.C., 2017 WL 4071386, at *4–5 (N.D. Cal. Sept. 14, 2017) (none of the consumer's allegations about trustee's conduct, including demand for inflated fees, "were unrelated to the foreclosure").

535 *See* § 4.7.5.3.1, *supra*.

536 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1037 1038, 203 L. Ed. 2d 390_ (2019). *See also* Ho v. ReconTrust Co., 858 F.3d 568, 576 (9th Cir. 2017) (expressing concern over FDCPA conflicts with core state foreclosure laws).

537 *See* Eastman v. NLP Capital, L.L.C., 2019 WL 1596142, at *2 (D. Colo. Apr. 15, 2019) (the *Obduskey* Court's concern over potential conflicts with state law "becomes less relevant where the security-interest holder is not attempting to pursue a nonjudicial foreclosure but only threatening foreclosure without taking any steps toward such in order to collect a debt").

538 *See, e.g.*, Ellison v. Fullett Rosenlund Anderson P.C., 347 F. Supp. 3d 370, 380–381 (N.D. Ill. 2018) (rejecting law firm's conflict arguments, finding state law foreclosure requirements can be met without violating FDCPA).

repeated nighttime calls to a borrower while pursuing a nonjudicial foreclosure would be subject to the full range of FDCPA liability.[539] These nighttime calls are "related to" enforcement of a security interest, but the Court acknowledged that the FDCPA's full scope would apply.

This view that the limited-purpose exception applies only to "required" conduct is consistent with the case law prior to *Obduskey*. Courts that treated the principal purpose definition as overriding the general definition limited that holding to conduct required by state law.[540] Even courts that treated foreclosures as always subject to broad FDCPA coverage often pointed to conduct beyond the requirements to foreclose as an alternative basis to reject a defendant's claim to exclusion from the general definition.[541]

4.7.5.4 Pleading Tips to Avoid the *Obduskey* Limited-Purpose Loophole

Careful pleading can avoid much of *Obduskey's* potential impact. *Obduskey* arose from a motion to dismiss a complaint, and the decision was grounded on assumed facts that are unlikely ever to coalesce in the circumstances giving rise to an FDCPA claim. The Court assumed as true the fact that the law firm in question had conduct of nonjudicial foreclosures as its principal purpose. Then the Court assumed that the firm's notices and other communications with the debtor were all required steps in the conduct of a nonjudicial foreclosure under Colorado law.[542]

539 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1039, 203 L. Ed. 2d 390 (2019).

540 Ho v. ReconTrust Co., 858 F.3d 568, 573 n.5 (9th Cir. 2017) ("a trustee of a deed of trust might become a 'debt collector' under the general definition if he did something *in addition* to the actions required to enforce a security interest" (emphasis in original), *aff'd*, 139 S. Ct. 1029 (2019); Crosby v. Brock & Scott, P.L.L.C., 2018 WL 2027735 (M.D. Ga. May 1, 2018) (rejecting claim of law firm threatening nonjudicial foreclosure that it was only enforcing security interest where firm's letter to debtor could be viewed as effort to collect debt); Williams v. Select Portfolio Servicing, Inc., 2016 WL 9450471 (N.D. Ga. Aug. 11, 2016), *adopted*, 2016 WL 9455375 (N.D. Ga. Sept. 14, 2016) (rejecting servicer claim that it engaged solely in *in rem* foreclosure activities when it had sent borrower letter unconditionally demanding payment); Williams v. Bayview Loan Servicing, L.L.C., 2016 WL 8711209 (E.D.N.Y. Jan. 22, 2016) (incorrectly suggesting New York foreclosure not debt collection, but refusing to dismiss FDCPA claim asserting servicer sent borrower demand for payment before initiating a foreclosure); Bailin v. Select Portfolio Servicing, Inc., 2015 WL 4711113 (D. Nev. Aug. 7, 2015) (denying dismissal of § 1692(d)(5) claims; claims were not premised upon mortgage servicer's foreclosure but, rather, upon repeated telephone calls in connection with collection of the note); Lohse v. Nationstar Mortg., 2014 WL 5358966 (N.D. Cal. Oct. 20, 2014) (homeowners' claim was based upon the servicer's failure to report to credit reporting agencies that debt was disputed after receiving what homeowners described as a "validation of debt" letter; did not involve any statutorily mandated communication for nonjudicial foreclosure); Anderson v. Bank of Am., 2014 WL 4631222 (D. Or. Sept. 12, 2014); Reyes-Aguilar v. Bank of Am., 2014 WL 2153792 (N.D. Cal. Mar. 20, 2014); Memmott v. OneWest Reg'l Bank, 2014 WL 715441 (D. Or. Feb. 21, 2014) (denying mortgage servicer's motion to dismiss where it allegedly resumed foreclosure after it terminated the HAMP agreement with which the homeowner had been complying; homeowner alleged an "attempt at debt collection [that] is not 'necessary to effectuate foreclosure'" and that was therefore not protected by even the *Hulse* decision); Natividad v. Wells Fargo Bank, 2013 WL 2299601 (N.D. Cal. May 24, 2013).

541 Reese v. Ellis, Painter, Ratterree & Adams, L.L.P., 678 F.3d 1211 (11th Cir. 2012); Gburek v. Litton Loan Servicing L.P., 614 F.3d 380, 386 (7th Cir. 2010); Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006); Caprel v. Specialized Loan Servicing, Inc., 2016 WL 4678313 (N.D. Ill. Sept. 7, 2016) (servicer's solicitation for loan modification was action to collect money); Luna v. Bank of Am., 2015 WL 11120875 (N.D. Tex. Nov. 9, 2015) (in finding assignee of mortgage regularly collects monetary debts, court looks to creditor's business generally and not just its activities directed to individual plaintiff), *adopted*, 2016 WL 158128 (N.D. Tex. Jan. 12, 2016); Parker v. CitiMortg., Inc., 2014 WL 12577116 (M.D. Fla. July 10, 2014) (motion and affidavit filed by servicer in state court foreclosure action were communications made to collect a debt); McFadden v. Fla. Foreclosure Attorneys P.L.L.C., 2014 WL 12623693 (M.D. Fla. July 7, 2014) (foreclosure firm attorneys used letters that stated they were attempts to collect a debt and provided a balance due); Donnelly-Tovar v. Select Portfolio Servicing, Inc., 945 F. Supp. 2d 1037, 1048 (D. Neb. 2013) (rejecting argument that collecting was not involved since the consumer did not owe the debt discharged in bankruptcy and the debt buyer was only enforcing a mortgage lien; "If the letter is not an attempt to collect a debt, then it can only be an attempt to defraud or extort money from a person with no obligation to pay it or solicitation of a gift. A disclaimer stating that the letter is not an attempt to collect a debt,' does not make that true."); Moore v. Mortg. Elec. Registration Sys., Inc., 848 F. Supp. 2d 107, 125 (D.N.H. 2012) (defendant law firm was in fact collecting on the underlying debt when it "informed [the homeowners] that their note had been accelerated 'and the entire balance [of $493,555.36] is due and payable forthwith and without further notice'" and because the complaint "supports a plausible inference that [the firm's] foreclosure activities were at least intermingled (if not coextensive) with its more mainstream collection activities"); Hagy v. Demers & Adams, L.L.C., 2011 WL 6091797 (S.D. Ohio Dec. 7, 2011) (claim was stated under §§ 1692d, 1692e, and 1692f where it was alleged that the debt collector represented that it would not seek a deficiency if the consumer gave it a deed in lieu of foreclosure and then sought the deficiency); Robinson v. BAC Home Loan Serv., L.P., 2011 WL 2490601 (S.D. Tex. June 21, 2011) (foreclosure attorneys subject to FDCPA claims beyond § 1692f(6) because of their fees demands); Malowney v. Zacur, Graham & Costis, P.A., 2011 WL 1655572 (M.D. Fla. May 2, 2011) (foreclosure attorneys' fees demands triggered broad FDCPA coverage); *In re* Robinson, 2011 WL 832857 (Bankr. E.D. Va. Mar. 3, 2011) (holding creditor in contempt because once it was granted relief from automatic stay to pursue *in rem* foreclosure alone, bank served a complaint that "made the debtor a defendant in a way that would appear to most debtors—and certainly to the least sophisticated debtor—as seeking a money judgment against her"); Carter v. Deutsche Bank Nat'l Tr. Co., 2010 WL 1875718 (N.D. Cal. May 7, 2010); Pettway v. Harmon Law Offices, P.C., 2005 WL 2365331, at *5 (D. Mass. Sept. 27, 2005) ("Harmon acted as a debt collector when it solicited borrowers to pay off the underlying mortgages"; fact that it was also pursuing foreclosure did not insulate it from FDCPA liability); Ray v. Int'l Bank, Inc., 2005 WL 2305017 (D. Colo. Sept. 21, 2005) (where foreclosure sale resulted in payment of money, foreclosing attorney covered by FDCPA). Walker v. Quality Loan Serv. Corp., 308 P.3d 716 (Wash. Ct. App. Aug. 5, 2013). *See also* Adams v. Albertelli, 2016 WL 931103 (M.D. Fla. Mar. 11, 2016) (denying dismissal to foreclosure attorneys alleged to have violated the FDCPA by trying to secure a deficiency judgment on reverse mortgage that provided homeowners were not liable for any deficiency, as seeking deficiency was debt collection).

542 One of the communications at issue in *Obduskey* was an FDCPA validation letter that the law firm sent to the debtor. This was clearly not a required step to conduct a foreclosure under Colorado law. A quick Westlaw search of the law firm's litigation activity would show that the

If a mortgage servicer or law firm regularly conducts foreclosures for others, it qualifies as a debt collector under the primary definition. If the consumer pleads facts with sufficient specificity to plausibly show that the defendant falls within the primary definition, it should be the defendant's burden to plead and prove that it is entitled to the protection of the limited-purpose definition.[543]

Thus, to the extent possible, it is prudent for the consumer to plead facts in the complaint in order to cut off an *Obduskey* challenge.[544] The complaint can describe, for example, how the law firm or servicer's principal purpose is not the enforcement of security interests. How advocates can investigate this issue without discovery is discussed at §§ 4.7.3.3 and 4.7.5.2.4, *supra*.

The pleading can also describe why the challenged activities were not essential to the conduct of a nonjudicial foreclosure under state law. The defendant may argue that everything it does related to a foreclosure, no matter how remotely related, is covered by *Obduskey*. Federal courts may be easily confused about what the requirements are to conduct a nonjudicial foreclosure under applicable state law. The complaint should mention what these are and describe how the actions in question were not necessary under state law to conduct a foreclosure, or, perhaps, that they even violated state law requirements.

Finally, in considering ways to avoid any impact from the *Obduskey* decision, advocates should keep in mind that framing claims within the scope of FDCPA § 1692f(6) can effectively address many forms of foreclosure and repossession misconduct. When the limited-purpose definition applies, the foreclosing party is still a "debt collector" for purposes of section 1692f(6).[545] FDCPA § 1692f(6) prohibits threatening or taking nonjudicial foreclosure or repossession actions when there is not a "present right" to do so. Advocates should review the state and federal laws that limit when and how a foreclosure or repossession can be conducted. Failure to comply with any of these laws means that the party does not have a present right to foreclose or repossess. The range of claims available under FDCPA § 1692a(f)(6) is discussed in § 8.6, *supra*.

4.8 Exclusions from "Debt Collector" Definition

4.8.1 Creditor Employees Collecting in the Creditor's Name, FDCPA § 1692a(6)(A)

> The term ["debt collector"] does not include—
>
> (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.[546]

FDCPA § 1692a(6)(A) excludes from the definition of debt collector employees and officers of a creditor, but only if they are collecting debts for such creditor and in the name of such creditor. The exclusion only applies if the employee or officer meets three separate requirements: the individual must be employed by the creditor (e.g. not by a collection agency); collecting debts for the creditor (e.g. not for a friend or other creditor); and collecting debts using the creditor's name (e.g. not in the name of a collection agency).

Although "creditor" is defined in the FDCPA as including "any person . . . to whom a debt is owed,"[547] at least one court has refused to extend the exemption to those employees.[548]

The FDCPA § 1692a(6)(A) exception only excludes a creditor's employees and officers, not the creditor's collection agency, since the provision does not mention the creditor's agents or representatives.[549] Nevertheless, issues can arise where a collection agency loans an employee to the creditor and that individual is under the creditor's direction and control, not that of the collection agency. Is the individual still an employee of the collection agency or now a *de facto* employee of the creditor?[550] Such an individual has a heavy burden to prove employment by the creditor and not the collection agency.[551]

The FDCPA § 1692a(6)(A) exclusion explicitly applies only to the creditor's employees and officers, not to the creditor itself. When the FDCPA means a provision to apply to a creditor, it uses the term "creditor," and not officers or employees of a creditor. A few courts have cited FDCPA § 1692a(6)(A) as

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firm conducted foreclosures regularly in neighboring New Mexico, a judicial foreclosure state. The complaint made no specific allegations regarding the nature of the law firm's practice. The law firm made a blanket assertion that all of its activities were required to conduct a nonjudicial foreclosure under state law. This contention was never challenged.

543 Brown v. Shapiro & Kreisman, L.L.C., 2020 WL 10313788, at *3 (S.D. Tex. June 22, 2020) (denying law firm's motion to dismiss where firm alleged in memorandum it was engaged in no more than nonjudicial foreclosures, but complaint did not include such allegation).

544 *See, e.g.*, Bates v. Green Farms Condo. Ass'n, 958 F.3d 470, 480 481 (6th Cir. 2020) (dismissing FDCPA claims where complaint contained no averments about nature of defendant law firm's and condominium management company's business).

545 Dowers v. Nationstar Mortg., L.L.C., 852 F.3d 964, 971 (9th Cir. 2017); Ponthieux v. Nationstar Mortg., L.L.C., 2021 WL 211252 (E.D. Cal. Jan. 21, 2021), *adopted*, 2021 WL 1089849 (E.D. Cal. Mar. 22, 2021); Thomas v. General Motors Fin. Co., 2020 WL 8771383 (W.D. Tex. Apr. 30, 2020) (*Obduskey* does not bar claim involving breach of peace vehicle repossession against limited purpose debt collector covered by § 1692f(6)); Shelton v. Ocwen Loan Servicing, L.L.C., 2019 WL 4747669, at *14 (S.D. Cal. Sept. 30, 2019); Cordeiro v. Carrington Mortg. Services, L.L.C., 2020 WL 3404742 (D.R.I. June 19, 2020) (allowing § 1692f(6) claim against foreclosure law firm that was subject to limited purpose definition when it conducted nonjudicial foreclosure in violation of FHA servicing regulations).

546 15 U.S.C. § 1692a(6)(A). *See also* S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*. Reg. F § 1006.2(*i*)(2)(i) tracks the statutory definition with only minor, non-substantive language changes for clarity.

547 15 U.S.C. § 1692a(4). *See* § 4.5, *supra*.

548 Collins v. Portfolio Recovery Assoc., 2013 WL 9805805 (E.D. Tenn. June 7, 2013).

549 *See* de Mayo, FTC Informal Staff Letter (May 23, 2002).

550 *See* FTC Official Staff Commentary § 803(6)-4(a), *discussed at* § 3.4.4.4, *supra, reproduced at* Appx. C.2, *infra*; de Mayo, FTC Informal Staff Letter (May 23, 2002).

551 Andrews v. Simm Assoc., Inc., 2017 WL 3424900, at *2 (W.D. Wash. Aug. 9, 2017).

the basis for their exclusion of an originating creditor from the definition of debt collector.[552] But these courts are confused as to the FDCPA's coverage provisions. Originating creditors do not fall within the general definition of debt collector—they are not collecting a debt owed to another and are not in the principal business of debt collection. Since originating creditors are not debt collectors, there is no need to exclude them from the definition of debt collector under FDCPA § 1692a(6)(A).

Employees and officers of a creditor that regularly engage in collection work, on the other hand, do need the protection of section 1692a(6)(A) to escape being debt collectors and being liable under the FDCPA. They are collecting debts owed to another and regularly collect such debts. They would be covered debt collectors but for the application of FDCPA § 1692a(6)(A).

4.8.2 *An Entity Not Principally a Collector, Collecting for a Commonly Owned or Affiliated Entity, FDCPA § 1692a(6)(B)*

> The term ["debt collector"] does not include . . .
>
> (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts.[553]

FDCPA § 1692a(6)(B) provides an exclusion if the following are all applicable:

- The collector is collecting on a debt owed to another;
- The debt owner has common ownership or is affiliated by corporate control with the collector;
- The collector only collects for those that share common ownership or are affiliated by corporate control; and
- The collector's principal business is not the collection of debts.[554]

The Seventh Circuit has held that, to be covered by the exclusion, the affiliate collector is not required to collect in the name of the debt owner, but presumably can collect under its own name.[555]

4.8.3 *State and Federal Officials, FDCPA § 1692a(6)(C)*

> The term ["debt collector"] does not include . . .
>
> (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;[556]

FDCPA § 1692a(6)(C) excludes from the definition of debt collector state or federal employees if their attempts to collect particular debts are within their official duties. Federal employees and officers include those employed by the IRS,[557] the U.S. Department of Education,[558] other federal agencies and departments,[559] and receivers appointed by federal courts.[560]

The term "state" means "any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision

552 *See* Shedd v. Wells Fargo Bank, 2016 WL 4565775 (S.D. Ala. Aug. 31, 2016); McCrimmon v. Mariner Fin. N.C., Inc., 154 F. Supp. 3d 256, 258 (M.D.N.C. 2016); Allgood v. West Asset Mgmt., Inc., 2013 WL 6234691 (D. Nev. Dec. 2, 2013).

553 15 U.S.C. § 1692a(6)(B) (Supp. II 1979). Reg. F § 1006.2(*i*)(2)(ii) tracks the statutory definition with only minor, non-substantive language changes for clarity.

The exclusion contained in this section first appeared in a broader form in a Senate minority bill late in the legislative process. S. 1130, 123 Cong. Rec. S4,884 (daily ed. Mar. 25 1977). It was incorporated in the subsequent Senate Consumer Affairs Subcommittee drafts with the present qualifications. The legislative history does not explain the exclusion's exact purpose. "One subsidiary or affiliate which collects debts for another subsidiary or affiliate is not a 'debt collector' so long as the collecting affiliate collects only for other related entities and its principal business is not debt collections." S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*.

554 *See* Fox v. Citicorp Credit Serv., Inc., 15 F.3d 1507 (9th Cir. 1994) (whether Citicorp was affiliated with actual creditor, whether Citicorp collected debts for non-affiliated entities, or whether debt collection was Citicorp's principal business precluded summary judgment); Rogers v. Capital One Serv., L.L.C., 2011 WL 873312 (D. Conn. Feb. 19, 2011), *aff'd on other grounds*, 447 Fed. Appx. 246 (2d Cir. 2011) (factual question whether collector's principle business was collection, thus denying it the benefit of the exclusion); Kreisler v. Latino Union, Inc., 2007 WL 1118408 (N.D. Ill. Apr. 12, 2007) (individual cannot have common ownership or affiliation with a business entity). *See also* Aubert v. Am. Gen. Fin., Inc., 137 F.3d 976 (7th Cir. 1998) (exclusion applies); Jarzyna v. Home Prop., L.P., 763 F. Supp. 2d 742 (E.D. Pa. 2011) (same); Grodberg v. Hendricks Auto. Grp. Corp., 2008 WL 11429306 (W.D. Mo. Jan. 31, 2008) (same); Burns v. Bank of Am., 655 F. Supp. 2d 240 (S.D.N.Y. 2008), *aff'd*, 360 Fed. Appx. 255 (2d Cir. 2010) (same).

555 Aubert v. Am. Gen. Fin., Inc., 137 F.3d 976 (7th Cir. 1998); Jarzyna v. Home Prop., L.P., 763 F. Supp. 2d 742 (E.D. Pa. 2011); Taylor v. Rollins, Inc., 1998 WL 164890 (N.D. Ill. Mar. 30, 1998).

556 15 U.S.C. § 1692a(6)(C). This provision was consistently included in bills leading to the Act. Reg. F § 1006.2(*i*)(2)(iii) tracks the statutory definition with only minor, non-substantive language changes for clarity.

557 *See* Kennedy v. Comm'r, Dep't of Treasury Internal Revenue Serv., 790 Fed. Appx 447 (3d Cir. 2019); Al-Sharif v. United States, 296 Fed. Appx. 740 (11th Cir. 2008); Israel v. Everson, 210 Fed. Appx. 549 (8th Cir. 2006); Coble v. Wilkins, 2012 WL 665976 (M.D.N.C. Feb. 29, 2012), *adopted*, 2012 WL 1450047 (M.D.N.C. Mar. 20, 2012), *aff'd*, 475 Fed. Appx. 17 (4th Cir. 2012).

558 *See* Wagstaff v. United States, 2013 WL 3989224 (Fed. Cl. July 31, 2013), *aff'd on other grounds*, 595 Fed. Appx. 975 (Fed. Cir. 2014); Ainsworth v. U.S. Dep't of Educ., 2019 WL 6134482, at *2 (N.D. Okla. Nov. 19, 2019); Allen v. United States Dep't of Educ., 755 F. Supp. 2d 122 (D.D.C. 2010).

559 *See* Diaz v. Dep't of Defense, 2008 WL 4671833 (S.D.N.Y. Oct. 23, 2008) (Department of Defense); McCall v. GMAC Mortg. Corp., 2007 WL 1201535 (E.D. Mich. Apr. 6, 2007) (Veterans Administration); Geiger v. Fed. Bur. of Prisons, 487 F. Supp. 2d 1155 (C.D. Cal. 2007) (Bureau of Prisons).

560 *See* Weiss v. Weinberger, 2005 WL 1432190 (N.D. Ind. June 9, 2005).

of any of the foregoing."[561] State employees thus include not just officials at state agencies,[562] but local sheriff officers,[563] police officers,[564] district attorneys,[565] and local judges and court officers.[566]

The exclusion only applies to an employee or officer collecting debts in the performance of their official duties. A state official collecting a debt outside those duties is not excluded.[567] While such an official cannot take advantage of the section 1692a(6)(C) exclusion, the consumer must still prove the official otherwise meets the FDCPA's definition of debt collector, such as regularly collecting debts owed to another.[568]

The exclusion only applies to officers or employees of government entities; it does not apply to private parties collecting debts on behalf of the government entity.[569] Sometimes an individual can have dual employment, such as a private collector and as a deputy sheriff. Even if an individual is employed by a government entity, the exclusion does not apply if the individual is not collecting while in the status of a government employee.[570] A private individual can be appointed as a government employee or official, and then the exclusion could apply, but it may be unclear whether a temporary appointment to assist the state in debt collection makes the individual an officer or employee of the state.[571]

The explicit language of FDCPA § 1692a(6)(C) excludes from the definition of debt collector officers and employees of government entities, and not the government entities themselves.[572] When the FDCPA means something more than officers or employees, it uses other language, such as persons or creditors.[573]

The limit of the exclusion makes perfect sense. The United States and the state typically will not fall within the general definition of a debt collector in that they are not in the business the principal purpose of which is the collection of debts and do not regularly collect debts owed another. Certain officers or employees may be viewed as regularly collecting debts owed to another (i.e., owed to the United States or the state), so the exclusion has direct relevance to them.

In addition, sovereign immunity may prevent claims against the government entities, further removing any purpose for FDCPA § 1692a(6)(C) to apply to government entities.[574] Sovereign immunity may not extend to employees and officers, and certainly does not extend to private entities collecting for the state.[575]

4.8.4 *The Service of Legal Process, FDCPA § 1692a(6)(D)*

> The term ["debt collector"] does not include . . .
>
> (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;[576]

FDCPA § 1692a(6)(D) excludes from the definition of debt collector not just the service of process to initiate a collection lawsuit, but any service or legal process involving the legal enforcement of a debt. It applies to serving a foreclosure notice[577] or the service of process of a subpoena upon a

561 15 U.S.C. § 1692a(8). *See* § 4.11, *infra.*

562 *See* Okoro v. Garner, 21 Fed. Appx. 486 (7th Cir. 2001); Streater v. Cox, 2008 WL 564884 (E.D. Mich. Feb. 28, 2008) (FDCPA does not apply to state officers or employees), *aff'd on other grounds*, 336 Fed. Appx. 470 (6th Cir. June 30, 2009); Dep't of Revenue v. Michaels, 2008 WL 360631 (M.D. Fla. Feb. 8, 2008) (Florida Dep't of Revenue exempt); Eley v. Evans, 476 F. Supp. 2d 531 (E.D. Va. 2007) (county officials not debt collectors); Fleeger v. Bell, 95 F. Supp. 2d 1126 (D. Nev. 2000) (district attorneys), *aff'd*, 2001 WL 1491252 (9th Cir. Nov. 26, 2001); Gary v. Spires, 473 F. Supp. 878 (D.S.C. 1979) (state check collection officials).

563 S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*. *See also* Rojo v. Watson, 2016 WL 5394679 (D. Neb. Sept. 27, 2016); Georgeadis v. County of Fairfield, 2000 WL 1459418 (S.D. Ohio Sept. 25, 2000).

564 *See* Parrish v. City of Highwood, 1998 WL 773994 (N.D. Ill. Oct. 30, 1998).

565 Landfried v. Spokane County, 2011 WL 1584328 (E.D. Wash. Apr. 27, 2011).

566 *See* Heredia v. Green, 667 F.2d 392 (3d Cir. 1981); Georgeadis v. County of Fairfield, 2000 WL 1459418 (S.D. Ohio Sept. 25, 2000).

567 *See* FTC Official Staff Commentary § 803(6)-4(c) ("The exemption applies only to such governmental employees in the performance of their 'official duties' and, therefore, does not apply to an attorney employed by a county government who also collected bad checks for local merchants where that activity is outside his official duties."), *discussed at* § 3.4.4.4, *supra, reproduced at* Appx. C.2, *infra.*

568 *See* Richardson v. Calmes, 2006 WL 8432831, at *6 (M.D. La. Aug. 11, 2006) ("The volume of [police] Defendants' alleged debt collection activities is simply not great enough to qualify them as 'debt collectors' [under § 1692a(6)].").

569 *See* Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000); Albanese v. Portnoff Law Assoc., Ltd., 301 F. Supp. 2d 389 (E.D. Pa. 2004) (law firm that contracted with municipalities to collect government debt was not exempt); Piper v. Portnoff Law Assoc., 262 F. Supp. 2d 520 (E.D. Pa. 2003); Gradisher v. Check Enf't Unit, Inc., 133 F. Supp. 2d 988 (W.D. Mich. 2001).

570 Burgess v. Lee Acceptance Corp., 2008 WL 5111905 (E.D. Mich. Dec. 4, 2008) (denying deputy sheriff's motion to dismiss; question of fact where court ordered him to execute writ to seize property, but plaintiff presented evidence that serving officer was an independent contractor, not an officer of court).

571 *See* Sheriff v. Gillie, 578 U.S. 317, 136 S. Ct. 1594, 1598, 194 L. Ed. 2d 625 (2016) ("Assuming, arguendo, that special counsel do not rank as 'state officers'" for purposes of § 1692a(6)(C)); Keefer v. Wiles, Boyle, Burkholder & Bringardner, Co. 2008 WL 4404295 (S.D. Ohio Sept. 23, 2008) (applicability of § 1692a(6)(C) to attorneys appointed as special counsel to state attorney general depended on factual determination).

572 *E.g.*, Passa v. City of Columbus, 2007 WL 3125130 (S.D. Ohio Oct. 24, 2007. *But see* Games v. Cavazos, 737 F. Supp. 1368 (D. Del. 1990).

573 *E.g.*, Passa v. City of Columbus, 2007 WL 3125130 (S.D. Ohio Oct. 24, 2007).

574 *See* § 12.6.5, *infra*. *See also* Codar Inc. v. Arizona, 168 F.3d 498 (9th Cir. 1999); Little v. Tennessee Student Assistance Corp., 537 F. Supp. 2d 942 (W.D. Tenn. 2008).

575 *See* Del Campo v. Kennedy, 517 F.3d 1070 (9th Cir. 2008).

576 15 U.S.C. § 1692a(6)(D). This section first appeared in the Senate minority bill S. 1130, 123 Cong. Rep. S. 4884 (daily ed. Mar. 25, 1977) at § 802(8)(D) and was retained in subsequent Senate Consumer Affairs Subcommittee drafts. Reg. F § 1006.2(*i*)(2)(iv) tracks the statutory language exactly.

577 Duraney v. Washington Mut. Bank, 2008 WL 4204821 (W.D. Pa. Sept. 11, 2008), *aff'd*, 2010 WL 2993810 (3d Cir. Aug. 2, 2010).

witness to appear in an action for debt. But the provision applies to service related to the legal enforcement of a debt, and not, for example, to presentment of a state-required notice about a tenant or consumer's rights to avoid the legal enforcement of a debt.[578]

FDCPA § 1692a(6)(D) only excludes from the definition of a debt collector a person "while" serving or attempting to serve legal process. This exclusion does not exempt process servers, but only their activity while serving process. The exclusion does not apply to a process server while filing false affidavits that process was served,[579] or to a process server seeking to collect payment on a debt.[580]

The exclusion for a person while serving legal process also does not apply to a person other than the one actually serving legal process, even where the FDCPA violation involves the service of legal process. For example, the FDCPA § 1692a(6)(D) exclusion is not applicable to a collection lawyer for its directions to a process servicer.[581]

4.8.5 Nonprofit Consumer Credit Counselors, FDCPA § 1692a(6)(E)

> The term ["debt collector"] does not include . . .
>
> (E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors;[582]

FDCPA § 1692a(6)(E) excludes from the definition of debt collector a nonprofit requested to perform bona fide consumer credit counseling and also that assists consumers in what is known as a debt management plan.[583] This exclusion requires the credit counselor to be nonprofit, so that it does not apply to profit-making entities offering debt management plans.[584] Even a nonprofit credit counselor cannot take advantage of the exclusion if its credit counseling is not bona fide—that is it if it is a ruse to profit from the consumer.[585]

4.8.6 Attorney Exclusion No Longer Applies

Congress, in 1986, repealed an exclusion from the scope of the FDCPA for attorneys when they were collecting a debt for a client in the client's name and their collection efforts were within the legal concept of the practice of law.[586] Congress found this exception had blossomed into a major loophole, and that some law firms had become indistinguishable from collection agencies. By 1985, more lawyers were regularly collecting consumer debts than were persons working in the non-lawyer debt collection industry.[587] The current FDCPA coverage of attorneys is discussed at § 4.7.3.3, *supra*.

578 Romea v. Heiberger & Assoc., 163 F.3d 111 (2d Cir. 1998) (state mandated three-day demand for payment of past-due rent).

579 *See* Avina v. Patenaude & Felix, A.P.C., 2021 WL 873336 (S.D. Cal. Mar. 9, 2021); Makhnevich v. MTGLQ Investors, L.P., 2020 WL 764158 (S.D.N.Y. Feb. 14, 2020); Guzman v. Mel S. Harris & Assoc., 2018 WL 1665252 (S.D.N.Y. Mar. 22, 2018); Rendon v. HBLC, Inc., 2017 WL 7275423 (N.D. Ill. Oct. 25, 2017); Rubio v. LVNV Funding, L.L.C., 2015 WL 13650046 (N.D. Cal. July 21, 2015); Sanchez v. Abderrahman, 2014 WL 4919153 (E.D.N.Y. Aug. 12, 2014), *adopted*, 2014 WL 4919258 (E.D.N.Y. Sept. 30, 2014); Holmes v. Elec. Document Processing, Inc., 966 F. Supp. 2d 925 (N.D. Cal. 2013); Long v. Nationwide Legal File & Serve, Inc., 2013 WL 5219053 (N.D. Cal. Sept. 17, 2013); Harbison v. Litow & Pech, P.C., 2013 WL 1095654 (E.D. Mo. Mar. 18, 2013); Freeman v. ABC Legal Serv. Inc., 827 F. Supp. 2d 1065 (N.D. Cal. 2011); Spiegel v. Judicial Attorney Serv., Inc., 2011 WL 382809 (N.D. Ill. Feb. 1, 2011); Sykes v. Mel Harris & Assoc., L.L.C., 757 F. Supp. 2d 413 (S.D.N.Y. 2010).

580 *See* Flamm v. Sarner & Assoc., P.C., 2006 WL 43770 (E.D. Pa. Jan. 3, 2006).

581 *See* Romea v. Heiberger & Assoc., 163 F.3d 111 (2d Cir. 1998); Mateti v. Activus Fin., L.L.C., 2009 WL 2507423 (D. Md. Aug. 14, 2009); Goldstein v. Hutton, Ingram, Yuzak, Gainen, Carroll & Bertolotti, 39 F. Supp. 2d 394 (S.D.N.Y. 1999); Andrews v. South Coast Legal Serv., Inc., 582 F. Supp. 2d 82 (D. Mass. 2008); Flamm v. Sarner & Assoc., P.C., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002); Alger v. Ganick, O'Brien & Sarin, 35 F. Supp. 2d 148 (D. Mass. 1999).

582 15 U.S.C. § 1692a(6)(E). This subsection was added during drafting by the Senate Consumer Affairs Subcommittee staff. Reg. F § 1006.2(*i*)(2)(v) tracks the statutory definition with only minor, non-substantive language changes for clarity.

583 *See* S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra* ("[t]he term debt collector is not intended to include . . . non-profit consumer credit counseling services which assist consumers by apportioning the consumer's income among his creditors pursuant to a prior arrangement"). *See also* FTC Official Staff Commentary § 803(6)(4)-e, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

584 *See* Hutchinson, FTC Informal Staff Letter (June 22, 1987); Hirsch, FTC Informal Staff Letter (Feb. 7, 1978) (exclusion does not apply to licensed, profit-making credit counselor).

585 *But see* Limpert v. Cambridge Credit Counseling Corp., 328 F. Supp. 2d 360 (E.D.N.Y. 2004) (failed to consider if whether firm's counseling was bona fide), *amended in part on other grounds*, 2005 WL 3395347 (E.D.N.Y. Sept. 16, 2004).

586 15 U.S.C. § 1692a(6)(F) (Supp. II 1979), *repealed by* Pub. L. No. 99-361, 100 Stat. 768 (July 9, 1986).

The former exclusion of attorneys from FDCPA liability first appeared in S. 3838. *See* S. 3838, 122 Cong. Rec. S16,273, at § 802(f) (daily ed. Sept. 21, 1976). With small changes in wording, it was contained in most subsequent bills. Two bills deleting the attorney exemption passed the Senate. S. 2851 and S. 1103, 98th Cong., 2d Sess. (Sept. 13, 1984). One bill died in the House: H.R. 4617, 98th Cong., 2d Sess. (Jan. 24, 1984). A second House bill passed on a voice vote. H.R. 237, 99th Cong., 1st Sess., 132 Cong. Rec. H10534 (daily ed. Dec. 2, 1985).

587 *Oversight Hearing on FDCPA and H.R. 4617 Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Fin. and Urban Affairs*, 98th Cong., 2d Sess. (Jan. 31, 1984); *Hearings on H.R. 237, Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Fin. and Urban Affairs*, 99th Cong., 1st Sess. (Oct. 22, 1985); H.R. Rep. No. 405, 99th Cong., 1st Sess. (Nov. 26, 1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 132 Cong. Rec. H10534 (daily ed. Dec. 2, 1985) (statement of Rep. Annunzio).

4.8.7 Collecting Debts Incidental to Fiduciary or Escrow Arrangements, FDCPA § 1692a(6)(F)(i)

The term ["debt collector"] does not include . . .

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent that such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;[588]

FDCPA § 1692a(F)(i) excludes from the definition of debt collector those collecting debts owed to another where that activity is incidental to a bona fiduciary obligation or escrow arrangement. Even if the exclusion applies to one debt that is collected pursuant to a fiduciary obligation or escrow arrangement related to that debt, the same person can be a covered debt collector when collecting on another debt that is not pursuant to the fiduciary obligation. But the exclusion applies even when the fiduciary obligation or escrow arrangement was entered into after a debt went into default.[589]

One indicator whether a person is acting pursuant to a fiduciary obligation is where state or federal law defines that activity as a fiduciary one.[590] Property management companies are generally found to be acting pursuant to a bona fide fiduciary obligation to the property owners.[591] A trustee for a securitized investment trust holding home mortgages has a fiduciary obligation to the trust.[592] But an entity operating a check diversion program is not acting in a fiduciary capacity for the district attorney authorizing the program.[593]

Even if there is a bona fide fiduciary obligation or escrow arrangement, the debt collection activity to be excluded must be incidental, and not central, to that obligation or arrangement. Where a loan servicer or collection law firm takes an account after default, collection of the debt is central and not incidental to its activities, even if the debts arguably are collected pursuant to a fiduciary obligation.[594] Similarly, even if a check diversion program is acting in a fiduciary capacity, its collection activities are not merely incidental, but central to its fiduciary duties.[595]

In a number of nonjudicial foreclosure states, a foreclosure trustee holds a mortgage deed and is responsible for foreclosing on the property if the homeowner defaults. The Fourth Circuit has found that the FDCPA § 1692a(F)(i) exclusion did not apply to a foreclosure trustee foreclosing on a deed of trust, since that action is more than just incidental to its fiduciary obligation.[596]

But the Ninth Circuit has found that a foreclosure trustee's sending notices prior to foreclosure were incidental to what it found to be an escrow arrangement.[597] Similarly, the Eleventh Circuit has found a foreclosure trustee had a fiduciary relationship; sending foreclosure notices was incidental to its fiduciary obligations.[598]

Paying creditors out of an escrow arrangement was found incidental to the escrow arrangement.[599]

A trustee collecting debts for a securitized investment trust holding home mortgages has been found to be incidental to its fiduciary obligation to the trust.[600] A bail bondsman collecting on its collateral is also incidental to its fiduciary obligations.[601]

Under the Federal Family Education Loan (FFEL) program, a guaranty agency has certain responsibilities for student loans originated by a lender, but ultimately insured by the Department of Education. By federal regulation, such a

588 15 U.S.C. § 1692a(6)(F)(i). Reg. F § 1006.2(*i*)(2)(vi)(A) tracks the statutory language with only format changes.

This section was added late in the legislative process, while the bills were in the Senate Consumer Affairs Subcommittee. See S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*.

589 Raburn v. Cmty. Mgmt., L.L.C., 761 Fed. Appx. 263 (5th Cir. 2019).

590 Harris v. Liberty Cmty. Mgmt., Inc., 702 F.3d 1298, 1302 (11th Cir. 2012); Cadiz v. Educ. Credit Mgmt. Corp., 2019 WL 4254484 (N.D. Ill. Feb. 21, 2019); Yergovich v. Small Cmty. Specialists L.L.C., 337 F. Supp. 3d 635 (E.D. Va. 2018); Barnett v. Homeowner Mgmt. Serv., Inc., 2017 WL 8186604 (N.D. Ga. Jan. 9, 2017), *adopted*, 2017 WL 8186598 (N.D. Ga. Feb. 9, 2017); Seo v. Educ. Credit Mgmt. Corp., 2016 WL 521065 (N.D. Ill. Feb. 9, 2016); Buckman v. Am. Bankers Ins. Co., 924 F. Supp. 1156 (S.D. Fla. 1996) (criminal bond forfeiture), *aff'd on other grounds*, 115 F.2d 892 (11th Cir. 1997). *See also* Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2017) (minority opinion at footnote 9).

591 Raburn v. Cmty. Mgmt., L.L.C., 761 Fed. Appx. 263 (5th Cir. 2019); Harris v. Liberty Cmty. Mgmt., Inc., 702 F.3d 1298, 1302 (11th Cir. 2012); Yergovich v. Small Cmty. Specialists L.L.C., 337 F. Supp. 3d 635 (E.D. Va. 2018); Barnett v. Homeowner Mgmt. Serv., Inc., 2017 WL 8186604 (N.D. Ga. Jan. 9, 2017), *adopted*, 2017 WL 8186598 (N.D. Ga. Feb. 9, 2017); Taylor v. Precision Prop. Mgmt., 2015 WL 1756981 (W.D. Mich. Apr. 17, 2015); Lusco v. Univ. Realty of Tampa, 2014 WL 1152934 (M.D. Fla. Mar. 21, 2014); Johnson v. Young, 2007 WL 2177956, at *3 (S.D. Ohio July 27, 2007); Reynolds v. Gables Residential Serv., Inc., 428 F. Supp. 2d 1260, 1264 (M.D. Fla. 2006); Berndt v. Fairfield Resorts, Inc., 339 F. Supp. 2d 1064, 1068 (W.D. Wis. 2004) (management company for timeshare company).

592 Junod v. Mortg. Elec. Registration Sys., Inc., 584 Fed. Appx. 465 (9th Cir. 2014).

593 *See* Solberg v. Victim Serv., Inc., 415 F. Supp. 3d 935 (N.D. Cal. 2019); Del Campo v. Mealing, 2013 WL 4764975 (N.D. Cal. Sept. 5, 2013).

594 Muir v. AM Solutions, L.L.C., 2019 WL 3530521 (E.D. Pa. Aug. 1, 2019); Grady v. Ocwen Loan Servicing, L.L.C., 2012 WL 929928 (N.D. Ill. Mar. 19, 2012); Reed v. Smith, 1994 U.S. Dist. LEXIS 21463 (M.D. Ala. July 25, 1994).

595 *See* Solberg v. Victim Serv., Inc., 415 F. Supp. 3d 935 (N.D. Cal. 2019); Del Campo v. Mealing, 2013 WL 4764975 (N.D. Cal. Sept. 5, 2013).

596 McCray v. Fed. Home Loan Mortg. Corp., 839 F.3d 354, 361 (4th Cir. 2016) (central, not incidental); Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 377 (4th Cir. 2006) (central, not incidental). *See also* FTC Official Staff Commentary § 803(6)-4(f), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

597 Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2017) (a minority opinion in that case argues that this is not incidental but central to the escrow arrangement).

598 Hasbun v. Reconstruct Co., 508 Fed. Appx. 941 (11th Cir. 2013).

599 *See* Fisher v. Congress Title, 2007 WL 77333 (D.N.J. Jan. 8, 2007), *aff'd*, 2007 WL 1862683 (3d Cir. June 29, 2007).

600 Junod v. Mortg. Elec. Registration Sys., Inc., 584 Fed. Appx. 465 (9th Cir. 2014).

601 Buckman v. Am. Bankers Ins. Co., 924 F. Supp. 1156 (S.D. Fla. 1996) (criminal bond forfeiture), *aff'd on other grounds*, 115 F.2d 892 (11th Cir. 1997).

guaranty agency has a fiduciary obligation to the Department of Education.[602] The Ninth Circuit and most other courts find a guaranty agency's collection actions under the FFEL program to be incidental to its fiduciary obligation because the guaranty agency has other responsibilities.[603] A subsequent guaranty agency's fiduciary obligation is not incidental though where a guaranty agency turns over a defaulted student loan to the second guaranty agency to collect on that loan.[604]

Whether a guaranty agency is excluded from the debt collector definition when owning a student loan, this is not the case where the guaranty agency is acting as a servicer or as a debt collector for the United States under the federal Direct Loan program—since 2010, all new federal student loans are under the Direct Loan, not the FFEL program.

In an Eleventh Circuit decision, the majority held that a guaranty agency may fall under the fiduciary obligation exemption even where the debt is alleged to be nonexistent, since a person may attempt to collect a debt "incidental to a bona fide fiduciary obligation" whether the debt sought to be collected is "owed or due" another or only "asserted to be owed or due another."[605]

4.8.8 Credit Originator Collecting on Behalf of Another, FDCPA § 1692a(6)(F)(ii)

> The term ["debt collector"] does not include . . .
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (ii) concerns a debt which was originated by such person;[606]

FDCPA § 1692a(6)(F)(ii) excludes from the definition of debt collector a credit originator that transfers a debt to another, but then collects that debt for the other entity that now owns the debt.[607] For example, this exclusion would apply to a mortgage loan originator that sells the loan, but then services the loan for the transferee.[608] It would also apply to a retailer or credit card issuer that assigns its accounts to a financer or a trust, but is responsible for collection on those accounts.

The term "originated" is not defined, but in common usage a debt is originated by a person where that person initially extends the credit. Originator does not apply to someone who brokers credit, someone who services the account after the credit is extended,[609] or a company that authorizes a merchant accepting a consumer's check.[610] Assignees and transferees also cannot take advantage of the exclusion because they are not originators.[611] The Eleventh Circuit has found that a bail bondsman originates a debt in that it is the consumer and bail bondsman who enter into the indemnification agreement and note, even though the bond is with an insurance company.[612]

The FDCPA § 1692a(6)(F)(ii) exclusion does not apply to either the originating creditor or any other entity that is collecting on its own debt. The exclusion states that it applies to one "collecting or attempting to collect any debt owed or due or asserted to be owed or due another." Where the originator transfers the debt to another, and then the debt is transferred back to the originator, the nature of that second transfer determines the exclusion's applicability. If the debt is transferred only for purposes of collection, the exclusion applies. The exclusion does not apply where ownership is transferred back to the originator, because then the originator would not be collecting for another. An entity collecting on its own debt may be a debt collector under the "principal purpose" prong of the general debt collector definition.[613]

Courts sometimes use FDCPA § 1692a(6)(F)(ii) as the basis to find an originating creditor collecting its own debt not to be

602 Murungi v. Texas Guaranteed, 402 Fed. Appx. 849 (5th Cir. 2010); Rowe v. Educ. Credit Mgmt. Corp., 559 F.3d 1028, 1034 (9th Cir. 2009); Cadiz v. Educ. Credit Mgmt. Corp., 2019 WL 4254484 (N.D. Ill. Feb. 21, 2019); Seo v. Educ. Credit Mgmt. Corp., 2016 WL 521065 (N.D. Ill. Feb. 9, 2016); Kozaczek v. N.H. Higher Educ. Assistance Found., 2014 WL 3640779 (D. Vt. July 21, 2014); Donohue v. Reg'l Adjustment Bur., Inc., 2013 WL 607853 (E.D. Pa. Feb. 19, 2013); Lasserre v. Educ. Credit Mgmt. Corp., 2012 WL 2191628 (M.D. La. June 14, 2012); Pelfrey v. Educ. Credit Mgmt. Corp., 71 F. Supp. 2d 1161 (N.D. Ala. 1999), *aff'd* 208 F.3d 945 (11th Cir. 2000).

603 Lima v. United States Dep't of Educ., 947 F.3d 1122, 1127 (9th Cir. 2020) (guaranty agency is "obligated to release its judgment against Plaintiff if Plaintiff's debt is consolidated, rehabilitated, or repaid. Defendant also is obligated to maintain records, report to the National Student Loan Database System, and properly administer its operating fund. Those obligations are not illusory, even if Defendant has not had to perform some of them"); Murungi v. Texas Guaranteed, 402 Fed. Appx. 849 (5th Cir. 2010); Cadiz v. Educ. Credit Mgmt. Corp., 2019 WL 4254484 (N.D. Ill. Feb. 21, 2019); Seo v. Educ. Credit Mgmt. Corp., 2016 WL 521065 (N.D. Ill. Feb. 9, 2016); Kozaczek v. N.H. Higher Educ. Assistance Found., 2014 WL 3640779 (D. Vt. July 21, 2014); Pelfrey v. Educ. Credit Mgmt. Corp., 71 F. Supp. 2d 1161 (N.D. Ala. 1999), *aff'd*, 208 F.3d 945 (11th Cir. 2000); Montgomery v. Educ. Credit Mgmt. Corp., 238 B.R. 806 (D. Minn. 1999).

604 Rowe v. Educ. Credit Mgmt. Corp., 559 F.3d 1028, 1034 (9th Cir. 2009).

605 *See* Darrisaw v. Penn. Higher Educ. Assistance Agency, 949 F.3d 1302, 1307 (11th Cir. 2020).

606 15 U.S.C. § 1692a(6)(F)(ii). Reg. F § 1006.2(*i*)(2)(vi)(B) tracks the statutory language with only stylistic and format changes.

This section was added late in the legislative process while the bills were in the Senate Consumer Affairs Subcommittee. See S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*.

607 *See* FTC Official Staff Commentary § 803(6)-4(f), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

608 *See, e.g.*, Lupo v. JPMorgan Chase Bank, 2015 WL 5714641 (D. Md. Sept. 28, 2015; FTC Official Staff Commentary § 803(6)-4(f), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

609 *See* Amini v. Bank of Am. Corp., 2012 WL 398636 (W.D. Wash. Feb. 7, 2012).

610 *See* Winterstein v. CrossCheck, Inc. 149 F. Supp. 2d 466 (N.D. Ill. 2001) (check guarantee service's "authorization" of check not an origination of debt); Holmes v. Telecredit Serv., 736 F. Supp. 1289 (D. Del. 1990) (same); Games v. Cavazos, 737 F. Supp. 1368, 1387 (D. Del. 1990) (school and lender originate guaranteed student loan, not the guaranty agency).

611 FTC Official Staff Commentary § 803(6)-4(f), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

612 Buckman v. Am. Bankers Ins. Co., 115 F.3d 892 (11th Cir. 1997).

613 *See* § 4.7.2, *supra*.

a debt collector.[614] It very well may be that such a creditor is not a debt collector (it is not collecting for another and its principal purpose is unlikely to be debt collection). But the court would be wrong in using the FDCPA § 1692a(6)(F)(ii) exclusion as the basis for the creditor's exemption, because the creditor is not collecting a debt owed to another.

4.8.9 *When Person Obtains Debt Not Yet in Default, FDCPA § 1692a(6)(F)(iii)*

4.8.9.1 Generally

> The term ["debt collector"] does not include . . .
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person;[615]

FDCPA § 1692a(6)(F)(iii) excludes from the debt collector definition a person collecting on a debt owed to another, if that person obtained the debt when the debt was not in default. Nevertheless, the exclusion will not apply to the same person collecting on an account obtained after default. The person can be a covered debt collector for some accounts and not others.[616] A servicer obtaining an account after default is a debt collector if the account is owed or due another.[617]

"Obtained" does not mean obtained ownership—if it did, the exclusion would be a nullity because it applies only to those collecting debts for another. The Seventh Circuit defines "obtained" as acquiring the authority to collect money on behalf of another.[618] A mortgage servicer,[619] management company,[620] or rental agent[621] obtains a debt when hired to take on a specific account to service or to manage. For servicers, the relevant date is when the transfer of servicing rights became effective. This usually occurs in connection with the transfer of servicing rights for a large pool of loans.[622]

A servicer is not a debt collector when entrusted with accounts not yet in default.[623] The Senate Report leading to the FDCPA's enactment indicates the exclusion applies to "mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing."[624] The same is the case for a property management company or rental agent that obtains an account prior to default.[625] A person is not a debt collector if an account is obtained prior to default, even if the person engages in collection after the account is in default.[626]

When an entity obtained an account through its merger with the original creditor at a time when the debt was not in default, the successor entity is not a debt collector.[627] Where a company obtained the debt through its merger with the original creditor at a time when the debt was in default, many courts hold that the company may be a debt collector subject to the FDCPA with regard to the defaulted accounts.[628] However, some courts have found that where a company obtained a debt through its merger with the original creditor at a time when the debt was in default, the company is *not* a debt collector with regard to

614 *See* Montgomery v. Huntington Bank, 346 F.3d 693, 699 (6th Cir. 2003). *See also* Anderman v. JP Morgan Chase Bank, 803 Fed. Appx. 290 (11th Cir. 2020).

615 15 U.S.C. § 1692a(6)(F)(iii). Reg. F § 1006.2(*i*)(2)(vi)(C) tracks the statutory language with only stylistic and format changes.

This section first appeared late in the legislative process in Senate Consumer Affairs Subcommittee drafts.

616 *See* Bailey v. Sec. Nat'l Servicing Corp., 154 F.3d 384 (7th Cir. 1998) (exclusion's application on collection of same debt depends whether collecting on original debt in default or on its loan modification no longer in default).

617 *E.g.* Tusen v. M&T Bank, 2017 WL 4990524(D. Minn. Oct. 31, 2017).

618 Carter v. AMC, L.L.C., 645 F.3d 840 (7th Cir. 2011). *See also* Papetti v. Does 1–25, 691 Fed. Appx. 24 (2d Cir. 2017); Geiger v. Florida Hosp. Mem'l Med. Ctr., 2017 WL 1177310 (M.D. Fla. Mar. 29, 2017).

619 *See* Alibrandi v. Fin. Outsourcing Services, Inc., 333 F.3d 82, 84–85 (2d Cir. 2003); Wadlington v. Credit Acceptance Corp., 76 F.3d 103, 107 (6th Cir. 1996); Bailey v. Sec. Nat'l Servicing Corp., 154 F.3d 384, 387–388 (7th Cir. 1998); Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985).

620 Carter v. AMC, L.L.C., 645 F.3d 840 (7th Cir. 2011); Gonon v. Cmty. Mgmt. Serv., Inc., 2015 WL 5692559 (S.D. Ind. Sept. 28, 2015) (homeowners' association property manager); Eke v. FirstBank Florida, 779 F. Supp. 2d 1354 (S.D. Fla. 2011); Lamb v. HSC Real Estate, Inc., 2008 WL 467410 (E.D. Wash. Feb.19, 2008).

621 Ramsay v. Sawyer Prop. Mgmt. of Md. L.L.C., 593 Fed. Appx. 204 (4th Cir. 2014); Franceschi v. Mautner Glick Corp., 22 F. Supp. 2d 250 (S.D.N.Y. 1998).

622 Johnson-Gellineau v. Steine & Assoc., 2018 WL 1605574, at *13 (S.D.N.Y. Mar. 29, 2018), *aff'd*, 837 Fed. Appx. 8 (2d Cir. 2020).

623 Macias v. Ocwen Loan Servicing, L.L.C., 718 Fed. Appx. 32 (2d Cir. 2017); Brumberger v. Sallie Mae Servicing Corp., 84 Fed. Appx. 458 (5th Cir. 2004); Valletta v. Navient Corp., 2017 WL 1437563 (D. Ariz. Apr. 24, 2017).

624 S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*.

625 Ramsay v. Sawyer Prop. Mgmt. of Md. L.L.C., 593 Fed. Appx. 204 (4th Cir. 2014) (rental agent); Gonon v. Cmty. Mgmt. Serv., Inc., 2015 WL 5692559 (S.D. Ind. Sept. 28, 2015) (homeowners' association property manager); Taylor v. Precision Prop. Mgmt., 2015 WL 1756981 (W.D. Mich. Apr. 17, 2015) (condo association's property manager); Eke v. FirstBank Florida, 779 F. Supp. 2d 1354 (S.D. Fla. 2011) (property manager); Franceschi v. Mautner Glick Corp., 22 F. Supp. 2d 250 (S.D.N.Y. 1998) (rental agent).

626 *See* Gentleman v. Massachusetts Higher Educ. Assistance Corp., 272 F. Supp. 3d 1054 (N.D. Ill. 2017); Gonon v. Cmty. Mgmt. Serv., Inc., 2015 WL 5692559 (S.D. Ind. Sept. 28, 2015) (homeowners' association property manager); Fontell v. Hassett, 870 F. Supp. 2d 395 (D. Md. 2012) (condominium association and its management agent); Franceschi v. Mautner Glick Corp., 22 F. Supp. 2d 250 (S.D.N.Y. 1998).

627 *See, e.g.*, Mathieson v. Wells Fargo Bank, 524 F. Supp. 3d. 1246, 1259 (M.D. Fla. 2021) (§ 1692a(6)(f)(iii) exception applies where mortgage was not in default when servicer took over servicing rights through corporate merger); Hines v. Regions Bank, 2020 WL 4335830 (N.D. Ala. July 28, 2020), *aff'd*, 2021 WL 4551301 (11th Cir. Oct. 5, 2021); Kovacik v. PNC Bank, 2015 WL 5255265 (W.D. Pa. Sept. 9, 2015); Ware v. Wells Fargo Bank, 2014 WL 12861350 (N.D. Ga. Aug. 11, 2014), *adopted*, 2014 WL 12861676 (N.D. Ga. Sept. 30, 2014); Centennial Bank v. Noah Grp., L.L.C., 755 F. Supp. 2d 1256 (S.D. Fla. 2010).

628 *See* Riley v. Home Retention Serv., Inc., 2014 WL 11906643 (S.D. Fla. Oct. 23, 2014); McAdams v. Citifinancial Mortg. Co., 2007 WL 141128 (M.D. La. Jan. 16, 2007).

those accounts, because the debt is not deemed to have been "obtained" for debt collection purposes.[629]

A debt buyer or other transferee of an account's ownership does not benefit from this exclusion. The Supreme Court has ruled that a debt buyer does not collect debts owed to another, because it is the current owner.[630] FDCPA § 1692a(6)(F)(iii) applies only to a person collecting on debts owed to another, so that it is not applicable to a debt buyer, whether it purchased a debt prior to or after default. Instead, a debt buyer is a debt collector if its principal purpose is debt collection,[631] whether or not the debt at issue was in default when purchased—as long as none of the other exclusions set out in FDCPA § 1692a(6) apply. On the other hand, that a debt buyer purchased a debt after default does not make it a debt collector—its principal business must be debt collection.[632]

FDCPA § 1692a(6)(F)(iii) is an exception to a person being defined as a debt collector. As an exception to the general rule, the burden should be on the collector to prove that the exception applies and that the loan was not in default when obtained.[633] Nevertheless, it is prudent for the consumer to allege both that the entity regularly collects debts owed to another and that such debts were in default when the entity obtained the debt—failure to plead the debt is in default has led some courts to dismiss a case.[634]

4.8.9.2 When Does Default Occur?

The FDCPA does not define default and courts are not consistent as to standards as to when a debt is considered in default. Certainly, a debt is in default by the time the creditor characterizes a debt as a bad debt, has handed it over for collection, or has written it off—if not before then.[635] A debt can be in default prior to the creditor sending a formal notice of default.[636]

On the other hand, a debt is not in default when services have been rendered, but the bill not yet sent.[637] An initial demand for payment is unlikely to be defined as declaring the debt in default. The Second Circuit has found that a debt that is merely outstanding does not make it in default, but only after some period of time does an outstanding debt go into default.[638] Even though a billing statement says it is due when rendered, it does not immediately go into default if not paid upon receipt.[639]

On the other hand, even if a creditor or debt collector characterizes a debt as not yet in default, the debt can be in default.[640] A creditor's self-serving statement that a debt is not in default may not be persuasive and a debt can be in default well before the creditor declares the debt in default.[641]

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629 *See, e.g.*, Brown v. Morris, 243 Fed. Appx. 31, 34–35 (5th Cir. 2007) (where mortgage company was not "specifically assigned" the mortgage for debt collection purposes, but rather acquired it through merger with previous mortgage company, the successor company was not deemed to have "obtained" the mortgage while it was in default); Esquivel v. Bank of Am., 2013 WL 682925 (E.D. Cal. Feb. 21, 2013) (same); Pascal v. JPMorgan Chase Bank, 2013 WL 5878142, at *2 (S.D.N.Y. Oct. 31, 2013) (same). *See also* Fenello v. Bank of Am., 926 F. Supp. 2d 1342 (N.D. Ga. 2013) (that the merger occurred after the plaintiffs' default did not change the fact that, by operation of law, the bank now stood in the place of the company it merged with as plaintiffs' loan servicer), *aff'd*, 577 Fed. Appx. 899 (11th Cir. Aug. 12, 2014); Forester v. Bank of Am., 2012 WL 3206471 (S.D. Ala. Aug. 7, 2012) (even though Countrywide obtained plaintiff's loan through assignment when it was already in default, when Countrywide then merged into BACHLS that entity (BACHLS) was not a debt collector). *Cf.* Rico v. Eveland, 2020 WL 7414016 (D. Utah. Dec. 17, 2020) (successor attorneys were not debt collectors, because they did not obtain debt through assignment for debt collection purposes but, instead, obtained it through purchase of law firm that included debt).

630 Henson v. Santander Consumer USA Inc., ___ U.S. ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017).

631 *See* § 4.7.2, *supra*.

632 Henson v. Santander Consumer USA Inc., ___ U.S. ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017).

633 Garner v. Select Portfolio Servicing, Inc., 2017 WL 8294293 (6th Cir. Oct. 27, 2017). *See also* Heejoon Chung v. U.S. Bank, 250 F. Supp. 3d 658, 685 (D. Haw. 2017) (servicer failed to meet burden to show loan not in default when acquired servicing rights, could not rely on claim it acquired servicing rights through a corporate merger). *But see* Wade v. Wells Fargo Home Mortg., 2019 WL 8333548, at *9 (W.D. Tenn. Dec. 20, 2019) (denying borrower's motion for summary judgment because borrower did not produce evidence of default status of loan at time of servicing transfer).

634 Qurashi v. Ocwen Loan Servicing, L.L.C., 760 Fed. Appx. 66 (6th Cir. 2019); Scott v. Mortg. Grp., L.L.C., 2017 WL 3732097 (S.D. Fla. Aug. 30, 2017); Keeton v. Countrywide Home Loans, Inc., 217 F. Supp. 3d 177 (D.D.C. 2016); Dareing v. Bank of Am. Corp., 2015 WL 11255490 (N.D. Ga. Feb. 18, 2015), *adopted*, 2015 WL 11364358 (N.D. Ga. Mar. 13, 2015). *Compare* McFadden v. Nationstar Mortg. L.L.C., 2021 WL 3284794, at *3 (D.D.C. July 30, 2021) (complaint survives motion to dismiss when alleges loan was in default when servicer acquired servicing rights, need not aver details of when and how loan went into default), *and* Torliatt v. Ocwen Loan Servicing, L.L.C., 2020 WL 1904596, at *4 (N.D. Cal. Apr. 17, 2020) (complaint against mortgage servicer failed to allege that notice of default as defined under mortgage was ever given).

635 *See* Anderson v. Good Shepherd Hosp., Inc., 2011 WL 846091 (E.D. Tex. Mar. 8, 2011) (sending of "final notice" and thereafter transmitting account to third party for collection indicated that debt was in default).

636 Lombana v. Green Tree Servicing, L.L.C., 2015 WL 3999366 (C.D. Cal. June 29, 2015).

637 Church v. Accretive Health, Inc., 654 Fed. Appx. 990, 992 (11th Cir. 2016) (upholding determination on summary judgment that debt was not in default at time of transfer to collector, because hospital creditor hadn't asked debtor to pay balance after insurance); Gould v. ClaimAssist, 876 F. Supp. 2d 1018 (S.D. Ill. June 27, 2012). *See also* Brown v. Knoxville HMA Holdings, L.L.C., 2020 WL 1322885, at *10 (M.D. Tenn. Mar. 20, 2020); Lange v. Prof'l Account Services, Inc., 2020 WL 1302512 (D. Alaska. Mar. 18, 2020) (entity hired to record hospital lien six days after patient's discharge was not debt collector, since debt was not in default and hospital intended to pursue patient's medical insurance coverage before billing him).

638 Alibrandi v. Fin. Outsourcing Services, Inc., 333 F.3d 82, 87 (2d Cir. 2003). *See also* Papetti v. Does 1–25, 691 Fed. Appx. 24 (2d Cir. 2017).

639 Mahon v. Anesthesia Bus. Consultants, L.L.C., 2016 WL 1452333 (D. D.C. Apr. 13, 2016) (not in default when obtained account immediately on billing going out even though said due when rendered).

640 Echlin v. Dynamic Collectors, Inc., 102 F. Supp. 3d 1179 (W.D. Wash. 2015). *But see* Church v. Accretive Health, Inc., 654 Fed. Appx. 990, 992 (11th Cir. 2016) (upholding determination on summary judgment that the debt was not in default at time of transfer to collector because hospital creditor hadn't asked debtor to pay the balance after insurance).

641 Magee v. AllianceOne, Ltd., 487 F. Supp. 2d 1024 (S.D. Ind. 2007).

Where the creditor or servicer indicates or acts as if the debt is in default, then the debt should be in default at least by that point in time, even if it is not yet in default.[642] One court used this test: "would a reasonable person in the debtor's position believe that the creditor viewed the debt as being in default?"[643] But the fact that the consumer disputes that the loan is in default or even disputes that the consumer owes the debt does not change the fact that the debt should be considered in default for purposes of rebutting the exclusion when the creditor has declared or views the loan to be in default.[644]

Relevant to a determination is the contract's definition of default.[645] If the contract provides that "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default," then any payment that is overdue is a default.[646] If a contract defines default as being late by one month, the fact that the creditor has discretion as to when it acts on the default does not change the fact that the debt is in default if payment is a month late.[647] If applicable law defines default, that can also determine if there has been a default.[648]

It is clear that there is no one simple test whether a debt is in default. One court listed these factors as relevant to a determination if a debt is in default: the number of times a creditor has requested payment, the time that has elapsed since the first request, the urgency of the language used in those requests, the debtor's knowledge that they have been referred to a third party, the creditor's internal policies, any representations made by or on behalf of the creditor—either publicly or to a specific debtor—about how it collects debts, and apparent attempts by the creditor or third party to circumvent the FDCPA's consumer protections.[649]

The Third Circuit finds that dishonored checks are in default because there is a failure to pay when due.[650] A loan is in default for purposes of FDCPA coverage even if the debtor is curing the default in a chapter 13 bankruptcy. A servicer obtaining the debt at that point is a debt collector.[651]

A servicer still takes a loan when it is in default even if the servicer brings the loan out of default through a loan modification or otherwise—the status when it began to service the loan remains controlling.[652] However, where a loan was in default,

642 *See* Bowen v. Ditech Fin., L.L.C., 2017 WL 4183081 (D. Me. Sept. 20, 2017); Bohringer v. Bayview Loan Servicing, L.L.C., 141 F. Supp. 3d 1229 (S.D. Fla. 2015); Mavris v. RSI Enters. Inc., 86 F. Supp. 3d 1079 (D. Ariz. 2015); Head v. Ocwen Loan Servicing, L.L.C., 2015 WL 4276148 (D. Kan. July 14, 2015); Langley v. Green Tree Servicing, L.L.C., 2015 WL 6965274 (S.D. Tex. Nov. 10, 2015); Hoehn v. FCC Fin., L.L.C., 126 F. Supp. 3d 472 (D.N.J. 2015); Geary v. Green Tree Servicing, L.L.C., 2015 WL 1286347 (S.D. Ohio Mar. 20, 2015); Haber v. Bank of Am., 2014 WL 2921659 (E.D. Pa. June 27, 2014); Thomas v. Deutsche Bank Nat'l Tr. Co., 2012 WL 2829451 (E.D. Ark. July 10, 2012).

643 *See* Mavris v. RSI Enters. Inc., 86 F. Supp. 3d 1079, 1086 (D. Ariz. 2015).

644 Bridge v. Ocwen Fed. Bank, 681 F.3d 355 (6th Cir. 2012). *See also* Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003); Makhnevich v. MTGLQ Investors, L.P., 2021 WL 3406484, at *5 (S.D.N.Y. Aug. 4, 2021) (debtor can deny all liability for debt at same time as avers that defendant treated debt as in default); Zinetti v. Deutsche Bank Nat'l Tr. Co. 2020 WL 409725, at *7 (D. Del. Jan. 24, 2020), *adopted*, 2020 WL 1536092 (D. Del. Feb. 14, 2020); Cooke v. Carrington Mortg. Services, 2019 WL 3241128 (D. Md. July 17, 2019); Thomas v. Ocwen Loan Servicing, 2018 WL 3608398 (W.D. Wash. July 26, 2018); Czerniak v. Servis One, Inc., 2017 WL 1196886 (N.D. Ill. Mar 31, 2017) (servicer incorrectly believed personal liability on mortgage debt still owed after bankruptcy discharge); Ayres v. Ocwen Loan Servicing, L.L.C., 129 F. Supp. 3d 249 (D. Md. 2015); Alhassid v. Bank of Am., 60 F. Supp. 3d 1302 (S.D. Fla. 2014); Galante v. Ocwen Loan Servicing L.L.C., 2014 WL 3616354 (D. Md. July 18, 2014); Haynes v. Wells Fargo Bank, 2009 WL 10677040 (E.D. Tex. Mar. 11, 2009), *adopted*, 2009 WL 10677775 (E.D. Tex. Mar. 31, 2009) (homeowner asserted had cured mortgage default in chapter 13 while servicer treated loan as in default).

645 *See, e.g.*, Dionne v. Fed. Nat'l Mortg. Ass'n, 2016 WL 6892465 (D.N.H. Nov. 21, 2016); McClenahan v. Equifax Info. Serv. L.L.C., 2016 WL 554819 (D. Minn. Feb. 11, 2016); Kapsis v. Am. Home Mortg. Servicing Inc., 923 F. Supp. 2d 430 (E.D.N.Y. 2013) (whether a debt is in default may be determined by the contract if it contains a default provision); Hartman v. Meridian Fin. Serv., 191 F. Supp. 2d 1031 (W.D. Wis. 2002). *See also* Ngo v. NPAS, Inc., 2021 WL 149121 (E.D. La. Jan. 15, 2021) (no evidence that consumer's debt was ever determined to be "in default" according to the terms of the creditor hospital's "conditions of admission"); Metzger v. Seterus, Inc., 2020 WL 2468480 (D. Minn. May 13, 2020) (under plain terms of promissory note, owing late charge is not same as being in default); Koepplinger v. Seterus, Inc., 2020 WL 2063416 (M.D.N.C. Apr. 29, 2020) (loan not in default at acquisition of servicing rights solely because late fee assessed; contractual terms did not set due date for payment of a late fee), *adopted*, 2020 WL 5705915 (M.D.N.C. Aug. 26, 2020); Raya v. NPAS, Inc., 2020 WL 3550009 (E.D. Va. Mar. 31, 2020).

646 Dionne v. Fed. Nat'l Mortg. Ass'n, 2016 WL 6892465 (D.N.H. Nov. 21, 2016). *See also* Castellanos v. Deutsche Bank, 2012 WL 2684968 (S.D. Ohio July 6, 2012).

647 Wood v. Nationstar Mortg., L.L.C., 2017 WL 3484664 (D. Or. Aug. 14, 2017).

648 *See* Skerry v. Mass. Higher Educ. Asst. Corp., 73 F. Supp. 2d 47, 53, 54 (D. Mass. 1999) (applying definition of "default" in Federal Family Education Loan Program regulations to construe § 803(6)(F)(iii)); Jones v. InTuition, Inc., 12 F. Supp. 2d 775, 779 (W.D. Tenn. 1998) (same). *See also* 12 C.F.R. § 1024.31 (defining "delinquency" under RESPA as "[a] borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid, until such time as no periodic payment is due and unpaid.").

649 *See* Mavris v. RSI Enters. Inc., 86 F. Supp. 3d 1079 (D. Ariz. 2015).

650 F.T.C. v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007). *See also* Durkin v. Equifax Check Serv., Inc., 2002 WL 31426397 (N.D. Ill. Oct. 28, 2002); Winterstein v. CrossCheck, Inc. 149 F. Supp. 2d 466 (N.D. Ill. 2001).

651 *In re* Trevino, 615 B.R. 108, 135 (Bankr. S.D. Tex. 2020).

652 Moody v. PennyMac Loan Services, L.L.C., 2019 WL 7596261, at *8 (D.N.H. Nov. 12, 2019) (servicer covered where loan was in default when servicer took over and servicer modified loan after it had commenced foreclosure); Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521 (D.N.J. July 27, 2017) (where mortgage was in default when servicer took over, servicer does not become a "creditor" by offering a modification or other loss mitigation option later); Poynter v. Ocwen Loan Servicing, L.L.C., 2016 WL 5380926 (W.D. Ky. Sept. 23, 2016) (fact that loan may have been modified later did not alter servicer's status as debt collector if loan was in default when the servicer took over servicing); Traut v. Quantum Servicing Corp., 2016 WL 8844254 (D. Mass. Aug. 4, 2016) (servicer is debt collector when borrower was under trial modification plan or forbearance agreement when servicer took over); Gritters v Ocwen Loan Servicing, L.L.C., 2014 WL 7451682 (N.D. Ill. Dec. 31, 2014) (servicer still debt collector even though it made relevant

but a loan modification brings the loan out of default, and then a new servicer takes over the loan, then that new servicer can claim to obtain the account while it was not in default and is not covered by the FDCPA when collecting on the modified loan.[653] The result is different if the modification fails, and the new servicer instead seeks to collect on the original debt where that original loan was in default at the time the servicer obtained the debt.[654]

Medical debt, in particular, raises issues because medical providers often do not expect prompt payment while insurance claims are processed that will cover all or much of the amount owed.[655] Look to see if the provider has a published policy as to payments that might suggest when the provider considers a debt in default.[656]

Medical providers may also hire collectors or subrogation agents to seek subrogation from the consumer when the consumer receives payment from a third party that is responsible for the consumer's injuries. Where the collector obtains an account for this purpose prior to the payment by the third party, the consumer is not yet be in default in the obligation to forward those payments to the medical provider, and the exception to coverage applies to the collector.[657]

4.8.10 Secured Parties Involving Commercial Credit, FDCPA § 1692a(6)(F)(iv)

> The term ["debt collector"] does not include . . .
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.[658]

The FDCPA § 1692a(6)(F)(iv) exclusion applies where a retailer or lender puts up consumer accounts receivable as collateral for commercial financing, and then defaults on that obligation. A secured party collecting on the payments due on the retailer's or lender's consumer accounts receivable is covered by this exclusion, so as not to be a debt collector.[659]

Nevertheless, FDCPA § 1692(a)(6) provides "Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." Since the exclusion for secured parties involving commercial credit is in clause (F), a secured party is a covered debt collector if it uses any name other than its own.

4.8.11 Private Bad Check Diversion Programs, FDCPA § 1692p

Section 1692p,[660] added to the FDCPA in 2006,[661] creates a limited exclusion from the definition of debt collector for private entities operating bad check diversion programs only if those entities meet a list of conditions. The check diversion program must be one established by a state or district attorney within its jurisdiction as a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily to avoid criminal prosecution.[662] In addition, the program cannot involve the following types of checks:

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collection efforts under modified loan; original loan had been in default when servicer took over); Harris v. LNV Corp., 2014 WL 12530946 (M.D. Tenn. Jan. 8, 2014) (mag.; forgiving some debt or modifying loan after acquisition does not remove from coverage); Oliver v. Ocwen Loan Serv., L.L.C., 2013 WL 210619 (W.D. Wash. Jan. 18, 2013). *See also* McWhorter v. Ocwen Loan Servicing, L.L.C., 2017 WL 3315375 (N.D. Ala. Aug. 3, 2017) (debtor was under trial HAMP plan at time of servicing transfer and later received modification; not clear whether original loan agreement or modification controlling, or whether borrower was current under trial plan). *But see* Ross v. Specialized Loan Servicing, L.L.C., 2018 WL 3636543 (E.D. Tenn. July 31, 2018) (loan was subject to cure plan in chapter 13 case so not in default when servicer took over—failing to recognize that under bankruptcy law the mortgage default is not cured until chapter 13 plan is completed).

653 Bailey v. Sec. Nat'l Servicing Corp., 154 F.3d 384 (7th Cir. 1998); Vilkofsky v. Specialized Loan Servicing, L.L.C., 2017 WL 2573874 (W.D. Pa. June 14, 2017) (mortgage servicer was exempt as the mortgage was brought current by a loan modification agreement before the servicing rights were transferred); Wallace v. Bank of Am., 2011 WL 3859745 (D.N.J. Aug. 30, 2011) (company servicing a current payment plan or forbearance agreement rather than demanding payment on a defaulted loan); *In re* Tolliver, 2012 WL 2952239 (Bankr. E.D. Ky. July 19, 2012) (forbearance payment plan not considered after default).

654 Bailey v. Sec. Nat'l Servicing Corp., 154 F.3d 384 (7th Cir. 1998).

655 Roberts v. NRA Grp., L.L.C., 2012 WL 3288076 (M.D. Pa. Aug. 10, 2012). *See also* National Consumer Law Center, Collection Actions § 9.2.2.2 (5th ed. 2020), *updated at* www.nclc.org/library.

656 *See* Mavris v. RSI Enters. Inc., 86 F. Supp. 3d 1079 (D. Ariz. 2015).

657 Kesselman v. Rawlings Co., L.L.C., 668 F. Supp. 2d 604 (S.D.N.Y. Nov. 13, 2009). *See also* Dantin v. Rawlings Co., L.L.C., 2005 WL 6075786 (M.D. La. Apr. 13, 2005); Hamilton v. Trover Solutions, Inc., 2003 WL 21105100 (E.D. La. May 13, 2003), *aff'd*, 104 Fed. Appx. 942 (5th Cir. 2004). *Compare* Young v. NPAS, Inc., 361 F. Supp. 3d 1171, 1195 (D. Utah 2019) (reasonable person would view hospital's billing processor as treating accounts it serviced as in default), *and* Wagoner v. NPAS, Inc., 456 F. Supp. 3d 1030, 1033 (N.D. Ind. 2020) (same hospital billing processor received accounts to process insurance coverage before they were in default).

658 15 U.S.C. § 1692a(6)(F)(iv). Reg. F § 1006.2(*i*)(2)(vi)(D) tracks the statutory language with only stylistic and format changes.

This section was added late in the legislative process during the Senate Consumer Affairs Subcommittee drafts.

659 *See* Melendez-Febus v. Toyota Credit de Puerto Rico Corp., 2009 WL 2950369 (D. P.R. Sept. 9, 2009) (defendant exempt enforcer of security agreement); Friedman v. Textron Fin. Corp., 1997 WL 467175 (N.D. Ill. Aug. 12, 1997) (commercial lender exempt). *See also* S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3–4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra* ("the committee does not intend the definition [of debt collector] to cover . . . the collection of debts collateral for commercial credit extended to the creditor"); FTC Official Staff Commentary § 803(6)-4(f), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

660 *See also* Reg. F § 1006.2(*i*)(2)(vii).

661 *See* § 3.4.2.4, *supra*.

662 15 U.S.C. § 1692p(a)(2)(A).

- Postdated checks for payday loans where the lender knew at the time of the check issuance that there were insufficient funds in the consumer's account;
- Checks involving the consumer's good faith stop payment order;
- Checks dishonored because of adjustments made at the bank without notice to the consumer;
- Checks in partial payment where partial payment had been accepted in the past;
- Checks written by a person not competent or not legal age; or
- Checks for illegal transactions.[663]

The private entity operating the check diversion program must be subject to an administrative support services contract with the state or district attorney and must operate under the direction, supervision, and control of the state or district attorney.[664] In addition, the check diversion program is only excluded from the definition of debt collector if it:

- Complies with the state's penal laws;[665]
- Complies with its contract and state directives;
- Does not exercise independent prosecutorial discretion;[666]
- Contacts alleged offenders for participation in the program only after the state or district attorney finds probable cause under the bad check law and that contact with the individual is appropriate, and that no payment followed a demand for payment;[667]
- Includes in the initial written communication with the alleged offender a clear and conspicuous disclosure that there is an opportunity to dispute the alleged violation, to file a crime report in the case of check forgery or related fraud, and to file a written dispute within 30 days that will trigger the state or district attorney investigating the matter again for probable cause before further proceedings;[668] and
- Only charges fees authorized by its contract with the state or district attorney.[669]

The failure of the program to meet all of these conditions is not itself an FDCPA violation—only that the provision does not exclude the check diversion program from the debt collector definition.[670] If not excluded, the consumer must still show that the diversion program otherwise qualifies as a debt collector and that its practices violate the FDCPA.

4.8.12 Debt Collectors Not Covered Under Regulation F, § 1006.1(c)

Regulation F (effective November 30, 2021) is based on the CFPB's authority under the FDCPA, the Dodd-Frank Act, and the E-SIGN Act.[671] Since Regulation F is issued based, in part, on the CFPB's authority under the FDCPA, it applies to all debt collectors covered by the FDCPA unless otherwise excluded.[672] The Regulation contains two such exclusions, discussed below.

Regulation F § 1006.1(c)(1) explicitly excludes from the Regulation F definition of debt collector those excluded by 12 U.S.C. § 5519(a). That provision excludes "a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both."[673] But *not* excluded are motor vehicle dealers that:

- Provide consumers with any services related to residential or commercial mortgages or self-financing transactions involving real property;
- Operate a line of business involving motor vehicle retail credit or lease extensions where the credit contract is not routinely assigned to a third party (e.g., a buy-here, pay-here dealer); or
- Offer a consumer financial product or service not involving the sale, financing, leasing, rental, repair, refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or service.[674]

With the exceptions noted above, motor vehicle dealers are excluded debt collectors for purposes of Regulation F (but not for purposes of the FDCPA), even where they regularly collect

663 15 U.S.C. §§ 1692p(a)(2)(A), 1692p(b).

664 15 U.S.C. § 1692p(a)(2)(B).

665 *But cf.* Solberg v. Victim Serv., Inc., 2019 WL 6140460 (N.D. Cal. Nov. 20, 2019) (requirement applies to private check diversion company, so that district attorney's failure to company with penal laws does not prevent application of the exclusion).

666 *Cf.* Solberg v. Victim Serv., Inc., 2019 WL 6140460 (N.D. Cal. Nov. 20, 2019) (discussing this requirement but reaching no conclusion).

667 Solberg v. Victim Serv., Inc., 2019 WL 6140460 (N.D. Cal. Nov. 20, 2019) (notice letter did not provide that district attorney would be the one determining probable cause); *Cavnar v. BounceBack, Inc.*, 2015 WL 4429095 (E.D. Wash. July 17, 2015) (exclusion did not apply where no evidence additional demand for payment made). *See also* Breazeale v. Victim Services, Inc., 2015 WL 13860897 (N.D. Cal. July 16, 2015) (complaint plausibly alleged that defendants did not effectively implement measures imposed by district attorneys).

668 Cavnar v. BounceBack, Inc., 2015 WL 4429095 (E.D. Wash. July 17, 2015) (exclusion did not apply where gave consumer only 10 days, not 30, and did not disclose dispute would lead to new investigation).

669 15 U.S.C. § 1692p(a)(2)(C).

670 Cavnar v. BounceBack, Inc., 2015 WL 4429095 (E.D. Wash. July 17, 2015) (exclusion did not apply where did not comply with conditions).

671 Reg. F § 1006.1(a) (specifying legal authority for Regulation F as "sections 814(d) and 817 of the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692*l*(d), 1692o; title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. 5481 *et seq.*; and paragraph (b)(1) of section 104 of the Electronic Signatures in Global and National Commerce Act (E-SIGN Act), 15 U.S.C. 7004").

672 For example, the Regulation F supplemental information states:

> The Bureau explained that it was not finalizing § 1006.1(c)(2) as part of the November 2020 Final Rule because all of the provisions of that final rule apply to debt collectors as defined in § 1006.2(i). The Bureau nevertheless reserved § 1006.1(c)(2) so that the Bureau could clarify which provisions of this final rule, if any, apply to debt collectors only if they are collecting debt related to a consumer financial product or service.

86 Fed. Reg. 5766, 5771 (Jan. 19, 2021).

673 12 U.S.C. § 5519(a).

674 12 U.S.C. § 5519(b).

debts for another or collect their own debts under a fictitious name.

The second exclusion, found in Reg. F § 1006.1(c)(2), states that Reg. F §§ 1006.34(c)(2)(iii) and (3)(iv) (certain of the provisions dealing with verification notices) apply to debt collectors only when they are collecting debt related to a consumer financial product or service as defined in 12 U.S.C. § 5481(5). This exclusion is examined at §§ 9.4.6 and 9.4.7, *infra*.

4.9 Limited-Content Message, Regulation F § 1006.2(j)

4.9.1 Overview

> **(j) Limited-content message** means a voicemail message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content.[675]

Regulation F (effective November 30, 2021) introduces a new concept, called a "limited-content message."[676] It applies to voicemail messages, but not to other forms of messages.[677] To qualify, it must include all the content described at Reg. F § 1006.2(j)(1), and it may include content described at Reg. F § 1006.2(j)(2), but it may contain no other content.

The Official Interpretations provide an example of a message that fails to qualify:

> If a voicemail message includes content other than the specific items described in § 1006.2(j)(1) and (2), and such other content directly or indirectly conveys any information about a debt, the message is a communication, as defined in § 1006.2(d). For example, a voicemail message that includes a statement that the message is from a debt collector and a request to speak to a particular consumer is not a limited-content message because it includes more than the required or permitted content.[678]

A limited-content message is defined as one left for a "consumer." Any message knowingly left for a third party is not a limited-content message.[679] As Regulation F's Official Interpretations explain:

> For example, assume that a debt collector has a telephone number that the debt collector knows belongs to the consumer's friend. A voicemail message left after calling that number is not a limited-content message, even if the message includes no more than the content described in § 1006.2(j)(1) and (2), because the debt collector knowingly left the message for someone other than the consumer.[680]

On the other hand, the regulation's supplemental information states that, "messages left without knowledge that the voicemail belongs to a third party, or if a debt collector is unsure to whom the voicemail belongs, are limited-content messages."[681]

As discussed in § 4.2.5, *supra*, the Regulation F Official Interpretations state that a debt collector does not convey information regarding a debt if the debt collector leaves the consumer a voicemail message that is a limited-content message.[682] As a result, a limited-content message that complies fully with Reg. F § 1006.2(j) is not a "communication"[683] and does not trigger the prohibition on communications with third parties[684] or the requirement to provide certain disclosures in the initial and subsequent communications in FDCPA § 1692e(11) [Reg. F § 1006.18(e)].[685] Moreover, Regulation F's Official Interpretations specify that, "[a] debt collector who leaves only a limited-content message for a consumer does not violate Reg. F § 1006.14(g)'s [FDCPA § 1692d(6)'s] requirement to meaningfully disclose the caller's identity with respect to that voicemail message."[686]

Thus, a fully compliant limited-content message effectively provides debt collectors with a safe harbor from the requirements of FDCPA §§ 1692c(b), 1692d(6), and 1692e(11) [Reg. F §§ 1006.6(d)(1), 1006.14(g), and 1006.18(e)]. This addresses a bind collectors face when they leave voicemails for consumers. As explained by the Regulation F supplemental information:

> If a voicemail or other message is a communication with a consumer, FDCPA section 807(11) [§ 1692e(11)] requires that the debt collector identify itself as a debt collector or inform the consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. A debt collector who leaves a message with such disclosures, however, risks violating FDCPA section 805(b)'s [§ 1692d(b)'s] prohibition against revealing debts to third parties if the disclosures are seen or heard by a third party.[687]

Limited-content messages are still "attempts to communicate," and are subject to all Regulation F provisions regulating attempts to communicate.[688] The Official Interpretations

675 Reg. F § 1006.2(j).
676 *See* Reg. F § 1006.2(j).
677 Reg. F Official Interpretations § 2(j)-1. *See also* 85 Fed. Reg. 76,734, 76,748 (Nov. 30, 2020) (discussing how CFPB considered and rejected application of concept of limited-content messages to emails, texts, and social media).
678 Reg. F Official Interpretations § 2(j)-1.
679 Reg. F Official Interpretations § 2(j)-2. *See also* 85 Fed. Reg. 76,734, 76,749 (Nov. 30, 2020) (discussing how CFPB considered and rejected definition of limited-content messages that would have permitted leaving messages with third parties).
680 Reg. F Official Interpretations § 2(j)-2.
681 85 Fed. Reg. 76,734, 76,749 (Nov. 30, 2020).
682 Reg. F Official Interpretations § 2(d)-2.
683 *See* § 4.2, *supra*.
684 15 U.S.C. § 1692c(b); Reg. F § 1006.6(d)(1). *See also* CFPB, FAQ, Limited Content Messages #1, *available at* https://www.consumerfinance.gov ("Since a limited-content message is an attempt to communicate and not a communication under the Debt Collection Rule . . . a debt collector who leaves only a limited-content message does not violate the prohibition against third-party communications.").
685 Reg. F Official Interpretations § 18(e)-1.
686 Reg. F. Official Interpretations § 2(j)-3.
687 85 Fed. Reg. 76,734, 76,747 (Nov. 30, 2020) (footnotes omitted).
688 Reg. F. § 1006.2(b). *See* § 4.2, *supra*.

provide as examples of requirements that may still apply to limited-content messages Reg. F § 1006.6(b) (communications at inconvenient times or places, communications with a consumer represented by an attorney, and certain communications at the consumer's place of employment), § 1006.6(c) (communications after a refusal to pay or cease communication notice), and § 1006.22(f) (although no § 1006.22(f) provisions deal with voicemails).[689] Even though a voicemail message is only a limited-content message, it still can lead to a violation of these or other FDCPA provisions. Section 4.2.1, *supra*, identifies Regulation F provisions and Official Interpretations that apply to "attempts to communicate."

In a FAQ, the CFPB discussed several types of messages that do not qualify as limited-content messages. First, a voicemail message that includes content required by state law that is beyond the optional or required content outlined in Reg. F § 1006.2(j) is not a limited-content message.[690] Next, if a call drops in the middle of leaving a voicemail message, the partial message that did not include all of the required elements of a limited-content message would not be a limited-content message.[691] Finally, voicemails modeled after *Zortman v. J.C. Christensen & Associates, Inc.*[692] are not limited-content messages.[693]

A contact that does not qualify as a limited-content message is not automatically a communication.[694] The Regulation F supplemental information states: "By finalizing a definition of limited-content message that excludes third-party messages, therefore, the Bureau has not determined that messages other than limited-content messages sent to third parties are always communications under the FDCPA and the final rule."[695] The definition of communication is discuss in § 4.2, *supra*.

4.9.2 Required Information in a Limited-Content Message

(1) Required content. A limited-content message is a voicemail message for a consumer that includes:

(i) A business name for the debt collector that does not indicate that the debt collector is in the debt collection business;

(ii) A request that the consumer reply to the message;

(iii) The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; and

(iv) A telephone number or numbers that the consumer can use to reply to the debt collector.[696]

Regulation F (effective November 30, 2021) provides that to qualify as a limited-content message, a voicemail to a consumer must contain four items: a business name for the debt collector not indicating that the collector is in the debt collection business; a request that the consumer call back; a name of a person to call back; and a number to call back.[697] The Official Interpretations use this example: "This is Robin Smith calling from ABC Inc. Please contact me or Jim Johnson at 1-800-555-1212."[698]

A collector whose business name indicates it is in the debt collection business would not be able to avail itself of a limited-content message. As the Regulation F supplemental information explains:

> [T]he Bureau expects that many debt collectors will be able to disclose a business name (e.g., a doing business as (d/b/a) name) without revealing that they are in the debt collection business. Moreover, industry has long been subject to FDCPA section 808(8) [§ 1692f(8)], which allows debt collectors to include their business name on an envelope only if the name does not indicate that the debt collector is in the debt collection business. But circumstances might exist that would prevent debt collectors from taking advantage of the limited-content message definition. For example, a debt collector's business name might reveal that the debt collector is in the debt collection business. In such circumstances, a message that includes the debt collector's business name would not be a limited-content message, as defined in final § 1006.2(j).[699]

The CFPB clarifies in an FAQ that Regulation F "does not require the business name in a limited-content message to be the debt collector's legal name or registered DBA," but that "[s]tate licensing or other laws, however, may require a debt collector to use their registered DBA when leaving messages for consumers."[700] The FAQ also clarifies that, "leaving a limited-content message does not violate the requirement to meaningfully disclose the caller's identity with respect to that voicemail message, even though that message may contain abbreviations or may not include the debt collector's full legal name."[701] However, the collector must not use false, deceptive,

689 Reg. F Official Interpretations § 2(j)-2.
690 CFPB, FAQ, Limited Content Messages #3, *available at* https://www.consumerfinance.gov.
691 CFPB, FAQ, Limited Content Messages #4, *available at* https://www.consumerfinance.gov.
692 870 F. Supp. 2d 694 (D. Minn. 2012) ("We have an important message from [company's name]. This is a call from a debt collector. Please call [company's telephone number].")
693 CFPB, FAQ, Limited Content Messages #6, *available at* https://www.consumerfinance.gov.
694 *See* Reg. F Official Interpretations § 2(j)-2 ("If a voicemail message includes content other than the specific items described in § 1006.2(j)(1) and (2), *and* such other content directly or indirectly conveys any information about a debt, the message is a communication, as defined in § 1006.2(d).") (emphasis added).
695 85 Fed. Reg. 76,734, 76,749 (Nov. 30, 2020).
696 Reg. F § 1006.2(j)(1).
697 Reg. F § 1006.2(j)(1).
698 Reg. F Official Interpretations § 2(j)(1)-1.
699 85 Fed. Reg. 76,734, 76,752 (Nov. 30, 2020).
700 CFPB, FAQ, Limited Content Messages #8, *available at* https://www.consumerfinance.gov.
701 *Id.*

or misleading representations in violation of FDCPA § 1692e when disclosing its name or otherwise violate the FDCPA.[702]

In terms of which names indicate that the collector is in the debt collection business, the FAQ notes that "if a debt collector could properly use the business name on an envelope without violating the FDCPA or the Debt Collection Rule, the debt collector could use the same business name in a limited-content message."[703] Whether a collector's name reveals that it is in the business of debt collection is based on the business name and not be based on what the recipient might learn after additional research.[704]

If a caller ID includes a business name or other information not complying with the requirements for a limited-content message, then the message is not a limited-content message. The Regulation F supplemental information states that, "[t]he Bureau acknowledges that caller ID information may disclose more information than permitted by [Reg. F] § 1006.2(j). In these circumstances, such voicemail messages would not meet the definition of limited-content message."[705] Similarly, a phone number conveyed with letters and not numbers (a "vanity number" such as 1-800-COLLECT) could prevent a message from being a limited-content message. The Regulation F supplemental information states: "a vanity telephone number that reveals that the debt collector is in the debt collection business would not comply with final [Reg. F] § 1006.2(j)(1)(i)."[706]

4.9.3 *Optional Information in a Limited-Content Message*

> **(2) Optional content.** In addition to the content described in paragraph (j)(1) of this section, a limited-content message may include one or more of the following:
>
> **(i)** A salutation;
>
> **(ii)** The date and time of the message;
>
> **(iii)** Suggested dates and times for the consumer to reply to the message; and
>
> **(iv)** A statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates.[707]

In addition to required information to qualify a voicemail as a limited-content message,[708] Regulation F (effective November 30, 2021) provides that the collector has the option to include four additional items: a salutation; the date and time; the dates and times requested for the consumer's reply; and a statement that a consumer reply can be with any of the company's representatives or associates.[709] An example of a limited-content message containing both required and optional information would be "Hi, this is Robin Smith calling from ABC Inc. It is 4:15 p.m. on Wednesday, September 1. Please contact me or any of our representatives at 1-800-555-1212 today until 6:00 p.m. Eastern time, or any weekday from 8:00 a.m. to 6:00 p.m. Eastern time."[710]

Not included in either required or optional information in a limited-content message is the consumer's name. The Regulation F's supplemental information considers whether to allow this information and rejects it to avoid conveying information regarding a debt.[711] Also rejected was allowing a generic reference to an account:

> The Bureau does not believe that the word account necessarily discloses the existence of a debt because consumers may receive messages about their accounts with companies other than debt collectors. In the context of the final rule's limited-content message, however, referring to an account would increase the risk of a prohibited third-party disclosure.[712]

While a limited-content message can include a statement that a consumer reply can be with any of the company's representatives or associates, a message that includes a more detailed description of the representative or associate group is not a limited-content message.[713] The Official Interpretations provide an example: "a reference to an agent with the 'credit card receivables group' is not a limited-content message because it includes more than a statement that the consumer's reply may be answered by a representative or associate."[714]

4.10 "Person," Reg. F § 1006.2(k)

> **(k) Person** includes natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.[715]

Regulation F (effective November 30, 2021) adds a definition of "person" that tracks the definition found at 1 U.S.C. § 1 to include natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.[716] "Persons" as used in the FDCPA need not be natural persons. A debt collector violating an FDCPA provision applying to a "person" can be liable to corporations, partnerships, companies, associations, nonprofits, and others.[717] A

702 *Id.*
703 *Id. See also* § 8.8, *infra.*
704 *See* CFPB, FAQ, Limited Content Messages #9, *available at* https://www.consumerfinance.gov.
705 85 Fed. Reg. 76,734, 76,753 (Nov. 30, 2020).
706 85 Fed. Reg. 76,734, 76,753 (Nov. 30, 2020).
707 Reg. F § 1006.2(j)(2).
708 *See* § 4.9.2, *supra.*
709 Reg. F § 1006.2(j)(2).
710 Reg. F Official Interpretations § 2(j)(2)-2.
711 85 Fed. Reg. 76,734, 76,752 (Nov. 30, 2020).
712 85 Fed. Reg. 76,734, 76,752 (Nov. 30, 2020).
713 Reg. F Official Interpretations § 2(j)(2)-1.
714 Reg. F Official Interpretations § 2(j)(2)-1.
715 Reg. F § 1006.2(k).
716 Reg. F § 1006.2(k).
717 *See* Anarion Invs. L.L.C. v. Carrington Mortg. Services, L.L.C., 794 F.3d 568 (6th Cir. 2015). *See also* Valhalla Inv. Props, L.L.C. v. 502, L.L.C., 456 F. Supp. 3d 939, 946 (M.D. Tenn. 2020), *aff'd*, 832 Fed.

"consumer," by contrast, as defined in the FDCPA,[718] must be a natural person. As a result, when a provision applies to a "consumer," the provision applies only to natural persons who otherwise meet the definition of debt collector.[719]

The Regulation F supplemental information explicitly rejects narrowing the definition of person found at 1 U.S.C. § 1:

> The Bureau declines to delete the definition of person or to narrow it to include only natural persons because the plain language of the FDCPA illustrates that Congress did not intend to limit the term person, as used in the FDCPA, to natural persons. For example, the definition of debt collector in the FDCPA uses the phrase "any person" repeatedly, and there is no doubt that Congress intended to include non-natural persons in the definition of debt collector. Where the statute was intended to be limited to natural persons, Congress achieved that intent by using the term consumer.[720]

4.11 "State," FDCPA § 1692a(8)

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.[721]

The FDCPA definition of "State" is necessary to clarify the meaning of an FDCPA exemption from the definition of debt collector for any officer or employee of any "State" to the extent that collecting or attempting to collect any debt is in the performance of the officer or employee's official duties.[722] As defined, this exemption applies to officers or employees not just of the fifty states, but of U.S. territories and possessions, the District of Columbia and Puerto Rico, and counties, cities, towns, and other political subdivisions.

Appx. 413 (6th Cir. 2020) (distinguishing FDCPA's treatment of "consumer" and "person").

718 *See* 15 U.S.C. § 1692a(3).

719 *See* § 4.4, *supra*.

720 85 Fed. Reg. 76,734, 76,754 (Nov. 30, 2020).

721 15 U.S.C. § 1692a(8). Reg. F § 1006.2*(l)* tracks the statutory language.

722 15 U.S.C. § 1692a(6)(C), *discussed at* § 4.8.3, *supra*.

Chapter 5 FDCPA §§ 1692b, 1692c: Collector Communications with Consumers and Third Parties

5.1 Introduction

This chapter discusses the specific requirements which the Fair Debt Collection Practices Act (FDCPA) imposes on debt collectors under 15 U.S.C. §§ 1692b and 1692c. Most of this chapter considers FDCPA § 1692c and Regulation F § 1006.6 (effective November 30, 2021), addressing debt collector communications with the consumer and also generally prohibiting communications about the debt with third parties.

FDCPA § 1692b and Reg. F § 1006.10 address an exception to the rule that prohibits contacting third parties—where the debt collector seeks the consumer's location information from third parties. This exception is addressed in § 5.2, *infra*.

The FDCPA restricts the times and places a debt collector may contact a consumer, restricts third-party contacts, and prohibits contacting a consumer represented by an attorney.[1] The consumer can also require the collector to cease communications with the consumer.[2] These restrictions, along with others,[3] protect the consumer's right to privacy and the security of the consumer's relationships with third parties, including attorneys, coworkers, and employers.[4] This was considered an "extremely important protection" by Congress.[5] Congress explicitly refers to "invasions of individual privacy" as harm the FDCPA was intended to address.[6]

5.2 Third-Party Contacts for Consumer Location Information, FDCPA § 1692b

5.2.1 Text of FDCPA §§ 1692b, 1692a(7)

FDCPA § 1692b provides:

> Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—
>
> (1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;
>
> (2) not state that such consumer owes any debt;
>
> (3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;
>
> (4) not communicate by post card;
>
> (5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and
>
> (6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

Location information is defined in FDCPA § 1692a (7):

> The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

Regulation F (effective November 30, 2021) at § 1006.10 essentially tracks the FDCPA § 1692b statutory language and the definition of location information from § 1692a(7), with minor technical changes. The regulation's official interpretations and the rule's supplemental information provide additional clarifications.

5.2.2 Overview

FDCPA § 1692b establishes a detailed, narrow exception to section 1692c(b)'s general prohibition of third-party contacts,[7] and allows debt collectors in some circumstances to contact third parties to obtain information about the consumer's residence, residential telephone number, and place of

1 15 U.S.C. § 1692c(a), (b); Reg. F § 1006.6(b), (d).
2 15 U.S.C. § 1692c(c); Reg. F § 1006.6(c).
3 *E.g.*, § 1692d (5) (repeated phone calls).
4 *See* Appx. E.2.2.4, *infra*.
5 S. Rep. No. 382, 95th Cong., 1st Sess. 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *reproduced at* Appx. A.3, *infra*. *See also* 122 Cong. Rec. H7,308 (daily ed. July 19, 1976) (remarks of Rep. Annunzio on H.R. 13720) ("[t]he bill's controls on communications are quite reasonable and strike a fair balance between the debt collector's need to contact and the consumer's right to privacy and right to be free from harassment").
6 *See* 15 U.S.C. § 1692(a).
7 15 U.S.C. § 1692c(b) states: "Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a post judgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector." *See* § 5.7, *infra*.

employment.[8] The burden of proof is on the debt collector to prove the exception applies.[9]

The FDCPA § 1692b exception applies only where the collector's contact is with a third party, and not with the consumer,[10] and where the purpose of a communication is acquiring location information.[11] If the consumer is deceased, location information includes location information for a person authorized to act on behalf of the deceased consumer's estate as described in Regulation F § 1006.6(a)(4) (effective November 30, 2021) and its associated commentary.[12]

To take advantage of the FDCPA § 1692b exception, collectors must make certain disclosures, but not identify the person's employer unless upon request,[13] and must not indicate the consumer owes a debt.[14] There are also limits to the number of location communications,[15] and no communication seeking location information is allowed if the consumer is represented by an attorney.[16] Enforcement of FDCPA § 1692b is discussed at § 5.2.12, *infra*.

A preliminary issue though is whether a debt collector's contact with a third party can be viewed as a communication regarding a debt, covered by both FDCPA §§ 1692b and 1692c(b). If the communication is not so viewed, so that these FDCPA sections do not apply to the communication, then the debt collector can contact third parties, including for location information, without complying with section 1692b.[17]

5.2.3 The Legislative History

Congress, in 1977, repeatedly amended the location information provision to arrive at the current procedures for a debt collector to obtain a consumer's contact information. According to the 1977 Senate report:

> While this legislation strongly protects the consumer's right to privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons, the committee also recognizes the debt collector's legitimate need to seek the whereabouts of missing debtors. Accordingly, this bill permits debt collectors to contact third persons for the purpose of obtaining the consumer's location. In seeking this information, however, the debt collector must observe certain guidelines . . .[18]

Provisions restricting the acquisition of location information appeared in various forms in all but one of the bills leading to the FDCPA. One of the earliest bills would only have permitted collectors to use telephone calls to obtain location information.[19] Most subsequent bills allowed collectors seeking location information to use the telephone, the mail (except for postcards), and telegrams.[20]

The Senate Consumer Affairs Subcommittee dropped this approach, implicitly permitting personal visits to obtain location information.[21] The subcommittee also added the requirement that the collector "state he is confirming or correcting location information,"[22] the clause permitting additional contacts of third parties providing incomplete information,[23] and the provision allowing non-attorney contacts when the consumer's attorney is unresponsive.[24] Most bills permitted the debt collector to use its own name in the contents, but not on the envelopes, of letters requesting location information, but the full Senate Banking Committee dropped this provision during markup.[25]

5.2.4 Role of Definition of Communication in FDCPA § 1692b Analysis

When a debt collector *communicates* with a third-party seeking location information, FDCPA § 1692b requires that the debt collector not indicate the consumer owes a debt.[26]

As discussed in § 4.2, *supra*, FDCPA § 1692a(2) defines a communication for purposes of the Act as the conveying of information directly or indirectly regarding a debt.[27] Several courts have examined whether a collector's contact conveys information directly or indirectly regarding a debt when it does not indicate the consumer owes a debt.[28] The Sixth and

8 15 U.S.C. § 1692a(7). *See also* Appx. E.2.1, *infra*.
9 *See* § 5.2.7, *infra*.
10 *See* § 5.2.5, *infra*.
11 *See* § 5.2.6, *infra*.
12 Reg. F Official Interpretations § 10(a)-1. A person authorized to behalf of the estate is defined as the executor, administrator, or personal representative of the consumer's estate. "Persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's financial assets or other assets of monetary value extrajudicially." *See* Reg. F Official Interpretations § 6(a)(4)-1. *See also* § 5.2.9.2, *infra*.
13 *See* § 5.2.8, *infra*.
14 *See* § 5.2.9, *infra*.
15 *See* § 5.2.10, *infra*.
16 *See* § 5.2.11, *infra*.
17 *See* § 5.3.2, *infra*.
18 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 5, *reprinted at* 1977 U.S.C.C.A.N. 1695, 1696, *reproduced at* Appx. A.3, *infra*. *See also* 138 Cong. Rec. S4885 (daily ed. Mar. 25, 1977) (remarks of Sen. Garn) ("[a]lthough both of the bills introduced in the House and Senate purport to prohibit harassment and abusive tactics, in reality they provide a Federal mechanism for the minute regulation of the internal business operations of the debt collection industry. . . . The debt collector is severely limited in contacts that can be made with the consumer at his place of employment or home").
19 H.R. 11969, 94th Cong., 2d Sess. § 803 (1976).
20 *E.g.*, H.R. 13720, 94th Cong., 2d Sess. § 803 (1976); S. 918, 95th Cong., 1st Sess. § 804 (1977).
21 Senate Comm. Print No. 1, 95th Cong., 1st Sess. (1977).
22 15 U.S.C. § 1692b(1).
23 15 U.S.C. § 1692b(3).
24 15 U.S.C. § 1692b(6).
25 *Compare* Senate Comm. Print No. 1, 95th Cong., 1st Sess. (1977), *with* H.R. 5294, 95th Cong., 1st Sess. § 804 (1977) (as passed by Senate).
26 *See* § 5.2.9, *infra*.
27 The term "communication" is the focus of § 4.2, *supra*, and Appx. E.1.5, *infra*.
28 The term "communication" is the focus of § 4.2, *supra*, and Appx. E.1.5, *infra*.

Tenth Circuits have found that, to constitute a communication under FDCPA § 1692b, a message must at least imply the existence of a debt.[29]

The Fifth Circuit found that a debt collector's call to, and conversation with, a consumer's sister did not violate FDCPA § 1692b because it did not convey information about the debt.[30] However, the collector called looking for the consumer, not seeking location information, and, when the sister asked "where are you from?" the collector responded "Bay Area Credit Service."[31] The Tenth Circuit, in *Marx v. General Revenue Corp.*,[32] found FDCPA § 1692b did not apply to the debt collector's fax to a consumer's employer, as it did not convey information directly or indirectly regarding a debt. The fax displayed the name "GRC," the GRC logo, address, phone number, and an ID number for the consumer's account. The fax sought the consumer's employment status, hire date, corporate payroll address, position, and whether the individual works full- or part-time. The Sixth Circuit agreed with *Marx* that FDCPA § 1692b did not apply to a collector's voicemail left at the consumer's work that stated the caller's name, return number, and reference number, because it did not convey information regarding the debt.[33]

Under this interpretation, however, FDCPA § 1692b's location provision would be extremely limited—as it would never apply where the debt collector does not indicate to the third party that the consumer owes a debt. This is not what Congress intended when drafting FDCPA § 1692b. A collector should still have to comply with the restrictions in section 1692b when contacting a third party, regardless of whether or not they imply the existence of a debt.

A number of federal district courts have found that there was a communication for FDCPA § 1692b purposes, even where the debt collector's communication did not disclose information about a specific debt to the third-party.[34] As one court noted:

> [A] review of section 1692c(b), in connection with the entire statutory scheme, indicates that Congress intended to broadly regulate contact between the debt collectors and third parties. . . . If the court were to adopt Defendant's interpretation of section 1692c(b) and construe the provision as only prohibiting third party communications in which some information about a debt is actually disclosed, section 1692b would be superfluous. . . . If Congress had intended for the statute to be interpreted in this manner, it would not have drafted section 1692b.[35]

5.2.5 FDCPA § 1692b Does Not Apply to Communications with the Consumer

To be covered under FDCPA § 1692b, the collector's communications must be with anyone other than the consumer—such as with a friend, neighbor, employer, or adult child—and must be for the purpose of locating the consumer. Communications delivered to the consumer, even if they could be seen by other parties, are not covered by this provision.[36]

29 Scribner v. Works & Lentz, Inc., 655 Fed. Appx. 702, 703 (10th Cir. 2016); Brown v. Van Ru Credit Corp., 804 F.3d 740, 742 (6th Cir. 2015); Marx v. General Revenue Corp., 668 F.3d 1174 (10th Cir. 2011). *See also* Lavallee v. Med-1 Solutions, L.L.C., 932 F.3d 1049 (7th Cir. 2019) (emails that did not include any information about debt were not communications for § 1692g(a) purposes).

30 Fontana v. HOVG L.L.C., 989 F.3d 338 (5th Cir. 2021).

31 *Id.*

32 668 F.3d 1174 (10th Cir. 2011). *See also* Scribner v. Works & Lentz, Inc., 655 Fed. Appx. 702, 703 (10th Cir. 2016) (debt collector's call to consumer's apartment manager, that allegedly was to confirm consumer's address, was not considered a "communication" under FDCPA, because debt collector did not refer to any debt owed by consumer during phone call).

33 Brown v. Van Ru Credit Corp., 804 F.3d 740 (6th Cir. 2015) (rejecting argument that narrow interpretation of definition of "communication" in § 1692a(2) would make § 1692b(2) and (5) redundant, because § 1692b provides valuable protection for debt collectors engaging in the single, important activity of seeking location of missing debtors). *See also* Lavallee v. Med-1 Solutions, L.L.C., 932 F.3d 1049, 1055 (7th Cir. 2019) (debt collector's message must at least imply existence of debt to meet Act's definition of "communication" for purposes of § 1692g(a); emails that only contained name and email address of debt collector did not constitute such communications); Horkey v. J.V.D.B. & Assoc., Inc., 179 F. Supp. 2d 861 (N.D. Ill. 2002), *aff'd*, 333 F.3d 769 (7th Cir. 2003) (collector calling consumer's co-worker did not discuss consumer's debt; no violation of § 1692c(b)); Boozer v. Enhanced Recovery Co., L.L.C. 2019 WL 5295730 (E.D. Mich. Oct. 18, 2019); Thompson v. Nationwide Debt Mgmt. Solutions, L.L.C., 2017 WL 4574566, at *4 (N.D. Ohio Oct. 13, 2017) (phone calls did not constitute § 1692a(2) "communications," as they did not mention debt or directly ask for location information); Litt v. Portfolio Recovery Assoc., 146 F. Supp. 3d 857 (E.D. Mich. Nov. 20, 2015).

34 Thomas v. Consumer Adjustment Co., 579 F. Supp. 2d 1290, 1296–1297 (E.D. Mo. 2008) (agency's employee's conversation with girlfriend was "communication" under FDCPA even though employee did not impart debt information); Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643 (S.D.N.Y. 2006) (debt collector's message stating that it was a call from NCO Financial Systems considered communication); Belin v. Litton Loan Servicing, L.P., 2006 WL 1992410, at *4 (M.D. Fla. July 14, 2006) (messages that gave phone number to call, directions to have debtor call that number, were communications under FDCPA); West v. Nationwide Credit, Inc., 998 F. Supp. 642, 645 (W.D.N.C. 1998) (telephone call to neighbor requesting that he ask consumer to call back on "very important" matter was communication under FDCPA). *See also* Miller v. Prompt Recovery Services, 2013 WL 3200659, *11 (N.D. Ohio June 24, 2013) (collector's call to consumer's son, in which he did not discuss debt, nor request location information, found to have no other legitimate purpose and violated § 1692c(b); discussing and rejecting narrow definition of communication in *Marx:* "Given the purpose of the FDCPA, and its broad reach, it seems unlikely that Congress intended to define the term 'communication' so narrowly that it would essentially sanction the use of third-parties to coerce payment.").

35 West v. Nationwide Credit, Inc., 998 F. Supp. 642, 644–645 (W.D.N.C. 1998).

36 Mora v. LVNV Funding L.L.C., 408 F. Supp. 3d 297, 303–304 (W.D.N.Y. Oct. 8, 2019) (LVNV's affixing of summons and complaint to consumer's front door without envelope or other wrapping to conceal contents of documents was not violation of § 1692b because summons and complaint were delivered to the consumer; their purpose was not to acquire location information about her).

5.2.6 FDCPA § 1692b Only Applies Where Purpose Is to Acquire Location Information

The FDCPA § 1692b exception to the general prohibition of third-party contacts applies only if the collector is attempting to obtain location information, defined as "a consumer's place of abode and his telephone number at such place, or his place of employment."[37] The location purpose of a debt collector's contacts with third parties may be indicated by the debt collector disclosing the purpose,[38] by asking for the consumer's contact information,[39] or by the collector's notes. In one case, a court refused to infer that fourteen calls to the consumer's brother-in-law were to obtain location information because the debt collector asserted that the calls were made to talk to the consumer, who had given that phone number as his contact phone.[40]

The FTC staff has stated that the collector may contact third parties to confirm location when the collector has good reason to believe the location information in the consumer's file is stale.[41] Once the collector has *either* the consumer's home address and phone number *or* work address, its future activities do not fall within this exception because it may no longer claim to be communicating for the purpose of acquiring location information.[42] A debt collector's communication to a third party that it would "come after" the consumer for a payment of the debt went beyond solely acquiring location information.[43]

5.2.7 Burden of Proof Under FDCPA § 1692b

FDCPA § 1692c(b) begins: "Except as provided in section 1692b . . . a debt collector . . . may not communicate . . . with any person . . ." The Third[44] and Tenth[45] Circuits hold that because section 1692b is an exception to section 1692c(b)'s broad prohibition of third-party contacts, the burden is on the debt collector to prove that the challenged third-party communications fit within section 1692b's exception for acquisition of location information.[46] The Ninth Circuit analyzed 15 U.S.C. § 1681b(f) of the Fair Credit Reporting Act by comparing it to FDCPA § 1692b(3), finding that both provisions are affirmative defenses for which the creditor bears the burden of proof.[47]

37 *See* 15 U.S.C. § 1692a(7); Reg. F § 1006.10(a). *See* Cozmyk v. Fin. Mgmt. Services, Inc., 2012 WL 2088766 (S.D. W. Va. June 8, 2012); Krapf v. Collectors Training Inst. of Ill., Inc., 2010 WL 584020 (W.D.N.Y. Feb. 16, 2010) (contact with consumer's employer "did not involve an inquiry into Consumer's location information, but rather, revealed that Consumer had a 'business matter,' and because the defendant "later placed another call to Consumer's employer in an attempt to use Consumer's employer as a means of inducing Consumer to return Defendant's call"). *See also* Shand-Pistilli v. Prof'l Account Services, Inc., 2010 WL 2978029 (E.D. Pa. July 26, 2010) (inquiry into current employment status went beyond boundaries of location information); Kwait, FTC Informal Staff Letter (Jan. 24, 1989), *reproduced at* Appx C.3.2, *infra*; FTC Official Staff Commentary § 805(b)-2 ("debt collector may not call third parties under the pretense of gaining information already in his possession"), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*. *Cf.* Branco v. Credit Collection Services Inc., 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011) (violation of § 1692c(b), but no violation of § 1692b(2) absent communication to acquire location information).

38 *See* Lynn v. Monarch Recovery Mgmt., Inc., 2013 WL 1247815 (D. Md. Mar. 25, 2013) (triable issue of fact as to whether call was seeking location information from third party or whether it was wrong-number call intended for debtor where debt collector had admitted that, while reaching debtor was its primary motive, its secondary motive was locating debtor).

39 Ponce v. BCA Fin. Services, Inc., 467 Fed. Appx. 806 (11th Cir. 2012).

40 Kenny v. Mercantile Adjustment Bur., L.L.C., 2013 WL 1855782 (W.D.N.Y. May 1, 2013). *See also* Hamburger v. Northland Group, Inc., 2015 WL 631066 (M.D. Pa. Feb. 12, 2015) (evidence indicated collector's calls were to talk to son, not locate him); Williams v. Web Equity Holdings, L.L.C., 2014 WL 3845952 (E.D. Mich. Aug. 5, 2014) (parents' pleadings failed to reveal inquiry about debtor's (their son's) whereabouts); Schwinn v. Shapiro & Ingle, L.L.P., 2013 WL 1010457 (E.D.N.C. Mar. 13, 2013) (sending foreclosure notices to homeowner at his mother's and son's addresses failed to state § 1692b claim, as there was no allegation of location purpose for sending letters; claim under § 1692c(b) stated).

41 *See* Kwait, FTC Informal Staff Letter (Jan. 24, 1989). *See also* Allen v. Checkredi of Kentucky, L.L.C., 2010 WL 4791947 (E.D. Ky. Nov. 17, 2010) (multiple calls to obtain address acceptable).

42 *See* Hultman v. Prof'l Choice Recovery, Inc., 2017 WL 2963869 (D. Neb. June 9, 2017) (creditor had given collector consumer's work phone number so that collector could not claim voicemails collector left at consumer's work were to acquire location information); Russell v. Goldman Roth Acquisitions, L.L.C., 847 F. Supp. 2d 994 (W.D. Mich. 2012) (collector had already gotten in touch with consumer and was already aware of the consumers' location); Quigley v. Verizon Wireless, 2012 WL 1945784 (N.D. Cal. May 30, 2012) (court allowed leave to amend complaint for consumer to add that "at all times when ER was communicating with his son, it knew of his place of abode, his telephone number at such place, and his place of employment," to address collector's § 1692b claim); Kempa v. Cadlerock Joint Ventures, L.P., 2011 WL 761500 (E.D. Mich. Feb. 25, 2011); Baker v. I.C. Sys., Inc., 2009 WL 1365002 (Conn. Super. Ct. May 11, 2009) (no bona fide error defense where debt collector called third parties after consumer provided location information); FTC Official Staff Commentary § 803(7) (other information, e.g., work phone number, is not location information), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*; Davignon, FTC Informal Staff Letter (Mar. 7, 1980). *But cf.* Kwait, FTC Informal Staff Letter (Jan. 24, 1989); Cinalli, FTC Informal Staff Letter (Feb. 17, 1978).

43 *See* Fajer v. Kaufman, Burns & Assoc., 2011 WL 334311 (W.D.N.Y. Jan. 28, 2011).

44 Evankavitch v. Green Tree Servicing, L.L.C.,793 F.3d 355 (3d Cir. 2015).

45 Scribner v. Works & Lentz, Inc., 655 Fed. Appx. 702, 705 (10th Cir. 2016) (§ 1692b provides limited exception to liability under § 1692c(b), not separate basis for liability).

46 *See also* Garner v. Select Portfolio Servicing, Inc., 2017 WL 8294293, at *4 (6th Cir. Oct. 27, 2017) (because § 1692a(6)(F) is exception to generally applicable definition of "debt collector," defendant bears burden of showing that exception to rule applies). For more discussion of burden of proof for FDCPA exceptions, see § 11.6.6, *infra*.

47 Nyab v. Capital One Bank, 942 F.3d 480, 498–499 (9th Cir. Oct. 31, 2019).

5.2.8 Required Disclosures While Seeking Location Information

If a debt collector wishes to avail itself of the exception allowing third party contacts seeking to find location information, the collector must identify themselves individually, state that they are confirming or correcting the consumer's location information, and, only if expressly requested, identify their employer.[48]

FDCPA § 1692b says that the collection employee "must identify himself" and Regulation F § 1006.10(b)(1) (effective November 30, 2021) further specifies that the employee must "[i]dentify himself or herself individually by name."

One question is whether the employee must use the employee's real name or can use an alias. Reg. F states that the use of employee aliases is not prohibited under the regulations implementing FDCPA § 1692e as long as the employee "uses the assumed name consistently and . . . the debt collector can readily identify any employee using an assumed name."[49] The obligation is not only on the employee, but also on the employer to have a system in place that can effectively and readily identify the employee based on the alias.[50] Precedent prior to Reg. F concerning the use of an employee alias is examined at § 6.8, *infra*. The employee may identify the name of the employer *only* upon request,[51] and then must reveal the true legal name.[52]

If the debt collector leaves a message for a third party, it must disclose that the call is to obtain contact information about the named consumer.[53] A voicemail message left for a third party does not meet the criteria for a limited-content message as defined by Reg. F § 1006.2(j) because it is not a message for the consumer.[54]

5.2.9 Collector Must Not Indicate the Consumer Owes a Debt

5.2.9.1 Generally

FDCPA § 1692b(2), (4), and (5) limits communications seeking location information that reveal that a consumer owes a debt or has a debt in collections:

- Section 1692b(2) prohibits the collector from stating that the consumer owes a debt;
- Section 1692b(4) prohibits any communication by post card;
- Section 1692b(5) prohibits a debt collector from using any language, or symbol in any communication or on any envelope indicating that the consumer owes a debt, that it is in the collection business, or that the communication relates to debt collection.[55]

According to the FTC staff, FDCPA § 1692b(1), which permits a collector to reveal the name of its employer upon the third party's request, is an exception to section 1692b(5).[56]

FDCPA § 1692b(2) is violated when a collector leaves messages on a third party's voicemail revealing that the agency is collecting on a debt owed by the consumer.[57] FDCPA § 1692b(5) is violated where a fax sent to a consumer's employer seeking employment verification indicates that the communication is from a debt collector or relates to debt collection.[58] The applicability of each provision hinges on whether the debt collector's contact constitutes a "communication" under the FDCPA as discussed at § 5.2.4, *supra*.

48 15 U.S.C. § 1692b(1); Reg. F § 1006.10(b)(1). *See* Ponce v. BCA Fin. Services, Inc., 467 Fed. Appx. 806 (11th Cir. 2012) (failed to comply with § 1692b(1)'s requirements); Davis-Fisk v. Overton, Russell, Doerr & Donovan, L.L.P., 2018 WL 4509489 (N.D.N.Y. 2018) (default judgment for consumer where she alleged collector did not state that he was confirming or correcting location information); Russell v. Goldman Roth Acquisitions, L.L.C., 847 F. Supp. 2d 994 (W.D. Mich. 2012); Puttner v. Debt Consultants of Am., 2009 WL 1604570 (S.D. Cal. June 4, 2009) (complaint stated claim alleging that collectors called consumer's parents without stating that they were confirming or correcting location information); Thomas v. Consumer Adjustment Co., 579 F. Supp.1290, 1297 (E.D. Mo. Sept. 30, 2008) (debt collector's request to third party for "better number" to reach debtor "real quick" did not meet safe harbor of § 1692b(1)); Cinalli, FTC Informal Staff Letter (Feb. 17, 1978); Charest, FTC Informal Staff Letter (Sept. 13, 1996), *reproduced at* Appx. C.3.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

49 Reg. F § 1006.18(f). *See* § 7.3.14.3, *infra*.

50 *See* § 7.3.14.3, *infra*.

51 15 U.S.C. § 1692b(1); Reg. F § 1006.10(b)(1). *See also* Clark v. Quick Collect, Inc., 2005 WL 1586862 (D. Or. June 30, 2005) (denying summary judgment to defendant where collector gave agency's name to employer, which would be proper only if collector were seeking location information and not if calling to reach debtor).

52 15 U.S.C. § 1692e(14) (use of true name). FTC Official Staff Commentary § 804-2 ("When asked, however, he must give the true and full name of the employer, to comply with this provision and avoid a violation of §807(14)."), *reproduced at* Appx. C.2.2, *infra*; § 3.4.4.4, *supra*.

53 *See* Cathcart, FTC Informal Staff Letter (July 27, 1979), *discussed at* § 3.4.4.4, *supra*.

54 *See* § 4.9, *supra* (discussing limited content messages).

55 *See also* Reg. F § 1006.10(b)(2), (3), (4).

56 FTC Official Staff Commentary § 804-4 ("A debt collector may not use his actual name in his letterhead or elsewhere in a written communication seeking location information, if the name indicates collection activity (such as a name containing the word "debt", "collector", or "collection"), except when the person contacted has expressly requested that the debt collector identify himself."), *reproduced at* Appx. C.2.2, *infra*; § 3.4.4.4, *supra*. *See* Jackson v. Eltman, Eltman & Cooper, P.C., 128 F. Supp. 3d 980 (E.D. Mich. 2015) (post judgment fax to consumer's employer seeking employment verification with "COLLECTION" on both pages constituted communication that violated § 1692b(5) and § 1692c(b)). *See also* Davignon, FTC Informal Staff Letter (Mar. 7, 1980); Kennedy, FTC Informal Staff Letter (July 10, 1978), *reproduced at* Appx. C.3.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

57 Clayson v. Rubin & Rothman, L.L.C., 751 F. Supp. 2d 491 (Nov. 16, 2010). *But see* Cozmyk v. Fin. Mgmt. Services, Inc., 2012 WL 2088766 (S.D. W. Va. June 8, 2012) (when debt collector communicates with third party, message is not communication until it is received or understood by third party).

58 *See* Jackson v. Eltman, Eltman & Cooper, P.C., 128 F. Supp. 3d 980 (E.D. Mich. 2015) (post judgment fax to consumer's employer seeking employment verification with "COLLECTION" on both pages constituted communication that violated § 1692b(5) and § 1692c(b)). *But see* Marx v. General Revenue Corp., 668 F.3d 1174 (10th Cir. Dec. 21, 2011) (fax sent to consumer's employer for employment verification that included collector's logo was not communication, because it did not convey information regarding debt).

5.2.9.2 Exception Where Consumer Is Deceased

When the consumer is deceased, the collector may wish not just to locate the contact information of the individual responsible for paying the estate's debts, but to identify who that individual is. In seeking the identity of that person, the question is raised whether the collector can ask third parties who is responsible for handling the financial affairs of the deceased, or whether this conflicts with the FDCPA § 1692b(2) prohibition that the collector not state to third parties that the consumer owes a debt.

The Regulation F (effective November 30, 2021) interpretations resolve this by allowing the debt collector to state to third parties that the debt collector is seeking to identify and locate the person who is authorized to act on behalf of the deceased consumer's estate. The debt collector may also state that the debt collector is seeking to identify and locate the person handling the financial affairs of the deceased consumer.[59]

Previously, the FTC in 2011 announced a different approach in an enforcement policy where it would not pursue collectors for violating FDCPA § 1692b(2) in certain circumstances,[60] but the CFPB declined to adopt the same language approved by the FTC when it finalized Reg. F.[61]

The CFPB declined to require collectors first to check public records to identify the person responsible for the estate's debts. Nevertheless, the rule's supplemental information states that "[t]he Bureau supports the FTC's encouragement for debt collectors to make good-faith efforts to search public records before communicating with a deceased consumer's estate."[62]

5.2.10 Limits on the Number of Location Communications

FDCPA § 1692b(3) provides that, if a debt collector is communicating with a third party to locate a consumer, the collector cannot "communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information."[63]

The Regulation F (effective November 30, 2021) version of FDCPA § 1692b(3) adds the phrase "In addition to complying with § 1006.14(b)(1),"[64] which prohibits "plac[ing] telephone calls or engag[ing] any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[65]

Reg. F § 1006.14(b)(2) provides standards to determine a presumption as to whether the collector has violated section 1006.14(b)(1). First, a violation is presumed[66] if the collector places a telephone call more than seven times in seven days.[67] The official interpretations clarifies that this presumptive limit applies to collector calls seeking location information from third parties.[68] The presumptive limit in Reg. F. § 1006.14(b)(2) applies to calls to "a particular person," meaning that these presumptive limits apply separately to each third-party and consumer that the collector attempts to call.

However, with the limited exception of certain student loan debts, the call frequency limit applies per debt in collection.[69] As a result, a debt collector can place telephone calls to a third party to obtain location information far more frequently if a consumer has multiple accounts in collection with the same collector (e.g. up to 35 telephone calls per week to the third-party if the consumer has five accounts in collection with that same collector).

Once the debt collector actually communicates with a third party to obtain location information, it is prohibited from communicating with that third party again "unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information."[70] If one of the exceptions apply and a second communication is permissible, the debt collector cannot have a second phone conversation within seven days of the first phone conversation.[71]

While not addressed in Regulation F, the FTC's Official Staff Commentary previously clarified that, "[a] debt collector may not leave telephone messages with neighbors when the debt collector knows the consumer's name and telephone number and could have reached him directly."[72]

Litigation regarding the FDCPA § 1692b(3) statutory provision prior to the Regulation F enactment relates to the collector's justification for multiple contacts, where it claims it reasonably believes a third party can obtain location information, and that the additional contacts are made to learn if the party has obtained the information.[73] The Fourth Circuit

59 Reg. F Official Interpretations § 10b(2)-1.

60 FTC Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts, 76 Fed. Reg. 44,915 (July 27, 2011), *available at* www.ftc.gov.

61 85 Fed. Reg. 76,734, 76,798–76,799 (Nov. 30, 2020) ("[I]n its Policy Statement on Decedent Debt, the FTC stated that it would refrain from taking enforcement action under FDCPA section 804(2) against debt collectors who state that they are seeking to locate a person 'with the authority to pay any outstanding bills of the decedent out of the decedent's estate.'").

62 85 Fed. Reg. 76,734, 76,799 (Nov. 30, 2020).

63 *See also* Reg. F § 1006.10(c).

64 Reg. F § 1006.10(c).

65 Reg. F § 1006.14(b)(1). *See* § 6.7.2, *infra*.

66 Reg. F § 1006.14(b)(2)(ii). *See* § 6.7.2, *infra*.

67 Reg. F § 1006.14(b)(2)(i)(B). *See* § 6.7.2, *infra*.

68 Reg. F Official Interpretations § 14(b)(2)(i)-1(iii); 85 Fed. Reg. 76,734, 76,799 (Nov. 30, 2020).

69 Reg. F § 1006(b)(4). *See* § 6.7.2, *infra*.

70 15 U.S.C. § 1692b(3).

71 Reg. F § 1006.14(b)(2)(i)(B). *See* § 6.7.2, *infra*.

72 FTC Official Staff Commentary § 806-2, *reproduced at* Appx. C.2.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *See also* Atteberry, FTC Informal Staff Letter (Dec. 30, 1977) (prohibiting a second call to leave a message with a relative of the consumer), *discussed at* § 3.4.4.4, *supra*.

73 Kuntz v. Rodenburg L.L.P., 838 F.3d 923 (8th Cir. 2016) (where debtor's father told collection law firm that he wanted to call his daughter and check with her before responding further, it was reasonable for

in one case ruled that a collector could continue calling the third party until it reasonably believed that it had received a complete response.[74] Even where a court allows repeated calls pursuant to this exception to FDCPA § 1692b(3), the calls may violate section 1692d(5) if they become so frequent as to be abusive.[75]

5.2.11 No Communication Allowed If Consumer Is Represented

FDCPA § 1692b(6) provides that a debt collector seeking a consumer's location information from a third party shall not do so after it learns the consumer is represented by an attorney with regard to the debt and knows or can readily ascertain the attorney's name and address.[76] The collector instead must communicate only with the attorney for location information, unless the attorney fails to respond within a reasonable period of time to the debt collector's communication.[77] This requirement may prevent the debt collector from contacting a credit reporting agency to obtain a represented consumer's contact information.[78]

collector to believe that parent had or could obtain location information, permitting follow-up call to learn if he had acquired or was now willing to provide correct or complete location information); Worsham v. Accounts Receivable Mgmt., Inc., 497 Fed. Appx. 274 (4th Cir. 2012) (repeated calls to consumer's brother-in-law to find her location were permitted where brother-in-law responded, but without providing location information); Allen v. Checkredi of Kentucky, L.L.C., 2010 WL 4791947 (E.D. Ky. Nov. 17, 2010); Sclafani v. BC Services, Inc., 2010 WL 4116471 (S.D. Fla. Oct. 18, 2010); Kasalo v. Monco Law Offices, S.C., 2009 WL 4639720 (N.D. Ill. Dec. 7, 2009) (applying exception for "erroneous or incomplete information" where collector called consumer's parents when consumer's attorney did not return phone calls).

74 Worsham v. Account Receivable Mgmt., Inc., 497 Fed. Appx. 274 (4th Cir. Nov. 14, 2012). *But cf.* Evankavitch v. Green Tree Servicing, L.L.C., 793 F.3d 355 (3d Cir. 2015) (collector who contacted consumer's daughter and neighbors more than once without permission, leaving several messages for consumer to call them in violation of § 1692c(b), failed to meet its burden of proving it fit into any exception under § 1692b)).

75 *See* Sclafani v. BC Services, Inc., 2010 WL 4116471 (S.D. Fla. Oct. 18, 2010); Deas v. Am. Recovery Sys., Inc., 2009 WL 3514560 (N.D. Miss. Oct. 29, 2009) (debt collection agency violated §§ 1692b(3), 1692d, and 1692d(5) by placing dozens of telephone calls to plaintiff's home, purportedly attempting to locate third-party debtor, after plaintiff informed agency that debtor did not live at his residence and requested that they cease calling).

76 *See* Reg. F § 1006.10(b)(5); Gustin v. Allied Interstate L.L.C., 2014 WL 1923735 (N.D. Ala. May 13, 2014) (allowing claim under § 1692b (6) to go to jury where collector called consumer's aunt for location information when it knew consumer was represented); FTC Official Staff Commentary § 804-5, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*; Stockham, FTC Informal Staff Letter (May 15, 1986), *discussed at* § 3.3.4.4, *supra*. *Cf.* Guerrero v. RJM Acquisitions L.L.C., 499 F.3d 926, 942, n.2 (9th Cir. 2007) (discussing role of consumer and attorney for purposes of FDCPA including that when debt collector "knows that a consumer has retained counsel with regard to the subject debt, he may not generally contact anyone other than that attorney to determine the consumer's whereabouts").

77 15 U.S.C. § 1692b(6).

78 *See* Valdez v. Capital Mgmt. Services, L.P., 2010 WL 4643272 (S.D. Tex. Nov. 16, 2010).

5.2.12 Enforcement of FDCPA § 1692b

The Seventh Circuit, in *Todd v. Collecto, Inc.*, found that the third party receiving the contact does not have standing to enforce FDCPA § 1692b or the related provision of section 1692c(b).[79] While recognizing that some FDCPA provisions, such as section 1692f, protect third parties, the Seventh Circuit refused to find that a son who had been contacted for his mother's location could obtain FDCPA relief for the debt collector revealing his mother's debt to him. Other courts however have ruled otherwise.[80]

It is unclear whether the consumer can sue directly for a violation of FDCPA § 1692b, or whether the section 1692b violation means the collector no longer has the protection of section 1692b for the third-party contact, so that the collector has instead violated the general rule against third-party contacts found in section 1692c(b). The Eleventh Circuit indicates the consumer can sue directly under FDCPA § 1692b.[81] The Third and Tenth Circuits though find that FDCPA § 1692b is a type of affirmative defense or safe harbor for debt collectors and is not an independent FDCPA claim for the consumer.[82]

5.3 Communication with the Consumer Generally, FDCPA § 1692c(a)

5.3.1 Overview

FDCPA § 1692c(a) prohibits three practices in connection with collection of a debt:

- Communication at unusual or inconvenient times or places, section 1692c(a)(1);[83]
- Communication with a consumer known to be represented by an attorney, section 1692c(a)(2);[84] and
- Communication with consumers at their workplace when the employer prohibits such contacts, section 1692c(a)(3).[85]

Regulation F (effective November 30, 2021) clarifies that FDCPA § 1692c(a) prohibits not only certain types of actual communication with the consumer, but also *attempts*

79 731 F.3d 734 (7th Cir. 2013).

80 *See, e.g.*, Kuntz v. Rodenburg, L.L.P., 2014 WL 12841784 (D.N.D. Dec. 19, 2014) (father stated claim where debt collector communicated with him more than once for purpose of acquiring location information about his daughter, in violation of § 1692b).

81 Ponce v. BCA Fin. Services, Inc., 467 Fed. Appx. 806 (11th Cir. 2012). *See also* Kuntz v. Rodenburg, L.L.P., 2014 WL 12841784 (D.N.D. Dec. 19, 2014) (father stated claim where debt collector communicated with him more than once for purpose of acquiring location information about his daughter, in violation of § 1692b). *Cf.* Todd v. Collecto, Inc., 731 F.3d 734 (7th Cir. 2013) (§ 1692b(2) is privacy protection for consumer who supposedly owes debt).

82 Evankavitch v. Green Tree Servicing, L.L.C., 793 F.3d 355 (3d Cir. 2015); Scribner v. Works & Lentz, Inc., 655 Fed. Appx. 702, 703 (10th Cir. 2016).

83 *See* § 5.4, *infra*.

84 *See* § 5.5, *infra*.

85 *See* § 5.6, *infra*.

to communicate.[86] For example, the prohibition on calling at unusual or inconvenient times includes persistent calls at inconvenient times where the consumer does not answer the phone, so that there is no communication, only attempted communication.[87]

There are three preconditions to a debt collector's liability for any of these three prohibitions. The communication or attempted communication must be:

- A communication with the consumer in connection with the collection of any debt;[88]
- Without the consumer's prior consent;[89] and
- Without a court's express permission.[90]

5.3.2 Prohibitions Apply to Communications in Connection with Collection of a Debt

In order for the restrictions found in FDCPA § 1692c(a) to apply, a communication must be made to the consumer "in connection with the collection of any debt."[91] This section discusses a few relevant FDCPA § 1692c cases interpreting "in connection with the collection of any debt." For a more general discussion of cases interpreting "in connection with the collection of any debt" that cuts across different sections of the FDCPA, see § 4.3, *supra*. The term communication also contains similar language "conveying of information regarding a debt," which is analyzed in detail at § 4.2, *supra*.

In cases involving FDCPA § 1692c(a), courts have found communications not in connection with the collection of a debt where the communication states it was for informational purposes only and not an attempt to collect a debt,[92] where collection of a debt was not referenced in the communication,[93] or where the communication does not state it is from a debt collector.[94]

But a communication not mentioning a debt can be in connection with collection of a debt where the consumer is asked to call a phone number and the number is the agency's collection service.[95]

86 *See* Reg. F § 1006.6(b)(1), (2), (3). "Attempt to communicate" is defined at Reg. F § 1006.2(b), and discussed at § 4.2, *supra*.

87 *See* 85 Fed. Reg. 76,734, 76,759 (Nov. 30, 2020).

88 *See* § 5.3.2, *infra*.

89 *See* § 5.3.3, *infra*.

90 *See* § 5.3.4, *infra*.

91 15 U.S.C. § 1692c(a).

92 Collazo v. Resurgent Capital Services, L.P., 443 F. Supp. 3d 398, 400–401 (W.D.N.Y. 2020).

93 *Cf.* Morgan v. Carrington Mortg. Services, 719 Fed. Appx. 735, 745–746 (10th Cir. Dec. 12, 2017) (no communication in connection with collection of debt where contacts with third party did not reference debt); Scribner v. Works & Lentz, Inc., 655 Fed. Appx. 702, 703 (10th Cir. 2016) (no communication in connection with collection of debt where phone call to third party did not reference debt).

94 Collazo v. Resurgent Capital Services, L.P., 443 F. Supp. 3d 398, 400–401 (W.D.N.Y. 2020).

95 *See* Quinn v. Specialized Loan Servicing, L.L.C., 2016 WL 4264967 (N.D. Ill. Mar. 8, 2019); Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. Feb. 20, 2018); Simpson v. Safeguard Prop., L.L.C., 2015 WL 2193135 (N.D. Ill. May 7, 2015).

5.3.3 Consumer's Prior Consent to the Communication

FDCPA § 1692c(a)'s three prohibitions[96] as to collector communications do not apply if the consumer has provided "prior consent of the consumer given directly to the debt collector."[97] The burden is on the collector to show such consent. Several 1977 House bills[98] and a 1976 Senate bill[99] required that consumers plead and prove the absence of prior consent when alleging violations of these provisions. These requirements were dropped in later Senate bills shifting the burden of proof to the debt collector.

The FDCPA and Regulation F (effective November 30, 2021) are clear that the consent must be "prior."[100] Consent cannot be obtained during a collector-initiated communication. For example, if the debt collector learns during a communication that it is communicating at an inconvenient time or place, the collector may ask the consumer during that communication what time or place would be convenient, but the FDCPA prohibits the collector from asking the consumer to consent to the continuation of that inconvenient communication that the collector has just initiated.[101] The prior consent must be "meaningful" and "voluntary."[102] Although there is no requirement that the prior consent be in writing, a cautious collector would obtain it in this form.[103]The statute and Reg. F are also clear that the consumer must give prior consent directly to the debt collector;[104] consent provided for in the credit agreement is not effective.[105] Nor can a debt collector rely on the consumer's prior consent given to a creditor or to a

96 *See* 15 U.S.C. § 1692c(a)(1), (2), (3), discussed at §§ 5.4, 5.5, and 5.6, *infra*.

97 15 U.S.C. § 1692c(a); Reg. F § 1006.6(b)(4)(i). *See also* Backlund v. Messerli & Kramer, P.A., 964 F. Supp. 2d 1010 (D. Minn. Aug. 9, 2013) (consumer consented to receive default notices from debt collector in stipulation agreement; collector did not violate § 1692c(a)(2) by sending notices, despite fact that consumer had retained attorney in interim).

98 *E.g.*, H.R. 13720, 94th Cong., 1st Sess. § 804(e) (1976); H.R. 5294 95th Cong., 1st Sess. § 804(e) (1977). *See* § 3.4.2.1, *supra*.

99 S. 3838, 94th Cong., 2d Sess. § 804(f) (1976). *See* § 3.4.2.1, *supra*.

100 15 U.S.C. § 1692c(a); Reg. F § 1006.6(b)(4)(i); Reg. F Official Interpretations § 6(b)(4)(i)-1.

101 Reg. F Official Interpretations § 6(b)(4)(i)-1.

102 *See* H.R. Rep. No. 131, 95th Cong., 1st Sess. 5 (1977) ("The Committee intends that in section 804 the 'prior consent' be meaningful, i.e., that any prior consent by a consumer is to be voluntary consent . . ."). *See* Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006). *See also* Taylor, FTC Informal Staff Letter (May 3, 1978), *discussed at* § 3.4.4.4, *supra*.

103 Atteberry, FTC Informal Staff Letter (Dec. 30, 1977). *See also* FTC Official Staff Commentary § 805(b)-1, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

104 15 U.S.C. § 1692c(a); Reg. F § 1006.6(b)(4)(i); Reg. F Official Interpretations § 6(b)(4)(i)-2.

105 *See* H.R. Rep. No. 131, 95th Cong., 1st Sess. 5 (1977) ("The Committee intends that in section 804 the 'prior consent' . . . shall be expressed by the consumer directly to the debt collector. Consequently, the Committee intends that any term in a contract which requires a consumer to consent in advance to debt collection communication would not constitute 'prior consent' by such consumer.").

previous debt collector.[106] The consumer may limit the consent to a particular time period, person, or context.[107]

5.3.4 A Court's Express Permission for the Communication

FDCPA § 1692c(a)'s three prohibitions[108] as to collector communications do not apply if the collector has the "express permission of a court of competent jurisdiction."[109] Such permission might involve a court order in a particular case permitting a debt collector to contact a represented consumer directly.[110]

Courts are split on whether court procedural rules amount to "express permission of a court." The Seventh Circuit found that where an attorney represented the consumer, but the attorney did not file an appearance, the collector could send pleadings directly to the consumer under state court rules.[111] A Massachusetts federal court rejected such an interpretation and found that:

> [I]nterpreting "express permission of a court" to mean "express permission" in a state law fails to afford "court" its plain and ordinary meaning. See Black's Law Dictionary 356 (7th ed. 1999). Furthermore, the fact that the next subsection of section 1692c expressly allows a communication that is "otherwise permitted by law" evidences a Congressional intention not to allow such an exception in section 1692c(a)(2).[112]

Express permission of a court is different than permitted by a rule or statute.

Where a federal requirement conflicts with the prohibitions found in FDCPA § 1692c(a), a court may find that the other federal statute prevails. A court has held that a mortgage servicer could send monthly statements to a consumer known to be represented by an attorney, as Truth in Lending Act regulations provided that the statements were to be sent to the consumer.[113]

Less clear is where a state law requires that notices in connection with collection of a debt be sent to a consumer. Some lower courts hold that the notices should be sent only to the represented consumer's lawyer,[114] but other courts allow them to be sent to the consumer.[115]

106 Reg. F Official Interpretations § 6(b)(4)(i)-2.

107 *See generally* Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006).

108 *See* 15 U.S.C. § 1692c(a)(1), (2), (3), discussed at §§ 5.4, 5.5, and 5.6, *infra*.

109 15 U.S.C. § 1692c(a). *See also* Reg. F § 1006.6(b)(4)(ii).

110 *See* Resler v. Messerli & Kramer, P.A., 2003 WL 193498, at *4 (D. Minn. Jan. 23, 2003) (mailing of writ of execution directly to represented consumer did not violate § 1692c(a)(2) as writ was issued directly to consumer as required by state law, and thus within exception of § 1692c(a) for communications with express permission of court, because "the state court's default judgment was in effect that court's permission to follow the collection procedures outlined in Minnesota law, including service of the levy directly on the judgment debtor"); McKneelen, FTC Informal Staff Letter (Aug. 4, 1987) (post judgment court order to contact represented consumer), *discussed at* § 3.4.4.4, *supra*.

111 Holcomb v. Freedman Anselmo Lindberg, L.L.C., 900 F.3d 990, 922–933 (7th Cir. Aug. 21, 2018) (consumer's attorney had appeared in two hearings but had not filed written appearance; filing appearance was necessary to acquire status of "attorney of record" for purposes of state rule). *See also* Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914 (7th Cir. 2004) (in *dicta*, reasoning that summons and complaint could be served on represented consumer to extent allowed by state procedural rules, as that would come within § 1692c(a) exception for "communications with the express permission of the court"); Baranowski v. Blitt & Gaines, P.C., 2017 WL 3278322 (N.D. Ill. Aug. 2, 2017) (either Illinois Supreme Court Rule allowing notices to be sent to party whose lawyer has withdrawn or state court's ruling allowing service of notice on consumer amounted to "express permission of a court of competent jurisdiction" to send notice to consumer); Foh v. Chase, 2015 WL 5254312 (M.D.N.C. Sept. 9, 2015); Palisades Collection, L.L.C. v. Kuchinsky, 2014 WL 7883575 (N.J. Super. App. Div. Feb. 18, 2015).

112 McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1, 70 (D. Mass. 2012). *See also* Washington v. Portfolio Recovery Assoc., 211 F. Supp. 3d 1041, 1056 (N.D. Ill. 2016), *reconsideration denied*, 2017 WL 2958250 (N.D. Ill. July 11, 2017) (§ 1692c(a)(2) provides greater protection to consumers than Illinois garnishment statute by preventing debt collectors from directly contacting debtors who have retained counsel); Fisher v. Bernhardt & Strawser, P.A., 2013 WL 3990744, at *13 (W.D.N.C. Aug. 2, 2013).

113 *See* Block v. Seneca Mortg. Servicing, 221 F. Supp. 3d 559 (D.N.J. 2016). *But see* Crespo v. Butler & Hosch, P.A., 2014 WL 11531360 (S.D. Fla. Mar. 21, 2014) (denying summary judgment for foreclosing law firm on its bona fide error defense to § 1692c(a)(2) violation, since jury could reasonably conclude that its procedures were not reasonably adapted to avoid error). *See also* CFPB Advisory Opinion, *Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*, 81 Fed. Reg. 71,977 (Oct. 19, 2016) (addressing communications with successors in interest and providing early intervention notices and responding to borrower-initiated communications after invoking cease communication right under FDCPA §1692c).

114 Bob Fisher v. Bernhardt & Strawser, 2013 WL 3990744 (W.D.N.C. Aug. 2, 2013) (sending state court conference notice to represented consumer violated § 1692c(a)(2)); McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1, 71 (D. Mass. 2012) (sending state-mandated delinquency notice to represented consumer prohibited); Johnson v. Statewide Collections, Inc., 778 P.2d 93 (Wyo. 1989) (demand for payment of dishonored check that was required by state statute to represented consumer violated FDCPA).

115 Mavroff v. Kohn Law Firm S.C., 2015 WL 9581763 (E.D. Wis. Dec. 30, 2015); Hooks v. Forman Holt Eliades & Ravin L.L.C., 2012 WL 3322637 (S.D.N.Y. Aug. 13, 2012) (acceptable to send state required foreclosure notice); Vitullo v. Mancini, 684 F. Supp. 2d 747 (E.D. Va. 2010) (foreclosure attorney's pursuit of non-judicial foreclosure by sending notice of foreclosure directly to consumer known to be represented by counsel did not violate FDCPA, because consumer's lawyer did not give foreclosure attorney notice that foreclosure notice should be sent to him). *See also* Davis v. Midland Credit Mgmt., Inc., 2016 WL 7117185 (D. Kan. Dec. 7, 2016) (granting consumer leave to amend because court could not determine, as a matter of law, that collector's letter sent to represented consumer requesting more detail about consumer's dispute of its report to consumer reporting agency, was or was not "in connection with the collection of a debt").

5.4 Contacts at Unusual or Inconvenient Times or Places, FDCPA § 1692c(a)(1)

5.4.1 *Text of FDCPA § 1692c(a)(1) and Reg. F § 1006.6(b)(1)*

(a) Communication with the consumer generally—Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known as inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock [a.m.] and before 9 o'clock [p.m.], local time at the consumer's location[.][116]

A provision similar to this was present in each bill preceding the final Act. Early bills prohibited all contacts from 9:00 p.m. to 8:00 a.m., but the Senate changed the bill to include only a presumption that the time period is inconvenient.[117] The Senate also extended the provision to prohibit contacts at unusual or inconvenient places.[118] The original House bill permitted contacts until 10:00 p.m., but later bills used the 9:00 p.m. limit.[119] The prohibition against contacting a consumer at an inconvenient or unusual place was added by a Senate bill, S.918,[120] late in the 1977 legislative process.

Regulation F (effective November 30, 2021) generally tracks this provision but clarifies that it applies to attempts to communicate at unusual or inconvenient times or places, and not just communications at those times or places.[121] For example, the prohibition on calling at unusual or inconvenient times or places includes persistent calls at inconvenient times where the consumer does not answer the phone, so that there is no communication, only an attempt at communication.[122]

5.4.2 *Contacts at Inconvenient Times*

FDCPA § 1692c(a)(1) creates a presumption that any communication received between 9:00 p.m. and 8:00 a.m. was made at an unusual or inconvenient time. The parallel provision in Regulation F § 1006.6(b)(1)(i) (effective November 30, 2021) clarifies that this provision applies to any mode of communication between 9:00 p.m. and 8:00 a.m., including emails, text messages, and other modes of electronic communication.[123] Consequently, collectors cannot send texts or emails during those hours, even if not viewed by the consumer at that time.[124]

This time-period applies regardless of the day of the week that the collector is communicating.[125] Consumers and debt collectors must provide specific evidence regarding the times communications were made to support a claim or defense.[126]

The presumptively inconvenient time period is calculated in local time at the consumer's location, so debt collectors must take into account the consumer's time zone when determining when to communicate. The Consumer Financial Protection Bureau and Federal Trade Commission have required two of the largest debt collectors to consider the consumer's zip code and area code to determine the convenient time to call in each time zone.[127]

Many consumers' cell phone area codes are associated with an area of the country quite distant from the consumer's home address. If a debt collector has conflicting or ambiguous information regarding a consumer's location, then, in the absence

116 15 U.S.C. § 1692c(a)(1). *See also* Reg. F. § 1006.6(b)(1)(i); Appx. E.2.2.1, *infra*.

117 *Compare* S. 656, 95th Cong., 2d Sess., § 804(a)(1) (1977), *with* S. 918, 95th Cong., 2d Sess. § 805(a)(1) (1977).

118 *Id.*

119 H.R. 11969, 94th Cong., 2d Sess. § 804(a)(1)(C) (1976).

120 S. 918, 95th Cong., 2d Sess. § 805(a)(1) (1977).

121 *See* Reg. F § 1006.6(b)(1).

122 *See* 85 Fed. Reg. 76,734, 76,759 (Nov. 30, 2020).

123 Reg. F Official Interpretations§ 6(b)(1)(i)-1. *See also* 85 Fed. Reg. 76,734, 76,765 (Nov. 30, 2020).

124 Reg. F Official Interpretations § 6(b)(1)(i)-1.

125 The FTC staff initially considered Sunday presumptively inconvenient or unusual, and therefore an improper time to contact a consumer. Mezines, FTC Informal Staff Letter (May 22, 1980); Coupel, FTC Informal Staff Letter (May 15, 1978); Hamilton, FTC Informal Staff Letter (Oct. 18, 1977). *But cf.* Halliday, FTC Informal Staff Letter (Feb. 25, 1986). Later, the FTC staff treated Sunday like any other day. FTC Official Staff Commentary § 807(a)-2, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

126 *See* Garrett v. Credit Prot. Ass'n, L.P., 2017 WL 3193759 (M.D. Fla. July 27, 2017) (consumer presented admissible third-party phone records and testimony by Sprint representative to support her claim that calls were made outside of allowable hours); Woodward v. Pressler & Pressler, L.L.P., 2014 WL 809003 (D.N.J. Feb. 28, 2014); Lacourte v. JP Morgan Chase & Co., 2013 WL 4830935 (S.D.N.Y. Sept. 4, 2013) (requiring specific fact pleading of inconvenience); Turner v. Prof'l Recovery Services, Inc., 2013 WL 3441100, at *2 (D.N.J. July 9, 2013). *See also* Juras v. Aman Collection Serv., Inc., 829 F.2d 739 (9th Cir. 1987) (jury verdict of no liability for pre-8:00 a.m. phone call upheld because *pro se* debtor failed to establish any damages and collector testified that he had erroneously failed to consider difference in time zones).

127 *See* CFPB v. Encore Capital Group, 2015-CFPB-0022 (Sept. 9, 2015) ("In the absence of knowledge of circumstances to the contrary, Encore must assume that the Consumer is located in the local time-zone associated with the United States Postal Service postal code associated with the Consumer's address or in the local time-zone associated with the area code associated with the Consumer's telephone number being dialed."); Fed. Trade Comm'n v. Green Tree Servicing L.L.C., 0:15-cv-02064 (D. Minn. Apr. 23, 2015) (unusual time includes before 8 a.m. or after 9 p.m. at consumer's location, as evidenced by consumer's zip code and area code of consumer's telephone number), *available at* https://files.consumerfinance.gov. *See also* Vinson v. Credit Control Services, Inc., 908 F. Supp. 2d 274 (D. Mass. 2012) (time zone governed by federal law, not local custom); Smith v. Capital One Fin. Corp., 2012 WL 3138024 (N.D. Cal. Aug. 1, 2012) (allegation that debt collector called her in U.S. at 7:00 a.m. Eastern Standard Time stated claim). *But cf.* Juras v. Aman Collection Serv., Inc., 829 F.2d 739 (9th Cir. 1987) (jury verdict of no liability for pre-8:00 a.m. phone call upheld because *pro se* debtor failed to establish any damages and collector testified that he had erroneously failed to consider difference in time zones).

of knowledge of circumstances to the contrary, the debt collector complies with Reg. F. § 1006.6(b)(1)(i) if the debt collector communicates or attempts to communicate with the consumer at a time that would be convenient at all of the locations at which the debt collector's information indicates the consumer might be located.[128]

For example, if a consumer's cell phone area code is associated with the Eastern time zone and a residential address with the Pacific time zone, the convenient times to communicate are after 11:00 a.m. Eastern time (8:00 a.m. Pacific time) and before 9:00 p.m. Eastern time (6:00 p.m. Pacific time).[129] Similarly, if the cell number's area code is associated with the Eastern time zone and the landline telephone number with an area code associated with the Mountain time zone, the convenient times to communicate are after 10:00 a.m. Eastern time (8:00 a.m. Mountain time) and before 9:00 p.m. Eastern time (7:00 p.m. Mountain time).[130]

For electronic communications, the applicable time is when the collector sends the communication, not when the consumer receives it or views it.[131] The collector sends the electronic communication when it is actually sent, and not when it is scheduled to be sent at a later time.[132]

Communications are also inconvenient if made at times the collector knows or should know[133] are inconvenient.[134] Collection contacts could be at an inconvenient time for the consumer for many reasons: consumers might be sleeping during the day because they work nights, or they work or care for a family member at a certain time of day. A debt collector should not phone a consumer after being told the consumer was busy serving customers.[135]

The Official Interpretations for Reg. F provide that a debt collector knows or should know that a time or place is inconvenient if the consumer uses the word "inconvenient" to notify the debt collector.[136] The Interpretations provide this example:

> The consumer answers the call but states "I am busy" or "I cannot talk now." The debt collector asks the consumer when would be a convenient time. The consumer responds, "on weekdays, except from 3:00 p.m. to 5:00 p.m." The debt collector asks the consumer whether there would be a convenient time on weekends. The consumer responds "no." Based on these facts, the debt collector knows or should know that the time-period between 3:00 p.m. and 5:00 p.m. on weekdays, and all times on weekends, are inconvenient to the consumer.[137]

The consumer does not have to use the word "inconvenient." The Regulation F supplemental information states:

> The Bureau declines to restrict how a consumer may designate a time or place as inconvenient. The statute does not prescribe any specific actions or require precise responses or utterances on behalf of the consumer to invoke these communications protections, and nor does this final rule impose such requirements. The Bureau determines that a flexible approach is necessary when it comes to communications, which by their very nature are dynamic, depend upon the specific circumstances, and differ from consumer to consumer. Such fluid communications cannot be scripted, nor can every permutation be anticipated.[138]

Similarly, a court held that collection calls violated FDCPA § 1692c(a)(1) when made after the consumer notified the debt collector that "all phone calls are inconvenient" because of the consumer's physical condition.[139] If the collector has any doubt as to whether the consumer is indicating a time or place is inconvenient, the collector is allowed to follow-up with questions to clarify the consumer's intent, as in the prior example from the Official Interpretations where the consumer indicated the consumer "was busy."[140]

The consumer indicating clearly to the collector that a time or place is inconvenient is not the only way a collector can be so informed. Reg. F Official Interpretations provide "depending on the facts and circumstances, the debt collector knows or should know that a time or place is inconvenient even if the consumer does not specifically state to the debt collector that a time or place is 'inconvenient.'"[141] The collector should know that certain days are inconvenient if the creditor provides the collector with a file on the consumer that contains recent notes that the consumer should not be disturbed on certain days[142] Regulation F has also clarified that collectors must not communicate or attempt to communicate with a person through a medium of communication after the person requested that the debt collector not use that medium of communication[143]

Because the statutory language about contacting the consumer at inconvenient times applies to "communicating with a consumer,"[144] prohibited contact is not limited to phone calls, but includes any other mode of communication.[145] The

128 Reg. F Official Interpretations § 6(b)(1)(i)-2. *See also* Messing v. Rubin & Yates, L.L.C., 2014 WL 916748 (W.D.N.Y. Mar. 10, 2014).

129 Reg. F Official Interpretations § 6(b)(1)(i)-2(i).

130 Reg. F Official Interpretations § 6(b)(1)(i)-2(ii).

131 Reg. F Official Interpretations § 6(b)(1)(i)-1.

132 *See* 85 Fed. Reg. 76,734, 76,765 (Nov. 30, 2020).

133 *See* § 5.4.4, *infra* (discussion of known or should have known standard).

134 *See* Petri v. Valarity, L.L.C., 2015 WL 13650911 (E.D. Mo. Mar. 13, 2015) (allegation that collection agency continued to call in evening, after expressly being asked not to do so, sufficiently stated claim under § 1692c(a)(1)); S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 2, ("Collection abuse takes many forms, including . . . telephone calls at unreasonable hours.") *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *reproduced at* Appx. A.3, *infra*.

135 Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890 (N.D. Ga. Dec. 7, 1984).

136 Reg. F Official Interpretations § 6(b)(1)-1.

137 Reg. F Official Interpretations § 6(b)(1)-1(ii).

138 *See* 85 Fed. Reg. 76,734, 76,761 (Nov. 30, 2020).

139 *See* Hilgenberg v. Elggren & Peterson, 2015 WL 4077765 (D. Utah July 6, 2015).

140 *See* 85 Fed. Reg. 76,734, 76,762 (Nov. 30, 2020).

141 Reg. F Official Interpretations § 6(b)(1)-1.

142 Reg. F Official Interpretations § 6(b)(1)-1(i).

143 Reg. F § 1006.14(h); § 6.9, *infra*.

144 *See* § 5.3.1, *supra*. *See, e.g.*, Diaz v. D.L. Recovery Corp., 486 F. Supp. 2d 474 (E.D. Pa. 23, 2007) (§ 1692c(a) requires communication with consumer; no communication was alleged against defendant; claim was dismissed).

145 *See* § 4.2, *supra*, Appx. E.1.4.2, *infra*. *See also* Reddin v. Rash Curtis & Assoc., 2016 WL 3743148 (E.D. Cal. July 13, 2016) (debtor's mother not

Reg. F Official Interpretations explicitly state that if a time is inconvenient, the collector cannot send an email during that time—the applicable time is when the email is sent, not when the consumer opens it.[146]

The Reg. F Official Interpretations provide a limited exception to communicating at inconvenient times or places. If the consumer initiates a communication at a time previously designated as inconvenient, the collector can use the same mode of communication to respond only once at that same inconvenient time. A second such communication is not permitted unless the consumer conveys that the time is no longer inconvenient.[147] If the consumer initiates an additional communication at a time designated as inconvenient, the collector can respond again, but again only once and only with the same mode of communication.[148]

The collector's one response using the same mode of communication includes a collector response that the consumer does not answer, such as an unanswered phone call. "The Bureau determines that a debt collector's unanswered call does constitute the debt collector's one permitted reply as described under comment 6(b)(1)-1."[149] If the consumer initiates an email at a time designated as inconvenient, the collector can reply with an automated response, but that counts as the one allowed reply at that inconvenient time.[150]

If the consumer visits the collector's website or mobile application during a time the consumer has indicated as inconvenient, the collector can provide information on that website or on that mobile application in response. Once the consumer stops navigating the site or application, the collector cannot further communicate during that inconvenient time.[151]

5.4.3 Contacts at Inconvenient Places

FDCPA § 1692(c)(a)(1) and Reg. F § 1006.6(b)(1) (effective November 30, 2021) prohibit a collector from contacting the consumer at unusual or inconvenient places, and not just unusual or inconvenient times. Examples might be a hospital, a military combat zone, a church or other place of worship, a daycare,[152] or a funeral parlor. A debt collection letter delivered to the consumer at his brother's address, at which he had never lived, was sufficiently "unusual" or "inconvenient" to state a claim under FDCPA § 1692c(a)(1).[153]

If the consumer notifies the collector or the collector otherwise knows that a place is inconvenient, then the collector should not direct communications to that place. The Reg. F Official Interpretations state that if a location, including the consumer's home, is an inconvenient place, the collector should not contact the consumer at that location, not only by calling a landline there, but also by sending mail to that address, unless the consumer qualifies the request to allow mail.[154] This restriction on a location though does not apply to emails, texts, or calls to cell phones, unless the debt collector knows that the consumer is presently at a place that it would be unusual or inconvenient to receive a communication.[155]

The Reg. F Official Interpretations provide that a debt collector knows or should know that a place is inconvenient if the consumer uses the word "inconvenient" to notify the debt collector.[156] The consumer does not have to use the word "inconvenient." The Regulation F supplemental information states:

> The Bureau declines to restrict how a consumer may designate a time or place as inconvenient. The statute does not prescribe any specific actions or require precise responses or utterances on behalf of the consumer to invoke these communications protections, and nor does this final rule impose such requirements. The Bureau determines that a flexible approach is necessary when it comes to communications, which by their very nature are dynamic, depend upon the specific circumstances, and differ from consumer to consumer. Such fluid communications cannot be scripted, nor can every permutation be anticipated.[157]

Reg. F Official Interpretations also provide "depending on the facts and circumstances, the debt collector knows or should know that a time or place is inconvenient even if the consumer does not specifically state to the debt collector that a time or place is 'inconvenient.'"[158] For example, the collector should know that a place is inconvenient if the creditor provides the collector with a file on the consumer that contains recent notes that the consumer should not be disturbed at that place.[159]

The Reg. F Official Interpretations provide a limited exception to communicating at inconvenient places. If the consumer initiates a communication from a place previously designated as inconvenient, the collector can use that same mode of communication to respond only once to that place. A second such communication is not permitted unless the consumer conveys that the place is no longer inconvenient.[160] If the consumer initiates an additional communication from an inconvenient place, the collector can respond again but only once to such place using the same mode of communication as the consumer-initiated communication.[161]

protected by § 1692c from two debt collection calls that did not violate any other section of FDCPA).

146 Reg. F Official Interpretations § 6(b)(1)(i)-1.

147 Reg. F Official Interpretations § 6(b)(1)-2.

148 Reg. F Official Interpretations § 6(b)(1)-2(i), (ii), (iv).

149 *See* 85 Fed. Reg. 76,734, 76,763 (Nov. 30, 2020).

150 *See* 85 Fed. Reg. 76,734, 76,764 (Nov. 30, 2020).

151 Reg. F Official Interpretations § 6(b)(1)-2(iii).

152 *See* CFPB Small Business Review Panel For Debt Collector And Debt Buyer Rulemaking 29–30 (July 28, 2016), *available at* https://files.consumerfinance.gov.

153 *See* Duran v. Midland Credit Mgmt., Inc., 2016 WL 3661538 (S.D.N.Y. June 30, 2016).

154 Reg. F Official Interpretations §§ 6(b)(1)-1(iii), 6(b)(1)(ii)-1.

155 Reg. F Official Interpretations §§ 6(b)(1)-1(iii), 6(b)(1)(ii)-1.

156 Reg. F Official Interpretations § 6(b)(1)-1.

157 *See* 85 Fed. Reg. 76,734, 76,761 (Nov. 30, 2020).

158 Reg. F Official Interpretations § 6(b)(1)-1.

159 *Cf.* Reg. F Official Interpretations §6(b)(1)-1(i) (example applicable to inconvenient time).

160 Reg. F Official Interpretations § 6(b)(1)-2.

161 Reg. F Official Interpretations § 6(b)(1)-2(i), (ii), (iv).

The collector's one response using the same mode of communication includes a response that the consumer does not answer, such as an unanswered phone call. "The Bureau determines that a debt collector's unanswered call does constitute the debt collector's one permitted reply as described under comment 6(b)(1)-1."[162]

While the CFPB declined to designate any locations as presumptively inconvenient in Regulation F,[163] workplaces are inconvenient places to contact many types of workers.[164] Courts treat FDCPA §§ 1692c(a)(1) and 1692c(a)(3) as banning workplace collection contacts whenever a consumer informs the debt collector to stop such calls because they are inconvenient or prohibited.[165] Contact to a consumer's workplace in violation of FDCPA § 1692c(a)(3) is discussed at § 5.6, *infra*.

5.4.4 *The Known or Which Should Be Known Standard*

FDCPA § 1692c(a)(1) provides that a collector cannot contact the consumer at a time or place that is "known or should be known" as inconvenient. This clearly means that once a debt collector receives a request to cease communication at specified inconvenient times or places, whether the request is made orally *or* in writing, the debt collector then knows the time or place is inconvenient and must honor that request.[166]

Previously it was critical to inform the debt collector o the reason for the inconvenience, rather than provide a vagu request to not call[167] or just a broad statement of not want ing calls.[168] The Reg. F Official Interpretations (effectiv November 30, 2021) provide, however, that a debt collecto knows or should know that a time or place is inconvenient i the consumer uses the word "inconvenient" to notify the deb collector and also stated that "depending on the facts and circumstances, the debt collector knows or should know that a time or place is inconvenient even if the consumer does not specifically state to the debt collector that a time or place is 'inconvenient.'"[169] In addition, Reg. F § 1006.14(h) has clarified that collectors must not communicate or attempt to communicate with a person through a medium of communication after the person requested that the debt collector not use that medium of communication.[170] As a result, collectors must honor consumer requests regarding a particular type of communication, such as a request to cease collection calls, even if the request did not adequately inform the collector that the time or place was inconvenient.

The statutory language "known or should be known" also means that a collector should be able to infer from the circumstances when a time or place is inconvenient to the consumer. The collector has a burden of reasonable inquiry to determine the times or places that are unusual or inconvenient for a particular consumer.

This "should have known standard" places a burden on the debt collector to pay careful attention to the information in their collection file and to carefully listen to the consumer's statements about the convenience of the call. For example, the

162 *See* 85 Fed. Reg. 76,734, 76,763 (Nov. 30, 2020).

163 *See* 85 Fed. Reg. 76,734, 76,767 (Nov. 30, 2020).

164 *See* Fed. Trade Comm'n v. Williams, Scott & Assoc., 2015 WL 12856779 (N.D. Ga. Nov. 4, 2015), *aff'd*, 2017 WL 540996 (11th Cir. Feb. 10, 2017) (summary judgment for FTC on § 1692c(a)(1) claim because collection agency and its associates "called some consumers repeatedly at work, even though the collectors knew or should have known that those calls were inconvenient or prohibited"); Burke v. Coachella Valley Collections Services, 2011 WL 13217709 (C.D. Cal. Mar. 25, 2011); Appx. E.2.2.3, *infra*. *But see* Thompson v. Nationwide Debt Mgmt. Solutions, L.L.C., 2017 WL 4574566, at *5 (N.D. Ohio Oct. 13, 2017) (no imputed knowledge that nurse should not be called at work); Sanchez v. Client Services, Inc., 520 F. Supp. 2d 1149 (N.D. Cal. 2007) (supervisor testified it was acceptable to telephone school cafeteria worker at job).

The FTC has also issued staff letters notifying several collectors that the consumer's workplace may by its nature be an inconvenient place to receive debt collection contacts. Atteberry, FTC Informal Staff Letter (Dec. 30, 1977), *discussed at* § 3.4.4.4, *supra*.

165 Horkey v. J.V.D.B. & Assoc., 333 F.3d 769 (7th Cir. 2003) (continuing to telephone and talk to consumer at work after she said she could not talk at work and would call collector from home violated § 1692c(a)(3)); Currier v. PDL Recovery Group, L.L.C., 2017 WL 712887 (E.D. Mich. Feb. 23, 2017); Chiverton v. Fed. Fin. Group, Inc., 399 F. Supp. 2d 96 (D. Conn. Sept. 30, 2005) (debt buyer violated §§ 1692c(a)(1), 1692c(a)(3) by repeatedly calling after consumer expressly requested collector not to do so because he was not permitted to receive personal calls at work); Pittman v. J.J. Mac Intyre Co., 969 F. Supp. 609 (D. Nev. 1997) (allegations in consumer's complaint, that debt collector called her at her job in attempt to collect debt, even after she had indicated that she could not talk at work," were sufficient to state claim under § 1692c(a)(1)).

166 Gilroy v. Ameriquest Mortg. Co., 632 F. Supp. 2d 132 (D.N.H. June 17, 2009) (consumer told collector that 8:00 p.m. was inconvenient to her because she goes to bed early); Brzezinski v. Vital Recovery Services, Inc., 2006 WL 1982501 (E.D. Wis. July 12, 2006); Chiverton v. Fed. Fin. Group, Inc., 399 F. Supp. 2d 96, 104 (D. Conn. 2005) (violation of § 1692c(a)(1), (3) where defendant repeatedly telephoned the plaintiff at work after being told by the plaintiff he was not permitted to receive personal calls at work).

167 *See* Currier v. PDL Recovery Group, L.L.C., 2017 WL 712887, at *19 (E.D. Mich. Feb. 23, 2017); Forgues v. Select Portfolio Servicing, Inc., 2016 WL 1588665 (N.D. Ohio Apr. 20, 2016); Sellers v. State Collection Serv., Inc., 2016 WL 1179231 (W.D. Wis. Mar. 24, 2016); Ghawi v. Law Offices Howard Lee Schiff, P.C., 2015 WL 6958010, at *6 (D. Conn. Nov. 10, 2015).

168 *See* Roider v. Capital Mgmt. Services, 2011 WL 5553796 (E.D. Wis. Nov. 15, 2011) (debt collector did not know or have reason to know that calling the plaintiff at her workplace was prohibited, or that it was inconvenient or unusual time or place, § 1692c(a) was not violated); Shand-Pistilli v. Prof'l Account Services, Inc., 2011 WL 2415142 (E.D. Pa. June 16, 2011) (plaintiff's statement "I'm not interested in these solicitation calls" was insufficient to put defendant on notice that she viewed telephone calls to her home as inconvenient); Jones v. Rash Curtis & Assoc., 2011 WL 2050195 (N.D. Cal. Jan. 3, 2011) (no evidence that plaintiff ever informed debt collector that calls were inconvenient). *See also* Danow v. Law Office of David E. Borack, P.A., 2008 WL 11331725 (S.D. Fla. Feb. 14, 2008), *aff'd on other grounds*, 346 Fed. Appx. 409, 411 (11th Cir. 2009) (finding material issues of fact as to whether letter's language sufficiently notified attorney that consumer's residence was inconvenient place to receive telephone calls).

169 Reg. F Official Interpretations § 6(b)(1)-1. *See also* 85 Fed. Reg. 76,734, 76,761 (Nov. 30, 2020) ("The Bureau declines to restrict how a consumer may designate a time or place as inconvenient."); Horkey v. J.V.D.B. & Assoc., 333 F.3d 769 (7th Cir. 2003).

170 Reg. F § 1006.14(h), *discussed at* § 6.9, *infra*.

creditor's file, including the loan application listing the consumer's place of employment, may tell the collector whether the consumer's job is one for which contacts at the workplace are inherently inconvenient or whether the consumer has indicated certain times or places are inconvenient. Or a family member might tell the collector that the consumer is ill or asleep, or a labor union might warn a collector not to contact its members at work.

5.4.5 Other FDCPA Provisions Also Regulate Phone Calls

FDCPA § 1692c(b)[171] prohibits most calls to unobligated persons, except to obtain the consumer's location information as permitted by section 1692b.[172] Collectors are prohibited under FDCPA § 1692f(5) from causing charges to be made to any person for phone calls (or other communications) by concealing the true purpose of the communication.[173] When the debt collector reaches a consumer, FDCPA § 1692e(11)[174] requires disclosure of the caller's identity and the debt collection purpose of the call, as do sections 1692d(6)[175] and 1692e(14).[176] Under Reg. F (effective November 30, 2021), there are presumptive call frequency limits,[177] a collector must cease calling a consumer upon the consumer's request,[178] and a debt collector that wants to leave a voicemail message must comply with content requirements in order to qualify the contact as a limited content message subject to specific safe harbors from FDCPA liability.[179] Numerous FDCPA provisions prohibit abuse, such as repetitious calls, and deceptive practices on the telephone.[180]

A threat to do an act that would violate FDCPA § 1692c would itself violate other provisions of the FDCPA.[181] Representing that the collector will contact the consumer at an inconvenient place unless requested not to in writing by the consumer may be deceptive violating FDCPA § 1692e, as the consumer has the right to be free of such a contact without making a written request.[182] The consumer may also order the collector to cease most common communications under FDCPA § 1692c(c).[183]

In addition, the Telephone Consumer Protection Act restricts debt collectors' calls to numbers on the do-not-call list and automated calls to cell phones, providing strong remedies for violations, as discussed elsewhere in this treatise.[184]

5.5 Contacting a Consumer Known to Be Represented by an Attorney, FDCPA § 1692c(a)(2)

5.5.1 Text of FDCPA § 1692c(a)(2) and Reg. F § 1006.6(b)(2)

> (a) Communication with the consumer generally—Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—
>
> * * *
>
> (2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer[.][185]

Senate bill, S. 918, 95th Cong., 2d Sess. § 805(a)(2) (1977), dropped an early provision prohibiting a debt collector from contacting a represented consumer "after the initial communication."[186] Congress might have intended through this deletion to prohibit even one collection contact with a consumer known to be represented as to a particular debt.

Regulation F generally tracks this provision but clarifies that it applies to *attempts* to communicate with a consumer represented by an attorney, and not just communications with such a consumer.[187]

5.5.2 Overview of FDCPA § 1692c(a)(2)

FDCPA § 1692c(a)(2) prohibits collectors contacting consumers if the collector knows the consumer is represented by an attorney with respect to the debt.[188] The provision only

171 *See* § 5.7, *infra*.
172 *See* § 5.2, *supra*.
173 *See* § 8.5, *infra*.
174 *See* § 7.2.11, *infra*.
175 *See* § 6.8, *infra*.
176 *See* § 7.2.14, *infra*.
177 Reg. F § 1006.14(b), *discussed at* § 6.7, *infra*.
178 Reg. F § 1006.14(h), *discussed at* § 6.7.2, *infra*.
179 Reg. F § 1006.2(j), *discussed at* § 4.9, *supra*.
180 *See* 15 U.S.C. §§ 1692d, 1692e, 1692f.
181 15 U.S.C. § 1692e(5), 1692e(10), *discussed at* §§ 7.2.5, 7.2.8, *infra*.
182 *See* Brzezinski v. Vital Recovery Services, Inc., 2006 WL 1982501 (E.D. Wis. July 12, 2006). *But see* Wan v. Commercial Recovery Sys., Inc., 369 F. Supp. 2d 1158 (N.D. Cal. 2005) (holding statement in collector's letter to consumer that "[i]f you notify us in writing to stop contacting you by telephone at your residence or place of employment, no further contact will be made" does not to violate §§ 1692e or 1692c(a)(1)).
183 § 5.8, *infra*.
184 *See* § 14.3.2.1, *infra*. *See also* National Consumer Law Center, Federal Deception Law (4th ed. 2022), *updated at* www.nclc.org/library.
185 15 U.S.C. § 1692c(a)(2). *See also* Reg. F § 1006.6(b)(2).
186 S. 656, 95th Cong., 1st Sess. § 804(a)(2) (1977); S. 3838, 94th Cong., 2d Sess. § 804(a)(2) (1976); H.R. 5294, 95th Cong., 2d Sess. § 804(a)(2) (1977).
187 *See* Reg. F § 1006.6(b)(1). *See also* 85 Fed. Reg. 76,734, 76,759 (Nov. 30, 2020).
188 *See* McCusker v. Ocwen Loan Services, L.L.C., 2015 WL 4529986 (D. Mass. July 27, 2015); Strasers v. Weinstein & Riley, P.S., 2012 WL 405454 (E.D. Wash. Feb. 8, 2012); Appx. E.2.2.2, *infra*.

refers to representation by an attorney,[189] but one court has suggested a debt collector may be restricted from contacting a consumer if the consumer authorized an agent to communicate with the debt collector.[190]

Absent an applicable exception,[191] once the collector learns that the consumer is represented by an attorney with respect to a particular debt, the collector must deal exclusively with the attorney and should not contact the consumer[192] or continue an ongoing conversation with the consumer with respect to the particular debt.[193] But the CFPB views the knowledge only extending to those debts for which the collector knows that the consumer has representation, even where the collector knows the consumer has representation for at least one debt.[194] Some older cases have found such violations to be technical or *de minimis*,[195] while others have found that any communication in violation of the provision creates FDCPA liability.[196]

After learning of the consumer's representation, the collector should not then contact the consumer, even to confirm with the consumer the attorney's retention,[197] the reason for the retention,[198] the scope of the attorney representation,[199] or to obtain the attorney's contact information, where the collector had the opportunity to obtain that when the consumer notified the collector of the representation.[200] A verification rights notice,[201] bills,[202] or even legal notices, should not be presented directly to the consumer. A court has held permissible a debt collector's confirmation that it would cease collection because of the consumer's legal representation where there was no request for payment.[203] The collector can contact the consumer

189 *See* Edwards, FTC Informal Staff Letter (Feb. 7, 1991); Hollcraft, FTC Informal Staff Letter (May 10, 1988); FTC Official Staff Commentary § 805(a)-3Federal Deception Law (4th ed. 2022).

190 Anderson v. Gamache & Myers, P.C., 2007 WL 4365745 (E.D. Mo. Dec. 10, 2007) (where agent was not attorney, but was engaged for purpose of mediating resolution, had debt collector communicated directly with consumer rather than his appointed agent, it arguably would have violated FDCPA).

191 *See* §§ 5.3.3, 5.3.2, 5.3.4, *supra*, § 5.5.4, *infra*. FDCPA § 1692c(a) creates prohibitions on certain types of communications when there is no "prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction." The consumer's consent should be the collector's responsibility to both raise and prove as an exception. *But see* Halsey v. Litton Loan Servicing, 2013 WL 3754919, at *3 (D.N.H. July 13, 2013) (plaintiff's claim that Ocwen communicated with him directly after notice of representation dismissed, in part because he did not allege that Ocwen did not have his prior consent to communicate with him). Note also that an attorney's consent to direct communication with the consumer is another exception. Some courts may find that an attorney's instruction to a client to contact the debt collector might constitute such consent. *See, e.g.*, Jackson v. I.C. Sys., Inc., 2020 WL 7023945, at *5 (E.D. Mo. 2020).

192 *See* Appx. E.2.2.2, *infra*.

193 *See* Curtis v. Caine & Weiner Co., 2016 WL 520987 (E.D. Mo. Feb. 10, 2016).

194 *See* 85 Fed. Reg. 76,734, 76,768 (Nov. 30, 2020) ("The Bureau interprets the protections afforded a consumer under FDCPA section 805(a)(2) to apply to a particular debt allegedly owed by the consumer, but not to future or other debts allegedly owed by the consumer, unless the debt collector knows that an attorney represents the consumer with respect to those debts and has knowledge of, or can readily ascertain, the attorney's name and address.").

195 Pearce v. Rapid Check Collection, Inc., 738 F. Supp. 334 (D.S.D. 1990) (letter threatening suit to consumer known to be represented by counsel was "technical" error and not a violation); Bieber v. Associated Collection Services, Inc., 631 F. Supp. 1410 (D. Kan. 1986) (asking consumer whether he intended to file for bankruptcy after being informed consumer was represented was legitimate business inquiry, not so extensive as to be prohibited).

196 Chung v. Shapiro & Denardo, L.L.C., 2015 WL 3746332 (D.N.J. June 15, 2015) (even if state law permitted direct communication with represented consumer, it would not absolve law firm from FDCPA liability); Campbell v. MBI Assoc., Inc., 98 F. Supp. 3d 568 (E.D.N.Y. 2015). *See also* § 12.7.2, *infra*. As with any case, when raising a FDCPA § 1692c(a)(2) violation in federal court, examine whether the violation resulted in a concrete harm to the consumer for Article III standing. *See* § 11.15, *infra*.

197 *See* Backlund v. Messerli & Kramer, P.A., 964 F. Supp. 2d 1010 (D. Minn. 2013); Hockenhull v. Law Office Howard Lee Schiff, P.C., 2012 WL 6525504 (D.R.I. Dec. 13, 2012) (cannot confirm representation, even when attorney has out-of-state office).

198 Istre v. Miramed Revenue Group, L.L.C., 2014 WL 4988201 (E.D. Mo. Oct. 7, 2014).

199 *See* Young v. Northand Group, 2018 WL 306023 (E.D. Mo. Jan. 5, 2018) (denying dismissal where collector informed of representation asked consumer if she had retained counsel for bankruptcy purposes); Backlund v. Messerli & Kramer, P.A., 964 F. Supp. 2d 1010 (D. Minn. 2013) (jury question raised). *See also* Curtis v. Fin. Recovery Services, Inc., 2016 WL 1161598 (E.D. Mo. Mar. 23, 2016) (disputed fact as to whether collection agency's single reference to payment of debt after consumer stated that she was represented by an attorney was attempt to collect debt); Istre v. Miramed Revenue Group, L.L.C., 2014 WL 4988201 (E.D. Mo. Oct. 7, 2014) (may ask for contact information for attorney, but may not ask why attorney was retained). *But see* Robin v. Miller & Steeno, P.C., 2014 WL 3734318 (E.D. Mo. July 29, 2014) (may ask for court docket number); Ikonomidis v. Duggins Law Firm, P.L.C., 2014 WL 3497246 (E.D. La. July 14, 2014) (whether lawyer represented consumer on debt being collected was at issue).

200 *See* Hanks v. Valarity, L.L.C., 2015 WL 1886960 (E.D. Mo. Apr. 24, 2015). *See also* Istre v. Miramed Revenue Group, L.L.C., 2015 WL 1020015 (E.D. Mo. Mar. 9, 2015) (rejecting collection agency's consent defense based upon fact that telephone conversation was initiated by consumer from attorney's office with attorney present, since undisputed material facts established that no *prior* consent was given by either consumer or counsel *directly to the debt collector*). *But see* Messick v. Messerli & Kramer, P.A., 2016 WL 1180169 (D. Minn. Mar. 25, 2016) (call was to confirm spelling of the attorney's name with no attempt to collect debt and therefore not "communication").

201 *See* Zaborac v. Mut. Hosp. Services, Inc., 2005 WL 1690553 (S.D. Ind. July 19, 2005); Simmons v. Miller & Steeno, P.C., 2002 WL 31898324 (E.D. Mo. Dec. 30, 2002), *vacated due to settlement*, 2003 WL 255238 (E.D. Mo. Feb. 4, 2003). *See also* Zaborac v. Mut. Hosp. Serv., Inc., 2004 WL 2538643 (S.D. Ind. Oct. 7, 2004).

202 *See* Yarney v. Ocwen Loan Servicing, L.L.C., 929 F. Supp. 2d 569 (W.D. Va. 2013).

203 *See* Salsbury v. Trac A Chec, Inc., 365 F. Supp. 2d 939 (C.D. Ill. Apr. 18, 2005). *See also* Young v. NPAS, Inc., 361 F. Supp. 3d 1171, 1197 (D. Utah Feb. 5, 2019) (no summary judgment to consumer where contact was to confirm that would not contact consumer again because of legal representation); Klein v. Stellar Recovery, Inc., (E.D. Mo. Oct. 12, 2017) (where consumer informed collection agency that she was represented by attorney, and was then asked in same call for her mailing address, email address, and telephone number, there was no violation, as there was no request for payment).

directly if the consumer has provided prior consent to do so directly to the collector.[204]

The Official Interpretations to Regulation F (effective November 30, 2021) provide that, where a represented consumer initiates the contact with the collector, the collector may respond because the communication from the consumer constitutes prior consent. But this does not negate the collector's knowledge that the consumer is represented by an attorney and does not permit the collector to later contact the consumer, unless the collector knows the consumer is no longer represented by an attorney or another exception applies.[205]

5.5.3 Collector's Knowledge that Consumer Has Legal Representation

5.5.3.1 Actual Knowledge

Notice to the collector that an attorney represents the consumer for all or specified current or future debts should trigger the requirement that the collector deal only with the consumer's attorney on the specified debts.[206] Issues may arise where the notification is not clear as to the scope of representation.[207] Notification should be made clear that it is an attorney representing the consumer and not just a paralegal or other non-attorney.[208]

There is no requirement that notification to the collector be in any particular form.[209] A court determined that a debt collector did not need to be provided the account number in addition to the consumer's and lawyer's contact information.[210] A written letter notifying the collector of the representation is not even required. The only requirement is that the collector in some manner learns that there is legal representation.

Whether the collector has that actual knowledge of legal representation is a question of fact. The consumer must show that the debt collector had actual knowledge about the representation without ambiguity and that it was provided a reasonable time to process the notice.[211]

A court allowed the consumer's lawyer's settlement offer to the debt collector to be admitted to show the debt collector's knowledge of the consumer's legal representation.[212]

A mortgage servicer may learn of the representation from the loan file.[213] A lower court left open the possibility that a mortgage servicer's investigation of the consumer's bankruptcy might have revealed the consumer's representation.[214] A collector's knowledge of legal representation in one matter may lead it to know that there is legal representation regarding

204 *See, e.g.*, Hochroth v. Ally Bank, 461 F. Supp. 3d 986, 1007–1008 (D. Haw. 2020) (mortgage servicer could communicate with consumer, even though represented by attorney, when consumer initiated multiple phone calls to mortgage servicing company and transmitted letter to mortgage servicing company).

205 Reg. F Official Interpretations § 6(b)(2)-1.

206 FTC Official Staff Commentary § 805(a)-3, *discussed at* § 3.4.4.4, *supra, reproduced at* Appx. C.2.2, *infra. See also* Fisher v. Bernhardt & Strawser, P.A., 2013 WL 3990744 (W.D.N.C. Aug. 2, 2013) (denying motion to dismiss where consumer's lawyer stated she represented consumer regarding FDCPA claim and requested collector stop all contact of consumer).

207 Ikonomidis v. Duggins Law Firm, P.L.C., 2014 WL 3497246 (E.D. La. July 14, 2014).

208 *See* Stockham, FTC Informal Staff Letter (May 15, 1986), *discussed at* § 3.4.4.4, *supra. Cf.* Yee v. Ventus Capital Services, Inc., 2006 WL 1310463 (N.D. Cal. May 12, 2006) (collection agency's motion for partial summary judgment denied because defendants' argument that plaintiff's attorney offered nonlegal services and because it had spoken with nonlawyer was unpersuasive and its business records were not competent evidence on that point).

209 *See* Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769 (7th Cir. 2003); Buckley v. Afni, Inc., 133 F. Supp. 3d 1140 (S.D. Ind. Jan. 6, 2016) (letter omitting debtor's account numbers and referring to her previous married name as "aka" rather than "fka" provided the agency enough information); Miceli v. Orange Lake Country Club, Inc., 2015 WL 5081621 (M.D. Fla. Aug. 5, 2015); Istre v. Miramed Revenue Group, L.L.C., 2014 WL 4988201 (E.D. Mo. Oct. 7, 2014) (phone notice acceptable); Lassiter v. Integrity Solution Services, Inc., 2014 WL 1040677 (D. Colo. Mar. 18, 2014) (service of FDCPA suit on debt collector sufficient); Day v. Am. Home Mortg. Serv., Inc., 2010 WL 2231988 (E.D. Cal. June 3, 2010) (notice does not have to be in writing); Clayson v. Rubin & Rothman, L.L.C., 2010 WL 547476 (W.D.N.Y. Feb. 11, 2010) (same); Bianchi v. The Bureaus, Inc., 2008 WL 597587 (N.D. Ill. Feb. 27, 2008) (bankruptcy notice with information had been mailed to collector); Tong v. Capital Mgmt. Services Group, Inc., 520 F. Supp. 2d 1145 (N.D. Cal. 2007) (consumer attorney's fax of his representation letter and collection letter were together sufficient).

210 *See* Buckley v. Afni, Inc., 133 F. Supp. 3d 1140 (S.D. Ind. Jan. 6, 2016). *Cf.* Alvarado v. Credit Prot. Ass'n, 2015 WL 1815863 (M.D. Fla. Apr. 22, 2015).

211 *See* Munoz v. Cal. Bus. Bur., Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016); Wyman v. Northland Group, Inc., 2014 WL 12586057 (M.D. Fla. Jan. 3, 2014); Sanford v. Portfolio Recovery Assoc., 2013 WL 3798285 (E.D. Mich. July 22, 2013); Fisher v. Bernhardt and Strawser, P.A., 2013 WL 3990744 (W.D.N.C. Aug. 2, 2013); Appx. E.2.2.2, *infra. See also* Dunning v. Portfolio Recovery Assoc., 903 F. Supp. 2d 1362 (S.D. Fla. 2012) (not reasonable to expect debt collector to react within hours to emailed notice); Marchman v. Credit Solutions Corp., 2011 WL 1560647 (M.D. Fla. Apr. 5, 2011), *adopted*, 2011 WL 1557853 (M.D. Fla. Apr. 25, 2011) (failed to allege that defendant was aware of representation); Silver v. Law Offices of Howard Lee Schiff, P.C., 2010 WL 3000053 (D. Conn. July 28, 2010) (judgment for defendant where it had not opened email notice of representation); McKeown v. Mary Jane M. Elliott P.C., 2007 WL 4326825 (E.D. Mich. Dec. 10, 2007) (where representation letter was ambiguous in referring to "limited representation," did not state unequivocally that attorney represented consumer with respect to debt, and as matter of policy attorney refused phone calls responding to representation letter, debt collector did not have reason to know consumer was represented by attorney).

212 Alvarado v. Credit Prot. Ass'n, L.P., 2015 WL 859109 (M.D. Fla. Feb. 27, 2015) (settlement letter fell outside protection of Federal Rule of Evidence 408 and was allowed in to show debt collector's knowledge of representation).

213 *See* Garrison v. Caliber Home Loans, Inc., 233 F. Supp. 3d 1282 (M.D. Fla. 2017); Quinn v. Specialized Loan Servicing, L.L.C., 2016 WL 4264967 (N.D. Ill. Aug. 11, 2016). *But see* Pewzner v. Med. Recovery Specialists, L.L.C., 2012 WL 12905552 (S.D. Fla. Dec. 5, 2012) ("business relationship" between hospital creditor and agency not sufficient to demonstrate actual knowledge on the part of the agency).

214 *See* Gagnon v. JPMorgan Chase Bank, 563 B.R. 835 (N.D. Ill. 2017). *But see* Polster v. Van Ru Credit Corp., 2017 WL 1196888, at *10 (N.D. Ill. Mar. 31, 2017) (attorney representation in one capacity (bankruptcy) "does not necessarily entail attorney representation in a separate, albeit related, capacity").

another debt with the same consumer.[215] Look to see if the consumer's representation was actually noted in the collection file.[216]

5.5.3.2 Imputed Knowledge of the Consumer's Representation

Where there is no proof of the collector's actual knowledge, consumers would benefit if they could impute such knowledge, such as where the creditor hiring the collector has that knowledge or where the collector has knowledge of the consumer's legal representation in another matter. The statutory language is not helpful here because it requires the collector to know about the representation, not "know or should have known."

If the consumer cannot impute such knowledge, collectors would have reason to remain purposefully ignorant about the collection history of the debts they collect,[217] and creditors would support their ignorance. The purpose of FDCPA § 1692c(a)(2) would be better served if a collector is required to take affirmative steps to determine a consumer's legal representation—inquire of its creditor as to its knowledge of legal representation, review files of other debts with the same consumer to see if there is legal representation of that debt, or affirmatively inquire of the consumer when there is reason to suspect such representation.[218]

Nevertheless, according to the Seventh and Eighth Circuits and some lower courts in other circuits,[219] the creditor's knowledge that the consumer is represented by an attorney is not to be imputed to the collector. Other courts though do impute such knowledge.[220]

A state UDAP claim might lie against the creditor for not informing the debt collector of the consumer's representation.[221] Where a debt buyer's agent has knowledge of the consumer's representation, where an agency relationship can be established, that agent's knowledge should be imputed to its principal, so that the debt buyer can be liable for contacting a represented consumer, either directly or through another debt collector.[222]

FDCPA § 1692c(a)(2) limits a collector's communication with the consumer where the debt collector knows the consumer is represented by an attorney "with respect to such debt."[223] Courts generally hold that a collector who knows a consumer is represented by an attorney regarding one debt is not necessarily required to assume the attorney represents the consumer on other debts.[224] The mere existence of a bankruptcy petition may not be enough to establish that a collection law firm actually knew that the consumer was represented by

215 Munoz v. Cal. Bus. Bur., Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016) (debt collector had actual knowledge of representation through recent state lawsuit).

216 *See* Gustin v. Allied Interstate L.L.C., 2014 WL 1923735 (N.D. Ala. May 13, 2014). *Cf.* Erickson v. General Elec. Co., 2012 WL 601171 (M.D. Fla. Feb. 23, 2012) (granting summary judgment for debt buyer, since consumer failed to timely pursue discovery regarding debt buyer's actual knowledge that consumer was represented by counsel at time of communication).

217 *Cf.* Mullen v. Compton, 2013 WL 3367080 (S.D. Ohio July 5, 2013) (no evidence to support willful blindness by collector).

218 *See* Abrams v. MiraMed Revenue Group, L.L.C., 2013 WL 1319385 (S.D. Ind. Mar. 29, 2013) (collector can inquire of consumer).

219 *See* Schmitt v. FMA Alliance, 398 F.3d 995 (8th Cir. 2005) (creditor's knowledge will not be imputed to debt collector); Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004) (creditor's knowledge of consumer's bankruptcy representation not imputed to collector); Wolhuter v. Carrington Mortg. Services, L.L.C., 2015 WL 12819153, at *5 (M.D. Fla. Oct. 28, 2015); Mullen v. Compton, 2013 WL 3367080 (S.D. Ohio July 5, 2013); Martinez v. Johnson, 2013 WL 1031363 (D. Utah Mar. 14, 2013); Vega v. United Recovery Sys., L.P., 2012 WL 458468 (D.N.J. Feb. 9, 2012); Lynch v. Nelson Watson & Assoc., 2011 WL 2472588 (D. Kan. June 21, 2011); Appx. E.2.2.2, *infra*. *See also* FTC Official Staff Commentary § 805(a)-3, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2.2, *infra*.

220 *See* Micare v. Foster & Garbus, 132 F. Supp. 2d 77 (N.D.N.Y. 2001) (unless debt collector had procedure in place by which it asked creditors whether debtor was represented by counsel and creditor suppressed information, creditor's knowledge may be imputed to debt collector); Powers v. Prof'l Credit Services, Inc., 107 F. Supp. 2d 166, 168 (N.D.N.Y. 2000) ("[t]o allow a creditor to hire a debt collector after receiving actual knowledge that the consumer has retained legal representation for that debt and then withhold knowledge of this representation from the debt collector would blatantly circumvent the intent of the FDCPA). *But see* Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004); Erickson v. Messerli & Kramer P.A., 2011 WL 1869044 (D. Minn. May 16, 2011) (question of fact as to whether the consumer's bankruptcy retainer agreement with an attorney included representation on the underlying debt); Offril v. J.C. Penny Co., 2009 WL 69344 (N.D. Cal. Jan. 9, 2009).

221 *See* § 16.3.5, *infra*.

222 *See* Torres v. LVNV Funding, L.L.C., 2018 WL 1508535, at *6 (N.D. Ill. Mar. 27, 2018); *But see* Reygadas v. DNF Assoc., 982 F.3d 1119 (8th Cir. 2020) (issues of material fact remained regarding nature of relationship of debt buyer and third-party collector hired by debt buyer where third-party collector contacted consumer directly when debt buyer, not third-party, knew consumer was represented by counsel; consumer had not established agency relationship between debt buyer and third-party collector).

223 The language "with respect to such debt" was added by the Senate Consumer Affairs Subcommittee, but the Senate report does not mention a purpose for the amendment. S. Rep. No. 382, 95th Cong., 1st Sess. 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *reproduced at* Appx. A.3, *infra*.

224 *See* Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991); Wolhuter v. Carrington Mortg. Services, L.L.C., 2016 WL 7177620 (M.D. Fla. July 22, 2016); Nordwall v. PNC Mortg., 2015 WL 4095350, at *3 (M.D. Fla. July 7, 2015); Wright v. Select Portfolio Servicing, Inc., 2015 WL 419618, at *5 (M.D. Fla. Feb. 2, 2015); Hernandez v. Scott, 2011 WL 4626244 (W.D. Tex. Sept. 3, 2011); Crenshaw v. Computex Info. Services, Inc., 2011 WL 1640175 (D.N.J. Apr. 30, 2011); Dragon v. I.C. Sys., Inc., 483 F. Supp. 2d 198 (D. Conn. 2007); Berndt v. Fairfield Resorts, Inc. 337 F. Supp. 2d 1120 (W.D. Wis. 2004); Udell v. Kansas Counselors, Inc., 313 F. Supp. 2d 1135 (D. Kan. 2004); Buffington v. Schuman & Schuman, P.C., 2001 WL 34082273 (N.D.N.Y. Feb. 21, 2001); Goodman v. S. Credit Recovery, Inc., 1999 WL 14004 (E.D. La. Jan. 8, 1999); Spinarski v. Credit Bur., Inc., 1996 U.S. Dist. LEXIS 22547 (D.N.M. Sept. 19, 1996); Robinson v. Transworld Sys., Inc., 876 F. Supp. 385 (N.D.N.Y. 1995); Masuda v. Thomas Richards & Co., 759 F. Supp. 1456 (C.D. Cal. 1991). *See also* FTC Official Staff Commentary § 805(a)-3, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2.2, *infra*; Herold, FTC Informal Staff Letter (Aug. 14, 1979).

an attorney.[225] Of course, that fact of representation for one debt or a bankruptcy filing may lead to a factual finding that a collector did have actual knowledge of the consumer's legal representation—such a finding is for the finder of fact.[226]

5.5.4 *Consumer's Attorney Must Reasonably Respond to Debt Collector's Communications*

If the consumer's attorney fails to respond to a collector's communications within a reasonable period of time, the consumer loses the protection against collector contacts. The statute does not define what constitutes a reasonable time and that question may remain for determination at trial.[227] Earlier bills had omitted this requirement,[228] used the language "unless the attorney is unjustifiably nonresponsive,"[229] or required an attorney response within seven days.[230]

5.6 Contacts at Workplace Are Restricted, FDCPA § 1692c(a)(3) and Reg. F § 1006.6(b)(3)

> (a) Communication with the consumer generally—Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—
>
> * * *
>
> (3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.[231]

FDCPA § 1692c(a)(3) prohibits contacting the consumer at work in contravention of the employer's policy against such communication if the collector knows or has reason to know of such policy.[232] Regulation F (effective November 30, 2021) generally tracks this provision but clarifies that it applies to *attempts* to communicate with a consumer at the consumer's place of employment where the collector knows such communication is not permitted, and not just actual communications at the place of employment.[233] A separate Reg. F provision, examined at § 8.10, *infra*, prohibits emails to a consumer sent to an email address that the collector knows is provided to the consumer by the consumer's employer unless the email address was obtained through certain specified procedures.

A debt collector knows or has reason to know that a consumer's employer prohibits the consumer from receiving communications if the consumer tells the debt collector that the consumer cannot take personal calls at work. The debt collector may ask follow-up questions regarding the employer's prohibitions or limitations on contacting the consumer at the place of employment to clarify statements by the consumer.[234]

But the regulation's supplemental information provides:

> The Bureau concludes that a consumer need not undertake specific actions or utter specific words to be afforded the statutory protections provided under FDCPA section 805(a)(3). The statute does not prescribe any specific actions or require precise responses or utterances on behalf of the consumer to invoke the workplace communications protections, and nor does this final rule impose such requirements. Even if a consumer does not precisely state that the employer prohibits the consumer from receiving

225 Grubermann v. Seas & Assoc., 2016 WL 4378975 (N.D. Ill. Aug. 17, 2016).

226 Munoz v. Cal. Bus. Bur., Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016) (debt collector had actual knowledge of representation through recent state lawsuit).

227 *See* Graff v. Henriques, 2008 WL 3916039 (N.D. Cal. Aug. 25, 2008) (question of fact as to failure of plaintiff's counsel to respond to defendant's correspondence); Blum v. Fisher & Fisher, 961 F. Supp. 1218 (N.D. Ill. 1997) (whether thirty days was reasonable period presented questions of fact); Phillips v. Amana Collection Services, 1992 WL 227839 (W.D.N.Y. Aug. 25, 1992); Gibson v. Rossman & Co., Civ. Act. No. 81-C-754 (W. Va. Cir. Ct. 1982) (issue of material fact whether collector waited reasonable period before it contacted consumer, having called consumer's attorney on May 15, 18, 19, and 21 and consumer on May 21). *Cf. In re* Webster, 2009 WL 2634576 (Bankr. D. Mass. Aug. 21, 2009) (whether consumer's attorney refused, when requested to communicate with debt collector, to confirm his representation was disputed fact).

228 S. 656, 95th Cong., 1 Sess. § 804(a)(2) (1976).

229 S. 3838, 94th Cong., 2d Sess. § 804(a)(2) (1976); H.R. 13720, 94th Cong., 2d Sess. § 804(a)(2) (1976).

230 H.R. 11969, 94th Cong., 2d Sess. § 804(a)(1)(D) (1976).

231 15 U.S.C. § 1692c(a)(3). *See also* Reg. F § 1006.6(b)(3).

Bills leading to the FDCPA contained many types of provisions restricting contacts at work. S. 918, 95th Cong., 2d Sess. § 805(b) (1977) (no contact if known to be inconvenient or one contact if convenience unknown); S. 656, 95th Cong., 2d Sess. § 804(b) (1977); H.R. 13720, 94th Cong., 2d Sess. § 804(b) (1976); H.R. 29, 94th Cong., 2d Sess. § 804(b) (Jan. 1976); S. 3838, 94th Cong., 2d Sess. § 804(b) (1976) (one contact at work permitted or two contacts per month under specified circumstances); H.R. 5294, 95th Cong., 2d Sess. § 804(b) (1977) (three contacts at work per thirty-month period permitted, except no contacts at work if consumer so requests and supplies home phone number); H.R. 11969, 94th Cong., 2d Sess. § 804(a)(1)(A) (1976) (no contacts at work). The final version contains one of the most restrictive provisions considered by Congress.

232 *See* Appx. E.2.2.3, *infra*. *See also* Austin v. Great Lakes Collection Bur., Inc., 834 F. Supp. 557 (D. Conn. 1993) (continued telephone calls to consumer at her place of employment, after collector had been asked to cease such calls because they inconvenienced consumer, violated § 1692c(a)(1) and collector's discussion of consumer's debt with consumer's secretary was improper communication with third party in violation of § 1692c(b)); Sluys v. Hand, 831 F. Supp. 321 (S.D.N.Y. 1993) (sending collection letters to consumer's employer violated § 1692c(b)); FTC Official Staff Commentary § 805(a)-4, *discussed at* § 3.4.4.4, *supra, reproduced at* Appx. C.2.2, *infra, supra*. *But see* Roider v. Capital Mgmt. Services, 2011 WL 5553796 (E.D. Wis. Nov. 15, 2011) (FDCPA § 1692c(a) was not violated where debt collector did not know or have reason to know that calling plaintiff at her workplace was prohibited, or that it was inconvenient or unusual time or place).

233 *See* Reg. F § 1006.6(b)(1). *See also* 85 Fed. Reg. 76,734, 76,759 (Nov. 30, 2020).

234 Reg. F Official Interpretations § 6(b)(3)-1.

debt collection communications at the workplace, the debt collector nevertheless may know or have reason to know, based on the facts and circumstances, that the employer prohibits such communications. Accordingly, the Bureau is finalizing revised comment 6(b)(3)-1 to provide that a debt collector knows or has reason to know that a consumer's employer prohibits the consumer from receiving such communication if, for example, the consumer tells the debt collector that the consumer cannot take personal calls at work.[235]

A consumer's statement to a debt collector that she "could not talk to him at work," while ambiguous, is nevertheless sufficient to put the collector on notice that she was prohibited from engaging in debt collection communications at work.[236] Even if an employer does not have a formal policy as to collection calls at work, a call to the consumer at work might also violate FDCPA § 1692c(a)(1) as a contact at an inconvenient time or place.[237] Collectors must also honor consumer requests to stop using a particular type of communication, which could include a request not to call the consumer's work phone number.[238]

The FDCPA § 1692c(a)(3) protection broadly applies to all types of communications at work, not just phone calls.[239] If the debt collector knows or has reason to know that the consumer's employer prohibits all collection communications at work, the debt collector should not call, mail, fax, text, e-mail, or otherwise communicate with a consumer at work.[240] However, even if the debt collector knows about a workplace policy prohibiting collection communications at work, that prohibition only applies to communications like calls or texts to personal devices like cell phones if the collector knows the consumer is at work when communicating or attempting to communicate.[241]

The protection may be modified by the consumer's prior consent[242] or by a court order. Because under FDCPA § 1692c(d) the term "consumer" includes the consumer's spouse, a parent of a minor child, and a guardian, executor, or administrator,[243] a collector may not contact those individuals at work if the collector knows or has reason to know that such calls are prohibited by the employer.

5.7 Prohibited Third-Party Contacts, FDCPA § 1692c(b)

5.7.1 Text of FDCPA § 1692c(b)

(b) Communication with third parties—Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a post-judgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.[244]

According to the 1977 Senate report:

[T]his legislation adopts an extremely important protection . . . it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as loss of jobs.[245]

A House Report also states:

Contacting a consumer's employer prior to final judgment can cause irreparable harm to the consumer's job or reputation. . . . The committee strongly believes that a debt collector's contact with a consumer's employer prior to final judgment (absent consumer consent or express court permission) constitutes unwarranted invasion of the consumer's privacy and interference with the consumer's employee-employer relationship.[246]

235 *See* 85 Fed. Reg. 76,734, 76,769 (Nov. 30, 2020). *See also* Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769 (7th Cir. 2003). *See* Appx. E.2.2.3, *infra*. *But see* Roudebush v. Collecto, Inc., 2004 WL 3316168 (S.D. Ind. Nov. 12, 2004) (rejecting erroneously claim that collector's statement unlawfully restricted consumers' rights under § 1692c(a)(3); while it was true that this notice expanded somewhat § 1692c(a)(3) rights, it also reduced them as well by requiring writing, yet court ignored that language of Act).

236 Horkey v. J.V.D.B. & Assoc., 333 F.3d 769 (7th Cir. 2003). *See also* 85 Fed. Reg. 76,734, 76,769 (Nov. 30, 2020).

237 *See* §§ 5.4.2, 5.4.3, *supra*. *See also* Currier v. PDL Recovery Group, L.L.C., 2017 WL 712887 (E.D. Mich. Feb. 23, 2017); Dauval v. MRS BPO, L.L.C., 2013 WL 9921550 (M.D. Fla. June 27, 2013) (collection agency's call to consumer's place of employment violated §§ 1692c(a)(1) and 1692c(a)(3)).

238 Reg. F § 1006.14(h), Reg. F Official Interpretations § 14(h)(1)-2; § 6.9, *infra*.

239 *See also* Rush v. Portfolio Recovery Assoc., 977 F. Supp. 2d 414 (D.N.J. 2013) (unanswered calls at work were "communications" because they were made after plaintiffs learned defendant's caller ID).

240 *See* 85 Fed. Reg. 76,734, 76,769 (Nov. 30, 2020).

241 *See* 85 Fed. Reg. 76,734, 76,770 (Nov. 30, 2020).

242 *See* § 5.3.3, *supra* (prior consent). *See also* FTC Official Staff Commentary § 805(b)-1, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2.2, *infra*.

243 15 U.S.C. § 1692c(d), *discussed at* § 5.3.5, *supra* (including discussion of relevant sections of Regulation F and its interpretations). *See also* FTC Official Staff Commentary § 805(d)-1, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2.2, *infra*.

244 15 U.S.C. § 1692c(b). *See also* Reg. F § 1006.6(d).

245 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *reproduced at* Appx. A.3, *infra*.

246 H.R. Rep. 131, 95th Cong., 1st Sess. 5 (1977).

5.7.2 Contacting Third Parties Generally Prohibited

FDCPA § 1692c(b)'s strict limitations on third-party contacts make it one of the FDCPA's most important protections. Section 1692c(b) protects the consumer's privacy, and also protects the consumer's relationship with friends, neighbors, coworkers, and others. It protects both the consumer[247] and the third party from the embarrassment and strain on their relationship of how to deal with the collector's revelation to the third party of the consumer's private financial affairs. Debt collectors sometimes contact third parties, particularly close friends and relatives to pressure them to assume financial responsibility for the consumer's debt.[248] This provision is also intended to stop those contacts.

Except for efforts to locate a consumer[249] or pursuant to one of the exceptions provided in FDCPA § 1692c(b),[250] a debt collector may not phone, write, or visit a consumer's employer,[251] coworker,[252] relatives (except the spouse),[253] friends,[254] neighbors,[255] other creditors,[256] the consumer' bank,[257] or any other third party.[258] In a decision that was subsequently vacated for an *en banc* hearing to address the plaintiff's standing,[259] the Eleventh Circuit found that a debt collector's electronic com-

247 For purposes of FDCPA § 1692c, as discussed in § 5.10, *infra*, "consumer" includes others such as the consumer's spouse, parent if a minor, guardian, executor, or administrator. *See* FDCPA § 1692c(d); Reg. F § 1006.6(a).

248 *See, e.g.*, Fed. Trade Comm'n v. Fed. Check Processing, Inc., 2016 WL 5956073 (W.D.N.Y. Apr. 13, 2016), *adopted*, 2016 WL 5940485 (W.D.N.Y. Oct. 13, 2016) (payday debt buyer called consumers' family, friends, employers, and coworkers, and accused consumer of "check fraud" or other crimes, and falsely threatened criminal prosecution, legal action, or wage garnishment)

249 15 U.S.C. § 1692b, *discussed at* § 5.2, *infra*.

250 *See* §§ 5.7.4, 5.7.5, *infra*.

251 *See* Jackson v. Eltman, Eltman & Cooper, P.C., 128 F. Supp. 3d 980 (E.D. Mich. 2015); Fed. Trade Comm'n v. LoanPointe, L.L.C., 2011 WL 4348304 (D. Utah Sept. 16, 2011), *aff'd*, 2013 WL 1896820 (10th Cir. May 8, 2013); Thomas v. Smith, Dean & Assoc., Inc., 2011 WL 2730787 (D. Md. July 12, 2011), *adopted*, 2011 WL 3567043 (D. Md. Aug. 10, 2011); Krapf v. Collectors Training Inst. of Ill., Inc., 2010 WL 584020 (W.D.N.Y. Feb. 16, 2010); Mangum v. Bonneville Billing & Collections, Inc., 2010 WL 672744 (D. Idaho Feb. 20, 2010); § 5.6, *supra*, Appx. 5.2.2.4, *infra*. *See also* Timmons v. Specified Credit Ass'n 1, Inc., 2014 WL 2154148 (E.D. Mo. May 21, 2014) (debt collector did not violate § 1692c(b) when she called consumer's place of employment, as she did not disclose existence of debt, but asked only for human resources fax number in order that she could forward job verification letter); Bolton v. Pentagroup Fin. Services, L.L.C., 2009 WL 734038 (E.D. Cal. Mar. 17, 2009) (defendant's threat to contact consumer's commanding officer violated FDCPA); Wynne v. Stevenson, 2003 WL 22425024 (N.D. Ill. Oct. 22, 2003) (summary judgment granted to defendant where employer called collector and was told that collector could not talk or answer questions without consumer's consent); S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, reprinted in 1977 U.S.C.C.A.N. 1695, 1696, *reproduced at* Appx. A.3, *infra*; H.R. Rep. 131, 95th Cong., 1st Sess. 5 (1977); 123 Cong. Rec. H2,919, H2,923 (daily ed. Apr. 4, 1977) (remarks of Rep. Annunzio) ("[i]t is simply not an employer's responsibility to collect debts for debt collectors").

252 *See* Ortega v. Griggs & Assoc., 2012 WL 2913202 (N.D. Cal. July 13, 2012); Terry v. C & D Complete Bus. Solutions, 2011 WL 144920 (W.D. Mo. Jan. 18, 2011); Fajer v. Kaufman, Burns & Assoc., 2011 WL 334311 (W.D.N.Y. Jan. 28, 2011); Wideman v. Monterey Fin. Services, Inc., 2009 WL 1292830 (W.D. Pa. May 7, 2009); Austin v. Great Lakes Collection Bur., Inc., 834 F. Supp. 557 (D. Conn. 1993). *See also* Niven v. Nat'l Action Fin. Services, Inc., 2008 WL 4190961 (M.D. Fla. Sept. 10, 2008) (although collector left two voicemails with debtor's assistant at work, summary judgment denied because debt collector's bona fide error defense raised questions of triable fact). *Cf.* Horkey v. J.V.D.B. & Assoc., 333 F.3d 769 (7th Cir. 2003) (call at work violated §§ 1692c(a)(3) and 1692d(2), but not § 1692c(b) because debt was not mentioned).

253 *See* McMann v. Selene Fin. LP for Wilmington Sav., 332 F. Supp. 3d 481, 486 (D. Mass. Sept. 14, 2018) (sister); Aitken v. Debt Mgmt. Partners, L.L.C., 2015 WL 1810345 (C.D. Ill. Apr. 17, 2015) (mother); Friedman v. Sharinn & Lipshie, P.C., 2013 WL 1873302 (E.D.N.Y. Mar. 28, 2013) (daughter listened to voicemail); Dorris v. Accounts Receivable Mgmt., Inc. 2013 WL 1209629 (D. Md. Mar. 22, 2013) (mother); Russell v. Goldman Roth Acquisitions, L.L.C., 847 F. Supp. 2d 994 (W.D. Mich. 2012); Anderson v. Didonato, 2012 WL 6553675 (E.D. Va. Nov. 19, 2012) (sister), *adopted*, 2012 WL 6561259 (E.D. Va. Dec. 14, 2012); Beckworth v. Law Office of Thomas Landis, L.L.C., 2012 WL 1361671 (E.D. Pa. Apr. 18, 2012) (mother); Nichols v. GC Services, L.P., 2009 WL 3488365 (D. Ariz. Oct. 27, 2009) (disputed facts about calling consumer's mother), *aff'd*, 423 Fed. Appx. 744 (9th Cir. 2011); Appx. E.2.2.4, *infra*. *But see* Collier v. Prof'l Bur. of Collections, 2012 WL 3745720 (D. Md. Aug. 28, 2012) (call to the father's phone did not violate FDCPA where message provided ample opportunity for recipient to ignore it or delete it); Jones v. Rash Curtis & Assoc., 2011 WL 2050195 (N.D. Cal. Jan. 3, 2011) (collector contacted plaintiff's mother but nothing in record to indicate that content of communications was improper).

254 *See* Thomas v. Smith, Dean & Assoc., Inc., 2011 WL 2730787 (D. Md. July 12, 2011), *adopted*, 2011 WL 3567043 (D. Md. Aug. 10, 2011); Kreisler v. Latino Union, Inc., 2007 WL 1118408 (N.D. Ill. Apr. 12, 2007) (girlfriend contacted); O'Connor v. Check Rite, 973 F. Supp. 1010 (D. Colo. 1997) (consumer's roommate). *See also* Murphy v. Stephens & Michaels Assoc., Inc., 2011 WL 1465761 (S.D. Cal. Apr. 18, 2011) (ex-boyfriend).

255 Lapan v. Greenspoon Marder P.A., 2018 WL 1033224 (D. Vt. Feb. 22, 2018) (collection law firm, in course of pursuing nonjudicial foreclosure on timeshare, sent list of delinquent timeshares holders to all of delinquent timeshare holders); West v. Nationwide Credit, Inc., 998 F. Supp. 642 (W.D.N.C. 1998). *See* Russell v. Goldman Roth Acquisitions, L.L.C., 847 F. Supp. 2d 994 (W.D. Mich. 2012).

256 *See* McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1 (D. Mass. 2012) (condominium association's attorneys violated § 1692c(b) by conducting secret communications with mortgage company that held mortgage on condominium unit).

257 *See* Muzuco v. Re$ubmitIt, L.L.C., 2012 WL 3242013 (S.D. Fla. Aug. 7, 2012).

258 *See* Travers v. Collecto, Inc., 2013 WL 55819 (D. Mass. Jan. 2, 2013) (new occupant at consumer's former residence). *But see* Johnson-Gellineau v. Stiene & Assoc., 837 Fed. Appx. 8, (2d Cir. 2020) (collection attorney communicating with county clerk in connection with foreclosure proceedings did not violate § 1692c(b)).

259 Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1103 (11th Cir. 2021), *vacating* 17 F.4th 1016 (11th Cir. 2021). *See also* § 11.15, *infra* (discussing standing).

munication with its third-party mailing vendor, that included specific details regarding the debt, the precise amount of the debt, the entity to which the debt was owed, and the fact that the debt concerned the consumer's son's medical treatment, was a third-party communication made in connection with the collection of the debt in violation of FDCPA § 1692c(b).[260] A debt collector is strictly liable for a violation of this provision,[261] unless it can successfully establish a bona fide error defense.[262]

The following types of conduct are generally prohibited:

- Leaving voicemail messages that result in a third-party disclosure, if the voicemail message does not qualify as a limited-content message under Reg. F § 1006.2(j);[263]
- Email and text messages that result in a third-party disclosure where the email address or phone number for text messages were not obtained in one of the methods provided by Reg. F § 1006.6(d)(4)-(5), discussed at § 5.7.9, *infra*,
- Direct message on social media or other electronic messages that result in a third-party disclosure;[264]
- Leaving a letter or summons requesting payment in a consumer's mailbox without putting it in an envelope;[265]
- Communicating information to the U.S. Immigration and Naturalization Service for the purpose of collecting a student loan from a resident alien;[266]
- Providing a consumer's contact information to a credit card issuer with the goal of having the credit card account pay off the debt;[267]
- Sending a collection letter to the consumer with the collector's name on the envelope that indicated it was a debt collector, and its logo with a large red dollar sign and the words "SPECIAL SETTLEMENT OFFER" were visible through the glassine window of the envelope;[268]
- Making a collect call that discloses the call's purpose to a live operator, who might in turn convey the information to a third party answering the telephone;[269]
- Failing to take reasonable steps to prevent eavesdropping by companions of a consumer making a payment;[270] and
- Sending a fax to the consumer's workplace

A letter to the consumer care of the consumer's employer can be anticipated to be opened by third parties, and thus can be found to violate FDCPA § 1692c(b).[271] On the other hand, courts have found that envelopes addressed to the consumer at a residential address that do not convey a debt collection purpose do not violate FDCPA § 1692c(b) just because they are mailed to the wrong address and a third party might end up opening the envelope and reading the contents.[272]

260 Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1036 (11th Cir. 2021), *vacating & superseding upon reh'g* 994 F.3d 1341 (11th Cir. 2021), *vacated on other grounds pending en banc resolution (seeking briefing only on standing)*, 17 F.4th 1103 (11th Cir. 2021). *Cf. In re* FDCPA Mailing Vendor Cases, ___ F. Supp. 3d ___, 2021 WL 3160794 (E.D.N.Y. 2021) (discussing that Supreme Court in *Transunion v. Ramirez* stated in *dicta* that courts have not recognized disclosures to printing vendors as actionable publications, and that communication of alleged non-payment of relatively minimal debt to mailing vendor doubtfully constitutes a "matter publicized . . . of a kind that . . . would be highly offensive to a reasonable person"; dismissing for lack of Article III standing). *But see* Dunn v. Global Trust Mgmt., L.L.C., 506 F. Supp. 3d 1214 (M.D. Fla. 2020) (collector's communications with third-party regarding facilitation of collection of outstanding debts that did not demand payment were not considered communications in connection with collection of debt and did not violate § 1692c(b)).

261 *See* § 3.2.4, *supra*. *See also* Zortman v. J.C. Christensen & Assoc., Inc., 819 F. Supp. 2d 874 (D. Minn. 2011); Cordes v. Frederick J. Hanna & Assoc., 789 F. Supp. 2d 1173 (D. Minn. 2011) (rejecting debt collector's argument that it could not be held liable absent the intentional or deliberate disclosure to third parties through the leaving of voicemail messages for the plaintiff). *See also* Atteberry, FTC Informal Staff Letter (July 18, 1978), *discussed at* § 3.4.4.4, *supra*.

262 15 U.S.C. § 1692k(c), *discussed at* § 12.2, *infra*.

263 *See* § 5.7.8, *infra*.

264 In contrast to emails and text messages, Reg. F § 1006.6(d)(4)-(5), does not outline procedures reasonably adapted to avoid a third-party communication under Reg. F § 1006.6(d)(3) for social media direct message. *See* § 5.7.9.1, *infra*.

265 Curto v. Palisades Collection, L.L.C., 2011 WL 5196708 (W.D.N.Y. Oct. 31, 2011) (summons and complaint left in curbside mailbox without envelope). *But see* Mora v. LVNV Funding L.L.C., 408 F. Supp. 3d 297 (Oct. 8, 2019) (affixing summons and complaint to consumer's front door without envelope or other wrapping to conceal contents of documents was not violation of § 1692c(b), because consumer did not allege that anyone actually saw summons and complaint while they were on her front door).

266 *See* Durham, FTC Informal Staff Letter (Aug. 2, 1984), *discussed at* § 3.4.4.4, *supra*. *See also* FTC Official Staff Commentary § 805(b)-5, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2.2, *infra*.

267 *See* Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007). *See also* Balogun v. Midland Credit Mgmt., Inc., 2007 WL 2934886 (S.D. Ind. Oct. 5, 2007) (certifying class where collection letter alleged to evidence violation § 1692c(b) by sharing information about consumer's debt with credit card issuer).

268 *See* Garcia v. Creditors Specialty Serv., Inc., 2016 WL 6778681 (N.D. Cal. Nov. 16, 2016). *See also* 15 U.S.C. § 1692f(8); § 8.8, *infra*.

269 Cathcart, FTC Informal Staff Letter (Dec. 10, 1980) (incidental contacts with telephone operators permissible). *But cf.* FTC Official Staff Commentary § 805(b)-3, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2.2, *infra*.

270 Atteberry, FTC Informal Staff Letter (July 18, 1978). *See also* FTC Official Staff Commentary § 805(b)-4, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2.2, *infra*.

271 Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015, 1036 (9th Cir. Aug. 1, 2012).

272 Davis. v. Phelan Hallinan & Diamond, P.C., 687 Fed. Appx. 140 (3d Cir. Apr. 24, 2017) (law firm sent consumer foreclosure notices by certified and regular mail at addresses with which consumer "had no connection;" certified letters were returned as unclaimed or undeliverable; no allegation that notices sent by regular mail were received or opened by any third party); Lorang v. Ditech Fin. L.L.C., 2017 WL 3891802 (W.D. Wis. Sept. 5, 2017); Wisdom v. Wakefield & Assoc., Inc., 2016 WL 3747586 (D. Utah July 11, 2016); Duran v. Midland Credit Mgmt., Inc., 2016 WL 3661538 (S.D.N.Y. June 30, 2016); Strouse v. Enhanced Recovery Co., L.L.C., 956 F. Supp. 2d 627 (E.D. Pa. 2013); Darden v. Trans Union, L.L.C., 2013 WL 12125739 (E.D. Tex. Oct. 28, 2013); Segal v. Nat'l Action Fin. Services, Inc., 2006 WL 449176, at *7 (M.D. Fla. Feb. 22, 2006) (letter addressed to consumer only at address of consumer's stepson did not violate § 1692c(b); "Clearly, it was improper for anyone other than [plaintiff] to open the July 7, 2004 letter without her permission.").

A threat to make a prohibited third-party contact does not violate FDCPA § 1692c(b) unless it is carried out,[273] but it does violate the general provisions of FDCPA § 1692e[274] and the specific provisions of other sections.[275] Thus, a privacy notice indicating that the debt collector would share the consumer's financial information with others in the absence of the consumer's objection was a threat to violate this provision and violated the FDCPA.[276] Another FDCPA provision prohibits a debt collector from threatening to reveal the consumer's financial information to a third party.[277]

5.7.3 *Is a Third-Party Contact a Communication for Purposes of FDCPA § 1692c(b)?*

As with FDCPA §§ 1692b and 1692c(a), discussed above, an analysis of whether a debt collector violated section 1692c(b) begins with whether the debt collector's contact with the third party constitutes a "communication" as defined by the FDCPA.[278] FDCPA § 1692a(2) defines a communication for purposes of the Act as the conveying of information directly or indirectly regarding a debt.[279] If the third-party contact is not a "communication," then FDCPA § 1692c(b) does not apply to restrict the contact.

The Seventh Circuit in *Gburek*[280] interpreted "communications" for purposes of FDCPA § 1692c as applying, even though the communication did not demand payment, as long as the nature of the parties' relationship and the purpose and context of the communications viewed objectively indicated that the communications were made in connection with the collection of a debt.[281] Demand for payment is not the only factor for determining FDCPA § 1692c(b).

Several lower courts have also utilized a broad interpretation of what constitutes a communication for purposes of FDCPA § 1692c(b). Voicemails have been found to be communications because they contained vague references to the debt, including a long reference number and comments about documents and the consumer's involvement,[282] but see § 5.7.8, *supra*, for more discussion about the treatment of voicemails under Regulation F (effective November 30, 2021). A reference that the third party should "know who she is doing business with" was found sufficient to indirectly convey information about the consumer's debt.[283] Use of the collector's name that suggests debt collection can also be sufficient to make a third party contact an FDCPA communication.[284] Even messages that gave a phone number to call, and directions to have the consumer call that number, were found to be communications violating FDCPA § 1692c(b).[285]

The Sixth Circuit, however, found that a debt collector who left his name and the name of his collection agency, Van Ru Credit Corporation, along with a return number and reference number as a voicemail at the consumer's business was not a communication.[286] The Tenth Circuit found that a debt collector's fax seeking to verify the consumer's employment did not convey information about a debt and therefore there was no violation of FDCPA § 1692c(b).[287]

When a telephone call is unanswered, courts have found that the call does not constitute a "communication" under the Act.[288] Regulation F clarifies that an unanswered call is an *attempt* to communicate,[289] however the regulations only

273 *See* Bougie v. Messerli & Kramer, P.A., 2011 WL 13234187 (D. Minn. May 24, 2011) (summary judgment for collection law firm on claim that it violated § 1692c(b) by asking consumer for his employer's contact information; no allegation that firm actually communicated with his employer).

274 *See* Weiss, FTC Informal Staff Letter (Apr. 17, 1986); Mansfield, FTC Informal Staff Letter (Apr. 20, 1978); Krieger, FTC Informal Staff Letter (undated); Taylor, FTC Informal Staff Letter (May 3, 1978); §§ 7.2.5.4, 7.2.10, 7.3, *infra*. *But see* Weber v. Payco-General Am. Credits, 1990 WL 341654 (D. Conn. Dec. 13, 1990) (threat to conduct investigation was not threat to unlawfully communicate with third parties).

275 15 U.S.C. §§ 1692e(5), 1692e(10). *See* Henderson v. Credit Bur. Inc., 1989 WL 78235 (W.D.N.Y. July 13, 1989); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979); §§ 7.2.5.4, 7.2.10, 7.3, *infra*.

276 *See* Hernandez v. Midland Credit Mgmt., Inc., 2006 WL 695451 (N.D. Ill. Mar. 14, 2006).

277 *See* Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009).

278 *See* §§ 4.2, 5.2.4, 5.3.2, *supra*.

279 Some courts also find that the communication is not a communication under FDCPA § 1692c(b) until it is received or understood by the third-party. *See, e.g.*, Zortman v. J.C. Christensen & Assoc., 819 F. Supp. 2d 874, 879–880 (D. Minn. 2011). *See also* § 5.7.3, *infra*.

280 Gburek v. Litton Loan Servicing L.P., 614 F.3d 380 (7th Cir. 2010) (exploring consumer's mortgage payment options).

281 *Id.* at 385.

282 Koby v. ARS Nat'l Services, Inc., 2010 WL 1438763 (S.D. Cal. 2010).

283 Smith v. Greystone Alliance L.L.C., 2011 WL 1303377 (N.D. Ill. Mar. 29, 2011).

284 Scaccia v. Pioneer Credit Recovery, 2018 WL 1701953 (M.D. Fla. July 14, 2018). *But see* Zortman v. J.C. Christensen & Assoc., Inc.870 F. Supp. 2d 694 (D. Minn. 2012) (no communication where collector's name left on cell phone shared with other family members).

285 Belin v. Litton Loan Servicing, L.P., 2006 WL 1992410, at *4 (M.D. Fla. July 14, 2006).

286 Brown v. Van Ru Credit Corp., 804 F.3d 740 (6th Cir. 2015).

287 Marx v. Gen. Revenue Corp., 668 F.3d 1174 (10th Cir. 2011), *aff'd on other grounds*, 568 U.S. 371, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013). *See also* Morgan v. Carrington Mortg. Services, 719 Fed. Appx. 735, 745–746 (10th Cir. Dec. 12, 2017) (mortgage loan servicers' letter to homeowner's husband, offering to pay all occupants of property $1000 to vacate premises, did not constitute prohibited "communication," because letter did not reference any debt or suggest that homeowner owed debt); Scribner v. Works & Lentz, Inc., 655 Fed. Appx. 702, 703 (10th Cir. 2016) (no violation of § 1692c where debt collector's call to consumer's apartment manager, was not "communication" under FDCPA because debt collector did not refer to any debt owed by consumer during phone call).

288 Davis v. Phelan Hallinan & Diamond, P.C., 2016 WL 1078166, at *4 (D.N.J. Mar. 18, 2016); Rush v. Portfolio Recovery Assoc., 977 F. Supp. 2d 414 (D.N.J. Oct. 17, 2013); Zortman v. J.C. Christensen & Assoc., Inc., 870 F. Supp. 694, 706 (D. Minn. 2012); Cozmyk v. Prompt Recovery Services, Inc., 851 F. Supp. 2d 991 (S.D. W. Va. Mar. 30, 2012); Worsham v. Acct. Receivables Mgmt., Inc., 2011 WL 5873107, at *3 (D. Md. Nov. 22, 2011), *aff'd*, 497 Fed. Appx. 274 (4th Cir. 2012) (finding that unanswered telephone calls "can hardly be considered 'communications' under the FDCPA").

289 Reg. F Official Interpretations § 2(b)-1(i).

prohibit communications and not attempts to communicate with third parties.[290]

5.7.4 Parties With Whom Debt Collectors May Communicate Without Violating FDCPA § 1692c(b)

FDCPA § 1692c(b) and Regulation F § 1006.6(d)(1) (effective November 30, 2021) explain that a debt collector must not communicate with any person other than:

- The consumer, defined as including for purposes only of FDCPA § 1692c, the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.[291]
- The consumer's attorney;[292]
- A credit reporting agency if otherwise permitted by law;[293]
- The creditor;[294] and
- The creditor's or collector's attorney.[295]

One court held that foreclosure attorneys could communicate with other creditors: "As a practical matter, in a state foreclosure action, the first and second mortgage holders and other creditors must be able to communicate regarding the balance or settlement of the outstanding mortgages."[296] An alternative approach would be for the creditor (not the creditor's attorney) to communicate directly with the other creditors, since the creditor will typically not be limited by the FDCPA.

The consumer's co-debtors who are individually obligated on the debt are also considered consumers under FDCPA § 1692c(b) and Reg. F § 1006.6(d)(1).[297] The FDCPA also includes within the definition of consumer "alleged debtors."[298]

5.7.5 Exceptions to the Prohibition on Third-Party Communications in FDCPA § 1692c(b)

As discussed in § 5.7.4, *supra*, FDCPA § 1692c(b) and Regulation F § 1006.6(d)(1) (effective November 30, 2021) specify parties with whom debt collectors can communicate without violating the general prohibition against third-party disclosures. Additionally, as discussed in this section, FDCPA § 1692c(b) and Reg. F § 1006.6(d)(2) contain four exceptions to compliance with FDCPA § 1692c(b).

The first exception is where the debt collector complies with FDCPA § 1692b.[299] As discussed at § 5.2, *supra*, the FDCPA provides a limited exception to section 1692c(b) for third-party contacts to learn location information for the consumer's residential address and phone number *or* their work address.[300] Even when obtaining this limited information,[301] however, the collector may not state that the consumer owes any money and cannot use the collection company's name unless it is requested.[302]

A second exception is where the consumer has provided prior consent to the third-party contact.[303] According to FTC staff, a debt collector may not contact a legitimate nonprofit

290 Reg. F § 1006.6(d)(1).

291 *See* FDCPA § 1692c(d); Reg. F § 1006.6(a), *discussed at* § 5.10, *infra*.

292 *See* Phillips v. N. Am. Capital Corp., 1999 WL 299872 (N.D. Ill. Apr. 30, 1999). *See also* Sweigart, FTC Informal Staff Letter (Apr. 25, 1978); Atteberry, Informal Staff Letter (Dec. 30, 1977), *discussed at* § 3.4.4.4, *supra*. *Cf.* Nogali v. Transcon Fin., Inc., 2015 WL 12656934 (C.D. Cal. Aug. 12, 2015) (once debt collector was informed that consumer's former personal injury lawyer no longer represented her, collector could no longer proceed under § 1692c(b)'s exception for communications with consumer's lawyer).

293 *See* Nogali v. Transcon Fin., Inc., 2015 WL 12656934 (C.D. Cal. Aug. 12, 2015); Darden v. Trans Union, L.L.C., 2013 WL 12125739 (E.D. Tex. Oct. 28, 2013); Acosta v. Campbell, 2006 WL 146208 (M.D. Fla. Jan. 18, 2006); McGrath, FTC Informal Staff Letter (July 12, 1979); Sweigart, FTC Informal Staff Letter (Apr. 25, 1978), *discussed at* § 3.4.4.4, *supra*. *See also* Ditty v. CheckRite, Ltd., 973 F. Supp. 1320 (D. Utah 1997) (whether check collection agency was liable under § 1692c(b) turned on whether it was "consumer reporting agency"). *But see* Miceli v. Dyck-O'Neal, Inc., 2016 WL 7666167 (M.D. Fla. Aug. 9, 2016) ("Although the FCRA ordinarily permits communications with consumer reporting agencies, it does not permit communications that are known to be inaccurate. See 15 U.S.C. § 1681s-2(a)(1).").

294 Acosta v. Campbell, 2006 WL 146208 (M.D. Fla. Jan. 18, 2006), *aff'd*, 309 Fed. Appx. 315 (11th Cir. 2009) (confidential communication issued from foreclosing party or its counsel to counsel for another creditor involved in foreclosure, regarding payoff figure, did not violate § 1692c(b), as such communication was not subject to FDCPA).

295 *See* Forman v. Academy Collection Serv., Inc., 388 F. Supp. 2d 199 (S.D.N.Y. 2005); Shrestha v. Nadel, 2001 WL 286852 (D. Conn. Mar. 21, 2001); Dreyfuss, FTC Informal Staff Letter (Jan. 20, 1987); Bagwell, FTC Informal Staff Letter (Jan. 6, 1987), *discussed at* § 3.4.4.4, *supra*. *See also* FTC Official Staff Commentary § 805(6)-8, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*; Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988), *discussed at* § 3.4.4.4, *supra*.

296 Acosta v. Campbell, 2006 WL 146208 (M.D. Fla. Jan. 18, 2006), *aff'd*, 309 Fed. Appx. 315 (11th Cir. 2009) (confidential communication issued from foreclosing party or its counsel to counsel for another creditor involved in foreclosure, regarding payoff figure, did not violate § 1692c(b), as such communication was not subject to FDCPA). *Cf.* Best v. Ocwen Loan Servicing, L.L.C., 279 Cal. Rptr. 3d 69, 75 (2021) (business engaged in only nonjudicial foreclosure proceedings is not "debt collector" within meaning of FDCPA, and therefore they would not be forbidden to communicate with third parties), *citing* Obduskey v. McCarthy & Holthus L.L.P., ___U.S. ___, 139 S. Ct. 1029, ___L. Ed. 2d ___(2019). *See* § 4.7.5, *supra*, for a detailed discussion of *Obduskey*.

297 *See* Baker v. Springer, Inc., 2010 WL 4942017 (D. Minn. Nov. 30, 2010) (reasonably believed, based on its information, to be co-obligor).

298 15 U.S.C. § 1692a(3) defines the term "consumer" to include a person "allegedly obligated." *See* § 4.4, *supra*.

299 15 U.S.C. § 1692c(b); Reg. F § 1006.6(d)(2)(i).

300 15 U.S.C. §§ 1692a(7), 1692b; Reg. F § 1006.10, *discussed at* § 5.2, *supra*.

301 Termed "location information." 15 U.S.C. § 1692a(7); Reg. F § 1006.10(a).

302 15 U.S.C. §§ 1692b(1), 1692b(2); Reg. F § 1006.10(b), *discussed at* § 5.2, *supra*. *See also* FTC Official Staff Commentary § 804, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

303 15 U.S.C. § 1692c(b); Reg. F § 1006.6(d)(2)(ii). *See* Martin v. United Collections Bur., Inc., 2015 WL 4255405 (E.D. Mo. July 14, 2015) (when requested by plaintiff, collection agency was permitted to submit Automated Universal Data Form to delete another person's information from plaintiff's credit file); Stewart v. Salzman, 1987 U.S. Dist. LEXIS 16865 (D. Conn. Nov. 2, 1987) (consent to conversation could not be implied; consent may be given directly to debt collector).

counseling service assisting the consumer with their debts[304] or the consumer's bank to compare a signature on a dishonored check with the consumer's signature specimen (although the payee-creditor in the latter situation could contact the bank) without prior consent of the consumer.[305] It may be a violation for the debt collector to try to get a third-party financial institution to lend money to the consumer to pay the debt.[306] In all those situations, the consumer must provide prior consent to the contacts.[307]Prior consent cannot be given during the third-party communication, but must precede that communication.[308] The statute provides that the consumer's prior consent must be "given directly to the debt collector."[309] Consequently, such consent cannot be given in the underlying credit agreement with the creditor. Nor can the consent be given to the creditor or a prior collector—it must be given directly to the current collector.[310] In another context, the FTC has rejected the notion that consent to a third-party contact may be inferred from the consumer's acts.[311] It is irrelevant also that the third party first called the collector—the collector cannot use that as permission for subsequent contacts.[312] A detailed discussion of consumer consent is provided at § 5.3.3, *supra*.

One area that has caused some confusion is where a third party makes a payment for the consumer. FTC staff have stated in this situation the consumer's consent can be implied, but only for purposes of allowing the collector to give a receipt to the third party.[313] Later, the FTC staff took the position that the collector may reasonably infer a consumer's consent to additional contacts with the third party from the third party's volunteering to make a payment for the consumer.[314]

A third exception is that a court of competent jurisdiction may authorize otherwise prohibited third-party contacts.[315] The "express permission of a court" cannot come from a statute, but must come as a court order or opinion.[316]

The fourth exception is that a collector also may contact a third party if it is reasonably necessary to affect a post judgment judicial remedy.[317] Thus a collector may contact an employer or bank to further a garnishment or a third-party occupant in an execution of an eviction judgment.[318]

Conversely, third-party contacts generally are not permitted within this exception in order to pursue a prejudgment remedy,[319] although court permission could be obtained for third-party contacts necessary to effectuate a prejudgment remedy. Prejudgment contacts might also be reasonably necessary to effectuate a post judgment remedy,[320] but collectors

304 Sweigart, FTC Informal Staff Letter (Apr. 25, 1978). *See also* FTC Official Staff Commentary § 805(b)-5, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

305 Evenchick, FTC Informal Staff Letter (May 30, 1978). *See also* FTC Official Staff Commentary § 805(b)-5, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

306 *See* Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007); Balogun v. Midland Credit Mgmt., Inc., 2007 WL 2934886 (S.D. Ind. Oct. 5, 2007) (certifying class where collection letter was alleged to evidence violation § 1692c(b) by sharing information about consumer's debt with credit card issuer).

307 15 U.S.C. § 1692c(b); Reg. F § 1006.6(d)(2)(ii). *See* § 5.3.3, *supra*.

308 *See* Reg. F Official Interpretations § 6(d)(2)-1, *referencing* § 6(b)(4)(i)-1.

309 15 U.S.C. § 1692c(b); Reg. F § 1006.6(d)(2)(ii). *See* Stewart v. Salzman, 1987 U.S. Dist. LEXIS 16865 (D. Conn. Nov. 2, 1987); Atteberry, FTC Informal Staff Letter (Dec. 30, 1977), *discussed at* § 3.4.4.4, *supra*. *But cf.* FTC Official Staff Commentary § 805(b)-1 (consumer's consent can be presumed to give a third part a receipt when the third party makes a payment for the consumer), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*; Atteberry, FTC Informal Staff Letter (Jan. 18, 1978).

310 See Reg. F Official Interpretations § 6(d)(2)-1, *referencing* § 6(b)(4)(i)-2.

311 Mezines, FTC Informal Staff Letter (Nov. 13, 1989).

312 Stewart v. Salzman, 1987 U.S. Dist. LEXIS 16865 (D. Conn. Nov. 2, 1987) (attorney's discussion of debt with sister of debtor violated § 1692c(b) even though sister telephoned attorney about debt).

313 Atteberry, FTC Informal Staff Letters (July 18, 1978, Jan. 18, 1978, Dec. 30, 1977), *discussed at* § 3.4.4.4, *supra*.

314 Fisher, FTC Informal Staff Letter (Aug. 19, 1992), *discussed at* § 3.4.4.4, *supra*; FTC Official Staff Commentary § 805(b)-1, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

315 15 U.S.C. § 1692c(a); Reg. F § 1006.6(d)(2)(iii). *See* McLain v. Gordon, 2010 WL 3340528 (W.D. Wash. Aug. 24, 2010) (collector obtained leave from court to contact third parties). *But see* Ingram v. Wells Fargo Bank, 2012 WL 252886 (M.D. Fla. Jan. 26, 2012) (*pro se* plaintiffs' complaint stated § 1692c(b) claim against foreclosure attorneys because communications to their tenants that foreclosure was pending occurred after foreclosure proceedings had been voluntarily dismissed, and thus any exemption from FDCPA coverage for activities that occur as part of "foreclosure process" did not apply).

316 *See* § 5.3.4, *supra*; McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1, 67 (D. Mass. 2012) ("express permission of a court" does not mean "express permission in a law"). *But see* Resler v. Messerli & Kramer, P.A., 2003 WL 193498, at *4 (D. Minn. Jan. 23, 2003) (mailing of writ of execution directly to represented consumer did not violate § 1692c(a)(2) because "Minnesota law requires service of a garnishment levy on the judgment debtor" and default judgment "was in effect that court's permission to follow the collection procedures outlined in Minnesota law, including service of the levy directly on the judgment debtor").

317 15 U.S.C. § 1692c(b); Reg. F § 1006.6(d)(2)(iv). *See also* Backlund v. Messerli & Kramer, P.A., 2012 WL 3582963 (D. Minn. Aug. 17, 2012) (garnishment communication to employer was proper to effectuate post judgment judicial remedy and did not violate § 1692c(b)); FTC Official Staff Commentary § 806(4)-5, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

318 *See* Backlund v. Messerli & Kramer, P.A., 2012 WL 3582963 (D. Minn. Aug. 17, 2012) (garnishment communication to employer was proper to effectuate post judgment judicial remedy and did not violate § 1692c(b)); Appx. E.2.2.4, *infra*. *See also* FTC Official Staff Commentary § 805(b), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*; Mansfield, FTC Informal Staff Letter (Apr. 20, 1978).

319 *But see* Busam v. Wilkinson, 2012 WL 3067935 (D. Or. July 26, 2012) (use of subpoena to consumer's mortgage company to gather consumer's location information in order to serve summons in state collection action was consistent with discovery under state rules and did not violate FDCPA). *But cf.* FTC Official Staff Commentary § 806(4)-6, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

320 *See* Zanayed v. Gertler & Gertler, Ltd., 2000 WL 294183, at *3 (N.D. Ill. Mar. 17, 2000) ("The wage deduction summons in this case was necessary to effectuate the post judgment judicial remedy of wage garnishment."); Bagwell, FTC Informal Staff Letter (Mar. 9, 1987). *See also* FTC Official Staff Commentary § 805(b)-6, (b)-8, *discussed*

must circumscribe those contacts to stay within this narrow exception.[321]

Once a judgment is paid or otherwise satisfied, the exception to affect a post judgment remedy would no longer apply to an improper garnishment notice sent to the consumer's employer, since there is no longer a right to seek a post judgment remedy.[322]

Publishing a notice of sale when the foreclosure had been dismissed, similarly is not a protected post judgment remedy.[323]

Because consumer consent, court permission, and to effectuate post judgment remedies are exceptions to the rule against third-party contact, the burden of proof as to these exceptions is on the debt collector.[324] For a discussion of burden of proof for FDCPA exceptions, see § 5.2.7, *supra*, and § 11.6.6, *infra*.

5.7.6 Other Allowed Third-Party Contacts

The Higher Education Act (HEA) allows for administrative wage garnishment without a court judgment to collect on defaulted federal student loans, so that this garnishment does not fall within FDCPA § 1692c(b)'s exception to effectuate a *post judgment* remedy. Nevertheless, courts have held that the more specific HEA trumps section 1692c(b).[325] Thus a debt collector can contact the student loan borrower's employer to garnish the wages.

The FTC staff has indicated it is not a violation of FDCPA § 1692c(b) for a collector to communicate through an interpreter to a non-English-speaking consumer,[326] to respond to an inquiry of the Better Business Bureau,[327] or contact the joint holder of a checking account, although that individual did not sign the check in question.[328]

The FTC staff has taken the position that a collector may compile a list of the drivers' license numbers or a list of the first three letters of the last name, first initial, and house or box number of consumers reported to have written dishonored checks and then distribute the lists as bad check writer lists to merchants who take checks from consumers.[329] Whether such coding is sufficient to protect consumers' privacy is open to question.[330]

5.7.7 Leaving Messages with Third Parties for the Consumer

Whether FDCPA § 1692c(b) is violated when a debt collector leaves a message for the consumer with a third party will depend on whether the message is treated as a communication under section 1692c(b).[331] Courts have found that messages left with third parties for consumers are communications leading to a FDCPA § 1692c(b) violation if the message asks the consumer to return a call to discuss a debt[332] or refers to a defaulted account.[333] The FTC staff also indicates that sending a debt collection letter to the consumer in care of a third party also violates section 1692c(b) if the consumer does not normally accept mail at that address.[334] Improperly contacting such third parties may also constitute harassment and abuse where the collector already has the consumer's location information.[335]

Under Regulation F (effective November 30, 2021), voicemails that qualify as limited-content messages[336] will be

at § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*; Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988). *But cf.* Bath, FTC Informal Staff Letter (May 28, 1987); Roberts, FTC Informal Staff Letter (Feb. 7, 1980). A collection agency may not report dishonored check to law enforcement agency. Atteberry, FTC Informal Staff Letter (July 18, 1978). However, if the check's payee is not "debt collection," the payee-creditor would be exempt from the FDCPA, and could report the dishonored check to law enforcer. *See* Evenchick, FTC Informal Staff Letter (May 30, 1978).

321 *But see* Taylor v. Heath W. Williams, L.L.C., 510 F. Supp. 2d 1206 (N.D. Ga. 2007) (collector's letter to magistrate court did not violate § 1692c, as it would not be embarrassing or threatening to consumer's employment, requirement not found in FDCPA).

322 *See* Taylor v. Heath W. Williams, L.L.C., 510 F. Supp. 2d 1206 (N.D. Ga. 2007).

323 *See* Friello v. Bank of New York, 2012 WL 4892856 (N.D. Ill. Oct. 15, 2012).

324 Evankavitch v. Green Tree Servicing, L.L.C., 793 F.3d 355 (3d Cir. 2015) (relating to burden of proof for exceptions to the provision regarding third party contacts for location information).

325 *See* Moss v. Premiere Credit of N. Am., L.L.C., 2012 WL 5416928 (S.D. Ga. Sept. 26, 2012); Bennett v. Premiere Credit of N. Am., L.L.C., 2012 WL 1605108 (S.D. Ga. May 8, 2012), *aff'd*, 2013 WL 310066 (11th Cir. Jan. 28, 2013) (unpublished); National Consumer Law Center, Student Loan Law § 9.3.4 (6th ed. 2019), *updated at* www.nclc.org/library.

326 Zbrzeznj, FTC Informal Staff Letter (Sept. 21, 1992), *discussed at* § 3.4.4.4, *supra*.

327 Jones, FTC Informal Staff Letter (Dec. 30, 1992), *discussed at* § 3.4.4.4, *supra*.

328 Borowski, FTC Informal Staff Letter (Nov. 6, 1992), *discussed at* § 3.4.4.4, *supra*. *See also* Hoffman v. GC Services Ltd., 2010 WL 9113645, at *11 (E.D. Tenn. Mar. 3, 2010) ("The court finds that this evidence presents a genuine issue of material fact regarding whether plaintiff's decision to give his mother a power of attorney (along with control over his checking account and mail) constituted 'consent' for the defendants to speak with his parents about the PayPal account."); National Consumer Law Center, Collection Actions Ch. 8 (5th ed. 2020), *updated at* www.nclc.org/library (varying rules about liability on joint bank accounts).

329 Fleming, FTC Informal Staff Letter (Apr. 1, 1982). FTC staff's premise that such a list protects individual consumer's privacy may be erroneous in some instances. *See also* FTC Official Staff Commentary § 806(4)-4, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

330 *See* § 6.5.3, *infra*.

331 *See* §§ 4.2, 5.7.3, *supra*.

332 *See* Wideman v. Monterey Fin. Services, Inc., 2009 WL 129830 (W.D. Pa. May 7, 2009).

333 *See* Vinson v. North Star Capital Acquisitions, L.L.C., 2011 WL 13319719 (N.D. Ga. Feb. 11, 2011).

334 *See* FTC Official Staff Commentary § 805(b)-1, (b)-4 (collector may use "in care of" letter only if consumer lives at or accepts mail at other party's address), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

335 Rozga, FTC Informal Staff Letter (Sept. 5, 1978); Faulkner, FTC Informal Staff Letter (June 15, 1978). *See also* FTC Official Staff Commentary § 806-2, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

336 Reg. F. § 1006.2(j), *discussed at* § 4.9, *supra*.

considered *attempted* communications[337] and not communications.[338] However, the definition of limited-content messages specifies that such messages must be left for a consumer, not a third party.[339] Thus, any message left for a third party is not a limited content message and can still be a violation of FDCPA § 1692c(b). However, where a message involves only a request for the consumer to call back and no information whatsoever about the debt, the message may not be a communication within FDCPA § 1692c(b)'s scope and thus not a section 1692c(b) violation.[340] An informal FTC staff opinion letter even indicates that a collector may ask the parents whether they take financial responsibility for a non-minor child, as long as the collector does not reveal the existence of the debt.[341] But FTC staff has also indicated that a message can be in connection with a debt even if the debt is not specifically mentioned.[342]

5.7.8 *Voicemails for Consumers Overheard by Third Parties*

Under Regulation F (effective November 30, 2021), voicemails that qualify as limited-content messages[343] will be considered attempted communications[344] and not communications.[345] As a result, contacts that qualify as limited-content messages will not be third-party disclosures although voicemail messages that do not comply with that definition can still lead to third-party disclosures.

The remainder of this section describes the law that applied to voicemail messages prior to November 30, 2021. This law is still valid precedent to the extent that a voicemail message *does not* qualify as a limited-content message.

A debt collector leaving a voicemail message for a consumer, in an attempt to comply other FDCPA requirements, may disclose the collection agency's identity[346] and describe the purpose of the communication.[347] But such disclosures run the risk of being overheard by a third party that shares the voicemail. The Eleventh Circuit has found that this risk of being overheard by a third party is not justification for violating other FDCPA requirements.[348] Thus voicemail messages left for the consumer have to walk a tightrope to comply with all of the applicable FDCPA requirements. Some courts find that inadvertent disclosure of a debt to a third party through a message on a shared voicemail does not violate FDCPA § 1692c(b), unless the collector has reason to suspect a third party will overhear the message.[349] Other courts find voicemail messages overheard by a third party violate FDCPA § 1692c(b), regardless of the collector's state of knowledge.[350] These courts find that a debt collector assumes the risk of violating FDCPA § 1692c(b) when on a shared answering machine it identifies itself as a debt collector and indicates that it is attempting to collect a debt.[351]

Courts have ruled that a message has to have been heard by the third party, and that the mere possibility that a third party might hear a voicemail is not sufficient to violate FDCPA

337 Reg. F. § 1006.2(b), *discussed at* § 4.2, *supra.*

338 Reg. F Official Interpretations § 2(d)-2.

339 Reg. F. § 1006.2(j). *See also* 85 Fed. Reg. 76,734, 76,749 (Nov. 30, 2020) ("final § 1006.2(j)'s definition of limited-content message does not permit third-party messages, either in live conversations or as voicemail messages.").

340 *See* Evankavitch v. Green Tree Servicing, L.L.C., 793 F.3d 355 (3d Cir. 2015); FTC Official Staff Commentary § 803(2)-2, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*; Rosenberg, FTC Informal Staff Letter (Jan. 29, 1986); Atteberry, FTC Informal Staff Letter (Dec. 30, 1977). *See also* Horkey v. J.V.D.B. & Associates, Inc., 179 F. Supp. 2d 861 (N.D. Ill. 2002) (collector asked consumer's co-worker for consumer in call and uttered profanity and hung up when told she was not available; because debt collector did not discuss consumer's debt with coworker, there was no violation of § 1692c(b)).

341 Atteberry, FTC Informal Staff Letter (Feb. 22, 1990).

342 *See* FTC Official Staff Commentary § 805(a)-1, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*; Rozga, FTC Informal Staff Letter (Sept. 5, 1978); Faulkner, FTC Informal Staff Letter (June 15, 1978).

343 Reg. F. § 1006.2(j), *discussed at* § 4.9, *supra.*

344 Reg. F. § 1006.2(b), *discussed at* § 4.2, *supra.*

345 Reg. F Official Interpretations § 2(d)-2.

346 15 U.S.C. § 1692d(6).

347 15 U.S.C. §§ 1695e(11), 1692f(5).

348 Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350, 1354 (11th Cir. 2009).

349 *See* Mostiller v. Chase Asset Recovery Corp., 2010 WL 335023 (W.D.N.Y. Jan. 22, 2010) (no violation for disclosing debt to roommate who overheard message, because there was no claim that collector intended third party to hear or knew or should have known of risk); Mark v. J.C. Christensen & Assoc., Inc., 2009 WL 2407700, at *5 (D. Minn. Aug.4, 2009) (FDCPA was not intended to protect against risk of inadvertent disclosure); Edwards v. Niagara Credit Solutions, Inc., 586 F. Supp. 2d 1346, 1363 (N.D. Ga. 2008) (inadvertent, unintended "communication" with third-party does not constitute violation of FDCPA); Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643 (S.D.N.Y. 2006); Joseph v. J.J. Mac Intyre Companies, L.L.C., 281 F. Supp. 2d 1156, 1164 (N.D. Cal. 2003). *See also* Zweigenhaft v. Receivables Performance Mgmt., L.L.C., 2014 WL 6085912 (E.D.N.Y. Nov. 13, 2014) (FDCPA privacy restrictions on voice mails were outdated, should be disregarded; no violation when parent's debt was revealed to their child in brief voicemail).

350 Marisco v. NCO Fin. Systems, Inc., 946 F. Supp. 287 (E.D.N.Y. May 23, 2013) (consumer adequately pleaded violation of § 1692c(b) where collection agency that identified itself as debt collection company and indicated that it was attempting to collect a debt, left message on answering machine at consumer's residence that was overheard by consumer's mother-in-law); Branco v. Credit Collection Services Inc., 2011 WL 3684503, at *4 (E.D. Cal. Aug. 23, 2013); Cordes v. Frederick J. Hanna & Assoc., 789 F. Supp. 2d 1173 (D. Minn. June 7, 2011) (voicemail messages left for debtor, which were heard by her boyfriend and friend, violated § 1692c(b)); Kelemen v. Prof'l Collection Sys., 2011 WL 31396 (M.D. Fla. Jan. 4, 2011) (consumer stated claim under § 1692c(b) when alleged collector left message on plaintiff's work voicemail that was overheard by her co-worker). *See also* Williams v. CT Corp. Sys., 2007 WL 9700908 (N.D. Ga. Mar. 6, 2007) (no violation of § 1692c(b) where collector left message for borrower's wife's voicemail, because § 1692c(d) defines "consumer" to include consumer's spouse).

351 Branco v. Credit Collection Services Inc., 2011 WL 3684503, at *4 (E.D. Cal. Aug. 23, 2013); Marisco v. NCO Fin. Systems, Inc., 946 F. Supp. 287 (E.D.N.Y. May 23, 2013) (collection agency that identified itself as debt collection company and indicated that it was attempting to collect debt, left message on answering machine at consumer's residence that was overheard by consumer's mother-in-law).

§ 1692c(b).[352] A voicemail left on a consumer's cell phone is also not likely to result in a violation, because it is assumed consumers are in control of their own cell phone.[353]

A collector cannot avoid liability under FDCPA § 1692c(b) by leaving a voicemail that states the message is intended for an identified person, requests that others stop listening, and then after a pause indicates it is a debt collection call.[354] This is particularly the case where the voicemail's outgoing message indicates that others share the voicemail, or where it is difficult for the listener to skip to the next message on the phone without hearing the collector's message.[355] In a stipulated FTC order, a debt collector agreed that it would only leave a message on the consumer's voicemail if the outgoing message only identifies the consumer's first and last name, the collector had talked to the consumer at that phone number once before, and the collector had not been requested to stop leaving messages.[356]

Other collectors have tried an approach that calls a number with a prerecorded message that asks the consumer to press a particular number only if they are the named individual, and does not provide any other information that can be left as a voicemail. (In a number of instances, the system has not operated properly and instead leaves a message concerning collection of a debt on the voicemail, as if the number had been pressed.[357] Even this approach can violate the FDCPA—if the recorded call asking the consumer to press a particular number does not first identify itself as a collection call, this should violate section 1692e(11). But if it does identify itself as a collection call, and a third party overhears the message, there can be a violation of FDCPA § 1692c(b).[358]

5.7.9 *Emails and Texts Viewed by Third Parties*

5.7.9.1 Generally

Regulation F (effective November 30, 2021) addresses whether a collector can raise the bona fide error defense where a text or email communication mistakenly sent to or read by a third party violates FDCPA § 1692c(b)'s prohibition of third-party contacts. Third-party communication via emails or texts is prohibited, but Regulation F defines standards as to whether the collector has maintained procedures reasonably adapted to avoid a third-party communication. Of course, even if such procedures are in place, there is still a violation if the email or text was intentionally sent so as to be viewed by a third party and did not result from a bona fide error.[359]

FDCPA § 1692k(c) provides that a debt collector may not be held liable for an FDCPA violation if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Regulation F defines procedures that are reasonably adapted to avoid an error involving an email or text being viewed by a third party.

A debt collector maintains procedures that are reasonably adapted to avoid a bona fide error in sending an email or text message communication that would result in a FDCPA § 1692c(b) or Reg. F § 1006.6(d)(1) violation if those procedures include steps to reasonably confirm and document that the collector has complied with Reg. F § 1006.6(d)(3).

Depending on their size, the scope of their operations, and other business-specific facts, different debt collectors may take different approaches to reasonably confirming and documenting compliance with Reg. F § 1006.6(d)(3). The Bureau declines to specify by rule a single set of steps or elements that all procedures must or should include under Reg. F § 1006.6(d)(3). As the Bureau noted in the preamble to the proposal, however, procedures permitting a debt collector to use obviously incorrect email addresses merely because the addresses were obtained consistent with Reg. F § 1006.6(d)(3) would not satisfy the requirement to reasonably confirm and document compliance. In this circumstance, any purported confirmation of the debt collector's compliance with Reg. F § 1006.6(d)(3) would not be reasonable.[360]

Failure to comply with the Reg. F § 1006.6(d)(3) procedures does not violate FDCPA § 1692c(b), if the text or email is *not* disclosed to a third party. Compliance with the procedures

352 Miller v. MediCredit, Inc., 2019 WL 6709388, at *8 (E.D. Va. Dec. 9, 2019). *See also* Zortman v. J.C. Christensen & Assoc., 819 F. Supp. 2d 874, 879–880 (D. Minn. 2011); Rayl v. Moores, 2010 WL 4386784, at *3 (S.D. Ind. Oct. 28, 2010); Seaworth v. Messerli, 2010 WL 3613821, at *5, n.6 (D. Minn. Sept. 7, 2010) (letter mailed to consumer that is never received not communication under FDCPA). *But see* Cerrato v. Solomon & Solomon, 909 F. Supp. 2d 139 (D. Ct. 2012) (eight unanswered telephone calls—all of which displayed Solomon's name and telephone number—constitute "communications" under FDCPA).

353 Bryan v. Allied Interstate L.L.C., 513 F. Supp. 3d 686 (W.D.N.C. 2021) (no violation of § 1692c(b) when consumer played voicemail message on cell phone in earshot of sister and mother, because cell phone was in her sole possession and control when message was overheard, even though caller appeared as "unknown"); Nelson v. Receivables Outsourcing, L.L.C., 2018 WL 3854796 (D.N.J. Aug. 14, 2018); Zortman v. J.C. Christensen & Assoc., Inc., 870 F. Supp. 2d 694 (D. Minn. May 2, 2012).

354 Lande v. Online Info. Services, Inc., 2016 WL 6609563 (E.D.N.Y. Nov. 3, 2016); Nicaisse v. Stephens & Michaels Assoc., Inc., 2015 WL 9462106 (E.D.N.Y. Dec. 28, 2015); Branco v. Credit Collection Services Inc., 2011 WL 3684503, at *4 (E.D. Cal. Aug. 23, 2013); Thompson v. Diversified Adjustment Services, Inc., 2013 WL 3973976 (S.D. Tex. July 31, 2013); Leahey v. Franklin Collection Serv., Inc., 756 F. Supp. 2d 1322, 1327 (N.D. Ala. 2010); Berg v. Merchants Ass'n Collection Div., Inc., 586 F. Supp. 2d 1336, 1341 (S.D. Fla. 2008) (explaining that forewarning does not alert listener to refrain from listening to message in presence of others, nor does it ensure that third party will not overhear contents of message).

355 Branco v. Credit Collection Services Inc., 2011 WL 3684503, at *4 (E.D. Cal. Aug. 23, 2013).

356 United States v. Expert Global Solutions, Inc., 2013 WL 5870336 (N.D. Tex. July 16, 2013) (stipulated order).

357 *See* Abernathy v. NCC Bus. Services, Inc., 2012 WL 4320810 (N.D. Miss. Sept. 18, 2012); Pawelczak v. Nations Recovery Ctr., Inc., 2012 WL 2192263 (N.D. Ill. June 14, 2012) (similar system failed in thirteen calls to consumer in three months).

358 Pawelczak v. Nations Recovery Ctr., Inc., at *5 2012 WL 2192263 (N.D. Ill. June 14, 2012).

359 See § 12.2, *infra*, discussing the elements of a bona fide error defense.

360 *See* 85 Fed. Reg. 76,734, 76,777 (Nov. 30, 2020) (footnote omitted).

helps determine the collector's bona fide error defense where there is a prohibited third-party communication.

But even if there is no disclosure to a third party, failure to comply with the procedures may result in violations of other Regulation F provisions. Compliance with the Reg. F § 1006.6(d)(3) procedures not only contribute to a bona fide error defense for an otherwise violative third-party communication, but also provides a safe harbor for the email or text revealing the debt collector's name or other information indicating that the communication relates to the collection of a debt,[361] as examined at § 8.9, *infra*. Compliance with the same procedures also is an exception to the prohibition that a collector communicates or attempt to communicate with a consumer by sending an email to an email address that the debt collector knows is provided to the consumer by the consumer's employer,[362] discussed at § 8.10, *infra*.

Procedures comply with Reg. F § 1006.6(d)(3) if the collector takes steps to reasonably confirm and document that:

1. The collector acquired an email address in a manner set out by Reg. F § 1006.6(d)(4) or the phone number for a text message in a manner set out by Ref. F § 1006.6(d)(5);[363] and
2. The collector has not sent an email to the email address or a text to the phone number where the collector knew that the email or text previously led to a third-party disclosure.[364]

As to the second requirement, a collector knows of such third-party disclosure if any person informs the collector of that fact.[365] The Regulation F supplemental information states "[t]hus, to comply with § 1006.6(d)(3)(ii), it is necessary (but not sufficient) for a debt collector to accept and track complaints."[366]

A collector sending in bona fide error an email to an address or a text to a number that previously led to a third-party disclosure goes to whether the collector's procedures are reasonably adapted to avoid disclosure to a third party. The supplemental information to Regulation F states:

> [I]f a debt collector sends repeated emails to an email address or text messages to a telephone number that the debt collector knows has led to a third-party disclosure, that conduct would likely show that the debt collector's procedures are not reasonable and that the debt collector is not entitled to a safe harbor from civil liability.[367]

As for the first requirement concerning procedures to acquire the email address or phone number for text messages, compliance with the procedures for acquiring an *email* address require that the email address is obtained pursuant in a manner described in at least one of the three subsections of Reg. F § 1006.6(d)(4). Reg. F § 1006.6(d)(4)(i) considers procedures where the collector obtains the email address itself, Reg. F § 1006.6(d)(4)(ii) where the creditor obtains the email address, and Reg. F § 1006.6(d)(4)(iii) where a prior collector obtains the email address. The procedures for obtaining a phone number for text messages are found at Reg. F § 1006.6(d)(5). These separate procedures are examined at §§ 5.7.9.2 to 5.7.9.5, *infra*.

In contrast to emails and text messages, Reg. F § 1006.6(d)(3) does not outline procedures that are reasonably adapted to avoid a bona fide error for other types of electronic messages, including direct messages via social media.[368] The supplemental information to Regulation F states:

> In light of the apparent variations in direct messaging technology, the Bureau is unable to assess how well the procedures in final Reg. F § 1006.6(d)(3) through (5) would address the risk of third-party disclosures in the direct messaging context. Therefore, for purposes of Reg. F § 1006.6(d)(3) through (5), the Bureau declines to define the term email to include direct messaging technology in mobile applications or on social media.[369]

5.7.9.2 Procedures Where the Debt Collector Acquires the Email Address from the Consumer

Compliance with Regulation F § 1006.6.(d)(4)(i) (effective November 30, 2021) occurs where either the consumer used the email address to communicate with the debt collector about the debt and has not since opted out of communications to that email address,[370] or the collector received directly from the consumer prior consent to use the email address to communicate about the debt and the consumer has not withdrawn the consent.[371] Opting out of communications to an email address is examined at § 5.8, *infra*. Note that in both cases the communication must be "about the debt."

Prior consent includes consent via any medium of communication, including in writing, electronically, or orally.[372] It also includes the consumer providing the email address on the debt collector's website or online portal if the collector discloses clearly and conspicuously that it may use the email address to communicate with the consumer about the debt.[373]

361 *See* Reg. F § 1006.22(g).
362 *See* Reg. F § 1006.22(f)(3).
363 Reg. F § 1006.6(d)(3)(i).
364 Reg. F § 1006.6(d)(3)(ii).
365 Reg. F Official Interpretations § 6(d)(3)(ii)-1.
366 *See* 85 Fed. Reg. 76,734, 76,779 (Nov. 30, 2020).
367 *See* 85 Fed. Reg. 76,734, 76,778, 76,779 (Nov. 30, 2020) (footnote omitted).
368 See also Reg. F § 1006.22(f)(4), discussed at § 8.11, *infra*, for additional restrictions on the use of social media.
369 85 Fed. Reg. 76,734, 76,777 (Nov. 30, 2020).
370 Reg. F § 1006.6(d)(4)(i)(A).
371 Reg. F § 1006.6(d)(4)(i)(B).
372 Reg. F Official Interpretations § 6(d)(4)(i)(B)-1 explains "[f]or purposes of § 1006.6(d)(4)(i)(B), a consumer may provide consent directly to a debt collector through any medium of communication, such as in writing, electronically, or orally."
373 Reg. F Official Interpretations § 6(d)(4)(i)(B)-2.

Collectors may use an email address provided by the consumer's employer if the collector obtained the email address via one of the two methods outlined in Reg. F § 1006.6.(d)(4)(i).[374]

5.7.9.3 Procedures Where the Creditor Obtains the Email Address from the Consumer

Email addresses obtained by creditors from consumers require special procedures for their use in a bona fide error defense. Regulation F (effective November 30, 2021) explains the basis for this in its supplemental information:

> [A] consumer might agree to receive electronic communications from a creditor without considering the risk that a third party might read those communications, but a consumer who is indifferent to the disclosure of creditor communications may not be indifferent to the disclosure of debt collection communications. Thus, a consumer's decision to communicate electronically with a creditor does not, without more, suggest that the risk of third-party disclosure is particularly low. Nor does a disclosure in account opening materials, without more, suggest that the risk of third-party disclosure is particularly low. Years may pass, and a consumer's circumstances may change, between the time a consumer opens an account and the time the account is transferred to a debt collector.[375]

Compliance with Reg. F § 1006.6(d)(4)(ii) occurs where a number of specific requirements are met. Again, this is not an affirmative requirement for collectors but rather, a type of safe harbor for collectors who choose to implement these procedures. First, the creditor obtained the consumer's email address from the consumer.[376] Second, before the collector uses the email address, the creditor must have used the email address to communicate with the consumer about the account and the consumer has not asked the creditor to stop its use.[377] Examples of creditor use of an email address include sending to the email address required disclosures, bills, invoices, periodic statements, payment reminders, and payment confirmations. Communications about the account do not include, for example, marketing or advertising materials unrelated to the consumer's account.[378]

In addition, the collector can only use that email address obtained from the creditor if the *creditor* (not the collector) has previously sent to the consumer a written or electronic notice (not an oral message, such as a live or robocall phone message[379]), to an address the creditor obtained from the consumer and used to communicate with the consumer about the account, that clearly and conspicuously discloses five items:[380]

1. That the debt has been or will be transferred to the debt collector, and the name of that debt collector;[381]
2. The email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt;[382]
3. That, if others have access to the email address, then it is possible they may see the emails;[383]
4. Instructions for a reasonable and simple method by which the consumer could opt out of such an email communication to that address;[384] and
5. The date by which the debt collector or the creditor must receive the consumer's request to opt out, which must be at least thirty-five days after the date the notice is sent. The notice may instruct the consumer to send the notice to the creditor or the collector, but not both.[385]

The creditor, not the collector, is responsible for sending the disclosure, but the creditor's failure to do so does not create any FDCPA liability for the creditor. Instead, the creditor's failure to properly send the disclosure means that the collector cannot rely on a bona fide error defense on the procedures by which the creditor obtained the email address.

Clear and conspicuous means readily understandable. The location and type size must be readily noticeable and legible to consumers, although no minimum type size is mandated.[386] The Reg. F Official Interpretations provide different sample language for written[387] or electronic[388] disclosures that the creditor may, but is not required to use. The notice may be

374 Reg. F § 1006.22(f)(3), *discussed at* § 8.10, *infra*.
375 *See* 85 Fed. Reg. 76,734, 76,780 (Nov. 30, 2020) (footnote omitted).
376 Reg. F § 1006.6(d)(4)(ii)(A).
377 Reg. F § 1006.6(d)(4)(ii)(B).
378 Reg. F Official Interpretations § 6(d)(ii)(B)-1.
379 *See* 85 Fed. Reg. 76,734, 76,784 (Nov. 30, 2020).
380 Reg. F § 1006.6(d)(4)(ii)(C).
381 Reg. F § 1006.6(d)(4)(ii)(C)(1); Reg. F Official Interpretations § 6(d)(4)(ii)(C)(1)-1.
The debt collector's name is an important requirement of these disclosures for a number of reasons. One is that the CFPB declined to require that the notice be close in time to the collector's use of the email address, because it assumed that the creditor designating a collector would be close in time to when the collector would use the email address. *See* 85 Fed. Reg. 76,734, 76,785 (Nov. 30, 2020).
382 Reg. F § 1006.6(d)(4)(ii)(C)(2).
383 Reg. F § 1006.6(d)(4)(ii)(C)(3).
384 Reg. F § 1006.6(d)(4)(ii)(C)(4).
385 Reg. F § 1006.6(d)(4)(ii)(C)(5); Reg. F Official Interpretations § 6(d)(4)(ii)(C)(5)-1.
386 Reg. F Official interpretations § 6(d)(4)(ii)(C)-1.
387 "We are transferring your account to ABC debt collector, and we are providing ABC debt collector with the following email address for you: [email address]. ABC debt collector may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by ABC debt collector to [email address], please fill out the enclosed form and return it in the enclosed envelope so that we receive it by [date]." Reg. F Official Interpretations § 6(d)(4)(ii)(C)-2(i).
388 "We are transferring your account to ABC debt collector, and we are providing ABC debt collector with the following email address for you: [email address]. ABC debt collector may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by ABC debt collector to [email address], please click here by [date]." Reg. F Official Interpretations § 6(d)(4)(ii)(C)-2(ii).

contained in a larger communication to the consumer, if the notice is clear and conspicuous.[389]

The Reg. F Official Interpretations provide two examples of a reasonable and simple opt-out method. When the notice is sent in writing, the creditor supplies a reply form and a pre-addressed envelope together with the opt-out notice. Requiring a consumer to call or write to obtain the form is not a reasonable and simple method.[390]

When the disclosure is sent electronically, an example of a reasonable and simple opt-out method is the notice including a hyperlink or allowing a reply to the disclosure with the word "stop." Not reasonable or simple is requiring a consumer who receives the opt-out notice electronically to opt out by postal mail, telephone, or visiting a website without providing a link.[391]

The collector cannot use the email address during the 35-day opt-out period, but the 35-day period is not a deadline for the consumer to opt out of further communications to that email address.[392] Reg. F § 1006.14(h)(1) prohibits, with certain exceptions, a collector from communicating through a medium if the consumer requests the collector not to use that medium.[393] The consumer's rights under Reg. F § 1006.14(h)(1) do not expire and continue to be effective after the thirty-five-day period.

In addition, the consumer continues to have ongoing rights under FDCPA § 1692c(c), so that if at any time the consumer properly notifies the collector that the consumer refuses to pay or wants the collector to cease all further communication, the collector must, with certain exceptions, stop all communications, through email and other mediums.[394] However, a consumer's request to opt out of a debt collector's use of a particular email address under Reg. F § 1006.6(d)(4)(ii)(D) will only apply to the collector's use of that email address and does not affect the collector's ability to communicate with the consumer through other means absent the consumer invoking rights under FDCPA § 1692c(c).[395]

Another limit on the collector's use of creditor-obtained email addresses is that the domain must be available for use by the general public (e.g. @gmail.com) and not reserved to particular corporations or institutions (e.g. @nclc.org).[396] In addition, the collector must not know that the address is provided by the consumer's employer.[397] A debt collector knows that an email address is provided by the consumer's employer if any person has informed the debt collector that the address is employer-provided, but the collector need not conduct a manual review of consumer accounts to determine whether an email address might be employer-provided.[398]

5.7.9.4 Procedures Where a Prior Debt Collector Obtains the Email Address from the Consumer

Regulation F (effective November 30, 2021) sets out procedures where a prior debt collector obtained the email address.[399] The *immediately prior* collector[400] must have used that email address to send an email to the consumer (and the consumer cannot then have opted out of communications to that email address) and *any* prior collector obtained the email address in compliance with Reg F. § 1006.6(d)(4)(i), as described at § 5.7.9.2, *supra*, or in compliance with Reg. F § 1006(d)(4)(ii), as described at § 5.7.9.3, *supra*.[401] There is no compliance where the immediately prior collector did not use the email address to send an email to the consumer, even though another collector prior to it had complied with either Reg. F § 1006.6(d)(4)(i) or (ii) and used the email address to send the email to the consumer.[402]

Collectors may use an email address provided by the consumer's employer if the collector obtained the email address in compliance with Reg. F § 1006.6.(d)(4)(iii).[403]

5.7.9.5 Procedures for When a Debt Collector Obtains a Phone Number for Text Messages

Regulation F (effective November 30, 2021) sets out two procedures to obtain a phone number for text messages in Reg. F § 1006.6(d)(5). One is that the consumer initiated the first text (not just a telephone call from a cell phone),[404] has not since opted out of receipt of texts to that number, and the collector confirms that the number still belongs to the consumer,

389 Reg. F Official Interpretations § 6(d)(4)(ii)(C)-3.
390 Reg. F Official Interpretations § 6(d)(4)(ii)(C)(4)-1(i).
391 Reg. F Official Interpretations § 6(d)(4)(ii)(C)(4)-1(ii). *See also* 12 C.F.R. § 1022.25 (reasonable and simple opt out method for use of eligibility information about consumer received from affiliate to make solicitation to consumer about products or services, referenced in Reg F supplemental information). *See* 85 Fed. Reg. 76,734, 76,785 (Nov. 30, 2020).
392 Reg. F § 1006.6(d)(4)(ii)(D).
393 *See* Reg. F Official interpretations § 6(d)(4)(ii)(D)-1. Reg. F § 1006.14(h)(1) is examined at § 6.9, *infra*.
394 *See* Reg. F Official Interpretations § 6(d)(4)(ii)(D)-1. *See* § 5.8, *infra*.
395 Reg. F Official Interpretations § 6(d)(4)(ii)(D)-2.
396 Reg. F § 1006.6(d)(4)(ii)(E); Reg. F Official Interpretations § 6(d)(4)(ii)(E)-1.
397 Reg. F § 1006.6(d)(4)(ii)(E).
398 Reg. F Official Interpretations § 6(d)(4)(ii)(E)-2.
399 Reg. F § 1006.6(d)(4)(iii).
400 *See* Reg. F Official Interpretations § 6(d)(4)(iii)-1 (discussion of immediately prior).
401 *See also* Reg. F Official Interpretations § 6(d)(4)(iii)-2(i), (ii).
402 *See* Reg. F Official Interpretations § 6(d)(4)(iii)-2(iii).
403 Reg. F § 1006.22(f)(3), *discussed at* § 8.10, *infra*.
404 *See* Reg. F Official Interpretations § 6(d)(5)(i)-1. *See also* 85 Fed. Reg. 76,734, 76,790 (Nov. 30, 2020) ("Because a consumer who places a telephone call to a debt collector generally can control who listens to the conversation by initiating or engaging in the call in private, the Bureau does not believe that a consumer's decision to call a debt collector, without more, generally suggests that the risk of third-party disclosure is low if the debt collector sends a text message to the same telephone number. Therefore, the text of § 1006.6(d)(5)(i), and new comment 6(d)(5)(i)-1, clarify that the consumer use method for text messages does not apply if the consumer only used the telephone number to communicate with the debt collector about the debt by telephone call.").

either by receiving a text from the consumer within the last sixty days or by checking a database of reassigned numbers within the last sixty days.[405] The consumer's initiation of a text message must be about the debt. It does not include a text in response to a call from the collector to the consumer's cell phone number simply asking who is calling the consumer.[406]

A qualifying reassigned number database is the one the FCC has established (if currently established)[407] or a substantially similar commercial database.[408] The commercial database must be substantially similar in terms of completeness and accuracy.[409] Based on FCC findings, the CFPB considers that existing commercial databases may not meet this standard. Regulation F's supplemental information indicates the unreliability of existing databases and provides the features of the FCC database:

> The FCC has observed that, although commercial databases currently exist to help callers determine whether a telephone number has been reassigned, these databases are not comprehensive. For this reason, in December 2018, the FCC announced the creation of a new database to serve as a single, comprehensive source for determining whether a telephone number has been reassigned. The purpose of the database, known as the Reassigned Numbers Database, is to help curb the proliferation of unwanted telephone calls directed to reassigned telephone numbers. Once operational, the database will contain reassigned number information from each provider that obtains North American Numbering Plan U.S. geographic numbers and toll-free numbers. Users will be able to consult the database to determine whether a telephone number has been permanently disconnected since a particular date—such as the date the consumer last consented to communicate by text message or the date of the consumer's most recent text message—and therefore no longer belongs to the consumer. If the database shows that a particular telephone number has been disconnected, then a debt collector has reason to anticipate that sending a text message to that number will result in a third-party disclosure. Thus, once operational, the FCC's Reassigned Numbers Database can help debt collectors comply with FDCPA § 1692c(b) and the final rule's prohibition on third-party disclosures.[410]

The other way to comply with the procedures for acquiring a phone number for text messaging is if the collector received directly from the consumer prior consent—through any mode of communication, including in writing, electronically, or orally[411]—to send texts to that number about the debt,[412] the consumer has not since withdrawn that consent, and either the consent was provided within the past sixty days or the collector checked a reassigned number database within the last sixty days.[413] Prior consent includes the consumer providing the text message number on the debt collector's website or online portal if the collector discloses clearly and conspicuously that it may use the number to communicate with the consumer about the debt.[414]

Note that the procedures for obtaining a phone number for a text message do not allow for the number to be acquired by either the creditor or a prior collector. The CFPB is concerned that phone numbers may be disconnected and then re-assigned to a third party, so Regulation F requires not only that the collector obtain the number, but that it do so within the last sixty days or check a reassigned number database within the last sixty days.

5.7.10 Third Party Enforcement of FDCPA § 1692c(b)

While many courts find aggrieved third parties have standing to bring claims under FDCPA §§ 1692d, e, and f,[415] only a few courts have found a third party has standing to raise a claim under FDCPA § 1692c(b).[416]

405 Reg. F § 1006.6(d)(5)(i).

406 *See* 85 Fed. Reg. 76,734, 76,790 (Nov. 30, 2020).

407 Established in *In re Advanced Methods to Target & Eliminate Unlawful Robocalls*, 33 FCC Rcd. 12024 (Dec. 12, 2018). *See* Reg. F Official Interpretations § 6(d)(5)-1.

408 *See* Reg. F Official Interpretations § 6(d)(5)-1.

409 *See* 85 Fed. Reg. 76,734, 76,791 (Nov. 30, 2020) (footnotes omitted).

410 *See* 85 Fed. Reg. 76,734, 76,791 (Nov. 30, 2020) (footnotes omitted).

411 Reg. F Official Interpretations § 6(d)(5)(ii)-1 (referencing § 6(d)(4)(i)(B)-1).

412 For CFPB guidance as to the nature of consent, see Reg. F Official Interpretations § 6(d)(4)(i)(B)-1,-2.

413 Reg. F § 1006.6(d)(5)(ii).

414 Reg. F Official Interpretations § 6(d)(5)(ii)-1 (referencing § 6(d)(4)(i)(B)-2 "for guidance concerning when a debt collector may treat a consumer who provides a telephone number for text messages as having consented directly to the debt collector"). Reg. F Official Interpretations § 6(d)(4)(i)(B)-2 says that: "If a consumer provides an email address to a debt collector (including on the debt collector's website or online portal), the debt collector may treat the consumer as having consented directly to the debt collector's use of the email address to communicate with the consumer about the debt for purposes of § 1006.6(d)(4)(i)(B) if the debt collector discloses clearly and conspicuously that the debt collector may use the email address to communicate with the consumer about the debt."

415 *See, e.g.*, Rawlinson v. Law Office of William M. Rudow, L.L.C., 460 Fed. Appx. 254, 258 (4th Cir. 2012) (aunt of debtor had standing under § 1692d, e, and f); Muir v. Navy Fed. Credit Union, 529 F.3d 1100 (D.C. Cir. 2008) (son of debtor); Montgomery v. Huntington Bank, 346 F.3d 693 (6th Cir. 2003) (son of debtor had FDCPA standing). *See also* McKenney-Becker v. Safeguard Props., L.L.C., 2015 WL 170520 (N.D. Ill. Jan. 13, 2015) (husband aggrieved by debt collector's conduct); Aviles v. Wayside Auto Body, Inc., 49 F. Supp. 3d 216 (D. Conn. 2014) (niece, passenger in car during threatened repossession); Mills v. ACS Recovery, Inc., 2014 WL 916674 (W.D.N.Y. Mar. 10, 2014) (father repeatedly contacted); Thompson v. Gateway Fin. Services, Inc., 2012 WL 5989240 (N.D. Ill. Nov. 29, 2012) (denying motion to dismiss children's FDCPA claims); Maddox v. Martin Co., L.L.C., 2006 WL 1308211 (S.D. Ohio May 11, 2006) (debtor's aunt protected from violations of § 1692e, but not of § 1692c; aunt awarded $500); Sibersky v. Borah, Goldstein, Altschuler & Schwartz, P.C., 2000 WL 1448635 (S.D.N.Y. Sept. 28, 2000) (husband who was not consumer could pursue FDCPA claims); Wenrich v. Robert E. Cole, P.C., 2001 WL 4994 (E.D. Pa. Dec. 22, 2000) (parents alleged to be obligated). *Cf.* Sibersky v. Goldstein, 155 Fed. Appx. 10, 11–12 (2d Cir. 2005) (husband of debtor did not state a claim under one of the FDCPA provisions that applied to any person).

416 Scott v. Portfolio Recovery Assoc., 139 F. Supp. 3d 956, 966 (S.D. Iowa 2015) (issue of fact remained as to whether collector alleged third party plaintiff owed debt, and therefore had standing to raise claim under

The Seventh Circuit found that FDCPA § 1692c(b) protects the privacy of the consumer who supposedly owes the debt, not the third party. Allowing third parties to seek relief for a collector's violation would be "inconsistent with § 1692c(b), a provision that places control over the disclosure of a consumer's information squarely in the hands of the consumer, not the third party who may receive the disclosure."[417] However, FDCPA § 1692c(b) explicitly prohibits communications to "any person other than the consumer," and section 1692k grants a private right of action to "any person." Other FDCPA protections are limited by their language to "consumers," but that is not true of section 1692c(b).

5.8 Right to Stop Collection Contacts, FDCPA § 1692c(c)

5.8.1 *Text of FDCPA § 1692c(c) and Reg F § 1006.6(c)*

(c) Ceasing communication—If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communications with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.[418]

This provision appeared in the midst of House efforts to pass the Act,[419] and was modified in each subsequent bill. In some bills, the consumer's notice to the collector to cease contacts was not required to be in writing.[420] A 1977 Senate version added certain permissible collector communications after receipt of a consumer's request to cease communication.[421]

Regulation F (effective November 30, 2021) generally tracks this provision but clarifies that, after the consumer's notification, not only communication but attempts to communicate are prohibited.[422] For example, a collector violates this provision if it continues to call the consumer even if the consumer does not answer the telephone call.

5.8.2 *The Consumer's Right to Stop Collection Contacts*

FDCPA § 1692c(c) requires a debt collector to halt all collection efforts, excluding a few exceptions discussed in § 5.8.4, *infra*, upon receipt of the consumer's written request to cease communications or the consumer's written refusal to pay the debt.[423] The requirement to cease further contacts applies to communications and attempted communications, including even phone calls the consumer does not answer.[424]

1692c(b) as consumer, when it wrongly garnished her wages); Strouse v. Enhanced Recovery Co., L.L.C., 956 F. Supp. 2d 627, 633, 635 (E.D. Pa. 2013) (consumer is defined not just as someone obligated to pay debt, but someone either obligated or allegedly obligated to pay debt and, as such, collector treated plaintiff as if she were obligated on debt, which gave her standing to bring claims under § 1692c(b)); Deuel v. Santander Consumer USA, Inc., 700 F. Supp. 2d 1306 (S.D. Fla. 2010); Bank v. Pentagroup Fin., L.L.C., 2009 WL 1606420 (E.D.N.Y. June 9, 2009) (one who received recorded calls aimed at different consumer has no standing under § 1692c; granting motion to dismiss as plaintiff lacks standing to bring § 1692c claim because: (1) he was not obligated or allegedly obligated to pay any debt; and (2) he has not alleged that he is consumer's spouse, parent, guardian, executor, or administrator); Thomas v. Consumer Adjustment Co. Inc., 579 F. Supp.1290, 1298–1299 (E.D. Miss. 2008). *Cf.* Montgomery v. Huntington Bank, 346 F.3d 693, 697 (6th Cir. 2003), *citing* Wright v. Fin. Serv. of Norwalk, Inc., 22 F.3d 647, 649 n.1 (6th Cir. 1994) (en banc) (only a "consumer" has standing to sue for violation of § 1692c); Christy v. EOS CCA, 905 F. Supp. 2d 648, 654–653 (E.D. Pa. 2012) (plaintiff was neither consumer or recipient of information from debt collector); Mantell v. Feingold & Levy, 1997 WL 45313, at *3 (N.D. Ill. Jan. 30, 1997) (plaintiff not consumer).

417 Todd v. Collecto, Inc., 731 F.3d 734 (7th Cir. 2013) (§ 1692b(2) is privacy protection for consumer who supposedly owes debt; adult son who had been contacted for his mother's location could not obtain relief under § 1692b because protection is for consumer only).

418 15 U.S.C. § 1692c(c). *See also* Reg F § 1006.6(c).

419 H.R. 13720, 94th Cong., 2d Sess. § 804(d) (1976).

420 H.R. 13720, 94th Cong., 2d Sess. § 804(d); H.R. 29, 95th Cong., 1st Sess. § 804(d) (1977); S. 918, 95th Cong., 1st Sess. § 805(d) (1977).

421 Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 805(d) (1977). *Cf.* S. 656, 95th Cong., 1st Sess. § 804(d) (1977).

422 *See* Reg. F § 1006.6(c)(1). *See also* 85 Fed. Reg. 76,734, 76,759 (Nov. 30, 2020).

423 *See* Cruz v. Int'l Collection Corp., 673 F.3d 991 (9th Cir. 2012); Flores v. Collection Consultants of Cal., 2015 WL 4254032 (C.D. Cal. Mar. 20. 2015); Appx. E.2.2.5, *infra*. *See also* Rush v. Portfolio Recovery Assoc., 977 F. Supp. 2d 414 (D.N.J. 2013); Sembler v. Attention Funding Trust, 2009 WL 2883049 (E.D.N.Y. Sept. 3, 2009) (claim dismissed where complaint failed to allege cease communication request sent in writing), *adopted*, 2009 WL 3055347 (E.D.N.Y. Sept. 24, 2009); Micare v. Foster & Garbus, 132 F. Supp. 2d 77 (N.D.N.Y. 2001); S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 7, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *reproduced at* Appx. A.3, *infra*; FTC Official Staff Commentary § 805(c), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*; Clement, FTC Informal Staff Letter (Nov. 12, 1985); Miller, FTC Informal Staff Letter (Mar. 31, 1983), *discussed at* § 3.4.4.4, *supra*. For sample cease contact letters, see § 2.4, *supra*.

424 Reg. F § 1006.6(c)(1). *See also* Litt v. Portfolio Recovery Assoc., 146 F. Supp. 3d 857 (E.D. Mich. 2015) (unanswered calls constituted "communications" under FDCPA where debt collector's name and telephone number appeared on caller identification display); Cerrato v. Solomon & Solomon, 909 F. Supp. 2d 139 (D. Conn. 2012) (eight unanswered telephone calls from the debt collector with caller ID displaying its name after receipt of cease letter were communications that violated § 1692c(c)).

The Official Interpretations of Regulation F (effective November 30, 2021) allow the consumer to notify a debt collector not only in writing, but also electronically using a medium of electronic communication through which a debt collector accepts electronic communications from consumers.[425]

The collector of course is not bound by the cease communication writing prior to receiving it. FDCPA § 1692c(c) provides "If such notice from the consumer is made by mail, notification shall be complete upon receipt." Regulation F (effective November 1, 2021) clarifies for electronic communication that the consumer's electronic communication is complete upon the debt collector's receipt of that information.[426] The Regulation provides no grace period upon receipt of the stop request, and instead a collector sending a communication shortly after receipt of the written or electronic stop request will have to rely on the bona fide error defense, assuming it can show that its procedures promptly stop notification upon receipt.[427]

While oral notification is not sufficient to stop all collection contacts, Reg. F § 1006.14(h)(1), as discussed at § 6.9, *infra*, allows the consumer to orally stop a particular mode of communication. For example, the consumer's oral statement "stop calling" is enough to stop further telephone calls.[428] The consumer can also orally say stop calls or text messages to a specific phone number while allowing calls to other numbers.

FDCPA § 1692c(c) provides rights for a "consumer." FDCPA § 1692a(3) defines "consumer" as one obligated or allegedly obligated to pay a debt. Thus, a person mistakenly being dunned for a debt or a person who is no longer obligated on a debt also has rights to send a cease communication stop collection notice.[429]

For purposes only of FDCPA § 1692c, the term "consumer" also includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.[430] Any such "consumer" thus has rights to notify the collector to cease communications. However, the Seventh Circuit has held that a debt collector may still communicate with the consumer's attorney, even if the attorney sends a cease communications letter.[431]

The debt collector is strictly liable for sending a request for payment after receiving a request to cease contacts.[432] Except for the bona fide error defense,[433] a collector is liable even if the employee sending the communication was unaware of the consumer's cease letter.[434]

The collector has no obligation to inform the consumer that they can request that it cease communications,[435] unless that requirement is included in an injunction or a consent decree[436] against a collector. Some state statutes also require notice to the consumer.[437]

When sending a written cease communication letter, it is prudent to send it by a time-stamped fax or by mail with return receipt requested.[438] The consumer should retain a record, such as a photocopy of the letter and stamped envelope, or a copy of the electronic cease communication notice reflecting the content and date it was sent. The cease communication notice is effective even if sent by the consumer's attorney.[439]

The cease communication notice should be sent to the collector and not the creditor. But a court has held that where the consumer sends the cease communication notice to the

425 Reg. F Official Interpretations § 6(c)(1)-2.

426 Reg. F Official Interpretations § 6(c)(1)-1.

427 *See* 85 Fed. Reg. 76,734, 76,773 (Nov. 30, 2020). *See also* § 12.2, *infra* (discussing bona fide error defense). *See, e.g.*, Lupia v. Mericredit, Inc., 445 F. Supp. 3d 1271 (D. Colo. 2020), *aff'd*, 8 F.4th 1184 (10th Cir. 2021) (collection call to consumer violated § 1692c(c) even though consumer's dispute letter was not recorded in agency's system until after call was made; letter was received day before call was made; collector did not meet burden of proving it had reasonable procedures adapted to avoid phone call for bona fide error defense).

428 *See* 85 Fed. Reg. 76,734, 76,772 (Nov. 30, 2020).

429 *See* Isaac v. RMB, Inc., 2014 WL 3566069 (N.D. Ala. July 18, 2014) (*pro se*; alleged consumers awarded $2500 damages for emotional distress), *aff'd*, 604 Fed. Appx. 818 (11th Cir. 2015); Garcia v. Resurgent Capital Services, L.P., 2012 WL 1144239 (N.D. Cal. Apr. 4, 2012). *Cf.* § 4.4, *supra*.

430 *See* 15 U.S.C. § 1692c(d); Reg. F § 1006.6(a), *discussed at* § 5.10, *infra*.

431 *See* Bravo v. Midland Credit Mgmt., Inc., 812 F.3d 599 (7th Cir. 2016).

432 *See* Hagen v. Messerli & Kramer, P.A., 85 F. Supp. 3d 1028 (D. Minn. 2015); Montgomery v. Shermeta, Adams & Von Allmen, P.C., 885 F. Supp. 2d 849 (W.D. Mich. 2012).

433 Smith v. Transworld Systems, Inc., 953 F.2d 1025 (6th Cir. 1992) (bona fide error defense where dunning letter sent out of its California office after receiving consumers' cease communications letter in its Ohio office). *See also* § 12.2, *infra*, discussing bona fide error defense.

434 *See* Kaschak v. Raritan Valley Collection Agency, 1989 WL 255498 (D.N.J. May 22, 1989) (since notification is effective when collector receives it, collector is liable for any communication made after that date, even if collector has no actual knowledge of request to cease communication; request had not yet been processed and noted on debtor's account). *Cf.* Smith v. Transworld Systems, Inc., 953 F.2d 1025 at 1036 (6th Cir. 1992) (dissent arguing that § 1692c(c) imposes absolute duty on collector to desist from further communication with consumer on date that collector received consumer's notice).

435 Stimpson v. Midland Credit Mgmt., Inc., 944 F.3d 1190 (9th Cir. Dec. 18, 2019).

436 United States v. Utah Bur. of Collections, Inc., 15 F.T.C. Ct. Dec. 485 (D. Utah 1981) (permanent injunction; collector to send notice of a consumer's right to require collector to cease communications).

437 *See* § 5.8.7, *infra*.

438 *See* Abdullah v. Ocwen Loan Servicing, Inc., 2014 WL 4851760 (M.D. Ga. Sept. 29, 2014) (fact finder must resolve issue of delivery where consumer submitted evidence that she had mailed cease letter, obtaining presumption of delivery, and debt collector rebutted with evidence that it had regular procedures for logging cease letters); Nichols v. GC Services, L.P., 2009 WL 3488365 (D. Ariz. Oct. 27, 2009) (summary judgment granted to debt collector on consumer's claim that collector failed to cease communication after he sent certified mail § 1692c(c) letter, where collector denied receiving letter and consumer did not receive return receipt; no delivery presumption for certified mail when sender does not receive requested return receipt), *aff'd*, 423 Fed. Appx. 744 (9th Cir. 2011; Bynum v. Cavalry Portfolio Services, L.L.C., 2006 WL 850935 (N.D. Okla. Mar. 30, 2006) (no summary judgment where debt collector denied receipt of consumer's cease letter); § 2.4.2, *supra*.

439 *See* Hagen v. Messerli & Kramer, P.A., 85 F. Supp. 3d 1028 (D. Minn. 2015).

creditor instead of the collection agency, the debt collector must honor it if it is aware of the notice.[440]

Courts have held that a consumer who has requested that a collector cease communications on a prior debt must reiterate the request if contacted by the same collector concerning a different debt.[441] But the consumer's request need not be in sophisticated language.[442]

The request to cease communications or refusal to pay should be reasonably clear.[443] One court held that a refusal to pay until the debt was "verified" permitted the debt collector to resume collections once the debt was verified.[444] Another court held that a written request for verification of the debt without a refusal to pay the debt only invoked the protections of FDCPA § 1692g, but not FDCPA § 1692c(c).[445]

5.8.3 Consumer's Subsequent Waiver of Right to Avoid Collection Contacts

After a consumer sends a cease letter, the consumer's subsequent conduct can waive the right to be free of further collection contacts. A collector can respond to a consumer's inquiry after the consumer's cease letter asking for further information about the debt[446] or for assisting in modifying the debt.[447] Where a consumer requests both cease communication and verification of the debt, the collector may provide a response with the verification information but cannot demand payment.[448] Waiver should only be found where even the least sophisticated consumer would understand that they

440 *See* Taufen v. Messerli & Kramer, P.A., 2014 WL 668019, at *7 (D. Minn. Feb. 19, 2014) ("a reasonable juror could conclude that Defendant, being in possession of the Account files with the 'cease and desist' code, would have known that Plaintiff had indicated that she wished the debt collector to cease all further communication").

441 Hernandez v. Scott, 2011 WL 4626244 (W.D. Tex. Sept. 3, 2011) (attorney's letter to collector requesting that communications cease was sent with regard to another debt rather than the one being collected); Udell v. Kansas Counselors, Inc., 313 F. Supp. 2d 1135 (D. Kan. 2004). *See also* Salazar v. MFP, Inc., 847 F. Supp. 2d 1329 (M.D. Fla. 2012) (no summary judgment where collector sent letter concerning same debt for which plaintiff had previously requested collector to cease communication, but where there were two accounts related to same debt); Atteberry, FTC Informal Staff Letter (Dec. 30, 1977), *discussed at* § 3.4.4.4, *supra*.

442 *See* Nogali v. Transcon Fin., Inc., 2015 WL 12656934 (C.D. Cal. Aug. 12, 2015); Hilgenberg v. Elggren & Peterson, 2015 WL 4077765 (D. Utah July 6, 2015); Hair v. Lazega & Johanson L.L.C., 2014 WL 12571424 (N.D. Ga. July 7, 2014); Barnes v. Seterus, Inc., 2013 WL 6834720 (S.D. Fla. Dec. 26, 2013); Garcia v. Resurgent Capital Services, L.P., 2012 WL 1144239 (N.D. Cal. Apr. 4, 2012); Bishop v. I.C. Sys., Inc., 713 F. Supp. 2d 1361 (M.D. Fla. 2010). *See also* Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769 (7th Cir. 2003) (consumer's statement she could not take debt collection calls at work need not be in precise legal language). *But cf.* Sajdak v. New Penn Fin. L.L.C., 281 F. Supp. 3d 740 (N.D. Ill. Dec. 8, 2017) (notice to mortgage servicer of consumer's bankruptcy did not trigger § 1692c(c)); McCray v. Samuel I. White, P.C., 2017 WL 1196586 (D. Md. Mar. 31, 2017) (consumer's request that foreclosing entities desist from selling her home was not request to cease communication under § 1692c(c)); Shelley v. Ocwen Loan Servicing, L.L.C., 2013 WL 4584649 (S.D. Ind. Aug. 28, 2013) (notice of bankruptcy does not meet requirements of § 1692c(c) notice to debt collector).

443 *See* Horkey v. J.V.D.B. & Assoc., 333 F.3d 769 (7th Cir. 2003); Young v. NPAS, Inc., 361 F. Supp. 3d 1171 (D. Utah Feb. 5, 2019) (genuine issue of material fact); Flores v. Collection Consultants of Cal., 2015 WL 4254032 (C.D. Cal. Mar. 20, 2015) (rejecting collection agency's contention that consumer's letter stating "I will not pay this debt" was ineffective to invoke § 1692c(c) as "ambiguous on its face. The letter noted the specific nature of the dispute, and it clearly articulated the consumer's refusal to pay the entire debt"); Casas v. Midland Credit Mgmt., Inc., 2009 WL 249992 (S.D. Cal. Jan. 30, 2009) (debt collector violated FDCPA by continuing to demand payment of debt which consumer convincingly stated was not hers). *Cf.* Shrestha v. State Credit Adjustment Bur., Inc., 117 F. Supp. 2d 142 (D. Conn. 2000) (when debtor's letters asked collection agency to call and also asked collection agency to stop collection efforts, collector was not asked to cease contacts and did not violate FDCPA by calling debtor).

444 *See* Elwyn v. ARS Nat'l Services, Inc., 2016 WL 6568077 (M.D. Fla. Nov. 4, 2016).

445 *See* Croftcheck v. Accounts Recovery Bur., Inc., 2012 WL 1378683 (M.D. Pa. Apr. 20, 2012).

446 *See* Scheffler v. Gurstel Chargo, P.A., 902 F.3d 757, 762–763 (8th Cir. Aug. 27, 2018); Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006); Hochroth v. Ally Bank, 461 F. Supp. 3d 986, 1006 (D. Haw. 2020) (mortgage servicer could communicate with consumer, even when represented by attorney, because consumer waived any cease communications notification when consumer made multiple, voluntary and self-initiated phone calls to mortgage servicing company and transmitted letter to mortgage servicing company); Lupia v. Medicredit, Inc., 445 F. Supp. 3d 1271 (D. Colo. 2020) (no violation of § 1692c(c) where consumer's letter refusing to pay debt expressly invited collections agency to send written confirmation of its actions to correct or rectify matter, and agency's letter was plainly responsive to consumer's request). *See also* Bender v. Elmore & Throop, P.C., ___ F. Supp. 3d ___, 2021 WL 1215057 (D. Md. 2021) (even though phone call by HOA attorney/debt collector to consumer was precipitated by consumer's letter to HOA about HOA meeting, reasonable jury could find that collector violated cease communication directive sent by consumer by steering her conversation with consumer toward debt).

447 Jay v. Bayview Loan Servicing, L.L.C., 2016 WL 8711730 (M.D. Tenn. Apr. 15, 2016) (factual question whether collector was responding to consumer's requests).

448 *See* Abbott v. Second Round Sub, L.L.C., 2017 WL 4296270 (W.D.N.Y. Sept. 28, 2017) (where consumer's cease letter also requests verification of debt, collector was in its rights to send verification of debt and cover letter requesting additional information to assist it in investigating dispute); Crumel v. Kross, Lieberman & Stone, Inc., 2015 WL 1565432 (E.D.N.C. Apr. 8, 2015); Marino v. Hoganwillig, P.L.L.C., 910 F. Supp. 2d 492 (W.D.N.Y. 2012); Cohen v. Beachside Two-I Homeowners' Ass'n, 2006 WL 1795140 (D. Minn. June 29, 2006) (collection attorneys may verify debt after cease notice and respond to settlement offer made by *pro se* consumer in cease letter), *aff'd*, 272 Fed. Appx. 534 (8th Cir. 2008); Recker v. Cent. Collection Bur., Inc., 2005 WL 2654222, at *4 (S.D. Ind. Oct. 17, 2005) ("Because verification is a statutorily required activity in order to resume collection activities, verification activities could be communications allowed implicitly under exception 1692c(c)(3)."); Johnson v. Equifax Risk Mgmt. Services, 2004 WL 540459 (S.D.N.Y. Mar. 17, 2004) (consumer's written demand to collector that it verifies debt pursuant to § 1692g and otherwise cease all other communication effectively invoked § 1692c(c)'s cease communication remedy and did not improperly attempt to "have it both ways"). *Cf.* Guerrero v. RJM Acquisitions L.L.C., 499 F.3d 926 (9th Cir. 2007) (when consumer's attorney requested verification and cessation of collections, verification response to attorney was not violation § 1692g, although it would have violated § 1692g if addressed to consumer).

were waiving rights to be free from collection contacts.[449] In addition, where the consumer contacts a creditor's collection attorney, that action does not waive rights to be free of contacts from the creditor's collection agency.[450] After receiving the consumer's cease letter, a consumer's subsequent contact solely asking for billing statements does not allow for further collection contacts demanding payment.[451]

5.8.4 Exceptions to Right to Cessation of Contacts

FDCPA § 1692c(c) provides three statutory exceptions to the requirement that a debt collector cease communication after the consumer's cease letter:

- To advise the consumer that the debt collector's further efforts are being terminated;[452]
- To notify the consumer that the debt collector or creditor may invoke certain remedies, such as filing a lawsuit to collect on the debt; and
- To notify the consumer that it intends to invoke such specific remedies.

A debt collector cannot use these exceptions to threaten remedies it has no intention of pursuing. But if there is an intention to pursue them, courts are likely to allow the collector to provide notice of legal remedies such as a garnishment summons[453] or a collection lawsuit.[454] Less clear are collector letters seeking to compromise a claim[455] or providing notice of the acceleration of installment payments.[456] But it is clear that permissible further collector communications may not request payment.[457]

The CFPB has interpreted the written early intervention notice that Truth in Lending requires of mortgage servicers for delinquent mortgage loans to fall within the scope of the second and third statutory exceptions.[458] Truth in Lending requires mortgage servicers to give borrowers who are in default a specific form of notice informing them how to contact servicer staff for loss mitigation reviews.[459]

The Official Interpretations of Regulation F (effective November 30, 2021)[460] also provide that mortgage servicers subject to the FDCPA do not have to comply with a cease request when complying with certain other mortgage servicing requirements, including requirements to provide a consumer with disclosures regarding the forced placement of hazard insurance,[461] a disclosure regarding an adjustable-rate mortgage's initial interest rate adjustment,[462] and a periodic statement for each billing cycle[463] as required by 12 C.F.R. § 1026.41. See CFPB Bulletin 2013-12 (Oct. 15, 2013) providing implementation guidance for certain mortgage servicing rules.[464]

The Federal Trade Commission in 2009 issued an advisory opinion[465] providing for a permitted debt collector contact after receipt of the consumer's cease letter. Where the consumer disputes a debt, the collector can respond to the consumer, despite a cease letter, describing the results of the collection agency's investigation of the dispute or the collector's belief that the communication is frivolous or irrelevant.[466] As discussed in § 3.4.4.3, *supra*, authority to issue advisory opinions was transferred from the FTC to the CFPB. The CFPB has not adopted this or other advisory opinions issued by the FTC.[467] However, as noted in § 5.8.3, *supra*, in specific circumstances

449 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006).

450 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006).

451 Strouse v. Enhanced Recovery Co., L.L.C., 956 F. Supp. 2d 627 (E.D. Pa. 2013).

452 *See* Cohen v. Beachside Two-I Homeowners' Assn., 272 Fed. Appx. 534 (8th Cir. 2008) (letter providing Cohen with a copy of satisfaction and release of lien did not violate FDCPA, because it falls squarely within statutory exception for "advis[ing] the consumer that the debt collector's further efforts are being terminated").

453 Scheffler v. Gurstel Chargo, P.A., 902 F.3d 757 (8th Cir. Aug. 27, 2018).

454 15 U.S.C. § 1692c(c)(3). *See* Zand v. Mandarich Law Group, L.L.P., 2013 WL 4516093 (C.D. Cal. Aug. 19, 2013) (notice of intent to file suit acceptable). *See also* Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) (section 1692c(c) does not stop collector from invoking legal process against consumer); FTC Official Staff Commentary § 805(c)-1 (restrictive definition of "communicate" not appropriate), *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

455 *See* Lewis v. ACB Bus. Services, 135 F.3d 389 (6th Cir. 1998). *See also* Vazquez v. Prof'l Bur. of Collections of Md., Inc., 217 F. Supp. 3d 1348 (M.D. Fla. 2016); Smith v. ARS Nat'l Serv. Inc., 102 F. Supp. 3d 1276 (M.D. Fla. 2015); Flores v. Collection Consultants of Cal., 2015 WL 4254032 (C.D. Cal. Mar. 20, 2015) (dismissing § 1692c(c) claim where collection agency's letter entitled "OFFER TO SETTLE AT HUGE REDUCTION!" fell within specified remedy exception of § 1692c(c)(2); "Indeed, many debtors may benefit from a final bargain offer from a collector, a last-ditch attempt to avoid litigation. Any fears of ongoing harassment are assuaged by the fact that only one final offer could be permissible under this analysis"). *But see* Schwarz v. Portfolio Recovery Assoc., 2016 WL 1169249 (M.D. Fla. Mar. 24, 2016) (rejecting agency's argument that its subsequent communications offering payment options fell within § 1692c(c)'s specific remedies exception, distinguishing *Lewis*); Strouse v. Enhanced Recovery Co., L.L.C., 956 F. Supp. 2d 627 (E.D. Pa. 2013) (follow-up letter came within protection of § 1692c(c)(2), since was effort to compromise claim).

456 *See* Graveling v. Castle Mortg. Co., 631 Fed. Appx. 690 (11th Cir. 2015) (*pro se* consumer).

457 *See* Cruz v. Int'l Collection Corp., 673 F.3d 991 (9th Cir. 2012) (violated § 1692c(c) by sending letters stating erroneous amount of check fees after receiving consumer's "refuse to pay" letter); FTC Official Staff Commentary § 805(c)-2, *discussed at* § 3.4.4.4, *supra*, *reproduced at* Appx. C.2, *infra*.

458 Reg. F Official Interpretations § 6(c)(2)-1. *See also* 81 Fed. Reg. 71,977 (Oct. 19, 2016) (CFPB Interpretive Rule); Appx. B.2.2, *infra*.

459 The early intervention notice is required by 12 C.F.R. § 1024.39(d)(3) and its commentary. *See also* National Consumer Law Center, Mortgage Servicing and Loan Modifications § 3.7.4 (2019), *updated at* www.nclc.org/library.

460 Reg. F Official Interpretations § 6(c)(2)-2.

461 As required by 12 C.F.R. § 1024.37.

462 As required by 12 C.F.R. § 1024.20(d).

463 As required by 12 C.F.R. § 1024.41.

464 Available at https://files.consumerfinance.gov.

465 Anderson, FTC Advisory Opinion (June 23, 2009).

466 Anderson, FTC Advisory Opinion (June 23, 2009).

467 *See* Reg. F. Appx. C (listing only one advisory opinion issued by the CFPB).

courts have allowed limited contact with consumers despite a cease communication notice.

5.8.5 *Debt Referred to Another Collector After Request to Cease Collection*

Where a creditor refers its claim against a consumer to a new collection agency after the consumer has sent a cease-contact letter to a prior collection agency, the creditor may violate a state unfair and deceptive acts and practices (UDAP) statute[468]—unless the particular state's UDAP statute excludes from coverage collection practices.[469] Another theory for pursuing the creditor for facilitating a subsequent debt collector's contact with the consumer may be that the creditor violated the covenant of good faith and fair dealing.[470] A consumer's claim against a creditor may be enhanced if the consumer sends a copy of the consumer's cease collection contacts letter to the creditor to avoid the creditor asserting that it was unaware of the cease-contacts letter.

5.8.7 *State Requirements As to Notice to Consumer of Right to Terminate Collection Contacts*

Some states such as Massachusetts, California, and Colorado have strengthened the consumer's right to request that a debt collector cease communications by requiring debt collectors to provide a state-specific notice in their debt collection letters alerting consumers of their right to terminate collection contacts under their state law.[471]

While these state laws do not provide any greater consumer protection than does the FDCPA with respect to the consumer's ability to stop all collection communications, the timely communication of the right in dunning letters informs consumers of this powerful tool when they may most need it. The required disclosure of an applicable state law regarding a consumer's ability to cease communications does not require a corresponding disclosure of rights under the FDCPA, as the FDCPA does not contain such a requirement.[472]

Collectors have responded to such state requirements by including language such as "The State of Colorado requires that we furnish Colorado residents" with notice of the right to demand a cease to collection contacts. When such a letter is sent to a non-resident of that state (in this example a non-resident of Colorado), the non-resident might believe that they do not have the right to demand a cease of collection contacts. The Seventh Circuit and other courts have found there to be no deception in such letters to non-residents.[473]

5.9 Opt-Out Notice for Electronic Communication, Reg. F § 1006.6(e)

Regulation F (effective November 30, 2021) addresses debt collector emails, texts, and other electronic communications to consumers. In general, except for social media messages,[474] the regulation allows for such communications with certain restrictions—such as at inconvenient times or places, while the consumer is represented by an attorney, employer-provided emails, where there is a cease communication request, and what are reasonable procedures to prevent third parties from viewing emails and text messages.[475]

Regulation F also requires the debt collector to provide notice in any electronic communication to the consumer of the right to opt out of that specific mode of electronic communication directed to that email address or telephone number for text messages, or other electronic-medium address. Reg. F § 1006.6(e) requires notice of the opt-out right for electronic communication, as discussed in this section. Reg. F § 1006.14(h), subject to some limited exceptions, prohibits

468 *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 2.2.2, 6.7.5, 6.10, 6.12 (10th ed. 2021), *updated at* www.nclc.org/library; National Consumer Law Center, Federal Deception Law § 2.3 (4th ed. 2022), *updated at* www.nclc.org/library; § 16.3, *infra*. *But see* Melvin v. Credit Collections, Inc., 2001 WL 34047943, at *3 (W.D. Okla. Apr. 5, 2001) ("Although some states have interpreted their respective consumer protection acts to apply to debt collection activities, there is no authority interpreting Oklahoma's statute in this manner.").

469 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.2.2 (10th ed. 2021), *updated at* www.nclc.org/library.

470 *See also* Taylor v. Mount Oak Manor Homeowners' Ass'n, 11 F. Supp. 2d 753 (D. Md. 1998) (complaint stated FDCPA claim for relief against attorneys and state claim against homeowners' association for breach of duty of fair dealing and good faith). *See generally* U.C.C. §§ 1-203, 2-103(b).

471 *See* Appx. D, *infra*; White v. Goodman, 200 F.3d 1016 (7th Cir. 2000) (inclusion of Colorado disclaimer in notice was not misleading under FDCPA). *Accord* Jackson v. Immediate Credit Recovery, Inc., 2006 WL 3453180 (E.D.N.Y. Nov. 28, 2006) (Colorado state-specific notifications are not so confusing as to violate FDCPA); Luna v. Alliance One Receivables Mgmt., Inc., 2006 WL 357823 (N.D. Cal. Feb. 16, 2006); Morse v. Dun & Bradstreet, Inc., 87 F. Supp. 2d 901 (D. Minn. 2000); Brown v. ACB Bus. Services, 1996 WL 469588 (S.D.N.Y. Aug. 16, 1996). *Contra* Scott v. Enhanced Recovery Corp., 2006 WL 1517755 (E.D.N.Y. May 31, 2006) (denying collector's motion to dismiss; whether notice was deceptive to be determined by fact-finder). *Cf.* Joslin v. Fair Collections & Outsourcing, Inc., 2016 WL 483117 (W.D. Mo. Feb. 5, 2016) (Massachusetts disclaimer could be read as applicable to not only Massachusetts residents); Scott v. Enhanced Recovery, 2006 WL 1517755, at *4 (E.D.N.Y. May 31, 2006).

472 Rocha v. Zwicker & Assoc., 474 F. Supp. 3d 388 (D. Mass. 2020).

473 White v. Goodman, 200 F.3d 1016 (7th Cir. 2000) (Inclusion of Colorado disclaimer in notice was not misleading under FDCPA) *Accord* Jackson v. Immediate Credit Recovery, Inc., 2006 WL 3453180 (E.D.N.Y. Nov. 28, 2006) (Colorado state-specific notifications are not so confusing as to violate FDCPA); Luna v. Alliance One Receivables Mgmt., Inc., 2006 WL 357823 (N.D. Cal. Feb. 16, 2006); Morse v. Dun & Bradstreet, Inc., 87 F. Supp. 2d 901 (D. Minn. 2000); Brown v. ACB Bus. Services, 1996 WL 469588 (S.D.N.Y. Aug. 16, 1996). *Contra* Scott v. Enhanced Recovery Corp., 2006 WL 1517755 (E.D.N.Y. May 31, 2006) (denying collector's motion to dismiss; whether notice was deceptive to be determined by fact-finder). *But see* Joslin v. Fair Collections & Outsourcing, Inc., 2016 WL 483117 (W.D. Mo. Feb. 5, 2016) (Massachusetts disclaimer could be read as applicable to not only Massachusetts residents).

474 *See* § 8.11, *infra*.

475 *See* §§ 5.3 to 5.8, *supra*, § 8.10, *infra*.

a debt collector from communicating or attempting to communicate with a person through a medium of communication, including electronic communication, that the person has requested the collector not to use. This prohibition is discussed at § 6.9, *infra*.[476]

Concerning notice of the right to opt-out of electronic communication, Reg. F requires that each email, text message, or other electronic communication addressed to a consumer must include a clear and conspicuous statement describing a reasonable, simple, and free method to opt out of further electronic communications at that address or telephone number.[477] Clear and conspicuous means readily understandable, so that it must be readily noticeable and legible to consumers, although no minimum type size is mandated.[478]

The method must be free, but free does not literally mean free, but only that the consumer must not pay a fee to the collector. The consumer may still have to pay a fee to a third party, such as the costs of a text message if the consumer's text message plan charges for each text message. But the Reg. F supplemental information indicates "an opt-out method that requires a consumer to use certified mail (which entails the consumer arranging for a special form of delivery that is costlier than ordinary mail and generally unwarranted under the circumstances) is not reasonable and simple."[479]

The method also must be reasonable and simple. Requiring opt out by postal mail, telephone, or visiting a website without providing a link is not adequate.[480]

An example of a clear and conspicuous, reasonable and simple method of opting out of text messages to a specific phone number is a text message stating "Reply STOP to stop texts to this telephone number."[481] An example of a complying opt out of email sent to a specific email address is providing in an email a readily noticeable and legible hyperlink "Click here to opt out of further emails to this email address."[482] Another example is an email that includes readily noticeable and legible text instructions that the consumer can opt out of further emails to that address by replying with the word "stop" in the subject line.[483] The Reg. F supplemental information indicates that "The Bureau expects that most debt collectors will follow these examples when they communicate electronically with consumers."[484]

The opt out method cannot require the consumer to provide additional information beyond the opt-out preferences and the applicable email address or phone number.[485]

Although the Reg. F Official Interpretations provide examples of reasonable and simple opt-out procedures only for emails and texts, the opt-out requirement applies to any means of electronic communication. The Reg. F supplemental information clarifies:

> The language of § 1006.6(e) makes clear that it applies to all electronic communications, regardless of whether that particular form of electronic communication is specified in the rule. This includes direct messaging communications on social media and communications in an application on a website, mobile telephone, or computer. It also includes electronic communications using platforms that allow users to search by name or another identifier rather than by email address or telephone number.[486]

In opting out, the consumer does not have to use the exact terminology suggested by the collector. The Reg. F supplemental information states:

> The Bureau determines that words such as "stop," "unsubscribe," "end," "quit," or "cancel" generally express a consumer's intent to opt out. But these are not the only words that express such an intent. A consumer may respond to a debt collector's electronic communication with an email or text message that makes the consumer's desire to opt out clear without using one of these words.[487]

The request to opt-out applies to texts to a specific telephone number or emails to the specific email address. The opt-out does not apply to communications to other phone numbers or email addresses, or other forms of electronic communication, or other modes of communication from that collector. Opting out of text messages to a phone number does not opt out of collector phone calls to that same number.[488] Of course, under another Regulation F provision, the consumer can opt out of calls to the number or any other medium of collector communication simply by orally or otherwise informing the collector of that fact.[489]

According to a statement in the regulation's supplemental information, an opt out sent to one collector does not bind a subsequent collector.[490] But where the consumer opts out of a specific mode of electronic communication for one debt, it applies to any other debt being collected by the same debt collector.[491]

The collector probably can still raise the bona fide error defense if it continues to send an email or text message while still processing the consumer's request with reasonable promptness.[492] The supplemental information indicates:

> However, depending on the circumstances, a debt collector who unintentionally communicates with a consumer

476 *See also* 85 Fed. Reg. 76,734, 76,796 (Nov. 30, 2020).
477 Reg. F § 1006.6(e).
478 Reg. F Official Interpretations § 6(e)-1 (referencing § 6(d)(4)(ii)(C)-1).
479 *See* 85 Fed. Reg. 76,734, 76,794 (Nov. 30, 2020).
480 Reg. F Official Interpretations § 6(e)-1 (referencing § 6(d)(4)(ii)(C)(4)-1(ii)).
481 Reg. F Official Interpretations § 6(e)-1(i). *See also* Reg. F Official Interpretations § 6(e)-1 (referencing § 6(d)(4)(ii)(C)(4)-1(i)).
482 Reg. F Official Interpretations § 6(e)-1(ii). *See also* Reg. F Official Interpretations § 6(e)-1 (referencing § 6(d)(4)(ii)(C)(4)-1(ii)).
483 Reg. F Official Interpretations § 6(e)-1(iii).
484 *See* 85 Fed. Reg. 76,734, 76,794 (Nov. 30, 2020).
485 Reg. F § 1006.6(e).
486 *See* 85 Fed. Reg. 76,734, 76,795 (Nov. 30, 2020).
487 *See* 85 Fed. Reg. 76,734, 76,796 (Nov. 30, 2020).
488 *See* 85 Fed. Reg. 76,734, 76,795 (Nov. 30, 2020).
489 *See* Reg. F § 1006.14(h), discussed at § 6.9, *infra*.
490 *See* 85 Fed. Reg. 76,734, 76,795, 76,796 (Nov. 30, 2020).
491 *See* 85 Fed. Reg. 76,734, 76,795 (Nov. 30, 2020).
492 *See* § 12.2, *infra*, discussing the bona fide error defense.

electronically after receiving a consumer's request to opt out but before processing the request may have a bona fide error defense to civil liability under FDCPA section 813(c). For example, if a debt collector who schedules an email to be sent to a consumer later receives an opt-out request from the consumer but sends the previously scheduled email to the consumer before the request can be processed (notwithstanding the maintenance of procedures to avoid such an error), the debt collector may have a bona fide error defense to civil liability under FDCPA section 813(c).[493]

5.10 Definition of Consumer for Purposes of FDCPA § 1692c under § 1692c(d)

FDCPA § 1692c(d) and Reg. F § 1006.6(a) define the term "consumer" to include additional parties that are not covered under the definition of consumer in FDCPA § 1692a(3).[494] For purposes of FDCPA § 1692c and Reg. F § 1006.6 only, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), legal guardian, executor, or administrator.[495] A debt collector may not communicate, however, with the parents of a non-minor consumer unless the child gives specific consent, even where the parents have continued to assume overall financial responsibility.[496] When the person is deemed to be a minor is a matter of each state's law.

Regulation F (effective November 30, 2021) also includes within FDCPA § 1692c and Reg. F § 1006.6 the spouse of a deceased consumer,[497] the parent of a deceased minor[498] and certain individuals who have been transferred property secured by a mortgage (such as where ownership is transferred on the borrower's death or divorce or as a gift to the owner's children) as "consumers."[499] The Official Interpretations also include an expansive definition of an executor or administrator.[500]

As a result, these individuals have the same rights as a person allegedly owing on the debt, but only for purposes of FDCPA § 1692c, and not for purposes of other FDCPA provisions. For example under FDCPA § 1692c(a), these individuals cannot be contacted at unusual or inconvenient times or places, contacted if known to be represented by an attorney, or contacted at their workplace when the employer prohibits such contacts.[501] Under FDCPA § 1692c(c), these individuals can send cease communication notices.[502] However, contacting such individuals will not be a violation of FDCPA § 1692c(b), since they are "consumers" for that provision, and not third parties.[503]

493 *See* 85 Fed. Reg. 76,734, 76,795 (Nov. 30, 2020).

494 *See* § 4.4, *supra* (discussing definition of consumer in § 1692a(3)).

495 *See* 15 U.S.C. § 1692c(d); Reg. F § 1006.6(a).

496 *See* Fava v. RRI, Inc., 1997 WL 205336 (N.D.N.Y. Apr. 24, 1997) (alleged consent did not meet statutory requirement that "the consumer's consent for a debt collector to speak to a third party 'be given directly to the debt collector'"); Atteberry, FTC Informal Staff Letter (Feb. 22, 1990), *discussed at* § 3.4.4.4, *supra*. *See also* Estrella v. G L Recovery Group, L.L.C., 2010 WL 679067 (C.D. Cal. Feb. 22, 2010) (allegation that defendant violated § 1692b(2) by calling plaintiff's mother "on more than one occasion" and "stating that Plaintiff owes a debt" stated claim).

497 Reg. F Official interpretations§ 6(a)(1)-1. *See also* FTC, Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts (July 27, 2011), *available at* https://www.ftc.gov.

498 Reg. F Official Interpretations § 6(a)(2)-1. *See also* FTC, Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts (July 27, 2011), *available at* https://www.ftc.gov.

499 Reg. F § 1006.6(a)(5). The precise definition of when such a transferee is a consumer is determined by whether the person is a confirmed successor in interest as defined by Regulation X, 12 C.F.R. § 1024.31, or Regulation Z, 12 C.F.R. § 1026.2(a)(27)(ii).

500 "The terms executor or administrator include the personal representative of the consumer's estate. A personal representative is any person who is authorized to act on behalf of the deceased consumer's estate. Persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's financial assets or other assets of monetary value extrajudicially." Reg. F Official Interpretations § 6(a)(4)-1.

501 *See* §§ 5.4 to 5.6, *supra*.

502 *See* § 5.8, *supra*.

503 *See* § 5.7, *supra*.

Chapter 6 Harassing, Oppressive, or Abusive Conduct; FDCPA § 1692d

6.1 Introduction

FDCPA § 1692d provides a general prohibition on harassing, oppressive, or abusive conduct by debt collectors as well as enumerating six specific examples of prohibited conduct. Regulation F (effective November 30, 2021) restates the general prohibition[1] and the six specific examples.[2] Regulation F also adds an additional example of prohibited conduct[3] and adds significant provisions related to frequency limits on telephone calls and conversations.[4]

This chapter first describes the general prohibition provided by FDCPA § 1692d at § 6.2, *infra*, discusses each of the six examples of prohibited conduct in the FDCPA at §§ 6.3 to 6.8, *infra*, and then discusses the additional example of prohibited conduct added by Regulation F at § 6.9, *infra*. New regulations related to call frequency are discussed at § 6.7.2, *infra*.

6.2 General Prohibition of Harassing, Oppressive, or Abusive Conduct

6.2.1 *General Prohibition and Relation to Specific Prohibitions*

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: [followed by six enumerated provisions][5]

In FDCPA § 1692d, Congress created a general, open-ended prohibition of harassing, oppressive, or abusive conduct in recognition of its inability to foresee every conceivable debt collection method. Regulation F (effective November 30, 2021) generally restated the statute at section 1006.14(a). According to a Senate report: "this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."[6]

Conduct can violate this general standard even when it falls outside the six specific examples listed in the provision's subsections (1) through (6) of the Act and the additional example provided by Reg. F § 1006.14(h).[7] As stated in the Regulation F Official Interpretations:

> The general prohibition covers the specific conduct described in § 1006.14(b) through (h), as well as any conduct by the debt collector that is not specifically prohibited by § 1006.14(b) through (h) but the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.[8]

The Regulation F Official Interpretations also clarify that violations of the general prohibition can occur regardless of the communication media that the debt collector uses.[9] For example, the Official Interpretations explain that a debt collector that sends "numerous, unsolicited text messages per day for several consecutive days," but does not communicate

1 Regulation F (12 C.F.R. Part 1006, hereinafter "Reg. F") § 1006.14(a).
2 Reg. F §§ 1006.14(b) to (g).
3 Reg. F § 1006.14(h).
4 Reg. F § 1006.14(b).
5 15 U.S.C. § 1692d.
6 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted at* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*. *See* Currier v. First Resolution Inv. Corp., 762 F.3d 529, 533 (6th Cir. 2014); Appx. E.2.3, *infra*.
7 *See, e.g.*, Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507, 1516 (9th Cir. 1994) (consumer stated claim even though "conduct alleged . . . does not fall neatly within" examples specified in § 1692d; alleged that collector improperly threatened to garnish wages and continued to call employer after being asked not to call); Jeter v. Credit Bur., Inc., 760 F.2d 1168, 1178 (11th Cir. 1985) ("§ 1692d is explicitly not limited to the conduct proscribed by subsections (1)–(6)"); Robinson v. Managed Accounts Receivables Corp., 654 F. Supp. 2d 1051 (C.D. Cal. 2009) (motion to dismiss defeated; complaint stated claim for violation of § 1692d even though conduct not specifically listed; plaintiff alleged she was told she had written bad check, was about to be sued on it, and that she could not be sent written validation of debt, which court inferred to be untrue); Riley v. Giguiere, 631 F. Supp. 2d 1295, 1309 (E.D. Cal. 2009) (jury could find violation of § 1692d for wrongly "filing an abstract of judgment and causing it to be recorded and filing an opposition to plaintiff's motion to set aside the default," even though conduct not listed in subsections (1) to (6)); Cirkot v. Diversified Sys., Inc., 839 F. Supp. 941, 947 (D. Conn. 1993) (collector's handwritten note saying "My special agents will remain in your area to *collect. Believe me.*" clearly violated § 1692d, even though conduct was not among examples listed in subsections (1) to (6)); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980, 981–982 (N.D. Ill. 1979) ("Plaintiff does not allege conduct which falls within one of the specific prohibitions contained in § 1692d, but we find that defendant's letter to plaintiff does violate this general standard."); FTC Official Staff Commentary § 806-1 ("Prohibited actions are not limited to the six subsections listed as examples of activities that violate this provision."), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.
8 Reg. F Official Interpretations § 14(a)-1. *See also* H.R. Rep. No. 131, 95th Cong., 1st Sess. 13 (1977), *available as companion material to this treatise* ("This section provides a general rule prohibiting any debt collector from harassing or intimidating any person in connection with the collection of any debt or the threat or attempt to do so. Six examples of what constitutes harassment or intimidation are enumerated. These examples do not limit the general application of this rule against harassment or intimidation.").
9 Reg. F Official Interpretations § 14(a)-1 ("Such conduct can occur regardless of the communication media the debt collector uses, including in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, social media, or other electronic media, even if not specifically addressed by § 1006.14(b) through (h).").

or attempt to communicate via other communication media, would likely have a natural consequence of harassing, oppressing, or abusing the consumer, and therefore violate the general prohibition, even though the debt collector's conduct does not violate the specific prohibitions in Reg. F. § 1006.14(b) through (h).[10]

Moreover, the Regulation F Official Interpretations also clarify that a violation of the general prohibition may be the result of the "cumulative effect of the debt collector's conduct through any communication medium the debt collector uses, including in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, social media, or other electronic media."[11] In other words, conduct that would not violate either the general or specific prohibitions on its own can still violate the general prohibition when "evaluated cumulatively with other conduct."[12] For example, where a debt collector places seven unanswered telephone calls in seven days and also sends multiple additional unsolicited emails to the consumer over that seven day period, the CFPB explains that the debt collector has likely violated the general prohibition, because the cumulative effect of the calls and text messages is likely harassment, even though neither the number of calls nor the number of emails would violate the general or specific prohibitions on their own.[13]

Separately, the CFPB explained in its discussion of Regulation F that:

> [Section] 1006.14(a) applies even if a consumer does not opt out of receiving electronic debt collection communications or communication attempts pursuant to the instructions in § 1006.6(e) or exercise the right to request that the debt collector stop using a particular communication medium under § 1006.14(h).[14]

In other words, debt collectors can still be found in violation of the general prohibition, even if the consumer did not specifically notify the debt collector that it should stop communication through a particular communication medium.

While the general prohibition found in FDCPA § 1692d is not limited to subsections (1) through (6) and Reg. F § 1006.14(h),[15] evidence of violation of a specific prohibition can be indicative of violation of the general prohibition.[16]

Generally, consumer litigants should allege, where applicable, a violation of one of the more specific prohibitions, because their specificity helps courts find a violation if the conduct falls within the specific provision. Conversely, it is also prudent to allege a violation of the general standard in case a court may find the conduct outside the scope of the specific provisions pleaded, or find that the cumulative effective of the conduct violates the general prohibition as described in Regulation F Official Interpretations 14(a)-2.

It is also prudent to allege violations of other FDCPA provisions, such as section 1692e (deception)[17] and section 1692f (unfairness),[18] since section 1692d violations can also violate these other provisions,[19] and a court may find a violation of these other sections even when not finding a section 1692d violation.[20] In addition, a consumer subject to egregious debt collection misconduct should also consider a claim for intentional infliction of emotional distress or invasion of privacy, particularly when those claims may provide punitive damages.[21]

6.2.2 FDCPA § 1692d Coverage

While most FDCPA provisions protect "consumers" ("any natural person obligated or allegedly obligated to pay any debt"),[22] section 1692d protects "any person."[23] Regulation F (effective November 30, 2021) defines "person" to include

10 Reg. F Official Interpretations § 14(a)-1(i).
11 Reg. F Official Interpretations § 14(a)-2.
12 Reg. F Official Interpretations § 14(a)-2.
13 Reg. F Official Interpretations § 14(a)-2(i).
14 85 Fed. Reg. 76,734 at 76,801 (Nov. 30, 2020).
15 *See* § 6.9, *infra*.
16 *See* Penny v. Williams & Fudge, Inc., 840 F. Supp. 2d 1314, 1320 (M.D. Fla. 2012) (rejecting defendant's contention "that the Court erred in allowing evidence of violations of specific sections to be considered by the jury with respect to the general claim that Defendant violated the 'catch all' provision of Section 1692d," following consumer's successful jury verdict (emphasis in original)).
17 *See* Ch. 7, *infra*.
18 *See* Ch. 8, *infra*.
19 *See* Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507, 1516 (9th Cir. 1994) ("it is not unusual for an action to violate more than one FDCPA provision"; citing 53 Fed. Reg. at 50,109).
20 *See, e.g.*, Finch v. Slochowsky & Slochowsky, L.L.P., 2020 WL 5848616 (E.D.N.Y. Sept. 30, 2020) (dismissing § 1692d claim concerning filing lawsuit; not § 1692d violation, but stated claims under §§ 1692e and 1692f); Zuniga v. Jacobs, 2020 WL 168106 (S.D. Fla. Jan. 13, 2020) (mere threat of taking legal action not § 1692(d) violation, but stated § 1692e(5) claim); Newman v. Encore Capital Grp., 2017 WL 3479510 (E.D. Mich. Aug. 14, 2017) (dismissing § 1692d claim, but not §§ 1692e and 1692f claims involving debt buyer's robosigned/fraudulently notarized statement of ownership with its state court debt collection suit); Williams v. Receivable Recovery Services, L.L.C., 2017 WL 8316935 (N.D. Ga. July 27, 2017) (falsely threatening litigation does not violate § 1692d, but plaintiff stated § 1692e(5) and (10) claims); Winehouse v. GC Services L.P., 2017 WL 2455075 (E.D.N.Y. June 6, 2017) (leaving one message on answering machine stated claim for violation of §§ 1692d(6) and 1692e(11), but not § 1692d); Scott v. Greenberg, 2017 WL 1214441, at *13 (E.D.N.Y. Mar. 31, 2017) (litigation abuses did not violate § 1692d, but stated claim for §§ 1692e and 1692f); Ruvalcaba v. Ocwen Loan Servicing, L.L.C., 2016 WL 7178855 (S.D. Cal. Dec. 9, 2016) (mortgage bills could be misleading, but no § 1692d violation); Reed v. EOS CCA, 2016 WL 1639121 (S.D. Ind. Apr. 26, 2016) (summary judgment for consumer under §§ 1692e and 1692f, but not § 1692d); Leahy-Fernandez v. Bayview Loan Servicing, L.L.C., 159 F. Supp. 3d 1294 (M.D. Fla. 2016) (billing for discharged debt not abusive, but may violate §§ 1692c(a)(2) and 1692e).
21 *See* §§ 15.2, 15.3, *infra*.
22 *See* 15 U.S.C. § 1692a(3). *See also* § 4.4, *supra*.

A provision similar to this was present in each of the bills leading to the Act. The provision in the initial bill expressly covered "implicit" threats, but protected harm only to the "person." H.R. 10191, 94th Cong., 1st Sess. § 802(1) (1975). Later provisions were identical to the one in the Act except that "threats" were not expressly covered, e.g., H.R. 11969, 94th Cong., 2d Sess. § 805(1) (1976); S. 918, 95th Cong., 1st Sess. § 805(1) (1977), until the Senate subcommittee included them. Senate Subcomm. Print No. 1 at § 806(1).

23 15 U.S.C. § 1692d. *See also* Reg. F § 1006.14(a).

"natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies."[24] Thus, FDCPA § 1692d has a broad application, including those not allegedly obligated for a debt, such as friends, neighbors, fellow employees, family members, and persons mistakenly believed to be the consumer.[25]

Unlike certain FDCPA provisions, there is no requirement that the conduct involve a communication or other conduct directed to a person, only that "the natural consequence" of the conduct is to harass, oppress, or abuse a person. But the conduct must be by a debt collector and the conduct must be "in connection with debt collection."[26] Debt collector is defined at § 4.7, *supra*, and "connection with collection of a debt" at § 4.3, *supra*.

6.2.3 *Harass, Oppress, or Abuse Defined*

FDCPA § 1692d prohibits "conduct the natural consequence of which is to harass, oppress, or abuse any person."[27] FDCPA § 1692d's subsections (1) through (6) and Reg. F § 1006.14(h) provide a non-exclusive list examples of conduct that violates section 1692d,[28] but neither the FDCPA nor Regulation F (effective November 30, 2021) define the terms "harass," "oppress," or "abuse."

At the time the Act was enacted, a Congressman stated that the dictionary should be used to define these and other terms in the Act.[29] According to one popular dictionary, the term "harass" means "to annoy persistently."[30] "Oppress" means "to crush or burden by abuse of power or authority," and "to burden spiritually or mentally, weigh heavily upon."[31] The term "abuse" means "to put to a wrong or improper use," "to use or treat so as to injure or damage," and "to attack in words."[32]

Context is also important. One judge noted, "Statements made and language used in a telephone contact can be and often are more oppressive than the same communication made in a face to face situation."[33]

6.2.4 *Least Sophisticated and Susceptible Consumer Standards*

As explained in § 3.2.1.3, *supra*, courts generally use the "least sophisticated consumer" standard when evaluating FDCPA claims under section 1692e and some other sections of the FDCPA.[34] The Eleventh Circuit and certain district courts in other circuits instead use an analogous "more susceptible" consumer standard for FDCPA § 1692d claims.[35] As the Eleventh Circuit explained in *Jeter v. Credit Bureau, Inc.*:[36]

> [T]he consumer protective purposes of the FDCPA require us to adopt an analogous standard for violations of § 1692d. Thus, we hold that claims under § 1692d should be viewed from the perspective of a consumer whose circumstances makes him relatively more susceptible to harassment, oppression, or abuse.

In applying either of these standards, the court does not consider whether the particular plaintiff feels harassed, oppressed, or abused, but whether the natural consequence of the conduct would harass, oppress, or abuse a susceptible consumer.[37] Nor

24 Reg. F § 1006.2(k), *discussed at* § 4.10, *supra*. *See also* 1 U.S.C. 1 (defining person as including "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

25 *See* Muir v. Navy Fed. Credit Union, 529 F.3d 1100 (D.C. Cir. 2008) (son's nest egg taken from joint account with father for the father's old debt; son protected); Cable v. Allied Interstate, Inc., 2012 WL 5966542 (M.D. Pa. Nov. 29, 2012); Kaschak v. Raritan Valley Collection Agency, 1989 WL 255498 (D.N.J. May 22, 1989) (debtor's executrix had claim for harassment and abuse she suffered due to collection letters to debtor). *See also* § 11.4.3, *infra*. *But cf.* Kleczy v. First Fed. Credit Control, Inc., 486 N.E.2d 204 (Ohio Ct. App. 1984) (consumer lacks standing to recover for alleged abusive phone calls received by his spouse).

26 *See* Cox v. Richland Holdings, Inc., 2019 WL 10248775, at *4–5 (D. Nev. Mar. 30, 2019) (animating purpose of collector's statement that consumer should "get the fuck out" of her office was to get consumer to leave, not pay, and therefore the statement was not made "in connection with the collection of a debt").

27 15 U.S.C. § 1692d. *See also* Reg. F § 1006.14(a).

28 *See* § 6.2.1, *supra*.

29 122 Cong. Rec. H7792 (daily ed. July 28, 1976) (remarks of Rep. Wylie) ("[w]e have talked about threats and harassment in the bill. They are not necessarily words of vagueness. All we have to do is go to the dictionary to find out that 'harass' means to worry and impede by repeated raids; exhaust, fatigue, to annoy continuously. Harass is to harass in a manner to injure, grieve or afflict; to cause to suffer because of belief; to annoy with persistent or urgent approaches, to pester"); Rozga, FTC Informal Staff Letter (Sept. 5, 1978); Kolarov, FTC Informal Staff Letter (Dec. 6, 1977).

30 Merriam-Webster.com (2021), https://www.merriam-webster.com.

31 Merriam-Webster.com (2021), https://www.merriam-webster.com.

32 Merriam-Webster.com (2021), https://www.merriam-webster.com.

33 Bingham v. Collection Bur., Inc., 505 F. Supp. 864, 873 (D.N.D. 1981).

34 As discussed in § 3.2.1.2, *supra*, some courts use an "unsophisticated consumer" standard instead of the "least sophisticated consumer standard." We use least sophisticated consumer here to refer to both standards.

35 *See, e.g.*, Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1305 (11th Cir. 2015); Hancock v. Legal Recovery Law Offices, Inc., 2015 WL 12532470, at *4 (S.D. Cal. June 23, 2015); Woods v. Oxford Law, L.L.C., 2015 WL 778778 (S.D. W. Va. Feb. 24, 2015); Johnson v. BAC Home Loans Servicing, L.P., 867 F. Supp. 2d 766, 779 (E.D.N.C. 2011) (citing *Jeter*); Hosseinzadeh v. M.R.S. Assoc., Inc., 387 F. Supp. 2d 1104, 1110 (C.D. Cal. 2005); Joseph v. J.J. Mac Intyre Companies, L.L.C., 238 F. Supp. 2d 1158, 1168 (N.D. Cal. 2002) (equating least sophisticated consumer and more susceptible consumer standards); Bryant v. Bonded Account Serv./Check Recovery, Inc., 208 F.R.D. 251, 255 (D. Minn. 2000) (following *Jeter*); Dorsey v. Morgan, 760 F. Supp. 509, 515 (D. Md. 1991) (quoting *Jeter*). *Cf.* Brown v. Hosto & Buchan, P.L.L.C., 748 F. Supp. 2d 847, 852 (W.D. Tenn. 2010) (equating least sophisticated consumer and more susceptible consumer standards; citing *Jeter*); Bieber v. Associated Collection Services, Inc., 631 F. Supp. 1410, 1416 (D. Kan. 1986) (citing *Jeter*).

36 760 F.2d 1168, 1179 (11th Cir. 1985).

37 Jeter v. Credit Bur., Inc., 760 F.2d 1168,1179 (11th Cir. 1985); Healey v. Trans Union L.L.C., 2011 WL 1900149, at *7 (W.D. Wash. May 18, 2011) ("subjective feeling of harassment is not actionable under the FDCPA"); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980, 982 (N.D. Ill. 1979) ("actual effect on the recipient is irrelevant"). *See also* Owens v. JP Morgan Chase Bank, 2020 WL 1888857, at *11

is there a requirement that the debt collector intend or even know of such consequence, as long as the conduct's natural consequence would be to harass, oppress, or abuse.[38]

6.2.5 Abusive Language and Repetitive Calling

FDCPA § 1692d(2) and Reg. F § 1006.14(d) (effective November 30, 2021) prohibit the use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.[39] Language not meeting this standard can still violate FDCPA § 1692d and Reg. F § 1006.14(a)'s general prohibition of conduct the natural consequence of which is to harass, oppress, or abuse.

Racial slurs, belligerent threats, and terms like liar, deadbeat, and crook may all violate the general prohibition.[40] FDCPA § 1692d was violated by a letter that "implies that plaintiff removes her head when she receives letters from the defendant, that she ignores her mail and her bills, and lacks the common sense to handle her financial matters properly."[41]

Rude and obnoxious language can be a violation,[42] such as where a collector told a woman that she should not have children if she could not afford them: "any remark of that tenor in a telephonic collection contact is egregious and . . . the remark was harassment."[43]

Threatening to charge a late fee, despite knowing the fee was unlawful, also was found "a good candidate" for a FDCPA § 1692d violation.[44] Threatening litigation over payment for an unconscionable contract after the consumer has informed the collector that they would not pay the debt violates the Act.[45]

Not every threat[46] or rude comment[47] is actionable. A single letter containing no threats or profane language did not violate FDCPA § 1692d.[48] Neither did asking the consumers whether they were married and how many dependents they had.[49] No FDCPA § 1692d violation was found by a letter warning that a collection lawsuit "may cause you embarrassment, inconvenience and further expense."[50] A court even held no FDCPA § 1692d violation where the collector said "that they were going to get their money one way or another; . . . yell[ing] that Georgia is a garnishable state, . . . ask[ing] what was her problem now because she was making the same salary when she was paying her bills" and hanged up on her.[51]

Calling consumers at their place of employment despite prior warnings that they could not accept such calls can violate FDCPA § 1692d.[52] But sending monthly billing statements regarding a bankruptcy-discharged debt did not constitute harassment.[53]

Repetitive calling can violate FDCPA § 1692d(5) and Reg. F § 1006.14(b) if done with an intent to annoy, abuse, or harass, but the same conduct could violate the FDCPA § 1692d general prohibition, which does not require intent, but only the natural consequence that it annoy, abuse, or harass. Section 6.7.3, *infra*, considers whether such a general FDCPA § 1692d claim can proceed without a showing of intent. In addition, Regulation F establishes a call frequency standard, where a collector exceeding that standard is considered to be presumed to be calling so frequently with an intent to annoy, abuse, or harass.[54]

6.2.6 Contacting Third Parties

While other FDCPA provisions more specifically regulate a collector's third-party communications,[55] such communications also may implicate the general prohibition in section 1692d and Reg. F § 1006.14(a). The following conduct may violate FDCPA § 1692d:

- Harassing and abusive telephone calls to the consumer's relatives, including the use of racial slurs, belligerent threats, and terms like liar, deadbeat, and crook;[56]

(W.D. Pa. Apr. 16, 2020) (if homeowners "actually felt threatened and embarrassed" by placement of door hangers by property inspector such was not the "natural consequence" of conduct described).

38 Jeter v. Credit Bur., Inc., 760 F.2d 1168 (11th Cir. 1985).

39 *See* § 6.4, *infra*.

40 United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370, 375–376 (N.D. Tex. 1986), *aff'd as modified*, 823 F.2d 880 (5th Cir. 1987).

41 Harvey v. United Adjusters, 509 F. Supp. 1218, 1221 (D. Or. 1981).

42 Sparks v. Phillips & Cohen Assoc., 641 F. Supp. 2d 1234 (S.D. Ala. 2008).

43 Bingham v. Collection Bur., Inc., 505 F. Supp. 864, 874 (D.N.D. 1981).

44 Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 778 (7th Cir. 2007).

45 Antkowiak v. TaxMasters, 779 F. Supp. 2d 434 (E.D. Pa. Mar. 17, 2011), *vacated on other grounds*, 455 Fed. Appx. 156 (3d Cir. 2011).

46 *See* Pollard v. Law Office of Mandy L. Spaulding, 967 F. Supp. 2d 470 (D. Mass. 2013) (mere threat of litigation not abusive); Dorsey v. Morgan, 760 F. Supp. 509 (D. Md. 1991) (attorney's claim that he would seek costs and attorney fees if legal action is filed was neither false nor oppressive).

47 *See* Gallagher v. Gurstel, Staloch & Chargo, P.A., 645 F. Supp. 2d 795 (D. Minn. 2009) (single laugh in phone call did not violate § 1692d).

48 Jennings v. Dynamic Recovery Solutions L.L.C., 441 F. Supp. 3d 106 (D. Md. 2020).

49 *See* Hoover v. Monarch Recovery Mgmt., Inc., 888 F. Supp. 2d 589 (E.D. Pa. 2012).

50 Jeter v. Credit Bur., Inc., 760 F.2d 1168 at 1179 (11th Cir. 1985). *See also* Zuniga v. Jacobs, 2020 WL 168106 (S.D. Fla. Jan. 13, 2020) (mere threat of taking legal action did not rise to level of § 1692(d) violation); Williams v. Receivable Recovery Services, L.L.C., 2017 WL 8316935 (N.D. Ga. July 27, 2017) (falsely threatening litigation not harassing, oppressive, or abusive means of debt collection).

51 Thomas v. LDG Fin. Services, Inc., 463 F. Supp. 2d 1370, 1373 (N.D. Ga. 2006).

52 *See, e.g.*, Pittman v. J.J. Mac Intyre Co., 969 F. Supp. 609 (D. Nev. 1997) (calling at work despite prior warnings that consumer could not take calls stated claim for violation of § 1692d).

53 *See* Leahy-Fernandez v. Bayview Loan Servicing, L.L.C., 159 F. Supp. 3d 1294 (M.D. Fla. 2016) (but may violate §§ 1692c(a)(2) and 1692e).

54 *See* § 6.7.2, *infra*.

55 *See* Ch. 5, *supra*.

56 United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370, 375–376 (N.D. Tex. 1986), *aff'd as modified*, 823 F.2d 880 (5th Cir. 1987).

- Numerous calls to a non-debtor wife, mother-in-law, and daughter, and various threats that eventually led the wife to pay a debt she did not owe;[57]
- Thirty-three calls in one month to the debtor and his wife; threats to call his employer, neighbors, and other family; continuing to call after being told that the debtor would not pay and his wife said she did not owe the debt and was sick.[58]

But not every third-party contact, even ones violating other FDCPA provisions, violates section 1692d.[59]

6.2.7 Legal Proceedings and Postjudgment Conduct

Litigation misconduct is within the FDCPA's scope,[60] but consumer litigants are often unsuccessful in challenging such conduct under section 1692d,[61] and are more likely to succeed alleging violations of section 1692e (deception) or section 1692f (unfairness).[62] Nevertheless, litigation conduct can in some cases be egregious enough to violate FDCPA § 1692d, such as where the consumer alleged that a debt buyer filed a "bogus" lawsuit to collect a debt that the plaintiff did not owe, with no intention of proving the case.[63]

Filing a suit on a debt where the collector knows the debt had been discharged in bankruptcy can also violate FDCPA § 1692d.[64] A section 1692d claim was also stated where a collector intentionally waited until the day of the hearing, after the consumer was prepared and ready to appear, to request a continuance to procure a witness it had no intention of procuring.[65]

As with litigation misconduct, claims under FDCPA §§ 1692e or 1692f are more likely to succeed for suits based on improper conduct in the context of postjudgment remedies, but with the right facts a section 1692d claim can proceed. For example, a court found that the consumer stated a section 1692d claim where a collector pursued judgment to confirm an arbitration award after being told the consumer had not been notified of the arbitration and the debt was the result of identity theft.[66]

57 Russell v. Goldman Roth Acquisitions, L.L.C., 847 F. Supp. 2d 994, 1003 (W.D. Mich. 2012). *See also* Sparks v. Phillips & Cohen Assoc., Ltd., 641 F. Supp. 2d 1234 (S.D. Ala. 2008).

58 Winberry v. United Collection Bur., Inc., 697 F. Supp. 2d 1279 (M.D. Ala. 2010). *See also* Swearingen v. Portfolio Recovery Assoc., 892 F. Supp. 2d 987 (N.D. Ill. 2012) (§ 1692d claim stated where collector repeatedly called non-debtor husband's cell phone, even after he informed representatives that it was his personal cell phone, that his wife could not be reached by calling it, he requested that collector provide him with an address for him to request that calls stop to no avail, and collector used "extremely loud buzzing sound" in some phone calls with him).

59 Davis. v. Phelan Hallinan & Diamond P.C., 687 Fed. Appx. 140 (3d Cir. 2017) (mailing sealed envelopes intended for consumer to two wrong addresses); Pearce v. Rapid Check Collection, 738 F. Supp. 334 (D.S.D. 1990) (letter to consumer's credit union threatening suit to collect bad check, but no other threats).

60 *See* § 4.3.3, *supra*, § 7.4.10, *infra*.

61 *See, e.g.*, Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814 (8th Cir. 2012) (suing person found not liable on debt); Gionis v. Javitch, Block & Rathbone, 238 Fed. Appx. 24 (6th Cir. 2007) (claiming attorney fees to which not entitled); Harvey v. Great Seneca Fin. Corp., 453 F.3d 324, 330–331 (6th Cir. 2006) (filing of debt collection lawsuit without immediate means of proving debt); Brake v. Slochowsky & Slochowsky, L.L.P., 504 F. Supp. 3d 103, 112–113 (E.D.N.Y. 2020) (consumer wrongfully sued twice); Finch v. Slochowsky & Slochowsky, L.L.P., 2020 WL 5848616 (E.D.N.Y. Sept. 30, 2020) ("filing of a lawsuit to collect a debt—even if the lawsuit is meritless—is not properly understood as 'conduct the natural consequence of which is to harass, oppress, or abuse any person'"); Cheslek v. Asset Acceptance Capital Corp., 2017 WL 7370983 (W.D. Mich. Dec. 22, 2017) (false affidavit); Chenault v. Credit Corp. Solutions, Inc., 2017 WL 5971727 (E.D. Pa. Dec. 1, 2017) (filing lawsuit without immediate means to prove case); Newman v. Encore Capital Grp., 2017 WL 3479510 (E.D. Mich. Aug. 14, 2017) (debt buyer's robosigned/fraudulently notarized statement of ownership); Delia v. Ditech Fin. L.L.C., 2017 WL 2379819 (M.D. Fla. June 1, 2017) (failing to revert title to homeowner after homeowner prevailed in foreclosure action); Scott v. Greenberg, 2017 WL 1214441, at *13 (E.D.N.Y. Mar. 31, 2017) (false affidavit of service, seeking payments already paid, and attorney fees not owed); Gonzalez v. Law Office of Allen Robert King, 195 F. Supp. 3d 1118 (C.D. Cal. 2016) (landlord's attorney procured default judgment after tenant's attorney had been assured that, if tenant vacated residence, landlord would dismiss unlawful detainer action); May v. Consumer Adjustment Co., 2015 WL 4506688 (E.D. Mo. July 24, 2015) (collection agency collecting interest without disclosing that interest might accrue); Thompson v. Resurgent Capital Serv., L.P., 2015 WL 12681653 (N.D. Ala. July 17, 2015) (debt was "out of statute"); Beeler-Lopez v. Dodeka, L.L.C., 711 F. Supp. 2d 679 (E.D. Tex. 2010) (bringing collection suit in forum violating § 1692*i*); Hartman v. Asset Acceptance Corp., 467 F. Supp. 2d 769 (S.D. Ohio 2004) (affidavit misrepresentation); *In re* Humes, 496 B.R. 557 (Bankr. E.D. Ark. 2013) (lulling consumer into believing that he need not file answer to state court complaint, and then procuring default judgment against him).

62 *See* Finch v. Slochowsky & Slochowsky, L.L.P., 2020 WL 5848616 (E.D.N.Y. Sept. 30, 2020) (filing meritless lawsuit did not violate § 1692d, but stated claims under §§ 1692e and 1692f); Newman v. Encore Capital Grp., 2017 WL 3479510 (E.D. Mich. Aug. 14, 2017) (dismissing § 1692d claim, but not §§ 1692e and 1692f claims involving debt buyer's robosigned/fraudulently notarized statement of ownership); Scott v. Greenberg, 2017 WL 1214441, at *13 (E.D.N.Y. Mar. 31, 2017) (false affidavit of service, seeking payments already paid, and attorney fees not owed not a 1692d violation, but stated claim under §§ 1692e and 1692f); Thompson v. Resurgent Capital Serv., L.P., 2015 WL 12681653 (N.D. Ala. July 17, 2015) (allegation that debt was "out of statute" stated claim under §§ 1692e(2)(A), 1692e(10), and 1692f, but not under § 1692d); Hartman v. Asset Acceptance Corp., 467 F. Supp. 2d 769 (S.D. Ohio 2004) (affidavit misrepresentation violated §§ 1692e(2) and 1692e(12), but not § 1692d); *In re* Humes, 496 B.R. 557 (Bankr. E.D. Ark. 2013) (lulling consumer into believing that he need not file answer to state court complaint, and then procuring default judgment against him was deceptive and unfair, but not abusive).

63 *See* Woychesin v. Midland Funding, L.L.C., 2020 WL 5893815 (N.D. Ala. Oct. 5, 2020). See also Dial v. Midland Funding, L.L.C., 2015 WL 751690 (N.D. Ala. Feb. 23, 2015) (knowingly filing lawsuit that was baseless at the time (and where, even if it was meritorious, debt buyer had no intention of proving case); Hamilton v. Midland Funding, L.L.C., 2015 WL 5084234 (N.D. Ala. Aug. 27, 2015); Taylor v. Midland Funding, L.L.C., 2015 WL 4670314 (N.D. Ala. Aug. 6, 2015).

64 *In re* Gunter, 334 B.R. 900 (Bankr. S.D. Ohio 2005).

65 McClellan v. Patenaude & Felix, A.P.C., 2021 WL 1060559 (W.D. Pa. Mar. 19, 2021).

66 Eads v. Wolpoff & Abramson, L.L.P., 538 F. Supp. 2d 981 (W.D. Tex. 2008).

But the Eleventh Circuit found that a collection lawyer's sworn filing opposing the consumer's claim of exemption from wage garnishment did not violate FDCPA § 1692d, because it is not enough that the collector cause "embarrassment, inconvenience, and further expense . . . Rather, the debt collector's conduct must manifest "a tone of intimidation . . . and no such tone emanates from Appellees' [debt collector's] sworn reply here."[67]

The Tenth Circuit even found no abuse when an unemployed consumer was arrested pursuant to a bench warrant for failing to appear at a hearing in aid of execution and his bail was paid to the judgment creditor. The hearing was the fifth requested in nine months, and the previous four had been dismissed because his unemployment benefits were exempt, but the debt collector had not acted unlawfully.[68]

6.3 Use or Threat of Use of Violence or Criminal Means; FDCPA § 1692d(1)

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property or any person.[69]

The threat or use of violence or criminal means to harm the person physically, or harm the person's reputation or property is actionable under FDCPA § 1692d(1). Regulation F (effective November 30, 2021) restates this language at Reg. F § 1006.14(c).

Since the prohibition includes the threat or use of "criminal means," this provision provides a private cause of action and federal jurisdiction for actual or threatened violations of federal, state, and local criminal laws (many of which are seldom enforced) where the criminal violation harms or could harm the person physically or the person's reputation or property, as long as the conduct occurs in connection with the collection of a debt.

For example, FDCPA § 1692d(1) should apply to threats or violations of federal criminal laws prohibiting misuse of the mails[70] or telephone,[71] collection of illegal charges,[72] or violations of the criminal provisions of the Consumer Credit Protection Act.[73] State criminal laws may also provide the basis for an FDCPA § 1692d(1) claim.[74] A collector who threatens to visit the consumer personally might be implying the use of violence, which can be criminal.[75]

FDCPA § 1692d applies to conduct against "any person," so conduct actionable under section 1692d(1) does not have to be directed at the individual allegedly owing the debt.[76] It can apply to conduct threatening harm or harming the consumer's children, friends, and other third parties. The language limiting the section to conduct that harms or threatens to harm the "physical" person might exclude threats to inflict psychological harm from coverage, but a threat of physical harm that causes the victim emotional distress should be actionable.[77]

6.4 Obscene, Profane, or Abusive Language; FDCPA § 1692d(2)

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.[78]

FDCPA § 1692d(2) has two prohibitions—the use of obscene or profane language and any language the natural consequence of which is to abuse the person hearing or reading the language—as long as either communication is by a collector in connection with collection of a debt. Regulation F (effective November 30, 2021) restates this language at section 1006.14(d).

During the legislative process, this provision underwent only minor alterations.[79] The prohibition against obscene language was dropped, then reinstated.[80] One member of Congress stated that he considered the hypothetical question, "Why the hell don't you pay your debts?" to be profane or abusive.[81]

Because this prohibition directly challenges the content of speech, it may raise First Amendment challenges. But the provision should be found within the commercial speech standards allowed by the First Amendment.[82]

The Eleventh Circuit, examined the provision's restriction on obscene and profane language:

67 Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1305 (11th Cir. 2015). *See also* Martinez v. Eltman Law, P.C., 444 F. Supp. 3d 748, 755 (N.D. Tex. 2020) (garnishing wrong person not § 1692d violation).

68 Davis v. Nebraska Furniture Mart, Inc., 567 Fed. Appx. 640 (10th Cir. 2014).

69 15 U.S.C. § 1692d(1). *See also* Reg. F § 1006.14(c); Appx. E.2.3.1, *infra*.

70 *See* § 14.1, *infra*.

71 *See* § 14.3, *infra*.

72 *See* § 14.5, *infra*.

73 *E.g.*, 15 U.S.C. §§ 1611, 1681q.

74 *See* § 16.6, *infra*.

75 Erickson v. Messerli & Kramer P.A., 2011 WL 1869044, at *8 (D. Minn. May 16, 2011) ("No reasonable juror could conclude that asking or encouraging [the debtor's son] to come to where Defendant was located to engage in an altercation was not a threat of violence"); Bell, FTC Informal Staff Letter (May 10, 1978). *See also* Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979); Louisiana State Bar v. Harrington, 571 So. 2d 151 (La. 1990); FTC Official Staff Commentary § 806(1)-1 (implied threats), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *But cf.* Mkhitaryan v. U.S. Bancorp, 2012 WL 6204840 (D. Nev. Dec. 12, 2012) (repossession agents who allegedly engaged in unlawful breach of peace repossession of plaintiff's vehicle were subject to § 1692f(6), but not to § 1692d(1) and (2)).

76 *See* § 6.2.2, *supra*.

77 *See* § 11.8.2, *supra*.

78 15 U.S.C. § 1692d(2). *See also* Reg. F § 1006.14(d); § 6.2, *supra*; Appx. E.2.3.1, *infra*.

79 *Compare* H.R. 11969, 94th Cong., 2d Sess. § 805(2) (1976), *and* S. 918, 95th Cong., 1st Sess. § 805(2) (1977), *with* Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 805(2) (1977).

80 *Id.*

81 122 Cong. Rec. H7,792 (daily ed. July 27, 1976) (remarks of Rep. Bauman). *But cf.* Kern, FTC Informal Staff Letter (Aug. 14, 1984) (statement that consumer should "[c]ontact the creditor now or be prepared for the consequences" did not violate § 1692d).

82 *See* § 3.3, *supra* (discussing constitutionality of FDCPA; collecting cases bringing challenges under First Amendment).

> [I]t is clear that, when read in context, subsection (2) was meant to deter offensive language which is at least akin to profanity or obscenity. Such offensive language might encompass name-calling, racial or ethnic slurs, and other derogatory remarks which are similar in their offensiveness to obscene or profane remarks. This is in keeping with one of the purposes of the FDCPA "[t]hat every individual, whether or not he owes the debt, has a right to be treated in a reasonable or civil manner."[83]

The Seventh Circuit considered a case where the collector left a message with the consumer Amanda's coworker to "tell Amanda to stop being such a [expletive] bitch."[84] In an attempt to sidestep what would otherwise be a clear violation, the collector argued that the message "was not spoken in connection with a debt collection nor was it meant to abuse the hearer or reader." The Seventh Circuit stated that "[w]e need not examine the varying meanings of the words employed to determine that, in the context used, they were abusive as a matter of law. Unequivocally they were."[85]

Less clear is the scope of the provision's second prohibition—language the natural consequence of which is to abuse the person hearing or reading the language. One court found a violation when the collector accused the consumer of lying about his ability to repay the debt.[86]

Another found that a "reasonable jury might conclude that a statement by a debt collector that it could call as much as it wished . . . where the debt collector had placed numerous calls to the person, had the natural consequence of abusing the hearer."[87] A key factor is how the language will affect the hearer.[88] But courts may require more than rudeness, bad manners, and obstinacy to violate the provision.[89] A warning that a collection lawsuit may lead to embarrassment, inconvenience, property lien, and garnishment was a true statement and not a FDCPA § 1692d(2) violation.[90]

Proving that a collector actually used the profane, obscene, or abusive language may sometimes be challenging.[91] The language will often only be spoken and out of the presence of any witnesses. Who the court believes will be a matter of the witnesses' credibility. Proof is easier, of course, if the violating language has been saved on the consumers' voicemail or if the collector records its employees' calls.[92] While Regulation F does not require debt collectors to record their calls, those who do must retain the call recordings for three years after the date of the call.[93]

6.5 Publishing Lists of Debtors Who Allegedly Refuse to Pay; FDCPA § 1692d(3)

> (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f)[94] or 1681b(3)[95] of this title.[96]

83 Jeter v. Credit Bur., Inc., 760 F.2d 1168 (11th Cir. 1985) (§ 1692d(2) claim rejected), *citing* 123 Cong. Rec. 10241 (1977) (statement of Representative Annuzio, Chairperson of Subcommittee which sponsored legislation).

84 Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769, 773 (7th Cir. 2003).

85 *Id.* at 774. *See also* Fed. Trade Comm'n v. Williams, Scott & Assoc., 2015 WL 12856779 (N.D. Ga. Nov. 4, 2015) (§ 1692d violated where collector used profanity), *aff'd*, 679 Fed. Appx. 836 (11th Cir. 2017); Smith v. ProCollect, Inc., 2011 WL 1375667 (E.D. Tex. Apr. 12, 2011) (material dispute over whether profane language, including "bitch," was used); Stuart v. AR Res., Inc., 2011 WL 904167 (E.D. Pa. Mar. 16, 2011) (allegation that defendants used rude, profane, and abusive language during repeated calls sufficient; no need to detail type of profanity); Iruegas v. Diversified Adjustment Serv., Inc., 2010 WL 1171088 (W.D. Tex. Mar. 22, 2010) (allegation that collector used profane and abusive language was sufficient); United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370, 376 (N.D. Tex. 1986) (violated § 1692d(2) "by using obscene and profane language in collection calls, including the terms 'god-damn liar, low-down son of a bitch, shit, the judge doesn't give a fuck about your complaint, hell, shit, and asshole'"), *aff'd as modified*, 823 F.2d 880 (5th Cir. 1987).

86 Woods v. Oxford Law, L.L.C., 2015 WL 778778 (S.D. W. Va. Feb. 24, 2015). *See also* Hart v. Universal Fid. L.P., 2007 WL 294241 (N.D. Ga. Jan. 26, 2007) ("called plaintiff a 'thief' . . . told plaintiff to 'get a job'" stated claim).

87 Tedeschi v. Kason Credit Corp., 2014 WL 1491173, at *5 (D. Conn. Apr. 15, 2014).

88 Strom v. Nat'l Enter. Sys., Inc., 2011 WL 1233118, at *8 (W.D.N.Y. Mar. 30, 2011) (question of fact whether calls allegedly causing stress and seizures violated ban on language, natural consequence of which is to abuse hearer or reader).

89 Toney v. Keil, 2014 WL 4800275 (D. Colo. Sept. 26, 2014) (use of language that is merely testy, smart-alecky, or rude does not constitute violation of § 1692d); Gnoinska v. Messerli & Kramer, P.A., 2012 WL 5382180 (D. Minn. Nov. 1, 2012); Monahan v. NRA Grp. L.L.C., 2011 WL 3901877 (D. Conn. Sept. 6, 2011) (statements such as: "activity is going to keep on coming, that's what we do;" "[we will] just call and call until she can pick up;" and "further collections will continue" did not violate § 1692d(2)); Bassett v. I.C. Sys., Inc., 715 F. Supp. 2d 803 (N.D. Ill. 2010) (acceptable to call consumer liar and laugh at him); Unterreiner v. Stoneleigh Recovery Assoc., 2010 WL 2523257 (N.D. Ill. June 17, 2010) ("scream[ing]" at debtor, telling her "she owed 'all kinds of money,'" and asking "how could you go and max out a card like that?" insufficient to state claim); Seals v. Gen. Revenue Corp., 2002 WL 32099632 (N.D. W. Va. Aug. 19, 2002) (*pro se* suit generally alleging belittling language did not state claim), *aff'd without op.*, 2002 WL 31856721 (4th Cir. Dec. 23, 2002).

90 Shuler v. Ingram & Assoc., 441 Fed. Appx. 712 (11th Cir. 2011).

91 *See, e.g.*, Harvey v. United Adjusters, 509 F. Supp. 1218, 1221 (D. Or. 1981) ("Plaintiff has not met her burden of proving that such phone calls were made by the defendant."). *See also* Lynch v. Nelson Watson & Assoc., 2011 WL 2472588 (D. Kan. June 21, 2011) (collector subpoenaed consumer's phone records which revealed no call to collector as alleged).

92 *See* § 11.5.2, *infra* (discussing call recording).

93 Reg. F § 1006.100(b).

94 Fair Credit Reporting Act (FCRA) § 603(f), 15 U.S.C. § 1681a(f). *See also* National Consumer Law Center, Fair Credit Reporting (9th ed. 2018), *updated at* www.nclc.org/library.

95 FCRA § 604(3), 15 U.S.C. § 1681b(3) (1976). This section was renumbered as Section 604(a)(3), 15 U.S.C. § 1681b(a)(3). Federal Trade Commission, Fair Debt Collection Practices Act, 8 n.1 (May 2013). *See also* National Consumer Law Center, Fair Credit Reporting (9th ed. 2018), *updated at* www.nclc.org/library.

96 15 U.S.C. § 1692d(3). *See also* Reg. F § 1006.14(e).

FDCPA § 1692d(3) prohibits the publication of shame lists while allowing lawful reporting to consumer reporting agencies. Regulation F (effective November 30, 2021) restates this language at section 1006.14(e).

Each of the major bills leading to the Act contained prohibitions similar to FDCPA § 1692d(3).[97] The Senate added the exception regarding consumer reporting agencies and 15 U.S.C. §§ 1681a and 1681b.

"Section 1681a(f) of this title" is 15 U.S.C. § 1681a(f), a Fair Credit Reporting Act (FCRA) provision defining "consumer reporting agency." Section 1681b(3) has been renumbered since the FDCPA's enactment and is now 15 U.S.C. § 1681b(a)(3). This FCRA section lists persons to whom a consumer reporting agency may furnish a consumer report.

FDCPA § 1692d(3) outlaws, among other acts, posting "dead beat lists" or "shame lists" in the window of a collection agency or publishing such lists in local newspapers.[98] But the prohibition has much broader application. The subsection prohibits publishing any list of allegedly delinquent consumers except to a consumer reporting agency[99] or persons to which a consumer reporting agency may furnish a consumer report pursuant to 15 U.S.C. § 1681b(a)(3). For example, it prohibits a collector from publishing to other time share owners a list of time share owners who are delinquent on their obligations to the time share community.[100]

Although a creditor can meet the FCRA § 1681b(a)(3) permissible use requirements for a particular consumer under proper circumstances, guidance from the FTC staff has stated that a debt collector's publication of a list of debtors generally to subscribing creditors should violate FDCPA § 1692d(3).[101] But the FTC staff believes that it was permissible to give a list of judgment debtors to an investigator for locating the debtors because FDCPA § 1692c(b) has an exception allowing communication with third parties "as reasonably necessary to effectuate a postjudgment judicial remedy."[102]

Publishing a list of debtors may not violate FDCPA § 1692d(3) if the consumers' identities are not revealed on the list. A list of bad check writers may not violate the provision where the list only identifies license numbers and the first three letters of the consumer's name, the list is not viewable by the public, but only by certain merchants, and the identity of an individual on the list is only provided to a person with a legitimate business need.[103] FTC staff have also stated that newspaper advertisements offering rewards for the return of an identified leased car does not violate this prohibition, at least as long as the advertisements do not identify the lessee's name.[104]

Section 11.15.7, *infra*, discusses the application to the publication of shame lists of the Supreme Court's 2016 and 2021 decisions on federal court constitutional standing in *Spokeo, Inc. v. Robins*[105] and *TransUnion L.L.C. v. Ramirez*.[106]

6.6 Advertising a Debt for Sale to Coerce Payment; FDCPA § 1692d(4)

(4) The advertisement for sale of any debt to coerce payment of the debt.[107]

FDCPA § 1692d(f) and Reg. F § 1006.14(f) (effective November 30, 2021) prohibit advertising of a list of accounts for sale, since identification of a consumer as having an account for sale could cause the consumer shame and embarrassment. A possible application of this provision involves a foreclosure notice that provides information about the consumer's delinquency beyond that required by state law. While the consumer in one case alleged this violated FDCPA § 1692c(b) (communication with third parties) and FDCPA § 1692d(4), the court's rejection of a motion to dismiss mentioned only section 1692c(b).[108]

6.7 Repeated or Continuous Telephone Calls; FDCPA § 1692d(5)

6.7.1 Overview

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with

97 *E.g.*, H.R. 10191, 94th Cong., 1st Sess. §§ 802(2), 802(4) (1975); H.R. 11969, 94th Cong., 2d Sess. § 805(3) (1976).

98 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, 7, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*. *See also* Appx. E.2.3.5, *infra*.

99 *See* Slimm v. Bank of Am. Corp., 2013 WL 1867035 (D.N.J. May 2, 2013) (reporting to credit bureaus does not violate first sentence of § 1692d as it permitted by § 1692d(3)).

100 *See* Lapan v. Greenspoon Marder P.A., 2018 WL 1033224 (D. Vt. Feb. 22, 2018) (denying dismissal of claim law firm violated FDCPA in course of pursuing non-judicial foreclosure on Las Vegas timeshare by disclosing details of claimed debt to third parties).

101 *See* FTC Official Staff Commentary § 806(4)-3 ("A debt collector may not distribute a list of alleged debtors to its creditor subscribers."), *reproduced at* Appx. C.2, *infra, discussed at* § 3.4.4.4, *supra*. Cathcart, FTC Informal Staff Letter (Aug. 24, 1981); Woosley, FTC Informal Staff Letter (May 30, 1978); Dean, FTC Informal Staff Letter (May 30, 1978). *See also* Rummel, FTC Informal Staff Letter (May 16, 1978) (form "amounts to a prejudgment employer contact and is prohibited under [§ 1692c(b)] as well as violating [§ 1692d(3)]").

102 FTC Official Staff Commentary § 806(4)-5, *reproduced at* Appx. C.2, *infra, discussed at* § 3.4.4.4, *supra*.

103 Page v. Checkrite, Ltd., 1984 WL 1052036 (D. Neb. Apr. 2, 1984); Fleming, FTC Informal Staff Letter (Apr. 1, 1982). *See also* FTC Official Staff Commentary § 806(4)-4, *reproduced at* Appx. C.2, *infra, discussed at* § 3.4.4.4, *supra*. *See also* Campbell v. Thompson, 1990 WL 71348 (N.D. Ala. May 23, 1990) (list of bad check writer's names and addresses acceptable with encoded reasons for dishonor).

104 Farmer, FTC Informal Staff Letter (Sept. 26, 1989).

105 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

106 ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021).

107 15 U.S.C. § 1692d(4). *See also* Reg. F § 1006.14(f).

The House bills contained similar language to this section; the major Senate bills contained identical language. *E.g.*, H.R. 10191, 94th Cong., 1st Sess. § 802(5) (1975) (prohibiting threat to advertise as well); S. 3838, 94th Cong., 2d Sess. § 805(4) (1976).

108 *See* Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340 (E.D. Mich. Nov. 2, 2017).

intent to annoy, abuse, or harass any person at the called number.[109]

FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1) (effective November 30, 2021) limit a collector's right to call "any person at the called number."[110] The provision applies to "any person,"[111] whether that person is the consumer[112] or any other person, including, for example, a family member or a third party at a number not belonging to the debtor.[113] Calls to any location or telephone number are covered under FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1). For example, calls to the consumer at work may violate this protection.[114]

Reg. F § 1006.14(b)(1) differs from FDCPA § 1692d(5) because it states that debt collectors may not "place telephone calls," while section 1692d(5) prohibits "[c]ausing a telephone to ring"[115]—including, for example, redialing after a consumer has hung up the telephone.[116] The CFPB's supplemental information states that the Regulation F prohibition on placing telephone calls applies "even if a debt collector's telephone call did not cause a traditional ring, as long as the telephone call connected to the dialed number."[117] "Placing a telephone call" includes conveying a ringless voicemail, but does not include sending an electronic message (e.g., a text message or an email) that may be received on a mobile telephone.[118] However, as discussed in § 6.2.1, *supra*, an excessive number of electronic messages can violate the general prohibition in FDCPA § 1692d and Reg. F. § 1006.14(a), either on their own or cumulatively with telephone calls.

Unlike any other FDCPA § 1692d prohibition, section 1692d(5) requires intent to annoy, abuse, or harass any person at the called number. The intent requirement and how the intent requirement relates to the Regulation F presumptions related to call frequency are discussed at § 6.7.3, *infra*.

Reg. F § 1006.14(b)(2) creates standards related to call frequency.[119] A collector complying with those standards is presumed to comply with FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1).[120] Such a collector also complies with Reg. F. § 1006.14(a) and FDCPA § 1692d with respect to the frequency of its telephone calls.[121]

Debt collectors may argue that their telephone logs refute that repeated calls were made, while the consumer's evidence is based on a vague recollection, not specifying dates and times.[122] This defense may not be successful.[123] A consumer's phone records can be used to demonstrate the number and frequency of incoming collection calls. Debt collectors' logs can be unreliable,[124] as can be demonstrated by subpoenaing the debt collector's telephone records from its telephone carrier.[125] Collection agencies also frequently retain audio recordings of collection calls.[126] Regulation F's record retention requirements for audio recordings and other records is discussed at § 11.5.4.3, *infra*.

109 15 U.S.C. § 1692d(5). *See also* Reg. F § 1006.14(b)(1).

While not found in the final bill, several bills leading to the Act restricted collector contacts to a specific number of telephone calls, such as two calls per week or one to three calls per month at work. *E.g.*, H.R. 5294, 95th Cong., 1st Sess. §§ 804(a)(3), 804(b) (1977) (two calls per week and three per month at work permitted, unless creditor has consumer's daytime home phone number or consumer requests not to be called at work); H.R. 13720, 94th Cong., 2d Sess. §§ 804(a)(3), 804(4) (1976) (two calls per week or one call at work, or two calls a month in limited circumstances); S. 918, 95th Cong., 2d Sess. §§ 805(a)(3), 805(b) (1977) (maximum two contacts in seven days and one contact at work if convenient).

Most of these bills also contained a provision quite similar to the current language. *E.g.*, H.R. 11969, 95th Cong., 2d Sess. § 805(6) (1976) (prohibited "harassing or threatening phone calls or visits" and "calling . . . repeatedly or constantly"); S. 3838, 94th Cong., 2d Sess. § 805(6) (1976).

110 See also S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 7, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*; FTC Official Staff Commentary § 806(5), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

111 The term "person" is defined at § 1006.2(k) to include "natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies." *See* § 4.10, *supra*.

112 *See* § 4.4, *supra*.

113 *See, e.g.*, Kane v. Nat'l Action Fin. Serv., Inc., 2011 WL 6018403 (E.D. Mich. Nov. 7, 2011) (wrong number).

114 *See* Andrews v. Simm Assoc., Inc., 2017 WL 3424900 (W.D. Wash. Aug. 9, 2017).

115 *See* Meadows v. Franklin Collection Serv., Inc., 414 Fed. Appx. 230, at *3 (11th Cir. Feb. 11, 2011) (most of 200–300 calls not answered); Rigby v. CrossCheck Services, L.L.C., 2020 WL 1492893, at *6 (W.D. Wis. Mar. 27, 2020) (although 76 calls yielded only 8 actual conversations, question for jury, regardless of call-to-conversation ratio); Gross v. Nationwide Credit, Inc., 2011 WL 379167 (S.D. Ohio Feb. 2, 2011); Clark v. Quick Collect, Inc., 2005 WL 1586862, at *4 (D. Or. June 30, 2005) (denying summary judgment to collector where it had called multiple times without leaving messages); Hosseinzadeh v. M.R.S. Assoc., Inc., 387 F. Supp. 2d 1104 (C.D. Cal. Mar. 3, 2005) (content and context of series of six telephone messages allowed question to go to jury). *But see* Pugliese v. Prof'l Recovery Serv., Inc., 2010 WL 2632562, at *10 (E.D. Mich. June 29, 2010) (although over 300 calls, one or two unanswered calls a day in unsuccessful effort to reach debtor is not violation if unaccompanied by any threatening messages).

116 *See, e.g.*, Bassett v. I.C. Sys., Inc., 715 F. Supp. 2d 803 (N.D. Ill. 2010); Atchoo v. Redline Recovery Serv., L.L.C., 2010 WL 1416738 (W.D.N.Y. Apr. 5, 2010); Lovelace v. Stephens & Michaels Assoc., Inc., 2007 WL 3333019 (E.D. Mich. Nov. 9, 2007) (collection notes stated "pick up/hang up-multiple times"); Chiverton v. Fed. Fin. Grp., Inc., 399 F. Supp. 2d 96 (D. Conn. 2005) (debt buyer violated § 1692d(5) by repeatedly calling to collect paid debt after consumer had hung up phone).

117 85 Fed. Reg. 76,734 at 76,810 (Nov. 30, 2020).

118 Reg. F Official Interpretations § 14(b)-1.

119 *See* § 6.7.2, *infra*.

120 Reg. F Official Interpretations § 1006.14(b)(2)-1.

121 Reg. F Official Interpretations § 1006.14(b)(1)-1.

122 *But see* Burke v. Coachella Valley Collections Services, 2011 WL 13217709 (C.D. Cal. Mar. 25, 2011) (consumer's allegations of inconvenient calls to her workplace after agency was told not to call there did not need to provide evidentiary details as to exact time or number of calls).

123 *See* Black v. AFNI, Inc., 2016 WL 4249491 (D.N.J. Aug. 10, 2016); Krapf v. Nationwide Credit Inc., 2010 WL 2025323 (C.D. Cal. May 21, 2010).

124 *See, e.g.*, Evans v. Portfolio Recovery Assoc., 2016 WL 4059645 (D.N.J. July 27, 2016).

125 *Cf.* Casey v. I.C. Sys., Inc., 2010 WL 415310 (M.D. Fla. Jan. 29, 2010) (telephone company records showed 171 attempted phone calls but did not conclusively establish how many times phone rang).

126 *See* § 1.5.3, *supra*.

6.7.2 *Call and Conversation Frequency Limits Under Regulation F*

6.7.2.1 Regulation F's Presumptions As to Call and Conversation Frequency

Regulation F § 1006.14(b)(2) (effective November 30, 2021) states that a debt collector is presumed to comply with FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1)'s prohibition on repeated or continued calls if the collector:

1. Places a call to a particular person in connection with a particular debt no more than seven times within seven consecutive days[127] (called the call frequency prong); and
2. If the collector reaches the consumer and has a telephone conversation with the consumer about a particular debt, the collector does not place another call to the consumer about the particular debt for seven consecutive days (called the conversation frequency prong).[128]

For the presumption of compliance to apply, the collector must comply with both prongs of the requirement.[129] The date of the telephone conversation is the first day of the seven-consecutive-day period.[130] If the collector instead does *not* comply with both of these two frequency standards, the collector is presumed to violate FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1).[131] Compliance with only one prong can still lead to a presumption of a violation.

For the purpose of Reg. F § 1006.14(b), the term "particular debt" means "each of a consumer's debts in collection."[132] However, for student loan debts, "the term particular debt means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by a debt collector."[133] Application of call and conversation frequency presumptions in situations where the collector is collecting multiple accounts for the same consumer is discussed at § 6.7.2.7, *infra*.

In finalizing Regulation F (effective November 30, 2021), the CFPB chose not to adopt bright-line frequency limits, instead adopting "a rebuttable presumption that a debt collector has either complied with or violated the prohibition in § 1006.14(b)(1) regarding repeated or continuous telephone calls and telephone conversations."[134]

The Reg. F Official Interpretations provide examples of circumstances where the debt collector complies with Reg. F § 1006.14(b)(2) and is thus presumed to comply with FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1)'s prohibition on repeated or continued calls.[135] One example involves a collector complying with call frequency requirements when attempting contact the consumer.[136] This example involves the collector leaving a limited-content message[137] for the consumer, which counts as one of the seven calls placed in the seven-day period. Another example involves the consumer contacting the collector, and the collector complying with conversation frequency limits after that consumer-initiated conversation.[138] The last example illustrates compliance where the collector calls attempting to communicate with a third party to obtain location information.[139] Rebutting the presumption of compliance where the collector has complied with Reg. F § 1006.14(b) is discussed at § 6.7.2.2, *infra*.

The Reg. F Official Interpretations also provide examples of circumstances where the debt collector does *not* comply with Reg. F § 1006.14(b)(2), and is thus presumed to violate FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1)'s prohibition on repeated or continued calls.[140] The first example involves a collector that places eight calls in a seven day period, including one call where the collector left a limited-content message.[141]

127 Reg. F § 1006.14(b)(2)(i)(A).

128 Reg. F § 1006.14(b)(2)(i)(B). *See also* Reg. F Official Interpretations § 14(b)(4)-1(ii) (providing examples regarding engaging in telephone conversation in connection with collection of particular debt).

129 Reg. F Official Interpretations § 14(b)(2)(i)-1.

130 Reg. F Official Interpretations § 14(b)(2)(i)-1.

131 Reg. F § 1006.14(b)(2)(ii).

132 Reg. F § 1006.14(b)(4).

133 Reg. F § 1006.14(b)(4).

134 85 Fed. Reg. 76,734 at 76,810 (Nov. 30, 2020).

135 Reg. F Official Interpretations § 14(b)(2)(i)-1.

136 Reg. F Official Interpretations § 14(b)(2)(i)-1(i) ("On Wednesday, April 1, a debt collector first attempts to communicate with a consumer in connection with the collection of a credit card debt by placing a telephone call and leaving a limited-content message. Between Thursday, April 2, and Tuesday, April 7, the debt collector places six more telephone calls to the consumer about the debt, all of which go unanswered. As of Tuesday, April 7, the debt collector has placed seven telephone calls to the consumer in connection with the collection of the credit card debt within the period of seven consecutive days that started on Wednesday, April 1. Assume the debt collector does not place any additional telephone calls about the debt until Wednesday, April 8.").

137 Limited-content messages are defined at Reg. F § 1006.2(j). *See* § 4.9, *supra*.

138 Reg. F Official Interpretations § 14(b)(2)(i)-1(ii) ("On Thursday, August 13, a consumer places a telephone call to, and initiates a telephone conversation with, a debt collector regarding a particular debt. Assume that the debt collector does not place a telephone call to the consumer in connection with the collection of that debt again prior to Thursday, August 20.").

139 Reg. F Official Interpretations § 14(b)(2)(i)-1(iii) ("On Tuesday, October 6, a debt collector first attempts to communicate with a particular third party for the purpose of acquiring location information about a consumer by placing a telephone call to that third party. The call is unanswered. The debt collector places up to six more unanswered telephone calls to that third party for the purpose of acquiring location information about the consumer through Monday, October 12."). *See also* Reg. F § 1006.10(c), *discussed at* § 5.2.10, *supra*.

140 Reg. F Official Interpretations § 14(b)(2)(ii)-1.

141 Reg. F Official Interpretations § 14(b)(2)(ii)-1(i) ("On Wednesday, April 1, a debt collector first attempts to communicate with a consumer in connection with the collection of a mortgage debt by placing a telephone call and leaving a limited-content message. On each of the next three business days (i.e., on Thursday, April 2, Friday, April 3, and Monday, April 6), the debt collector places two additional telephone calls to the consumer about the debt, all of which go unanswered. On Tuesday, April 7, the debt collector places an additional telephone call to the consumer about the debt. The debt collector has placed a total of eight telephone calls to the consumer about the debt during the seven-day period starting Wednesday, April 1. None of the calls was subject to the exclusions in § 1006.14(b)(3).").

The second example involves phone calls placed to the consumer within seven days of the collector's conversation with the consumer.[142] Rebutting the presumption of violation where the collector has *not* complied with Reg. F § 1006.14(b) is discussed at § 6.7.2.3, *infra*.

6.7.2.2 Rebutting the Presumption of Compliance

As discussed in § 6.7.2.1, *supra*, a debt collector that complies with Regulation F § 1006.14(b)(2) (effective November 30, 2021) is presumed to comply with FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1)'s prohibition on repeated or continued calls. To rebut the presumption of compliance, the person called must prove that a debt collector whose calls were within the Reg. F § 1006.14(b) frequency limits "nevertheless placed a telephone call or engaged a person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[143]

The Regulation F Official Interpretations provide a non-exhaustive list of four factors that may rebut the presumption of compliance, considered either individually or in combination with one another or other non-specified factors.[144] "The factors may be viewed in light of any other relevant facts and circumstances and therefore may apply to varying degrees."[145] In weighing these factors, "it is assumed that debt collectors intend the natural consequence of their actions."[146]

These four factors are:

1. The frequency and pattern of telephone calls the debt collector places to a person, including the intervals between them, such as whether the debt collector placed telephone calls to a person in rapid succession (*e.g.*, two unanswered telephone calls to the same telephone number within five minutes) or in a highly concentrated manner (*e.g.*, seven telephone calls to the same telephone number within one day).[147]
2. The frequency and pattern of any voicemails that the debt collector leaves for a person, including the intervals between them, such as where the debt collector left voicemails for a person in rapid succession (*e.g.*, two voicemails within five minutes left at the same telephone number) or in a highly concentrated manner (*e.g.*, seven voicemails left at the same telephone number within one day).[148]
3. The content of a person's prior communications with the debt collector, such as where the person previously informed the debt collector that the person did not wish to be contacted again about the particular debt, that the person was refusing to pay the particular debt, that the person did not owe the particular debt, or that the person has sent a general cease communication notification or the consumer had requested that the debt collector not communicate with the consumer by telephone calls. The amount of time elapsed since any such prior communications also may be relevant to this factor.[149]
4. The debt collector's conduct in prior communications or attempts to communicate with the person, such as where the debt collector used obscene, profane, or otherwise abusive language or called at an inconvenient time or place). The amount of time elapsed since any such prior communications or attempts to communicate also may be relevant to this factor.[150]

In a subsequent FAQ, the CFPB added to the first factor:

> It may also be relevant if the debt collector concentrates telephone calls on days that may be less convenient for the consumer (such as Sundays or holidays). Application of this factor is not limited to rapid succession or highly concentrated calling, however, and is dependent on all of the relevant facts and circumstances that may indicate an intent on the part of the debt collector to harass, annoy, or abuse the consumer.[151]

In the same FAQ, the CFPB also added to the fourth factor where attempts to communicate "used or threatened to use violence or other criminal means to harm the person, or called at an inconvenient time or place."[152]

In addition, in the supplemental information on this Rule F provision, the CFPB stated:

> [E]ven a small number of debt collection calls may have the natural consequence of causing a consumer to experience harassment, oppression, or abuse, and therefore, assuming the debt collector is aware of this effect, the debt collector's

142 Reg. F Official Interpretations § 14(b)(2)(ii)-1(ii) ("On Tuesday, August 11, a debt collector first attempts to communicate with a consumer in connection with the collection of a credit card debt by placing a telephone call to the consumer that the consumer does not answer. On Friday, August 14, the debt collector again places a telephone call to the consumer and has a telephone conversation with the consumer in connection with the collection of the debt. Subject to the exclusions in § 1006.14(b)(3), the debt collector is presumed to violate § 1006.14(b)(1) and FDCPA section 806(5) if the debt collector places a telephone call to the consumer in connection with the collection of that debt again prior to Friday, August 21.").

143 Reg. F Official Interpretations § 14(b)(2)(i)-2.

144 Reg. F Official Interpretations § 14(b)(2)(i)-2.

145 Reg. F Official Interpretations § 14(b)(2)(i)-2.

146 Reg. F Official Interpretations § 14(b)(2)(i)-2.

147 Reg. F Official Interpretations § 14(b)(2)(i)-2(i).

148 Reg. F Official Interpretations § 14(b)(2)(i)-2(ii).

149 Reg. F Official Interpretations § 14(b)(2)(i)-2(iii).

150 Reg. F Official Interpretations § 14(b)(2)(i)-2(iv). The supplemental information to Regulation F elaborates on this: "if a debt collector previously used obscene language or threatened violence during a debt collection telephone call, or called at an inconvenient place or time, and thereby violated another rule provision (and the FDCPA itself), then the person receiving the subsequent telephone calls may be more likely to find they are annoying, harassing, or abusive. The Bureau also believes that by placing the subsequent telephone calls, it generally would be more likely that the debt collector intended to annoy, harass, or abuse the person." 85 Fed. Reg. 76,734 at 76,815 (Nov. 30, 2020).

151 *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Rebutting the Presumptions #1, *available at* https://www.consumerfinance.gov.

152 *See, e.g., Id.*

placement of even a small number of such calls to that consumer may indicate that the debt collector has the requisite intent to annoy, abuse, or harass.[153]

6.7.2.3 Rebutting the Presumption of Violation

As discussed in § 6.7.2.1, *supra*, a debt collector that does *not* comply with Regulation F § 1006.14(b)(2) (effective November 30, 2021) is presumed to violate FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1)'s prohibition on repeated or continued calls. However, a collector violating the Reg. F § 1006.14(b)(2) call frequency limits can still rebut the presumption that it violated FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1). According to the Reg. F Official Interpretations, the collector will have to show that it "did not place a telephone call or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[154] "For purposes of determining whether the presumption of a violation has been rebutted, it is assumed that debt collectors intend the natural consequence of their actions."[155]

The Interpretations provide a non-exhaustive list of four factors that may rebut the presumption of a violation, that may be considered either individually or in combination with one another (or other non-specified factors).[156] "The factors may be viewed in light of any other relevant facts and circumstances and therefore may apply to varying degrees."[157]

These four factors are:

1. Whether a debt collector placed a telephone call to comply with, or as required by, applicable law, such as where a call is made to inform the consumer of available loss mitigation options in compliance with Regulation X, 12 C.F.R. § 1024.39(a).[158]
2. Whether a debt collector placed a telephone call that was directly related to active litigation involving the collection of a particular debt, such as to complete a court-ordered communication with the consumer about the debt, or as part of negotiations to settle active debt collection litigation regarding the debt.[159]
3. Whether a debt collector placed a telephone call in response to a consumer's request for additional information, such as where in one telephone conversation the consumer asked the debt collector for more information about the debt amount, but the consumer could not talk at that moment. The consumer ended the telephone call before the debt collector could seek prior consent under § 1006.14(b)(3)(i) to call back with the requested information.[160]
4. Whether a debt collector placed a telephone call to convey information to the consumer that, as shown through evidence, would provide the consumer with an opportunity to avoid a demonstrably negative effect relating to the collection of the particular debt, where the negative effect was not in the debt collector's control, and where time was of the essence.[161]

The Official Interpretations provide two examples of where the fourth factor described above does apply:

- Toward the end of lengthy telephonic settlement discussions, the call dropped, and the collector called back to complete the conversation. This provided the consumer an opportunity to avoid a demonstrably negative effect that was not in the debt collector's control (*i.e.*, having to repeat a substantive conversation with a potentially different representative of the debt collector) and where time was of the essence (*i.e.*, to prevent the delay of settlement negotiations by seven days).[162]
- The consumer had previously entered into a payment plan with the debt collector where only the creditor may approve waivers of late fees. The debt collector placed a telephone call to the consumer to remind the consumer that a late fee would be applied unless payment was made by the next day. The collector placed the telephone call to alert the consumer to the pending penalty, giving the consumer an opportunity to avoid a demonstrably negative effect that was not in the debt collector's control and where time was of the essence.[163]

The Official Interpretations also provide one example of where the fourth factor described above does *not* apply: The debt collector placed a telephone call to the consumer to offer the consumer a "one-time only" discount on the debt payment expiring the next day when, in fact, the collector could offer a similar discount for an additional period. Because the negative effect on the consumer was in the debt collector's control, the discount offer is not a factor that may rebut the presumption of a violation.[164]

Factors that might rebut the presumption of a violation are different from the list of phone calls in Reg. F § 1006.14(b)(3)[165] that are definitively excluded from telephone call frequencies. As the CFPB explains in the supplemental information:

153 85 Fed. Reg. 76,734 at 76,811 (Nov. 30, 2020).
154 Reg. F Official Interpretations § 14(b)(2)(ii)-2.
155 Reg. F Official Interpretations § 14(b)(2)(ii)-2.
156 Reg. F Official Interpretations § 14(b)(2)(ii)-2.
157 Reg. F Official Interpretations § 14(b)(2)(ii)-2.
158 Reg. F Official Interpretations § 14(b)(2)(ii)-2(i). The supplemental information to this factor though notes "the Bureau understands that legally required communications infrequently are delivered over the telephone, in contrast to by mail or other means." 85 Fed. Reg. 76,734 at 76,816 (Nov. 30, 2020).
159 Reg. F Official Interpretations § 14(b)(2)(ii)-2(ii). But the CFPB notes: "However, the debt collector must comply with the prohibition on communicating or attempting to communicate with a consumer represented by an attorney with regard to the specific debt." *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Rebutting the Presumptions #2, *available at* https://www.consumerfinance.gov.
160 Reg. F Official Interpretations § 14(b)(2)(ii)-2(iii).
161 Reg. F Official Interpretations § 14(b)(2)(ii)-2(iv).
162 Reg. F Official Interpretations § 14(b)(2)(ii)-2(iv)(A).
163 Reg. F Official Interpretations § 14(b)(2)(ii)-2(iv)(B).
164 Reg. F Official Interpretations § 14(b)(2)(ii)-2(iv)(C).
165 *See* § 6.7.2.6, *infra*.

> While the Bureau believes that telephone calls placed under these four circumstances generally would not reflect an intent on the part of the debt collector to harass, annoy, or abuse the consumer, it is possible that there could be factual circumstances where such a telephone call is placed with that intent. Therefore, the Bureau is including such telephone calls within the rebuttable presumption rather than excluding them from the telephone call frequencies altogether under final § 1006.14(b)(3).[166]

6.7.2.4 Limits on Regulation F's Safe Harbor for Call Frequency

A collector following the Regulation F § 1006.14(b)(2) (effective November 30, 2021) frequency limits creates a presumption for compliance with FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1), but the debt collector's conduct can still violate other aspects of FDCPA § 1692d or Reg. F. § 1006.14 if the natural consequence of another aspect of the debt collector's telephone calls, unrelated to frequency, is to harass, oppress, or abuse any person in connection with the collection of a debt.[167] For example, if one of the calls results in the collector leaving a voicemail that contains obscene language, although there is no frequency violation, there can still be a Reg. F § 1006.14(a) and (d) violation and an FDCPA § 1692d(2) violation.[168]

In addition, frequency of calls, even though within Regulation F's frequency limits, can still contribute to a finding of a FDCPA § 1692d or Reg. F § 1006.14 violation. "Depending on the facts and circumstances, conduct that on its own would violate neither the general prohibition in § 1006.14(a), nor any specific prohibition in § 1006.14(b) through (h), nonetheless may violate § 1006.14(a) when such conduct is evaluated cumulatively with other conduct."[169] For example, according to the Reg. F Official Interpretations, even though seven calls in a week is presumed not to violate Reg. F § 1006.14(b), the cumulative effect of the collector placing those calls plus sending a number of unsolicited emails is likely lead to a section 1692d and Reg. F § 1006.14(a) violation.[170] The CFPB has stated: "However, a debt collector's conduct using any media, such as in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, and social media, including the cumulative effect of the debt collector's conduct across multiple media types, may still violate the general prohibition against harassing, oppressive, or abusive conduct."[171]

6.7.2.5 Prior Consent to Additional Calls

Under Regulation F (effective November 30, 2021), telephone calls do not count toward the frequency limits discussed in § 6.7.2.1, *supra*, where the person has given prior consent directly to the debt collector[172] and the call is placed within a period no longer than seven consecutive days from the day of consent, with the day of consent being the first day.[173] Once the debt collector obtains prior consent, no calls made will count toward the frequency limits during that seven day period unless consent expires early.[174] Consent expires after seven days even if the consumer expresses a willingness to consent for a longer period of time.[175]

Consent can expire early if: "(1) the person consented to the additional telephone calls for a shorter time period and such time period has ended; (2) the person revokes such prior consent; or (3) the debt collector has a telephone conversation with the person regarding the particular debt."[176] If the seven days have expired, the consent is no longer applicable, and the collector would have to obtain additional prior consent directly from the consumer.[177]

Prior consent cannot be obtained during a call that would otherwise violate the frequency requirement, but must be obtained prior to that call.[178] The consent must be given directly to the collector and not to the creditor.[179] Nor can consent be obtained by a medium of communication that the person, pursuant to Reg. F § 1006.14(h), has requested that the debt collector not use with the person.[180] Nor can the consent be though a communication in violation of Reg. F § 1006.6(b)—at an inconvenient time or place, with a consumer represented by an attorney, or at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.[181]

6.7.2.6 When Does a Call Count Toward the Frequency Limits

One counts the frequency limits differently under the call frequency prong than the conversation frequency prong.[182] The first call counting toward the conversation frequency prong includes not only calls the collector initiates where there is a conversation, but also where the consumer initiated the call and there is a conversation. Then a second collector call within seven days would violate the standard. On the other hand, in

166 85 Fed. Reg. 76,734 at 76,816, n.436 (Nov. 30, 2020).
167 Reg. F Official Interpretations § 14(b)(1)-1.
168 Reg. F Official Interpretations § 14(b)(1)-2.
169 Reg. F Official Interpretations § 14(a)-2.
170 Reg. F Official Interpretations § 14(a)-2(i).
171 *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Rebutting the Presumptions #3, *available at* https://www.consumerfinance.gov.
172 Reg. F Official Interpretations § 14(b)(3)(i)-1 referencing Reg. F Official Interpretations § 6(b)(4)(i) (providing guidance about giving "prior consent directly to a debt collector").
173 Reg. F § 1006.14(b)(3)(i).
174 Reg. F Official Interpretations § 14(b)(3)(i)-2.
175 *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Excluded Calls #2, *available at* https://www.consumerfinance.gov.
176 Reg. F Official Interpretations § 14(b)(3)(i)-2.
177 Reg. F Official Interpretations § 14(b)(3)(i)-3(iii).
178 Reg. F Official Interpretations § 14(b)(3)(i)-1 *referencing* Reg. F Official Interpretations § 6(b)(4)(i)-1.
179 Reg. F Official Interpretations § 14(b)(3)(i)-1 *referencing* Reg. F Official Interpretations § 6(b)(4)(i)-2.
180 Reg. F Official Interpretations § 14(b)(3)(i)-1.
181 Reg. F Official Interpretations § 14(b)(2)(i)-1.
182 *See* § 6.7.2.1, *supra* (discussing two prongs).

counting for purposes of the call frequency prong, one does not count the calls that the consumer initiates to the collector.[183]

The call frequency prong is based on the number of calls to a person, and not the number of calls to each phone number where a person has multiple phone numbers. Thus, the CFPB has stated:

> For example, if a debt collector has eight different telephone numbers associated with a consumer and places one unanswered call to each of the telephone numbers about the same debt within seven consecutive days, the debt collector is presumed to violate the "call frequency prong" of the presumptions related to telephone call frequency.[184]

Under Regulation F § 1006.14(b)(2) (effective November 30, 2021), "placing a telephone call" includes conveying a ringless voicemail, but does not include sending an electronic message (e.g., a text message or an email) that may be received on a mobile telephone.[185] As a result, conveying a ringless voicemail counts to call frequency limits, but electronic messages do not. Limited-content messages[186] also count to call frequency limits.[187] Telephone calls to the wrong person do not count as calls to the intended person, although they do count as calls to wrong person.[188]

Calls that do not connect to the dialed number do not count toward the frequency limits.[189] Regulation F's Official Interpretations explain that:

> A debt collector's telephone call does not connect to the dialed number if, for example, [1] the debt collector receives a busy signal or [2] an indication that the dialed number is not in service.[190]

Additionally, Regulation F's Official Interpretations provide the following examples indicating that a collector's call has connected to the dialed number:

> [1] the telephone call is answered, even if it subsequently drops; [2] if the telephone call causes a telephone to ring at the dialed number but no one answers it; or [3] if the telephone call is connected to a voicemail or other recorded message, even if it does not cause a telephone to ring and even if the debt collector is unable to leave a voicemail.[191]

Other examples of a call being connected include where the telephone call causes a telephone to ring at the dialed number, but the call does not connect to a voicemail, or where the telephone call causes a telephone to ring at the dialed number, but the debt collector hangs up before anyone answers the call, or where the call connects to a voicemail.[192] A limited-content message[193] is a voicemail message and counts toward the call frequency limit as a connected call.[194] Connected calls count toward the call frequency unless an exclusion in Reg. F § 1006.14(b)(3) applies.

Not counting toward frequency limits are calls placed to the consumer's attorney, a consumer reporting agency (if otherwise permitted by law), the creditor, the creditor's attorney, or the debt collector's attorney.[195] The limits, however, apply to calls to any other person, and not just to the consumer. For example, the limits apply where a collector seeks location information from a third party.[196]

As discussed in § 6.7.2.5, *supra*, calls placed with prior consumer consent to the debt collector do not count toward the call frequency limits, in some circumstances.

6.7.2.7 Counting Call Frequency When the Collector Calls About Multiple Debts

Under Regulation F (effective November 30, 2021), the frequency limits in section 1006.14(b)(2) apply to each particular debt—meaning "each of a consumer's debts in collection."[197] This is true even when a collector has multiple accounts in collection for the same consumer.[198] Student loans are treated differently, as discussed below.

If a debt collector places a telephone call to a person and initiates a conversation or leaves a voicemail covering more than one particular debt, the call counts as a telephone call in connection with the collection of each debt mentioned in the call.[199] The same applies if the consumer either initiated the call or initiated the discussion of a debt or debts—the call counts toward the frequency limit for each debt that the consumer or collector mentions in the call.[200] Then, if within the next seven days there is a conversation about either debt, then the standard is violated.[201]

If a debt collector places a telephone call to a person, but neither initiates a conversation about a particular debt, nor leaves a voicemail that refers to a particular debt, or if the debt collector's telephone call is unanswered, the debt collector counts the telephone call as a telephone call in connection with the collection of at least one particular debt for purposes

183 *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Rebutting the Presumptions #2, *available at* https://www.consumerfinance.gov.

184 *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Rebutting the Presumptions #4, *available at* https://www.consumerfinance.gov.

185 Reg. F Official Interpretations § 14(b)-1.

186 Limited-content messages are defined at Reg. F § 1006.2(j). *See* § 4.9, *supra*.

187 *See* Reg. F Official Interpretations § 14(b)(2)(i)-1(i).

188 Reg. F Official Interpretations § 14(b)(2)(i)-3.

189 Reg. F § 1006.14(b)(3)(ii).

190 Reg. F Official Interpretations § 14(b)(3)(ii)-1.

191 Reg. F Official Interpretations § 14(b)(3)(ii)-1.

192 *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Excluded Calls #3, *available at* https://www.consumerfinance.gov.

193 Reg. F § 1006.2(j) (defining limited-content messages). *See* § 4.9, *supra*.

194 *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Excluded Calls #4, *available at* https://www.consumerfinance.gov.

195 Reg. F § 1006.14(b)(3)(iii).

196 Reg. F Official Interpretations § 14(b)(2)(i)-1(iii). *See also* Reg. F § 1006.10(c), *discussed at* § 5.2.10, *supra*.

197 Reg. F § 1006.14(b)(4).

198 *See* Reg. F Official Interpretations § 14(b)(4)-1(i).

199 Reg. F Official Interpretations § 14(b)(4)-1(i). *See also* Reg. F Official Interpretations § 14(b)(4)-2(iv).

200 Reg. F Official Interpretations §§ 14(b)(4)-1(ii), -2(vi).

201 *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Rebutting the Presumptions #6, *available at* https://www.consumerfinance.gov.

of the call frequency prong.[202] The same applies if there is a voicemail[203] or telephone conversation, but no particular debt is mentioned.[204] The same applies even if the collector intends to discuss multiple debts, but the call is unanswered or debts are not discussed.[205] For example, if a collector intends to seek collection of three different debts and twenty-one calls go unanswered within a seven day period, this complies with the frequency standards.[206]

An exception is made though for student loans. All student loan debts that a consumer owes or allegedly owes that are serviced under a single account number at the time the debts were obtained by a debt collector are considered one debt, so that calls concerning any of them count to the frequency limits for all of them.[207] The regulation's supplemental information states:

> Because Federal and private student loans, and loans originated by different lenders, would not be serviced under the same account number at the time the debts were obtained by a debt collector, a debt collector would not be required to treat those student loan debts as a single debt.[208]

The language in the section specifies that the relevant question is whether the loans are under a single account number at the time the debts were obtained by "a" debt collector, not just the current collector.[209] However, creditors may simply choose to separate all student loans into separate accounts before placing the accounts with any debt collectors to maximize the number of permissible calls.

6.7.2.8 State or Local Law Limitations on Call Frequency

Some state and local jurisdictions have their own call or communication frequency limits. Massachusetts,[210] Washington State,[211] and New York City[212] have restrictions on the number of collection calls or a general restriction on the number of collection communications that are lower than those in Reg. F § 1006.14(b)(2). In 2021, Washington D.C. also enacted a temporary provision[213] restricting telephone calls that was also lower than the limits in Regulation F.[214] Since the FDCPA does not preempt state debt collection laws that provide additional consumer protection,[215] debt collectors must comply with the laws providing more consumer protections in these jurisdictions.[216]

West Virginia also has a restriction on collection calls, but its limits are quite high.[217] To the extent that West Virginia's law would provide less protection than Regulation F, debt collectors would still be required to comply with Reg. F § 1006.14(b)(2).[218]

6.7.2.9 Frequency Standard Prior to Regulation F Standards

Prior to Regulation F (effective November 30, 2021), courts found that the point at which telephone calls become so frequent as to violate FDCPA § 1692d(5) depends on the circumstances.[219] FTC interpretations do not provide a numerical test,[220] and only point to extremes—a call on the day before and the day after a promised payment would not violate the provision, but six phone calls in an hour would.[221] Before Regulation F, courts also refused to define a bright line for the

202 Reg. F Official Interpretations § 14(b)(4)-1(i).
203 Reg. F Official Interpretations § 14(b)(4)-2(ii).
204 Reg. F Official Interpretations § 14(b)(4)-1(ii).
205 Reg. F Official Interpretations §§ 14(b)(4)-2(i), (v).
206 Reg. F Official Interpretations § 14(b)(4)-2(i).
207 Reg. F § 1006.14(b)(4). *See also* Reg. F Official Interpretations §§ 14(b)(4)-2(vii).
208 85 Fed. Reg. 76,734 at 76,821, 76,822 (Nov. 30, 2020).
209 85 Fed. Reg. 76,734 at 76,824 (Nov. 30, 2020).
210 940 Code Mass. Regs. § 7.04(1)(f) (unfair or deceptive act or practice for creditors to "[i]nitiat[e] a communication with any debtor via telephone, either in person or via text messaging or recorded audio message, in excess of two such communications in each seven-day period to either the debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number and two such communications in each 30-day period other than at a debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number, for each debt"); 209 Code Mass. Regs. § 18.14(1)(d) (without prior consent of the consumer, the debt collector may not "engage[] any consumer in communication via telephone or via text messaging, initiated by the debt collector, in excess of two such communications in each seven-day period to a consumer's residence or cellular telephone and two such communications in each 30-day period other than at a consumer's residence, or cellular telephone for each debt").
211 Wash. Rev. Code § 19.16.250(13)(a), (b) ("A communication shall be presumed to have been made for the purposes of harassment" if the debtor is contacted more than once per week at work or the debtor or spouse are contacted more than three times per week in "any form, manner, or place").
212 New York City, N.Y., Rules, tit. 6, § 5-77(b)(1)(iv) (generally prohibits calling more than twice during seven-day period).
213 As of September 29, 2021, B24-0347: Protecting Consumers from Unjust Debt Collection Practices Emergency Amendment Act of 2021 expires on November 30, 2021.
214 D.C. Code § 28-3814(d)(4) (generally prohibits "making in excess of 3 phone calls, inclusive of all phone numbers and accounts the creditor or debt collector has for the consumer, in any 7-day period").
215 15 U.S.C. § 1692n; Reg. F § 1006.104. *See* § 11.16.1, *infra*.
216 *See, e.g.*, CFPB, FAQ, Telephone Call Frequency: Rebutting the Presumptions #8, *available at* https://www.consumerfinance.gov.
217 W. Va. Code Ann. § 46A-2-125(d) ("Calling any person more than thirty times per week or engaging any person in telephone conversation more than ten times per week" violates prohibition on oppression or abuse).
218 15 U.S.C. § 1692n; Reg. F § 1006.104. *See* § 11.16.1, *infra*.
219 Kuntz v. Rodenburg L.L.P., 838 F.3d 923, 926 (8th Cir. 2016) ("turns on evidence regarding the volume, frequency, pattern, or substance of the phone calls); Hicks v. Am.'s Recovery Solutions, L.L.C., 816 F. Supp. 2d 509, 515 (N.D. Ohio 2011) ("The court concludes that the number of calls is not totally dispositive in this case. Rather, the nature, extent, and context of the calls are also important").
220 *See* FTC Official Staff Commentary § 806(5)-1 ("'Continuously' means making a series of telephone calls, one right after the other. 'Repeatedly' means calling with excessive frequency under the circumstances."), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.
221 Atteberry, FTC Informal Staff Letter (July 18, 1978).

number of calls[222] and little pattern is to be found in court decisions[223] other than that a small number of calls without other factors did not state a FDCPA § 1692d(5) claim.[224]

Before Regulation F, factors leading a court to find a violation included:

- The number of calls per day;[225]
- The total number of calls made over a period of time;[226]
- Whether the calls were answered;[227]
- Whether the consumer told the collector to stop;[228] and
- Whether the consumer told the collector that they did not owe the debt.[229]

Ultimately, decisions were usually for the fact finder.[230]

Best practice pre-Regulation F was to plead and present evidence displaying as many of these factors as possible,[231]

222 Davis v. Diversified Consultants, Inc., 36 F. Supp. 3d 217, 228 (D. Mass. 2014); Crockett v. Rash Curtis & Assoc., 929 F. Supp. 2d 1030, 1032 (N.D. Cal. 2013); Durthaler v. Accounts Receivable Mgmt., Inc., 854 F. Supp. 2d 485, 489 (S.D. Ohio 2012); Hicks v. Am.'s Recovery Solutions, L.L.C., 816 F. Supp. 2d 509, 515 (N.D. Ohio 2011); Valentine & Kebartas, Inc. v. Lenahan, 801 S.E.2d 431, 442 (W. Va. 2017).

223 *See* Haysbert v. Navient Solutions, Inc., 2016 WL 890297, at *13 (C.D. Cal. Mar. 8, 2016) (discussing Cal. state debt collection practices act and observing "Whether a particular volume or pattern [of calls] leads to liability, however, is not a straightforward question, and courts have been inconsistent in applying the standards."); Scheiner v. Portfolio Recovery Assoc., 2013 WL 12103069, at *5 (S.D. Ohio Nov. 5, 2013) ("Courts have come to seemingly inconsistent conclusions regarding whether summary judgment is appropriate on § 1692d(5) claims."); Arteaga v. Asset Acceptance, L.L.C., 733 F. Supp. 2d 1218, 1227 (E.D. Cal. 2010) ("Court opinions differ . . . as to the amount or pattern of calls sufficient to raise a triable issue of fact regarding the intent to annoy, harass, or oppress.").

224 Bonanno v. New Penn Fin., L.L.C., 2017 WL 3219517 (M.D. Fla. July 28, 2017) (complaint alleged only servicer made "multiple calls" to consumer; this could mean "as few as two"), Ebanks v. Old Republic Equity Credit Services, Inc., 2016 WL 9526336 (M.D. Fla. July 29, 2016) (at most, five calls); Miller v. Cain, 2015 WL 222434 (W.D. La. Jan. 14, 2015) (single unanswered call to consumer's cell phone while at work); Saltzman v. I.C. Sys., Inc., 2009 WL 3190359 (E.D. Mich. Sept. 30, 2009) (one or two non-threatening calls per day).

225 *See, e.g.*, Fed. Trade Comm'n v. Williams, Scott & Assoc., 2015 WL 12856779 (N.D. Ga. Nov. 4, 2015) (ten times daily), *aff'd*, 679 Fed. Appx. 836 (11th Cir. 2017); Light v. Seterus, Inc., 337 F. Supp. 3d 1210, 1215 (S.D. Fla. 2018) (plaintiff alleged multiple calls "in a campaign designed to apply maximum psychological stress," with examples; plaintiff "sufficiently alleged a pattern and frequency of calls from which a jury could easily infer an intent to harass"); Brown v. Credit Mgmt., L.P., 131 F. Supp. 3d 1332 (N.D. Ga. 2015) (four calls in one day, two made after consumer had already hung up); Davis v. Diversified Consultants, Inc., 36 F. Supp. 3d 217, 228 (D. Mass. 2014) ("Sixty calls over . . . about three months is not insignificant in volume, and on multiple days, defendant called plaintiff as many as three or four times); Webb v. Premiere Credit of N. Am., L.L.C., 2012 WL 2359434, at *3 (D. Kan. June 20, 2012) (six calls per day); Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443 (D. Nev. 1994) (six calls to consumer's workplace within twenty-four minutes). *But see* Shuler v. Ingram & Assoc., 441 Fed. Appx. 712, 718 (11th Cir. 2011) (five calls, including one successful contact and two voicemail messages did not amount to repeated or continuous attempts to annoy).

226 *See, e.g.*, Meadows v. Franklin Collection Serv., Inc., 414 Fed. Appx. 230, 233 (11th Cir. 2011) (300 calls over 2.5 years); Palmer v. Simon's Agency, Inc., 2020 WL 1332829 (N.D.N.Y. Mar. 23, 2020) (thirty calls over a three- to four-week period); Sussman v. I.C. Sys., Inc., 928 F. Supp. 2d 784 (S.D.N.Y. 2013) (50 calls over three months); Hoover v. Monarch Recovery Mgmt., Inc., 888 F. Supp. 2d 589, 598–599 (E.D. Pa. 2012) (more than ten calls per week for eleven weeks); Winberry v. United Collection Bur., Inc., 697 F. Supp. 2d 1279 (M.D. Ala. 2010) (33 calls in a month); Harrison v. Fed. Pac. Credit Co., L.L.C., 2006 WL 276605 (W.D.N.Y. Feb. 3, 2006) (for fifteen months defendant placed weekly calls); Joseph v. J.J. Mac Intyre Companies, L.L.C., 238 F. Supp. 2d 1158 (N.D. Cal. 2002) (200 calls during nineteen-month period).

227 *See, e.g.*, Tucker v. CBE Grp., Inc., 710 F. Supp. 2d 1301, 1305 (M.D. Fla. 2010) (summary judgment for collector; never spoke to consumer, who neither told defendant it had wrong number, nor requested end to calls; 57 calls, no more than 7 per day, 6 voice mail messages, but never called back on same day after leaving message); Saltzman v. I.C. Sys., Inc., 2009 WL 3190359, at *7 (E.D. Mich. Sept. 30, 2009) (summary judgment for collector; court estimated 1:5 ratio of actual conversations to calls attempted). *See also* Reed v. Receivable Recovery Services, L.L.C., 702 Fed. Appx. 239, 241 (5th Cir. 2017) ("approximately 14 phone calls—six of which were not answered and about the same amount were answered but the person answering hung up—over five weeks likewise did not violate the FDCPA."). *But see* Meadows v. Franklin Collection Serv., Inc., 414 Fed. Appx. 230, 234 (11th Cir. 2011) ("We reject Franklin's contention that its telephone calls were not harassing because Meadows did not answer them. The plain language of § 1692d prohibits 'causing a telephone to ring . . . with intent to annoy, abuse or harass any person at the called number.' The statute itself recognizes that answering the phone is not necessary for there to be harassment.").

228 Zurich Am. Ins. Co. v. Ocwen Fin. Corp., 990 F.3d 1073, 1082 (7th Cir. 2021) (intent inferred from debt collector's persistence in face of consumer's requests for calls to stop); Meadows v. Franklin Collection Serv., Inc., 414 Fed. Appx. 230, 233 (11th Cir. 2011); Martinez v. Alltran Fin. L.P., 2020 WL 1677403 (D. Ariz. Apr. 6, 2020) (claim stated for debt collector's continued calls after being asked to stop); Parente v. Fay Servicing, L.L.C., 2020 WL 1182714 (N.D. Ill. Mar. 12, 2020) (multiple calls after she requested that calls cease); Jones v. Sw. Credit Sys., 2017 WL 4736790, at *3 (E.D. Pa. Oct. 18, 2017) ("Though Defendant is correct that calls to a debtor after he verbally requests that they cease do not automatically trigger a violation of § 1692d(5), there still may be a finding of an intent to annoy when examining the frequency of the calls."); Davis v. Diversified Consultants, Inc., 36 F. Supp. 3d 217, 228 (D. Mass. 2014); Sussman v. I.C. Sys., Inc., 928 F. Supp. 2d 784 (S.D.N.Y. 2013); Winberry v. United Collection Bur., Inc., 697 F. Supp. 2d 1279 (M.D. Ala. 2010); McGrady v. Nissan Motor Acceptance Corp., 40 F. Supp. 2d 1323 (M.D. Ala. 1998) (numerous phone calls including to mother and employer after being told to stop). *But see* Chapin v. Credit Control Services, Inc., 2020 WL 1898340 (S.D. Tex. Feb. 11, 2020) (thirty-eight calls over five-month period did not raise genuine issue of fact regarding intent where debt collector never called after marking "wrong number" in its records, and where plaintiff alleged that she asked at least twenty times for calls to stop, but also acknowledged she often did not know who was calling repeatedly).

229 Meadows v. Franklin Collection Serv., Inc., 414 Fed. Appx. 230, 234–235 (11th Cir. 2011); McCaskill v. Navient Solutions, Inc., 178 F. Supp. 3d 1281 (M.D. Fla. 2016). *Compare* Merchant v. Nationwide Recovery Serv., Inc., 440 F. Supp. 3d 1369 (N.D. Ga. 2020) (consumer confirmed to collector that he owed debt, and when representative told him calls would continue, even if VA was ultimately going to pay debt, he said "yeah, that's fine").

230 *See* § 6.7.3, *infra* (establishing intent under § 1692d(5)).

231 *See* Aguirre v. Wells Fargo Bank, 2015 WL 4065245 (C.D. Cal. July 2, 2015); Tamayo v. Am. Coradious Int'l, L.L.C., 2011 WL 6887869 (D.N.J. Dec. 28, 2011).

but the consumer's pleading did not need to provide precise details.[232]

Prior to Regulation F, courts were frequently unaffected by whether the calls involved the collector seeking multiple debts or only one from the same consumer.[233] In determining whether the number of calls was excessive, courts have considered calls made outside the statute of limitations as evidence showing that calls made within the limitations period are part of a pattern of repeated or continuous calls with intent to annoy, abuse, or harass.[234]

6.7.3 Establishing Intent to Annoy, Abuse, or Harass

FDCPA § 1692d(5)[235] is the only section 1692d subsection that requires proof of intent. The repeated calls must be made "with intent to annoy, abuse, or harass."

Regulation F (effective November 30, 2021) creates a presumption that, absent exceptions discussed in §§ 6.7.2.5 and 6.7.2.6, *supra*, calls exceeding the call and contact frequency standards set in Reg. F § 1006.14(b)(2) violate the prohibition on repeated or continuous telephone contact in FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1).[236] Once the presumption of a violation is established, the debt collector has the burden of rebutting the presumption of violation as described in § 6.7.2.3, *supra*. To do so, the debt collector would need to show that despite violating the frequency standards it "nevertheless did not place a telephone call or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[237]

Conversely, complying with the contact frequency standards in in Reg. F § 1006.14(b)(2) creates a presumption of compliance with FDCPA § 1692d(5) and Reg. F § 1006.14(b)(1).[238] In order to rebut the presumption of compliance as described in § 6.7.2.2, *supra*, the consumer or other person must show that, despite complying with the frequency standards, the debt collector "nevertheless placed a telephone call or engaged a person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[239]

Prior to Regulation F, intent was generally a question for the fact finder,[240] although summary judgment was still possible for the collector where the number of calls was minimal,[241] or for the consumer where the number of calls was extreme.[242]

Prior to Regulation F, proving the collector's intent directly was difficult, but courts would infer intent from the nature, pattern, content, or frequency of debt collection calls, as well as the place to which they are made.[243]

232 Gilmore v. USCB Corp., 2017 WL 5230922 (M.D. Ga. Nov. 9, 2017) (*Twombly* did not require exact number of calls or explanation of how calls constituted harassment); Burke v. Coachella Valley Collections Services, 2011 WL 13217709 (C.D. Cal. Mar. 25, 2011) (consumer's allegations of inconvenient calls to her workplace after agency was told not to call there did not need to provide evidentiary details as to exact time or number of calls).

233 Crockett v. Rash Curtis & Assoc., 929 F. Supp. 2d 1030, 1032 (N.D. Cal. 2013).

234 *See* Dore v. Five Lakes Agency, Inc., 2015 WL 4113203 at n.10 (N.D. Ill. July 8, 2015); Pittman v. J.J. Mac Intyre Co., 969 F. Supp. 609 (D. Nev. 1997). *See also* § 12.3.3.3, *infra*.

235 *See also* Reg. F § 1006.14(b)(1).

236 Reg. F § 1006.14(b)(2)(ii).

237 85 Fed. Reg. 76,734 at 76,816 (Nov. 30, 2020).

238 Reg. F § 1006.14(b)(2)(i).

239 85 Fed. Reg. 76,734 at 76,814 (Nov. 30, 2020).

240 *See, e.g.*, Light v. Seterus, Inc., 337 F. Supp. 3d 1210, 1215 (S.D. Fla. 2018) (plaintiff alleged multiple calls "in a campaign designed to apply maximum psychological stress," with examples; held plaintiff "sufficiently alleged a pattern and frequency of calls from which a jury could easily infer an intent to harass"); Black v. AFNI, Inc., 2018 WL 3546193, at *6 (D.N.J. July 23, 2018) (collecting cases); Wright v. Enhanced Recovery Co., 227 F. Supp. 3d 1207, 1213 (D. Kan. 2016) ("Where there is some evidence that the defendant continued to call the plaintiff after being asked to stop, the question of whether the conduct constitutes an intent to harass, in violation of § 1692d(5), is one for a jury."); Swearingen v. Portfolio Recovery Assoc., 892 F. Supp. 2d 987, 992 (N.D. Ill. 2012); Hendricks, 891 F. Supp. 2d 892, 896 (N.D. Ill. 2012); Holland v. Bur. of Collection Recovery, 801 F. Supp. 2d 1340, 1342–1343 (M.D. Fla. 2011); Valentine & Kebartas, Inc. v. Lenahan, 801 S.E.2d 431, 442 (W. Va. 2017) ("Accordingly, it is obvious that such an issue is exclusively one for the trier of fact—in this case, the trial court").

241 *See, e.g.*, Grimsley v. Palm Beach Credit Adjusters, Inc., 691 Fed. Appx. 576 (11th Cir. 2017) (called four times in two weeks); Kuntz v. Rodenburg L.L.P., 838 F.3d 923, 926 (8th Cir. 2016) ("may be resolved as a matter of law when the summary judgment record establishes that no reasonable jury could find the requisite level of harassment"); Merchant v. Nationwide Recovery Serv., Inc., 440 F. Supp. 3d 1369 (N.D. Ga. 2020) (collector called average of once a month and didn't call in middle of night, contact his relatives, or use profane language to threaten him); Benson v. Portfolio Recovery Assoc., 2019 WL 4040135, at *4 (E.D. Mo. Aug. 27, 2019) (nine calls made in eight months, spaced no less than six days apart); Dore v. Five Lakes Agency, Inc., 2015 WL 4113203 (N.D. Ill. July 8, 2015) (average of two calls per month without any allegation of hostile or vexations conduct and no request to stop).

242 *See, e.g.*, Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443, 1453 (D. Nev. 1994) (summary judgment for consumer where collector called her at her job six times within twenty-four minutes, including two calls after she had hung-up on collector).

243 Light v. Seterus, Inc., 337 F. Supp. 3d 1210, 1215 (S.D. Fla. 2018) (plaintiff alleged multiple calls "in a campaign designed to apply maximum psychological stress," with examples; held plaintiff "sufficiently alleged a pattern and frequency of calls from which a jury could easily infer an intent to harass"); Crockett v. Rash Curtis & Assoc., 929 F. Supp. 2d 1030, 1032 (N.D. Cal. 2013) ("intent may be inferred from circumstantial evidence such as the nature, pattern, and frequency of debt collection calls"); Neu v. Genpact Services, L.L.C., 2013 WL 1773822, at *4 (S.D. Cal. Apr. 25, 2013) (surveying case law); Durthaler v. Accounts Receivable Mgmt., Inc., 854 F. Supp. 2d 485, 489 (S.D. Ohio 2012) ("Courts consider whether the nature of telephone calls, including their frequency, substance, or the place to which they are made, provides grounds to infer a debt collector's intent to annoy, abuse, or harass without any other evidence of the debt collector's motive in calling."); Brown v. Hosto & Buchan, P.L.L.C., 748 F. Supp. 2d 847, 852 (W.D. Tenn. 2010) ("The nature of telephone calls, including their frequency, substance, or the place to which they are made, provides grounds to infer a debt collector's intent to annoy, abuse, or harass without any other evidence of the debt collector's motive in calling.").

There was no bright-line rule regarding how many calls showed intent to annoy, abuse, or harass.[244]

But courts often found intent where calls continued after the consumer asked that calls be stopped or where the called person informed the collector that it was the wrong number.[245]

Intent is not an element under the general FDCPA § 1692d prohibition of "conduct the natural consequence of which is to harass, oppress, or abuse any person." Thus, the question is raised whether plaintiff can prevail on a claim based on unwanted phone calls under the general FDCPA § 1692d prohibition, where the consumer need not show intent, but only that the natural consequence of repeated calls is to harass, oppress, or abuse, without showing the intent required under FDCPA § 1692d(5). The Official Interpretations of Regulation F explain that a debt collection that complies with FDCPA § 1692d(5)[246] also complies with section 1692d[247] "with respect to the frequency of its telephone calls" although the debt collector could still violate FDCPA § 1692d for other reasons "unrelated to frequency."[248]

Prior to Regulation F, some courts allowed a consumer to allege violations of both provisions as alternative theories, and recover under the general prohibition even when intent could not be established.[249] But other courts treated any claim under the general prohibition for repeated calls as actually a claim under FDCPA § 1692d(5), requiring intent.[250]

6.8 Meaningful Disclosure of Caller's Identity; FDCPA § 1692d(6)

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.[251]

FDCPA § 1692d(6) and Regulation F § 1006.14(g) (effective November 30, 2021) require collectors to identify themselves in a meaningful way when they call a person, except as provided in section 1692b, which states that when a collector seeks a debtor's location information from someone other than the debtor, the collector must "identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer."[252]

Because the FDCPA § 1692b exception applies to "any person other than the consumer," collectors cannot take advantage of the exception by claiming they are only seeking location information when they reach the consumer—that is the person that owes or allegedly owes the debt.[253] Moreover, FDCPA § 1692d applies to calls to "any person," so that when a collector calls the wrong person, such as a person subsequently assigned the debtor's old number, the called person can have a claim under section 1692d(6) if the collector does not provide proper identification.[254]

Nevertheless, FDCPA § 1692d(6) refers to "the placement of telephone calls" in the plural, so that some courts have given the debt collector a free pass to make one call without

244 Davis v. Diversified Consultants, Inc., 36 F. Supp. 3d 217, 228 (D. Mass. 2014); Crockett v. Rash Curtis & Assoc., 929 F. Supp. 2d 1030, 1032 (N.D. Cal. 2013); Pace v. Portfolio Recovery Assoc., 872 F. Supp. 2d 861, 865 (W.D. Mo. 2012), *aff'd*, 512 Fed. Appx. 643 (8th Cir. 2013); Durthaler v. Accounts Receivable Mgmt., Inc., 854 F. Supp. 2d 485, 489 (S.D. Ohio 2012); Arteaga v. Asset Acceptance, L.L.C., 733 F. Supp. 2d 1218, 1227 (E.D. Cal. 2010).

245 Zurich Am. Ins. Co. v. Ocwen Fin. Corp., 990 F.3d 1073, 1082 (7th Cir. 2021) (district court did not err in inferring intent to "annoy or harass" from debt collector's persistence in face of consumer's requests for calls to stop); Rigby v. CrossCheck Services, L.L.C., 2020 WL 1492893, at *6 (W.D. Wis. Mar. 27, 2020) (numerous and persistent phone calls, even after consumer asked for calls to stop); Hollis v. LVNV Funding, 2019 WL 1091336, at *3 (C.D. Cal. Jan. 2, 2019) ("Defendant continued calling her multiple times per week, and sometimes on multiple occasions in a single day, for more than a year after she requested they stop is sufficient to infer an intent to harass"); Hendricks v. CBE Grp., Inc., 891 F. Supp. 2d 892, 896 (N.D. Ill. 2012) ("where a plaintiff has shown that he asked the collection agency to stop calling or has informed the collection agency that it has the wrong number, and the collection agency nevertheless continued to call the plaintiff, courts have found intent"); Joseph v. J.J. Mac Intyre Companies, L.L.C., 238 F. Supp. 2d 1158, 1168 (N.D. Cal. 2002) ("on some days there were multiple calls made after voice contact in which the Plaintiff requested no further calls be made."). *See also* Hicks v. Am.'s Recovery Solutions, L.L.C., 816 F. Supp. 2d 509, 515 (N.D. Ohio 2011) ("Defendant continued to call Plaintiffs on a daily basis, often twice a day, despite being advised that Plaintiffs were represented by a debt management company"). *Compare* Stinson v. Receivables Mgmt. Bur. Inc., 2013 WL 1278966 (N.D. Ala. Mar. 26, 2013) (no intent, where despite high volume of calls, consumer never asked that collector stop them or indicated that collector was calling wrong person).

246 *See also* Reg. F § 1006.14(b)(1).

247 *See also* Reg. F § 1006.14(a).

248 Reg. F Official Interpretations § 1006.14(b)(1)-1.

249 *See, e.g.*, Jones v. Seas & Assoc., 2016 WL 4146192, at *5 (W.D. Tenn. Aug. 3, 2016) (refusing to dismiss concurrent § 1692d and § 1692d(5) claims based on same facts; citing Fed. R. Civ. P. 8(d)(2)-(3) and case law); Harris v. Stellar Recovery, 2015 WL 4041719, at *6 (D. Utah July 1, 2015) (plaintiff alleged violation of § 1692d(5); but even if unable to prove requisite intent, claim may survive under general proscription of § 1692d; subsection (5) is only "one example of behavior that violates 1692d"); Kromelbein v. Envision Payment Solutions, Inc., 2013 WL 3947109 (M.D. Pa. Aug. 1, 2013) (denying defense motions for summary judgment on § 1692d and § 1692d(5) claims based on same phone calls; noting that intent not required for § 1692d and issue of fact existed regarding intent for § 1692d(5) claim).

250 *See, e.g.*, Muzyka v. Rash Curtis & Assoc., 2019 WL 2869114, at *4 n.3 (E.D. Cal. July 3, 2019) (quoting *Hollis* and collecting cases); Hollis v. LVNV Funding, 2019 WL 1091336, at *3 (C.D. Cal. Jan. 2, 2019); Stirling v. Genpact Services, L.L.C., 2012 WL 952310, at *3 (C.D. Cal. Mar. 19, 2012).

251 15 U.S.C. § 1692d(6). *See also* Reg. F § 1006.14(g).

252 *See* 15 U.S.C. § 1692b(1); Reg. F § 1006.10(b). *See also* Sclafani v. BC Serv., Inc., 2010 WL 4116471 (S.D. Fla. Oct. 18, 2010) (collector calling under § 1692b could leave just her individual name without giving her employer's name).

253 Thomas v. Everest Receivable Services, Inc., 2020 WL 6276033, at *2 (M.D. Fla. Sept. 10, 2020) (collector could have asked who collector was speaking to when it reached the debtor); Hultman v. Prof'l Choice Recovery, Inc., 2017 WL 2963869 (D. Neb. June 9, 2017) (rejecting argument that collector did not know it had reached debtor when it was debtor's number).

254 Horowitz v. GC Services L.P., 2015 WL 1959377 (S.D. Cal. Apr. 28, 2015); Kane v. Nat'l Action Fin. Serv., Inc., 2011 WL 6018403 (E.D. Mich. Nov. 7, 2011).

providing a meaningful identification.[255] But collectors will often make multiple calls to a consumer, and then it is prudent to allege the collector's failure to identify itself in all of these calls. Since the provision refers to "meaningful" disclosure, if the debt collector provided any sort of identifying information, then it is prudent to specify as precisely as possible the facts showing that the identification was not meaningful.[256]

When a collector calls repeatedly, the consumer answers, and the collector then hangs up without providing identification, this can violate FDCPA § 1692d(6).[257] On the other hand, unanswered calls where no message is left on voice mail are unlikely to violate FDCPA § 1692d(6), particularly where the caller ID is not deceptive.[258]

Regulation F's Official Interpretations state that a voicemail that qualifies as a limited-content message, as defined at Ref. F § 1006.2(j),[259] does not violate FDCPA § 1692d(6)'s meaningful disclosure requirement.[260] However, voicemail messages that do not comply with Reg. F 1006.2(j) can still violate the FDCPA, including section 1692d(6).[261] When collectors do leave a voice mail message, they cannot excuse their lack of identification by arguing that if a third party heard the message with the collector's identity, that would violate FDCPA § 1692c(b) (third party contact). This issue is examined at § 5.7.8, *supra*.

Callers must identify the collection agency making the call and the nature of its business, if not apparent from the collection agency's name.[262] That the collector sent a prior letter identifying the collector is not a defense where a subsequent voice mail only identifies the collector by its phone number.[263] But the Third Circuit found no violation where the caller identified the employer and nature of the call, but abbreviated the name of the employer.[264] Where the call properly identified the caller and the nature of the call, courts do not require that the caller ID displayed on the consumer's phone also identify the caller.[265]

Despite the provision requiring identification of the "caller," the Eleventh Circuit does not require disclosure of

255 *See* Pisarz v. GC Services L.P., 2017 WL 1102636 (D.N.J. Mar. 24, 2017); Pollock v. GC Services L.P., 2014 WL 7140046 (E.D. Mich. Dec. 12, 2014); Brailey v. F.H. Cann & Assoc., 2014 WL 7639909 (W.D. La Dec. 5, 2014); Hagler v. Credit World Serv., 2014 WL 4954595 (D. Kan. Oct. 1, 2014); Sanford v. Portfolio Recovery Assoc., L.L.C., 2013 WL 3798285, at *19 (E.D. Mich. July 22, 2013); Jordan v. ER Solutions, Inc., 900 F. Supp. 2d 1323 (S.D. Fla. 2012); Thorne v. Accounts Receivable Mgmt., Inc., 2012 WL 3108662 (S.D. Fla. July 24, 2012); Garza v. MRS BPO, L.L.C., 2012 WL 3527072 (S.D. Tex. Aug. 15, 2012); Sampaio v. I.C. Sys., Inc., 2009 WL 8731170 (S.D. Fla. Nov. 6. 2009).

256 *See* Davis v. Bonewicz, 2011 WL 5827796 (E.D. Mo. Nov. 18, 2011) (plaintiff's general allegation that debt collector left voicemail messages without meaningful disclosure of identity was dismissed); Evangelista v. Regent Asset Mgmt. Solutions, Inc., 2011 WL 4531340 (M.D. Fla. Sept. 29, 2011) (allegations did not contain sufficient factual specificity so as to warrant entry of default judgment, since complaint failed to specify content of one or more of the voicemail messages left on plaintiff's answering machine by debt collector).

257 Sussman v. I.C. Sys., Inc., 928 F. Supp. 2d 784 (S.D.N.Y. 2013); Langdon v. Credit Mgmt., L.P., 2010 WL 3341860, at *2 (N.D. Cal. Feb. 24, 2010).

258 Kuberski v. Cred X Debt Recovery, L.L.C., 2012 WL 2943726 (D. Colo. July 2, 2012), *adopted*, 2012 WL 2936421 (D. Colo. July 19, 2012).

259 *See* § 4.9, *supra*.

260 Reg. F Official Interpretations § 2(j)-3.

261 *See* Reg. F Official Interpretations § 2(j)-1.

262 *Second Circuit*: *See, e.g.*, Ostrander v. Accelerated Receivables, 2009 WL 909646, at *6 (W.D.N.Y. Mar. 31, 2009) (message stated only person's name to contact and a telephone number).

Fourth Circuit: *See, e.g.*, Woods v. Oxford Law, L.L.C., 2015 WL 778778, at *8 (S.D. W. Va. Feb. 24, 2015) (allegation that caller failed to state company name or purpose of call was sufficient for default judgment).

Fifth Circuit: *See, e.g.*, Campos v. Tolteca Enterprises, Inc., 2015 WL 4078134, at *2 (W.D. Tex. July 6, 2015) (call violated § 1692d(6); "caller provided her name, [company]'s name, and a phone number, but did not say anything about the nature of the call itself"; quoting *Baker v. Allstate Fin. Services*, with approval).

Sixth Circuit: *See, e.g.*, Crain v. Pinnacle Fin. Grp. of MN, Inc., 2007 WL 3408540, at *5 (E.D. Mich. Nov. 14, 2007) ("Plaintiff asserts (1) '[t]hey would not tell me their names of where they were from and (2)[w]hen I told them to stop calling that is when profane language was used.' These allegations, if true, state clear violations of Section 1692d(6) and (2), respectively.").

Seventh Circuit: *See, e.g.*, Mino v. Credit Prot. Ass'n, L.P., 2013 WL 4039453, at *2 (S.D. Ind. Aug. 7, 2013) ("only requires the debt collector inform the debtor 1) of the name of the debt collection company, and 2) that the purpose of the telephone call was for the collection of the debt").

Eighth Circuit: *See, e.g.*, Baker v. Allstate Fin. Services, Inc., 554 F. Supp. 2d 945, 949–950 (D. Minn. 2008) (message stated caller's name and collector's name, but not nature of business or purpose of call); Knoll v. Allied Interstate, Inc., 502 F. Supp. 2d 943, 946 (D. Minn. 2007) ("§ 1692d(6) does not prohibit a debt collection agency employee from using an alias during a telephone call, as long as the employee accurately discloses the name of the debt collection agency and explains the nature of its business").

Ninth Circuit: *See, e.g.*, Kersten v. Quick Collect, Inc., 2015 WL 105797 (D. Or. Jan. 7, 2015); Moritz v. Daniel N. Gordon, P.C., 895 F. Supp. 2d 1097, 1104 (W.D. Wash. 2012); Wood v. GC Serv., L.P., 2012 WL 995207, at *3 (M.D. Fla. Mar. 23, 2012); Koby v. ARS Nat'l Services, Inc., 2010 WL 1438763 (S.D. Cal. 2010); Costa v. Nat'l Action Fin. Services, 634 F. Supp. 2d 1069, 1075 (E.D. Cal. 2007) (violation where message stated only caller's name, not debt collection agency's name or purpose of call); Hosseinzadeh v. M.R.S. Assoc., Inc., 387 F. Supp. 2d 1104, 1112 (C.D. Cal. 2005).

Tenth Circuit: *See, e.g.*, Rhodes v. Nat'l Collection Sys., Inc., 2016 WL 6472112 (D. Colo. Oct. 31, 2016) (callers name not enough, but must disclose identity of employer); Rhodes v. Olson Assoc., 83 F. Supp. 3d 1096, 1109–1110 (D. Colo. 2015) (caller and company name not enough if name not sufficient to indicate debt collection purpose).

Eleventh Circuit: *See, e.g.*, Hart v. Credit Control, L.L.C., 871 F.3d 1255, 1260 (11th Cir. 2017); Dauval v. MRS BPO, L.L.C., 2013 WL 9921550 (M.D. Fla. June 27, 2013); Frazier v. Absolute Collection Serv., Inc., 767 F. Supp. 2d 1354, 1364 (N.D. Ga. 2011); Valencia v. Affiliated Grp., Inc., 2008 WL 4372895, at *3 (S.D. Fla. Sept. 24, 2008) (did not disclose nature of business).

263 *See* Garo v. Glob. Credit & Collection Corp., 2011 WL 251450 (D. Ariz. Jan. 26, 2011).

264 Levins v. Healthcare Revenue Recovery Grp. L.L.C., 902 F.3d 274 (3d Cir. 2018). *Cf.* Hutton v. C.B. Accounts, Inc., 2010 WL 5463108 (C.D. Ill. Dec. 29, 2010) (class inappropriate where some consumers would have recognized debt collector by its initials in messages).

265 Bryan v. Allied Interstate L.L.C., ___ F. Supp. 3d ___, 2021 WL 141703, at *3 (W.D.N.C. Jan. 14, 2021); Scheffler v. Integrity Fin. Partners, Inc., 2013 WL 9768539 (D. Minn. Oct. 28, 2013).

the employee's name, only the employer.[266] When the caller discloses their name, it may be an alias.[267] Regulation F states that the use of aliases is not prohibited under the regulations implementing FDCPA § 1692e as long as the employee "uses the assumed name consistently and . . . the debt collector can readily identify any employee using an assumed name."[268] The obligation is not only on the employee, but also on the employer to have a system in place that can effectively and readily identify the employee based on the alias.[269]

Regulation F does not directly address the use of aliases in the context of FDCPA § 1692d(6)'s "meaningful disclosure of the caller's identity" requirement. However, the FTC Staff Commentary previously addressed the use of aliases in the context of FDCPA § 1692d(6), concluding that "meaningful disclosure of the caller's identity" is satisfied if the alias "permits identification of the debt collector (i.e., where he uses the alias consistently, and his true identity can be ascertained by the employer)."[270]

Prior to the implementation of Regulation F, many courts found no FDCPA § 1692d(6) violation where the caller uses an alias, as long as the caller also identifies the employer and the nature of the call,[271] and especially if the collection employee may be identified through the collector's employer.[272]

6.9 Prohibited Communication Media; Reg. F § 1006.14(h)

In connection with the collection of any debt, a debt collector must not communicate or attempt to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.[273]

Regulation F (effective November 30, 2021) adds an additional example of conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Regulation F § 1006.14(h) prohibits a debt collector from communicating or attempting to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.[274] The supplemental information explains "Once a person has requested that a debt collector not use a specific medium of communication to communicate with that person, the Bureau believes that the natural consequence of further communications or attempts to communicate from the debt collector to that person using that same medium likely is harassment, oppression, or abuse of that person."[275]

Reg. F § 1006.14(h)(1) refers to a "person" requesting the collector not use a medium of communication, so that the provision is not limited to a consumer as defined at Reg. F § 1006.6(c).[276] The term "person" is defined at Reg. F § 1006.2(k) to include "natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies."[277]

Regulation F's Official Interpretations explain that medium of communication includes "any oral, written, electronic, or other medium."[278] As examples, the Official Interpretations specify that "a communication may occur in person or by telephone, audio recording, paper document, mail, email, text message, social media, or other electronic media."[279]

Additionally, Regulation F's Official Interpretations explain that:

> Within a medium of communication, a person may request that a debt collector not use a specific address or telephone number. For example, if a person has two mobile telephone numbers, the person may request that the debt collector not use one or both mobile telephone numbers.[280]

If a consumer opts out of communications with a specific phone number or email address, this does not apply to communications to different email addresses or phone numbers.[281]

The request to stop using a means of communication need not be in writing.[282] The CFPB's supplemental information

266 Hart v. Credit Control, L.L.C., 871 F.3d 1255, 1259–1260 (11th Cir. 2017). *See also* Mino v. Credit Prot. Ass'n, L.P., 2013 WL 4039453, at *2 (S.D. Ind. Aug. 7, 2013) (caller's name not required; "Other courts have suggested that a debt collector employee must give his or her personal name, but those courts have not been faced with the issue of whether the omission of the personal name alone is sufficient to warrant § 1692d(6) relief.").

267 *See, e.g.*, Arslan v. Florida First Fed. Grp., 1995 WL 731175 (M.D. Fla. Oct. 5, 1995).

268 Reg. F § 1006.18(f). *See* § 7.2.14.3, *infra*.

269 *See* § 7.2.14.3, *infra*.

270 FTC Official Staff Commentary §806(6)-1, *reproduced at* Appx. C.2, *infra*; *discussed at* § 3.4.4.4, *supra*.

271 *See* Beeders v. Gulf Coast Collection Bur., 796 F. Supp. 2d 1335, 1339 (M.D. Fla. 2011), *aff'd*, 432 Fed. Appx. 918 (11th Cir. 2011) (no discussion of aliases); Gostony v. Diem Corp., 320 F. Supp. 2d 932 (D. Ariz. 2003); Youngblood v. GC Services L.P., 186 F. Supp. 2d 695 (W.D. Tex. 2002); Wright v. Credit Bur., Inc., 548 F. Supp. 591 (N.D. Ga. 1982), *modified on other grounds*, 555 F. Supp. 1005 (N.D. Ga. 1983); Kleczy v. First Fed. Credit Control, Inc., 486 N.E.2d 204 (Ohio Ct. App. 1984). *Cf.* United States v. Cent. Adjustment Bur., Inc., 823 F.2d 880 (5th Cir. 1987) (modified order so that "No provision in said judgment shall be construed to prevent Central Adjustment Bureau, Inc. or its co-defendants from using assumed names in order to gather information relative to debtors"). *But see* Arslan v. Florida First Fed. Grp., 1995 WL 731175 (M.D. Fla. Oct. 5, 1995).

272 *See* Johnson v. NCB Collection Services, 799 F. Supp. 1298 (D. Conn. 1992).

273 Reg. F § 1006.14(h)(1).

274 Reg. F § 1006.14(h)(1).

275 85 Fed. Reg. 76,734 at 76,825 (Nov. 30, 2020).

276 *See* § 4.4, *supra*.

277 *See* § 4.10, *supra*.

278 Reg. F Official Interpretations § 14(h)(1)-1 *referencing* Reg. F Official Interpretations § 2(d)-1.

279 Reg. F Official Interpretations § 14(h)(1)-1 *referencing* Reg. F Official Interpretations § 2(d)-1.

280 Reg. F Official Interpretations § 14(h)(1)-2.

281 Reg. F Official Interpretations § 14(h)(1)-3(ii).

282 Reg. F Official Interpretations § 14(h)(1)-3(i) (providing an example where consumer "tells" debt collector to stop calling).

states that, unlike a request to cease all communications under FDCPA § 1692c(c),[283] a "writing requirement is not necessary or warranted in the context of Reg. F § 1006.14(h)(1), which provides a person with the opportunity to make a narrower request regarding communication media."[284] When a person responds to a collector's telephone call by stating "stop calling," the regulation prohibits the debt collector from communicating or attempting to communicate with the person through telephone calls.[285]

Regulation F Official Interpretations clarify that "[t]he debt collector may ask follow-up questions regarding preferred communication media to clarify statements by the person."[286]

The CFPB's supplemental information notes that "final rule does not specify the period of time afforded a debt collector to update its systems to reflect a person's request under § 1006.14(h)(1)," but that in some circumstances a bona fide error defense may be available if:

> [N]otwithstanding the maintenance of procedures reasonably adapted to avoid any such error, a debt collector communicates or attempts to communicate with a person through a medium of communication after the person has requested that the debt collector not use that medium but before the debt collector has implemented the person's request.[287]

The CFPB's supplemental information also explains that Reg. F § 1006.14(h)(1) does not require a debt collector to transfer a request not to communicate with a particular consumer through a particular medium to a creditor or subsequent debt collector.[288] As a result, the consumer would need to renew such requests with each subsequent debt collector.[289]

Notably, unlike the presumption of compliance in Reg. F § 1006.14(b)(2) with the prohibition on repeated or continuous telephone calls in Reg. F § 1006.14(b)(1),[290] the prohibition in Reg. F § 1006.14(h)(1) is not limited to "collection of a particular debt."[291] As a result, a debt collector should apply a request not to communicate through a particular medium of communication broadly to all of the accounts that debt collector is attempting to collect from the requesting consumer. Indeed, Regulation F Official Interpretations explain that:

> Section 1006.14(h)(1) prohibits a debt collector from communicating or attempting to communicate with a person *in connection with the collection of any debt* through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.[292]

There are three exceptions to the requirement that the collector not use a particular medium of communication. First, if a person opts out of receiving electronic communications, the collector can still send electronic confirmation of the request and the collector can indicate it will honor the request, but the confirmation can contain no other information.[293] Second, where a person requests that the collector not use a medium of communication, and the person later initiates contact using that same medium, the collector can reply using that same medium, but only once for each communication initiated by the person.[294]

Third, the collector can still use the means of communication the person requested the collector not use if that means is otherwise required by applicable law.[295] The Reg. F Official Interpretations provide an example. Assume a debt collector is also a mortgage servicer subject to the Truth in Lending Regulation Z requirement that is send periodic statement regarding a residential mortgage loan.[296] Also assume the mortgage loan borrower has not consented to receive statements electronically in accordance with Regulation Z.[297] Even if the person tells the debt collector to stop mailing letters, the collector can still mail the person periodic statements, because the periodic statements are required by applicable law.[298]

283 *See* § 5.8, *supra*.
284 85 Fed. Reg. 76,734 at 76,826 (Nov. 30, 2020).
285 Reg. F Official Interpretations § 14(h)(1)-3(i).
286 Reg. F Official Interpretations § 14(h)(1)-1.
287 85 Fed. Reg. 76,734 at 76,826 (Nov. 30, 2020).
288 85 Fed. Reg. 76,734 at 76,826 (Nov. 30, 2020).
289 85 Fed. Reg. 76,734 at 76,826 (Nov. 30, 2020).
290 *See* § 6.7.2, *supra*.
291 *See* Reg. F § 1006.14(b)(4) ("For purposes of this paragraph (b), particular debt means each of a consumer's debts in collection.").
292 Reg. F Official Interpretations § 14(h)(1)-1 (emphasis added).
293 Reg. F § 1006.14(h)(2)(i).
294 Reg. F § 1006.14(h)(2)(ii).
295 Reg. F § 1006.14(h)(2)(iii).
296 Regulation Z, 12 C.F.R. § 1026.41.
297 Regulation Z, 12 C.F.R. § 1026.41(c).
298 Reg. F Official Interpretations § 14(h)(2)-1. *See also* Reg. F Official Interpretations § 6(c)(2)-1, -2, *discussed at* § 5.8.4, *supra*.

Chapter 7 FDCPA § 1692e: False, Deceptive, or Misleading

7.1 Introduction

This chapter discusses the specific requirements the Fair Debt Collection Practices Act (FDCPA) imposes on debt collectors under section 1692e—including section 1692e's general prohibition of false, deceptive, or misleading representations, as well as the sixteen enumerated protections that proscribe a broad range of deceptive debt collector misconduct. Section 1692e may contain the most litigated provisions of the FDCPA. The chapter also considers Regulation F[1] (effective November 30, 2021) provisions related to FDCPA § 1692e.

Section 7.3, *infra*, considers general topics applicable to FDCPA § 1692e, while § 7.2, *infra*, examines the sixteen specific provisions. Section 7.4, *infra*, then examines all of these principles' application to a number of selected topics, such as claims relating to a collector's lawsuit to collect on the debt, collection on a time-barred debt, and misrepresentations in settlement offers.

Chapter 3, *supra*, also discusses important issues that often arise in connection with FDCPA § 1692e claims:

- The Act should be construed to protect the least sophisticated consumers;[2]
- The interaction of the FDCPA with state law;[3]
- Waiver of FDCPA protections is disfavored;[4]
- The FDCPA is a strict liability statute;[5]
- The FDCPA should be liberally interpreted to meet its remedial purposes;[6] and
- Even debtors who have mismanaged their affairs deserve to be treated in a reasonable and civil manner.[7]

The Supreme Court has held that any consumer claim in federal court (thus including a FDCPA § 1692e claim) must have Article III standing. This issue is discussed in detail at § 11.15, *infra*, with particular application to FDCPA § 1692e at § 11.15.4, *infra*.

7.2 The Sixteen Enumerated FDCPA § 1692e Prohibitions

7.2.1 False Implication of Government Affiliation, FDCPA § 1692e(1)

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.[8]

FDCPA § 1692e(1) prohibits misrepresentation of a del collector's connection with the government. It is closely relate to FDCPA § 1692e(9), which prohibits misrepresenting a del collector's authority, and FDCPA § 1692e(13), which prohibit distributing or using simulated government documents.[9]

FDCPA § 1692e(1) is intended, among other things, to pro hibit a collector from impersonating a government official, such as a law enforcement officer.[11] For example, collector may not use off-duty uniformed police officers to collec debts. It was also found to be a violation for collector employ ees to claim they are officers or investigators before threaten ing criminal charges.[12] A collector using a telephone caller II that states the caller is a police department is actionable.[13]

Misrepresentations of government affiliation or approva also violate FDCPA § 1692e(1). The Seventh Circuit found violation had been stated where a collector's letters said: "W provided the systems used by a major branch of the federal gov ernment and various state governments. . . . You must surel know the problems you will face later if you do not pay."[14]

1 12 C.F.R. Part 1006.
2 *See* § 3.2.1, *supra*.
3 *See* § 3.2.2, *supra*; § 11.16.1, *infra*.
4 *See* § 3.2.3, *supra*.
5 *See* § 3.2.4, *supra*.
6 *See* § 3.2.5, *supra*.
7 *See* § 3.2.6, *supra*.
8 15 U.S.C. § 1692e(1). Each major bill leading to the Act contained provision similar in substance to this section. *E.g.*, H.R. 10191, 94 Cong., 1st Sess. (1975). *See also* Reg. F § 1006.18(b)(1)(i).
9 15 U.S.C. § 1692e(9), *discussed at* § 7.2.9, *infra*; 15 U.S.C. § 1692e(1 *discussed at* § 7.2.13, *infra*.
10 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, 8, *reprinted in* 19 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*.
11 122 Cong. Rec. H7787, H7789 (daily ed. July 27, 1976) (remarks Rep. Annunzio); 113 Cong. Rec. H2922 (daily ed. Apr. 4, 197 (remarks of Rep. Annunzio). *See also* FTC Official Staff Commenta § 807(1), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *sup*.
12 FTC v. Fed. Check Processing, Inc., 2016 WL 5956073 (W.D.N Apr. 13, 2016), *adopted*, 2016 WL 5940485 (W.D.N.Y. Oct. 13, 201 *But cf.* Chesworth, FTC Informal Staff Letter (Sept. 16, 1997) (na "Law Enforcement Systems" not deceptive where collection age collecting overdue parking fines).
13 *See* Aurandt v. Brown, 2017 WL 1215451 (W.D. Pa. Mar. 31, 2017).
14 Gammon v. GC Services, 27 F.3d 1254, 1257 (7th Cir. 1994). *See* FTC v. Williams, Scott & Assoc., 2015 WL 12856779 (N.D. Ga. No 2015), *aff'd on other grounds*, 2017 WL 540996 (11th Cir. Feb. 2017) (granting FTC summary judgment where collectors misre sented they were affiliated with government entities, including enforcement agencies). *But see* Sullivan v. Credit Control Serv Inc., 745 F. Supp. 2d 2 (D. Mass. 2010) (use of name "Govern Employees Insurance Company" did not falsely represent that deb lector was vouched for or affiliated with government).

The use of "Federal" in a debt collector's name has been found to be a FDCPA § 1692e(1) violation.[15] Use of a state name in the collector's name without explanatory language can also be a violation (e.g. "Maryland Collection Service," "Credit Bureau of Connecticut").[16] However, use of the word "state" in the collector's name, such as in "State Collection Service," will not necessarily violate the FDCPA.[17]

Symbols can violate FDCPA § 1692e(1). The FTC Commentary provides examples—"[f]or example, a collection letter depicting a police badge, a judge, or the scales of justice, normally violates this section."[18]

FDCPA § 1692e(1) prohibits the *false* representation of government affiliation. If the affiliation is accurate, there is no violation. The U.S. Supreme Court found no FDCPA § 1692e violation where the state had required special counsel collecting state debts to use state letterhead. "Special counsel create no false impression in doing just what they have been instructed to do."[19]

Similarly, where a collection agency was hired by the district attorney to help collect bad checks, there was no FDCPA § 1692e(1) violation where the district attorney authorized the collector to send letters in the name of the district attorney.[20] Also, a licensed collection agency can represent itself as licensed by the state.[21]

7.2.2 Debt's Character, Amount, Status; Collector Services or Compensation, FDCPA § 1692e(2)

7.2.2.1 Generally

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(2) The false representation of—
(A) the character, amount, or legal status of any debt; or[22]
(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.[23]

FDCPA § 1692e(2) prohibits "false" representations, while section 1692e generally prohibits "false, deceptive, or misleading" representations, and section 1692e(10) prohibits "any false representation or deceptive means." Where a court would limit the reach of FDCPA § 1692e(2) because the provision applies only to "false" but not deceptive claims,[24] a claim might instead be brought under section 1692e or 1692e(10).

This section focuses on inaccurate or false representations of the amount owing or that any amount is owed at all, including misrepresentations concerning the current balance, interest charges, interest and fees that will accrue in the future, collection costs and other fees, attorney fees, and special penalties for writing an insufficient funds check. The section also considers other deception relating to the debt's character or legal status, and the collector's services.

Particularly where there are inaccurate statements as to the amount due, collectors may claim they are only passing on information they received from the creditor. While the consumer bears the burden of proving that the stated amount of the debt is false,[25] there is no requirement that the consumer

15 FTC v. Fed. Check Processing, Inc., 2016 WL 5956073 (W.D.N.Y. Apr. 13, 2016), *adopted*, 2016 WL 5940485 (W.D.N.Y. Oct. 13, 2016); Adams v. First Fed. Credit Control, Inc., 1992 WL 131121 (N.D. Ohio May 21, 1992) (used "federal" in collector's letterhead, surrounded with icons resembling great seal of U.S.). *See also* United States Ass'n of Credit Bureaus v. Fed. Trade Comm'n, 299 F.2d 220 (7th Cir. 1962) (deceptive under FTC Act to use name, "USA of CB"). *But see* Cook v. Fed. Credit Corp., 2008 WL 11515166 (N.D. Cal. Mar. 7, 2008) (consumer did not offer any evidence that he was deceived into believing that Federal Credit was arm of federal government or acting on its behalf); Pache Mgmt. Co. v. Lusk, 1997 WL 254096 (Ohio Ct. App. May 15, 1997) (use of word "federal" in debt collector's name, when communications stated prominently that collector was private corporation, did not unlawfully imply affiliation with government).

16 *See* Crouch, FTC Informal Staff Letter (Sept. 10, 1996). *See also* Slough v. Fed. Trade Comm'n, 396 F.2d 870 (5th Cir. 1968) (use of name "State Credit Control Board" a deceptive practice under FTC Act); Bennett v. Fed. Trade Comm'n, 200 F.2d 362 (D.C. Cir. 1952) (deceptive under FTC Act to use name "Washington Service Bureau," with Washington, D.C. address, and official-sounding title, "disbursement officer"). *But see* Molesky v. State Collection & Recovery Services, L.L.C., 2015 WL 5746835 (N.D. Ohio Sept. 30, 2015) (the word "State" in collection agency's name did not violate FDCPA); Osborn v. Ekpsz, L.L.C., 821 F. Supp. 2d 859 (S.D. Tex. 2011) (least sophisticated consumer would not see official court status in collection letter with centered letterhead, a bar code, and the collector name of Texas Final Judgments, L.L.C.).

17 Born v. State Collection Serv., Inc., 2019 WL 2518135 (E.D. Wash. June 18, 2019).

18 FTC Official Staff Commentary § 807(1)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *See also* United States Ass'n of Credit Bureaus v. Fed. Trade Comm'n, 299 F.2d 220 (7th Cir. 1962) (deceptive under FTC Act to use insignias of American Eagle and red, white, and blue shield with stars in its collection letters); Adams v. First Fed. Credit Control, Inc., 1992 WL 131121 (N.D. Ohio May 21, 1992) (used "federal" in collector's letterhead, surrounded with icons resembling great seal of U.S.).

19 Sheriff v. Gillie, 578 U.S. 317, 326, 136 S. Ct. 1594, 194 L. Ed. 2d 625 (2016). *See also* Bednarski v. Potestivo & Assoc., 2017 WL 3581140 (N.D. Ill. Aug. 18, 2017) (no § 1692e(1) violation where signature block indicated that the lawyer was an "Attorney for the United States," when attorney was representing the United States).

20 *See* Landfried v. Spokane County, 2011 WL 1584328 (E.D. Wash. Apr. 27, 2011).

21 Smith v. Transworld Sys., Inc., 953 F.2d 1025 (6th Cir. 1992).

22 15 U.S.C. § 1692e(2)(A). *See also* Reg. F § 1006.18(b)(2)(i).

23 15 U.S.C. § 1692e(2)(B). The major bills, *e.g.*, H.R. 10191, 94th Cong., 1st Sess. § 804(7) (1975) and H.R. 11969, 94th Cong., 2d Sess. § 806(2)(B) (1976), leading to the FDCPA contained provisions similar to those in the final version of this section, except that later Senate bill added the term "lawfully." S. 918, 95th Cong., 1st Sess. § 807(2)(B) (1977). *See also* Reg. F § 1006.18(b)(2)(ii).

24 Hahn v. Triumph P'ships L.L.C., 557 F.3d 755, 757 (7th Cir. 2009); Heffington v. Gordon, Aylworth & Tami, P.C., 2018 WL 3763799, at *3 (D. Or. Aug. 8, 2018).

25 *E.g.*, Glover v. Wells Fargo Home Mortg., 629 Fed. Appx. 331 (3d Cir. 2015); De La Torre v. Legal Recovery Law Office, 2015 WL 574629

prove that the collector intentionally misstated the amount.[26] Instead, as described at § 7.2.2.2, *infra*, the FDCPA is a strict liability statute, and lack of intent is not a defense unless the collector can prove all of the elements of the bona fide error defense.

Nor is it a defense that a stated amount due is a mere estimate, at least where the communication did not represent that the amount was an estimate.[27] Another possible collector defense is that the mistake is not material. Materiality is examined at § 7.3.9, *supra*.

Misstatements of an amount or other violations of FDCPA § 1692e(2) apply to statements made in litigation and not just in collection communications.[28] It is no defense that the complaint seeking an amount not owed "was merely an aspirational request to the state court, not a representation of the legal status of the debt."[29] The result may be different where the debt collector had a reasonable basis for the requested amount, even though the court ruled for the consumer.[30]

7.2.2.2 Strict Liability

A common debt collector claim is that its FDCPA § 1692e(2) violation was unintentional, that the collector was relying on the creditor's information, or otherwise simply made a mistake. But, unless the bona fide error defense applies,[31] a collector is strictly liable for misstating the amount of a debt, even if that is unintentional.[32] This is in keeping with the general notion that the FDCPA is a strict liability statute.[33]

Some courts hold that a FDCPA § 1692e(2) claim fails if the collector was relying on information from the creditor.[34] But this result is justified only if the bona fide error defense applies, requiring both "that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[35]

The FDCPA § 1692g verification provision is a separate requirement from FDCPA § 1692e(2) and requires the debt collector to verify the debt with the creditor only when the consumer requests verification.[36] This requirement does not give a collector permission to rely without question on the creditor's initial statement to the collector of the debt or eliminate the requirement that, like all representations to the consumer, the initial communication about the debt not be deceptive in violation of FDCPA § 1692e(2).[37]

7.2.2.3 Demanding Payment When No Debt Is Owed

There are a number of reasons why a collector's claim that a debt is due may not be correct, such as the debt was paid in full

(S.D. Cal. Feb. 11, 2015); Kasalo v. NCSPLUS Inc., 2011 WL 4686436 (N.D. Ill. Oct. 4, 2011) (but consumer failed to prove an error).

26 *See* § 7.3.5.1, *supra*.

27 McLaughlin v. Phelan Hallinan & Schmieg, L.L.P., 756 F.3d 240 (3d Cir. 2014). *Cf.* Francis v. General Revenue Corp., 2020 WL 4586392, at *4 (E.D.N.Y. Aug. 10, 2020) (where collection letter represented collection fee as definite when it was not, the lack of disclosure rendered letter deceptive to the least sophisticated consumer).

28 Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995); Haney v. Portfolio Recovery Assoc., 837 F.3d 918, 926 (8th Cir. Sept. 21, 2016); Stratton v. Portfolio Recovery Assoc., L.L.C., 770 F.3d 443 (6th Cir. 2014); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011); Hartman v. Great Seneca Fin. Corp., 569 F.3d 606 (6th Cir. 2009); DeWolf v. Samaritan Hosp., 2018 WL 3862679 at *3 (N.D.N.Y. Aug. 14, 2018); § 7.3.7, *supra*.

29 Stratton v. Portfolio Recovery Assoc., L.L.C., 770 F.3d 443, 451 (6th Cir. 2014); Stubbs v. Cavalry SPV I, L.L.C., 2015 WL 135131 (N.D. Ill. Jan. 8, 2015); McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513 (E.D. Mich. Aug. 7, 2013).

30 *See* Haney v. Portfolio Recovery Assoc., 837 F.3d 918, 932–933 (8th Cir. 2016) ("Although we have concluded that PRA cannot collect the disputed interest on interest under Missouri law, the claim for that amount in the [state court] petition was not prohibited by the FDCPA as it was a statement directed to the court, and it was a good faith legal position on a point of unsettled Missouri law.").

31 *See* § 12.2, *infra*.

32 Kaymark v. Bank of Am., 783 F.3d 168, 174 (3d Cir. 2015), *abrogated on other grounds by* Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 203 L. Ed. 2d 390 (2019); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011); Owen v. I.C. Sys., Inc., 629 F.3d 1263, 1273 (11th Cir. 2011); Hepsen v. J.C. Christensen & Assoc., Inc., 383 Fed. Appx. 877 (11th Cir. 2010) (conflicting statements of the debt balance); Ross v. RJM Acquisitions Funding L.L.C., 480 F.3d 493 (7th Cir. 2007); Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006); Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991, 995 (7th Cir. 2003); Gearing v. Check Brokerage Corp., 233 F.3d 469, 472 (7th Cir. 2000); Hylton v. Amerifinancial Solutions, L.L.C., 2018 WL 6044734 (E.D. Pa. Nov. 19, 2018); Brandt v. Columbia Credit Services, Inc., 2018 WL 1757114 (W.D. Wash. Apr. 12, 2018); DeWolf v. Samaritan Hosp., 2018 WL 3862679 at 3 (N.D.N.Y. Aug. 14, 2018) (amount sought in collection lawsuit); Bell v. Northland Group, 2018 WL 1792368 (E.D. Mich. Apr. 16, 2018) (creditor had settled debt years earlier); Carlisle v. Nat'l Commercial Services, Inc., 2015 WL 4092817 (N.D. Ga. July 7, 2015); Wyant v. Nationstar Mortg., L.L.C., 2014 WL 3446633 (W.D. La. June 10, 2014), *aff'd in relevant part*, 2014 WL 4146351 (W.D. La. Aug. 19, 2014);. Klemp v. Columbia Collection Serv., Inc., 2014 WL 5324318 (D. Or. Oct. 17, 2014); Lee v. Kucker & Bruh, L.L.P., 958 F. Supp. 2d 524 (S.D.N.Y. 2013); Lee v. Credit Mgmt., L.P., 846 F. Supp. 2d 716 (S.D. Tex. 2011); Prince v. U.S. Bancorp, 2010 WL 3385396 (D. Nev. Aug. 25, 2010); Whitaker v. Hudson & Keyse, L.L.C., 2007 WL 2265057 (S.D. Ind. Aug. 6, 2007). *See also* § 3.2.4, *supra*.

33 *See* § 3.2.4, *supra*.

34 *See* Solomon v. Baer & Timberlake, P.C., 504 Fed. Appx. 702, 705 (10th Cir. 2012); Chrisp v. Prof'l Choice Recovery, Inc., 2016 WL 6237220 (D. Neb. Jan. 28, 2016); Lauer v. Credit Control Serv., 2015 WL 5714261 (D. Utah Sept. 29, 2015). *Cf.* Jenkins v. Heintz, 124 F.3d 824 (7th Cir. 1997) (confusing decision about whether court views unintentional violation not actionable or whether that is an element of the bona fide error defense).

35 15 U.S.C. § 1692k(c). *See* § 12.2, *infra*.

36 *See* § 9.11.3, *infra*.

37 Hepsen v. J.C. Christensen & Assoc., Inc., 383 Fed. Appx. 877 (11th Cir. 2010) (conflicting statements of the debt balance); Bell v. Northland Group, 2018 WL 1792368 (E.D. Mich. Apr. 16, 2018); Whitaker v. Hudson & Keyse, L.L.C., 2007 WL 2265057 (S.D. Ind. Aug. 6, 2007). *But see* Hubbard v. Nat'l Bond & Collection Assoc., Inc., 126 B.R. 422 (D. Del. 1991), *aff'd without op.*, 947 F.2d 935 (3d Cir. 1991) (§ 1692g is grounds for excusing unintentional error relating to bankruptcy automatic stay).

(either voluntarily or by garnishment[38]), settled,[39] discharged in bankruptcy, void as usurious,[40] never due in the first place,[41] fictitious,[42] paid for by medical insurance,[43] etc. Similarly, the collector may improperly seek payment from an unobligated relative,[44] a person with a similar name to the individual owing the debt,[45] or an identity theft victim.[46] These consumer defenses are examined at NCLC's Collection Actions §§ 5.2, 5.3 (5th ed. 2020), *updated at* www.nclc.org/library.

When the debt is not owed, this can violate FDCPA § 1692e(2)(A) either as a false representation of the amount due or of the debt's character or legal status.[47] Some decisions find it a representation regarding the amount due,[48] and others the debt's characteristics or legal status,[49] and yet others just cite to FDCPA § 1692e(2)(A) generally,[50] or indicate it is both a misrepresentation of the amount due and the debt's legal status.[51] A prudent plaintiff will allege a violation of the debt's character, legal status, and amount due.

Some courts hold that it is not a FDCPA § 1692e(2) violation merely to seek to collect on a debt not owed. Instead, the consumer must point to some misrepresentation by the collector as to the status or amount of the debt.[52] But collecting on a debt should be seen as an implied representation that the debt is owed, which representation is false if the debt is not owed.

Collection of a time-barred debt presents special issues. Except in Mississippi, North Carolina (for accounts held by debt buyers), and Wisconsin,[53] running of the statute of limitations does not extinguish a debt, but instead typically provides an affirmative legal defense in court.[54] Thus a demand for payment of a time-barred debt might not violate FDCPA

38 Edwards v. Velocity Invs., L.L.C., 2011 WL 4007394 (N.D. Ohio Sept. 8, 2011) (defendants misrepresented amount and legal status of debt by garnishing plaintiff's wages a second time, falsely representing debt as no debt was legally owed). *See also In re* Trevino, 615 B.R. 108, 137 (Bankr. S.D. Tex. 2020) (loan servicer not entitled to collect taxes it was never owed from plaintiffs).

39 Diaz v. Resurgent Capital Services L.P., 2013 WL 22215 (D. Mass. Jan. 2, 2013); Fetters v. Paragon Way, Inc., 2010 WL 5174989. (M.D. Pa. Dec. 15, 2010); Losure v. Capital One Services, 2006 WL 166520 (M.D. Fla. Jan. 23, 2006).

40 Nance v. Ulferts, 282 F. Supp. 2d 912 (N.D. Ind. 2003) (attempt to collect usurious, illegal check charges). *See also* Dunn v. Global Tr. Mgmt., L.L.C., 506 F. Supp. 3d 1214 (M.D. Fla. 2020) (denying motion to dismiss where consumer alleged that debt buyer knowingly misrepresented validity of debts it knew were usurious and unenforceable, thereby violating both state and federal collection statutes).

41 Gilmore v. Account Mgmt., Inc., 2009 WL 2848278 (N.D. Ga. Apr. 27, 2009) (consumer billed for lawn services after cancelling service), *rev'd on other grounds*, 2009 WL 4826953 (11th Cir. Dec. 16, 2009). *See also* Transamerica Fin. Services, Inc. v. Sykes, 171 F.3d 553 (7th Cir. 1999) (question of whether underlying debt was valid (consumer claimed it was forgery) would arise under § 1692e, which consumer did not plead).

42 Fed. Trade Comm'n v. Swatsworth, 2018 WL 4016312 (W.D.N.C. Aug. 22, 2018) (debt buyer portfolio was largely fictitious).

43 Weathers v. Gem City Account Serv., Inc., 2010 WL 3210985 (C.D. Ill. Aug. 13, 2010) (stating claim for violating § 1692e(2)(A); complaint alleging that defendant attempted to collect medical debt in violation of applicable federal and state Medicaid law).

44 *See* Heard v. Bonneville Billing & Collections, 2000 WL 825721 (10th Cir. June 26, 2000) (check writer's mother); Hennings v. Alltran Fin., L.P., 2017 WL 2312909 (E.D. Wis. May 26, 2017) (ex-husband); Stuart v. AR Res., Inc., 2011 WL 904167 (E.D. Pa. Mar. 16, 2011) (unobligated relative); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (unobligated spouse); Erickson v. Johnson, 2006 WL 453201 (D. Minn. Feb. 22, 2006) (unobligated spouse); Grassley v. Debt Collectors, Inc., 1992 U.S. Dist. LEXIS 22782 (D. Or. Dec. 4, 1992) (unobligated spouse); Robinson v. Credit Serv. Co., 1991 WL 186665 (D.N.J. Sept. 16, 1991) (parent for emancipated child).

45 *See* Ali v. Portfolio Recovery Assoc., 2018 WL 4760284 (N.D. Ill. Sept. 30, 2018); Scott v. Portfolio Recovery Assoc., L.L.C., 139 F. Supp. 3d 956 (S.D. Iowa 2015); Heathman v. Portfolio Recovery Assoc., L.L.C., 2013 WL 755674 (S.D. Cal. Feb. 27, 2013); Johnson v. Bullhead Inv., L.L.C., 2010 WL 118274 (M.D.N.C. Jan. 11, 2010); Beattie v. D.M. Collections, Inc., 764 F. Supp. 383 (D. Del. 1991); Covarrubias v. Zee Law Group, 2017 WL 6570281 (Cal. Ct. App. Dec. 22, 2017) (debtor's father misidentified and treated as the debtor).

46 Osborn v. J.R.S.-I., Inc., 949 F. Supp. 2d 807 (N.D. Ill. 2013) (deceptive to describe identity theft victim as responsible for the debt); Diaz v. Resurgent Capital Services L.P., 2013 WL 22215 (D. Mass. Jan. 2, 2013); Erickson v. Johnson, 2006 WL 453201 (D. Minn. Feb. 22, 2006).

47 Vangorden v. Second Round, L.P., 897 F.3d 433, 437 (2d Cir. 2018) (debt had been settled with the creditor); Ross v. RJM Acquisitions Funding L.L.C., 2006 WL 752953 (N.D. Ill. Mar. 16, 2006) (debt discharged in bankruptcy; however, bona fide error defense attached due to reasonable procedures in place to prevent error), *aff'd*, 480 F.3d 493 (7th Cir. Mar. 13, 2007). *See also* Brake v. Slochowsky & Slochowsky, L.L.P., 504 F. Supp. 3d 103 (E.D.N.Y. 2020); Persilver v. Merchants Credit Corp., 2020 WL 4582188 (W.D. Wash. Aug. 10, 2020).

48 Schore v. Renton Collections, Inc., 2018 WL 2018417 (W.D. Wash. May 1, 2018) (summary judgment entered for consumer against collection agency that violated §§ 1692e and 1692f in continued attempts to collect medical debt that was paid).

49 Kottler v. Gulf Coast Collection Bur., Inc., 847 Fed. Appx. 542, 544 (11th Cir. 2021) (affirming summary judgment for consumer on § 1692e(2)(A) claim where defendant 's letter stated she was responsible for paying medical bills owed by her employer for work-related accident); Young v. NPAS, Inc., 361 F. Supp. 3d 1171 (D. Utah 2019) (medical debt collector repeatedly attempted to collect money from the patient on debts that she did not owe, due to workers' compensation coverage).

50 Fed. Trade Comm'n v. Swatsworth, 2018 WL 4016312 (W.D.N.C. Aug. 22, 2018) (fictitious debts); Castellanos v. Portfolio Recovery Assoc., 297 F. Supp. 3d 1301 (S.D. Fla. 2017) (debt already settled); Johnson v. Superior Asset Mgmt., Inc., 2010 WL 11619042 (W.D. Mo. Mar. 31, 2010) (contacted wrong person).

51 Kuberski v. Cred X Debt Recovery, L.L.C., 2012 WL 2943726 (D. Colo. July 2, 2012), *adopted*, 2012 WL 2936421 (D. Colo. July 19, 2012) (debt that had in fact been previously paid in full).

52 *See* Williams v. Computer Credit, Inc., 2018 WL 5707185 (E.D. La. Nov. 1, 2018) (finding various misrepresentations to be properly alleged).

53 Miss. Code Ann. § 15-1-3(1) ("The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy."); N.C. Gen. Stat. § 58-70-115(4) ("No collection agency shall collect or attempt to collect any debt by use of any unfair practices. Such practices include, but are not limited to, the following: . . . (4) When the collection agency is a debt buyer or is acting on behalf of a debt buyer, bringing suit or initiating an arbitration proceeding against the debtor or otherwise attempting to collect on a debt when the collection agency knows, or reasonably should know, that such collection is barred by the applicable statute of limitations."); Wis. Stat. Ann. § 893.05 ("When the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy.").

54 *See* National Consumer Law Center, Collection Actions § 3.7 (5th ed. 2020), *updated at* www.nclc.org/library.

§ 1692e(2), but the demand can be actionable if it misrepresents that the debt is legally enforceable or otherwise misrepresents the debt's status or characteristics. The collection of time-barred debts is generally examined at § 7.4.9, *infra*.

It is deceptive to seek to collect on a debt after the collector's lawsuit is dismissed with prejudice.[55] It can be deceptive to seek payment on a debt discharged in bankruptcy or when the automatic stay is in effect.[56]

Even where one debt is owed to a collector, it can be deceptive to imply that there are additional debts owed to the collector when that is not the case. Thus, a statement "You may have more accounts in our office" could be a FDCPA § 1692e violation, if false.[57]

7.2.2.4 Misrepresentations As to the Total Amount Due

Regulation F (effective November 30, 2021) provides detailed regulations about the amount and itemization of debts that must be provided to consumers as part of the validation information.[58] When considering a FDCPA § 1692e(2) claim based on misrepresentations as to the total amount due, plaintiffs should consider whether the collector complied with these regulations in the validation notice or mirrored these required disclosures or model language[59] in other communications.

The remainder of this section discusses case law prior to Regulation F's effective date, which should be considered in light of these new regulations.

It is deceptive to indicate the total amount due as being a dollar amount including only the principal balance, and stating only that there is additional interest and fees, without specifying the amount of the interest and fees.[60] It may also be deceptive to indicate that an amount sought consists solely of principal when the amount actually includes interest or fees.[61]

Where a collector agrees to settle a debt for a lower amount, later correspondence indicating the pre-settlement amount due is deceptive because the consumer can be confused as to the amount needed to repay the debt. Even though the amount stated as due might be technically accurate, the consumer can satisfy the debt by paying the lower amount.[62] It can also be deceptive to demand payment of a materially inflated sum that fails to take into account a loan modification agreement.[63]

It is deceptive to include in the overdue dollar amount additional payments that will not be due until the future.[64] Conversely, where interest continues to accrue, it is deceptive to communicate an amount due that is over a month stale, so the amount due at the time of the communication is actually higher.[65] Where a court judgment against a consumer specifies a dollar amount, it is deceptive for a collector to seek a larger amount postjudgment.[66]

Where a collector is slow to credit a consumer's payment, the collector may then assess interest charges on an amount higher than actually owed. Particularly if this is in violation of state or federal law, the addition of this interest can be a FDCPA § 1692e(2) violation for misrepresenting the amount due to which interest should be applied.[67] Similarly, it is deceptive to seek payment on the original amount due without adjusting that amount sought to reflect consumer payments or other credits.[68] The same is the case where a collector fails to credit a payment at all or fails to credit a consumer for

55 *See* Alarcon v. Vital Recovery Services, Inc., 2019 WL 1577744, at *2 (S.D. Cal. Apr. 11, 2019) ("where a debt has been reduced to judgment in favor of the debtor—whether by judgment following trial or voluntary dismissal—the debt is extinguished under California law, and a subsequent attempt to collect on that extinguished debt is a plausible basis for an FDCPA claim").

56 *See, e.g.*, Houser v. LTD Fin. Services L.P., 512 F.3d 746 (S.D. Tex. 2021). See Chapter 13, *infra, for a discussion of the interrelationship between bankruptcy and the FDCPA.*

57 *See* Ghulyani v. Stephens & Michaels Assoc., Inc., 2015 WL 6503849 (S.D.N.Y. Oct. 26, 2015).

58 *See* § 9.4.7, *infra*.

59 *See* § 9.5.2, *infra* (discussing the model validation notice).

60 *See* Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872 (7th Cir. June 5, 2000); Farmer v. Buffaloe & Assoc., P.L.C., 2012 WL 6045976 (E.D. Tenn. Dec. 5, 2012) (only stated principal due and not interest or other fees); Bell v. Bowman, Heintz, Boscia & Vician, P.C., 370 F. Supp. 2d 805 (S.D. Ind. May 6, 2005). *Cf.* § 9.4.7.4, *infra* (discussing Regulation F validation information requirement to disclose the current amount of the debt as of the date when the validation information is provided).

61 *See* Howard v. LVNV Funding, L.L.C., 2020 WL 978653, at *6 (W.D. Pa. Feb. 28, 2020) (statement was false, and even it were not, the least sophisticated debtor could have been misled; "The proofs of claim stated that the entire amount owed was principal and even the least sophisticated debtor is aware of the possibility of owing interest on a debt. The proofs of claim as filed could affect the least sophisticated debtor's reasoning regarding the debt and mislead the debtor about the nature and amount of the debt."). *But see* Hahn v. Triumph P'ships L.L.C., 557 F.3d 755, 757 (7th Cir. 2009) (upholding dismissal on ground that it was not material to a consumer who doesn't contest owing the amount claimed that the principal balance includes past interest charges added to principal, rather than breaking out the past due interest as a separate line item). *Cf.* § 9.4.7, *infra* (discussing Regulation F itemization requirements for the validation information).

62 *See* Munoz v. Cal. Bus. Bur., Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016).

63 *See* Macholtz v. Carrington Mortg. Services, L.L.C., 499 F. Supp. 3d 434 (W.D. Mich. 2020).

64 Grant-Fletcher v. McMullen & Drury, P.A., 2013 WL 4051890 (D. Md. Aug. 8, 2013) (future homeowner association assessments); Melillo v. Shendell & Assoc., P.A., 2012 WL 253205 (S.D. Fla. Jan. 26, 2012) (same).

65 Gesten v. Phelan Hallinan, P.L.C., 57 F. Supp. 3d 1381 (S.D. Fla. 2014) (mortgage loan). *Cf.* § 9.4.7.4, *infra* (discussing Regulation F requirements that the validation information include the current amount of the debt).

66 Taylor v. Heath W. Williams, L.L.C., 510 F. Supp. 2d 1206 (N.D. Ga. 2007).

67 *See* Asch v. Teller, Levit & Silvertrust, P.C., 2003 WL 22232801 (N.D. Ill. Sept. 26, 2003) (state law required crediting of payments on day they are received).

68 Strasers v. Weinstein & Riley, P.S., 2012 WL 405454 (E.D. Wash. Feb. 8, 2012), *aff'd in part, rev'd in part*, 500 Fed. Appx. 682 (9th Cir. 2012). *See also* Finch v. Slochowsky & Slochowsky, L.L.P., 2020 WL 5848616 (E.D.N.Y. Sept. 30, 2020) (failure to credit multiple money order rent payments); Guevara v. Constar Fin. Services, L.L.C., 2020 WL 3001390 (M.D. Pa. June 4, 2020); Zuniga v. Jacobs, 2020 WL 168106, at *12 (S.D. Fla. Jan. 13, 2020).

surplus escrow payments.[69] It is deceptive to seek repayment of amounts as paid for property taxes and insurance where the collector never made those payments.[70]

It can be a FDCPA § 1692e violation to demand inconsistent amounts for the same debt.[71] It can also be confusing in the same communication to demand different amounts, even where one amount was for a particular debt and the other for all debts from the consumer that the collector was collecting on.[72] Just as confusing can be demands with different due dates for the same debt.[73] Of course, communications can have differing balances listed if there is a good reason to do so and if the difference is clearly explained,[74] or if the different amounts over time just result from accruing interest charges[75] or a co-obligor making payments.[76]

Where an obligation is not yet accelerated, then only the past due payments are due, and it can be deceptive to seek the full, accelerated balance instead of the amounts overdue.[77] It is also confusing to demand one amount representing a number of different debt obligations without itemizing the amount due for each obligation.[78] Also deceptive is an itemization of the amount due that makes no sense and does not explain how the total due is computed.[79] It is deceptive to threaten that suit will

69 Traut v. Quantum Servicing Corp., 2016 WL 8844254, at *4 (D. Mass. Aug. 4, 2016) (servicer "purportedly failed to acknowledge the payments made under the forbearance agreement despite its receipt of the monies"); Gritters v. Ocwen Loan Servicing, L.L.C., 2014 WL 7451682 (N.D. Ill. Dec. 31, 2014) (surplus escrow); Garcia v. Pharia, L.L.C., 2012 WL 12892731 (N.D. Tex. July 6, 2012) (failure to credit payments); Dowling v. Litton Loan Servicing, L.P., 2006 WL 3498292 (S.D. Ohio Dec. 1, 2006) (duns misstated that she was two months behind).

70 *See* Langley v. Statebridge Co., L.L.C., 2014 WL 7336787 (D.N.J. Dec. 22, 2014).

71 *See* Williams v. Columbia Debt Recovery, L.L.C., 2021 WL 1063330 (W.D. Wash. Mar. 19, 2021) (alleging that collector reported debt and sent consumer letter and documentation with contradictory information as to amount allegedly owed); Bazan v. Hammerman & Hultgren P.C., 2020 WL 5439517, at *2 (D. Ariz. Sept. 10, 2020) (least sophisticated debtor "would need to calculate the sum independently" and "would be unsure of the debt amount and might reasonably reach at least three different balance figures, two of which are inaccurate"); Hall v. Cent. Research, Inc., 2020 WL 1434456 (S.D. Ohio Mar. 24, 2020) (current balance of $26,664.17 was contradicted by the sum of the individual components of the debt, $26,577.89); Muir v. AM Solutions, L.L.C., 2019 WL 3530521 (E.D. Pa. Aug. 1, 2019) (amounts demanded related to foreclosure were inconsistent with stated terms of mortgage); Leib v. Thompson, Dunlap & Heydinger, Ltd., 2019 WL 358904 (S.D. Ohio Jan. 29, 2019) (October 2016 Notice demanded payment of $962.53 and December 2016 Notice demanded payment of $782.02); Rodriguez v. Codilis & Assoc., 2018 WL 1565596 (N.D. Ill. Mar. 30, 2018); Chung v. U.S. Bank, 250 F. Supp. 3d 658, 682 (D. Haw. 2017) (loan servicer violated § 1692e(2)(A) by sending two letters on the same date with different balances in contrast to its affidavit stating that no post-foreclosure balance was due); Dawson v. Genesis Credit Mgmt., L.L.C., 2017 WL 5668073 (W.D. Wash. Nov. 27, 2017); Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017) (representing different amount in a letter and then claiming higher amount in collection lawsuit); Thebert v. Potestivo & Assoc., 2017 WL 3581322 (E.D. Mich. Aug. 18, 2017); Garcia v. Law Offices Howard Lee Schiff P.C., 2017 WL 1230847 (D. Conn. Mar. 30, 2017) ("charge off balance" of $633.94, and a "current balance" of $565.46); Gonzales v. Stillman Law Office, 2015 WL 4903344 (W.D. Mich. Aug. 17, 2015) (different amount in the complaint, a letter, and a proposed consent order); Carlisle v. Nat'l Commercial Services, Inc., 2015 WL 4092817 (N.D. Ga. July 7, 2015) (creditor stated varying amounts and collector sought yet another amount); Thomas v. Loomis-Therrien, 2014 WL 5335913 (C.D. Cal. Oct. 20, 2014); Devlin v. Law Offices Howard Lee Schiff, P.C., 2012 WL 4469139 (D. Mass. Sept. 25, 2012); Morgan v. Bank of Am., 2012 WL 12883327 (E.D. Tenn. Oct. 31, 2012); Suquilanda v. Cohen & Slamowitz, L.L.P., 2011 WL 4344044 (S.D.N.Y. Sept. 8, 2011). *But see* Kleinman v. Frontline Asset Strategies, L.L.C., 2020 WL 705169, at *2 (E.D.N.Y. Feb. 12, 2020) (finding that, given "the format of the table, the wording of the table's column headings, the express instructions in the body of the letter, and the lack of certain additional variables that could possibly confuse a reader," collection letter was not misleading even though "total due as of charge-off" was $168.39 more than current "total due").

72 Machnik v. RSI Enters., Inc., 2017 WL 4351859 (E.D. Wis. Sept. 29, 2017); Loreaux v. ACB Receivables Mgmt., 2014 WL 6685469 (D.N.J. Nov. 26, 2014) (correspondence referenced two amounts—$191.57 as the amount "due" and $130.00 as the amount "owed"—stated a plausible FDCPA claim). *But cf.* § 9.4.7.4, *infra* (discussing Reg. F Official Interpretation § 34(c)(2)(ix)-2 stating that "[a] debt collector who combines multiple debts on a single validation notice complies with § 1006.34(c)(2)(ix) by disclosing on the validation notice a single cumulative figure that is the sum of the current amount of all the debts.").

73 Richard v. Caliber Home Loans, Inc., 2017 WL 4349082 (S.D. Ohio Sept. 29, 2017) (mortgage servicer violated § 1692e(2)(A) with two conflicting payment dates would leave consumer not knowing which date the payment was due).

74 *See* Guevara v. Summit Mortg. 2018 WL 1089535 (E.D. Mich. Feb. 28, 2018) (discrepancy between figures stated by servicer and collection attorney arose because one was payoff figure and one was cure figure). *Cf.* § 9.4.7.4, *infra* (discussing Reg. F Official Interpretation § 34(c)(2)(viii)-4 stating that "[a] debt collector who combines multiple debts on a single validation notice complies with § 1006.34(c)(2)(viii) by disclosing either a single, cumulative itemization on the validation notice or a separate itemization of each debt on a separate page or pages provided in the same communication as the validation notice.").

75 Meier v. Law Offices of Weltman, Weinberg & Reis Co., L.P.A., 2011 WL 2039113 (W.D. Pa. May 5, 2011), *adopted*, 2011 WL 2036693 (W.D. Pa. May 24, 2011); Sambor v. Omnia Credit Services, 183 F. Supp. 2d 1234 (D. Haw. 2002).

76 *See* Matray v. DBF Collection Corp., 2011 WL 2417151 (D.N.J. June 13, 2011).

77 Castro v. Green Tree Servicing L.L.C., 959 F. Supp. 2d 698 (S.D.N.Y. Aug. 14, 2013). *See also* Harrison v. NBD Inc., 968 F. Supp. 837 (E.D.N.Y. 1997) (confusing to include a balance due that would apply only if the consumer continued staying in school and that would be due on completion if no payments were made and was not the amount overdue at that date).

78 *See* Deporter v. Credit Bur. of Carbon County, 2015 WL 1932336 (D. Colo. Apr. 28, 2015); Smith v. Am. Revenue Corp., 2005 WL 1162906 (N.D. Ind. May 16, 2005) (demanding payment of lump-sum for "various accounts" was confusing where there were fourteen accounts in varying amounts). *But cf.* § 9.4.7.4, *infra* (discussing Reg. F Official Interpretation § 34(c)(2)(viii)-4 stating that "[a] debt collector who combines multiple debts on a single validation notice complies with § 1006.34(c)(2)(viii) by disclosing either a single, cumulative itemization on the validation notice or a separate itemization of each debt on a separate page or pages provided in the same communication as the validation notice.").

79 *See* Meola v. Asset Recovery Solutions, L.L.C., 2018 WL 4660373 (E.D.N.Y. Sept. 28, 2018) (same dollar amount listed as the principal balance prior to interest accrual, the amount interest accrued,

result not only in attorney fees and costs being added to the amount of the debt, but also the judgment amount being added to the debt, in effect doubling the debt.[80]

Initial amounts owed for health care are often adjusted as insurers or other parties pay some of the amount owed or the provider reduces the amount based on the consumer's financial situation. Thus, it is deceptive for a collector to represent that such reduction in the amount owed will not occur when the collector has no information in that regard as to the particular debt.[81]

7.2.2.5 Misrepresentations As to Interest Charges

Regulation F (effective November 30, 2021) provides detailed regulations about the amount and itemization of debts that must be provided to consumers as part of the validation information.[82] When considering a FDCPA § 1692e(2) claim based on misrepresentations as to interest charges, plaintiffs should consider whether the collector complied with these regulations in the validation notice or mirrored these required disclosures or model language[83] in other communications.

The remainder of this section discusses case law prior to Regulation F's effective date, which should be considered in light of these new regulations.

This subsection considers the misrepresentation as to interest charges generally. The next subsection considers the related issue of a collector's statement of the current balance where interest charges will continue to accrue or a statement that interest charges will accrue when they will not.[84] FDCPA § 1692e(2)(A) prohibits misrepresentation of the amount of the debt, which includes misrepresentation of the amount of interest charges. Courts generally hold that FDCPA § 1692e does not require a separate itemization of interest.[85]

Where a consumer's payment is timely, it can be a FDCPA § 1692e(2)(A) violation to seek interest as if the payment was not made.[86] A statement of the amount due can be deceptive where it includes only the principal due and not the interest or other charges due.[87]

FDCPA § 1692e(2)(A) is also violated where a collector claims interest charges not provided for in the contract or provided for by state law.[88] Often medical debt, collections on bad checks, and certain other forms of consumer debt do not provide for contractual interest, and then the collector must justify an interest charge based on state law allowing for prejudgment interest. FDCPA § 1692e(2)(A) is thus actionable where the collector misapplies the authority to compute prejudgment interest.[89] Fees and charges on insufficient funds checks are often closely regulated by state law, and a collector can only seek interest on such a debt as consistent with that law.[90] Where prejudgment interest can be awarded only by a court, it is deceptive to seek it prior to the judgment.[91] FDCPA

and the total amount due); Berg v. Blatt, Hasenmiller, Leibsker & Moore L.L.C., 2009 WL 901011 (N.D. Ill. Mar. 31, 2009) (same dollar amount stated for interest for each of two debts and the same dollar amount for the total interest of the two debts). *See also* Madorskaya v. Frontline Asset Strategies, L.L.C., 2020 WL 423408 (E.D.N.Y. Jan. 27, 2020) (letter included correct statement of consumer's balance, but also implied that interest and fees could be accruing as it listed non-zero amount of interest accrued since charge-off); Leitner v. Client Services, Inc., 2020 WL 3489482 (E.D.N.Y. June. 26, 2020) (denying motion to dismiss where collection letter contained non-zero amount after line item for "non-interest charges and fees accrued since charge off," and failed to explain whether amount was one-time occurrence or recurring). *Cf.* § 9.4.7, *infra* (discussing Reg. F itemization requirements for validation information).

80 Madonna v. Academy Collection Serv., Inc., 1997 WL 530101 (D. Conn. Aug. 12, 1997).

81 Ponce v. BCA Fin. Services, Inc., 467 Fed. Appx. 806 (11th Cir. 2012) (collector based her statement on her general experience about insurance claims, had no particular information to support statement, and statement was meant to coax consumer into paying bill).

82 *See* § 9.4.7, *infra*.

83 *See* § 9.5.2, *infra* (discussing the model validation notice).

84 *See* § 7.2.2.6, *infra*.

85 Hahn v. Triumph P'ships L.L.C., 557 F.3d 755, 756–757 (7th Cir. 2009); Yavorka v. Midland Credit Mgmt., Inc., 2020 WL 5747832 (W.D. Pa. Sept. 25, 2020); Day v. NCB Mgmt. Services, Inc., 2018 WL 4777405 (E.D. Mich. Oct. 3, 2018); Spuhler v. State Collection Serv., Inc., 2017 WL 6557558 (E.D. Wis. Dec. 22, 2017); Humphreys v. Budget Rent-a-Car Sys. Inc., 2017 WL 6497285 (E.D. Pa. Dec. 19, 2017); Moran v. Greene & Cooper Attorneys L.L.P., 43 F. Supp. 3d 907, 914–915 (S.D. Ind. 2014) ("A debt collector need not 'itemize' the debt, so long as its statement of the total is clear and accurate"). *But see* Tepper v. Amos Fin., L.L.C., 2017 WL 3446886 (E.D. Pa. Aug. 11, 2017) (§ 1692e(2)(A) violation where no explanation on amount due on complicated variable rate mortgage). *But cf.* § 9.4.7.3, *infra* (discussing the Reg. F requirement that the validation information include an itemization of interest since the itemization date).

86 Eisenberg v. Shendell & Assoc., P.A., 2011 WL 1233253 (S.D. Fla. Mar. 31, 2011).

87 *See* Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872 (7th Cir. June 5, 2000); Farmer v. Buffaloe & Assoc., P.L.C., 2012 WL 6045976 (E.D. Tenn. Dec. 5, 2012) (only stated principal due and not interest or other fees); Bell v. Bowman, Heintz, Boscia & Vician, P.C., 370 F. Supp. 2d 805 (S.D. Ind. May 6, 2005). *Cf.* § 9.4.7.4, *infra* (discussing Reg. F validation information requirement to disclose the current amount of the debt as of the date when the validation information is provided).

88 Eul v. Transworld Sys., 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017) (collected interest in excess of state law limits on private student loans); Hanson v. JQD, L.L.C., 2014 WL 3404945 (N.D. Cal. July 11, 2014).

89 *See, e.g.*, Haney v. Portfolio Recovery Assoc., 837 F.3d 918, 926 (8th Cir. 2016) (Missouri statutory prejudgment interest cannot be compounded by being assessed on already accrued contractual interest); Knepp v. Huffman, 2018 WL 4680020 (N.D. Ind. Sept. 28, 2018) (collection letter stating that legal interest "will accrue" but applicable state statute allowed prejudgment interest to be awarded only after judgment); Galdamez v. I.Q. Data Int'l, Inc., 170 F. Supp. 3d 890 (E.D. Va. 2016) (added unauthorized prejudgment interest to contested balance on their apartment lease without any basis in law or contract); Klemp v. Columbia Collection Serv., Inc., 2014 WL 5324318 (D. Or. Oct. 17, 2014). *Cf.* Aker v. Americollect, Inc., 854 F.3d 397 (7th Cir. 2017) (no violation where seeking prejudgment interest was found lawful).

90 Cruz v. Int'l Collection Corp., 673 F.3d 991 (9th Cir. 2012); Mejia v. Marauder Corp., 2007 WL 806486 (N.D. Cal. Mar. 15, 2007).

91 Fulk v. LVNV Funding L.L.C., 55 F. Supp. 3d 967 (E.D. Ky. 2014) (debt buyer reported a balance including statutory prejudgment interest prior to a prerequisite judgment); Adams v. A & S Collection Assoc., Inc., 2007 WL 2206936 (D. Conn. July 30, 2007) (prejudgment interest in excess of legal rate).

§ 1692e(2)(A) may also be violated if undifferentiated prejudgment interest is included in the lump sum demanded in a small claims complaint.[92]

Where a collector relies on contractual authority to charge interest, it can be a FDCPA § 1692e(2)(A) violation to seek a greater amount than allowed by the contract.[93] To justify charging interest at a contract rate, the collector must produce evidence of the contract and the contract rate, something debt buyers often cannot produce.[94] Failure to do so will result in the finding of a violation.[95]

It can also be a violation to seek contractual interest greater than allowed by state law. See NCLC's Consumer Credit Regulation (3d ed. 2020), *updated at* www.nclc.org/library, to ascertain whether contractual interest is allowed by state law and whether federal law preempts the application of that state law.

One issue that has been raised in a number of FDCPA cases is whether a debt buyer can seek new interest charges after the originating creditor charged off the debt and stopped seeking new interest charges before selling the debt to the debt buyer. Refer to other NCLC treatises as to the current law on whether the creditor has waived interest charges, the effect of this on a debt buyer's ability to assess new interest charges, whether a debt buyer can assess charges in excess of the state usury limit based on the originating bank's ability to do so, and whether the debt buyer can do so at either the contract rate or the rate specified by state law for prejudgment interest.[96]

If interest charges assessed by the debt buyer are unauthorized, then there should be a FDCPA § 1692e(2)(a) violation.[97] The same is the case where a collector seeks to collect interest charges that were waived by the originating creditor.[98]

Sometimes debt buyers disclose the amount due by separately stating the balance when the debt buyer purchased the debt and "interest" that represents only the debt buyer's new interest charges. The Seventh Circuit has found that this is not deceptive even when the balance includes but does not mention interest assessed by the originating creditor.[99] But it is deceptive to seek to avoid usury limits by labeling interest charges as service fees.[100]

7.2.2.6 Misrepresentations As to Accruing Interest and Fees

Regulation F (effective November 30, 2021) provides detailed regulations about the amount and itemization of debts that must be provided to consumers as part of the validation information.[101] When considering a FDCPA § 1692e(2) claim based on misrepresentations as to accruing interest and fees, plaintiffs should consider whether the collector complied with these regulations in the validation notice or mirrored these required disclosures or model language[102] in other communications. Note in particular § 9.4.7.4, *infra*, which discusses the required disclosure of the current amount due in the validation information, the lack of a dynamic balance disclosure, and when it is permissible to include optional disclosures in validation notices.

The remainder of this section discusses case law prior to Regulation F's effective date, which should be considered in light of these new regulations.

Prior to Regulation F, some courts found that communicating a debt's current balance could be misleading if the consumer did not understand that the balance would continue to increase over time as interest or other charges continue to accrue.[103]

92 Lannan v. Levy & White, 186 F. Supp. 3d 77, 92 (D. Mass. 2016).

93 *See* Tepper v. Amos Fin., L.L.C., 2017 WL 3446886 (E.D. Pa. Aug. 11, 2017); Munoz v. Pipestone Fin., L.L.C., 2006 WL 2786911 (D. Minn. Sept. 26, 2006) (contract did not permit adding unaccrued interest or future attorney fees).

94 *See* § 1.4.7.3, *supra* (discussing account information available to debt buyers).

95 Reed v. EOS CCA, 2016 WL 1639121 (S.D. Ind. Apr. 26, 2016) (cell phone contract); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002).

96 *See* National Consumer Law Center, Collection Actions § 5.4 (5th ed. 2020), *updated at* www.nclc.org/library; National Consumer Law Center, Consumer Credit Regulation §§ 7.5.4, 7.7, 7.8.2.2 (3d ed. 2020), *updated at* www.nclc.org/library.

97 Stratton v. Portfolio Recovery Assoc., 770 F.3d 443 (6th Cir. 2014).

98 Brooks v. Cama Self Directed IRA, L.L.C., 2019 WL 418412 (D. Md. Jan. 31, 2019). *See also* Tabiti v. LVNV Funding, L.L.C., 2019 WL 1382235, at *10 (N.D. Ill. Mar. 27, 2019) (plain language of purchase agreement did not transfer to debt buyer the right to collect post-charge-off interest, and even if it did, creditor waived the right to collect post-charge-off interest and debt buyer was bound by that waiver).

99 Wahl v. Midland Credit Mgmt., Inc.,556 F.3d 643 (7th Cir. 2009); Hahn v. Triumph P'ships L.L.C., 557 F.3d 755 (7th Cir. 2009). *Cf.* § 9.4.7.3, *infra* (discussing the requirement in Reg. F § 1006.34(c)(2)(viii) that the validation information include an itemization of interest since the itemization date).

100 Grace v. LVNV Funding, Inc., 2014 WL 2167487 (W.D. Ky. May 23, 2014) (8% medical "service charge" was disguised interest and exceeded state's statutory rate).

101 *See* § 9.4.7, *infra*.

102 *See* § 9.5.2, *infra* (discussing the model validation notice).

103 Avila v. Riexinger & Assoc., 817 F.3d 72 (2d Cir. 2016); Spuhler v. State Collection Services, Inc., 2018 WL 3651356 (E.D. Wis. Aug. 1, 2018); Roth v. Solomon and Solomon, P.C., 2018 WL 718402 (E.D.N.Y. Feb. 5, 2018); Spuhler v. State Collection Serv., Inc., 2017 WL 6557558 (E.D. Wis. Dec. 22, 2017); Thomas v. Midland Credit Mgmt., Inc., 2017 WL 5714722 (E.D.N.Y. Nov. 27, 2017); Pimentel v. Nationwide Credit Inc., 2017 WL 5633310 (S.D. Fla. Nov. 13, 2017); Gill v. Credit Bur. of Carbon Cty., 2015 WL 2128465 (D. Colo. May 5, 2015) (communication specified "total due" instead of current balance and did not specify the due date); Murr v. Tarpon Fin. Corp., 2014 WL 546690 (E.D. Tenn. 2014) (§ 1692g(a)(1) violation); Marucci v. Cawley & Bergmann, L.L.P., 66 F. Supp. 3d 559 (D.N.J. 2014); Michalek v. ARS Nat'l Sys., Inc., 2011 WL 6180498 (M.D. Pa. Dec. 13, 2011). *Cf.* Newman v. Ormond, 396 Fed. Appx. 636 (11th Cir. 2010) (no violation where expressly stated that amount of debt might vary daily based on additional interest, late charges, and collection costs); Taylor v. Cavalry Inv., L.L.C., 365 F.3d 572 (7th Cir. 2004) (no violation where indicated balance might increase). *But see* Bazile v. Fin. Sys. of Green Bay, Inc., 2019 WL 652421, at *5 (E.D. Wis. Feb. 15, 2019) ("the FDCPA does not require that the debt collector tell the debtor whether the balance is or is not accruing interest or late fees"), *vacated and remanded on other grounds*, 983 F.3d 274 (7th Cir. 2020); Schaefer v. ARM Receivable Mgmt., Inc., 2011 WL 2847768 (D. Mass. July 19, 2011).

FDCPA § 1692g(a)(1) requires that the collector, in its initial communication or within five days, disclose the amount of the debt.[104] FDCPA §§ 1692e(2)(a) and 1692g(a)(1) are distinct requirements.[105] Section 1692g(a)(1) requires disclosure of the "amount of the debt," while section 1692e(2)(a) prohibits the collector from misleading the consumer as to the amount of the debt.

The Seventh Circuit, in *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, found a FDCPA § 1692g(a)(1) violation in a somewhat different situation, where the collector disclosed only the unpaid principal and did not disclose the unpaid interest or fees, and so did not disclose the total amount due.[106] Cognizant of the problem of a balance that will continue to grow, the *Miller* court offered a safe harbor that required the total amount due (including unpaid interest and fees as of that date) and additional language as to future assessment of fees and interest:

> As of the date of this letter, you owe $___ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1-800-[phone number].[107]

The Seventh Circuit found that this language also may be sufficient to comply with FDCPA § 1692e if the facts as to the debt are consistent with that safe harbor language.[108]

The Second Circuit suggests there will not be a FDCPA § 1692e violation if, consistent with the nature of the debt, a communication "either accurately informs the consumer that the amount of the debt stated in the letter will increase over time, or clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date."[109] While not requiring any specific language,[110] the Second Circuit indicates the *Miller* safe harbor language may be sufficient.[111]

The Second Circuit also suggests as an example of safe harbor language it finds preferable to the *Miller* language: "As of today, [date], you owe $——. This amount consists of a principal of $——, accrued interest of $——, and fees of $——. This balance will continue to accrue interest after [date] at a rate of $—— per [day/week/month/year]."[112] Despite the Second Circuit preferring the more detailed breakdown in the latter language, a later Second Circuit decision finds the *Miller* safe harbor language sufficient and that the collector need not also provide a breakdown of current principal, interest, and fees or explain how the future interest and other charges will be computed.[113]

But cf. § 9.4.7.4, *infra* (discussing the fact that, under Regulation F, the validation information does not require any kind of dynamic balance disclosure).

104 *See also* § 9.4.7, *infra* (discussing required validation information under Regulation F related to the amount and itemization of debts).

105 Avila v. Riexinger & Assoc., 817 F.3d 72 (2d Cir. 2016).

106 Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872 (7th Cir. June 5, 2000). *See also* § 9.4.7.4, *infra* (discussing Regulation F validation information requirement to disclose the current amount of the debt as of the date when the validation information is provided).

107 *Id.* at 876.

108 Boucher v. Fin. Sys. of Green Bay, Inc., 880 F.3d 362, 367 at 368 (7th Cir. 2018). *Cf.* Hoffman v. Keith D. Weiner & Assoc. Co., L.P.A., 2019 WL 1746353 (E.D. Wis. Apr. 18, 2019) (use of safe harbor language did not immunize collector from liability; speculative possibility that collector could eventually be entitled to collect postjudgment interest did not render statement accurate and not misleading). *Cf.* § 9.6.2, *infra* (discussing the use of safe harbors as optional validation information in accordance with Regulation F, including a discussion of when such disclosures are permissible).

109 Avila v. Riexinger & Assoc., 817 F.3d 72 (2d Cir. 2016). *See also* Cortez v. Forster & Garbus, L.L.P., 999 F.3d 151, 155 (2d Cir. 2021) (collection letter extending offer to settle debt in full did not also have to advise consumer that debt was still accruing interest and fees; where *Avila* held only that debt collector must "*either*" disclose that interest and fees continue to accrue "*or*" offer to extinguish debt in exchange for specified payment, "either disclosure option alone dispels the risk of a collection notice misleading a debtor about the effect paying the specified amount would have on the outstanding debt"); Seeger v. Ross & Assoc., 2019 WL 5695944 (E.D.N.Y. Aug. 6, 2019) (letter failed to include any safe harbor language at all); Kraus v. Prof'l Bur. of Collections, Inc., 817 F.3d 72, 77 (E.D.N.Y. 2017) (applying *Avila* safe harbor because the letter clearly stated that the holder of the debt would accept payment of the amount set forth in full satisfaction of the debt if payment was made by a specific date). *But cf.* § 9.4.7.4, *infra* (discussing Regulation F validation information requirement to disclose the current amount of the debt as of the date when the validation information is provided, the lack of a required dynamic balance disclosure, and when such optional disclosures are permissible in the validation information).

110 *See, e.g.*, Heffington v. Gordon, Aylworth & Tami, P.C., 2018 WL 3763799, at *4 (D. Or. Aug. 8, 2018) ("interest may continue to accrue" may not have been the most informative or conclusive, but it would not mislead or deceive even the least sophisticated consumer).

111 Kolbasyuk v. Capital Mgmt. Services, L.P., 918 F.3d 236 (2d Cir. 2019); Avila v. Riexinger & Assoc., 817 F.3d 72 (2d Cir. 2016). *See also* Timoshenko v. Mullooly, Jeffrey, Rooney & Flynn, L.L.P., 2018 WL 1582220 (E.D.N.Y. Mar. 30, 2018) (use of *Miller* safe harbor language sufficient). *Cf.* § 9.6.2, *infra* (discussing the use of safe harbors as optional validation information in accordance with Regulation F, including a discussion of when such disclosures are permissible).

112 Avila v. Riexinger & Assoc., 817 F.3d 72 (2d Cir. 2016) (suggesting language found in Jones Midland Funding, L.L.C., 755 F. Supp. 2d 393, 397 n.7 (D. Conn. 2010)). *Cf.* § 9.4.7, *infra* (discussing Regulation F validation information requirements for itemization of the debt); § 9.6.2, *infra* (discussing the use of safe harbors as optional validation information in accordance with Regulation F, including a discussion of when such disclosures are permissible).

113 Kolbasyuk v. Capital Mgmt. Services, L.P., 918 F.3d 236 (2d Cir. 2019); Taubenfliegel v. EGS Fin. Care, Inc., 764 Fed. Appx. 76 (2d Cir. 2019) (rejecting § 1692g(a)(1) claim). *See also* Heffington v. Gordon, Aylworth & Tami, P.C., 2018 WL 3763799 (D. Or. Aug. 8, 2018). *Cf.* § 9.6.2, *infra* (discussing the use of safe harbors as optional validation information in accordance with Regulation F, including a discussion of when such disclosures are permissible). *But cf.* § 9.4.7, *infra* (discussing required validation information under Regulation F related to the amount and itemization of debts).

On the other hand, the Second Circuit has also ruled that a statement that the total amount due *may* include *estimated* fees and costs is inadequate. "There is no clarity as to whether new fees and costs are accruing or as to the basis for those fees and costs."[114] Another court also found not sufficient "Your account balance may be periodically increased due to the addition of accrued interest or other changes if so provided in your agreement with your original creditor." This does not tell the consumer whether it will, in fact, increase.[115]

It may be sufficient to disclose that payment of a fixed amount by a certain date will discharge the debt.[116] But it can be a violation to state only that payment of a fixed amount by a certain date will bring one's account current and stop collections since this could be interpreted as only stopping collections and not fully discharging the debt if additional charges accrue.[117]

No special language is required where the debt balance does not continue to change as of the date of the collector's communication.[118] Just disclosure of the amount due is sufficient. On the other hand, it can be deceptive for a collector to imply that the debt will increase over time if that is not the case.[119] Not only does use of the safe harbor language in this situation not protect the collector,[120] but its use can be deceptive.[121] The Seventh Circuit found it was a misrepresentation to tell the consumer to call to obtain the most current balance where the balance would not change.[122] A debt collector deviates from safe harbor language by adding "confusing other information."[123]

Similarly, the Seventh Circuit found deceptive use of its own *Miller* safe harbor language, "Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater," where further *late charges* were prohibited by Wisconsin law.[124] This was the case even though *interest charges* could continue to accrue.

But where the contract permitted it, the Seventh Circuit found no deception in the statement "if applicable, your account may have or will accrue interest at a rate specified in your contractual agreement with the original creditor," even where the creditor voluntarily did not assess such interest.[125] Similarly, the Fifth Circuit found no violation in a collection letter stating "in the event there is interest or other charges accruing on your account, the amount due may be greater than the amount shown" because such conditional language merely "expresses a common-sense truism about borrowing and lending, and does not imply that interest or other charges may actually accrue on the debtor's account."[126]

Referencing the amount of the debt as the "Balance Due" and itemization of that balance without explicitly indicating whether interest or other charges could accrue does not necessarily violate FDCPA § 1692e, as the term "Balance Due" does not falsely imply that the debt is, or could be, increasing.[127]

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114 Carlin v. Davidson Fink L.L.P., 852 F.3d 207, 217 (2d Cir. 2017) (finding violation of § 1692g(a)(1)). *Cf.* § 9.4.7.4, *infra* (discussing Regulation F validation information requirement to disclose the current amount of the debt as of the date when the validation information is provided).

115 Balke v. Alliance One Receivables Mgmt., Inc., 2017 WL 2634653 (E.D.N.Y. June 19, 2017). *But cf.* § 9.4.7.4, *infra* (discussing Regulation F validation information requirement to disclose the current amount of the debt as of the date when the validation information is provided, the lack of a required dynamic balance disclosure, and when such optional disclosures are permissible in the validation information).

116 *Cf.* § 9.4.7.4, *infra* (discussing Regulation F validation information requirement to disclose the current amount of the debt as of the date when the validation information is provided).

117 Balke v. Alliance One Receivables Mgmt., Inc., 2017 WL 2634653 (E.D.N.Y. June 19, 2017).

118 *Taylor v. Fin. Recovery Services, Inc.*, 886 F.3d 212 (2d Cir. 2018); Derosa v. CAC Fin. Corp., 740 Fed. Appx. 742 (2d Cir. 2018). *See also* Hopkins v. Collecto, Inc., 994 F.3d 117 (3d Cir. 2021) (letter itemizing $0.00 in interest and fees on consumer's static debt did not violate § 1692e); Solares v. Fin. Recovery Services, Inc., 2019 WL 7405495, at *5 (E.D.N.Y. Dec. 3, 2019), *adopted*, 2020 WL 32463 (E.D.N.Y. Jan. 2, 2020); Gissendaner v. Enhanced Recovery Co., 2018 WL 6418184 (W.D.N.Y. Dec. 6, 2018); Johnson v. Alltran Educ., L.P., 2018 WL 2096374 (N.D. Ill. May 7, 2018); Spurlock v. Receivables Mgmt. Partners, L.L.C., 2018 WL 1992580 (S.D. Ind. Apr. 27, 2018) (no obligation for collector to inform consumer that *if* it were to file a lawsuit against her, it would seek prejudgment interest, court costs and/or other statutory penalties); Holly v. Cooling & Winter, L.L.C., 2017 WL 8186734 (N.D. Ga. Dec. 18, 2017) (no requirement to inform consumer that postjudgment interest was waived).

119 *See, e.g.*, Smith v. Johnson Mark L.L.C., 2021 WL 66297 (D. Utah. Jan. 7, 2021) (implication that charges will accrue when they will not); Thomas v. Midland Credit Mgmt., Inc., 2017 WL 5714722 (E.D.N.Y. Nov. 27, 2017) ("current balance" suggested accruing charges); Bledsoe v. Prof'l Fin. Co., 2016 WL 1267811 (W.D. Mo. Mar. 30, 2016); Safdieh v. P & B Capital Group, L.L.C., 2015 WL 2226203 (D.N.J. May 12, 2015); Reeseg v. Gen. Revenue Corp., 2015 WL 4525869 (D.N.J. July 27, 2015). *See also* Hassine v. Simon's Agency, Inc., 2020 WL 3481815, at *3 (D.N.J. June. 26, 2020) (collection letter falsely stated that interest and other fees may accrue); Beauchamp v. Fin. Recovery Services, Inc., 2011 WL 891320 (S.D.N.Y. Mar. 14, 2011) (because collector provided that outstanding balance might increase, least sophisticated consumer could reasonably conclude that she must pay balance stated in letter immediately or possibly owe larger amount).

120 *See, e.g.*, Bledsoe v. Prof'l Fin. Co., 2016 WL 1267811 (W.D. Mo. Mar. 30, 2016); Reeseg v. Gen. Revenue Corp., 2015 WL 4525869 (D.N.J. July 27, 2015); Safdieh v. P & B Capital Group, L.L.C., 2015 WL 2226203 (D.N.J. May 12, 2015).

121 Medzhidzade v. Kirschenbaum & Phillips, P.C., 2018 WL 2093116 (E.D.N.Y. May 3, 2018) *(Miller* safe harbor language deceptive where collector did not establish right to charge future interest); Hovermale v. Immediate Credit Recovery Inc., 2016 WL 4157160 (D.N.J. Aug. 4, 2016) (could not lawfully assess late charges). *See also* Nolan v. Account Control Tech., Inc., 2018 WL 1903147 (W.D. Tex. Feb. 23, 2018); Polak v. Kirschenbaum & Phillips, P.C., 2018 WL 1189337 (E.D.N.Y. Feb. 16, 2018), *adopted*, 2018 WL 1187400 (E.D.N.Y. Mar. 6, 2018); DeFrancesco v. Veripro Solutions Inc., 2015 WL 179376 (M.D. Fla. Jan. 14, 2015).

122 Chuway v. Nat'l Action Fin. Services, Inc., 362 F.3d 944 (7th Cir. 2004).

123 *Id. See also* Lopez-Gordillo v. Fin. Recovery Services, Inc., 2019 WL 527627 (N.D. Ill. Feb. 11, 2019).

124 Boucher v. Fin. Sys. of Green Bay, Inc., 880 F.3d 362, 367 at 368 (7th Cir. 2018).

125 Taylor v. Cavalry Inv., L.L.C., 365 F.3d 572, 574 (7th Cir. 2004).

126 Salinas v. R.A. Rogers, Inc., 952 F.3d 680 (5th Cir. 2020).

127 Nagan v. Optio Solutions, L.L.C., 2020 WL 5061838, at *4–5 (E.D. Wis. Aug. 27, 2020) ("The itemization of the debt contained in the letter was articulated in the same way it was received from the creditor. The letter is not false, deceptive, or misleading, as the only

7.2.2.7 Misrepresentation of Collection Costs, Other Compensation, and Fees

Regulation F (effective November 30, 2021) provides detailed regulations about the amount and itemization of debts that must be provided to consumers as part of the validation information.[128] When considering a FDCPA § 1692e(2) claim based on misrepresentations of fees, plaintiffs should consider whether the collector complied with these regulations in the validation notice or mirrored these required disclosures or model language[129] in other communications.

The remainder of this section discusses case law prior to Regulation F's effective date, which should be considered in light of these new regulations.

A false representation of the debt amount, prohibited by FDCPA § 1692e(2)(A), can apply where the amount sought involves collection costs or other fees. In addition, FDCPA § 1692e(2)(B) prohibits false representations concerning "compensation which may be lawfully received by any debt collector for the collection of a debt," so that provision also applies to collection costs and certain related fees. Misrepresentation of collection costs, of course, also can violate FDCPA §§ 1692e and 1692e(10).

In addition, the same practice can violate FDCPA § 1692f(1) that prohibits "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." The FDCPA § 1692f(1) provision is examined at § 8.3, *infra*. This subsection considers any misrepresentation of collector compensation that is found to be deceptive under FDCPA §§ 1692e, 1692e(2)(A), 1692e(2)(B), or 1692e(10).

This section, though, is not a comprehensive discussion of when, under state law and a consumer's contract, collection costs and other related fees are allowed. For such a discussion, see NCLC's Collection Actions § 6.6 (5th ed. 2021), *updated at* www.nclc.org/library.

A closely related issue is whether it is deceptive for a collection attorney to seek attorney fees prior to filing a collection lawsuit. This issue is examined in the next subsection.[130]

There is no FDCPA § 1692e violation when a collector seeks collection costs that are reasonable and authorized by contract[131] or by state law,[132] but otherwise seeking such costs is deceptive.[133] Even where collection costs are authorized by contract, there can be a FDCPA § 1692e violation where the costs are excessive[134] or not as provided for under the contract.[135]

Where a contract provides for the actual costs of collection, it can be deceptive to seek a flat percentage fee.[136] Even where authorized and reasonable, it can be deceptive to misrepresent the collection cost as being for another purpose[137] or where the amount demanded was based on a percentage of the total debt, so that the itemized collection costs were not accurate as the full amount had not been collected as of that date.[138]

Courts have ruled that it is deceptive to seek collection costs or other obscure charges not separately itemized.[139] The Seventh Circuit has found this to be the case for attorney

reasonable interpretation of the letter is that it states the itemized amount of the debt that was owed."). *Cf.* Degroot v. Client Services, Inc., 977 F.3d 656 (7th Cir. 2020) (no § 1692e violation where collection letter stated "Please note that no interest will be added to your account balance through the course of Client Services, Inc. collection efforts concerning your account."); § 9.4.7.4, *infra* (discussing Regulation F validation information requirement to disclose the current amount of the debt as of the date when the validation information is provided).

128 *See* § 9.4.7, *infra*.

129 *See* § 9.5.2, *infra* (discussing the model validation notice).

130 § 7.2.2.8, *infra*.

131 Shapiro v. Riddle & Assoc., 351 F.3d 63 (2d Cir. 2003); Zelner v. ATG Credit, L.L.C., 2019 WL 556737, at *2 (N.D. Ill. Feb. 12, 2019) (medical patient agreement may have authorized collection fee). *See also* Bjornsdotter v. Suttell & Hammer, P.S., 2020 WL 1049906, at *3 (D. Or. Mar. 4, 2020) (where contract authorized $65 process service fee, but court awarded $45, there was no FDCPA violation, as collector "had a good-faith basis for seeking $65").

132 Durham v. Cont'l Cent. Credit, 2009 WL 3416114 (S.D. Cal. Oct. 20, 2009) (California homeowner association statute allows for collection costs). *Cf.* Van Hoven v. Buckles & Buckles, P.L.C., 947 F.3d 889 (6th Cir. 2020) (seeking "current" garnishment costs did not violate § 1692e because debt collector made reasonable interpretation at time of what was permissible under Michigan rules).

133 *See* Breckenridge v. Vargo, 225 F. Supp. 3d 1216 (D. Colo. 2016) (collection fee inconsistent with federal student loan regulations); Hanson v. JQD, L.L.C., 2014 WL 3404945 (N.D. Cal. July 11, 2014); Agostino v. Quest Diagnostics, Inc., 2011 WL 5410667 (D.N.J. Nov. 3, 2011); Seeger v. AFNI, Inc., 2007 WL 1598618 (E.D. Wis. June 1, 2007); Adams v. A & S Collection Assoc., Inc., 2007 WL 2206936 (D. Conn. July 30, 2007) (collection fees in violation of Connecticut law); Teemogonwuno v. Todd, Bremer & Larsen, Inc., 1991 U.S. Dist. LEXIS 21720 (N.D. Ga. June 13, 1991) (non-legal expenses are not recoverable as collection costs under Georgia law).

134 *See* Fonseca v. Focus Fin. Services, 2016 WL 4146663, at *7 (S.D. Fla. Aug. 1, 2016) ("it would be unreasonable for a patient to expect that a late charge of 10% and a collection fee of 35% would be added to one overdue balance" where hospital registration form generally authorized payment of collection fees).

135 *See* Means v. Intelligent Bus. Solutions, Ltd., 2016 WL 1030072 (D. Nev. Mar. 10, 2016) (collection costs sought do not appear to equal the 30% stated in the contract).

136 Bradley v. Franklin Collection Serv., Inc., 739 F.3d 606 (11th Cir. 2014) (collection cost that is a flat one-third of debt is not consistent with contract that provides for payment of actual collection costs); Kojetin v. CU Recovery, Inc., 212 F.3d 1318 (8th Cir. 2000) (flat percentage not actual costs).

137 *See* Tesora v. Lyons, Doughty, Veldhuis, P.C., 2017 WL 3207060 (D.N.J. July 28, 2017) ($35 collection fee was misrepresented as part of the amount to satisfy the judgment).

138 Annunziato v. Collecto, Inc., 207 F. Supp. 3d 249 (E.D.N.Y. 2016); Hernandez v. Miracle Fin., Inc., 2011 WL 6328216 (D.N.J. Dec. 13, 2011). *See also* Gathuru v. Credit Control Services, Inc., 623 F. Supp. 2d 113 (D. Mass. 2009) (including collector's contingency fee in amount due was misrepresentation because fee was not yet due).

139 *Cf.* § 9.4.7.3, *infra* (discussing Regulation F itemization requirements for the validation information, including itemization of "fees").

fees,[140] and other courts apply this principle to collection costs.[141]

Unless the costs or fees at issue are authorized by contract or state law, it is deceptive to seek not just collection costs, but service fees, late fees, or any other fees.[142] This includes payment processing fees claimed to process for the consumer's credit card or other payment on the debt, where such a fee is not authorized by the contract or by law.[143] It is deceptive to seek fees for services that were never performed, such as fees for title searches or service of process.[144] It is also deceptive to hide questionable fees under vague terminology.[145]

7.2.2.8 Attorney Fees and Court Costs

False representations related to attorney fees are actionable not only under FDCPA § 1692e(2)(A) concerning the debt amount, but also under FDCPA § 1692e(2)(B) concerning "compensation which may be lawfully received by any debt collector for the collection of a debt."[146] Misrepresentation as to attorney fees can also violate FDCPA §§ 1692e and 1692e(10).

Whether and when a collector can recover attorney fees after prevailing in a collection lawsuit is examined at NCLC's Collection Actions §§ 6.2 through 6.5.[147] This subsection considers whether it is a FDCPA §§ 1692e, 1692e(2), or 1692e(10) violation to seek attorney fees not yet awarded, not yet incurred, or not available under the contract or state law.

Where state law is not clear as to whether the collector's attorney fee representation is correct, a prudent approach is to first obtain a state court ruling on the matter, rather than asking a federal court to do so as a matter of first impression. A federal court may be reluctant to do so.[148]

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140 Fields v. Wilber Law Firm, P.C., 383 F.3d 562, 565 (7th Cir. 2004).

141 *See* Vogel v. McCarthy, Burgess, & Wolff, Inc., 2018 WL 3729329 at 3 (N.D. Ill. Aug. 6, 2018); Patel v. Seterus, Inc., 2015 WL 13547010 (M.D. Fla. June 19, 2015); Richard v. Oak Tree Grp., Inc., 614 F. Supp. 2d 814, 821–822 (W.D. Mich. 2008) (applying *Fields* to collection fees not separately itemized); Dowdy v. Solutia Healthcare TAS, Inc., 2006 WL 3545047, at *8–9 (M.D. Tenn. Dec. 8, 2006) (same). *See also* Hackler v. Tolteca Enters., Inc., 2019 WL 6727874 (W.D. Tex. Dec. 11, 2019).

142 *See* Reichenbach v. Hayes, Johnson & Conley, P.L.L.C., 2019 WL 4511698 (M.D. Pa. Sept. 19, 2019) (late fees not authorized by law or homeowner association declaration); Dawson v. Genesis Credit Mgmt., L.L.C., 2017 WL 5668073 (W.D. Wash. Nov. 27, 2017) (fees, such as for painting the rental apartment and not returning a parking permit, not authorized under the lease); Jackson v. Carrington Mortg. Services, L.L.C., 2017 WL 4347382 (S.D. Fla. Sept. 29, 2017) (issue whether mortgage allowed the servicer to charge late fees after acceleration of the debt); Doskocz v. Ass'n Lien Services, 2016 WL 7425922 (N.D. Cal. Dec. 23, 2016) (homeowner association fees and costs that state law prohibited); Hanson v. JQD, L.L.C., 2014 WL 3404945 (N.D. Cal. July 11, 2014) (homeowner association fees); Grady v. Ocwen Loan Servicing, L.L.C., 2012 WL 929928 (N.D. Ill. Mar. 19, 2012) (unauthorized fees); Eisenberg v. Shendell & Assoc., P.A., 2011 WL 1233253 (S.D. Fla. Mar. 31, 2011) (seeks $125 late fee where governing statute limited the late fee to $6.25); Russo v. Puckett & Redford, P.L.L.C., 2009 WL 3837529 (W.D. Wash. Nov. 17, 2009) (service-fee for unregistered process server); Piscatelli v. Universal Adjustment Services, Inc., Consumer Cred. Guide (CCH) ¶ 96,337 (D. Conn. 1985) (added 25% collection fee where state statute limited fees to 15%). *See also* Muhammad v. Carrington Mortg. Services, L.L.C., 2019 WL 1259353 (S.D. Fla. Mar. 19, 2019) (denying motion to dismiss where court could not make a determination as to whether plaintiff still had a right to reinstate after the alleged acceleration at the time she received the letters and whether defendant was contractually authorized to collect the late fees in question); Diaz v. FCI Lender Services, Inc., 2018 WL 4681013 (S.D.N.Y. Sept. 28, 2018) (not clear from language in mortgage whether late charges could be imposed on loan that had been accelerated).

143 McLain v. Head Mercantile Co., 2017 WL 3710073 (M.D. La. Aug. 28, 2017) ($2 convenience fee for phone payments was not authorized by contract or law); Thomas v. Youderian, 232 F. Supp. 3d 656 (D.N.J. 2017) (fee not authorized by contract or state law); Fuentes v. AR Res., Inc., 2017 WL 1197814 (D.N.J. Mar. 31, 2017) (misrepresented that the $5 payment processing fee was permissible); Simmet v. Collection Consultants of Cal., 2016 WL 11002359 (C.D. Cal. July 7, 2016) ($4 surcharge for online payment was violation where not authorized by contract or state law); Wittman v. CBI, Inc., 2016 WL 3093427 (D. Mont. June 1, 2016) (2.5% transaction fee for use of debit or credit card in payment of the debt); Liable v. Rockport Fin., L.L.C., 2015 WL 4771664 (E.D. Mo. Aug. 12, 2015) (factual issue remained whether agency received compensation from fee); Campbell v. MBI Assoc., Inc., 2015 WL 1543215 (E.D.N.Y. Mar. 31, 2015) (collection agency's charge of $5 processing fee for credit card payment not authorized by contract or law); Quinteros v. MBI Assoc., Inc. 999 F. Supp. 2d 434 (E.D.N.Y. 2014) ($5 processing fee for any payments made via credit card contravening a state prohibition); Longo v. Law Offices of Gerald E. Moore & Assoc., 2005 WL 8153247 (N.D. Ill. Feb. 3, 2005), *rev'd. on other grounds*, 2008 WL 4425444, at *6 (N.D. Ill. Sept. 26, 2008) (fee was not authorized by contract or law). *But see* Lee v. Main Accounts, Inc., 1997 WL 618803 (6th Cir. Oct. 6, 1997) (statement that payment by credit card required 5% additional charge not deceptive, as fee was pass-through charge by payment service); Sanders v. LoanCare L.L.C., 2019 WL 441964 (C.D. Cal. Feb. 1, 2019) (convenience fee for credit card payment allowed where it was clear to consumer that he could avoid fee by not paying by credit card); Weast v. Rockport Fin., L.L.C., 115 F. Supp. 3d 1018 (E.D. Mo. July 17, 2015) (same); Shami v. Nat'l Enter. Sys., 914 F. Supp. 2d 353, 357 (E.D.N.Y. 2012) (fee for making online payment was paid directly to payment processor).

144 *See* Hedayati v. Perry Law Firm, APLC, 2018 WL 3155186 (C.D. Cal. May 16, 2018), *adopted*, 2018 WL 3129803 (C.D. Cal. June 25, 2018) (collector assessed $75 fee for title search that was not done); Belcher v. Ocwen Loan Servicing, L.L.C., 2016 WL 7243100 (M.D. Fla. Dec. 15, 2016) (service of process that never occurred).

145 Cortellessa v. Udren Law Offices P.C., 2016 WL 4554539 (E.D. Pa. Sept 1, 2016) (corporate advance not sufficient to describe various add-on fees); Manrique v. Wells Fargo Bank, 116 F. Supp. 3d 1320 (S.D. Fla. 2015) (labeling 22 unnecessary property inspection fees as "MISC THIRD PARTY RECOVERABLE"); Acik v. I.C. Sys., Inc., 640 F Supp. 2d 1019 (N.D. Ill. 2009) (failing to disclose what "additional client charges" of $78.50 included). *Cf.* Leitner v. Client Services, Inc., 2020 WL 3489482, at *4 (E.D.N.Y. June 26, 2020) (itemization showed "mysterious term" of "non-interest charges and fees").

146 *See* Sanz v. Fernandez, 633 F. Supp. 2d 1356 (S.D. Fla. 2009) (§ 1692e(2)(B) claim where nonlawyer filed eviction complaint seeking attorney fees where state law prohibits such fees to nonlawyers); Brooks v. Auto Sales & Services Inc., 2001 WL 686950 (S.D. Ind. June 15, 2001) (§ 1692e(2)(B) claim that attorney fees must be reasonable under state law); Strange v. Wexler, 796 F. Supp. 1117 (N.D. Ill. 1992) (§ 1692e(2)(B) claim).

147 National Consumer Law Center, Collection Actions Ch. 6 (5th ed. 2020), *updated at* www.nclc.org/library.

148 *See* Montclair v. L.O.I., Inc., 2007 WL 2493091 (9th Cir. Sept. 4, 2007); Robey v. Shapiro, Marianos & Cejda, L.L.C., 434 F.3d 1208 (10th Cir. 2006) (attorney fee was authorized by state law); Olvera v. Blitt & Gaines, P.C., 431 F.3d 285 (7th Cir. 2005) (debt buyer did not charge interest exceeding state limitations); Bird v. Pressler & Pressler, L.L.P., 2013 WL 2316601 (E.D.N.Y. May 28, 2013) (prejudgment interest that

Where a collector seeks attorney fees, there may be a FDCPA § 1692e violation when there are no grounds to seek those fees under the contract or pursuant to state law.[149] The same is the case where state law restricts the ability to recover attorney fees[150] or the collector does not comply with state requirements to recover fees.[151] Where state law allows a collector prevailing under certain causes of action to recover fees, but not under other causes of action, it is deceptive to sue under a cause of action allowing for fees when that cause of action is inapplicable to the case.[152]

Where fees are allowed for a collector only after prevailing in a collection action, it may be deceptive to claim attorney fees are owed before the collector obtains a judgment.[153] That the attorney fee amount sought is based on the contingency recovery agreement between the collection attorney and creditor has no bearing on the amount the consumer must pay as reasonable fees.[154] And if attorney fees can be charged the consumer even prior to a court award, it can be deceptive to include in the dollar balance an amount for attorney fees without separately itemizing those fees.[155]

In addition, a debt collector seeking attorney fees pursuant to a contract must be able to produce that contract[156] and the consumer must be a party to that contract.[157] The contract must provide for attorney fees for the attorney work actually performed. Where the contract calls for attorney fees when a vehicle is repossessed, this may not authorize fees in a later deficiency action.[158] Where the contract provides for recovery of the actual cost of the attorney's time, it can be deceptive to instead seek recovery based on a percentage of the debt.[159] It can be deceptive to seek attorney fees preemptively where the contract provides that such fees can be charged only as a loan "matures" and is placed with an attorney for collection.[160] It can also be a FDCPA § 1692e(2) violation to seek unreason-

could not have been included prior to suit); Munoz v. Pipestone Fin., L.L.C., 513 F. Supp. 2d 1076 (D. Minn. 2007); Harper v. Collection Bur., Inc., 2007 WL 4287293 (W.D. Wash. Dec. 4, 2007) (state court suit did not amount to self-adjudication of attorney fees that could be sought); Winn v. Unifund CCR Partners, 2007 WL 974099 (D. Ariz. Mar. 30, 2007) (request for $2486.42 attorney fees not deceptive; credit card agreement authorized reasonable attorney fees). *See also* Kasalo v. Monco Law Offices, S.C., 2009 WL 4639720 (N.D. Ill. Dec. 7, 2009) (internet gambling debt was not void under state law).

149 Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012); Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856 (S.D. Ohio 2005) (attorney fees not permitted by Ohio law), *aff'd*, 238 Fed. Appx. 24 (6th Cir. 2007); Reichert v. Nat'l Credit Sys., 2005 WL 5549677 (D. Ariz. Mar. 31, 2005).

150 Salvati v. Deutsche Bank Nat'l Tr. Co., 575 Fed. Appx. 49 (3d Cir. 2014); Maronyan v. Fin. Credit Network Inc., 2017 WL 57835 (C.D. Cal. Jan. 3, 2017) (seeking attorney fees greater than state statutory maximum); Moxley v. Pfundstein, 2012 WL 4848973 (N.D. Ohio Oct. 11, 2012) (collection suit requested attorney fee award when state law prohibited it); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (Ohio prohibits attorney fees in collection of consumer debt).

151 *See* Eger v. Messerli & Kramer, P.A., 2015 WL 3915776 (D. Minn. June 25, 2015) (added to judgment amount payments attorney made to garnishees to process garnishments without following state procedures allowing for such fee recovery as part of the judgment).

152 *See* Powers v. Credit Mgmt. Services, Inc., 2016 WL 612251, at *10 (D. Neb. Feb. 2, 2016) ("Misrepresenting the nature of a debtor's debts as debts for materials or services rendered in state collection suits, rather than actions on accounts, in order to deceive state courts and debtors and collect impermissible attorney fees and prejudgment interest is a violation of the FDCPA.").

153 McNair v. Maxwell & Morgan P.C., 893 F.3d 680, 684 (9th Cir. 2018) (seeking as part of writ of garnishment); Kaymark v. Bank of Am., 783 F.3d 168 (3d Cir. 2015) (did not state amount for fees was estimate); McLaughlin v. Phelan Hallinan & Schmieg, L.L.P., 756 F.3d 240 (3d Cir. 2014); Veach v. Sheeks, 316 F.3d 690 (7th Cir. 2003); Banks v. Kottemann Law Firm, 2021 WL 1200090, at *16 (M.D. La. Mar. 30, 2021) (where letter sought to collect amount that "will be owed" rather than amount that *may* be owed after judicial proceedings, it was "reasonable to conclude that such a mischaracterization created a false sense of urgency"); Reichenbach v. Hayes, Johnson & Conley, P.L.L.C., 2019 WL 4511698 (M.D. Pa. Sept. 19, 2019) (defendants requested payment for unincurred attorney fees); Jackson v. Sagal, 370 F. Supp. 3d 592 (D. Md. 2019) (collector violated FDCPA where it maintained that it incurs a $50 minimum fee "at the time the case is assigned"); VonGermeten v. Planet Home Lending, L.L.C., 2019 WL 1298564 (E.D. Wis. Mar. 21, 2019) (alleging that defendant violated FDCPA by including attorney fees in mortgage statements that were not authorized by mortgage agreement); Park v. McCabe Trotter & Beverly, P.C., 2018 WL 3912356 (D.S.C. Aug. 14, 2018) (summary judgment to homeowners where collector prematurely sought attorney fees; recovery of fees only permitted if collector prevails or there is a judgment on its claims); Aubrey v. McCabe Trotter & Beverly, P.C., 2018 WL 3912353 (D.S.C. Aug. 14, 2018); Carney v. Russel P. Goldman, P.C., 2018 WL 2441766 (D.N.J. May 30, 2018); Durham v. Makower, Abbate & Assoc., 2016 WL 7116596 (E.D. Mich. Dec. 7, 2016) (future costs for attorney fees that they did not yet owe); Sunga v. Broome, 2010 WL 3198925 (E.D. Va. Aug. 12, 2010); Pettway v. Harmon Law Offices, P.C., 2005 WL 2365331 (D. Mass. Sept. 27, 2005); Reichert v. Nat'l Credit Sys., Inc., 2005 WL 5549677 (D. Ariz. Mar. 31, 2005) (adding attorney fees to account before suit when contract provided for fees to "prevailing party"); Tyrell v. Robert Kaye & Assoc., 2004 WL 7346589 (S.D. Fla. Aug. 10, 2004); Blum v. Fisher & Fisher, 961 F. Supp. 1218 (N.D. Ill. 1997) (questions of fact remained where collection attorney's letter that stated consumer owed attorney fees when none would be due unless foreclosure judgment was obtained). *See also* Stanley v. Stupar, Schuster & Cooper, 136 F. Supp. 2d 957 (E.D. Wis. 2001). *Compare Fields v. Wilber Law Firm, P.C.*, 383 F.3d 562, 565 (7th Cir. 2004) (no deception to seek fees if authorized for work before file suit); Allison v. McCabe Trotter & Beverly, P.C., 2018 WL 3826674 (D.S.C. Aug. 10, 2018), *order clarified on reconsideration*, 2018 WL 5122207 (D.S.C. Oct. 22, 2018) (adding attorney fees to amount sought not premature just because client had not yet paid attorney for the fees incurred, as long as the work had been incurred); Whaley v. Shapiro & Kreisman, L.L.C., 2003 WL 22232911 (N.D. Ill. Sept. 16, 2003) (collection-attorney fees in Illinois not limited to after a court action).

154 Carney v. Russel P. Goldman, P.C., 2018 WL 2441766 (D.N.J. May 30, 2018); Munoz v. Pipestone Fin., L.L.C., 513 F. Supp. 2d 1076 (D. Minn. 2007).

155 *Fields v. Wilber Law Firm, P.C.*, 383 F.3d 562, 565 (7th Cir. 2004). *See also* Richard v. Oak Tree Grp., Inc., 614 F. Supp. 2d 814, 821–822 (W.D. Mich. 2008) (applying *Fields* to collection fees not separately itemized); Dowdy v. Solutia Healthcare TAS, Inc., 2006 WL 3545047, at *8–9 (M.D. Tenn. Dec. 8, 2006) (same).

156 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011).

157 Erickson v. Johnson, 2006 WL 453201 (D. Minn. Feb. 22, 2006) (credit card agreement's attorney fee clause inapplicable to nonparty).

158 Lockett v. Freedman, 2004 WL 856516 (N.D. Ill. Apr. 21, 2004).

159 *See* Kojetin v. CU Recovery, Inc., 212 F.3d 1318 (8th Cir. 2000).

160 *See* Walker v. Hill, 2021 WL 1062238, at *15 (E.D. Va. Mar. 19, 2021).

able attorney fees.[161] Seeking an amount before the attorney work is complete can produce an unreasonable amount.[162] The amount sought can be unreasonable where it is more than the collection attorneys billed their client.[163]

It can be deceptive to obscure the fact that attorney fees are being sought by labeling them as something else.[164] Also actionable is threatening the consumer with "a fortune in legal fees" where state law limited them to $300.[165] Where a collection attorney can recover from the consumer fees for post-judgment work, it can still be a FDCPA § 1692e(2) violation to represent that those fees are part of the judgment debt—they are a separate obligation not yet reduced to a judgment.[166] It is also deceptive to lump in with a particular amount due attorney fees owed over a different matter.[167]

Demands for court costs follow similar rules as for attorney fees. A collector should not demand court costs not authorized by law or the contract[168] or that are not otherwise owed.[169] It can be deceptive to demand court costs in a dollar amount before the court has awarded them[170] or before required state procedures have been met to seek those costs.[171]

7.2.2.9 Penalties and Charges for Dishonored Checks

In consumer transactions, the dollar amount of an insufficient funds check is likely to be small, making it impractical to expend significant resources collecting such bad check amounts. In response, collectors may threaten penalties under state bad check laws in the hope that such threats in a letter will result in payment. Collectors may also attempt to increase their recoveries by seeking to collect additional amounts that may or may not be allowed under state law and the contract. Another NCLC treatise considers consumer and collector rights concerning collections of insufficient funds checks.[172] This section considers when such collection efforts run afoul of FDCPA § 1692e.

While many states have bad check statutes providing special penalties (e.g., treble damages, costs, attorney fees, other charges) where a consumer writes an insufficient funds check under certain circumstances, those penalties must be awarded by a court. It is deceptive to represent that the consumer owes those amounts before a court so rules, such as including those amounts in the amount due.[173] It is also deceptive to threaten penalties that are not available under the bad check law (such as attorney fees when the amount owed is under a certain dollar threshold for allowing such fees).[174]

Where a state bad check statute does not apply to postdated checks, it is deceptive for a collector collecting on a payday loan to threaten remedies under that statute.[175] In some states,

161 Brooks v. Auto Sales & Services Inc., 2001 WL 686950 (S.D. Ind. June 15, 2001).

162 Gonzalez v. Codilis & Assoc., P.C., 2004 WL 719264 (N.D. Ill. Mar. 31, 2004).

163 McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1 (D. Mass. 2012).

164 Wilson v. Trott Law, P.C., 118 F. Supp. 3d 953 (E.D. Mich. 2015) (attorney fees labeled as "corporate advances"); Dougherty v. Wells Fargo Home Loans, Inc., 425 F. Supp. 2d 599 (E.D. Pa. 2006) (recoverable corporate advances); Porter v. Fairbanks Capital Corp., 2003 WL 21210115 (N.D. Ill. May 21, 2003) (demand for attorney fees under heading "recoverable corporate advances" when document also had heading "legal fees" reading zero).

165 Pacheco v. Joseph McMahon Corp., 698 F. Supp. 2d 291 (D. Conn. 2010).

166 Campion v. Credit Bur. Services, Inc., 2000 WL 33255504 (E.D. Wash. Sept. 2, 2000).

167 Menashe v. Baum, 2011 WL 4553097 (E.D.N.Y. Sept. 28, 2011).

168 Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435 (W.D. Wash. Mar. 29, 2017) (filing fees); Doskocz v. Ass'n Lien Services, 2016 WL 7425922 (N.D. Cal. Dec. 23, 2016) (collection agency that was attempting to collect homeowner associations fees and costs that state law prohibited); Oberg v. Blatt, 2015 WL 9478213 (N.D. Ill. Dec. 29, 2015) (court filing and service); Hallmark v. Cohen & Slamowitz, L.L.P., 293 F.R.D. 410 (W.D.N.Y. 2013) (court costs).

169 *See* Shula v. Lawent, 359 F 3d 489 (7th Cir. 2004) (demanded costs that were not awarded). *See also* Jackson v. Sagal, 370 F. Supp. 3d 592, 602 (D. Md. 2019) (collector's statement that consumer would incur costs and expenses was false, deceptive, or misleading, since she "could avoid costs altogether by proceeding *pro se* or with the aid of pro bono counsel and by utilizing any number of free legal resources to eliminate court costs" or agreed to pre-trial settlement).

170 *See* Veach v. Sheeks 316 F.3d 690, 693 (7th Cir. 2003) (including court costs in the balance before suit deceptive); Francis v. General Revenue Corp., 2020 WL 4586392 (E.D.N.Y. Aug. 10, 2020) (failure to disclose contingent nature of collection cost was deceptive); Anda v. Roosen Varchetti & Olivier, P.L.L.C., 2016 WL 7157414 (W.D. Mich. Oct. 31, 2016) (garnishment filing fees that had not been adjudicated as costs); Cohn v. New Century Fin. Services, Inc., 2016 WL 4016993 (E.D.N.Y. June 7, 2016) (filing and service costs that state court had not yet awarded); *In re* FDCPA Cognate Cases, 2016 WL 1273349 (W.D. Mich. Mar. 28, 2016) (claiming costs that were not due in garnishment action until garnishing party prevailed); Champion v. Target Nat'l Bank, 2013 WL 8699367 (N.D. Ga. Apr. 15, 2013) (included court costs, although no judgment had entered).

171 Hawksley v. Weltman, Weinberg & Reis Co., 2017 WL 63033 (W.D. Ky. Jan. 5, 2017) (lien recording fee).

172 National Consumer Law Center, Collection Actions Ch. 7 (5th ed. 2020), *updated at* www.nclc.org/library.

173 *Veach v. Sheeks*, 316 F.3d 690, 693 (7th Cir. 2003); Duffy v. Landberg, 215 F.3d 871 (8th Cir. 2000) (Minnesota statute allowed penalty "up to" $100); Eaton v. Credit Bur., Inc., 2007 WL 2781844 (D.N.D. Sept. 21, 2007) (attempting to collect statutory dishonored check civil penalties not assessed by court); Brumbelow v. Law Offices of Bennett & Deloney, P.C., 2005 WL 1566689 (D. Utah June 21, 2005) (Georgia check collection statute); Goins v. JBC & Assoc., P.C., 2004 WL 2063562 (D. Conn. Sept. 3, 2004) (check collector's pre-suit demand for maximum civil penalty that court might award in future collection suit deceptive); Ditty v. CheckRite, Ltd., 973 F. Supp. 1320 (D. Utah 1997) (check service charge over $15 only available where collector brings lawsuit).

174 Duffy v. Landberg, 215 F.3d 871 (8th Cir. 2000) (Minnesota bad check statute); Day v. Check Brokerage Corp., 511 F. Supp. 2d 950 (N.D. Ill. 2007) (seeking fees without complying with requirements of bad check statute); Day v. Check Brokerage Corp., 511 F. Supp. 2d 950 (N.D. Ill. 2007) (fees over $25 requires certified letter to the consumer); Thinesen v. JBC Legal Group, P.C., 2005 WL 2346991 (D. Minn. Sept. 26, 2005). *See also* Imperial Merchant Services, Inc. v. Hunt, 212 P.3d 736 (Cal. 2009) (prejudgment interest could not be added to statutory dishonored check charge).

175 Nance v. Ulferts, 282 F. Supp. 2d 912 (N.D. Ind. 2003); Jones v. Kunin, 2000 WL 34402017 (S.D. Ill. May 1, 2000).

special penalties for submitting a dishonored check can be awarded only to the payee or only certain other parties, and not to the collector or a debt buyer. A collector that is not one of those parties but threatens such penalties violates FDCPA § 1692e.[176] Where a state shoplifting statute does not apply to writing an insufficient funds check, it is deceptive to threaten remedies under that statute.[177]

Collectors may also attempt to collect service charges even when not authorized by a bad check statute, claiming they are allowed by a contract provision. But it is deceptive to seek such a service charge not authorized by contract.[178] Posting a sign in the merchant's store notifying customers of the fee may not be sufficient to provide authorization, making the demand for the fee deceptive.[179] Even if a bad check fee is included in a contract, the fee may be void if it does not constitute reasonable liquidated damages, and then seeking such fee can be deceptive.[180] Collectors may argue that the fees are incidental damages that are collectible under UCC Articles 2 and 3, but courts often find that the collector does not meet the requirements of those UCC provisions.[181]

7.2.2.10 Misrepresentation of Collector Services

FDCPA § 1692e(2)(B) prohibits a collector's false representations to the consumer as to the extent of collection services it is authorized to perform. Where a debt collector's contract with a creditor is limited to mailing a series of dunning letters (called "flat-rate" collecting), it can be deceptive to represent to a consumer that it will take additional collection actions.[182]

The same practice can violate FDCPA § 1692j(a),[183] providing: "It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt . . ."[184] Where a collection attorney lends its name to a form letter, but is not otherwise involved with the account, this can also violate FDCPA § 1692e(3), falsely implying that a communication comes from an attorney.[185] This provision is examined at § 7.2.3, *infra*.

7.2.2.11 Other Misrepresentation of Debt's Character or Legal Status

FDCPA § 1692e(2)(A) prohibits false statements as to a debt's character or legal status. It can thus be deceptive to collect on a debt while not owning the debt or collecting for someone who does not own the debt, such as where ownership has not yet transferred.[186] After ownership is transferred to a debt buyer, it is similarly deceptive to collect while claiming that the original creditor owns the debt[187] or misstating that the debt buyer is a holder in due course.[188] A debt's legal status is also misrepresented where the collector misrepresents that it has the right to file suit on a debt.[189]

It can be actionable under FDCPA § 1692e to describe a debt as owed to "multiple creditors" or "other creditors" while collecting for only one creditor, even if there are multiple accounts overdue with that one creditor.[190] It is also deceptive to seek collection of multiple debts from multiple creditors without identifying the multiple creditors.[191] Misidentifying the identity of the original creditor[192] or the entity that is

176 *See* Cruz v. Int'l Collection Corp., 673 F.3d 991 (9th Cir. 2012) (California bad check statute); Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000) (Illinois bad check statute); Check Brokerage Corp., 511 F. Supp. 2d 950 (N.D. Ill. 2007).

177 Scott v. Riddle, 2000 WL 33980013 (D. Utah Dec. 4, 2000).

178 *See* Ditty v. CheckRite, Ltd., 973 F. Supp. 1320 (D. Utah 1997) (check service charge inconsistent with state law); West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983).

179 Wegmans Food Mkts., Inc. v. Scrimpsher, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) ($5 service charge for dishonored check without showing more of contractual basis than posted notice in store). *See also* Still v. JBC Assoc., 2005 WL 1334715 (D.N.J. June 3, 2005) (not known if consumer had seen notice of returned check fee posted in store).

180 Ballard v. Equifax Check Services, 158 F. Supp. 2d 1163 (E.D. Cal. 2001).

181 *See* Semper v. JBC Legal Group, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005); Ballard v. Equifax Check Services, 27 F. Supp. 2d 1201 (E.D. Cal. 1998) (UCC provisions do not apply to assignee); State *ex rel.* Hatch v. JBC Legal Group, P.C., 2006 WL 1388453 (Minn. Dist. Ct. Apr. 13, 2006). *But see* Freyermuth v. Credit Bur. Services, Inc., 248 F.3d 767 (8th Cir. 2001) (service charge on checks was permitted by UCC art. 2 as incidental damages).

182 *See* Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002).

183 *See* Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002).

184 § 10.4.1, *infra*.

185 *See* Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002).

186 *See* Wallace v. Washington Mut. Bank, F.A., 683 F.3d 323 (6th Cir. 2012) (consumer stated an FDCPA claim where a party filed a judicial foreclosure more than a month before that party was assigned the note and mortgage); Bourff v. Rubin Lublin, L.L.C., 674 F.3d 1238 (11th Cir. 2012) (foreclosure law firm's listing a bank in its letter to consumer as creditor, when it was to be, but not at time, creditor, false and "a serious matter"); Flores v. Collection Consultants, 2015 WL 12791370 (C.D. Cal. June 2, 2015) (failure to list identity of "other creditors" could frustrate consumer's ability to choose intelligently how to respond to letter). *See also* Hepsen v. J.C. Christensen & Assoc., Inc., 2009 WL 3064865 (M.D. Fla. Sept. 22, 2009) (defendant misrepresented identity of current owner of the debt, *aff'd on other grounds*, 383 Fed. Appx. 877 (11th Cir. 2010).

187 *See* Nottingham v. Houston Hosps., Inc., 2018 WL 4604023 (M.D. Ga. Sept. 25, 2018).

188 Hartman v. Asset Acceptance Corp., 467 F. Supp. 2d 769 (S.D. Ohio 2004).

189 *See* Boerner v. LVNV Funding L.L.C., 326 F. Supp. 3d 665 (E.D. Wis. 2018) (failed to provide state-mandated right to cure, so no right to sue on debt).

190 Gibson v. Creditors' Serv. of Ind., Inc., 2015 WL 12559887 (S.D. Ind. Nov. 23, 2015).

191 *See* Deporter v. Credit Bur. of Carbon County, 2015 WL 1932336 (D. Colo. Apr. 28, 2015).

192 Tourgeman v. Collins Fin. Services, Inc., 755 F.3d 1109 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2014) (false identification of original creditor in dunning letter). *See also* Sturm v. Alpha Recovery Corp., 2020 WL 1140425 (E.D.N.Y. Mar. 6, 2020) (if consumer could show that debt buyer was not proper assignee, then letter would include false representation regarding legal status of debt). *Cf.* Stewart v. JP Morgan Chase Bank, 2020 WL 433888, at *4 (N.D. Ill. Jan. 28, 2020) (where January 2017 collection letter indicated that Freddie Mac was "the current creditor to whom the debt is owed" but

servicing the loan as the entity that owns the loan[193] can also violate FDCPA § 1692e.

It can be deceptive to state that prompt payment will result in the collector waiving additional collection fees or interest, where such additional amounts could not be charged in any event.[194] Making false statements about the underlying sales transaction that would conflict with a consumer's valid defenses to a debt can also violate FDCPA § 1692e.[195] Also deceptive can be representing that insurance would not cover an obligation when not based on information about the consumer's actual insurance coverage, thus seeking to have a consumer make payments that might not be owed.[196]

Misrepresentations that relate to credit reporting may also violate the Act. A statement that a debt would remain on the consumer's credit report until it was paid is a materially false representation because by law, the debt remains on credit reports for only seven years.[197] It is a material violation for a debt collector to continue to report a "judgment" to consumer reporting agencies after knowing that there was no judgment.[198] The use of a different account number for what is actually a second collection attempt on an already reported delinquent debt, without making any clarification to a consumer reporting agency, may violate FDCPA § 1692e(2)(a).[199]

FDCPA § 1692e(2)(a) relates to misrepresentations concerning the characteristics or legal status of the *debt*. Thus, courts have found that it does not apply to misrepresentations concerning the collector, such as a collector's Better Business Bureau rating.[200] Of course, the same misrepresentation may be actionable under other FDCPA provisions.

April 2017 letter indicated the "Present Creditor" was Chase, and the collector did not explain this contradiction or clarify the relationship between the two entities, an unsophisticated consumer could be confused and concerned that two entities were seeking to collect on a single debt).

193 Suquilanda v. Cohen & Slamowitz, L.L.P., 2011 WL 4344044 (S.D.N.Y. Sept. 8, 2011).

194 *See* Franklin v. Nat'l Credit Audit Corp., 2018 WL 1155973 (C.D. Cal. Jan. 22, 2018).

195 *See* Panzer v. Alternative Claims Mgmt., L.L.C., 2016 WL 3771251 (S.D.N.Y. July 8, 2016) (false representation that rental car did not have a leak when it left repair shop).

196 Ponce v. BCA Fin. Services, Inc., 467 Fed. Appx. 806 (11th Cir. 2012) (collector had no specific information to support statement that the consumer's insurance would not provide coverage).

197 *See* Irvine v. I.C. Sys., Inc., 176 F. Supp. 3d 1054 (D. Colo. 2016); CFPB, Bulletin 2013-8: Representations Regarding Effect of Debt Payments on Credit Reports and Scores (July 10, 2013), *available at* www.consumerfinance.gov.

198 *See* Johnson v. Columbia Debt Recovery, L.L.C., 2021 WL 796332 (W.D. Wash. Mar. 2, 2021).

199 *See* Reyes v. IC Sys., Inc., 470 F. Supp. 3d 190, 193 (D. Conn. 2020) (denying motion to dismiss § 1692e, e(2)(A), and e(10) claim where collector did not tell credit reporting agency that it was second collector for debt already reported by previous collector).

200 *See* Strobel v. RJM Acquisitions L.L.C., 2014 WL 507510, at *3 (E.D.N.Y. Feb. 6, 2014). *See also* Bryan v. I.C. Sys., Inc., 2017 WL 4326041 (E.D.N.Y. Sept. 28, 2017).

7.2.3 *Falsely Implying Person Is an Attorney or That Communication Comes from an Attorney, FDCPA § 1692e(3)*

7.2.3.1 Generally

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> ***
>
> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.[201]

This section focuses on two different FDCPA § 1692e(3) violations. Section 7.2.3.2, *infra*, considers where a non-attorney impersonates an attorney. Section 7.2.3.3, *infra*, analyzes the application of FDCPA § 1692e(3) where an attorney essentially lends its letterhead to a collector. While doing so generally is viewed as a FDCPA § 1692e(3) violation,[202] a body of law has developed indicating that, in some situations, the letter can avoid a violation by disclosing that an attorney has not reviewed the letter.[203] Attorneys sometimes also argue that the letter does not indicate it is from an attorney.[204]

Where there is a FDCPA § 1692e(3) violation, both the collection attorney and the collection agency can be liable. Interestingly, where the originating creditor sends out the letter on attorney letterhead, this may subject the creditor to FDCPA coverage and then liability under section 1692e(3).[205]

7.2.3.2 Non-Attorneys Impersonating Attorneys

FDCPA § 1692e(3) prohibits a debt collector from even indirectly impersonating an attorney.[206] Non-attorney collection agencies can violate FDCPA § 1692e(3) by using a name that implies they are attorneys, such as "Lawyers Collection

201 15 U.S.C. § 1692e(3). Each of the major bills leading to the FDCPA contained a provision similar to this section. *E.g.*, H.R. 11969, 94th Cong., 2d Sess. § 806(3) (1976). The Senate Consumer Affairs Subcommittee added the word "implication" and the last clause to the subsection. Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 807(3) (1977). The statute defines communication as the "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). *See also* Reg. F § 1006.18(b)(1)(iii).

202 *See* § 7.2.3.3.1, *infra*.

203 *See* § 7.2.3.3.3, *infra*.

204 *See* § 7.2.3.3.2, *infra*.

205 *See* § 7.2.3.3.4, *infra*.

206 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*; 123 Cong. Rec. H29222 (daily ed. Apr. 4, 1977) (remarks of Rep. Annunzio).

Services,"[207] or by creating a fake law firm website.[208] It can also be a FDCPA § 1692e(3) violation where a non-attorney collection agency's phone calls have a caller ID of "law office."[209] An actionable impersonation of an attorney can involve a non-attorney performing functions only an attorney can perform,[210] or that an attorney routinely performs.[211]

The FTC Staff Commentary states that it is a FDCPA § 1692e(3) violation for a collector to use the label "Pre-Legal Department" where the collector lacks a legal department.[212] Some debt collection agencies have "legal departments" where no employee is an attorney, and the department's supervisor is a non-attorney, but where the employees place accounts out to contract attorneys around the country, provide documents for litigation, and act as witnesses where required. A collection agency that sends out collection letters under the name "legal department" with no attorney involvement may be impersonating an attorney. Where a federal court had dismissed such a FDCPA § 1692e(3) claim, the Third Circuit sent the case back to determine whether the least sophisticated consumer would find the name deceptive.[213]

A court has found it unlikely the title "senior litigation associate" will deceive even an unsophisticated consumer into believing the individual is an attorney.[214] Nor did a court find that letters sent as "The Collection Firm of Franklin Collection Service, Inc." violated FDCPA § 1692e(3); use of the word "firm" does not imply law firm;[215] neither does use of the word "Associates" in a collection agency's name.[216] A court has ruled that a collection agency name Biehl and Biehl, Inc. does not imply it is a law firm just because law firms often have multiple names of individuals in their firm name.[217] A letter does not indicate it is from an attorney where the letter states it is from a collection agency and makes reference to the agency's legal department and in-house attorney.[218]

7.2.3.3 Attorney Letters Without Attorney Review of the Account

7.2.3.3.1 Introduction

With the possible exception where the attorney clearly discloses it has not reviewed the consumer's account,[219] FDCPA § 1692e(3) is violated where a collection letter is on an attorney's letterhead or is signed by an attorney, but the attorney has not meaningfully reviewed the account. The Second, Third, Fifth, Sixth, and Seventh Circuits have all reached this conclusion—that mass-produced letters on an attorney's letterhead or over the attorney's signature violate FDCPA § 1692e(3) where the attorney does not review the consumer's file.[220] (Some of these cases note that the attorney acknowledged neither reviewing the files nor reading each letter being mailed.[221]) Federal courts in other circuits reach the same

207 Challed, FTC Informal Staff Letter (May 16, 1994). *See also* United States v. Commercial Recovery Sys, Inc., 179 F. Supp. 3d 728 (E.D. Tex. 2016).

208 *See* Leonard v. John Doe Corp., 2020 WL 3642562 (S.D. Ohio July 6, 2020).

209 Crespo v. Valentine & Kebartas, Inc., 2010 WL 11597922 (S.D. Fla. Dec. 21, 2010).

210 *See* Jacquez v. Diem Corp., 2003 WL 25548423 (D. Ariz. Feb. 20, 2003) (non-attorney applied for writ of garnishment, where attorney is required to sign the document); Marchant v. U.S. Collections West, Inc., 12 F. Supp. 2d 1001 (D. Ariz. 1998) (same).

211 Brannigan v. Harrison, 2018 WL 1942520 (D.N.J. Apr. 24, 2018) (question for jury where non-attorney answered call to law firm, described nature of potential collection lawsuit and referred to "we"); Brown v. Transurban USA, Inc., 144 F. Supp. 3d 809 (E.D. Va. 2015) (appearing at the courthouse and negotiating with the consumer and giving the appearance of being an attorney). *See also* United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370 (N.D. Tex. 1986) (collector impersonated attorney by referring to himself as "consumer law expert" and representing that he "knew the law"), *aff'd per curiam*, 823 F.2d 880 (5th Cir. 1987).

212 *See* FTC Official Staff Commentary § 807(3)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Krisor, FTC Informal Staff Letter (Oct. 5, 1983).

213 Rosenau v. Unifund Corp., 539 F.3d 218 (3d Cir. 2008). *See also* United States v. Commercial Recovery Sys, Inc., 179 F. Supp. 3d 728 (E.D. Tex. 2016). *But see* Pollak v. Portfolio Recovery Assoc., 285 F. Supp. 3d 812, 839 (D.N.J. 2018) (debt buyer did not violate § 1692e(3) by referencing its "Litigation Department" in its collection letters because the letter included a disclaimer of lawyer noninvolvement on the front of the letter); Leblanc v. Unifund CCR Partners, G.P., 552 F. Supp. 2d 1327 (M.D. Fla. May 8, 2008) ("Legal Department" did not imply attorney involvement when viewed as a whole with the rest of the letter).

214 Tromba v. M.R.S. Assoc., Inc., 323 F. Supp. 2d 424 (E.D.N.Y. 2004).

215 Winans v. Franklin Collection Serv., Inc., 2018 WL 3942073 (M.D.N.C. Aug. 16, 2018; Bradley v. Franklin Collection Serv., Inc. 2013 WL 1346714 (N.D. Ala. Mar. 28, 2013).

216 Zaborac v. Phillips and Cohen Assoc., Ltd., 330 F. Supp. 2d 962 (N.D. Ill. 2004).

217 Sulaiman v. Biehl & Biehl, Inc., 2016 WL 5720476 (N.D. Ill. Sept. 30, 2016).

218 *See* Medley v. Kentucky Accounts Serv., L.L.C., 2014 WL 5471029 (E.D. Ky. Oct. 28, 2014).

219 *See* § 7.2.3.3.3, *infra*.

220 Lesher v. Law Offices of Mitchell N. Kay, P.C., 650 F.3d 993 (3d Cir. 2011); Gonzalez v. Kay, 577 F.3d 600 (5th Cir. 2009); Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433 (6th Cir. 2008); Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 304 (2d Cir. 2003) (finding that "merely being told by a client that a debt is overdue is not enough" to satisfy the requirement of meaningful attorney involvement); Nielsen v. Dickerson, 307 F.3d 623, 638 (7th Cir. 2002) ("[The attorney] knew nothing about the debtor and her potential liability beyond what [the creditor] had conveyed to him; and [the creditor] provided [the attorney] only the bare information that [he] required in order to complete the blanks in his form letter."); Boyd v. Wexler, 275 F.3d 642 (7th Cir. 2001); Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996); Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993). *See also* Vincent v. The Money Store, 736 F.3d 88 (2d Cir. 2013); Young v. Citicorp Retail Services, 1998 WL 537530 (2d Cir. June 29, 1998); Kranz v. Midland Credit Mgmt., Inc., 2020 WL 4905806 (W.D. Tex. Aug. 20, 2020); *Gibbons v. Weltman, Weinberg & Reis Co.*, L.P.A., 2018 WL 5720750, at *8 (E.D. Pa. Oct. 31, 2018); Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798 (E.D. Mich. Aug. 14, 2017).

221 Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433 (6th Cir. 2008) (attorney acknowledged that while he drafted the form collection letter, he neither reviewed the file nor the specific letter in this case); Clomon v. Jackson, 988 F.2d 1314, 1320 (2d Cir. 1993) (impression that letters were from an attorney was "false and misleading because in fact [the attorney] did not review each debtor's file; he

conclusion.[222] The same approach has been applied to the filing of collection lawsuits where an attorney did not review the complaints.[223]

It is no defense that the lawyer owns the collection agency[224] or discloses that it is acting as a debt collection agency. One can be both an attorney and a debt collector.[225] It is also no defense to say that there can be no FDCPA § 1692e(3) liability if the debt collector later commences a lawsuit.[226]

The fact finder may give little credence to an affidavit from the attorney attesting that they had reviewed each file where over ten thousand letters were mailed in a week on the attorney's signature.[227] Evidence of the lack of involvement of an attorney is the sheer number of letters sent out on the firm's letterhead or collection lawsuits filed in a given period.[228]

Summary judgment for the consumer was also granted where the collection attorney claimed he used software to evaluate large numbers of accounts quickly. This was found not to demonstrate the sort of independent analysis and professional opinion that must occur when a debt collector represents that an attorney has reviewed a debt.[229]

A lawyer's cursory review is not enough.[230] It is not enough that an attorney drafted the form letter and letters were sent out pursuant to the attorney's standing instructions.[231]

The Seventh Circuit has set a standard that the collection attorney make a "considered, professional judgment" that individual consumers were delinquent and were candidates for legal action or that the dunning letter should be sent to them.[232] A court has described the required attorney review—it "need not be lengthy, but it must permit the attorney to form a professional opinion about whether the debt is potentially viable, barred by the statute of limitations, uncollectable due to the debtor's bankruptcy, and to evaluate similar legal considerations."[233]

The Seventh Circuit indicates these factors show a lack of attorney involvement:

- The creditor, not the attorney decides which consumers receive letters;
- The creditor does not provide sufficient account information for the lawyer to reach an independent, professional judgment about liability and collectability;
- The use of the same form letter in every case and the large number of accounts receiving the letter;
- The lawyer refers responses to the letter back to the creditor and has no authority to negotiate payments or settle the debt;
- The collection lawyer's low flat fee per letter suggests the lawyer is not paid for legal judgment but rather for the value of a lawyer letterhead;
- The collection lawyer was not authorized to file suit for the creditor.[234]

The consumer should produce some evidence of lack of attorney review. Where the attorney claims to review the file

did not determine when particular letters should be sent; he did not approve the sending of particular letters based upon the recommendations of others; and he did not see particular letters before they were sent—indeed, he did not even know the identities of the persons to whom the letters were issued. In short, the fact that Jackson played virtually no day-to-day role in the debt collection process supports the conclusion that the collection letters were not 'from' [the attorney] in any meaningful sense of that word.").

222 Nepomuceno v. Legal Recovery Law Offices, Inc., 2014 WL 2711828 (S.D. Cal. June 16, 2014); Pollard v. Law Office of Mandy L. Spaulding, 967 F. Supp. 2d 470 (D. Mass. 2013), *aff'd*, 766 F.3d 98 (1st Cir. 2014); Martinez v. Johnson, 2013 WL 1031363 (D. Utah Mar. 14, 2013); Henggeler v. Brumbaugh & Quandahl, P.C., 2012 WL 2855104 (D. Neb. July 5, 2012); Cordes v. Frederick J. Hanna & Assoc., P.C., 789 F. Supp. 2d 1173 (D. Minn. 2011); Palmer v. Stassinos, 2009 WL 86705 (N.D. Cal. Jan. 9, 2009); Dunn v. Derrick E. McGavic, P.C., 653 F. Supp. 2d 1109, 1114 (D. Or. 2009); Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995); Martinez v. Albuquerque Collection Services, 867 F. Supp. 1495 (D.N.M. 1994); Masuda v. Thomas Richards & Co., 759 F. Supp. 1456 (C.D. Cal 1991). *See also* Walsh v. Jon B. Sage, P.A., 2006 WL 8431662 (S.D. Fla. May 17, 2006).

223 *See* § 7.4.10.4.1, *infra*.

224 Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996).

225 *See also* Pollard v. Law Office of Mandy L. Spaulding, 967 F. Supp. 2d 470 (D. Mass. 2013), *aff'd*, 766 F.3d 98 (1st Cir. 2014).

226 Hochhauser v. Grossman & Karaszewski, P.L.L.C., 2020 WL 2042390, at *6 (E.D.N.Y. Apr. 28, 2020) (lawsuit had no bearing on the question of whether there was attorney involvement at the time the letter was sent).

227 Boyd v. Wexler, 275 F.3d 642 (7th Cir. 2001). *See also* Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003); Bahena v. Jefferson Capital Sys., L.L.C., 363 F. Supp. 3d 914 (W.D. Wis. 2019).

228 *See* Miller v. Upton, Cohen & Slamowitz, 687 F. Supp. 2d 86, 100 (E.D.N.Y. 2009) (where collection records show no attorney involvement other than signing court papers at high volume, there was no meaningful attorney involvement; collection attorney and his partner signed 211 collection letters on the same day they signed the plaintiff's letter and issued over 3000 letters in that month, leaving little time for legal review, and "debt collection letters and litigation documents were regularly mass-produced at UCS by non-lawyers at the push of a button").

229 Martsolf v. JBC Legal Group, P.C., 2008 WL 275719 (M.D. Pa. Jan. 30, 2008). *See also* Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003).

230 Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003); Morgan v. Vogler Law Firm, P.C., 2016 WL 3958608 (E.D. Mo July 22, 2016) (consumer's assertion that an attorney making a meaningful review of the verification letter would have noticed that supporting documents did not support amount of debt being pursued sufficed to deny motion to dismiss).

231 Cordes v. Frederick J. Hanna & Assoc., P.C., 789 F. Supp. 2d 1173 (D. Minn. 2011); Masuda v. Thomas Richards & Co., 759 F. Supp. 1456 (C.D. Cal. 1991).

232 Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002).

233 Martsolf v. JBC Legal Group, P.C., 2008 WL 275719 (M.D. Pa. Jan. 30, 2008). *See also* Navarro v. Eskanos & Adler, 2007 WL 549904 (N.D. Cal. Feb. 20, 2007). *But see* Rossi v. Kohn Law Firm S.C., 2020 WL 2527176, at *10–11 (W.D. Wis. May 18, 2020) (granting summary judgment for law firm where attorney who spent fewer than six minutes reviewing case was "professionally involved" in preparing state court collection complaint, and stating that "the court of appeals has not imposed a minimum time requirement on reviewing debt collection cases and it has not held that lawyers who perform routine, high-volume work are necessarily liars").

234 Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002).

and the consumer provides no contrary evidence, the FDCPA § 1692e(3) claim is likely to fail.[235]

On the other hand, no evidence may be required of the lack of attorney involvement where the letter itself is contradictory in that regard. A FDCPA § 1692e(3) violation was found where the letter indicated that if payment was not received an attorney would review the account, and also stated that an attorney had reviewed the account using computer software.[236]

In an unsuccessful case brought by the Consumer Financial Protection Bureau against a large collection law firm, the federal court sets out in detail the various procedures at the law firm, including the extent of attorney involvement prior to and after form letters are sent.[237] Collection law firms may model their future claims of attorney involvement on the claims made by the law firm in this case.

Despite the CFPB's introduction of survey evidence, the court found that any deception by the collection letters themselves was not material in that the deception did not affect consumer behavior. Perhaps the court was influenced to rule against the CFPB by the fact that the CFPB Director bring ing the action previously was the Ohio Attorney General and had required the defendant to put the Ohio Attorney General's name on collection letters that the defendant sent for the State of Ohio.

7.2.3.3.2 Does a letter indicate it is from an attorney?

Not every form letter suggests it is from an attorney, and lawyers may defend a FDCPA § 1692e(3) claim by arguing that the letter does not indicate it is from an attorney. This argument will not get the collector far if there is the mention of "attorney," "law offices," "law firm" or the like on the letterhead, in the signature block, or in the address where payment should be made.[238]

Nor is it a defense that the person signing a letter on law firm letterhead is not an attorney and not listed on the letterhead as one of the attorneys in the firm. A court found that the presence of a list of attorneys on the letterhead was further evidence that the letter indicated to unsophisticated consumers that it was from an attorney.[239]

Even if a letter does not indicate in any direct way that it is from a law firm, it can indirectly indicate it is from a law firm. In one case, the letter indicated only that it was from a "Professional Corporation" with the name "Trott & Trott, P.C.," but elsewhere the firm branded itself publicly as the largest foreclosure law firm in the United States. A consumer could easily learn this, so the court concluded that the letter indicated it was from a law firm.[240]

On the other hand, a court found no violation where the only indication that a letter was from an attorney was "esq." after the sender's name in the signature block.[241] Another court found that a required legal form filled out by a creditor does not indicate it is from an attorney even though the form lists the name of the creditor's law firm if the matter proceeds to litigation.[242]

7.2.3.3.3 Where lawyer letter discloses attorney has not reviewed the account

The Second Circuit, in *Greco v. Trauner, Cohen & Thomas*,[243] provided an exception that allowed a lawyer to mass mail duns without any evaluation of the accounts. The letter stated: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account." The Second Circuit found this disclosure prevented a FDCPA § 1692e(3) violation "so long as that letter includes disclaimers that should make clear even to the 'least sophisticated consumer' that the law firm or attorney sending the letter is not, at the time of the letter's transmission, acting as an attorney." *Greco* also noted that there was no lawyer signature, only use of a law firm letterhead.

The *Greco* approach has been followed by the D.C. Circuit,[244] and by a number of federal district courts.[245] While

235 Thebert v. Potestivo & Assoc., 2017 WL 3581322, at *11 (E.D. Mich. Aug. 18, 2017) ("Thebert essentially speculates about Potestivo's inner workings without any factual allegations about the law firm's debt-collection process."); Napolitano v. Ragan & Ragan, 2017 WL 3535025 (D.N.J. Aug. 17, 2017); Barata v. Nudelman, Klemm & Golub, P.C., 2015 WL 733628 (D.N.J. Feb. 19, 2015); Cook v. Petrocchi, 2010 WL 11520221 (D. Minn. Dec. 2, 2010), *aff'd*, 455 Fed. Appx. 707 (8th Cir. 2012).

236 Sparkman v. Zwicker & Assoc., 374 F. Supp. 2d 293, 302 (E.D.N.Y. 2005).

237 *CFPB v. Weltman, Weinberg & Reis Co.*, 2018 WL 3575882 (N.D. Ohio July 25, 2018). *But see* Bitzko v. Weltman, Weinberg & Reis Co., L.P.A., 2019 WL 4602329, at *6 (N.D.N.Y. Sept. 23, 2019) (concluding that "the procedural and legal differences between the current case and Consumer Financial render it unhelpful to Defendant"; no evidence that an attorney personally reviewed or exercised professional judgment with respect to plaintiff's file before letter was sent); Gibbons v. Weltman, Weinberg & Reis Co., L.P.A., 2018 WL 5720750 (E.D. Pa. Oct. 31, 2018).

238 *See* Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 439 (6th Cir. 2008).

239 Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798 (E.D. Mich. Aug. 14, 2017).

240 Martin v. Trott Law, P.C., 198 F. Supp. 3d 794, 805 (E.D. Mich. 2016). *But see* Daniels v. Solomon & Solomon P.C., 751 Fed. Appx. 254 (3d Cir. 2018) (no violation where letterhead only said Solomon & Solomon where letter stated it was from a debt collector and did not include lawyer's signature).

241 *See* Rumpler v. Phillips & Cohen Assoc., Ltd., 219 F. Supp. 2d 251 (E.D.N.Y. 2002).

242 *See* Johnson v. Williams, 2017 WL 8217626, at *3 (N.D. Ga. July 24, 2017).

243 412 F.3d 360 (2d Cir. 2005). *See also* Wendel v. Mullooly, Jeffrey, Rooney & Flynn, L.L.P., 689 Fed. Appx. 45 (2d Cir. 2017); Avila v. Riexinger & Assoc., L.L.C., 644 Fed. Appx. 19 (2d Cir. 2016).

244 Jones v. Dufek, 830 F.3d 523 (D.C. Cir. 2016).

245 Spurgeon v. Frederick J. Hanna & Assoc., 2015 WL 1246157 (D. Neb. Mar. 17, 2015); McGhee v. Buffaloe & Assoc., P.L.C., 2014 WL 1333730 (E.D. Tenn. Apr. 2, 2014); Derry v. Buffalo & Assoc., P.L.C., 2013 WL 3865242 (E.D. Tenn. July 25, 2013); Lilly v. RAB Performance Recoveries, L.L.C., 2013 WL 3834008 (E.D. Tenn. July 23, 2013); Grant-Fletcher v. Brachfeld Law Group, P.C., 2012 WL 2523094 (D. Md. June 28, 2012); Michael v. Javitch, Block & Rathbone, L.L.P., 825 F. Supp. 2d 913 (N.D. Ohio 2011); Taylor v. Pinnacle Credit Services,

most cases involve letters on attorney letterhead, courts have applied the same principle to telephone calls.[246]

Since *Greco*, though, courts often take a more nuanced approach. The Fifth Circuit in *Gonzalez v. Kay*[247] held that a jury could find a debt collection letter on law firm's letterhead to deceptively imply that a lawyer was involved where the *Greco* disclaimer was not conspicuous. In *Greco*, the disclaimer was on the front of the letter. In *Kay*, the disclaimer was on the letter's back following other disclaimers in complex legal language.

The Third Circuit went one step further than *Kay*, holding deceptive as a matter of law a letter on law firm letterhead without attorney involvement despite a *Greco* disclaimer on the letter's back.[248] While not ruling out the possibility that a non-deceptive letter without attorney involvement could be drafted on law firm letterhead, the court held that it was inherently deceptive to have such contradictory messages in one letter—on the front that the law firm had been retained to collect the debt and on the back that no one in the firm had looked at the account.[249]

Courts also find the threat of immediate litigation overshadows any *Greco* disclaimer.[250] A New Jersey federal court has suggested that the disclaimer is inconsistent with New Jersey lawyer ethics rulings.[251] But there is also a trend to uphold a *Greco* warning where it is clear and conspicuous, such as where a letter on law firm letterhead is not signed by an attorney and the disclaimer is on the letter's front in bold, normal-size print, and set apart in a separate paragraph.[252]

7.2.3.3.4 Creditor liability for letters on attorney letterhead

FDCPA § 1692a(6) provides that the FDCPA applies to a creditor that uses a name other than its own, so as to indicate that a third person is collecting or attempting to collect the debt owed the creditor.[253] Where in fact the creditor sends out a collection letter that is on law firm letterhead, does the FDCPA then apply to the creditor and has the creditor violated section 1692e(3)?

The Second Circuit has held that "[w]here a creditor, in the process of collecting its own debts, hires a third party for the express purpose of representing to its debtors that the third party is collecting the creditor's debts, and the third party engages in no bona fide efforts to collect those debts, the false name exception exposes the creditor to FDCPA liability."[254] In that case, the creditor had an arrangement to send out letters on law firm letterhead and the court found a triable issue of fact regarding whether the law firm's role was so "tangential" as to permit a jury to conclude that it was a mere "conduit" for the creditor's attempt to collect the debt. In that event, the creditor would be subject to the FDCPA and liable under section 1692e.

7.2.4 Claims That Nonpayment Will Result in Arrest, Garnishment, or Property Seizure, FDCPA § 1692e(4) and e(5)

7.2.4.1 Generally

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.[255]

L.L.C., 2011 WL 1303430 (N.D. Cal. Apr. 4, 2011); Walsh v. Frederick J. Hanna & Assoc., P.C., 2010 WL 5394624 (E.D. Cal. Dec. 21, 2010).

246 *See* Bard v. Law Offices of Harold E. Scherr, P.C., 2014 WL 2610894 (E.D.N.Y. June 6, 2014) (voicemail must not misrepresent the extent to which an attorney has become involved).

247 577 F.3d 600 (5th Cir. 2009). *See also* Brazier v. Law Offices of Mitchell N. Kay, P.C., 2009 WL 764161 (M.D. Fla. Mar. 19, 2009).

248 Lesher v. Law Offices Of Mitchell N. Kay, P.C., 650 F.3d 993 (3d Cir. 2011).

249 *See also* Bock v. Pressler & Pressler, L.L.P., 30 F. Supp. 3d 283 (D.N.J. 2014); Johnson v. Law Offices of Farrell & Seldin, 2013 WL 12136584 (D.N.M. Mar. 29, 2013) (question of fact whether conflicting messages were deceptive); Henggeler v. Brumbaugh & Quandahl, P.C., 2012 WL 2855104 (D. Neb. July 5, 2012) (same); Brazier v. Law Offices of Mitchell N. Kay, P.C., 2009 WL 764161 (M.D. Fla. Mar. 19, 2009) (question of fact whether contradictory messages were deceptive). *But see* Daniels v. Solomon & Solomon, P.C., 2017 WL 3675400 (E.D. Pa. Aug. 25, 2017) (no contradiction between letter and disclaimer).

250 Nepomuceno v. Legal Recovery Law Offices, Inc., 2014 WL 2711828 (S.D. Cal. June 16, 2014); Martinez v. Johnson, 2013 WL 1031363 (D. Utah Mar. 14, 2013); Dunn v. Derrick E. McGavic, P.C., 653 F. Supp. 2d 1109, 1114 (D. Or. 2009). *Cf.* Murphy v. Bronson, Cawley, & Bergmann, L.L.P., 2011 WL 2413447 (S.D. Cal. June 13, 2011) (no violation where no threat of litigation).

251 *See* Bock v. Pressler & Pressler, L.L.P., 30 F. Supp. 3d 283 (D.N.J. 2014). *But see* Eddis v. Midland Funding, L.L.C., 2012 WL 664812 (D.N.J. Feb. 28, 2012).

252 *See* Powell v. Aldous & Assoc., 762 Fed. Appx. 127 (3d Cir. 2019). *See also* Bencosme v. Stillman Law Office, L.L.C., 2020 WL 1955826 (D.N.J. Apr. 23, 2020) (prominent location on front page and in separate paragraph with same font as other paragraphs); Hamilton v. LLM Mgmt., Inc., 2016 WL 589869 (E.D. Pa. Feb. 11, 2016) (bold lettering in the middle of the page); Davis v. Lyons, Doughty & Veldhuis, P.A., 855 F. Supp. 2d 279 (D. Del. 2012) (disclosure on the front, in the middle of the page in a separate paragraph); Eddis v. Midland Funding, L.L.C., 2012 WL 664812 (D.N.J. Feb. 28, 2012) (front of letter in normal text size).

253 *See* § 4.7.4, *supra*.

254 Vincent v. Money Store, 736 F.3d 88 (2d Cir. 2013). *See also* Young v. Citicorp Retail Services, 1998 WL 537530 (2d Cir. June 29, 1998) (creditor liable where mailed letters with attorney letterhead despite no attorney review); Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232 (5th Cir. 1997) (same).

255 15 U.S.C. § 1692e(4). *See also* Reg. F § 1006.18(b)(3).

The first House bill contained a similar provision and the present form appeared in every major bill that followed. *E.g.*, H.R. 10191, 94th Cong., 1st Sess. § 805(6) (1975); H.R. 11969, 94th Cong., 2d Sess.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.[256]

FDCPA § 1692e(4) protects consumers from false threats if they fail to pay—for example, that the consumer will be arrested, that their wages will be garnished, their bank accounts seized, or their property attached and sold. The provision applies not just to explicit threats, but also to veiled false threats implying such consequences of nonpayment.[257]

There is surprisingly little FDCPA caselaw on section 1692e(4), in large part because the same conduct can be challenged under other FDCPA provisions, including the general section 1692e prohibition on deception and sections 1692e(2),[258] 1692e(5),[259] and 1692e(10).[260] In fact, FDCPA § 1692e(4) can be viewed as a subset of FDCPA § 1692e(5), which prohibits threats to take unlawful actions or actions that are not intended.[261] FDCPA § 1692e(4) prohibits only certain threats to take unlawful actions or actions that are not intended.[262]

Section 7.2.4.2, *infra*, will consider threats as to arrest, garnishment or property seizure, whether brought under FDCPA § 1692e(4) or (5). Additional information though may be found in the subsequent discussion of FDCPA § 1692e(5) as to when a representation is a veiled threat, proving a threat is illegal, and proving that a collector does not intend to carry out a threat.[263]

FDCPA § 1692e(4) states explicitly that a threat is prohibited either if the threatened action is unlawful or if it is unintended. Even if a debt collector intends, for example, to seize the consumer's property, the threat to do so is a violation if the action is unlawful. Similarly, even if arrest for writing an insufficient funds check may in certain circumstances be lawful, it is a violation to make that threat if the collector does not intend to take that action.

7.2.4.2 Threats of Arrest

A consumer cannot be arrested for nonpayment of civil debt with certain limited exceptions involving writing an insufficient funds check, hiding collateral, not returning rented or leased property, and not submitting postjudgment to a debtor's examination.[264] Almost any other threat or implied threat of arrest should violate FDCPA § 1692e(4)[265] The consumer need not show that the debt collector had no intent to follow through with seeking the consumer's arrest.[266] Even where an arrest is possible, there may a violation if there was no intent to do so.[267]

In limited circumstances, there can be criminal liability where a consumer writes an insufficient funds check. Nevertheless, a threat to seek the consumer's arrest for nonpayment of a debt involving an insufficient funds check violates FDCPA § 1692e(4), even if lawful, if there is no intent to follow through with that threat,[268] for example where the threat is made before an individual assessment of the consumer's criminal liability.[269] Collectors rarely refer matters for criminal prosecution and, moreover, the fact that the district attorney rarely if ever pursues such referrals is an indication the collector has no intent that there would be a criminal prosecution for a particular threatened consumer.[270]

A state's fraudulent check statute may not apply to postdated checks related to payday loans, so threats to enforce that statute as to a bounced check for a payday loan should be a violation.[271] Arrest for writing an insufficient funds check can also be unlawful because that crime under state law has a number of other elements that may not apply—e.g., the consumer's

§ 806(5) (1967). *See also* S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*.

256 15 U.S.C. § 1692e(5). *See also* Reg. F § 1006.18(c)(1).

257 *See* Weiss v. Collection Ctr., Inc., 667 N.W.2d 567 (N.D. 2003) (consumer may interpret statement that debt collector had sought information from motor vehicle department regarding his vehicle as threat to repossess it).

258 *See* § 7.2.2, *supra*.

259 *See* § 7.2.5, *infra*.

260 *See* § 7.2.10, *infra*.

261 *See, e.g.*, Sanchez v. Law Office of Lance E. Armo, 2021 WL 1214559 (E.D. Cal. Mar. 31, 2021) (allegations that collection attorneys represented that they could evict tenant if she failed to pay alleged debt that did not exist, and that they made false and deceptive statements regarding conduct that was not intended to be taken were sufficient to establish violation of § 1692e(4) and (5)), *adopted*, 2021 WL 2292779 (E.D. Cal. June 4, 2021).

262 *See, e.g.*, Laporte v. Midland Funding L.L.C., 2020 WL 2814184, at *6 (W.D. Va. May 29, 2020) (Writ of Garnishment did not constitute a violation of § 1692e(4), because it was not a communication threatening the use of garnishment in the event of nonpayment, but rather a notice indicating that garnishment processes had started due to nonpayment).

263 *See* § 7.2.5, *infra*.

264 *See* National Consumer Law Center, Collection Actions Ch. 16 (5th ed. 2020), *updated at* www.nclc.org/library.

265 *See* Stafford v. MST Fin. Solutions, Inc., 2020 WL 1033542 (W.D. Ky. Mar. 3, 2020); Grimm v. GPG Processing, L.L.C., 2019 WL 3821788 (S.D. Ohio Aug. 15, 2019), *adopted*, 2019 WL 4220903 (S.D. Ohio Sept. 5, 2019); Anderson v. E. Asset Services, L.L.C., 2019 WL 2141664 (N.D. Tex. May 16, 2019); Aitken v. Debt Mgmt. Partners, L.L.C., 2015 WL 1810345 (C.D. Ill. Apr. 17, 2015); Douyon v. N.Y. Med. Health Care, P.C., 2013 WL 5423800 (E.D.N.Y. Sept. 25, 2013); Ortega v. Griggs & Assoc. L.L.C., 2012 WL 2913202 (N.D. Cal. July 13, 2012); Chiverton v. Fed. Fin. Group, Inc., 399 F. Supp. 2d 96 (D. Conn. Sept. 30, 2005); United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370 (N.D. Tex. 1986), *aff'd per curiam*, 823 F.2d 880 (5th Cir. 1987).

266 Douyon v. N.Y. Med. Health Care, P.C., 2013 WL 5423800 (E.D.N.Y. Sept. 25, 2013).

267 Flores v. Quick Collect, Inc., 2007 WL 433239 (D. Or. Jan. 31, 2007) (threatening jail for consumer failing to attend a debtor's exam).

268 *See* Del Campo v. Am. Corrective Counseling Serv., Inc., 718 F. Supp. 2d 1116 (N.D. Cal. 2010); Davis v. Commercial Check Control, Inc., 1999 WL 89556 (N.D. Ill. Feb. 16, 1999); West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983) (threatened arrest on bad check charges; never sought criminal complaints). *See also* Lensch v. Armada Corp., 795 F. Supp. 2d 1180 (W.D. Wash. 2011) (no intent to prosecute bad check).

269 Del Campo v. Am. Corrective Counseling Serv., Inc., 718 F. Supp. 2d 1116 (N.D. Cal. 2010); Gradisher v. Check Enforcement Unit, Inc., 210 F. Supp. 2d 907 (W.D. Mich. 2002); Davis v. Commercial Check Control, Inc., 1999 WL 89556 (N.D. Ill. Feb. 16, 1999); West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983).

270 Gradisher v. Check Enforcement Unit, Inc., 210 F. Supp. 2d 907 (W.D. Mich. 2002); Davis v. Commercial Check Control, Inc., 1999 WL 89556 (N.D. Ill. Feb. 16, 1999).

271 Jones v. Kunin, 2000 WL 34402017 (S.D. Ill. May 1, 2000).

intent, that the complainant is the check payee, that the action is not time-barred, etc.[272] Note that the FDCPA does not apply to an entity that, under the supervision of the state or a district attorney, operates a pre-trial check diversion program.[273]

7.2.4.3 Threats Involving Postjudgment Remedies

With the exception of student loans,[274] nonpayment of a consumer debt cannot result in wage garnishment until the creditor has obtained a court judgment. A court order is also a requirement for seizures of bank accounts or other property, except where property is pledged as collateral or seized pursuant to a banker's right of setoff. Unless there is a court judgment against the consumer or the threat clearly discloses that a precondition to seizure or garnishment is a collection lawsuit filed against the consumer where the court rules for the collector, any threat to garnish wages or a bank account or seize property can violate FDCPA § 1692e(4).[275]

It is also deceptive to threaten that property will be seized immediately upon commencement of a lawsuit, instead of after a judgment for the collector.[276] A statement that is interpreted as a threat that postjudgment remedies will necessarily follow filing of a suit ignores the potential of the consumer raising defenses in the suit, so it can be a threat to seek postjudgment remedies even when not prevailing in the collection lawsuit.[277]

Even after a court judgment is obtained on a debt, it can be a FDCPA § 1692e(4) violation to threaten to seize property if there is no intent to do so.

There can be no intent to garnish wages within ten days where the collector has not yet filed suit against the consumer.[278] Moreover, where a collector does not intend to sue, it certainly does not intend to resort to postjudgment remedies.[279] Threats that a collector has already begun the process of seizing property postjudgment can lead to a finding that there is no intent to seize the property if such initial steps have not in fact begun.[280]

A collector's statement such as that they will contact a spouse's "employer to verify that he is still working and look into me if I am working because they can garnish our wages to pay back the debt" will violate FDCPA § 1692e(4) if the collector does not intend to pursue garnishment.[281] Moreover, federal law protects 75% or more of a consumer's wages from garnishment and state law may offer even greater protections,[282] so that a representation of an intent to garnish all or 75% of a consumer's wages should violate FDCPA § 1692e(4).[283]

The United States can administratively garnish student loan debtors' wages without a court judgment. But there could be a FDCPA § 1692e(4) or (5) violation where a collector threatens administrative garnishment where the United States only garnished 12% of accounts the collector referred to it.[284]

Similarly, threats to seize the consumer's property prior to obtaining a court judgment violates FDCPA § 1692e(4).[285] Because some of the consumer's property will be exempt from seizure, it is also a violation to threaten to seize all of a consumer's property.[286]

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272 *See* National Consumer Law Center, Collection Actions Ch. 8 (5th ed. 2020), *updated at* www.nclc.org/library. *See also* Lensch v. Armada Corp., 795 F. Supp. 2d 1180 (W.D. Wash. 2011) (threat of unlawful action because limitations period had run).

273 15 U.S.C. § 1692p. *See* § 4.8.11, *supra*.

274 *But see* Kort v. Diversified Collection Services, Inc., 2001 WL 881449 (N.D. Ill. Aug. 2, 2001) (claim stated where student loan collector's letter plausibly suggested to consumer that garnishment could be initiated with less than thirty-day notice required by applicable federal regulations).

275 *See* Thomas v. LDG Fin. Services, Inc., 463 F. Supp. 2d 1370 (N.D. Ga. 2006) (left for jury to determine if threat to garnish without judgment); Schimmel v. Slaughter, 975 F. Supp. 1357 (M.D. Ga. 1997) (§ 1692e(10) violated where attorney letter suggested that wage garnishment would inevitably follow filing of a collection lawsuit); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990) (represented that the mere filing of a lawsuit would result in seizure of property).

276 Dutton v. Wolhar, 809 F. Supp. 1130 (D. Del. 1992) (language "once judgment is obtained" falsely represented collector's ability to secure judgment), *aff'd*, 5 F.3d 649 (3d Cir. 1993); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990); Gasser v. Allen County Claims & Adjustment, Inc., 1983 U.S. Dist. LEXIS 20361 (N.D. Ohio Nov. 2, 1983). *Cf.* Winans v. Franklin Collection Serv., Inc., 2018 WL 3942073 (M.D.N.C. Aug. 16, 2018) (no impermissible threat of "imminent asset seizure" where two unchecked checkboxes labeled "Employment Verified" and "Assets Located" and elsewhere letter asks for payment to stop further procedures). *But cf.* Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087 (D. Or. 2000) (debt collector's threat of seizure or garnishment within five days of notice to consumer, contrary to state five-day waiting period violated § 1692e(2)(A) but not § 1692e(4) where there was evidence of collector's intent to seize consumer's property).

277 *See* Oglesby v. Rotche, 1993 WL 460841 (N.D. Ill. Nov. 5, 1993). *But see* Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015 (9th Cir. 2012) (lawsuit could result in judgment not the same as would result in judgment).

278 Terry v. C & D Complete Bus. Solutions, 2011 WL 144920 (W.D. Mo. Jan. 18, 2011).

279 *See In re* Cambron, 2007 WL 4287376 (M.D. Ala. Dec. 5, 2007).

280 Weiss v. Collection Ctr., Inc., 667 N.W.2d 567 (N.D. 2003).

281 *See* Skinner v. Green Tree Servicing L.L.C., 2012 WL 6554530, at *3 (N.D. Cal. Dec. 14, 2012). *Accord* Fed. Trade Comm'n v. Fed. Check Processing, Inc., 2016 WL 5956073 (W.D.N.Y. Apr. 13, 2016), *adopted*, 2016 WL 5956073 (W.D.N.Y. Oct. 13, 2016) (misrepresenting that nonpayment would result in garnishment of consumer's wages where collector did not pursue garnishments); Gasser v. Allen County Claims & Adjustment, Inc., 1983 U.S. Dist. LEXIS 20361 (N.D. Ohio Nov. 2, 1983).

282 *See* National Consumer Law Center, Collection Actions § 14.2 (5th ed. 2020), *updated at* www.nclc.org/library.

283 Oglesby v. Rotche, 1993 WL 460841 (N.D. Ill. Nov. 5, 1993) (threatening that all wages would be garnished). *See also* Seabrook v. Onondaga Bur. of Med. Economics, Inc., 705 F. Supp. 81 (N.D.N.Y. 1989) (threat to garnish 10% of consumer's wages was *per se* violation of § 1692e(5) because of failure to disclose exemption of first $100.50 in weekly earnings); Bieber v. Associated Collection Services, Inc., 631 F. Supp. 1410 (D. Kan. 1986) (false representation that 75% of wages would be garnished was excused as bona fide error).

284 Lucero v. The CBE Group, Inc., 2010 WL 3894043 (N.D. Ill. Sept. 29, 2010).

285 Fed. Trade Comm'n v. Fed. Check Processing, Inc., 2016 WL 5956073 (W.D.N.Y. Apr. 13, 2016), *adopted*, 2016 WL 5956073 (W.D.N.Y. Oct. 13, 2016) (misrepresenting that nonpayment would result in seizure of consumer's property).

286 *See* Young v. Dey, 1994 U.S. Dist. LEXIS 21484 (D. Conn. July 5, 1994) (issue of fact as to whether debt collector's threat of attachment, without disclosing relevant property exemptions, was misleading).

As with collection lawsuits, just because a collector's attempt to use postjudgment remedies is ultimately unsuccessful does not make the attempt an action that cannot legally be taken.[287] But threatening or seizing wages or assets in violation of federal or state law is a violation.[288]

The same is the case where a debt collector pursues postjudgment remedies knowing that the underlying judgment has been vacated[289] or that the judgment is void (such as where there was sewer service).[290] It should also be unlawful to pursue postjudgment remedies after the debt has been paid,[291] discharged in bankruptcy,[292] or the parties reached a settlement to prevent those remedies and the consumer complied with their obligations under the settlement.[293]

Threatening to seize wages or assets while knowing that they are protected by state or federal exemptions or do not belong to the debtor is also a threat of an unlawful action.[294] So are threats to employ postjudgment remedies that involve military servicemembers without complying with the Soldiers and Sailors Civil Relief Act and related state requirements.[295] It can also be a FDCPA § 1692e(4) or (5) violation to send the consumer a notice that the consumer's house has been foreclosed upon and sold when that is not the case.[296]

7.2.5 *Threatening Unlawful or Unintended Lawsuits, Other Actions, FDCPA § 1692e(5)*

7.2.5.1 Generally

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.[297]

FDCPA § 1692e(5) prohibits a collector from threatening to take either an unlawful action or an action it does not intend to take. The "or" means that a threat to take an unlawful action is actionable even if the collector intends to take it. Also, a threat to take even a legal action is actionable if the collector does not intend to take it. FDCPA § 1692e(5) often overlaps with section 1692e(2) (prohibiting misrepresentation of a debt's legal status),[298] section 1692e(4) (prohibiting specific threats),[299] section 1692e(10) (prohibiting false representations

287 Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291 (11th Cir. 2015).

288 *See* Baltazar v. Houslanger & Assoc., 2018 WL 3941943 (E.D.N.Y. Aug. 16, 2018), *adopted*, 2018 WL 4781143 (E.D.N.Y. Sept. 30, 2018) (§ 1692e(5) claim stated where collection attorneys initiated garnishment on bank branch in New York in violation of New York's rules providing that New York courts had no jurisdiction over account in bank's New Jersey branch); New v. Gemini Capital Group, 859 F. Supp. 2d 990 (S.D. Iowa 2012) (garnishment unconstitutional).

289 Mateer v. Ross, Suchoff, Egert, Hankin, Maidenbaum & Mazel, P.C., 1997 WL 171011 (S.D.N.Y. Apr. 10, 1997).

290 Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201 (E.D.N.Y. 2019).

291 Edwards v. Velocity Invs., L.L.C., 2011 WL 4007394 (N.D. Ohio Sept. 8, 2011).

292 Contreras v. United States Dep't of Veterans Affairs (*In re* Contreras), 2007 WL 273128 (Bankr. S.D. Tex. Jan. 26, 2007).

293 Moore v. Diversified Collection Services, Inc., 2009 WL 1873654 (E.D.N.Y. June 29, 2009). *See also* Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994) (consumers' allegations that debt collector agreed to payment schedule and then demanded increased payments and filed wage garnishment without contacting consumer's attorney as promised were sufficient to state claim under § 1692e(5)).

294 *See* Gonzalez v. Allied Collection Services, Inc., 2018 WL 715359, at *6 (D. Nev. Feb. 5, 2018) (stating § 1692e(5) claim where the debt collector's execution on the debtor's wife's bank account was possibly illegal as the collector had already received payment for the debt); Edwards v. McCormick, 136 F. Supp. 2d 795 (S.D. Ohio 2001) (threat to seize home despite homestead exemption; while defendant did not contest that homestead exemption was applicable, court did not specify whether defendant knew of such applicability prior to making threat to foreclose); Oglesby v. Rotche, 1993 WL 460841 (N.D. Ill. Nov. 5, 1993) (threat to seize all wages and property; no indication in case that collector knew that some funds were protected against garnishment under state law); Seabrook v. Onondaga Bur. of Med. Economics, Inc., 705 F. Supp. 81, 85 (N.D.N.Y. 1989) (failing to disclose exemption of first $100.50 in weekly disposable earnings; "OMBE did not proffer any evidence to establish that it knew the amount of plaintiff's weekly disposable earnings, so that it would have been justified in threatening to garnish plaintiff's gross weekly wages in an amount up to 10%. Consequently, because the May 18, 1988, letter did not accurately reflect the state of New York garnishment law at the time it was sent, the court finds that that letter violated § 1692e(5)."). *See also* Duby v. Cavalry Portfolio Services, L.L.C., 2005 WL 8177397, at *2 (D. Or. Aug. 16, 2005) (denying motion to dismiss where court did not know "whether . . . plaintiff's accounts contained, in whole or in part, social security funds that were exempt from garnishment; what knowledge defendant had about the exempt status of any or all funds in those accounts at the time garnishment was threatened or attempted; and what communications between the parties took place prior to the attempt to garnish funds"), *adopted*, 2005 WL 8177396 (D. Or. Sept. 7, 2005); Tenuto v. Transworld Sys., Inc., 2000 WL 1470213 (E.D. Pa. Sept. 29, 2000) (granting class certification to persons sent letters threatening wage garnishment, normally not available in Pennsylvania; no indication in case that collector knew that wages were largely protected against garnishment under state law). *But cf.* Gates v. MCT Group, Inc., 678 Fed. Appx. 539, 540 (9th Cir. 2017) (affirming dismissal of § 1692e(5) claim because "least sophisticated debtor" who received Notice of Levy would not have viewed notice as threat to levy Social Security benefits, where document informed her that those benefits were exempt and instructed her as to process for claiming an exemption).

295 *See* Sprinkle v. SB&C Ltd., 472 F. Supp. 2d 1235 (W.D. Wash. 2006) (violating state garnishment statute by failing to file military service affidavit also violated §§ 1692e(5), 1692e(10), particularly since debtor was deployed in Middle East at time).

296 Friello v. Bank of N.Y., 2012 WL 4892856 (N.D. Ill. Oct. 15, 2012).

297 15 U.S.C. § 1692e(5). *See also* Reg. F § 1006.18(c)(1).

Every major bill, e.g., H.R. 11969, 94th Cong., 2d Sess. § 806(5) (1976), S. 918, 95th Cong., 1st Sess. § 807(5) (1977), contained language identical to this section, except the initial House bill which contained a different version, H.R. 10191, 94th Cong., 1st Sess. § 805(6) (1975).

298 *See* § 7.2.2, *supra*.

299 *See* § 7.2.4, *supra*.

and deceptive means),[300] and the general deception prohibition found in section 1692e.[301]

Some threats are clear and then the only issue is whether the threatened action is either illegal or not intended. Whether the consumer is misled by the threats should be irrelevant as long as they are either illegal or not intended to be carried out. The Eleventh Circuit has ruled that it is a *per se* FDCPA § 1692e(5) violation if the collector made threats to take an action it did not intend to take, whether or not the consumer is deceived by these threats. The only issue is whether the collector intended to follow through with the threat.[302]

More often, a debt collector's threats are veiled, implied, or ambiguous. In that case, the question of whether the representation is a threat to take a particular action is to be judged by the least sophisticated consumer standard.[303] The question is whether such a consumer would perceive the statement as a threat to take a certain action.

7.2.5.2 Veiled, Implied, or Ambiguous Threats

7.2.5.2.1 Introduction

Debt collector threats often are veiled, implied, or ambiguous, but representations are still actionable under FDCPA § 1692e(5) if the least sophisticated consumer would view them as threats to take illegal actions or actions that the collector does not intend to take.[304] Where a representation has two meanings, only one of which would violate FDCPA § 1692e(5), the representation can be seen as a violation.[305]

Even though a collector only states it will "consider" further action, this can be a threat of imminent action, for example if the collector states it will consider further action if payment is not made within five days.[306] The Ninth Circuit found a threat to investigate a consumer's employment was a veiled threat to contact the consumer's employer about the debt, which would be unlawful as a prohibited third-party contact.[307] The Seventh Circuit held that a privacy notice stating that the collector can share the consumer's information with third parties was a prohibited threat to share information with third parties, even though the notice states "to the extent permitted by law."[308] A letter promising a costly and long personal asset search could be viewed as a threat that the consumer would bear the cost of the investigation.[309]

A debt collector's statement about the "importance of preserving a good credit record" could be seen as a threat to report the debt to a consumer reporting agency.[310] A letter stating that an investigation may be conducted to determine what further action to take is a threat to put the consumer's assets in jeopardy.[311]

300 § 7.2.10, *infra*.

301 *See* § 7.3, *infra*.

302 Jeter v. Credit Bur., Inc., 760 F.2d 1168, 1175 (11th Cir. 1985).

303 *See* § 7.2.4, *supra*.

304 *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1199–1201 (11th Cir. 2010); Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009); Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. Sept. 29, 2006); United States v. Nat'l Fin. Services, Inc., 98 F.3d 131 (4th Cir. 1996); Bentley v. Great Lakes Collection Bur., 6 F.3d 60 (2d Cir. 1993) (implied that legal proceedings were authorized and imminent when they were not); Swanson v. S. Oregon Credit Serv., Inc., 869 F.2d 1222 (9th Cir. 1988); Murray v. Hunter Warfield, Inc., 2021 WL 268382, at *4 (M.D. Fla. Jan. 27, 2021) ("reasonable interpretation of the letter is that it is implicitly threatening litigation to coerce Plaintiff to pay the debt"); Gartrell v. J.J. Marshall & Assoc., Inc., 2020 WL 3250219, at *4 (M.D. Fla. Mar. 23, 2020) (reasonable juror could conclude that the letter conveyed a "thinly-veiled" threat of some "approaching menace"), *adopted*, 2020 WL 3250037 (M.D. Fla. Apr. 28, 2020); Williams v. Receivable Recovery Services, L.L.C., 2017 WL 8316935 (N.D. Ga. July 27, 2017); Talamor v. I.C. Sys., Inc., 2017 WL 3712186 (W.D. Tex. Aug. 10, 2017); United States v. Nat'l Fin. Services, Inc., 820 F. Supp. 228 (D. Md. 1993), *aff'd*, 98 F.3d 131 (4th Cir. 1996); Henderson v. Credit Bur., Inc., 1989 WL 78235 (W.D.N.Y. July 13, 1989).

305 Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. Sept. 29, 2006). *But see* Goswami v. Am. Collections Enter., Inc., 377 F.3d 488, 495 (5th Cir. 2004) (reference to an "amnesty period" for payment did not imply that nonpayment would result in criminal prosecution).

306 Bloodworth v. United Credit Serv., Inc., 2016 WL 1453520 (E.D. Wis. Apr. 12, 2016) (collecting cases interpreting "consider").

307 Swanson v. S. Oregon Credit Serv., 869 F.2d 1222 (9th Cir. 1988). *See also* Sherman v. Fin. Credit, L.L.C., 2003 WL 1732601 (N.D. Ill. Apr. 1, 2003) (mere mention of employer survived motion to dismiss even though argument was "a stretch"); Raimondi v. McAllister & Assoc., Inc., 50 F. Supp. 2d 825 (N.D. Ill. 1999) (investigate finances through employer); Henderson v. Credit Bur., Inc., 1989 WL 78235 (W.D.N.Y. July 13, 1989) (just mentioning the employer's name is enough to imply an unlawful contact with the employer); United States v. First Fed. Credit Control, Inc., 1982 U.S. Dist. LEXIS 17964 (N.D. Ohio Mar. 11, 1982) (letter sent to servicemember pretended it was supposed to be sent to servicemember's commanding officer); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979) investigator call on employer); Fierst, FTC Informal Staff Letter (Nov. 19, 1979) (right to ask for personal information from third parties implies more than just location information).

308 Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009) (notice sent with debt collection letter and mentioned information obtained while collecting debt). *See also* Castro v. Green Tree Servicing L.L.C., 959 F. Supp. 2d 698 (S.D.N.Y. Aug. 14, 2013) (privacy notice that collector shares certain nonpublic information with third parties); Smith v. NCO Fin. Sys., Inc., 2009 WL 1675078 (E.D. Pa. June 12, 2009) (privacy notice that indicated sharing information with third parties even with language "We do not disclose the information we collect about you to anyone, except as permitted by law"); Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007). *But see* Carlvin v. Ditech Fin. L.L.C., 2017 WL 635151 (N.D. Ill. Feb. 16, 2017) (§ 1692e(5) did not apply because privacy notice not sent with collection letter and not mentioning collection was not a communication within FDCPA's scope).

309 *See* Elmore v. Northeast Florida Credit Bur., Inc., 2011 WL 4480419 (M.D. Fla. Sept. 27, 2011).

310 *See* Diena v. Certified Credit & Collection Bur., Inc., 2015 WL 570247 (D.N.J. Feb. 11, 2015). *See also* Reitz v. Credit Sys. of Fox Valley, Inc., 2020 WL 4753842 (E.D. Wis. Aug. 17, 2020) (collection letter stating "Avoid errors and protect your CREDIT RECORD" could be understood as implied threat to report debt to credit reporting agency even though there was no intent to do so).

311 *In re* Cambron, 2007 WL 4287376, at *7 (M.D. Ala. Dec. 5, 2007) ("MDS suggested that investigation into available sources in order to locate assets would be undertaken, and that collection efforts against assets would be taken, unless the Cambrons paid the debts, when MDS had no intention of doing so").

7.2.5.2.2 *Implied threats to sue*

The Third Circuit finds that a letter indicating that the collector "could" refer a debt to an attorney and "could" institute suit could be found to be a violation as implying to a least sophisticated consumer that suit *would* be instituted.[312] A statement can be viewed as a threat of litigation where it warns that if payment is not made immediately, the consumer "may" be subject to court costs and attorney fees.[313] The FTC Commentary states that a "debt collector may state that certain action is possible, if it is true that such action is legal and is frequently taken by the collector or creditor with respect to similar debts; however, if the debt collector has reason to know there are facts that make the action unlikely in the particular case, a statement that the action was possible would be misleading."[314]

But other courts find no threat from communications that the collector can or may sue.[315] Some courts require that the threat communicate that a lawsuit is not merely a possibility, but that a decision to pursue legal action is either imminent or has already been made. These courts find litigation threats can be found in indirect or oblique statements, provided that they imply legal action is underway or contemplated in the near future.[316] Other courts find this standard too restrictive.[317]

Even just a statement that non-payment will be costly for the consumer can be seen as a threat of litigation.[318] A threat of litigation can be found where the collector states that it will assume the consumer is not going to pay without legal action and will act accordingly.[319] A threat of litigation can be found by the phrase "voluntary resolution is doubtful.[320] The same is the case with a phrase "may exercise various options to enforce collections."[321]

The threat to turn a matter over to an attorney can be viewed as a threat to institute a collection lawsuit.[322] "A debt collector's statement that legal action has been recommended is a representation that legal action may be taken, since such a recommendation implies that the creditor will act on it at least some of the time."[323]

312 Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. Sept. 29, 2006). *See also* LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1199–1201 (11th Cir. 2010) (for jury to decide if conditional statement was a threat of suit); Williams v. Receivable Recovery Services, L.L.C., 2017 WL 8316935 (N.D. Ga. July 27, 2017) (stating "we may refer this matter to an attorney" and stating "If suit is filed"); Feuerstack v. Weiner, 2014 WL 3619675 (D.N.J. July 22, 2014) (attorney letter with legal caption and indicate suit may be filed); Martsolf v. JBC Legal Group, P.C., 2008 WL 275719 (M.D. Pa. Jan. 30, 2008); Khon v. Paul Michael Mktg. Serv., 2006 WL 3065588 (E.D.N.Y. Oct. 27, 2006) (if payment not received, creditor will have to choose whether or not to take legal action); Uyeda v. J.A. Cambece Law Office, P.C., 2005 WL 1168421 (N.D. Cal. May 16, 2005) (equivocal language can constitute an impermissible threat); Kapeluschnik v. Leschack & Grodensky, P.C., 1999 WL 33973360 (E.D.N.Y. Aug. 26, 1999) ("legal action may become necessary" was threat of suit; consumer failed to prove it was false); Lamb v. M&M Assoc., Inc., 1998 WL 34288694 (S.D. Ohio Sept. 1, 1998) (could be sued); Ditty v. CheckRite, Ltd., 973 F. Supp. 1320 (D. Utah 1997) ("other actions . . . may be considered" may threaten suit); Vaughn v. CSC Credit Services, 1995 WL 51402 (N.D. Ill. Feb. 3, 1995) (mag. judge) ("could" be turned over to credit reporting agency was threat to do so); Herbert v. Monterey Fin. Services, Inc., 863 F. Supp. 76 (D. Conn. 1994) (possible legal action); Lambert v. Nat'l Credit Bur., Inc., 1981 U.S. Dist. LEXIS 18623 (D. Or. Apr. 24, 1981) (if there is a suit there will be extra costs for the consumer).

313 Martsolf v. JBC Legal Group, P.C., 2008 WL 275719 (M.D. Pa. Jan. 30, 2008); Failla v. Cohen, 2005 WL 3032560 (E.D.N.Y. Mar. 10, 2005) ("[w]e may proceed with suit against you without waiting 30 days if so requested by our client").

314 FTC Official Staff Commentary § 807(5)-3, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

315 Avila v. Riexinger & Assoc., L.L.C., 644 Fed. Appx. 19 (2d Cir. 2016); Muharemovic v. Client Services, Inc., 2017 WL 6316827 (E.D. Mo. Dec. 11, 2017) (no threat that consumer will be sued where indicated that referral would be made to attorney and settlement would avoid potential legal action, but indicating that no decision has been made); Stockman v. Credit Prot. Ass'n, 2017 WL 2798403, at *4 (N.D. Ill. June 28, 2017) (mere mention of a potential future legal action not sufficient; "there must be something to suggest that such litigation is imminent or that the decision to sue has already been made"); Matuszczak v. Miramed Revenue Group L.L.C., 2017 WL 5467117 (N.D. Ind. Nov. 13, 2017) (no threat of a lawsuit where said could refer the debt to an attorney); Cokeley v. Midland Credit Mgmt., Inc., 2014 WL 5341919 (D. Kan. Oct. 21, 2014); Castro v. Green Tree Servicing L.L.C., 959 F. Supp. 2d 698 (S.D.N.Y. Aug. 14, 2013); Ruiz v. Midland Credit Mgmt., Inc., 2012 WL 33016 (N.D. Ind. Jan. 6, 2012) (considering forwarding account to an attorney not a threat to sue); Sherry v. Global Credit & Collection Corp., 2011 WL 13177236 (D. Neb. Mar. 22, 2011) (no threat of lawsuit found where stated "Capitol One Bank (USA), N.A. has not yet made a decision to file a lawsuit"; letter also stated: "If we cannot get this matter resolved soon and your account charges off, Capital One Bank (USA), N.A. may be forced to take legal action"); Madonna v. Academy Collection Serv., Inc., 1997 WL 530101 (D. Conn. Aug. 12, 1997); Lee v. CBC Co., 1996 U.S. Dist. LEXIS 21993 (S.D. Ohio Sept. 26, 1996) ("may" or "might" not enough to imply legal action).

316 Jenkins v. Union Corp., 999 F. Supp. 1120 (N.D. Ill. 1998).

317 *See* Flecha v. Medicredit, Inc., 2017 WL 1326312 (W.D. Tex. Apr. 10, 2017) (collecting cases).

318 *See* Sweeney v. D.C. Credit Services, Inc., 2007 WL 981919 (W.D.N.Y. Mar. 30, 2007).

319 Bakewell v. Fed. Fin. Group, Inc., 2007 WL 951764 (N.D. Ga. Mar. 28, 2007).

320 Flecha v. Medicredit, Inc., 2017 WL 1326312 (W.D. Tex. Apr. 10, 2017).

321 Koval v. Harris & Harris, Ltd., 2017 WL 1321152 (N.D. Ill. Apr. 5, 2017); Cuenca v. Harris & Harris, Ltd., 2017 WL 1196922 (N.D. Ill. Mar. 31, 2017).

322 United States v. Nat'l Fin. Services, Inc., 98 F.3d 131 (4th Cir. 1996); Janti v. Encore Capital Group, Inc., 2010 WL 3058260 (S.D. Cal. Aug. 3, 2010); Lovelace v. Stephens & Michaels Assoc., Inc., 2007 WL 3333019 (E.D. Mich. Nov. 9, 2007) (refer to attorney for "resolution"); Arellano v. Etan Indus., 1998 WL 911729 (N.D. Ill. Dec. 23, 1998); FTC Official Staff Commentary § 807(5)-6 (reference to an attorney may mislead the debtor as to the likelihood or imminence of legal action), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *Cf.* Talamor v. I.C. Sys., Inc., 2017 WL 3712186 (W.D. Tex. Aug. 10, 2017) (while threat to turn matter over to attorney could imply that collection action would be filed, consumer failed to submit evidence that there was no intent to file suit).

323 FTC Official Staff Commentary § 807(5)-6, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *But see* Owsley v. Coldata, Inc., 104 Fed. Appx. 994 (5th Cir. 2004) (account was "scheduled to be returned to [her] creditor who may . . . secure advice of counsel" not threat of imminent suit); Zilbert v. Credit Corp. Solutions, Inc., 2017 WL 8236354 (C.D. Cal. Dec. 13, 2017) (no threat of legal action where collection agency letter said would where would send consumer's account to law firm for review by an attorney to consider possible legal options).

The Second Circuit found this language, although vague, a sufficient threat to initiate a collection lawsuit: "48 hour notice" and "Notice is Hereby Given That This Item Has Already Been Referred For Collection Action," "We Will At Any Time After 48 Hours Take Action As Necessary And Appropriate To Secure Payment In Full," and "Pay This Amount Now If Action Is To Be Stopped."[324] The demand for payment within five days with a threat of a collection action can be interpreted that the collection action will be brought immediately after five days.[325]

An expression of urgency and the suggestion of a lawsuit can be seen as a threat of an immediate collection lawsuit.[326] A sense of urgency, combined with indication that other remedies have been exhausted also can make the threat of further proceedings to be a threat of an imminent lawsuit.[327] That the account is currently being reviewed for legal action can be seen as a threat of immediate legal action.[328] An attempt to settle the debt out of court before proceeding with collection procedures can be taken as a threat of a lawsuit.[329]

While a letter advising the consumer to consult with an attorney about the collector's remedies and the consumer's defenses might not be a threat to sue, adding the statement that the debt would be pursued to a conclusion can make the statement a threat to sue.[330] Where a letter starts by offering the consumer a settlement to resolve the matter and them immediately advises the consumer to contact their attorney regarding the collection agency's "potential remedies" and the consumer's "defenses," such terms, in combination, could communicate the message to the consumer that if they does not pay then they will be sued.[331] A threat to file a collection lawsuit is implied in a "final notice" from a law firm that the debt had to be paid or the law firm would have no choice "except to take further action in the matter as may be necessary."[332]

The terminology in a threat can imply the threat of a lawsuit, such as using words like "plaintiff and "damages and costs"[333] or the letter using a legal caption.[334] An attorney's letter stating that garnishment was available "after judgment was obtained" could convey to the least sophisticated consumer the impression that a judgment was a virtual certainty, and therefore was deceptive.[335]

Language from a collection agency that may not appear to a consumer to be threatening a lawsuit may appear to be doing so when coming from a law firm.[336] A collection letter on a lawyer's letterhead adds to the impression that litigation may be imminent[337] particularly where the letter includes a legal caption and indicates litigation may result.[338]

A court found a law firm's letter to be threatening litigation where it requested payment so that further action by the office could be avoided.[339] The fact that a letter is from an attorney, combined with a sense of urgency and a threat of an unspecified action, can be seen as a threat of litigation.[340] An attorney statement that it was hired to proceed against the consumer also could be seen as a threat of suit.[341]

But not every letter from an attorney implies the threat of litigation.[342] Letters on attorney letterhead were not found to be threats of suit where they stated "act now to resolve the

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324 Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989); Flecha v. Medicredit, Inc., 2018 WL 3014422 (W.D. Tex. May 15, 2018). *But see* Guzman v. I.C. Sys., Inc., 2021 WL 861914 (E.D.N.Y. Mar. 8, 2021) (distinguishing *Pipiles*; no violation where defendant merely reported to CRA that debt was "[s]eriously past due date" and had been "assigned" to attorney, collection agency, or creditors internal collection department, but did not threaten that they would do anything about it and did not set a deadline for consumer to respond).

325 Jeter v. Credit Bur., Inc., 760 F.2d 1168 (11th Cir. 1985). *See also* Edwards v. Nat'l Bus. Factors, Inc., 897 F. Supp. 455 (D. Nev. 1995) (threat of "action" by attorney "without further notice").

326 Bankston v. Phycom Corp., 2007 WL 4170627 (N.D. Cal. Nov. 19, 2007).

327 Bandas v. United Recovery Serv., L.L.C., 2017 WL 5191844 (N.D. Ill. Nov. 8, 2017).

328 Dewees v. Legal Servicing, 506 F. Supp. 2d 128 (E.D.N.Y. 2007). *But see* Laster v. Cole, 2000 WL 306848 (E.D.N.Y. Mar. 20, 2000) (payment not received within seven days would make litigation recommendation).

329 Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982).

330 Huling v. Franklin Collection Serv., Inc., 2016 WL 4803196 (N.D. Ga. Sept. 13, 2016).

331 Soyinka v. Franklin Collection Serv., Inc., 472 F. Supp. 3d 463, 467 (N.D. Ill. 2020). *See also* Lee v. Franklin Collection Serv., Inc., 2020 WL 6870823 (N.D. Ill. Nov. 23, 2020).

332 Phillips v. Stokes & McAtee, 1992 U.S. Dist. LEXIS 22731 (N.D. Ga. Jan. 8, 1992). *But see* Williams v. Internal Credit Sys., Inc., 2021 WL 765574 (M.D. Fla. Feb. 27, 2021) (no violation where letter referenced "possible civil action," as this language was not threatening, and statement that agency "may be instructed to take further action" was also not threatening).

333 Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989).

334 See Feuerstack v. Weiner, 2014 WL 3619675 (D.N.J. July 22, 2014); Finch v. Silverstein, 1996 WL 467251 (N.D. Ill. Aug. 13, 1996).

335 Schimmel v. Slaughter, 975 F. Supp. 1357 (M.D. Ga. 1997). *But see* Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015 (9th Cir. 2012) (different result where letter only said could result in postjudgment remedies).

336 Gervais v. Riddle & Assoc., P.C., 363 F. Supp. 2d 345 (D. Conn. 2005), *aff'd in part, rev'd in part*, 479 F. Supp. 2d 270 (D. Conn. 2007); Francis v. Snyder, 389 F. Supp. 2d 1034 (N.D. Ill. Sept. 30, 2005).

337 *See* § 16.5.3, *infra*.

338 Feuerstack v. Weiner, 2014 WL 3619675 (D.N.J. July 22, 2014).

339 Canlas v. Eskanos & Adler, P.C., 2005 WL 1630014 (N.D. Cal. July 6, 2005).

340 Francis v. Snyder, 389 F. Supp. 2d 1034 (N.D. Ill. Sept. 30, 2005).

341 Kaminsky v. Nat'l Bur. Collection Corp., 2008 WL 11330728 (S.D. Fla. Dec. 19, 2008).

342 *See* Powell v. Aldous & Assoc., 762 Fed. Appx. 127 (3d Cir. 2019) (that letter from law firm and contained legal language was not enough); Avila v. Riexinger & Assoc., 644 Fed. Appx. 19 (2d Cir. 2016); Rueda v. Forster & Garbus, L.L.P., 2018 WL 4777561 (N.D. Ill. Oct. 3, 2018) (law firm's statement that its client "may consider additional remedies to collect the debt" not threat to sue); Aker v. Bureaus Inv. Group Portfolio No. 15 L.L.C., 2014 WL 4815366 (N.D. Ill. Sept. 29, 2014) (lawyer's mention of "remedies" not a threat of litigation); Nichols v. Frederick J. Hanna & Assoc., P.C., 760 F. Supp. 2d 275 (N.D.N.Y. 2011) (letter sent by out-of-state law firm on firm's letterhead not threat of imminent litigation where letter advised that firm was representing creditor, that no attorney had yet personally reviewed debtor's account, but noted that creditor could consider additional remedies to recover balance due); Kapeluschnik v. Leschack & Grodensky, P.C., 1999 WL 33973360 (E.D.N.Y. Aug. 26, 1999) ("more than the fact that a collection letter is from an attorney" is required to find that threat of litigation); Veillard v. Mednick, 24 F. Supp. 2d 863 (N.D. Ill. 1998) (dun on

problem[343] or "may consider additional remedies to recover the balance due"[344] or would take "appropriate action" or "action as necessary."[345]

Neither does every letter from a collection agency threaten legal action.[346] A court may find a collection agency indicating that it would investigate available options did not imply a threat to sue.[347]

7.2.5.3 Threats to Take Actions Not Intended to Be Taken

7.2.5.3.1 Introduction

A threat, explicit or implied, is actionable under FDCPA § 1692e(5) if either the threat is unlawful or the collector does not intend to take the threatened action. If there is no intent to act on a threat, the threat need not be to take an unlawful action. FDCPA § 1692e(5) applies to a threat to take any action, as long as the consumer can convince the court that the collector does not intend to take the action.

The consumer bears the burden of proving the lack of intent to take the action and must be prepared with some evidence to rebut an assertion that the debt collector intended to take the action.[348] But the collector's own self-serving affidavit of its intent is not dispositive.[349]

While FDCPA § 1692e(5) prohibits the collector threatening an action it does not intend to take, the Third Circuit has indicated it is enough to show that the threat is an action the collector is unlikely to take.[350] Since proof of the collector's state of mind may be difficult, this is a more manageable standard than proof that there was 100% no intent to take the action.

A common collector technique is to display a false sense of urgency. This can show that there is no intent to take an action where the collector threatens the action if the consumer does not respond immediately, but the collector does not take the action despite the consumer's lack of immediate response.[351] A statement that a demand is final can be deceptive where it is not in fact a final demand, but the collector continues to send other "final" demands.[352] The same is the case with a letter that states there will be no more extensions of time.[353]

There is no intent to follow through with a threatened action if the action has already taken place. For example, there is no intent to send a matter to a collection agency where that has already happened.[354]

7.2.5.3.2 Proving lack of intent to sue

Proof of the lack of intent to sue is often dependent on the precise meaning of the collector's implied threat as it would be understood by the least sophisticated consumer. For example, if the threat can be characterized as one to file suit immediately, the passage of time without such a suit may be convincing as to the collector's intent to file suit immediately.[355] This is

attorney's letterhead not, by itself, threat of legal action); Sturdevant v. Jolas, P.C., 942 F. Supp. 426 (W.D. Wis. 1996).

343 Daniels v. Solomon, 2017 WL 3675400 (E.D. Pa. Aug. 25, 2017).

344 Walsh v. Frederick J. Hanna & Assoc., P.C., 2010 WL 5394624 (E.D. Cal. Dec. 21, 2010). *See also* Covington v. Franklin Collection Services, Inc., 2016 WL 4159731 (D. Kan. Aug. 5, 2016).

345 Walsh v. Jon B. Sage, P.A., 2007 WL 9698323 (S.D. Fla. Mar. 12, 2007).

346 Winans v. Franklin Collection Serv., Inc., 2018 WL 3942073 (M.D.N.C. Aug. 16, 2018) ("we seldom resort to litigation" found not to be a threat of litigation).

347 Williams v. Northwest Collectors, Inc., 2018 WL 6505431 (N.D. Ill. Dec. 11, 2018). *See also* Scavone v. Frontline Asset Strategies, L.L.C., 2020 WL 589641 (E.D.N.Y. Jan. 8, 2020) (no violation where letter stated that creditor may forward account to one of its attorneys for review), *adopted*, 2020 WL 372785 (E.D.N.Y. Jan. 23, 2020).

348 *E.g.*, Shuler v. Ingram & Assoc., 441 Fed. Appx. 712 (11th Cir. 2011); Cox v. Richland Holdings, Inc., 2019 WL 10248775, at *5 (D. Nev. Mar. 30, 2019) (consumer's "speculation" that collector "had to know" about plan to dismiss collection action did not overcome collector's assertion that it could have brought such action); Pierson v. Franklin Collection Serv., Inc., 965 F. Supp. 2d 957 (E.D. Tenn. 2013) (debt collector testified that it was his intent is to sue on every account assigned); Mullen v. Compton, 2013 WL 3367080 (S.D. Ohio July 5, 2013); Matray v. DBF Collection Corp., 2011 WL 2417151 (D.N.J. June 13, 2011); Leone v. Ashwood Fin., Inc., 257 F.R.D. 343 (E.D.N.Y. 2009); Baptist v. Global Holding and Inv. Co., L.L.C., 2007 WL 1989450 (E.D.N.Y. July 9, 2007); Prewitt v. Wolpoff & Abramson, L.L.P., 2007 WL 841778 (W.D.N.Y. Mar. 19, 2007); Bystrom v. Burgess Law Office, 2007 WL 5329352 (W.D. Wis. Feb. 20, 2007). *See also* Little v. Portfolio Recovery Assoc., L.L.C., 548 Fed. Appx. 514 (10th Cir. 2013); Malowney v. Bush/Ross, 2010 WL 3340493 (M.D. Fla. Aug. 25, 2010) (collection attorneys intended suit).

349 Jeter v. Credit Bur., Inc., 760 F.2d 1168 (11th Cir. 1985).

350 Brown v. Card Serv. Ctr., 464 F.3d 450, 455 (3d Cir. 2010).

351 *See* Diena v. MCS Claim Services, Inc., 2014 WL 5358995 (D.N.J. Oct. 20, 2014) (threatened to recommend to its client that further action be taken when no recommendation intended); Walsh v. Jon B. Sage, P.A., 2007 WL 9698323 (S.D. Fla. Mar. 12, 2007) ("Failing to receive a satisfactory response from you within forty-eight (48) hours of your receipt of this letter, we shall have no alternative but to take the appropriate action. . . .").

352 *See* Marino v. Hoganwillig, P.L.L.C., 910 F. Supp. 2d 492 (W.D.N.Y. 2012); Herbert v. Monterey Fin. Services, Inc., 863 F. Supp. 76 (D. Conn. 1994) ("final demand" in first of many letters).

353 Provo v. Rady Children's Hosp. San Diego, 2015 WL 3648845 (S.D. Cal. June 11, 2015).

354 Berndt v. Fairfield Resorts, Inc., 337 F. Supp. 2d 1120 (W.D. Wis. 2004).

355 *See* Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989); Jeter v. Credit Bur., Inc., 760 F.2d 1168 (11th Cir. 1985); Beeler v. C.S.D., L.L.C., 2012 WL 2045863 (D. Md. June 5, 2012); Drennan v. Van Ru Credit Corp., 950 F. Supp. 858 (N.D. Ill. 1996); Tsenes v. Trans-Continental Credit & Collection Corp., 892 F. Supp. 461 (E.D.N.Y. 1995); Oglesby v. Rotche, 1993 WL 460841 (N.D. Ill. Nov. 5, 1993); Graziano v. Harrison, 763 F. Supp. 1269 (D.N.J. 1991), *aff'd in part and rev'd in part on other grounds*, 950 F.2d 107 (3d Cir. 1991); Florence v. Nat'l Sys., 1983 U.S. Dist. LEXIS 20344 (N.D. Ga. Oct. 14, 1983); Lambert v. Nat'l Credit Bur., Inc., 1981 U.S. Dist. LEXIS 18623 (D. Or. Apr. 24, 1981) (no intent to file suit immediately after 48 hours); *In re* Belile, 209 B.R. 658 (Bankr. E.D. Pa. 1997). *See also* Zarate v. I.C. Sys., Inc., 2020 WL 3448165 (N.D. Ill. June 24, 2020) (even if consumer interpreted letter as containing even an indirect threat of litigation, letter must indicate that legal action is underway or contemplated in near future in order to be actionable; in this case, litigation was not underway or imminent); Rosenberg v. Client Services, 2020 WL 2732017 (S.D.N.Y. May 26, 2020) (plaintiff failed plausibly to allege that collector made threat of imminent legal action).

the case even if suit is eventually filed, as long as the threat is interpreted to mean that the collector will sue immediately.[356]

A threat to sue immediately also can be shown to be deceptive where the procedures to determine whether a suit should be filed have not been performed.[357] An experienced foreclosure attorney can have no intent to foreclose within a threatened ten days where state law first requires a thirty -day notice prior to initiating a foreclosure.[358]

On the other hand, it may be more difficult to persuade a court that the action was not intended to be taken where the threat is interpreted as an open-ended threat to sue. The mere passage of time without suit might not show an intent not to sue,[359] particularly where changed circumstances changed the collector's intent.[360]

Similarly, if the threat can be characterized as the collector threatening to initiate suit itself or as determining whether an attorney should initiate suit, lack or intent can be shown by the collector not having an internal procedure to get authorization to file suit or its admitted recognition of the impracticality of doing so due to the small amounts at issue,[361] lack of authority to proceed from the creditor[362] or by the lack of legal authority under state law.[363] The collector may be engaged in the unauthorized practice of law if it recommends to the creditor that the creditor should sue on the debt.[364]

A contract between the collection agency and creditor may spell out whether the collection agency has authority to initiate a suit, refer the matter to an attorney, or otherwise make a determination that a lawsuit be filed. It can be deceptive where a collector threatens suit but has no authority to initiate suit.[365] Similarly, there may be no intent to sue if the creditor has guidelines as to under what circumstances the creditor will authorize suit, and it can be shown that the consumer's debt does not meet those criteria,[366] or that procedures were never followed to determine if a suit was possible under those guidelines.[367]

On the other hand, a more vague threat to sue might be more credible if interpreted to mean that the collector would refer the matter to a party who could initiate suit[368] or that suit is one of the possible outcomes of nonpayment.

Lack of intent to pursue suit can be established where the collector never pursues lawsuits or never sues in the locality

356 Bond v. Ideal Collection Services, Inc., 2018 WL 7351699, at *3 (M.D. Fla. Aug. 29, 2018) (threatened suit if no payment within ten days but took action a year later); Piccinetti v. Clayton, Myrick, McClanahan & Coulter, P.L.L.C., 2017 WL 3879085 (D.N.J. Sept. 5, 2017) (§ 1692e(5) claim stated where letter expressed intent to sue after ten days but suit filed nine months later); Mills v. Turner, 2017 WL 3670967 (D. Mass. Aug. 25, 2017) (violating § 1692e(5) where four letters threatened litigation if payment was not received within ten days ("the next . . . correspondence you will receive will be a Summons and Complaint") but suit was not brought until a year later); Russell v. SN Servicing Corp., 2017 WL 1449211 (N.D. W. Va. Apr. 21, 2017) (no suit filed months after fifteen-day deadline threat); Kaplan v. Law Offices of Timothy Baxter & Assoc., P.C., 2013 WL 2947369 (E.D. Mich. June 14, 2013) (suit not filed until after FDCPA claim brought); Dewees v. Legal Servicing, 506 F. Supp. 2d 128 (E.D.N.Y. 2007); Oglesby v. Rotche, 1993 WL 460841 (N.D. Ill. Nov. 5, 1993) (threat of suit within five days not filed for two months). *See also* Osterloh, FTC Informal Staff Letter (July 13, 1979).

357 *See* Trans World Accounts, Inc. v. Fed. Trade Comm'n, 594 F.2d 212 (9th Cir. 1979) (applying FTC Act); Pizzimenti v. Southern, 2011 WL 2182893 (W.D. Ark. June 6, 2011).

358 Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989).

359 Shuler v. Ingram & Assoc., 441 Fed. Appx. 712 (11th Cir. 2011); Oatman v. Augusta Collection Agency, Inc., 2020 WL 1916173 (S.D. Ga. Apr. 20, 2020); Bytwerk v. Mary Jane Elliott, P.C. 2013 WL 150461 (W.D. Mich. Jan. 14, 2013) (failure to sue within eight months of the collection letter, in and of itself, is not sufficient to create an issue of fact for trial); Hegwood v. Lighthouse Recovery Assoc., L.L.C., 2012 WL 693658 (N.D. Ind. Mar. 1, 2012) (consumer produced no evidence other than that no suit had been filed to date and failed to allege no intent to sue); Phipps v. Stellar Recovery, Inc., 2010 WL 1433168 (S.D. Ohio Apr. 5, 2010). *But see* Lovelace v. Stephens & Michaels Assoc., Inc., 2007 WL 3333019 (E.D. Mich. Nov. 9, 2007) (after general threat to sue, may show intent not to sue by fact that no suit filed even six months later).

360 Medley v. Kentucky Accounts Serv., L.L.C., 2014 WL 5471029 (E.D. Ky. Oct. 28, 2014); Mejia v. Marauder Corp., 2007 WL 806486 (N.D. Cal. Mar. 15, 2007) (collection suit blocked by consumer's bankruptcy).

361 United States v. Nat'l Fin. Services, Inc., 98 F.3d 131 (4th Cir. 1996). *See also*, Bentley v. Great Lakes Collection Bur., 6 F.3d 60 (2d Cir. 1993) (implied that legal proceedings were authorized and imminent when they were not for a variety of reasons, including lack of authority by the creditor and lack of attorneys admitted in the state); Leone v. Ashwood Fin., Inc., 257 F.R.D. 343 (E.D.N.Y. 2009); United States v. ACB Sales & Serv., Inc., 590 F. Supp. 561 (D. Ariz. 1984) (lack of intent inferred from failure of collector's employee to seek authorization to sue); FTC Official Staff Commentary § 807(5)-6 ("Lack of intent may be inferred when . . . the debt collector is unable to take the action because the creditor has not authorized him to do so"), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *See also* Ellis v. Cohen & Slamowitz, L.L.P., 701 F. Supp. 2d 215 (N.D.N.Y. 2010) (allegation that creditor has not authorized suit); Malowney v. Zacur, Graham & Costis, P.A., 2011 WL 1655572 (M.D. Fla. May 2, 2011) (same); Rosa v. Gaynor, 784 F. Supp. 1 (D. Conn. 1989).

362 Bentley v. Great Lakes Collection Bur., 6 F.3d 60 (2d Cir. 1993) (implied that legal proceedings were authorized and imminent when they were not).

363 Vaile v. Nat'l Credit Works, Inc., 2012 WL 1520120 (D. Ariz. Mar. 26, 2012) (collector as non-attorney could not bring action), *adopted*, 2012 WL 1520115 (D. Ariz. May 1, 2012); Withers v. Eveland, 988 F. Supp. 942 (E.D. Va. 1997) (non-lawyer collector may not file suit); Herbert v. Monterey Fin. Services, Inc., 863 F. Supp. 76 (D. Conn. 1994) (no licensed attorney who could file suit).

364 Weinstein, FTC Informal Staff Letter (Apr. 14, 1980).

365 *See* Bentley v. Great Lakes Collection Bur., 6 F.3d 60, 62–63 (2d Cir. 1993).

366 *See also* Irwin v. Mascott, 186 F.R.D. 567 (N.D. Cal. 1999) (could show intent not to sue class members who did not meet creditor's criteria); Herbert v. Monterey Fin. Services, Inc., 863 F. Supp. 76 (D. Conn. 1994).

367 *See* Paul v. Metro Area Collections, Inc., 2011 WL 2270515 (D. Or. May 4, 2011), *adopted*, 2011 WL 2261301 (D. Or. June 8, 2011); United States v. ACB Sales & Serv., Inc., 590 F. Supp. 561 (D. Ariz. 1984).

368 *See* Cook v. Petrocchi, 2010 WL 11520221 (D. Minn. Dec. 2, 2010), *aff'd*, 455 Fed. Appx. 707 (8th Cir. 2012) (out-of-state attorneys could associate with local counsel); O'Connor v. Check Rite, 973 F. Supp. 1010 (D. Colo. 1997) (lawsuit will be handled by attorney within consumer's state); Sturdevant v. Jolas, P.C., 942 F. Supp. 426 (W.D. Wis. 1996) (demand letter signed by out-of-state attorney acceptable as local counsel could be retained).

where the consumer lives.[369] Some states have electronic dockets that can help expose some of a collector's litigation policies in some courts, and this information may be useful to prove FDCPA claims that a debt collector does not sue in the state or does not sue for small amounts.[370]

Where an attorney letter threatens suit, a lack of an intent to sue can be shown by the fact that the attorney on the collection letter is not admitted to practice in the state and has made no arrangements to refer cases to a local attorney.[371] Lack of intent can be found where the amount of the debt is so small as to make a lawsuit impractical.[372] The FTC Staff Commentary states that "[l]ack of intent may be inferred when the amount of the debt is so small as to make the action totally unfeasible."[373] Nevertheless, courts may require proof of a formal policy of not suing for debts under a certain dollar amount, and not just evidence that no suits have been filed for small amounts.[374]

Where a consumer alleges that the collector's statements should be interpreted as making illegal threats as to postjudgment remedies, the collector may respond that it should not be so characterized and that the collector never sues. This should be an admission that when the collector threatens suit it does not intend to take that action.[375]

Characterizing a threat as implying an intent to try a collection action to completion should be distinguished from a threat to file a complaint against the consumer. The Eighth Circuit has held that there could be a FDCPA § 1692e(5) violation where the collector requested a continuance on the day of the trial because it had no intent to actually try the case.[376] But other courts find no violation where the threat is to initiate suit, and the collector intends to (or actually does) initiate suit, but has no intent to try the case if the consumer contests the matter.[377]

7.2.5.3.3 Proving lack of intent to take other actions

Threatening arrest, garnishment, or seizure of assets without an intent to do so is a violation of both FDCPA § 1692e(4) and (5). Threats to take these actions are examined at § 7.2.4.2, *supra*, as part of the discussion of FDCPA § 1692e(4).

A lack of intent to carry out a threat to contact a military servicemember's commander about the servicemember's debt was found where the debt collector never contacted

369 *See* United States v. Nat'l Fin. Services, Inc., 98 F.3d 131 (4th Cir. 1996); Bandas v. United Recovery Serv., L.L.C., 2017 WL 5191844 (N.D. Ill. Nov. 8, 2017); United States v. Commercial Recovery Sys., Inc., 179 F. Supp. 3d 728 (E.D. Tex. 2016); Lucero v. The CBE Group, Inc., 2010 WL 3894043 (N.D. Ill. Sept. 29, 2010) (creditor initiated lawsuits against only 2% of accounts that debt collector referred to creditor); United States v. First Fed. Credit Control, Inc., 1982 U.S. Dist. LEXIS 17964 (N.D. Ohio Mar. 11, 1982) (does not file suit in 99% of cases). *See also* Flecha v. Medicredit, Inc., 2018 WL 3014422 (W.D. Tex. May 15, 2018) (collector never suing on debts points to a violation, but collector could seek to prove that creditor files collection suits when case referred back to creditor); Antkowiak v. TaxMasters, 779 F. Supp. 2d 434 (E.D. Pa. Mar. 17, 2011), *vacated on other grounds*, 455 Fed. Appx. 156 (3d Cir. Dec. 22, 2011); Irwin v. Mascott, 186 F.R.D. 567 (N.D. Cal. 1999); United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370 (N.D. Tex. 1986) (collector "can" sue on small amounts threat of suit), *aff'd per curiam*, 823 F.2d 880 (5th Cir. 1987); Lipsett, FTC Informal Staff Letter (Dec. 1, 1987). *But see* Adams v. Applied Bus. Services, 2019 WL 7820431 (E.D. Va. Sept. 4, 2019) (even though law firm had not filed suit on behalf of collector for four years, law firm did have power to file suit and could potentially have done so); Sherrell v. L&P Fin. Adjusters Inc., 2018 WL 3753359, at *3 (N.D. Ill. Aug. 8, 2018) (collector showed evidence of past suits and consumer's case of lack of intent to sue was pure speculation; even if plaintiff were correct that defendant had not sued consumers in the past and did not intend to sue her now, her "bare allegations" were " insufficient to plausibly infer intent": "Simply because something has not happened in the past does not mean Lou Harris did not intend for it to happen here."); Madonna v. Academy Collection Serv., Inc., 1997 WL 530101 (D. Conn. Aug. 12, 1997) (creditor sued sometimes and litigation had not been ruled out, though probability of suit was low).

370 Currently, the Westlaw path for the database is Databases-Public Records-Filings or Litigation-Dockets. Copies of judgments themselves also are available from an 800-number. Identify yourself as a Westlaw user if appropriate.

371 Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995).

372 *See* Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989) (collector testified took no action on debts under $150). *But see* Tipping-Lipshie v. Riddle, 2000 WL 33963916 (E.D.N.Y. Mar. 2, 2000) ($128 claim; firm introduced evidence that it had sued for less); Riveria v. MAB Collections, Inc., 682 F. Supp. 174 (W.D.N.Y. 1988) (statement that collector would advise creditor that legal action may be necessary on $112 debt not deceptive).

373 FTC Official Staff Commentary § 807(5)-6, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

374 Baptist v. Global Holding and Inv. Co., L.L.C., 2007 WL 1989450 (E.D.N.Y. July 9, 2007) (small amount not conclusive); Leone v. Ashwood Fin., Inc., 257 F.R.D. 343 (E.D.N.Y. 2009) (denying summary judgment as lawyer was reconsidering his options on small claims); Spira v. Ashwood Fin., Inc., 371 F. Supp. 2d 232 (E.D.N.Y. 2005) (although never in past collected on small debts, considering doing so in this case); Unger v. Nat'l Revenue Group, Ltd., 2000 WL 1897346 (E.D.N.Y. Dec. 8, 2000) (that collector had not filed suit in last year for less than $300 does not mean it would not do so).

375 Edwards v. McCormick, 136 F. Supp. 2d 795 (S.D. Ohio 2001). *See also* Day v. Check Brokerage Corp., 511 F. Supp. 2d 950 (N.D. Ill. 2007) (debt collector admits it did not intend to file suit); Morgan v. Credit Adjustment Bd., Inc., 999 F. Supp. 803 (E.D. Va. 1998) (same).

376 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 695 (8th Cir. 2017). *See also* Mason v. Midland Funding L.L.C., 2017 WL 6994577, at *33 (N.D. Ga. July 27, 2017), *adopted as modified on other grounds*, 2017 WL 8186866 (N.D. Ga. Sept. 29, 2017); Lott v. Vial Fotheringham, L.L.P., 2016 WL 4479536 (D. Or. Aug. 23, 2016) (law firm had scheduled foreclosure sale, but cancelled it, did not reschedule sale for later date, continued to threaten foreclosure, but took no affirmative steps to follow through).

377 St. John v. Cach, L.L.C., 822 F.3d 388 (7th Cir. 2016) (filing of a complaint is not an implied threat to pursue the case through trial and consumer never showed an intent not to do so at time complaint was filed); Hackett v. Midland Funding L.L.C., 2019 WL 1902750 (W.D.N.Y. Apr. 29, 2019); Gordon v. Cavalry SPV I, L.L.C., 2018 WL 3545119, at *1, 2 (E.D. Mich. July 24, 2018) (§ 1692e(5) does not prohibit a debt buyer from filing a collection lawsuit without intending to go to trial); Garcia v. Portfolio Recovery Assoc., 2018 WL 3218665 (D.N.J. June 29, 2018) (no violation where filed lawsuit without intent to try case, but never threatened to try case); Atwood v. Selip & Stylianou, L.L.P., 2017 WL 5515851 (E.D.N.Y. Feb. 8, 2017).

commanders.[378] There was no intent to conduct a thorough investigation of the consumer where the collector did not even check the consumer's credit report.[379]

The exact language of the threat can also be important. A statement that the collector is going to investigate the consumer's bank accounts might not be deceptive. But a statement that the collector is going to search all of the consumer's assets can be found to be a FDCPA § 1692e(5) violation because the search is unlikely to actually be intended.[380]

It is also a FDCPA § 1692e(5) violation to threaten to report information to a consumer reporting agency (CRA) where there is no intent to do so.[381] Where a collection agency has a policy of waiting sixty days before reporting adverse information about a debt to a CRA, a threat to do so immediately is a threat to take action it does not intend to take.[382] If a collector does not have a relationship with a CRA allowing it to report consumer debts, then the threat to do so is one with no intent to follow through. For example, a collector had no intent to report information to a CRA where the collector urged payment so it could "update the credit bureau," when the agency would only inform the creditor, who may or may not report that to the reporting agency.[383]

When a collector forgives principal (not interest or fees), this may be taxable income to the consumer, and the creditor must report the forgiven amount to the IRS and the consumer on IRS Form 1099-C.[384] Not only are there exceptions to the general rule that the reported income is taxable (for example, insolvency, bankruptcy, disputed debt), but a form 1099-C need not be sent to the consumer when the amount of principal forgiven is under $600 and in a number of other situations. As a result, a threat that the collector must or will submit to the IRS a Form 1099-C may be made with no intent to do so because the amount of forgiven principal is under $600 or because other exceptions apply.[385]

The scheduling of postjudgment "depositions" in aid of execution of judgment has been found to violate FDCPA § 1692e where there is no indication that the collector intends to take a deposition that would comport with the procedural rules and formalities associated with all other depositions.[386] Where a collector has a policy of requesting a continuance to procure a witness during the state court collection proceeding despite never actually intending to procure a witness, such conduct has been found to violate FDCPA § 1692e.[387]

7.2.5.4 Threats to Take or the Taking of Unlawful Actions

7.2.5.4.1 Introduction

FDCPA § 1692e(5) prohibits threats to take unlawful actions, but some courts have held that the provision applies also to illegal attempts to collect a debt, at least where the attempt results in an ongoing threat of seizure of the consumer's property or assets.[388] Other courts rule that FDCPA

378 United States v. First Fed. Credit Control, Inc., 1982 U.S. Dist. LEXIS 17964 (N.D. Ohio Mar. 11, 1982).

379 Beasley v. Collectors Training Inst., 1999 WL 675196 (N.D. Ill. Aug. 17, 1999).

380 Davis v. Commercial Check Control, Inc., 1999 WL 89556 (N.D. Ill. Feb. 16, 1999) (question for jury).

381 *See* Draper v. Complete Payment Recovery Services, Inc., 2014 WL 5032340 (N.D. Ill. Oct. 8, 2014); Uyeda v. J.A. Cambece Law Office, P.C., 2005 WL 1168421 (N.D. Cal. May 16, 2005); Epps v. Etan Industr., 1998 WL 851488 (N.D. Ill. Dec, 1998); FTC Official Staff Commentary § 807(5)-6, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *See also* Hanrahan v. Statewide Collection, Inc., 2020 WL 7643127 (N.D. Cal. Dec. 23, 2020) (threat to report judgment).

382 *See* Creighton v. Emporia Credit Serv., Inc., 981 F. Supp. 411 (E.D. Va. 1997).

383 *See* Cooper v. Retrieval-Masters Creditors Bur., Inc., 2017 WL 2404952 (N.D. Ill. June 2, 2017).

384 *See* § 11.14.2.5, *infra*.

385 *See* Balon v. Enhanced Recovery Co., 264 F. Supp. 3d 597 (M.D. Pa. 2017) (granting summary judgment for consumer on § 1692e(10) claim where the collection agency used a false representation by invoking the IRS $600 discharge of debt rules to collect the debt when the agency offered forgiveness of less than $160); Carlvin v. Ditech Fin. L.L.C., 2017 WL 635151 (N.D. Ill. Feb. 16, 2017); Kaff v. Nationwide Credit, Inc., 2015 WL 12660327 (E.D.N.Y. Mar. 31, 2015) (denying collection agency's motion to dismiss where agency's letter stated "American Express is required to file a form 1099C with the Internal Revenue Service for any cancelled debt of $600 or more," but failed to disclose exceptions, including exception for amounts other than principal); Good v. Nationwide Credit, Inc., 55 F. Supp. 3d 742 (E.D. Pa. 2014) (denying the collection agency's motion to dismiss where the dunning letters stated that creditor was "required to file a form 1099C for any cancelled debt of $600 or more," but omitted the seven IRS exceptions); Wideman v. Monterey Fin. Services, Inc., 2009 WL 1292830 (W.D. Pa. May 7, 2009) (consumer alleges collector did not intend to file Form 1099-C); Wagner v. Client Services, Inc., 2009 WL 839073 (E.D. Pa. Mar. 26, 2009) (collector failed to show that plaintiff was not exempt from reporting requirement).

386 Barenbaum v. Hayt, Hayt & Landau, L.L.C., 2019 WL 4305761, at *6 (E.D. Pa. Sept. 10, 2019) ("least sophisticated debtor—and indeed, debtors of significantly greater sophistication—would read the Notice to say that HHL intended to conduct a deposition when at most HHL sought only an informal conversation regarding the debtor's ability to satisfy his or her debt").

387 *See* McClellan v. Patenaude & Felix, A.P.C., 2021 WL 1060559, at *2 (W.D. Pa. Mar. 19, 2021).

388 Stratton v. Portfolio Recovery Assoc., 770 F.3d 443 (6th Cir. 2014) (filing a lawsuit seeking to collect illegal interest is a threat to collect such interest); Currier v. First Resolution Inv. Corp.,762 F.3d 529 (6th Cir. 2014) (filing and maintaining an illegal judgment lien); Poirier v. Alco Collections, Inc., 107 F.3d 347 (5th Cir. 1997) (filing a collection lawsuit without authority); Baltazar v. Houslanger & Assoc., 2018 WL 3941943 (E.D.N.Y. Aug. 16, 2018), *adopted*, 2018 WL 4781143 (Sept. 30, 2018) (improperly seeking a freeze on the consumer's bank account); Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017) (despite bankruptcy stay, pursued collection action); Scott v. Portfolio Recovery Assoc., 139 F. Supp. 3d 956 (S.D. Iowa 2015) (garnishment of the wrong person's wages); Carrero v. LVNV Funding, L.L.C., 2014 WL 6433214 (S.D. Fla. Oct. 27, 2014); Collins v. Erin Capital Mgmt., L.L.C., 991 F. Supp. 2d 1195 (S.D. Fla. 2013) (unregistered debt collector seeking garnishment orders); Smith v. LVNV Funding, L.L.C., 894 F. Supp. 2d 1045 (E.D. Tenn. 2012) (bringing collection lawsuits without authority to do so); Bradshaw v. Hilco Receivables, L.L.C., 765 F. Supp. 2d 719, 730 (D. Md. 2011) (filing collection lawsuit without authority to do so); Harrington v. CACV, L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007) (fraudulent motion for a default); Sprinkle v. SB&C Ltd., 472 F. Supp. 2d 1235, 1247 (W.D. Wash. 2006) (to rule otherwise "would provide more protection to debt collectors who violate the law

§ 1692e(5) applies only to threats and not to the taking of illegal action.[389] When a claim involves an illegal action, it is safer to allege, in addition to a FDCPA § 1692e(5) claim, violations of other provisions found in sections 1692d, e, and f.[390]

Not every violation of federal or state law is actionable under FDCPA § 1692e(5).[391] Nevertheless, if the activity does not violate section 1692e(5), it may still violate other FDCPA provisions.[392]

7.2.5.4.2 Threats to unlawfully file a collection lawsuit

A common debt collector threat is to sue the consumer for the debt. There is no violation of FDCPA § 1692e(5) if the collector both intends to pursue that option and that option is lawful. Section 7.2.5.3.2, *supra*, examines proving whether the threat is intended.

That a collector does not prevail in a debt collection suit against a consumer does not necessarily make the suit unlawful.[393] But there are a number of situations where it is unlawful to bring a collection lawsuit, and threats to do so violate FDCPA § 1692e(5).

When a consumer seeks verification of a debt, the collector must cease collection efforts (including filing a lawsuit) until it responds to the verification request.[394] Until the collector provides that verification, any threats to sue are unlawful.[395]

Similarly either where a consumer is complying with a loan modification or where federal regulations prohibit foreclosure during a pending loan modification, it can be a FDCPA § 1692e(5) violation to threaten foreclosure.[396] There can be a FDCPA § 1692e(5) violation where a threat to foreclose is made prior to all the preconditions of state law have been satisfied to allow the collector to foreclose, such as providing notice of the right to cure or the delinquency being over a certain dollar amount.[397]

Serving a legally defective summons and thereby threatening to pursue a default judgment on that summons can violate FDCPA § 1692e(5).[398] It can also be deceptive to sue someone without attaching an affidavit regarding military service, particularly where the defendant was on active duty.[399]

It should be a FDCPA § 1692e(5) violation to threaten to sue or sue a consumer where the collector knows or should have known that the consumer was not legally liable on the debt.[400]

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than to those who merely threaten or pretend to do so"); Marchant v. U.S. Collections W., Inc. 12 F. Supp. 2d 1001, 1006 (D. Ariz. 1998) ("To argue that a collection agency can avoid the strictures of the FDCPA simply by acting where it has no legal authority, as opposed to threatening to act where it has no legal authority, would defy the very purposes of the section, one of which is to prevent 'use of . . . false . . . means in connection with the collection of any debt.' 15 U.S.C. § 1692e.").

389 *E.g.*, Cordeiro v. Carrington Mortg. Services, L.L.C., 2020 WL 3404742 (D.R.I. June 19, 2020) (debt collector did not threaten to file an eviction action, but actually did so); Hayes v. Receivables Performance Mgmt., L.L.C., 2018 WL 4616309 (N.D. Ill. Sept. 26, 2018) (collection calls which continued over consumer's protestations); VanHuss v. Rausch, Sturm, Israel, Enerson & Hornik, 2017 WL 1379402 (W.D. Wis. Apr. 14, 2017); Taylor v. Midland Funding, L.L.C., 2015 WL 4670314 (N.D. Ala. Aug. 6, 2015); Vanhuss v. Kohn Law Firm S.C., 127 F. Supp. 3d 980 (W.D. Wis. 2015); Dial v. Midland Funding, L.L.C., 2015 WL 751690 (N.D. Ala. Feb. 23, 2015); Townsend v. Quantum3 Group, L.L.C., 535 B.R. 415 (M.D. Fla. 2015) (filing of proofs of claim without state license); Thompson v. CACH, L.L.C., 2014 WL 5420137 (N.D. Ill. Oct. 24, 2014); Dicesari v. Asset Acceptance L.L.C., 2012 WL 4108944 (E.D. Pa. Sept. 18, 2012); Fick v. Am. Acceptance Co., L.L.C., 2012 WL 1074288 (N.D. Ind. Mar. 28, 2012); Cox v. Hilco Receivables, L.L.C., 726 F. Supp. 2d 659 (N.D. Tex. 2010); Meroney v. Pharia, L.L.C., 688 F. Supp. 2d 550, 554 (N.D. Tex. 2009); Cohen v. Beachside Two-I Homeowners' Ass'n, 2006 WL 1795140 (D. Minn. June 29, 2006) (even if legally required notice about foreclosure filed on land record contained improper amount for fees, it was not "threat"), *aff'd*, 272 Fed. Appx. 534 (8th Cir. 2008); Delawder v. Platinum Fin. Services Corp., 443 F. Supp. 2d 942, 948 (S.D. Ohio 2005); *In re* Ramirez, 2014 WL 2522148, at *9 (Bankr. S.D. Tex. June 4, 2014).

390 *See* Alexander v. Absolute Resolutions Corp., 2019 WL 1938811, at *5 (W.D. Ark. May 1, 2019) ("Once it is remembered that § 1692e(5)'s prohibition on threats of illegal action is simply but one example from a non-exhaustive list of potential types of deceptive debt-collection practices, it seems apparent that § 1692e's *general* prohibition on false, deceptive, or misleading debt-collection practices might apply to the actual undertaking of illegal actions, and that § 1692e(5) is simply there to clarify for the reader that it is *also* prohibited even to *threaten* such undertakings without actually following through on those threats." (emphasis in original)).

391 *See* Carlson v. First Revenue Assurance, 359 F.3d 1015, 1018 (8th Cir. 2004) ("even if FRA was violating Minnesota law by not having the Seattle lockbox licensed (and we have concluded that it was not), that violation would not constitute a false or misleading representation").

392 Kaymark v. Bank of Am., 783 F.3d 168 (3d Cir. 2015) (consumer's allegation that the foreclosure attorney listed as due attorney fees not incurred stated a claim under §§ 1692e(2)(A) and (10) and 1692f(1) as the contract provided for fees incurred, but not under § 1692e(5), as the stated fees were a reasonable estimate of the amount that would be incurred). *See also* Tekkoc v. Paula G., 2018 WL 11275903 (D.N.J. Apr. 6, 2018) (§ 1692e(5) is narrower than general prohibitions of § 1692e and e(10), so statement that does not rise to level of § 1692e(5) "threat" may still be misleading or deceptive for purposes of § 1692e or e(10)).

393 *See* Heintz v. Jenkins, 514 U.S. 291, 296, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) ("we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken'").

394 15 U.S.C. § 1692g. *See* § 9.8, *infra*.

395 Wilhelm v. Credico, Inc., 519 F.3d 416 (8th Cir. 2008); Gilmore v. Account Mgmt., Inc., 2009 WL 2848278 (N.D. Ga. Apr. 27, 2009), *rev'd on other grounds*, 2009 WL 4826953 (11th Cir. Dec. 16, 2009). *See also* Graziano v. Harrison, 763 F. Supp. 1269 (D.N.J. 1991), *aff'd in part and rev'd in part on other grounds*, 950 F.2d 107 (3d Cir. 1991).

396 Finley v. Ocwen Loan Servicing, L.L.C., 2018 WL 1705802 (N.D. Ohio Apr. 9, 2018) (threatened foreclosure that was not available because parties' loan modification agreement was valid defense to foreclosure proceedings).

397 Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989) (deceptive threat to proceed with suit within one week where consumer had thirty-day right to cure); Hanson v. JQD, L.L.C., 2014 WL 3404945 (N.D. Cal. July 11, 2014); Shapiro v. Haenn, 222 F. Supp. 2d 29 (D. Me. 2002).

398 *See* Wiley v. Portfolio Recovery Assoc., 2021 WL 780763 (D. Minn. Mar. 1, 2021).

399 *See* Sprinkle v. SB&C Ltd., 472 F. Supp. 2d 1235 (W.D. Wash. 2006). For a discussion of the Servicemembers Civil Relief Act, see National Consumer Law Center, Collection Actions Ch. 7 (5th ed. 2020), *updated at* www.nclc.org/library.

400 *See* Lombana v. Green Tree Servicing, L.L.C., 2015 WL 3999366 (C.D. Cal. June 29, 2015) (state law prohibited deficiency after foreclosure); Dowling v. Litton Loan Servicing, L.P., 2006 WL 3498292 (S.D. Ohio

It may be a violation to threaten to sue if the consumer did not make larger payments than a settlement agreement called for.[401] It can also be unlawful for a collector to file a second lawsuit on the same debt.[402]

In some states, a debt buyer must be licensed or registered either as a debt collector or otherwise, and state law may provide that it is unlawful for an unlicensed or unregistered debt buyer to bring a collection action in the state courts.[403] Where this is the case—the debt buyer's failure to be licensed or registered prevents it from bringing lawsuits in the state's courts—a threat of a lawsuit by the debt buyer, its collection agency, or its collection attorney is a threat of an unlawful action.[404] If state law prohibits a collection agency from suing in its own name or requires a written assignment from the creditor before the collection agency can sue on a debt (which the collector does not have), it is a FDCPA § 1692e(5) violation to threaten that the collection agency will sue.[405] Unlicensed debt collection is discussed in more detail at § 7.4.13, *infra*.

There may be no FDCPA § 1692e(5) violation if there is no threat or no actual taking of an unlawful action, such as where a communication is merely informational that a certain amount is owed and does not threaten the consumer with suit or any other unlawful action.[406] The FDCPA § 1692e(5) violation is not that the collector is unlicensed; courts often find that the lack of a license is not a *per se* section 1692e(5) violation.[407] Instead, it is that under state law the lack of a proper license makes the threatened action unlawful.[408] Of course, even if being unlicensed is not a *per se* violation under FDCPA § 1692e(5), it can be a violation under another section 1692e provision to misrepresent oneself as licensed when one is not.[409]

State law may also limit a collection attorney's right to sue in a state's courts, such as where the attorney is not licensed as a debt collector[410] or is not admitted to the state's bar.[411] A court may find that an out-of-state attorney's threat that suit will be filed is not a FDCPA § 1692e(5) violation because the attorney can hire local counsel to file the suit.[412] But it would be a violation if the implication is that the out-of-state attorney is threatening to file the action themself.[413]

Similarly, state provisions on the unauthorized practice of law or other state statutes may prevent debt collection agencies

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Dec. 1, 2006) (mortgage servicer's records showed that consumer was one month's payment behind; stating that she was two months behind, threatening foreclosure violated § 1692e(5)); Carroll v. Butterfield Health Care, Inc., 2003 WL 22462604 (N.D. Ill. Oct. 29, 2003) (collection suit against relative based on relative's guarantee of payment to nursing home, which is prohibited by Medicaid Act); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383 (D. Del. 1991) (consumer was not the obligor). *See also* Harrington v. CAC, L.L.C., 508 F. Supp. 2d 128 (D. Mass. Aug. 30, 2007) (violating § 1692e(5) where debt collector's filing of improper motion for default in collection matter alleging that consumer had failed to respond to discovery when he had done so constituted threat to take action that cannot legally be taken).

401 Martinez v. Express Recovery Services, Inc., 2012 WL 1850948 (D. Utah May 21, 2012).

402 *See* Donley v. Nordic Props., Inc., 2003 WL 22282523 (N.D. Ill. Sept. 30, 2003).

403 *See* National Consumer Law Center, Collection Actions § 3.3 (5th ed. 2020), *updated at* www.nclc.org/library.

404 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1199–1201 (11th Cir. 2010); Buhler v. BCG Equities, L.L.C., 2020 WL 888733 (D. Utah Feb. 24, 2020); Altenburg v. Caliber Home Loans, Inc., 2017 WL 2733803 (D. Md. June 26, 2017) (unlicensed debt buyer's collection agency initiated foreclosure proceedings); Carrero v. LVNV Funding, L.L.C., 2014 WL 6433214 (S.D. Fla. Oct. 27, 2014); Collins v. Erin Capital Mgmt., L.L.C., 991 F. Supp. 2d 1195 (S.D. Fla. 2013) (seeking writ of garnishment); Smith v. LVNV Funding, L.L.C., 894 F. Supp. 2d 1045 (E.D. Tenn. 2012); Fiorenzano v. LVNV Funding, L.L.C., 2012 WL 2562415 (D.R.I. June 29, 2012); Thomas v. Smith, Dean & Assoc., Inc., 2011 WL 2730787 (D. Md. July 12, 2011), *adopted*, 2011 WL 3567043 (D. Md. Aug. 10, 2011); Bradshaw v. Hilco Receivables, L.L.C., 765 F. Supp. 2d 719 (D. Md. 2011); Goray v. Unifund CCR Partners, 2007 WL 4260017 (D. Haw. Dec. 4, 2007). *See also* Lopez v. Law Offices of Faloni & Assoc., 2016 WL 4820629 (D.N.J. Sept. 14, 2016); Lilly v. RAB Performance Recoveries, L.L.C., 2013 WL 4010257 (E.D. Tenn. Aug. 5, 2013); Robinson v. Sherman Fin. Group, L.L.C., 2013 WL 1249567 (E.D. Tenn. Mar. 27, 2013); Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358 (D. Md. 2010) (§ 1692f violation). *But see* Townsend v. Quantum3 Group, L.L.C., 535 B.R. 415 (M.D. Fla. 2015) (filing of proofs of claim in bankruptcy without state license not unlawful); Scheible v. Quantum3 Group, L.L.C., 2015 WL 6828753 (S.D. Ind. Nov. 6, 2015) (no licensure required for filing bankruptcy proof of claim).

405 Day v. Check Brokerage Corp., 511 F. Supp. 2d 950 (N.D. Ill. 2007); FTC Official Staff Commentary § 807(5)-7, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

406 Wade v. Regional Credit Ass'n, 87 F.3d 1098 (9th Cir. 1996); ValleCastro v. Tobin, Melien & Marohn, 2015 WL 6478412 (D. Conn. Oct. 27, 2015); Thibodeau v. Credit Adjustment Bur., 2006 WL 3498159 (M.D. Fla. Dec. 4, 2006); Ferguson v. Credit Mgmt. Control, Inc., 140 F. Supp. 2d 1293 (M.D. Fla. 2001).

407 Carlson v. First Revenue Assurance, 359 F.3d 1015 (8th Cir. 2004); Reyes v. Manchester Gardens Condo., 2020 WL 3791964 (D. Md. July. 7, 2020); Kuhn v. Asset Acceptance Capital Corp., 2015 WL 1505648 (S.D. Ind. Mar. 31, 2015); Cox v. Sherman Capital L.L.C., 2014 WL 1328147 (S.D. Ind. Mar. 31, 2014) (violations of the Indiana licensing law cannot form the basis of an FDCPA claim); Skinner v. Asset Acceptance, L.L.C., 876 F. Supp. 2d 473 (D.N.J. 2012); James v. Merchants & Prof'ls, Inc., 2010 WL 785803 (E.D.N.Y. Mar. 8, 2010); Ferguson v. Credit Mgmt. Control, Inc., 140 F. Supp. 2d 1293 (M.D. Fla. 2001).

408 *See, e.g.*, Garner v. Asset Mgmt. Assoc., Inc., 2011 WL 6398112 (D. Utah Dec. 20, 2011) (unlicensed activity not *per se* a § 1692e violation, but if unlicensed collector threatens suit it would be a violation because a person cannot lawfully attempt to collect a debt in Utah unless that person is registered and bonded). *See also* Buhler v. BCG Equities, L.L.C., 2020 WL 888733 (D. Utah Feb. 24, 2020).

409 *See* § 7.4.13, *infra*.

410 *See* Scott v. J. Anthony Cambece Law Office, P.C., 600 F. Supp. 2d 479 (E.D.N.Y. 2009); Goins v. JBC & Assoc., 352 F. Supp. 2d 262 (D. Conn. 2005).

411 *See also* Chulsky v. Hudson Law Offices, P.C., 777 F. Supp. 2d 823 (D.N.J. 2011) (state law violation, operating a debt collection business under auspices of law office, may form basis for a claim under § 1692e). *But see* Sturdevant v. Jolas, P.C., 942 F. Supp. 426 (W.D. Wis. 1996) (demand letter signed by out-of-state attorney not § 1692e(5) violation as local counsel could have been retained).

412 Sturdevant v. Jolas, P.C., 942 F. Supp. 426 (W.D. Wis. 1996).

413 Allen v. Silverman Theologou, L.L.P., 2015 WL 2129698 (D. Md. May 6, 2015); Richardson v. Rosenberg & Assoc. L.L.C., 2014 WL 823655 (D. Md. Feb. 27, 2014) (threat of foreclosure); Ademiluyi v. PennyMac Mortg. Inv. Tr. Holdings I, L.L.C., 929 F. Supp. 2d 502 (D. Md. 2013) (threat of foreclosure); Goins v. JBC & Assoc., 352 F. Supp. 2d 262 (D. Conn. 2005).

from controlling the creditor's litigation or suing in their own name (even through their own attorney) on debts owned by the creditor. It has been held to be a FDCPA § 1692e(5) violation for the collection agency to take such actions.[414]

7.2.5.4.3 *Threats to take other unlawful actions*

Threats to take unlawful postjudgment creditor remedies (garnishment, levy, etc.) are actionable under both FDCPA § 1692e(4) and (5). They are analyzed at § 7.2.4.3, *supra*.

FDCPA § 1692c(b) prohibits almost all debt collector contacts with third parties discussing the consumer's debt.[415] As a result, a debt collector's threat to contact employers, neighbors, other creditors, or other third parties about a debt likely violates FDCPA § 1692e(5).[416]

FDCPA § 1692e(8) prohibits supplying a consumer reporting agency (CRA) with information which the collector should know is false. Thus, it is a FDCPA § 1692e(5) violation to threaten to do so.[417] Once a homeowner disputes the amount due on a mortgage loan with a qualified written request, the mortgage loan servicer cannot make an adverse credit report for sixty days. If the mortgage servicer is a debt collector, then the threat to do so thus is a FDCPA § 1692e(5) violation.[418] Similarly, when a consumer seeks verification of a debt, the collector cannot report adverse information on the debt to a reporting agency until it has verified the debt.[419] The threat to report the information immediately before the verification is unlawful.[420]

Other threats to take unlawful actions could involve prejudgment threats to intercept wages or otherwise garnish assets where such prejudgment action is not authorized by state law.[421] Although federal student loan debt can sometimes lead to permissible prejudgment wage garnishment, a collector cannot threaten such garnishment where federal law provides garnishment is not permitted in the student's particular situation.[422]

A threat that an insufficient check payment will result in treble damages if not paid within ten days is a FDCPA § 1692e(5) violation where state law only provides for treble damages after thirty days.[423] Also actionable is a threat that failure to supply the consumer's tax identification number would subject the debtor to an IRS penalty.[424]

There can be a FDCPA § 1692e(5) violation where a collector threatens to collect amounts not owed or recoverable.[425]

414 *See* Poirier v. Alco Collections, Inc., 107 F.3d 347 (5th Cir. 1997) (filing suit in assignee's own name where assignee did not have ownership of the debt constituted unauthorized practice of law and therefore action that could not legally be taken in violation of e(5)); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (suit without proper registration of fictitious name); Jones v. Vest, 2000 WL 33797103 (E.D. Va. Nov. 7, 2000); Martinez v. Albuquerque Collection Services, Inc., 867 F. Supp. 1495 (D.N.M. 1994); Kolker v. Sanchez, 1991 WL 11691589 (D.N.M. Dec. 10, 1991); Kolker v. Duke City Collection Agency, 750 F. Supp. 468 (D.N.M. 1990). *See also* FTC Official Staff Commentary § 807(5)-7, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *But see* McMinn v. Midland Credit Mgmt., Inc., 2015 WL 867335 (S.D. Cal. Mar. 2, 2015) (under California law an attorney employee of a collection agency can represent the debt owner in court in an action brought in the debt owner's name); Metz v. HCSC—Credit & Collections, 1985 WL 3368 (E.D. Pa. Oct. 29, 1985) (threat to recommend that creditor file suit was not threat to engage in unauthorized practice of law).

415 *See* § 5.7, *supra*.

416 Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009) (privacy notice that could contact third parties); Swanson v. S. Oregon Credit Serv. 869 F.2d 1222 (9th Cir. 1988) (threat to contact employer); Waddell v. Capital Accounts, L.L.C., 2019 WL 5792865, at *3 (S.D. W. Va. Nov. 5, 2019) (threat to call employer); Velez v. Enhanced Recovery Co., 2016 WL 1730721 (E.D. Pa. May 2, 2016) (threat to report to IRS waived portion of debt as income to consumer); Basinger-Lopez v. Tracy Paul & Assoc., 2009 WL 1948832 (N.D. Cal. July 6, 2009) (threats to embarrass plaintiff by disclosing debt to her family, neighbors, and employer); Raimondi v. McAllister & Assoc., Inc., 50 F. Supp. 2d 825 (N.D. Ill. 1999) ("will investigate your financial situation through . . . employers"); Beasley v. Collectors Training Inst., 1999 WL 675196 (N.D. Ill. Aug. 17, 1999) (threats to contact creditors and to review past and present employment); Holt v. Wexler, 1999 U.S. Dist. LEXIS 8785 (N.D. Ill. May 28, 1999) (debt collector implied it could freely contact any employer, neighbor, and relative); Grassley v. Debt Collectors, Inc., 1992 U.S. Dist. LEXIS 22782 (D. Or. Dec. 4, 1992) (employer); Gasser v. Allen County Claims & Adjustment, Inc., 1983 U.S. Dist. LEXIS 20361 (N.D. Ohio Nov. 2, 1983) (employer); United States v. First Fed. Credit Control, Inc., 1982 U.S. Dist. LEXIS 17964 (N.D. Ohio Mar. 11, 1982) (pretending that it is contacting servicemember's commanding officer); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979) (employers and neighbors); FTC Official Staff Commentary § 807(5)-7, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Weiss, FTC Informal Staff Letter (Apr. 17, 1986).

417 Casey v. I.C. Sys., Inc., 2010 WL 415310 (M.D. Fla. Jan. 29, 2010). The threat also violates § 1692e(8)

418 Richard v. Caliber Home Loans, Inc., 2017 WL 4349082 (S.D. Ohio Sept. 29, 2017).

419 15 U.S.C. § 1692g(b).

420 *See* Creighton v. Emporia Credit Serv., Inc., 981 F. Supp. 411 (E.D. Va. 1997). *See also* Vaughn v. CSC Credit Services, 1995 WL 51402 (N.D. Ill. Feb. 3, 1995) (recommendations of Magistrate Judge) (collection letter's threat implied that immediate credit report would be made regardless of whether debt was disputed); Florence v. Nat'l Sys., 1983 U.S. Dist. LEXIS 20344 (N.D. Ga. Oct. 14, 1983) (threats of damage to credit rating and reputation if consumer made no response in five days were deceptive during thirty-day period for requesting verification).

421 Picht v. Jon R. Hawks, Ltd., 236 F.3d 446 (8th Cir. 2001) (threats of prejudgment garnishment where state law did not allow for it); Ortega v. Griggs & Assoc. L.L.C., 2012 WL 2913202 (N.D. Cal. July 13, 2012) (paycheck would be intercepted).

422 *See* Kort v. Diversified Collection Services, Inc., 2001 WL 881449 (N.D. Ill. Aug. 2, 2001) (student loan collector required borrower to provide written proof of entitlement for exemption from garnishment, while applicable federal regulations require granting exemption without such written proof).

423 Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995).

424 *See* Kuehn v. Cadle Co., 335 Fed. Appx. 827 (11th Cir. 2009).

425 Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012) (attorney fees; § 1692e(10) violation); Wilhelm v. Credico, Inc., 519 F.3d 416 (8th Cir. 2008); Gionis v. Javitch, Block, Rathbone, L.L.P., 2007 WL 1654357 (6th Cir. June 6, 2007) (submitting affidavit in collection suit stating that parties' contract permitted award of attorney fees "to the extent permitted by applicable law" where applicable law did not permit recovery of such fees); Duffy v. Landberg, 215 F.3d 871 (8th Cir. 2002) (seeking penalty, attorney fees and interest not authorized); Finley v. Ocwen Loan Servicing, L.L.C., 2018 WL 1705802 (N.D. Ohio Apr. 9, 2018) (threatening to collect amounts resulting from Ocwen's failure

A demand for a dollar amount can be deceptive where the amount includes attorney fees, court costs, or other amounts that can only be awarded by a court after a judgment.[426] It may also be a violation to threaten collection activity regarding a debt that has been discharged in bankruptcy.[427] It may be a violation to threaten any kind of collection effort if the debt collector is not properly licensed and thus should not engage in debt collection.[428] On the other hand, courts may find that not every violation of a statutory provision creates a FDCPA § 1692e(5) violation.[429]

A collector's threat that a homeowner's mortgage loan could be accelerated and the property could be sold at a foreclosure sale before doing so would be permissible under state law may constitute a violation of FDCPA § 1692e(5),[430] as may the act of threatening and scheduling a foreclosure sale before a loss mitigation application is resolved.[431]

7.2.6 *False Implications As to a Debt Transfer, FDCPA § 1692e(6)*

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.[432]

Court decisions rarely address FDCPA § 1692e(6). This section is closely related to FDCPA § 1692e(12), which prohibits false representations that an account has been turned over to innocent purchasers for value.[433]

FDCPA § 1692e(6) indicates that a debt collector cannot falsely represent or imply that if the debt is transferred to another debt collector, referred to a collection attorney or a repossession agency, or sold to a debt buyer, the consumer will be worse off—that the transfer will either eliminate consumer claims or defenses or that the debt buyer or other collection agency is more likely to engage in conduct that violates the FDCPA. The FTC has stated that the provision also prohibits debt collector misrepresentations that the debt would be sent back to the creditor, which, not being covered by the FDCPA, will take actions that otherwise would violate the FDCPA.[434]

Sale of a debt will rarely cut off a consumer's defenses on the debt—this is the case only if a transferee can claim the rights of a holder in due course, which does not apply to most consumer debt obligations.[435] Transfers of a credit sale obligation may not even eliminate the consumer's right to bring affirmative claims against the transferee that the consumer has against the credit-seller, because of the operation of the FTC Holder Notice.[436]

An allegation that a collector falsely stated that a homeowner's property was sold to an entity that had the right to

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to abide by the terms of a loan modification); Captain v. ARS Nat'l Services, Inc., 636 F. Supp. 2d 791 (S.D. Ind. 2009) (unauthorized $15 per day fee); Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995) (unauthorized attorney fees). *But cf.* Barany-Snyder v. Weiner, 539 F.3d 327 (6th Cir. 2008) (no violation where contract attached to complaint in collection suit contained illegal provision purporting to permit recovery of reasonable attorney fees since collector never sought fees).

426 Veach v. Sheeks, 316 F.3d 690 (7th Cir. 2003) (demanding treble damages, court costs, or attorney fees, which could not be obtained until judgment). *See also* Lannan v. Levy & White, 186 F. Supp. 3d 77, 92 (D. Mass. 2016) (§ 1692e(2) violation found for demanding prejudgment interest in complaint).

427 Garfield v. Ocwen Loan Servicing, L.L.C., 811 F.3d 86 (2d Cir. 2016); Turner v. J.V.D.B. & Assoc., 202 Fed. Appx. 123 (7th Cir. Oct. 16, 2006); Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991 (7th Cir. 2003); Juras v. Aman Collection Serv., Inc., 829 F.2d 739 (9th Cir. 1987) (threatening to withhold school transcript where student loan discharged in bankruptcy). *But see* Sutton v. Law Offices of Alexander L. Lawrence, 1992 U.S. Dist. LEXIS 22761 (D. Del. June 17, 1992) (collection letter did not violate § 1692e(5) where debt collector was unaware of bankruptcy stay); Hubbard v. Nat'l Bond & Collection Assoc., Inc., 126 B.R. 422 (D. Del. 1991) (same), *aff'd without op.*, 947 F.2d 935 (3d Cir. 1991).

428 Veras v. LVNV Funding, L.L.C., 2014 WL 1050512 (D.N.J. Mar. 17, 2014); Gaetano v. Payco, Inc., 774 F. Supp. 1404 (D. Conn. 1990). *See also* St. Denis v. New Horizon Credit, Inc., 2006 WL 1965779 (D. Conn. July 12, 2006); § 7.2.5.4.2, *supra*; § 7.4.13, *infra*.

429 Gomez v. Oxford Law, L.L.C., 2015 WL 58766 (M.D. Pa. Jan. 5, 2015) (no § 1692e(5) violation where agency's voicemail failed to identify caller at beginning of message, as TCPA requires), *aff'd*, 657 Fed. Appx. 141 (3d Cir. 2016).

430 *See* Cooke v. Carrington Mortg. Services, 2019 WL 3241128 (D. Md. July 18, 2019). *See also* Peebles v. Seterus, Inc., 2019 WL 4464126 (E.D. Cal. Sept. 18, 2019). *See* § 7.4.11.2, *infra*.

431 Cooke v. Carrington Mortg. Services, 2019 WL 3241128, at *5 (D. Md. July 18, 2019) ("Because RESPA prohibits a foreclosure sale before such an application has been denied and all appeal rights exhausted, the scheduling of this sale could constitute a debt collector's 'threat' to take an action ' that cannot legally be taken' in violation of § 1692e(5)."). *See* § 7.4.11.2, *infra*.

432 15 U.S.C. § 1692e(6). See *also* Reg. F § 1006.18(b)(1)(v).

"Subchapter" refers to the FDCPA. Provisions similar to this section were included in each major bill leading to Act; the words "implication" and "claim" were added late in the legislative process by the Senate Consumer Affairs Subcommittee. *Compare* H.R. 10191, 94th Cong., 1st Sess. §§ 802(6), 802(7) (1975), *with* Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 807(6) (1977).

433 *See* § 7.2.12, *infra*.

434 FTC Official Staff Commentary § 807(6)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

435 *See* National Consumer Law Center, Mortgage Lending § 10.7 (3d ed. 2019), *updated at* www.nclc.org/library.

436 FTC Trade Regulation Rule on Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433; National Consumer Law Center, Federal Deception Law Ch. 4 (4th ed. 2022), *updated at* www.nclc.org/library.

foreclose the redemption of her property plausibly qualifies as a false statement about the transfer of interest in a debt (namely, a municipal lien) within the meaning of FDCPA § 1692e(6).[437]

FDCPA § 1692e(6)(B) is ambiguous. Does the subsection require that the threat is that the consumer may be subject to a practice the FDCPA lists as prohibited, or must the person who would engage in the practice also be covered under the FDCPA? In the latter interpretation, the provision would not apply if the threat related to actions a creditor might take. The FTC Commentary takes the former position, so that even a collector's threat of a referral back to a creditor would be covered.[438] Even if this section is construed otherwise, the general prohibitions of deception[439] or the general prohibition of abusive collection tactics[440] may serve to prohibit this practice.

7.2.7 *Misrepresenting Consumer Engaged in a Crime, Other Misconduct, FDCPA § 1692e(7)*

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.[441]

FDCPA § 1692e(7) has some overlap with section 1692e(4) that prohibits unintended or illegal threats to arrest the consumer.[442] FDCPA § 1692e(7) is violated where a debt collector misrepresents that a "criminal case" is pending against the consumer or that the consumer will be arrested for failure to pay the debt.[443] The provision also applies to a statement that it was a crime merely to write a dishonored check,[444] because criminal bad check laws usually have other prerequisites—for example, the consumer's specific intent to write a check not covered by sufficient funds[445] or that the merchant, not the collector, initiate the criminal complaint.[446]

The provision's very language prohibits not only falsely implying the consumer has committed a crime, but falsely representing that the consumer has engaged in any other conduct that would disgrace the consumer.[447] Collectors thus cannot represent or imply that the consumer has engaged in conduct that shames or humiliates the consumer, such as calling into question the consumer's honesty,[448] or accusing the consumer of fraud,[449] or of disregarding all good business practices.[450]

The collector's misrepresentation must be made "in order to disgrace the consumer." This can be viewed as describing the types of other representations of consumer conduct besides criminal conduct to which the provision applies. Even if the phrase requires a showing of the collector's motive to disgrace the consumer, this should not be difficult to infer from the nature of the misrepresentation. It is safest to allege and seek to support this motive.[451] In any event, FDCPA § 1692e

437 Flowers v. Baltax, 2017, L.L.C., 2019 WL 3501584, at *6 (D. Md. Aug. 1, 2019).

438 FTC Official Staff Commentary § 807(6)-1, *reproduced at* Appx. C.2, *infra, discussed at* § 3.4.4.4, *supra.*

439 15 U.S.C. §§ 1692e and 1692e(10); § 7.2.10, § 7.3, *infra.*

440 15 U.S.C. § 1692d; § 6.2, *supra.*

441 15 U.S.C. § 1692e(7). *See also* Reg. F § 1006.18(b)(1)(iv).

This provision was included in each major bill leading to the Act. *E.g.*, H.R. 10191, 94th Cong., 1st Sess. § 802(8) (1975).

442 *See* § 7.2.4, *supra.*

443 *See* Hebert v. Allegiant Capital Recovery Services, L.L.C., 2019 WL 6974390, at *1 (W.D.N.Y. Dec. 20, 2019) (alleging that collection agency falsely stated consumer had committed a crime); Anderson v. E. Asset Services, L.L.C., 2019 WL 2141664 (N.D. Tex. May 16, 2019) (alleging that collection agency informed a third party of the debt and falsely suggested consumer could be arrested for nonpayment); Ortega v. Griggs & Assoc., 2012 WL 2913202 (N.D. Cal. July 13, 2012) (criminal case pending); United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370 (N.D. Tex. 1986) (false representation that debtor would be arrested or jailed), *aff'd per curiam*, 823 F.2d 880 (5th Cir. 1987). *See also* Georgopulous v. PPM Capital, Inc., 2019 WL 6065617, at *5 (D. Colo. Oct. 21, 2019) (recommending entry of default judgment for consumer on § 1692e(7) claim alleging that the debt collector demanded the consumer pay the debt or "face criminal charges for defrauding a financial institution"), *adopted*, 2019 WL 6053333 (D. Colo. Nov. 15, 2019).

444 FTC Official Staff Commentary § 807(7)-2, *reproduced at* Appx. C.2, *infra, discussed at* § 3.4.4.4, *supra. See also In re* Accelerated Recovery Sys., Inc., 431 B.R. 138 (W.D. Va. 2010) ("if we file warrants, it will be a felony"); Ransom v. Telecredit Serv. Corp., 1992 U.S. Dist. LEXIS 22738 (D. Md. Feb. 5, 1992). Rummel, FTC Informal Staff Letter (May 16, 1978).

445 *See* National Consumer Law Center, Collection Actions Ch. 8 (5th ed. 2020), *updated at* www.nclc.org/library (regarding limitations on prosecution for dishonored checks).

446 Prof'l Check Serv., Inc. v. Dutton, 560 So. 2d 755 (Ala. 1990).

447 *See* McMillan v. Collection Prof'ls, Inc., 455 F.3d 754, 763 (7th Cir. 2006); Selig v. Niagara Recovery Solutions Mgmt. Group, L.L.C., 2020 WL 4283926, at *4 (E.D. Va. July 27, 2020) (collection agency's voicemail messages warning consumer about missed court appearance "would make the least sophisticated consumer wonder whether he committed a crime by failing to pay the debt").

448 *See* McMillan v. Collection Prof'ls, Inc., 455 F.3d 754, 763 (7th Cir. 2006) (calling into question debtor's honesty and good intentions simply because check was dishonored; nonpayment of debt does not mean that debtor is dishonest).

449 Skinner v. Green Tree Servicing L.L.C., 2012 WL 6554530, at *8 (N.D. Cal. Dec. 14, 2012) (stating claim where consumer, whose house was sold at foreclosure, was told she was "stealing" from lender when she pointed out that there was no claim for deficiency under Cal. law); Guidry, FTC Informal Staff Letter (July 2, 1979). *See* FTC Official Staff Commentary § 807(7)-1, *reproduced at* Appx. C.2, *infra, discussed at* § 3.4.4.4, *supra. See also* Pauly v. GC Services, L.P., 2007 WL 1350449 (D. Neb. Apr. 11, 2007) (stating claim where complaint alleged violation of §§ 1692d and 1692e where defendant collector telephoned plaintiff, who is mother of alleged debtor, and stated that her daughter had "committed a federal fraud" and that defendant's legal department was going to prosecute her daughter).

450 Florence v. Nat'l Sys., 1983 U.S. Dist. LEXIS 20344 (N.D. Ga. Oct. 14, 1983).

451 *See* Pache Mgmt. Co. v. Lusk, 1997 WL 254096 (Ohio Ct. App. May 15, 1997) (*pro se* debtor did not present evidence that statement was made to "disgrace" consumer).

and 1692e(10) prohibit deceptive representations even if not intended to disgrace the consumer.

FDCPA § 1692e(7) provides that it protects "the consumer" and thus does not protect collector misrepresentations aimed at third parties.[452] Other FDCPA provisions protect third parties.[453]

7.2.8 *Disclosure of Consumer's Dispute; Communicating or Threatening to Communicate False Credit Information, FDCPA § 1692e(8)*

7.2.8.1 Generally

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> ***
>
> (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.[454]

FDCPA § 1692e(8)'s most common application is to the actual reporting of false information to a CRA or other entity, or the failure to properly report to a CRA or the creditor that the consumer disputes the debt, as discussed respectively in §§ 7.2.8.3 and 7.2.8.4, *infra*. Nevertheless, FDCPA § 1692e(8) also applies to threats to report false credit information. A prime example is a collector's threat to report to a CRA the consumer's failure to pay a debt that the collector knows or should know is not owed or is not owed in that amount.[455] Section 7.2.8.2, *infra*, addresses such threats.

Note that Regulation F (effective November 30, 2021) prohibits so-called "passive collections" or "parking" a debt on a credit report.[456] Both terms refer to the practice of a debt collector furnishing to a consumer reporting agency (CRA), information regarding a debt before communicating with the consumer about the debt.

7.2.8.2 Threats Aimed at the Consumer

FDCPA § 1692e(8) prohibits in connection with collection of a debt threatening to communicate to any person credit information that the debt collector knows or should know to be false. The threat might be to communicate false credit information to the creditor, a government agency, a neighbor, an employer, or any other person. Many false threats relate to communication with consumer reporting agencies (CRAs). As one court has stated: "The Court has learned, through its work on countless FDCPA cases, that threatening to report and reporting debts to CRAs is one of the most commonly-used arrows in the debt collector's quiver,"[457] although not all such threats are false.

A consumer's credit report and credit score is a key determinative for access to credit, home mortgages, and even residential rentals, banking, insurance and employment.[458] The threat to report false information to a CRA is a powerful one.

FDCPA § 1692e(8) prohibits threats to communicate false credit information, and therefore does not apply to a debt collector's threats to report accurate credit information unless the collector does not intend to do so or is legally prohibited from doing so. In such a situation, FDCPA § 1692e(5) should apply, since it prohibits "the threat to take any action that cannot legally be taken or that is not intended to be taken."

Claims based on misrepresentations as to the extent of continued non-payment's negative impact on a credit rating or misrepresentations as to the positive impact of a payment or settlement on a credit rating are more appropriately brought under FDCPA § 1692e(2)(A) (false representation of the character, amount, or legal status of any debt), FDCPA § 1692e(10) ("use of any false representation or deceptive means to collect or attempt to collect any debt"), or FDCPA § 1692e generally (false, deceptive, or misleading representations).

7.2.8.3 Reporting False Information to CRAs and Others

FDCPA § 1692e(8) offers consumers a powerful remedy where a debt collector furnishes false credit information to a CRA. Creditors and other furnishers of information to a CRA are not liable under the Fair Credit Reporting Act for furnishing false credit information or failing to disclose the consumer's dispute unless they fail to properly perform a reinvestigation when requested to do so by the CRA.[459]

FDCPA § 1692e(8) makes debt collectors liable immediately for furnishing false credit information they know or

452 *See* Toney v. Keil, 2014 WL 4800275 (D. Colo. Sept. 26, 2014).

453 *See, e.g.*, § 4.4, *supra*.

454 15 U.S.C. § 1692e(8). *See also* Reg. F § 1006.18(c)(2).

A provision similar to this section was contained in each major bill leading to the Act. *E.g.*, H.R. 10191, 94th Cong., 1st Sess. §§ 802(9), 802(12) (1975); H.R. 13720, 94th Cong., 2d Sess. § 806(7) (1976).

455 *See, e.g.*, Russell v. Absolute Collection Services, Inc., 763 F.3d 385 (4th Cir. 2014) (debt already paid in full); Escobar v. Midland Credit Mgmt., 2019 WL 3751486, at *7 (D. Conn. Aug. 8, 2019) (debt already paid); Sunga v. Broome, 2010 WL 3198925 (E.D. Va. Aug. 12, 2010) (false condominium assessments); Merchants & Med. Credit Corp., Inc., 2010 WL 2613086 (E.D. Mich. June 28, 2010) (consumer alleging debt not owed); Iruegas v. Diversified Adjustment Serv., Inc., 2010 WL 1171088 (W.D. Tex. Mar. 22, 2010) (threatening to collect amount not owed). *See also* Mayall v. The Randall Firm, P.L.L.C., 2019 WL 4696283, at *5 (D. Utah Sept. 26, 2019) (medical debt not owed because bill had been waived).

456 Reg. F § 1006.30(a). *See* § 8.12, *infra*.

457 Edeh v. Midland Credit Mgmt., Inc., 748 F. Supp. 2d 1030, 1035 (D. Minn. 2010), *aff'd on other grounds*, 413 Fed. Appx. 925 (8th Cir. 2011).

458 *See* National Consumer Law Center, Fair Credit Reporting (9th ed. 2018), *updated at* www.nclc.org/library.

459 *See* National Consumer Law Center, Fair Credit Reporting (9th ed. 2018), *updated at* www.nclc.org/library.

should know is false, including the failure to disclose the consumer's dispute. This subsection considers a debt collector's reporting of false credit information to a CRA or any other entity. The next subsection examines the failure to disclose the consumer's dispute of a debt.

Courts have found communicating the following information to be a FDCPA § 1692e(8) violation:

- Misstating as delinquent an account that is current or where no money is owed;[460]
- Misstating the amount owed;[461]
- Reporting a fraudulent debt as merely disputed;[462]
- Misstating the date of payment or default, particularly where this affects whether the debt is time-barred or obsolete so as not to be included in the consumer's credit file;[463]
- Reporting the same debt multiple times under different account numbers;[464]
- Reporting as owing debts discharged in bankruptcy;[465]
- Incorrect reporting of the status of a mortgage,[466] such as that a mortgage is in foreclosure where the foreclosure had not yet been filed;[467] and
- Reporting a false name for the creditor.[468]

Of course, not every interaction between a debt collector and a CRA is actionable under FDCPA § 1692e(8). The credit information furnished must be false;[469] and the debt collector must communicate to the CRA, not the CRA to the debt collector.[470] The FDCPA places no obligation on a debt collector to correct a CRA's mistakes, such as where a CRA mismerges the furnished information with the wrong consumer's file.[471]

In addition, it is not enough that the communicated credit information be false. The consumer must show that the debt collector knew or should know that the information was false.[472] A common situation is where a debt collection agency relies on the information supplied it by the creditor or a debt buyer relies on information supplied by the originating creditor. The consumer must then show that such reliance on the creditor was unreasonable and that the debt collector should have taken steps that would have uncovered the falsity of the information.[473]

For example, a consumer might show that the debt collection agency failed to request the full content of the creditor's file on the consumer or did not ask the creditor to pass on updated information received about a debt—a consumer's payment, dispute, or bankruptcy filing. A debt buyer typically receives only very minimal information about a debt, but may

460 Escobar v. Midland Credit Mgmt., 2019 WL 3751486, at *7 (D. Conn. Aug. 8, 2019) (after receiving payment, defendant reported to credit bureaus that the debt was still outstanding while knowing it was not), *related case*, 2020 WL 5411574 (D. Conn. Sept. 9, 2020); Chung v. U.S. Bank, 250 F. Supp. 3d 658, 682 (D. Haw. 2017) (mortgage servicer told CRA that balance was due where own affidavit stated that no balance was due); Green v. Specialized Loan Servicing, L.L.C., 2016 WL 3963255 (W.D. Wis. July 21, 2016); Justice v. Ocwen Loan Servicing, 2015 WL 235738 (S.D. Ohio Jan. 16, 2015) (mortgage servicer falsely reported account as delinquent to CRAs when homeowners were making full payments and were not delinquent); Randolph v. Northeast Legal Group, L.L.C., 2014 WL 2819122 (N.D. Ala. May 23, 2014), *adopted in part, rejected in part*, 2014 WL 2740309 (N.D. Ala. June 16, 2014); Lucero v. Cenlar, 2014 WL 12026660 (W.D. Wash. Oct. 3, 2014). *See also* Mayall v. The Randall Firm, P.L.L.C., 2019 WL 4696283, at *5 (D. Utah Sept. 26, 2019) (medical debt not owed because bill had been waived due to treatment center's failure to provide preauthorization for procedure).

461 *See* Williams v. Columbia Debt Recovery, L.L.C., 2021 WL 1063330 (W.D. Wash. Mar. 19, 2021); Miceli v. Dyck-O'Neal, Inc., 2016 WL 7666167 (M.D. Fla. Aug. 9, 2016); McKinney v. Nationstar Mortg., L.L.C., 2016 WL 3659898 (E.D.N.C. July 1, 2016); Fulk v. LVNV Funding L.L.C., 55 F. Supp. 3d 967 (E.D. Ky. 2014) (reporting debt as including prejudgment interest where no right to such interest); Grace v. LVNV Funding, Inc., 2014 WL 2167487 (W.D. Ky. May 23, 2014) (unlawful disguised interest); Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013) (reporting debt included court costs that were not awarded); Appx. E.2.4.8, *infra*. *See also* Akalwadi v. Risk Mgmt. Alternatives, Inc., 336 F. Supp. 2d 492, 503 n.4 (D. Md. 2004) (denying both parties' motions on grounds that there was triable issue of fact as to whether amount of debt stated in two tradelines arising from same debt were accurate).

462 *Cf.* King v. Asset Acceptance, L.L.C., 452 F. Supp. 2d 1272 (N.D. Ga. 2006) (no violation where consumer only later demonstrated account to be fraudulent).

463 Kasalo v. Trident Asset Mgmt., L.L.C., 53 F. Supp. 3d 1072 (N.D. Ill. 2014) (alleged that defendant incorrectly reported to CRAs date of delinquency on account); Smith v. RJM Acquisitions, L.L.C., 2014 WL 3107291 (W.D.N.Y. July 7, 2014); Randolph v. Northeast Legal Group, L.L.C., 2014 WL 2819122 (N.D. Ala. May 23, 2014), *adopted in part, rejected in part*, 2014 WL 2740309 (N.D. Ala. June 16, 2014) (reporting wrong year of payment); Daley v. A & S Collection Assoc., Inc., 717 F. Supp. 2d 1150 (D. Or. 2010).

464 Gustafson v. Experian Info. Solutions Inc., 2014 WL 2115210 (C.D. Cal. May 21, 2014).

465 Garfield v. Ocwen Loan Servicing, L.L.C., 811 F.3d 86 (2d Cir. 2016).

466 Anderson v. Bank of Am., 2014 WL 4631222 (D. Or. Sept. 12, 2014).

467 Williams v. Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 1582515, at *11 (D. Conn. Mar. 31, 2018).

468 *See* Semper v. JBC Legal Group, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005).

469 *See* Abernathy v. Continental Serv. Grp., Inc., 2018 WL 3370524 (D. Nev. July 9, 2018); Drake v. Enhanced Recovery Co., 2018 WL 1402586 (D. Or. Mar. 19, 2018) (collector accurately reported debt as in dispute); McGee v. Rockford Mercantile Agency, Inc., 2018 WL 1920130 (N.D. Ill. Apr. 24, 2018) (reporting accurate loan balance prior to confirmation of chapter 13 bankruptcy plan where that balance is later modified by confirmed plan); Frierson v. States Recovery Sys., 2017 WL 2546889 (E.D. Cal. June 13, 2017) (information reported was accurate).

470 Goodwyn v. Capital One, 127 F. Supp. 3d 1367 (M.D. Ga. 2015).

471 *See* Drake v. Enhanced Recovery Co., 2018 WL 1402586 (D. Or. Mar. 19, 2018).

472 *See* Fulk v. LVNV Funding L.L.C., 55 F. Supp. 3d 967 (E.D. Ky. 2014) (knowledge of identity theft not shown). *Accord* Stephens v. Premiere Credit of N. Am., L.L.C., 2018 WL 505593 (W.D. Ky. Jan. 22, 2018) (consumer never alleged collector knew or should have known). *See also* Hopkins v. I.C. Sys., Inc., 2020 WL 2557134, at *11 (E.D. Pa., May 20, 2020) (in light of property management's continued belief that tenant owed debt, debt collector "could not have known or found out that the debt was false"); Jones v. City Plaza, L.L.C., 2020 WL 2062325, at *7 (M.D.N.C. Apr. 29, 2020) (where lawful entitlement to payment of debt was a legal question to be decided by a court, it could not be said that collection agency knew or should have known that the debt it reported was false).

473 *See also* § 12.2.6, *infra* (discussing whether debt collectors' reliance on information from the creditor qualifies as a bona fide error).

have a contractual right to request additional information.[474] When the consumer disputes a debt, should the debt buyer go back to the originating creditor for more information, and should a debt collection agency go back to its creditor or independently seek out other information?

Where a debt buyer or debt collection agency inflates the amount due based on prejudgment or other interest charges or collection fees or attorney fees to which it is not entitled, it should know that it is not entitled to such charges.[475] A debt buyer or collection agency either knows or should know state law related to the charges it assesses.

A debt collector should also know that information it is reporting is false where it reports different information to different CRAs.[476] Where a consumer disputes a debt, and the collector has little information about a debt and what information it does have is conflicting, the collector should know that the information it is reporting is false, or at least should more thoroughly investigate prior to reporting it.[477]

7.2.8.4 Disclosure of the Consumer's Dispute of the Credit Information

7.2.8.4.1 Nature of the disclosure obligation

Whenever a debt collector knows or should know the consumer disputes a debt, and the collector communicates about the debt to a third party, then the communication must include an indication that the consumer disputes the debt.[478]

Specifically, if a debt collector reports a debt to a CRA, it must include in the report that the consumer disputes the debt, if it knows or should know about that dispute.[479] When a debt collector learns of a dispute, there is no affirmative obligation to report the dispute to a CRA, but it must do so the next time it reports about the debt to the CRA.[480] The same applies when the debt collector next communicates about the debt with any third party. This includes such communications as where a debt collection agency or collection attorney communicates with the creditor, a debt buyer communicates with its collection agency, or a debt buyer's servicer communicates with the debt buyer.[481]

While the collector has to accurately report to a CRA that the debt is disputed, the collector need not resolve the dispute.

474 *See* § 1.4.7.3, *supra*.

475 *See, e.g.*, Fulk v. LVNV Funding L.L.C., 55 F. Supp. 3d 967 (E.D. Ky. 2014) (illegal prejudgment interest); Grace v. LVNV Funding, Inc., 2014 WL 2167487 (W.D. Ky. May 23, 2014) (unlawful disguised interest); Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013) (reporting debt that included court costs that were not awarded).

476 Carlisle v. Nat'l Commercial Services, Inc., 2015 WL 4092817 (N.D. Ga. July 7, 2015).

477 Carlisle v. Nat'l Commercial Services, Inc., 2015 WL 4092817 (N.D. Ga. July 7, 2015).

478 Evans v. Portfolio Recovery Assoc., 889 F.3d 337 (7th Cir. 2018) (noting that failure in reporting to CRA that debt was disputed created risk of real injury and was material violation); Wilhelm v. Credico, Inc., 519 F.3d 416, 418 (8th Cir. 2008); Brady v. Credit Recovery Co., 160 F.3d 64 (1st Cir. 1998). *See also* Webster v. Receivables Performance Mgmt., L.L.C., 473 F. Supp. 3d 861 (S.D. Ind. 2020); Goss v. Receivables Performance Mgmt., L.L.C., 2020 WL 2219048, at *5 (N.D. Ill. May 7, 2020); Krier v. United Revenue Corp., 2020 WL 2065618, at *4 (N.D. Tex. Apr. 28, 2020); Centeno v. LVNV Funding, L.L.C., 2019 WL 2173779, at *3–4 (N.D. Ill. May 20, 2019); Francisco v. Midland Funding, L.L.C., 2019 WL 498936, at *5 (N.D. Ill. Feb. 8, 2019); Odsather v. Fay Servicing, L.L.C., 2018 WL 6696688 (W.D. Wash. Dec. 20, 2018); Baranowski v. Portfolio Recovery Assoc., 2018 WL 1534967 (N.D. Ill. Mar. 29, 2018); Mack v. Wakefield & Assoc., Inc., 2017 WL 7794344, at *2 (S.D. Fla. Oct. 19, 2017); Mohamed v. Select Portfolio Servicing, Inc., 215 F. Supp. 3d 85 (D.D.C. 2016); Miceli v. Dyck-O'Neal, Inc., 2016 WL 7666167 (M.D. Fla. Aug. 9, 2016); Pygott v. Metro Area Collection Serv., Inc., 2012 WL 2522636 (D. Or. June 26, 2012); Quigley v. Verizon Wireless, 2012 WL 1945784 (N.D. Cal. May 30, 2012).

479 Evans v. Portfolio Recovery Assoc., 889 F.3d 337 (7th Cir. 2018); FTC Official Staff Commentary § 807(8), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

480 Llewellyn v. Allstate Home Loans, Inc. 711 F.3d 1173 (10th Cir. 2013) (no obligation to correct credit information at CRA where collector does not communicate with CRA); Wilhelm v. Credico, Inc., 519 F.3d 416, 418 (8th Cir. 2008); Alcivar v. Enhanced Recovery Co., 2020 WL 2559845, at *5 (E.D.N.Y. May 20, 2020) (debt collector has no affirmative obligation to update credit bureaus on status of consumer's debt, but if collector chooses to discuss consumer's debt with third party it must inform that third party of disputed nature of debt); Whitehead v. Nationwide Recovery Serv., Inc., 2019 WL 8277269, at *6 (N.D. Ga. Dec. 2, 2019) (whether defendant had affirmative, independent duty to report consumer's dispute letter was "of no consequence" where consumer did not claim such affirmative duty; rather, consumer alleged that defendant violated FDCPA by reporting information to CRA about debt after receiving dispute letter without also disclosing dispute), *adopted*, 2020 WL 1467253 (N.D. Ga. Jan. 8, 2020); Levine v. Creditors' Prot. Serv., Inc., 2019 WL 1077126, at *4 (N.D. Ill. Mar. 7, 2019) (consumer disputed debt before debt collector reported it as undisputed to CRA); Mack v. Wakefield & Assoc., Inc., 2017 WL 7794344, at *2 (S.D. Fla. Oct. 19, 2017) (violation is not that failed to report dispute, but that failed to report dispute when collector re-reported credit information); Danehy v. Jaffe & Asher, L.L.P., 2015 WL 1249879 (E.D.N.C. Mar. 17, 2015) (no affirmative duty to report consumer's dispute to CRA); Rogers v. Virtuoso Sourcing Group, L.L.C., 2013 WL 772865 (S.D. Ind. Feb. 28, 2013) (no affirmative duty unless report to CRA after learning of dispute); Edeh v. Aargon Collection Agency, L.L.C., 2011 WL 2963855 (D. Minn. June 20, 2011) (no obligation to disclose where collector learns of dispute after report to CRA), *adopted*, 2011 WL 2910750 (D. Minn. July 20, 2011); FTC Official Staff Commentary § 807(8), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra* (collector need not report dispute if first became aware of it after reporting debt to credit bureau). *See also* Rivera v. Med-Bill Corp., 2020 WL 4583084 (S.D. Ind. Aug. 10, 2020) (debt collector that reported debt before consumer disputed it did not have continuing obligation to update CRA); Mitchell-Williams v. Capio Partners, L.L.C., 2018 WL 3586363 (E.D. Mich. July 26, 2018) (debt buyer did not violate FDCPA by waiting almost a month after receiving consumer's dispute letter to notify credit reporting agency of dispute); Luxenburg v. Equifax Credit Info. Services, 2005 WL 78947 (N.D. Ill. Jan. 12, 2005) (delay of about two months reasonable; no requirement to notify CRA within certain amount of time). *But see* Farren v. RJM Acquisition Funding, L.L.C., 2005 WL 1799413 (E.D. Pa. July 26, 2005) (once debt collector learns of dispute, it must notify CRA within reasonable time). *Cf.* Acri v. Nat'l Collection Sys., Inc., 1998 WL 255271 (9th Cir. May 19, 1998) (summary judgment finding no violation of § 1692e(8) affirmed on basis of uncontroverted evidence that collector immediately advised credit reporting agencies of disputed nature of debt upon its receipt of dispute).

481 *See* § 7.2.8.4.2, *infra*.

The collector can continue to report the same credit information if it has reason to believe it to be true, as long as it includes in the report that the consumer disputes the information.[482] But the very fact of the dispute might lead the debt collector to know or have reason to know that the credit information is false.

The consumer should not rely on the collection agency to correct information on the consumer's credit report that the consumer disputes. While the consumer should notify the debt collector of the dispute, the consumer should also notify the CRA. Then the CRA must ask the entity that furnished the disputed information to reinvestigate that information. The furnisher should then report the results of its investigation to the CRA. It is at that point that the consumer may have a cause of action under the Fair Credit Reporting Act (FCRA) against the CRA or furnisher, as discussed later in this treatise as well as in NCLC's Fair Credit Reporting.[483]

Where the consumer had disputed the debt with the CRA and the debt collector is responding to the CRA's request for a reinvestigation, the debt collector may not be required in subsequent communications with the CRA to reiterate that the debt is disputed.[484] But it must fulfill its obligations under the FCRA.

7.2.8.4.2 Disclosure requirement applies to communications with any third party

FDCPA § 1692e(8) applies to any debt collector and any communication to a third party, including the creditor,[485] a debt buyer,[486] or a CRA.[487] FDCPA § 1692e(8) also applies to a covered debt buyer's communications to a collection agency or collection attorney.[488] A debt collector bringing suit against the consumer may even have an obligation to disclose to the court that the consumer disputes the debt, either in the complaint,[489] or otherwise.[490]

When a consumer seeking a mortgage loan has disputed a debt and asks the lender to contact the debt collector about its report of negative information about the consumer, and the debt collector communicates with the lender, it must disclose the consumer's dispute as to that debt.[491]

7.2.8.4.3 Informing the debt collector of the dispute

The debt collector—whether it is a debt buyer, collection agency, or collection attorney—has an obligation to include the consumer's dispute when it knows or should know of that dispute.[492] A debt collector certainly knows of the consumer's dispute where the consumer directly informs the debt collector of the dispute.

The consumer can do so either in writing or orally.[493] A consumer's dispute of debt in documents filed in the collector's lawsuit is sufficient to notify the collector, requiring the collector to note the dispute when it next communicates with a CRA or other third party.[494]

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482 *See* Moonflower v. Columbia Recovery Group, L.L.C., 2019 WL 461122 (W.D. Wash. Feb. 6, 2019).

483 *See also* National Consumer Law Center, Fair Credit Reporting (9th ed. 2018), *updated at* www.nclc.org/library; § 14.6, *infra*.

484 *See* McIvor v. Credit Control Services, Inc., 773 F.3d 909 (8th Cir. 2014); Schwantes v. Monco Law Offices, 2014 WL 4163024 (D. Minn. Aug. 21, 2014).

485 *See* Wilhelm v. Credico, Inc., 519 F.3d 416 (8th Cir. 2008); Baker v. I.Q. Data Int'l, Inc., 2015 WL 1945148 (D. Colo. Apr. 29, 2015); Hudspeth v. Capital Mgmt. Services, L.P., 2013 WL 674019 (D. Colo. Feb. 25, 2013); Kinel v. Sherman Acquisition II, L.P., 2007 WL 2049566 (S.D.N.Y. July 13, 2007) (attorney debt collector failed to communicate dispute to its client); Perez v. Telecheck Services, Inc., 208 F. Supp. 2d 1153 (D. Nev. 2002) (communication to Walmart).

486 *See* Burdick v. Palisades Collection L.L.C., 2008 WL 80943 (C.D. Cal. Jan. 3, 2008); Stiff v. Wilshire Credit Corp., 2006 WL 141610 (D. Ariz. Jan. 17, 2006). *See also* Magrin v. Unifund CCR Partners, Inc., 2002 WL 31804268 (9th Cir. Dec. 10, 2002).

487 *See* Wilhelm v. Credico, Inc., 519 F.3d 416 (8th Cir. 2008); Purnell v. Arrow Fin. Services, L.L.C., 303 Fed. Appx. 297 (6th Cir. 2008); Baranowski v. Portfolio Recovery Assoc., 2018 WL 1534967 (N.D. Ill. Mar. 29, 2018); Sayles v. Advanced Recovery Sys., Inc., 206 F. Supp. 3d 1210 (S.D. Miss. 2016), *aff'd*, 865 F.3d 246 (5th Cir. 2017); Quale v. Unifund CCR Partners, 682 F. Supp. 2d 1274 (S.D. Ala. 2010); Gilmore v. Account Mgmt., Inc., 2009 WL 2848278 (N.D. Ga. Apr. 27, 2009), *rev'd on other grounds*, 2009 WL 4826953 (11th Cir. Dec. 16, 2009); Randall v. Midland Funding, L.L.C., 2009 WL 2358350 (D. Neb. July 23, 2009); Davis v. Trans Union, L.L.C., 526 F. Supp. 2d 577 (W.D.N.C. 2007) (falsely reporting balance of account to credit bureau survived motion to dismiss); Kinel v. Sherman Acquisition II, L.P., 2007 WL 2049566 (S.D.N.Y. July 13, 2007); Acosta v. Campbell, 2006 WL 146208 (M.D. Fla. Jan. 18, 2006); Stiff v. Wilshire Credit Corp., 2006 WL 141610 (D. Ariz. Jan. 17, 2006); Sullivan v. Equifax, Inc., 2002 WL 799856 (E.D. Pa. Apr. 19, 2002).

488 Plummer v. Atl. Credit & Fin., Inc., 66 F. Supp. 3d 484, 492 (S.D.N.Y. 2014) ("[D]ebt collectors may not benefit from unlawful collection practices merely by enlisting third-party debt collectors to act on their behalf. To read the statute otherwise would allow debt collectors to escape liability through the simple act of transferring a debt and would enable subsequent debt purchasers or assignees to circumvent the statute by remaining purposely ignorant of a loan's legal status."). *See also* Finley v. Dynamic Recovery Solutions L.L.C., 2015 WL 3750140 (N.D. Cal. June 15, 2015) (debt buyer and collection agency should have disclosed to each other their knowledge of consumer's dispute).

489 Hollis v. Stephen Bruce & Assoc., 2007 WL 4287623, at *3 (W.D. Okla. Dec. 5, 2007) (denying motion to dismiss).

490 *See* Gough v. Bernhardt & Strawser, P.A., 2006 WL 1875327 (M.D.N.C. June 30, 2006) (no violation where collection attorney, in letter, notified court of consumer's dispute).

491 Brady v. Credit Recovery Co., 160 F.3d 64 (1st Cir. 1998).

492 15 U.S.C. § 1692e(8).

493 Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 347 (7th Cir. 2018); Dixon v. RJM Acquisitions, L.L.C., 640 Fed. Appx. 793 (10th Cir. 2016); Brady v. Credit Recovery Co., 160 F.3d 64, 66 (1st Cir. 1998) ("[c]learly, the ordinary usage of 'dispute' does not contemplate a writing"); Hudspeth v. Capital Mgmt. Services, L.P., 2013 WL 674019 (D. Colo. Feb. 25, 2013). *See also* Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078 (9th Cir. 2005); Rusk v. Specialized Loan Servicing, L.L.C., 2020 WL 2772771, at *9 (S.D. Ga. May 28, 2020); Irvine v. I.C. Sys., Inc., 176 F. Supp. 3d 1054 (D. Colo. 2016). *Cf.* Cramer v. Equifax Info. Services, L.L.C., 2019 WL 5188942, at *6 (E.D. Mo. Oct. 15, 2019) (consumer may dispute debt verbally, but here it was clear that plaintiff did not dispute debt, either verbally or in writing, until she sent her dispute letter to CRAs).

494 Patterson v. Peterson Enters., Inc., 2018 WL 5269810 (E.D. Wash. Oct. 23, 2018) (debt was disputed in consumer's answer to collector's state court collection suit).

While FDCPA § 1692g provides the consumer with certain verification rights if the consumer disputes the debt in writing,[495] there is no requirement that the consumer's notification of the dispute be in writing for purposes of FDCPA § 1692e(8).[496] Nor does the consumer have to exercise rights under FDCPA § 1692g for the collector to know that the consumer disputes a debt.[497]

The consumer must convey the dispute to the debt collector, but need not address it to any particular department, such as a debt buyer's disputes department.[498] To avoid the collector claiming never to have received a dispute letter, however, it is prudent to send a letter with a return receipt or a dated fax.

The consumer need not use the words "dispute" or "verify" to dispute the debt.[499] A consumer is not required to use legally precise or sophisticated language to assert FDCPA protections.[500] There is no requirement that the individual's dispute be valid or even reasonable.[501] Instead, the consumer simply makes clear that they dispute the debt.[502] Debt collectors cannot determine unilaterally that a dispute lacks merit and should not be reported.[503]

Consumers should be wary of credit repair, debt settlement, debt elimination, or similar agencies, not just for potential fraudulent practices, but also because creditors and collectors may decide to pay no attention to their correspondence. But if such an agency has sent a collector a dispute on behalf of the consumer, the collector should then know about the dispute.[504]

The consumer's attorney can send the dispute letter.[505] Debt collectors have complained that the consumer's dispute is buried in a long letter from the consumer's attorney and that the letter's purpose was not to inform the collector of the dispute, but to game the legal system. The Seventh Circuit has rejected this argument as long as the dispute language itself is clear.[506] Another court required the consumer's attorney to pay fees

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495 *See also* § 9.10, *infra* (discussing the right to dispute a debt under § 1692g(a)(3) either orally or in writing).

496 Brady v. Credit Recovery Co., 160 F.3d 64, 67 (1st Cir. 1998) ("Applying the meaning of 'disputed debt' as used in § 1692g(b) to § 1692e(8) would thus render the provision's 'knows or should know' language impermissibly superfluous."). *See also* Sayles v. Advanced Recovery Sys., Inc., 865 F.3d 246 (5th Cir. 2017). *But see* Mellinger v. Midwestern Audit Serv., Inc., 2012 WL 405008 (E.D. Mich. Feb.8, 2012) (where consumer waited more than 30 days to dispute debt, collector could assume debt not valid and that where debt is not valid it need not be communicated to CRA).

497 Brady v. Credit Recovery Co., 160 F.3d 64 (1st Cir. 1998). *See also* Rusk v. Specialized Loan Servicing, L.L.C., 2020 WL 2772771, at *9 (S.D. Ga. May 28, 2020) (sections 1692g and 1692e "operate independently of one another").

498 Baranowski v. Portfolio Recovery Assoc., 2018 WL 1534967 (N.D. Ill. Mar. 29, 2018); Flores v. Portfolio Recovery Assoc., 2017 WL 5891032 (N.D. Ill. Nov. 29, 2017); Bowse v. Portfolio Recovery Assoc., 218 F. Supp. 3d 745 (N.D. Ill. 2016), *aff'd sub nom.* Evans v. Portfolio Recovery Assoc., 889 F.3d 337 (7th Cir. 2018).

499 Tejero v. Portfolio Recovery Assoc., 955 F.3d 453, 460–461 (5th Cir. 2020) ("The relevant part of the letter reads: 'My monthly expenses exceed my monthly income . . . and the amount you are reporting is not accurate either.' Aside from invoking the word 'dispute,' we struggle to see how a debtor could dispute a debt more clearly than by writing, 'the amount you are reporting is not accurate.'"); Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 346 (7th Cir. 2018) ("the amount reported is not accurate" called into question amount owed and therefore constituted dispute); Dixon v. RJM Acquisitions, L.L.C., 640 Fed. Appx. 793, 795 (10th Cir. 2016) (reasonable fact finder could treat "I feel that all I owe is $20" as dispute of alleged $102.99 debt); Brady v. Credit Recovery Co., 160 F.3d 64, 66 (1st Cir. 1998); Washington v. Convergent Outsourcing, Inc., 2017 WL 1093152 (N.D. Ill. Mar. 23, 2017) (debt not accurate). *See also* Goss v. Receivables Performance Mgmt., L.L.C., 2020 WL 2219048, at *4 (N.D. Ill. May 7, 2020) (where consumer said she did not know anything about debt, "in contrast to other cases where debtors disputed how *much* they owed, here, Goss was disputing that she owed *any* debt *at all*." (emphasis in original)); Levine v. Creditors' Prot. Serv., 2019 WL 1077126, at *3 (N.D. Ill. Mar. 7, 2019) (consumer's statement that he had already paid amount and that he no longer owed anything on his account called debt into question); Sanchez v. Pinnacle Credit Services, L.L.C., 195 F. Supp. 3d 1184 (D. Colo. 2016) (consumer's statements during telephone call that she owed much less than was claimed on phone bill was sufficient); Irvine v. I.C. Sys., Inc., 176 F. Supp. 3d 1054 (D. Colo. 2016) (violating § 1692e(8) where consumer claimed that she "did not owe that much"); Paz v. Portfolio Recovery Assoc., 2016 WL 6833932 (N.D. Ill. Nov. 21, 2016) (amount owed not accurate); Carter v. Credit Bur. of Carbon Cty., 2014 WL 4976320 (D. Colo. Oct. 6, 2014) (issue of material fact as to whether consumer's statement to collection agency that insurance should have paid amount at issue was "dispute" for purposes of § 1692e(8) claim); Palmer v. I.C. Sys., Inc., 2007 WL 1655569 (N.D. Cal. June 7, 2007).

500 *See* Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769 (7th Cir. 2003) (interpreting another FDCPA provision concerning notice of employer's policy against debt collection calls at work).

501 Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 347 (7th Cir. 2018); Mohamed v. Select Portfolio Servicing, Inc., 215 F. Supp. 3d 85 (D.D.C. 2016); Carter v. Credit Bur. of Carbon Cty., 2015 WL 4450698, at *3 (D. Colo. July 20, 2015) (consumer "need not prevail on the merits of her argument that she is not liable for the debt in order for the debt to be disputed within the meaning of Section 1692e(8) . . . [T]he FDCPA obligated the Defendant to report that debt as disputed."); Hudspeth v. Capital Mgmt. Services, L.P., 2013 WL 674019 (D. Colo. Feb. 25, 2013).

502 Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 347 (7th Cir. 2018).

503 *See* Bowse v. Portfolio Recovery Assoc., 218 F. Supp. 3d 745 (N.D. Ill. 2016) (FDCPA does not permit debt collectors to withhold disputed nature of debts, even in instances when debt collector considers that dispute invalid), *aff'd sub nom.* Evans v. Portfolio Recovery Assoc., 889 F.3d 337 (7th Cir. 2018); Mohamed v. Select Portfolio Servicing, Inc., 215 F. Supp. 3d 85 (D.D.C. 2016); Hoffman v. Partners in Collections, Inc., 1993 WL 358158 (N.D. Ill. Sept. 14, 1993) (dispute need not be demonstrated as "valid" for protection to apply).

504 *See* Ridgeway v. AR Res., Inc., 2017 WL 3736650 (D.N.J. Aug. 30, 2017) (credit repair agency sent dispute for consumer). *But see* Taylor-Burns v. AR Res., Inc., 2017 WL 3034353 (S.D.N.Y. July 14, 2017) (violating Credit Repair Organizations Act where dispute was not conveyed by consumer, but by CRA that voided consumer's relationship with repair agency and voided her dispute letter); Robinson v. I.C. Sys., Inc., 2016 WL 6462278 (E.D.N.Y. Nov. 1, 2016) (no § 1692e(10) violation in refusing to note dispute from consumer's credit counseling agency; debt collector was not refusing to note oral dispute, but was requiring that consumer personally affirm dispute orally or otherwise).

505 Baranowski v. Portfolio Recovery Assoc., 2018 WL 1534967 (N.D. Ill. Mar. 29, 2018); Bowse v. Portfolio Recovery Assoc., 218 F. Supp. 3d 745 (N.D. Ill. 2016), *aff'd sub nom.* Evans v. Portfolio Recovery Assoc., 889 F.3d 337 (7th Cir. 2018); Paz v. Portfolio Recovery Assoc., 2016 WL 6833932 (N.D. Ill. Nov. 21, 2016).

506 Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 347 (7th Cir. 2018).

and costs for a tricky dispute letter,[507] but this decision was reversed on appeal where the Fifth Circuit found that the district court had overlooked the actual language of the letter and improperly inferred subjective bad faith on the part of the consumer's counsel.[508]

7.2.8.5 Collector Defenses to FDCPA § 1692e(8) Claims

Where a court requires that a misrepresentation in violation of FDCPA § 1692e be material,[509] courts usually have little trouble finding FDCPA § 1692e(8) violations to be material. Failure to communicate with a CRA that a debt is disputed affects the consumer's credit rating, and thus it is material.[510]

FDCPA § 1692e applies only to representations and practices "in connection with the collection of any debt."[511] A threat by a debt collector to communicate false credit information is intended to coerce payment and therefore is made in connection with the collection of a debt, as is actually furnishing information to a CRA.[512] But courts generally find a lack of connection with collection of a debt when the CRA asks the debt collector to reinvestigate the consumer's dispute, and the debt collector then responds to the CRA request for information.[513]

Bona fide error, examined in detail at § 12.2, *infra,* is an affirmative defense. A collection agency that does not report a dispute may not hide behind a glitch in its computer system to claim that its violation was a bona fide error where the glitch could have been easily overcome by the debt collector.[514]

The FDCPA § 1692e(8) violation must have occurred within one year of the consumer's FDCPA action.[515] But each monthly report to a CRA by a debt collector in violation of FDCPA § 1692e(8) presents a separate harm to the consumer and an independent opportunity for a debt collector to comply with the statute. Even if some monthly reports are outside the one-year statute of limitations, a plaintiff could proceed based on the monthly reports made within the one -year period.[516] The FDCPA statute of limitations for continuing violations is examined at § 12.3.3.3, *infra.*

A thorough discussion of case or controversy Article III standing in federal court is found at § 11.15, *infra.* Standing for FDCPA § 1692e(8) claims, specifically, is discussed at § 11.15.7, infra.

7.2.8.6 FCRA Claims Complementing FDCPA § 1692e(8)

The Fair Credit Reporting Act (FCRA) offers consumers a procedure to correct inaccurate information in their credit reports, as outlined at § 14.6.2, *infra,* and in more detail in

507 Tejero v. Portfolio Recovery Assoc., 2018 WL 1612856, at *4 (W.D. Tex. Apr. 2, 2018) ("[T]he evidence shows Plaintiff's counsel is involved in a scheme to force settlements from debt collectors by abusing the FDCPA. . . . Viewing the [ambiguous, tricky dispute] letter as it was intended by Plaintiff's counsel, the debt collector understands the letter to say the debtor cannot afford to pay the debt. The debt collector then fails to mark the debt as disputed and Plaintiff's counsel files suit for violation of the FDCPA. Facing the high costs of discovery and trial, the debt collector settles the lawsuit, paying the debtor's attorneys' fees."). *See also* Huebner v. Midland Credit Mgmt., Inc., 897 F.3d 42, 52, 57 (2d Cir. 2018) (consumer lawyer plaintiff sanctioned for trying "to provoke an FDCPA [§ 1692e(8)] violation"). *But see* Jones v. Portfolio Recovery Assoc., 2017 WL 7052288 (W.D. Tex. Aug. 16, 2017) (finding § 1692e(8) violation with similar letter).

508 Tejero v. Portfolio Recovery Assoc., 955 F.3d 453, 460–461 (5th Cir. 2020) ("The relevant part of the letter reads: 'My monthly expenses exceed my monthly income . . . and the amount you are reporting is not accurate either.' Aside from invoking the word 'dispute,' we struggle to see how a debtor could dispute a debt more clearly than by writing, 'the amount you are reporting is not accurate.'"; finding that district court had no basis to ignore language of letter and instead infer subjective bad faith).

509 *See* § 7.3.9, *infra.*

510 Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 349 (7th Cir. 2018); Wilhelm v. Credico, Inc., 519 F.3d 416 (8th Cir. 2008); Baranowski v. Portfolio Recovery Assoc., 2018 WL 1534967 (N.D. Ill. Mar. 29, 2018); Paz v. Portfolio Recovery Assoc., 2016 WL 6833932 (N.D. Ill. Nov. 21, 2016); Daley v. A & S Collection Assoc., Inc., 717 F. Supp. 2d 1150 (D. Or. 2010). *See also* Whitehead v. Nationwide Recovery Serv., Inc., 2019 WL 8277269, at *6 (N.D. Ga. Dec. 2, 2019), *adopted,* 2020 WL 1467253 (N.D. Ga. Jan. 8, 2020).

511 *See* § 4.3, *supra,* § 7.3.2, *infra.*

512 McIvor v. Credit Control Services, Inc., 773 F.3d 909 (8th Cir. 2014) (while reinvestigating debt is not in connection with debt, reporting debt initially is in connection with collection of debt); Escobar v. Midland Credit Mgmt., 2019 WL 3751486, at *6 (D. Conn. Aug. 8, 2019); Williams v. Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 1582515, at *11 (D. Conn. Mar. 31, 2018); Davis v. Trans Union, L.L.C., 526 F. Supp. 2d 577 (W.D.N.C. 2007); Akalwadi v. Risk Mgmt. Alternatives, Inc., 336 F. Supp. 2d 492, 503 n.4 (D. Md. 2004) ("act of a debt collector reporting the status of a consumer debt to a credit reporting agency is an activity that would certainly appear to meet the statute's requirement that the false, deceptive, or misleading representation or means be 'in connection with' the collection of a debt").

513 McIvor v. Credit Control Services, Inc., 773 F.3d 909 (8th Cir. 2014); Fulton v. Equifax Info. Services, L.L.C., 2016 WL 5661588 (E.D. Mich. Sept. 30, 2016).

514 *See* Holmes v. NCO Fin. Services, Inc., 538 Fed. Appx. 765, 766 (9th Cir. 2013) ("had NCO clicked on the applicable button on the Oasis interface, it would have discovered that its access to essential information was blocked and needed to be restored before NCO could report the account to a credit reporting agency"). *See also* Evans v. Portfolio Recovery Assoc., 889 F.3d 337 (7th Cir. 2018) (no bona fide error defense where mistakenly thought FDCPA requirement did not apply to consumer's dispute); Valenta v. Midland Funding, L.L.C., 2019 WL 1429656, at *6 (N.D. Ill. Mar. 29, 2019) (no bona fide error defense where system could not receive dispute letter on Friday evening and update report it sends to credit bureaus by following Friday, since such system is not "reasonably adapted" to avoid FDCPA violations); Baranowski v. Portfolio Recovery Assoc., 2018 WL 1534967 (N.D. Ill. Mar. 29, 2018) (failure to report consumer's dispute); Daley v. A & S Collection Assoc., Inc., 717 F. Supp. 2d 1150 (D. Or. 2010) (misreporting date of default not bona fide error). *But see* Washington v. Convergent Outsourcing, Inc., 2017 WL 1093152 (N.D. Ill. Mar. 23, 2017) (defense shown when failure to report dispute caused by clerical mistake in typing wrong code and requirements of bona fide error defense met).

515 *See* Wilhelm v. Credico, Inc., 519 F.3d 416, 418 (8th Cir. 2008).

516 *See* Purnell v. Arrow Fin. Services, L.L.C., 2007 WL 421828 (E.D. Mich. Feb. 2, 2007).

NCLC's Fair Credit Reporting.[517] Claims under the FCRA often are complex. It is advisable for a less experienced consumer lawyer to join with experienced FCRA consumer attorneys in cases with FCRA claims. A reliable directory of consumer attorneys with FCRA experience is available at www.consumeradvocates.org.

To bring an FCRA claim against the debt collector, the consumer must first initiate with the consumer reporting agency (not just the collector or creditor) a dispute of information in the consumer's credit file. Then the reporting agency will request the entity that furnished the information to reinvestigate the information that it previously reported.[518] A furnisher that fails to fulfill its FCRA obligation to conduct a reasonable reinvestigation may be liable to the consumer under the FCRA for statutory, actual and punitive damages, attorney fees, and costs.[519] FCRA and FDCPA claims may be combined in the same complaint where they are based on the same transaction.[520] Even where a FDCPA claim is not successful, the FCRA claim may still prevail.

7.2.9 *False Impression of Writing's Source, Authorization, or Approval, FDCPA § 1692e(9)*

7.2.9.1 Generally

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.[521]

FDCPA § 1692e(9) is closely related to section 1692e(1), which prohibits misrepresentation of government affiliation, and section 1692e(13), which prohibits misrepresentation of documents as legal process. FDCPA § 1692e(9) prohibits simulating legal process[522] and using bogus legal documents.[523] When collectors include legal captions or legalistic formats, titles, or phraseology in their collection letters, they are apt to violate FDCPA § 1692e(9).[524] A collection law firm that mails the consumer a confession of judgment with legal captions and references to the consumer as the defendant violates FDCPA § 1692e(9).[525]

FDCPA § 1692e(9), like section 1692e(1), also prohibits writings that appear to be authorized, issued, or approved by a branch of government.[526] Useful precedent for FDCPA

517 National Consumer Law Center, Fair Credit Reporting Ch. 6 (9th ed. 2018), *updated at* www.nclc.org/library.

518 15 U.S.C. § 1681*i*. *See* § 14.6.2.1, *infra*; National Consumer Law Center, Fair Credit Reporting § 4.5 (9th ed. 2018), *updated at* www.nclc.org/library.

519 15 U.S.C. §§ 1681s-2(b), 1681n (generally creating cause of action for willful noncompliance), § 1681o (generally creating cause of action for negligent noncompliance). *See* National Consumer Law Center, Fair Credit Reporting § 6.10, Ch. 11 (9th ed. 2018), *updated at* www.nclc.org/library.

520 *E.g.*, Siconolfi v. Trans Union, L.L.C., 2009 WL 10656481 (E.D. Pa. Sept. 22, 2009). *See also* Zaby v. Perfection Collection, L.L.C., 2019 WL 5067184 (D. Nev. Oct. 9, 2019); Mushala v. US Bank, 2019 WL 1429523 (D.D.C. Mar. 29, 2019); Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163, 172 (E.D.N.Y. 2013) (rejecting defendant's contention "that the FCRA provides the exclusive remedy for misrepresentations to a credit reporting agency").

521 15 U.S.C. § 1692e(9). *See also* Reg. F § 1006.18(c)(3); Appx. E.2.4.13, *infra*.

A provision similar in most respects to this section was contained in each major bill leading to the Act. The last clause of the subsection was added by the Senate Consumer Affairs Subcommittee. *Compare, e.g.*, H.R. 10191, 94th Cong., 1st Sess. § 804(2) (1975), *and* H.R. 11969, 94th Cong., 2d Sess. § 806(9) (1976), *with* Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 807(9) (1977).

522 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra* (FDCPA prohibits "simulating court process"). *See also* FTC Official Staff Commentary § 807(9)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

523 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra* (FDCPA prohibits "utilizing bogus legal documents"). *See* also Kachlic v. Bursey & Assoc., 2013 WL 820375 (D. Ariz. Mar. 5, 2013) (providing affidavit in support of state court debt collection claim in response to verification request); Johnson v. Eaton, 873 F. Supp. 1019 (M.D. La. 1995) (mailed questionnaire and unfiled, draft consent judgment created false impression that they were issued or approved by court). *But see* Yohannes v. Olympic Collection, Inc., 2019 WL 5103777, at *11 (W.D. Wash. Oct. 11, 2019) (no evidence that writs of garnishment were falsely represented as official court documents where they were not recorded in state court docket and required fees were not paid).

524 *See* Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890 (N.D. Ga. Dec. 7, 1984) (letter labeled "FINAL NOTICE" with legal caption, red notary seal, and indicating copy to court clerk); Gasser v. Allen County Claims & Adjustment, Inc., 1983 U.S. Dist. LEXIS 20361 (N.D. Ohio Nov. 2, 1983) (form letter with caption, pink paper, bold lettering, direction to bring notice, and make no phone calls suggested officially authorized legal compulsion); 122 Cong. Rec. H7309 (daily ed. July 19, 1967) (remarks by Rep. Annunzio) (giving example of letter with official-looking gold seal simulating subpoena or judgment). *See also* Kachlic v. Bursey & Assoc., 2013 WL 820375 (D. Ariz. Mar. 5, 2013) (response to verification request had the facial appearance of legal document); Johnson v. Ardec Credit Services, Inc., 1984 U.S. Dist. LEXIS 24889 (N.D. Ga. Mar. 21, 1984) (collection letter headed "Total Equity d.b.a. Manchester Apartments v. Jessie Johnson"); FTC Official Staff Commentary § 807(9)-1 (this provision prohibits creating false impression that document comes from any source other than collector), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Schorr, FTC Informal Staff Letter (July 27, 1981); DiPippa, FTC Informal Staff Letter (Jan. 5, 1981); Wehrwein, FTC Informal Staff Letter (Aug. 7, 1980); Aycock, FTC Informal Staff Letter (Apr. 13, 1978); Hoivik, FTC Informal Staff Letter (Jan. 30, 1978).

525 *See* Erekson v. Clarkson & Hale, L.L.C., 2018 WL 4220603 (D.S.C. Sept. 5, 2018).

526 *See* Tolentino v. Friedman, 833 F. Supp. 697 (N.D. Ill. 1993) (placing collection attorney's notice in same envelope as summons and complaint would mislead debtor about court's role); Thomas v. Nat'l

§ 1692e(9)'s application to such practices are older circuit court rulings finding such practices to be deceptive pursuant to the FTC Act.[527]

FDCPA § 1692e(9) is broader in scope that just misrepresentations related to legal processes and government affiliation. It prohibits any written communications that creates a false impression of source, authorization, or approval, including:

- Letters sent by a creditor on a collection agency's stationery;[528]
- Letters misrepresenting the creditor's identity;[529]
- An invalid execution served on a bank that appears to be authorized[530]
- A collection law firm adding unauthorized fees to a garnishment order, where a consumer would assume the dollar amount to be garnished had been approved by a court;[531] and
- A collection attorney entering into a settlement without authorization of its client and where the settlement is later rejected by the client.[532]

Misrepresentations that a collector is a credit reporting agency certainly violate FDCPA § 1692e(9), but may be better challenged under section 1692e(16) (the false representation or implication that a debt collector operates or is employed by a consumer reporting agency).

On the other hand, courts have found not to violate FDCPA § 1692e(9):

- Letters that include at the bottom the name of an executive at the collection agency, where that name does not imply that individual is the letter's signatory;[533]
- Use of the name "Bureau of Medical Economics," since there was no implication that the debt collector was a government agency, as there were no government symbols or indicia, the email domain was .com (not .gov), and the letter indicated it was from a debt collector on behalf of a medical creditor;[534]
- Using the word "State" in the collection agency's name;[535]
- Using the name "Credit Protection Association";[536]
- Including "Revenue Department" on the envelope's return address.[537]
- An envelope stating "official notice" and "important information enclosed";[538]
- Service of an unfiled summons and complaint;[539]
- Use of a state "General Business License" number in the signature block;[540] and
- Use of an information subpoena prepared by the issuing lawyer, not by a court, as allowed by state law.[541]

7.2.9.2 Where Debt Collector Is Related to Source, Authorizer, or Approver

Where the debt collector is closely related to the source, authorizer, or approver, whether the debt collector's representation of source, authorization, or approval violates FDCPA § 1692e(9) may depend on the legitimacy of that representation. A unanimous Supreme Court in *Sheriff v. Gillie* found no FDCPA § 1692e(9) violation when attorneys hired as special

Bus. Assistants, Inc., 1984 U.S. Dist. LEXIS 24876 (D. Conn. Oct. 5, 1984) (forms appeared to be government forms, word "National" in collector's name prominent, and at least one form contained prominent box stating "Pursuant to the Federal Fair Debt Collection Practices Act, Section 809, Validation of Debts"). *See also* N. Star Capital Acquisitions, L.L.C. v. Krig, 2008 WL 346021 (M.D. Fla. Feb. 7, 2008) (including stipulation of settlement and collection letter with service of summons and complaint); Douglass, FTC Informal Staff Letter (Nov. 26, 1993). *Cf.* Gartrell v. J.J. Marshall & Assoc., Inc., 2020 WL 3250219, at *5 (M.D. Fla. Mar. 23, 2020 (recommending that *North Star Capital Acquisitions* analysis be applied to claim brought under state debt collection statute's provision that is analogous to § 1692e(9) where language and sending of letter itself arguably gave appearance that defendant was licensed and authorized by state of Florida to collect consumer debts, when it is not), *adopted*, 2020 WL 3250037 (M.D. Fla. Apr. 28, 2020).

527 *See* Floersheim v. Fed. Trade Comm'n, 411 F.2d 874 (9th Cir. 1969) (using government letter format, Gothic type, D.C. address); Slough v. Fed. Trade Comm'n, 396 F.2d 870 (5th Cir. 1968) (mailing forms seeking location information from mail drops in appropriate state capitals and using official sounding titles, such as "County Agent"); United States Ass'n of Credit Bureaus v. Fed. Trade Comm'n, 299 F.2d 220 (7th Cir. 1962) (including American Eagle and red, white, and blue shield with stars); Bennett v. Fed. Trade Comm'n, 200 F.2d 362 (D.C. Cir. 1952) (using D.C. address, letter format similar to VA, and official-sounding title, "disbursement officer"; consumer locating company).

528 *See* Durve v. Oker, 1996 WL 355311 (Ohio Ct. App. July 8, 1996). *Cf.* Raff, FTC Informal Staff Letter (Sept. 11, 1986) (proposed demand letter printed on collection agency letterhead has potential to mislead consumers that, at time letter is received, collection agency is involved in collection process).

529 Wallace v. Wash. Mut. Bank, 683 F.3d 323 (6th Cir. 2012) (identifying wrong bank created problems for consumer in resolving debt); Bourff v. Rubin Lublin, L.L.C., 674 F.3d 1238 (11th Cir. 2012) (identifying bank as creditor before bank was assigned mortgage note).

530 *See* Dina v. Cuda & Assoc., 950 F. Supp. 2d 396 (D. Conn. June 13, 2013).

531 *See* Eger v. Messerli & Kramer, P.A., 2015 WL 3915776 (D. Minn. June 25, 2015).

532 Duell v. First Nat'l Bank of Omaha, 2015 WL 4602008 (S.D. Cal. July 29, 2015). *See also* Deschaine v. Nat'l Enter. Sys., Inc., 2013 WL 12121197 (N.D. Ill. Mar. 7, 2013) (stating twice in collection letter that Paragon Way is the "client," "Current Creditor" is Precision Recovery Analytics, Inc., and "Original Creditor" is GE Money Bank/JC Penney Consumer, without any further explanation).

533 Campuzano-Burgos v. Midland Credit Mgmt., Inc., 550 F.3d 294, 298 (3d Cir. 2008).

534 Empire v. Med. Soc'y Bus. Services Inc., 2014 WL 5080414 (D. Ariz. Oct. 9, 2014).

535 Molesky v. State Collection & Recovery Services, L.L.C., 2015 WL 5746835 (N.D. Ohio Sept. 30, 2015).

536 Campbell v. Credit Prot. Ass'n, L.P. 2013 WL 1282348 (E.D. Mo. Mar. 27, 2013).

537 Johnson v. NCB Collection Services, 799 F. Supp. 1298 (D. Conn. 1992).

538 McRobie v. Credit Prot. Ass'n, 2018 WL 5608121 (E.D. Pa. Oct. 30, 2018).

539 LeClair v. Suttell & Assoc., 2010 WL 417418 (W.D. Wash. Jan. 29, 2010).

540 Washington v. Merchants Credit Guide Co., 2020 WL 435463 (N.D. Ohio Jan. 28, 2020) (neither letterhead nor body of letter suggested that collection agency was acting under any government authority, and signature block did not represent agency as debt collector "to" or "for" state of Ohio).

541 Jensen v. Pressler & Pressler, 791 F.3d 413 (3d Cir. 2015).

counsel by a state attorney general for the collection of debts used the state attorney general's letterhead while disclosing that they were acting as special counsel.[542] The state attorney general had required the special counsel to use the letterhead. There was no misrepresentation in that the special counsel accurately represented the relationship to the state attorney general.[543]

On the other hand, the Seventh Circuit found that an attorney who owns both a law firm and an intertwined collection agency violated FDCPA § 1692e(9) by allowing mass mailings of collection letters to be sent on his law firm letterhead and over his facsimile signature. The attorney was not involved in the matter as an attorney, since he did not review debtor files, did not decide which letters to send, and did not see particular letters before they were sent. "The attorney letter implies that the attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action." That was not the case.[544] Note also that FDCPA § 1692e(3) prohibits the false representation that a communication is from an attorney.[545]

7.2.10 *Deception in Collecting a Debt or Obtaining Consumer Information, FDCPA § 1692e(10)*

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.[546]

FDCPA § 1692e prohibits "false, deceptive, or misleading representation or means in connection with the collection of any debt." FDCPA § 1692e(10) is quite similar, prohibiting false representations and deceptive means to collect a debt. Courts generally view FDCPA § 1692e(10) as being as broad in scope as the general deception prohibition in the first sentence of section 1692e,[547] and, like that sentence, it is a "catch-all" provision.[548] FDCPA § 1692e(10) makes clear that it can apply to both attempting to collect a debt and obtaining information concerning a consumer.

FDCPA § 1692e(10) is to be construed broadly by the courts to deal with new deceptive collection methods as they emerge.[549] When alleging a violation of one of the other fifteen enumerated violations found in FDCPA § 1692e, it is prudent to also allege a section 1692e(10) violation in case the court finds the practice does not fall within the more specific prohibition. The converse is also prudent—when pleading a FDCPA § 1692e(10) violation, also plead any applicable more specific prohibition because a court may be more comfortable ruling on something more specific A practice can violate both § 1692e(10) and another provision of section 1692e. Even if a court were to dismiss the FDCPA § 1692e(10) claims as duplicative of the other,[550] this is unlikely to affect the consumer's damage recovery.

Because of its general nature, applicable to all forms of deceptive representations and practices in connection with collection of a debt, this subsection will not list all the types of conduct that violate FDCPA § 1692e(10). Instead, reference should be made to the other subsections in this chapter, with particular attention to § 7.3, *supra*, which discusses general standards as to deception, and to § 7.4, *infra*, which sets out

542 578 U.S. 317, 136 S. Ct. 1594, 194 L. Ed. 2d 625 (2016).

543 *See also* Solberg v. Victim Services, Inc., 415 F. Supp. 3d 935, 951–952 (N.D. Cal. 2019) (private entity administering bad-check diversion programs authorized to use district attorneys' letterhead and send out letters under name of district attorneys did not violate § 1692e(9)); Bednarski v. Potestivo & Assoc., 2017 WL 896777, at *4 (N.D. Ill. Mar. 7, 2017) (no violation where letter was analogous to that in *Sheriff*; debt collector represented United States Department of Justice in matter, as was stated in first sentence of letter).

544 Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996).

545 *See* § 7.2.3, *supra*.

546 15 U.S.C. § 1692e(10). *See also* Reg. F § 1006.18(d).

This provision first appeared in its present form in H.R. 13720 94th Cong., 2d Sess. § 806(10) (1976) and was contained in each subsequent major bill leading to the Act.

547 *E.g.*, Teemogonwuno v. Todd, Bremer & Larsen, Inc., 1991 U.S. Dist. LEXIS 21720 (N.D. Ga. June 13, 1991) (violating §§ 1692e(2)(A), 1692e(10) where debt collector's attempt to collect amount which included, but did not itemize, $4000 as collection fees on student loan would deceive "least sophisticated consumer" concerning character and amount of debt). *See In re* Eastman, 419 B.R. 711 (Bankr. W.D. Tex. 2009) (violating § 1692e(10) when defendants filed claim to recover on debt that was not recoverable due to discharge in bankruptcy); FTC Official Staff Commentary §§ 807(1), 807(10)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; § 7.3.2, *infra*. *See also* Dutton v. Wolhar, 809 F. Supp. 1130 (D. Del. 1992) (mere re-allegation of violations of other sections of FDCPA was not sufficient to constitute violation of § 1692e(10)), *aff'd*, 5 F.3d 649 (3d Cir. 1993).

548 *See* Bicking v. Law Offices of Rubenstein & Cogan, 783 F. Supp. 2d 841, 846 (E.D. Va. 2011) (§ 1692e(10) is not limited to use of false threats; "If subsection e(10) barred only the use of false threats, the phrase 'deceptive means' would be rendered meaningless.").

549 Congress included this general proscription in recognition of its inability to foresee every conceivable abusive debt collection method. According to the Senate report, "this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed." S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*.

550 Despite innumerable examples of courts finding violations of both § 1692e(10) and other § 1692e provisions, a few courts refuse to find a § 1692e(10) violation when the consumer also alleges violation of another § 1692e provision applicable to the exact same conduct. *See* Barlow v. Safety Nat'l Cas. Corp, 2014 WL 1327922 (M.D. La. 2014), *aff'd*, 586 Fed. Appx. 191 (5th Cir. 2014); Lee v. Credit Mgmt., L.P., 846 F. Supp. 2d 716 (S.D. Tex. 2012); Wideman v. Monterey Fin. Serv. Inc., 2009 WL 1292830, at *3 (W.D. Pa. May 7, 2009); Gostony v. Diem Corp., 320 F. Supp. 2d 932, 942 (D. Ariz. 2003); Dutton v. Wolhar, 809 F. Supp. 1130, 1140 (D. Del. 1992); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 394 (D. Del. 1991).

caselaw finding violations as to selected topics, where the court often finds violations under FDCPA § 1692e(10)—such as deceptive offers to settle, representations regarding time-barred debts, deception in collection litigation, misrepresentations regarding mortgage servicing and foreclosures, and deception as to student loans, credit reporting, and the nature of the collector.

Regulation F (effective November 30, 2021) issued Official Interpretations about false representations or deceptive means related to social media under this FDCPA provision. These are discussed at § 7.4.2, *infra*.

7.2.11 *Notice of Attempt to Collect a Debt, FDCPA § 1692e(11)*

7.2.11.1 Generally

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.[551]

FDCPA § 1692e(11) and Reg. F § 1006.18(e)(1) and (e)(2) set out three separate requirements:

1. If a collector's initial communication with a consumer is oral, then the collector must, in that oral communication, state that the collector is attempting to a collect a debt and that any information obtained will be used for that purpose;
2. In the initial written communication, even if there is a prior oral communication, the collector must make the same disclosure.
3. In all other communications, whether written or oral, the communication must disclose that it is from a debt collector.

Regulation F (effective November 30, 2021) adds the additional requirement that the disclosures must be in the same language or languages used for the rest of the communication in which the debt collector conveyed the disclosures.[552] Any translation of the disclosures a debt collector uses must be complete and accurate.[553] The Reg. F Official Interpretations set out this example.

> ABC debt collector is collecting a debt. ABC debt collector's initial communication with the consumer takes place in Spanish. [Reg. F §] 1006.18(e)(4) requires ABC debt collector to provide in Spanish the disclosure required by [Reg. F] § 1006.18(e)(1). Thereafter, ABC debt collector has a communication with the consumer that takes place partly in English and partly in Spanish. During this communication, the debt collector must provide the disclosure required by [Reg. F] § 1006.18(e)(2) in both English and Spanish.[554]

A debt collector must make the disclosure required in the debt collector's initial communication with a consumer, regardless of the medium of communication and regardless of whether the debt collector or the consumer initiated the communication.[555] The Regulation F Official Interpretations provide an example of a debt collector who has not previously communicated with a consumer that leaves a limited-content message for the consumer to which the consumer responds. Under Regulation F, limited-content messages are not communications.[556] Because the consumer-initiated call is considered the initial communication between the debt collector and the consumer, the debt collector must disclose during that telephone call that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.[557]

The Regulation F supplemental information discusses when a communication is a subsequent communication requiring a new disclosure or where it is a continuation of an existing communication not requiring new disclosures:

> On one hand, communications that occur in different media, such as an email message followed by a text message, or communications that have no inherent connection between them, such as two letters, seem to be exactly the kind of "subsequent communications" where a new disclosure would further the purposes of the FDCPA section 807(11) [§ 1692e(11)] and final [Reg. F] § 1006.18(e)(2). On the other hand, some communications, such as a webchat session, may be closer to individual telephone calls where new disclosures throughout the conversation would likely be unnecessary.[558]

The disclosure requirements apply to all debt collector communications, even those not designed to deceive consumers as to the purpose of the communication.[559] But a formal pleading

551 15 U.S.C. § 1692e(11) *See also* Reg. F § 1006.18(e)(1), (2).
552 Reg. F § 1006.18(e)(4).
553 Reg. F § 1006.18(e)(4).
554 Reg. F Official Interpretations § 18(e)(4)-1(i).
555 Reg. F Official Interpretations § 18(e)(1)-1.
556 *See* § 7.2.11.2, *infra*.
557 Reg. F Official Interpretations § 18(e)(1)-1.
558 85 Fed. Reg. 76,734, 76,830 (Nov. 30, 2020) (footnote omitted).
559 *See* Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984); Garrick v. Hosp. Collection Services, 1990 U.S. Dist. LEXIS 20961 (D. Conn. Jan. 31, 1990).

in a legal action is not a written communication for purposes of FDCPA § 1692e(11), as examined at § 7.2.11.4, *infra*.

Regulation F specifically lists the disclosures required by FDCPA § 1692e(11) and Reg. F § 1006.18(e)(1) and (2) as required validation information that must be provided to the consumer.[560] The Official Interpretations to that rule specify that, where the validation information is provided in a written or electronic notice provided within five days of the initial communication, the debt collector complies with Reg. F § 1006.34(c)(1) by making *either* the disclosure required by Reg. F § 1006.18(e)(1) or the disclosure required by Reg. F § 1006.18(e)(2).[561]

Prior to 1996 amendments to the FDCPA,[562] except when acquiring location information from a third party, the debt collector under section 1692e(11) had to disclose in *all* communications that the communication was for the purpose of collecting a debt and that any information received would be used for that purpose.[563] Thus, older court decisions interpreting the section as written prior to 1996 may no longer be applicable.

Before the 1996 amendments, the provision applied to communications with the consumer and with third parties.[564] The current provision applies to consumers,[565] and does not apply to communications with other parties.[566]

This 1996 change eliminating the provision's applicability to third parties has limited significance because FDCPA § 1692c prohibits most third-party contacts, except for communications seeking the consumer's location information, and FDCPA § 1692b regulates communications seeking location information. But FDCPA § 1692c does not limit communications with the "consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator."[567]

Consequently, FDCPA § 1692e(11) appears to offer no protection when a collector contacts such individuals, unless the collector is alleging that they are obligated on the debt, in which case the provision applies. A number of courts also find that when a debt collector contacts the consumer's attorney, FDCPA § 1692e(11) does not apply—the provision applies to communications with the consumer.[568]

A collector is strictly liable for non-compliance.[569] Whether the non-disclosure was material to the consumer is irrelevant—even if materiality is a requirement for a deception claim, it is not required where the debt collector fails to make a required disclosure.[570]

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560 Reg. F § 1006.34(c)(1). *See* § 9.4.3, *infra*.

561 Reg. F Official Interpretations § 34(c)(1)-1.

562 *See* § 3.4.2.3, *supra*.

563 Text of former section 1692e(11): "(11) Except as otherwise provided for communications to acquire location information under section 804, the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose."

564 *See* 15 U.S.C. § 1692e(11) *as amended by* Pub. L. No. 104-208, 110 Stat. 3009, the Omnibus Consolidated Appropriations Act of 1997, § 2305 (Sept. 30, 1996). 15 U.S.C. § 1692e(11) previously read: "[T]he following conduct is a violation of this section: . . . (11) Except as otherwise provided for communications to acquire location information under section 1692b of this title [section 804], the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11) (Supp. II 1979). The original provision was first proposed in the initial House bill and omitted from the second. H.R. 10191, 94th Cong., 1st Sess. § 805(10) (1975).

In later House proceedings, three other (subsequently omitted) subsections were proposed prohibiting deceptive survey, prepaid package, and free gift ruses commonly used to obtain location information. *See* H.R. 13720, 94th Cong., 2d Sess. §§ 806(11), 806(12), 806(13) (1976). While the other subsections were deemed superfluous in view of other FDCPA protections, this section was included in Senate bills because it required affirmative disclosures not required by other parts of the Act.

565 15 U.S.C. § 1692a(3). *See* Isaac v. RMB, Inc., 2014 WL 3566069 (N.D. Ala. July 18, 2014) (§ 1692e(11) applies even where consumer does not owe debt), *aff'd*, 604 Fed. Appx. 818 (11th Cir. 2015); Strouse v. Enhanced Recovery Co., L.L.C., 956 F. Supp. 2d 627 (E.D. Pa. 2013) (same). *Cf.* Hadler v. Alltran Fin., L.P., 2019 WL 1433666 (D. Minn. Mar. 5, 2019) (no § 1692e(11) claim in "mistaken contact" case, since allegations did not support inference that defendant asserted at any time that plaintiff was obligated to pay any debt), *adopted*, 2019 WL 1429617 (D. Minn. Mar. 29, 2019).

566 *See* Girdler v. Convergent Outsourcing, Inc., 2016 WL 7479541 (D. Mass. Dec. 29, 2016) (debt collector claimed that it thought person answering phone was not consumer but third person); Kempa v. Cadlerock Joint Ventures, L.P., 2011 WL 761500 (E.D. Mich. Feb. 25, 2011) (no violation where person answering phone refused to identify himself as consumer). *But see* Prendergast v. First Choice Assets, L.L.C., 317 F. Supp. 3d 1018 (N.D. Ill. 2018) (cannot use third-party defense contact when debtor adequately identified himself by name and address, even though would not provide Social Security number).

567 15 U.S.C. § 1692c(d). *See* § 5.10, *supra*.

568 *See, e.g.*, Guerrero v. RJM Acquisitions L.L.C., 499 F.3d 926 (9th Cir. 2007); Dikeman v. National Educators, Inc., 81 F.3d 949 (10th Cir. 1996); Condon v. Global Credit & Collection Corp., 2010 WL 5071014 (M.D. Fla. Dec. 7, 2010); Young v. Manley, 2000 WL 1280968 (N.D. Ill. Sept. 6, 2000).

569 *See, e.g.*, Doshay v. Global Credit Collection Corp., 796 F. Supp. 2d 1301, 1304 (D. Colo. 2011); Gryzbowski v. I.C. Sys., Inc., 691 F. Supp. 2d 618, 625 (M.D. Pa. 2010); Garrick v. Hosp. Collection Services, 1990 U.S. Dist. LEXIS 20961 (D. Conn. Jan. 31, 1990).

570 Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 374 (4th Cir. 2012), *abrogated on other grounds by* Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016); Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201, 208 (E.D.N.Y. 2019) (failure to make disclosure actionable *per se*, without any requirement of materiality); Price-Richardson v. DCN Holdings, Inc., 2018 WL 902167, at *6 (D. Md. Feb. 15, 2018) ("Although courts have generally required that other § 1692e violations rest upon material misrepresentations, holding that immaterial statements are non-actionable, this requirement does not attach to a § 1692e(11) disclosure omission. Therefore, a mere failure to disclose is actionable under the FDCPA."). *See also* Prendergast v. First Choice Assets, L.L.C., 317 F. Supp. 3d 1018, 1026 (N.D. Ill. 2018) ("it is not clear that this materiality requirement applies § 1692e(11) specifically—and if it does, violations of § 1692e(11) are *per se* material"); Heyer v. Pierce & Assoc., 2017 WL 75739, at *13 n.5 (N.D. Ill. Jan. 9, 2017) ("It is not at all clear that the materiality requirement applies to omissions under Section 1692e(11)."); Smith v. Greystone Alliance L.L.C., 2011 WL 1303377 (N.D. Ill. Mar. 29, 2011) (non-disclosure is material). *Cf.* Driesen v. RSI Enters. Inc., 2019 WL 283646, at *4 (D. Ariz. Jan. 22, 2019) (in Ninth Circuit "a materiality requirement probably applies to claims arising under § 1692e(11)"; alleged omission in this case was material); Fausz v. NPAS, Inc., 237 F. Supp. 3d 559, 570 (W.D. Ky. 2017) (applying materiality requirement; consumer did not show that debt collector's failure "to identify itself as a debt collector or to provide that any information that it obtained

FDCPA § 1692e(11), being a disclosure provision, is likely to draw a challenge as to whether a claim involves an Article III case or controversy. This issue is discussed at § 11.15, *infra*, and with particular application to FDCPA § 1692e(11) at § 11.10.5.5, *infra*.

7.2.11.2 Is a Voicemail or Other Contact a "Communication"?

FDCPA § 1692e(11) specifies required notices during a debt collector's "communication." A preliminary issue in FDCPA § 1692e(11)'s application is whether a voicemail or other minimal contact with the consumer is a communication. The FDCPA defines a communication as "conveying of information regarding a debt directly or indirectly to any person through any medium."[571] A voicemail message or any other contact with a consumer is certainly via a medium that conveys information directly or indirectly to a person. The question is whether the information is regarding a debt.

Regulation F resolves this issue by introducing the concept of a limited-content message, as examined in more detail at § 4.9, *supra*. A limited-content message is a voicemail that contains only certain required and optional content. Regulation F's Official Interpretations provide that a limited-content message is not a "communication" because it does not convey information regarding a debt directly or indirectly to any person.[572] As a result, a debt collector who leaves only a limited-content message for a consumer need not make the disclosures required of a debt collection communication.[573] "However, if a debt collector leaves a voicemail message for a consumer that includes content in addition to the content described in [Reg. F] § 1006.2(j)(1) and (2) and that directly or indirectly conveys any information regarding a debt, the voicemail message is a communication, and the debt collector is required to make the [Reg. F] § 1006.18(e) disclosures."[574] The consumer's response to a limited-content message is a communication, and then the disclosures are required at that point, even though the communication is initiated by the consumer.[575]

The remainder of this section describes the law that applied to voicemail messages prior to November 30, 2021. This law is still valid precedent to the extent that a voicemail message *does not* qualify as a limited-content message.

It is enough to show a call is regarding a debt if the call identifies itself as being from a debt collector; the call need not indicate an attempt to collect on the debt.[576] A voicemail can be ruled as regarding a debt where the voicemail contains a long reference number and the caller said there were documents pertaining to the consumer in the caller's office.[577]

Even where the debt collector just leaves a person's name and a phone number to call back, the majority position is that this is a communication and that FDCPA § 1692e(11) applies if the purpose of the message is debt collection.[578] The same is the case where the call tells the consumer to hold and someone will be with them shortly.[579] Some courts find that FDCPA § 1692e(11) does not apply to a debt collector merely leaving a message with a callback number.[580]

Debt collectors argue that a message that avoids mention of a debt should not be covered because the collector would otherwise be placed in a difficult position. If the collector is obligated to identify a voicemail as from a debt collector,

would be used for a debt collection purpose was materially false or misleading"); Kagan v. Selene Fin. L.P., 210 F. Supp. 3d 535, 548 (S.D.N.Y. 2016) ("Although the Second Circuit has not clearly established that violations of § 1692e(11) must be material in order to be enforceable, it has cited other circuits (even if in a summary order) so holding with apparent approval and numerous courts therein have adopted the materiality requirement.").

571 15 U.S.C. § 1692a(2).

572 Reg. F Official Interpretations § 2(d)(2).

573 Reg. F Official Interpretations § 18(e)-1.

574 Reg. F Official Interpretations § 18(e)-1.

575 Reg. F Official Interpretations § 18(e)(1)-1.

576 Hart v. Credit Control, L.L.C., 871 F.3d 1255, 1258 (11th Cir. 2017) ("This is Credit Control calling with a message. This call is from a debt collector. Please call us at 866-784-1160."). *Cf.* § 4.9, *supra* (discussing Reg. F § 1006.2(j), which does not include a disclosure that the call is from a debt collector as either required or optional content for a limited-content message).

577 Koby v. ARS Nat'l Services, Inc., 2010 WL 1438763 (S.D. Cal. Mar. 29, 2010). *Cf.* § 4.9, *supra* (discussing Reg. F § 1006.2(j), which does not include reference numbers or references to documents as either required or optional content for a limited-content message).

578 *See* Winehouse v. GC Services L.P., 2017 WL 2455075 (E.D.N.Y. June 6, 2017); Pisarz v. GC Services L.P., 2017 WL 1102636 (D.N.J. Mar. 24, 2017) Rhodes v. Nat'l Collection Sys., Inc., 2016 WL 6472112 (D. Colo. Oct. 31, 2016); Lyon v. Bergstrom Law, Ltd., 2016 WL 4161107 (E.D. Cal. Aug. 5, 2016); Kersten v. Quick Collect, Inc., 2015 WL 105797 (D. Or. Jan. 7, 2015); Jarzyna v. Home Props., L.P., 114 F. Supp. 3d 243 (E.D. Pa. 2015); Erez v. Steur, 2014 WL 6069847 (W.D. Wash. Nov. 13, 2014); Isaac v. RMB, Inc., 2014 WL 1278096 (N.D. Ala. Mar. 27, 2014), *aff'd*, 604 Fed. Appx. 818 (11th Cir. 2015); Latimore v. Gateway Retrieval, L.L.C., 2013 WL 791258 (N.D. Ga. Feb. 1, 2013), *adopted*, 2013 WL 791308 (N.D. Ga. 2013) (left message to call because conducting investigation that involves you directly); Thompson v. Nat'l Credit Adjusters, L.L.C., 2012 WL 5372577 (D. Minn. Oct. 31, 2012); Thorne v. Accounts Receivable Mgmt., Inc., 2012 WL 3108662 (S.D. Fla. July 24, 2012); Whatley v. Creditwatch Services, Ltd., 2012 WL 2885640 (E.D. Tex. July 13, 2012) (prerecorded message required to comply), *adopted*, 2012 WL 3151261 (E.D. Tex. Aug. 2, 2012); Pawelczak v. Nations Recovery Ctr., Inc., 2012 WL 2192263 (N.D. Ill. June 14, 2012); Wood v. GC Services, L.P., 2012 WL 995207 (M.D. Fla. Mar. 23, 2012); Lensch v. Armada Corp., 795 F. Supp. 2d 1180 (W.D. Wash. 2011); Stewart v. Regent Asset Mgmt. Solutions, 2011 WL 1766018 (N.D. Ga. May 4, 2011); Costa v. Nat'l Action Fin. Services, 634 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007); Hosseinzadeh v. M.R.S. Assoc., Inc., 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005). *See also* Appx. E.2.4.9, *infra*. *But cf.* § 4.9, *supra* (discussing Reg. F § 1006.2(j), which requires limited-content messages to include the name of a natural person that the consumer can contact and a call-back number).

579 Paul v. Syndicated Office Sys., Inc., 2012 WL 12838293 (S.D. Fla. Nov. 29, 2012).

580 Stewart v. Nathan & Nathan, 2014 WL 977979 (E.D. Tenn. Mar. 12, 2014); Makreas v. Moore Law Group, A.P.C., 2011 WL 4803005 (N.D. Cal. Oct. 11, 2011); Koby v. ARS Nat'l Services, Inc., 2010 WL 1438763 (S.D. Cal. Mar. 29, 2010); Biggs v. Credit Collections, Inc., 2007 WL 4034997 (W.D. Okla. Nov. 15, 2007). *Cf.* § 4.9, *supra* (discussing Reg. F § 1006.2(j), which requires limited-content messages to include a call-back number).

third parties (e.g., children, roommates, or other employees) might overhear the voicemail, resulting in a third-party contact prohibited by FDCPA § 1692c(b). But courts find that this is no reason not to comply with both FDCPA §§ 1692c(b) and 1692e(11).[581]

At least one court has held that there can be a violation of FDCPA § 1692e(11) even if a consumer does not listen to a voicemail.[582] But the Sixth Circuit has ruled that where the consumer never received a writing, there can be no violation based on that writing.[583]

Some courts find that FDCPA § 1692e(11) does not apply where the collector hangs up before giving a message or where the message is inaudible.[584] But another court found it did apply where the collector called fifty times and hung up before the consumer could answer.[585]

Issues also arise as to whether not just a voicemail but also a debt collector's written communication is regarding a debt and thus a covered communication.[586] A collector's letter seeking stipulation of discontinuance of a debt collection suit against the consumer could be found to be regarding a debt.[587] Where a collector merely sought information regarding the consumer's possible bankruptcy, the court could not determine on the facts whether this was regarding a debt, and so could not rule at the summary judgment stage.[588] Where a consumer disputes a debt and a debt collector reports what it believes to be the current status of a debt, this was found to be in relation to a debt.[589] Neither an assignment of mortgage nor its recording is an initial or subsequent communication sent to a debtor or third parties in connection with collection of debt for the purposes of FDCPA § 1692e(11).[590]

Prior to the FDCPA's 1996 amendment, the relevant language read: "failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer . . ." Since this language is different than "conveying of information regarding a debt,"[591] decisions interpreting FDCPA § 1692e(11)'s applicability to communications prior to the 1996 amendments are of limited value.

In addition to the discussion of limited-content messages in § 4.9, *supra*, voicemail messages and their implications under FDCPA §§ 1692c(b) and 1692d(6) are discussed at §§ 5.7.8 and 6.8, *supra*.

7.2.11.3 Collector's Adequate Disclosure of FDCPA § 1692e(11) Notices

A collector's disclosure of the FDCPA § 1692e(11) notices must be clear and effective.[592] It is not adequate to place the notice on a separate document[593] or on the letter's reverse side[594] without the letter's front referencing that the notice is on the other document or the letter's reverse side. The reference must also be conspicuous.[595] But courts have found it adequate where a letter's front side clearly and conspicuously refers

581 Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350 (11th Cir. 2009); Pawelczak v. Nations Recovery Ctr., Inc., 2012 WL 2192263 (N.D. Ill. June 14, 2012); Koby v. ARS Nat'l Services, Inc., 2010 WL 1438763 (S.D. Cal. Mar. 29, 2010) (voicemail must comply with §§ 1692c(b), 1692d(6), and 1692e(11)). *But cf.* § 4.9, *supra* (discussing Reg. F § 1006.2(j) and the safe harbors created for compliant limited-content messages).

582 Jarzyna v. Home Props., L.P., 114 F. Supp. 3d 243 (E.D. Pa. 2015). *Cf.* Grosz v. Cavalry Portfolio Servs, L.L.C., 2019 WL 4888583, at *3 (E.D.N.Y. Sept. 30, 2019) (amended complaint and motion remained silent as to whether the wife-plaintiff ever actually heard the voicemail message but husband-plaintiff did hear the message).

583 Hardin v. Finkelstein, Kern, Steinberg & Cunningham, P.C., 707 Fed. Appx. 855, 858 (6th Cir. 2017).

584 Isaac v. RMB, Inc., 2014 WL 1278096 (N.D. Ala. Mar. 27, 2014), *aff'd*, 604 Fed. Appx. 818 (11th Cir. 2015); Lynch v. Fin. Recovery Services of Minn., Inc., 2013 WL 11971263 (S.D. Fla. Sept. 30, 2013) (where predictive dialer left voicemail only containing series of beeps, series of numbers that might be phone number, and "thank you," call was not communication within § 1692a(2) violating § 1692e(11)); Garza v. MRS BPO, L.L.C., 2012 WL 3527072 (S.D. Tex. Aug. 15, 2012).

585 Sussman v. I.C. Sys., Inc., 928 F. Supp. 2d 784 (S.D.N.Y. 2013).

586 *See* Brinkley v. Midland Funding, L.L.C., 2016 WL 5017307 (E.D. Tenn. Sept. 19, 2016) (filing certified copy of state court judgment with county register of deeds was not communication from debt collector).

587 *See* Hummel v. Forster & Garbus L.L.P., 2017 WL 4697514 (W.D.N.Y. Oct. 19, 2017).

588 Buckley v. Bass & Assoc., 249 F.3d 678 (7th Cir. 2001).

589 Mennes v. Capital One, 2014 WL 1767079 (W.D. Wis. May 5, 2014).

590 *See, e.g.*, Tardi-Osterhoudt v. McCabe, Weisberg & Conway L.L.C., 2019 WL 4242410, at *7 (N.D.N.Y. Sept. 6, 2019).

591 *See* § 3.4.2.3, *supra*.

592 *See* Dykes v. Portfolio Recovery Assoc., 111 F. Supp. 3d 739 (E.D. Va. June 30, 2015) (Spanish language § 1692e(11) notice to a non-Spanish speaker was not effective). *See also* Reg. F § 1006.34(d)(1) ("validation information required by paragraph (c) [which includes the § 1692e(11) disclosure] must be clear and conspicuous").

593 Sylvester v. Laks, 1991 U.S. Dist. LEXIS 21777 (N.D. Ohio Aug. 1, 1991). *Cf.* Day v. Law Offices of A. Lysa Simon, 2019 WL 1751824, at *5 (C.D. Cal. Feb. 4, 2019) (letter provided notice in the "Notice of Rights" in complaint, which was included with letter and deemed incorporated by reference). *Cf.* Reg. F, Appx B-1 Model Validation Notice (placing § 1692e(11) notice on the front side of the model validation notice).

594 *See* Lee v. Select Portfolio Servicing, Inc., 2016 WL 9275411 (N.D. Ga. Aug. 25, 2016) (disclosure was not in a sufficiently obvious location); Phillips v. Amana Collection Services, 1992 WL 227839 (W.D.N.Y. Aug. 25, 1992); Read v. Amana Collection Services, 1991 WL 5155 (W.D.N.Y. Jan. 15, 1991); Butler v. Int'l Collection Services, Inc., 1989 U.S. Dist. LEXIS 19102 (D. Conn. June 6, 1989). *See also* Friedman v. HHL Fin. Services, Inc., 1993 WL 367089 (N.D. Ill. Sept. 17, 1993) (debt collection warning pursuant to § 1692e(11) is sufficient when stated on front of collection letter and need not be restated on back). *Cf.* Reg. F, Appx. B-1 Model Validation Notice (placing § 1692e(11) notice on the front side of the model validation notice). *But cf.* Weber v. Payco-General Am. Credits, 1990 WL 341654 (D. Conn. Dec. 13, 1990) ("extraneous verbiage" included in debt collection warning required by § 1692e(11) which was located on reverse side of demand letter, did not violate FDCPA).

595 Rabideau v. Mgmt. Adjustment Bur., 805 F. Supp. 1086 (W.D.N.Y. 1992); Siler v. Mgmt. Adjustment Bur., 1992 WL 32333 (W.D.N.Y. Feb. 18, 1992). *See also* Reg. F § 1006.34(d)(1) ("validation information required by paragraph (c) [which includes the § 1692e(11) disclosure] must be clear and conspicuous").

to important information on the reverse side.[596] Whether the notice itself is in large enough type size or otherwise conspicuous enough will be a question for the fact finder.[597]

In any phone call, the collector must make the full, required disclosure, but a court may find no liability where the consumer interrupts the call and makes it impossible for the collector to make the disclosure.[598]

Where a collector's voicemail message appeared to seek to make the required disclosure, but the call was cut off, it is a question of fact whether the collector is liable where it is unclear whether the fault is with the collector's phone system or the consumer's voicemail.[599] However, if a call drops in the middle of leaving a limited-content voicemail message, and the partial message did not include all of the required elements of a limited-content message, there would be no violation of FDCPA § 1692e(11), because a partial limited-content message is still only an attempt to communicate and not a communication.[600]

The language required in the initial communication is fairly specific—the collector must disclose both that it is attempting to collect a debt and that any information obtained will be used for that purpose. Even if the collector is not seeking to obtain information, it must still disclose that any information obtained will be used to collect a debt.[601]

More open to interpretation is what language is sufficient in subsequent communications, since FDCPA § 1692e(11) just requires that the collector disclose that the communication is from a debt collector. No specific language is required, as long as the language utilized is sufficient to disclose that the communication is from a debt collector.[602]

This requirement has been found satisfied where a voicemail message states it is from the creditor's collection division,[603] a letter indicates it is from a professional debt collector,[604] where a letter states it is from a law firm and indicates in large upper case letters that it is seeking to collect a debt,[605] or it is clear the communication is about collection of a debt.[606] The Eighth Circuit found it sufficient to repeat the language required in the initial disclosure in a subsequent communication—that "this is an attempt to collect a debt and any information obtained will be used for that purpose."[607] The name "Collection Bureau" and reference to a file number have been found sufficient to disclose the call is from a debt collector.[608]

But a court has found not sufficient identification that a call is from a debt collector where the call indicates it was about settling a case or a legal action affecting the consumer's tax liability.[609] The debt collector's name alone is not sufficient where the name provided does not signify that the agency is

596 *See* Youngblood v. GC Services L.P., 186 F. Supp. 2d 695 (W.D. Tex. 2002); O'Connor v. Check Rite, 973 F. Supp. 1010 (D. Colo. 1997). *See also* Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. Feb. 20, 2018) (§ 1692e(11) disclaimers were "sufficiently noticeable" on second page of collection letter); Gaalswyk-Knetzke v. Receivable Mgmt. Services Corp., 2008 WL 2224833 (M.D. Fla. May 27, 2008) (factual question whether light grey ink and poor quality paper of collection letter effectively conveyed disputed rights).

597 Vaughn v. CSC Credit Services, Inc., 1995 WL 51402 (N.D. Ill. Feb. 3, 1995). *But see* Latimer v. Transworld Sys., Inc., 842 F. Supp. 274 (E.D. Mich. 1993) (smaller type complied).

598 *See, e.g.*, Churchwell v. Ray Klein, Inc., 2019 WL 1553674 (D. Or. Feb. 1, 2019), *adopted*, 2019 WL 3577659 (D. Or. Aug. 6, 2019); Dodd v. Delta Outsource Group, Inc., 2016 WL 4479240 (E.D. Mo. Aug. 25, 2016); Lauer v. Credit Control Services, 2015 WL 5824941 (D. Utah Oct. 6, 2015); Wisdom v. Portfolio Recovery Assoc., 2015 WL 1892956 (N.D. Tex. Apr. 24, 2015).

599 *See* Alvarado v. Credit Prot. Ass'n, L.P., 2015 WL 1815863 (M.D. Fla. Apr. 22, 2015).

600 CFPB, FAQ, Limited Content Messages #4, *available at* https://www.consumerfinance.gov. *See also* § 4.9, *supra* (discussing limited-content messages).

601 Emanuel v. Am. Credit Exch., 870 F.2d 805 (2d Cir. 1989); Chandler v. Eichel, 2017 WL 4236569 (S.D. Ind. Sept. 25, 2017); Sandlin v. Shapiro & Fishman, 919 F. Supp. 1564 (M.D. Fla. 1996); Peters v. Collection Tech. Inc., 1991 U.S. Dist. LEXIS 21810 (D. Or. Dec. 5, 1991) (failing to inform that any information obtained would be used for purpose of collection).

602 Davis v. Hollins Law, 832 F.3d 962, 967 (9th Cir. 2016) ("§ 1692e(11) does not require a subsequent communication from the debt collector to use any specific language so long as it is sufficient to disclose that the communication is from a debt collector, as it was here"); Shanker v. Fair Collection & Outsourcing, L.L.C., 2009 WL 1767580 (D.N.J. June 19, 2009) (debt collector need not use "magic words" as long as it is clear it is from debt collector).

603 *See* Meyer v. Christus Health, 2017 WL 4295233 (W.D. Tex. Sept. 27, 2017).

604 Wade v. DCS Fin., Inc., 2016 WL 6267803 (W.D. Wash. Oct. 26, 2016). *See also* Ross v. Commercial Fin. Services, Inc., 31 F. Supp. 2d 1077 (N.D. Ill. 1999) (letter asserted defendant was "different kind of debt collector").

605 *See In re* Holyfield, 740 Fed. Appx. 695 (11th Cir. 2018); Geiger v. Creditors Interchange, Inc., 59 Fed. Appx. 803 (6th Cir. 2003). *See also* Stewart v. Nathan & Nathan, 2014 WL 977979 (E.D. Tenn. Mar. 12, 2014); Taufen v. Messerli & Kramer, P.A., 2014 WL 668019 (D. Minn. Feb. 19, 2014); Bank v. Cooper, Paroff, Cooper & Cook, 2009 WL 4825207 (2d Cir. Dec. 16, 2009) (stated that law firm had been retained to collect debt of $2,854.79 consisting of past due rent); Laws v. Cheslock, 1999 WL 160236 (N.D. Ill. Mar. 8, 1999).

606 Freeman v. Simm Assoc., Inc., 2012 WL 12884665 (E.D. Mich. Oct. 15, 2012) (clear from transcript that consumer understood caller was debt collector calling to collect).

607 Volden v. Innovative Fin. Sys., Inc., 440 F.3d 947 (8th Cir. 2006). *See also In re* Holyfield, 740 Fed. Appx. 695 (11th Cir. 2018) (using similar language); Gaston v. Fin. Sys. of Toledo, Inc., 2019 WL 2210769, at *2 (N.D. Ohio May 22, 2019); Danehy v. Jaffe & Asher, L.L.P., 2015 WL 1249879 (E.D.N.C. Mar. 17, 2015); Campbell v. Credit Prot. Ass'n, L.P., 2013 WL 1282348 (E.D. Mo. Mar. 27, 2013); Hinds v. AR Res., Inc., 2013 WL 1811322 (D. Minn. Apr. 30, 2013); Purdy v. Richland Holdings, Inc., 2012 WL 1019115 (D. Nev. Mar. 23, 2012); Lorandeau v. Capital Collection Serv., 2011 WL 4018248 (E.D. Pa. Sept. 8, 2011); Degonzague v. Weiss, Neuren & Neuren, 89 F. Supp. 2d 282 (N.D.N.Y. 2000). *Cf.* Reg. F Official Interpretations § 34(c)(1)-1.

608 Beeders v. Gulf Coast Collection Bur., 432 Fed. Appx. 918 (11th Cir. 2011). *See also* Lopez v. Mid-America Accounts Control Bur. Inc., 2014 WL 6908140 (W.D. Mo. Dec. 8, 2014) (name Mid-America Collections was sufficient); Paul v. Metro Area Collections, Inc., 2011 WL 2270515 (D. Or. May 4, 2011) (collector stated he was calling from Metro Area Collections about unpaid dental bill, and he and plaintiff had spoken on phone previously on multiple occasions), *adopted*, 2011 WL 2261301 (D. Or. June 8, 2011).

609 Sears v. Fed. Credit Corp., 2009 WL 2601378 (W.D. Va. Aug. 18, 2009).

a debt collector,[610] and certainly does not apply where a voicemail just leaves an individual's name.[611] Similarly inadequate is disclosure of just the name of a law firm,[612] even with the additional disclosure that the law firm has been retained in relationship to a debt obligation.[613]

Where the initial communication indicates that a named entity is a debt collector, subsequent communications cannot assume the consumer will remember that association.[614] One initial letter is not enough to excuse a subsequent voicemail from identifying itself as coming from a debt collector.[615]

But the Ninth Circuit found that, where the debt collector and consumer had extensive phone communications with each other, there reached a point where the collector identifying itself on voicemail as "Gregory at Hollins Law" was sufficient.[616] Where a letter properly indicates it is for purposes of collection of a debt and refers the consumer to the collector's website for payment, the website need not comply with FDCPA § 1692e(11) where the site can be used for payment only by inserting information found in the letter.[617] A court has found there is no requirement for a debt collector to identify itself as such when responding to the consumer's communication to them asking for a payment plan.[618]

7.2.11.4 Exemption for Legal Pleadings

FDCPA § 1692e(11) states that its requirements "shall not apply to a formal pleading made in connection with a legal action."[619] This statutory exemption was added by 1996 amendments.[620] Prior to that amendment, FTC staff had, consistent with the 1996 amendment, interpreted the Act not to require the FDCPA § 1692e(11) disclosure and warning in a formal pleading made in connection with a legal action.[621]

Some courts interpret the exemption broadly. Courts have viewed the Congressional intent that a consumer would know when sued that the purpose of filings in the suit is to collect a debt.[622] Thus courts have found to be exempt formal pleadings:

- Affidavits attached to the complaint;[623]
- Requests for admission attached to the complaint where complaint included the FDCPA § 1692e(11) notice;[624]
- The collection attorney's notice of appearance;[625]

610 Wong v. Green Tree Servicing, L.L.C., 2014 WL 4418077 (D.N.J. Sept. 5, 2014) (leaving the name Greentree); Paul v. Syndicated Office Sys., Inc., 2012 WL 12838293 (S.D. Fla. Nov. 29, 2012) (Central Financial Control); Smith v. Greystone Alliance L.L.C., 2011 WL 1303377 (N.D. Ill. Mar. 29, 2011) (leaving the name Greystone). *See also* Meyer v. Phoenix Recovery Group, 2019 WL 2564572, at *2 (W.D. Tx. Feb. 21, 2019) (leaving individual's name and "the Phoenix Group," but neglecting to identify Phoenix Group as debt collector).

611 Lyon v. Bergstrom Law, Ltd., 2016 WL 4161107 (E.D. Cal. Aug. 5, 2016); Kersten v. Quick Collect, Inc., 2015 WL 105797 (D. Or. Jan. 7, 2015); Costa v. Nat'l Action Fin. Services, 634 F. Supp. 2d 1069 (E.D. Cal. 2007); Hosseinzadeh v. M.R.S. Assoc., Inc., 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005). *Cf.* § 4.9, *supra* (discussing required content for limited-content voicemail messages).

612 Erez v. Steur, 2014 WL 6069847 (W.D. Wash. Nov. 13, 2014); Pasquale v. Law Offices of Nelson & Kennard, 940 F. Supp. 2d 1151 (N.D. Cal. 2013). *Cf.* § 4.9, *supra* (discussing required content for limited-content voicemail messages).

613 Calvert v. Alessi & Koenig, L.L.C., 2013 WL 592906 (D. Nev. Feb. 12, 2013) (failing to state law firm for homeowners' association was "debt collector"). *See also* Okulovich v. Durham & Durham, L.L.P., 2017 WL 4355258 (S.D. Ind. Oct. 2, 2017); Ellis v. Alessi Tr. Corp., 2013 WL 2475764 (D. Nev. June 7, 2013) (disclosure that ATC was acting on behalf of Arrow Creek HOA for past due assessment payments is not sufficient to disclose that ATC is debt collector).

614 Smith v. Greystone Alliance L.L.C., 2011 WL 1303377 (N.D. Ill. Mar. 29, 2011).

615 *See* Okulovich v. Durham & Durham, L.L.P., 2017 WL 4355258 (S.D. Ind. Oct. 2, 2017); Makreas v. Moore Law Group, A.P.C., 2011 WL 4803005 (N.D. Cal. Oct. 11, 2011). *See also* Garo v. Global Credit & Collection Corp., 2011 WL 251450, at *5 (D. Ariz. Jan. 26, 2011) ("The fact that a debt collector may leave a message, in which the debt collector is otherwise unidentified, to contact the consumer at a phone number that had previously been contained in the debt collector's correspondence with the consumer is insufficient to identify the subsequent communication as being from a debt collector as is required by § 1692e(11).").

616 Davis v. Hollins Law, 832 F.3d 962, 967 (9th Cir. 2016). *See also* Brannigan v. Harrison, 2018 WL 1942520 (D.N.J. Apr. 24, 2018) (after extensive communications, sufficient where voicemail stated "This is Joy from Attorney Michael Harrison calling you regarding New Century Imagine."); Lopez v. Mid-America Accounts Control Bur. Inc., 2014 WL 6908140 (W.D. Mo. Dec. 8, 2014) (where collection agency made full disclosure in its initial communication, a telephone call, identifying both agency and its employee by name in voicemail that was left two days later clearly conveyed that communication was from debt collector); Forcier v. Creditors Specialty Serv., Inc., 2014 WL 6473043 (D.N.H. Nov. 17, 2014) (indicating nature of initial communication relevant as to adequacy of identification in subsequent communications).

Prior to § 1692e(11)'s 1999 amendment, the Ninth Circuit found a proper warning in the initial communication excused the identical warning in subsequent communication. Pressley v. Capital Credit & Collection Serv., Inc., 760 F.2d 922, 926 (9th Cir. 1985). In 1999, Congress explicitly required there be a different warning in subsequent communication, making *Pressley* no longer good law.

617 Berger v. Northland Group, Inc., 886 F. Supp. 2d 59 (D. Mass. 2012).

618 Boedicker v. Rushmore Loan Mgmt. Services, L.L.C., 2017 WL 1408158 (D. Kan. Apr. 20, 2017). *See also* Biggs v. Credit Collections, Inc., 2007 WL 4034997 (W.D. Okla. Nov. 15, 2007) (§ 1692e(11) does not apply where consumer initiates call).

619 *See also* Reg. F § 1006.18(e)(3).

620 *See* § 3.4.2.3, *supra*.

621 *See* Freeman, FTC Informal Staff Letter (Nov. 15, 1988); Anderson, FTC Informal Staff Letter (Jan. 5, 1987); Coury, FTC Informal Staff Letter (Mar. 7, 1978). *See also* FTC Official Staff Commentary § 803(2)-2, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *But cf.* Shibley, FTC Informal Staff Letter (Dec. 14, 1988).

622 D'Altilio v. Noam J. Cohen, P.A., 2018 WL 5263972 (S.D. Fla. Oct. 23, 2018); Bohannon v. LVNV Funding, L.L.C., 2015 WL 893362 (E.D. Va. Mar. 2, 2015); Motherway v. Gordon, 2010 WL 2803052 (W.D. Wash. July 15, 2010). *See also* Rivas v. Pollack & Rosen, P.A., 2019 WL 6468709 (S.D. Fla. Dec. 2, 2019); Acosta v. Campbell, 2006 WL 146208 (M.D. Fla. Jan. 18, 2006) (rejecting that subsequent filings in foreclosure case are not formal pleadings).

623 Bohannon v. LVNV Funding, L.L.C., 2015 WL 893362 (E.D. Va. Mar. 2, 2015); Roberson v. LVNV Funding, L.L.C., 2014 WL 4748305 (E.D. Tenn. Sept. 23, 2014); McGhee v. Buffaloe & Assoc., P.L.C., 2014 WL 1333730 (E.D. Tenn. Apr. 2, 2014); Lilly v. RAB Performance Recoveries, L.L.C., 2013 WL 4010257, at *4 (E.D. Tenn. Aug. 5, 2013).

624 *See* Aqeel v. Cach L.L.C., 2016 WL 5334751 (N.D. Ga. Sept. 22, 2016).

625 *See* McKee v. Ingram Law Office, L.L.C., 2016 WL 6157807, at *4 (N.D. Ala. Oct. 24, 2016).

- Objections to the consumer's motion to dismiss;[626]
- Filings in a state court foreclosure action;[627]
- A proof of claim in a bankruptcy proceeding;[628]
- The debt collector's response to the consumer's motion to dismiss the debt collection suit;[629]
- A motion seeking a garnishment order;[630]
- The collector's motion to revive a judgment;[631]
- A motion for a telephonic appearance;[632] and
- A collection attorney's notice of voluntary dismissal of the state court action.[633]

Some courts even view the exemption so broadly as to apply to all court filings, such as requests for admissions, notice of hearings, summary judgment motions, or a proposed order.[634]

On the other hand, courts have found not to be exempt pleadings:

- A conversation between the consumer and a collection lawyer in the court house hallway;[635]
- A letter accompanying the complaint and summonses;[636]
- Interrogatories;[637]
- An income execution;[638] and
- Notice of a foreclosure sale.[639]

While the FDCPA § 1692e(11) notice need not be included in formal pleadings, the debt collector can do so as long as the inclusion does not mislead the consumer.[640]

A complaint and summons in an underlying state court action are clearly formal pleadings, but they do not qualify as the "initial communication" for purposes of FDCPA § 1692e(11), and thus a letter sent subsequent to the complaint and summons is the initial communication that is subject to the requirements of the provision.[641]

7.2.11.5 Other Situations Where FDCPA § 1692e(11) May Not Apply

Courts generally find that a debt collector need not provide the FDCPA § 1692e(11) notice where the collector is responding to the consumer's communication.[642] However, Regulation F (effective November 30, 2021) provides that where a consumer initiates communication with the collector after receiving a limited-content message, the collector must provide a FDCPA § 1692e(11) disclosure.[643]

Communications from a court or court clerk need not include the FDCPA § 1692e(11) notice, even when dealing with collection of a debt.[644]

A collector, though, cannot avoid liability by hiding behind a third party. Where a debt collector prepared and mailed a letter, it was no defense that it arranged for the creditor to sign it.[645] Where a debt collector sent a letter, it was no defense that the district attorney authorized the collection contact.[646] A third party working with a debt collector cannot seek the consumer's phone number and not disclose to the consumer that it is attempting to a collect a debt and any information obtained will be used for that purpose.[647] This third party is a debt collector even though it only assists the collector and does not seek to collect debts itself.[648]

FDCPA § 1692e(11) applies where a debt collector seeks to collect a debt, even where that debt has been converted into a court judgment against the consumer. There is no exemption from the provision just because a communication is postjudgment.[649]

The interplay between the FDCPA and the Bankruptcy Code raises issues examined in detail at Chapter 13, *infra*. The Third Circuit has ruled that, since the automatic stay in the consumer's bankruptcy prevents the collector from seeking to collect from the consumer, any letters and subpoenas the collector might send to the consumer would violate that stay

626 *See* D'Altilio v. Noam J. Cohen, P.A., 2018 WL 5263972 (S.D. Fla. Oct. 23, 2018).

627 *See* Stephens v. Manley Deas Kochalski, 2017 WL 5454458, at *6 (E.D. Pa. Nov. 14, 2017); Acosta v. Campbell, 2006 WL 146208, at *14 (M.D. Fla. Jan. 18, 2006).

628 Townsend v. Quantum3 Group, L.L.C., 535 B.R. 415 (M.D. Fla. 2015).

629 *See* Lambe v. Allgate Fin. L.L.C., 2017 WL 3115755, at *2 (S.D. Fla. July 20, 2017).

630 Thomas v. Stokes & Clinton, P.C., 2014 WL 3385305 (N.D. Ala. July 10, 2014).

631 *See* McKee v. Ingram Law Office, L.L.C., 2016 WL 6157807, at *4 (N.D. Ala. Oct. 24, 2016).

632 Rivas v. Pollack & Rosen, P.A., 2019 WL 6468709 (S.D. Fla. Dec. 2, 2019).

633 Rivas v. Pollack & Rosen, P.A., 2019 WL 6468709 (S.D. Fla. Dec. 2, 2019).

634 *See* Motherway v. Gordon, 2010 WL 2803052, at *3 (W.D. Wash. July 15, 2010).

635 *See* Turner v. Nesbit, 2014 WL 6908541 (N.D. Ill. Dec. 8, 2014).

636 Chandler v. Eichel, 2017 WL 4236569 (S.D. Ind. Sept. 25, 2017).

637 Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 235 n.2 (4th Cir. 2007); Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358 (D. Md. 2010). *But see* Motherway v. Gordon, 2010 WL 2803052 (W.D. Wash. July 15, 2010) (it did not make sense to require debt collection law firm to restate it is debt collector in state court discovery requests and motions).

638 Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201, 211–212 (E.D.N.Y. 2019).

639 Heyer v. Pierce & Assoc., 2017 WL 75739 (N.D. Ill. Jan. 9, 2017).

640 Ramsay v. Sawyer Prop. Mgmt. of Md. L.L.C., 593 Fed. Appx. 204 (4th Cir. Dec. 9, 2014).

641 Beane v. RPW Legal Services, P.L.L.C., 378 F. Supp. 3d 948, 960 n.4 (W.D. Wash. 2019).

642 Lee v. Cohen, McNeile & Pappas, P.C., 520 Fed. Appx. 649, 651 (10th Cir. 2013); Geiger v. Creditors Interchange, Inc., 59 Fed. Appx. 803 (6th Cir. 2003); Price-Richardson v. DCN Holdings, Inc., 2018 WL 902167 (D. Md. Feb. 15, 2018); Chapman v. J & M Sec., 2015 WL 5785952 (E.D. Mo. Oct. 1, 2015).

643 Reg. F Official Interpretations § 18(e)(1)-1. *See also* § 4.9, *supra* (discussing limited-content messages).

644 *See* Hardin v. Finkelstein, Kern, Steinberg & Cunningham, P.C., 707 Fed. Appx. 855, 857 (6th Cir. 2017); Zevgolis v. Greenberg Law Firm, P.C., 2011 WL 251024 (E.D. Va. Jan. 26, 2011).

645 Dowling v. Kucker Kraus & Bruh, L.L.P., 2005 WL 1337442 (S.D.N.Y. June 6, 2005).

646 Del Campo v. Am. Corrective Counseling Serv., Inc., 718 F. Supp. 2d 1116 (N.D. Cal. 2010).

647 Romine v. Diversified Collection Services, 155 F.3d 1142 (9th Cir. 1998) (talking telegrams tricking consumers into revealing their phone numbers).

648 *Id.*

649 *See* Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992).

if they indicated that the document was intended to collect on a debt. The more specific requirements of the automatic stay prevail over any required disclosure pursuant to FDCPA § 1692e(11).[650] But the Bankruptcy Code displaces FDCPA § 1692e(11) only when there is a conflict between the two. There is no conflict where a debt collector, after a bankruptcy discharge, sends a letter violating the bankruptcy discharge and also violating FDCPA § 1692e(11).[651]

7.2.12 False Implication That Accounts Have Been Transferred to Innocent Purchasers, FDCPA § 1692e(12)

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.[652]

FDCPA § 1692e(12) prohibits a debt collector's misrepresentation that it has purchased a debt from the creditor, rather than been hired to collect a debt. This may persuade a consumer that any claims or ill feeling they have against the original creditor should not be directed to the debt collector and that the debt collector has paid good money for the consumer's debt and should not suffer a loss. While FDCPA § 1692e(12) may also prohibit a debt collector from misrepresenting that it is an innocent purchaser not subject to the consumer's claims and defenses against the creditor,[653] section 1692e(6)(A) more clearly prohibits such misrepresentations.[654]

7.2.13 Falsely Implying That Documents Are Legal Process, FDCPA § 1692e(13)

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(13) The false representation or implication that documents are legal process.[655]

A collector's use of simulated process renders actual legal process less recognizable to consumers, increasing the likelihood of default judgments. The false representation of participation by the courts to collect a debt undermines the dignity of the courts, deceives consumers, and gives deceptive collectors an unjust advantage over competitors.

A collection letter closely resembling the format, words, and type size and style of a court summons or complaint simulates legal process and violates FDCPA § 1692e(13).[656] One court also found that mailing a collection letter with legal process sent to the consumer violates FDCPA § 1692e(13) because its inclusion implies that the letter, too, is legal process even though its appearance does not so indicate.[657]

Prohibitions similar to FDCPA § 1692e(13) are found in section 1692e(1) prohibiting misrepresentation of government affiliation,[658] section 1692e(2)(A) regarding misrepresentation of the legal status of a debt,[659] and section 1692e(9) prohibiting the simulation of government documents.[660]

650 Simon v. FIA Card Services,732 F.3d 259 (3d Cir. Oct. 7, 2013). *Cf.* Garfield v. Ocwen Loan Servicing, L.L.C., 811 F.3d 86 (2d Cir. 2016).

651 Garfield v. Ocwen Loan Servicing, L.L.C., 811 F.3d 86 (2d Cir. 2016).

652 15 U.S.C. § 1692e(12). *See also* Reg. F § 1006.18(b)(1)(vi).

This section first appeared in a House bill and was included in each subsequent major bill. The word "implication" was first added by the Senate Consumer Affairs Subcommittee. *Compare* H.R. 13720, 94th Cong., 2d Sess. § 806(14) (1976), *with* Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 807(14) (1977).

653 *See* Hartman v. Asset Acceptance Corp., 467 F. Supp. 2d 769 (S.D. Ohio 2004) (literally false statement—that creditor was holder in due course—violated FDCPA as matter of law). *But cf.* Miller v. Javitch, Block & Rathbone, 561 F.3d 588 (6th Cir. 2009) (statement in court pleading that "acquired, for valuable consideration, all right, title and interest in and to the claim" not actionable).

654 *See* § 7.2.6, *supra*. *See also* FTC Official Staff Commentary § 807(12)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

655 15 U.S.C. § 1692e(13). *See also* Reg. F § 1006.18(b)(1)(vii).

656 *See* Zimmerman v. Portfolio Recovery Assoc., 276 F.R.D. 174 (S.D.N.Y. 2011) (enclosing bogus summonses and complaint with cover letter indicating that this is lawsuit collector intends to file); Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890 (N.D. Ga. Dec. 7, 1984) (letter labeled "FINAL NOTICE" with legal caption, red notary seal and indicating copy to court clerk); Gasser v. Allen County Claims & Adjustment, Inc., 1983 U.S. Dist. LEXIS 20361 (N.D. Ohio Nov. 2, 1983) (form letter with caption, pink paper, bold lettering, direction to bring notice, and make no phone calls suggested officially authorized legal compulsion); FTC Official Staff Commentary § 807(13)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; King, FTC Informal Staff Letter (Nov. 22, 1979). *But see* McCoy v. Midland Funding, L.L.C., 2019 WL 2773703, at *3 (N.D. Ill. July 2, 2019) (claim failed where there was "every indication from the face of the letter that Midland sent it and none that a court sent it" where Midland's logo, name, and contact information appeared at top of letter, back of the letter stated that it "is a communication from a debt collector" and "an attempt to collect a debt," and letter provided an "internal legal account number" next to "court file number," reinforcing the message that Midland was not the court and that Midland sent letter); Biber v. Pioneer Credit Recovery, Inc., 229 F. Supp. 3d 457 (E.D. Va. 2017) (student loan collection agency's letter giving notice of administrative wage garnishment did not imply that legal process was being pursued, as there was no implication of court or agency involvement).

657 Tolentino v. Friedman, 833 F. Supp. 697 (N.D. Ill. 1993).

658 *See* § 7.2.1, *infra*.

659 *See* § 7.2.2, *infra*.

660 *See* § 7.2.9, *infra*.

7.2.14 Collector's Use of a False Name, FDCPA § 1692e(14)

7.2.14.1 Generally

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.[661]

FDCPA § 1692e(14) prohibits a debt collector from using a fictitious name. A debt collection agency cannot identify itself as the creditor or use the creditor's letterhead,[662] except possibly where collection agency employees are closely supervised by the creditor and can be considered employees of the creditor.[663]

A debt buyer or its attorney cannot bring a collection lawsuit in the name of the originating creditor.[664] Where a debt buyer purchases a judgment, it cannot substitute counsel in the name of its assignor.[665]

A debt collector seeking collection on an insufficient funds check violates FDCPA § 1692e(14) by misrepresenting that it is calling from the DA's office or the sheriff's office when the collector has no such authority.[666]

On the other hand, there may not be a violation where the collector's reference to a law enforcement agency is not deceptive. The Supreme Court ruled that a special counsel hired by a state attorney general office did not violate FDCPA § 1692e(14) where the state required it to use the state attorney general letterhead when collecting debts for the state, and where the letter said that the state attorney general was responsible for collecting the debt and disclosed that the sender was a special counsel acting for the state attorney general.[667]

FDCPA § 1692e(14) can apply not just to collectors but also to creditors. FDCPA § 1692a(6) includes in the definition of a debt collector "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts."[668] A creditor doing so not only becomes covered within the scope of the FDCPA, but also violates section 1692e(14).[669]

FDCPA § 1692e(14) does not prevent a collector from identifying other parties in its communications, as long as it does not imply that the collector and that other party are one and the same.[670] A court rejected the argument that a letter with both the current and new loan servicer's names at the top violated FDCPA § 1692e(14).[671]

FDCPA § 1692e(14) is violated if the name on the caller ID of a debt collector's call is not the name of the individual calling.[672] But other courts have found no FDCPA § 1692e(14)

661 15 U.S.C. § 1692e(14). *See also* Reg. F § 1006.18(c)(4).

Somewhat different provisions addressing the use of fictitious names were contained in the initial House bill and were deleted in subsequent House bills. H.R. 10191, 94th Cong., 1st Sess. §§ 804(3), 804(5) (1975). Major Senate bills prohibited the use of any alias or fictitious name. The present language was first adopted by the Senate Consumer Affairs Subcommittee. *Compare* S. 3838, 94th Cong., 1st Sess. § 806(17) (1976), *and* S. 918, 95th Cong., 1st Sess. § 807(17) (1977), *with* Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 807(14) (1977).

662 Carrizosa v. Stassinos, 2010 WL 144807 (N.D. Cal. Jan. 10, 2010); Palmer v. Stassinos, 2009 WL 86705 (N.D. Cal. Jan. 9, 2009) (debt collectors sending letters on letterhead of creditor); Hartman v. Meridian Fin. Services, Inc., 191 F. Supp. 2d 1031 (W.D. Wis. 2002); Zager, FTC Informal Staff Letter (Nov. 10, 1992).

663 *See* DeMayo, FTC Informal Staff Letter (May 1, 2000); FTC Official Staff Commentary § 803(6)-4(a), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

664 *See* Nottingham v. Houston Hosps., Inc., 2018 WL 4604023 (M.D. Ga. Sept. 25, 2018). *See also* Hageman v. Barton, 817 F.3d 611 (8th Cir. 2016) (stating § 1692e(14) claim but FDCPA claim was time-barred).

665 *See* Dilallo v. Miller and Steeno, P.C., 2016 WL 4530319 (N.D. Ill. Aug. 30, 2016).

666 Ortega v. Griggs & Assoc., 2012 WL 2913202 (N.D. Cal. July 13, 2012) (stated they were from the "D.A.'s Office"); Gradisher v. Check Enforcement Unit, Inc., 210 F. Supp. 2d 907 (W.D. Mich. 2002) (debt collector, independent contractor with county, sent notices purporting to be from sheriff's department giving false impression that they were from sheriff).

667 Sheriff v. Gillie, 578 U.S. 317, 136 S. Ct. 1594, 194 L. Ed. 2d 625 (2016). *See also* Solberg v. Victim Services, Inc., 415 F. Supp. 3d 935 (N.D. Cal. 2019) (private entity administering bad-check diversion programs authorized to use district attorneys' letterhead and send out letters under the name of the district attorneys did not violate § 1692e(14)).

668 15 U.S.C. § 1692a(6); § 4.7.4, *supra*. *See also* Hartley v. Suburban Radiologic Consultants, Ltd., 295 F.R.D. 357 (D. Minn. 2013) (liability "where the creditor merely implies that a third party is collecting a debt when in fact it is the creditor that is attempting to do so").

669 *See* Lester E. Cox Med. Ctr. v. Huntsman, 408 F.3d 989 (8th Cir. 2005) (hospital using name of debt collector); Young v. Citicorp Retail Services, 1998 WL 537530 (2d Cir. June 29, 1998) (collection letters by Citicorp on letterhead of private attorney was § 1692e(10) violation); Hartley v. Suburban Radiologic Consultants, Ltd., 295 F.R.D. 357 (D. Minn. 2013) (creditor can be liable under § 1692e(14)); FTC Official Staff Commentary § 807(14)-2, -4, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

670 *See* Christy v. Designed Receivable Solutions, Inc., 2018 WL 4008982 (D. Nev. Aug. 21, 2018) (listing the creditor on its communications but indicating the debt collector was collecting on behalf of the creditor). *See also* Daley v. Bono, 420 F. Supp. 3d 1247, 1264 n.22 (M.D. Fla. 2019) (no violation where attorney wrote letters on creditor's letterhead, since letters noted that attorney was "acting on behalf" of the doctor, and that "[o]wnership of these bills remains fully with the MEDICAL PROVIDERS").

671 *See* Geary v. Green Tree Servicing, L.L.C., 2015 WL 1286347 (S.D. Ohio Mar. 20, 2015).

672 *See* Aurandt v. Brown, 2017 WL 1215451 (W.D. Pa. Mar. 31, 2017) (used spoofing to impersonate police); Sohns v. Bramacint, L.L.C., 2010 WL 3926264 (D. Minn. Oct. 1, 2010) (used spoofing to show phone number of debtor's mother-in-law); Knoll v. Allied Interstate, Inc., 502 F. Supp. 2d 943 (D. Minn. 2007). *See also* Knoll v. Intellirisk Mgmt., 2006 WL 2974190 (D. Minn. Oct. 16, 2006); FTC Official Staff Commentary § 807(14)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

violation where the caller is identified as "unavailable"[673] or the caller ID indicates that the call is local when it is long distance without misrepresenting the name of the caller.[674]

7.2.14.2 Misleading Use of One of Collector's Alternative Names

In its Staff Commentary, the FTC stated that:

> A debt collector may use a name that does not misrepresent his identity or deceive the consumer. Thus, a collector may use its full business name, the name under which it usually transacts business, or a commonly used acronym."[675]

Regulation F (effective November 30, 2021) does not provide any Official Interpretations of the section of the regulations corresponding to FDCPA § 1692e(14).[676] However, Regulation F creates a new definition of limited-content messages that require disclosure of a business name for the debt collector when leaving a voicemail for a consumer. Interpretations of this similar requirement are discussed at § 4.9.2, *supra*.

A debt collector may avoid liability under FDCPA § 1692e(14) where it properly registers its incorporated and any alternate trade names.[677] Using a name not registered with a state may be deceptive, because it can make it more difficult for the consumer to research the entity contacting them.[678]

There may be no FDCPA § 1692e(14) violation where the collector has registered its initials with the state as a name under which it is doing business and the communication provides the collector's contact information.[679] Where a communication uses the collector's correct business name, the same communication can also use the name's abbreviation.[680]

The debt collector can make minor modifications to its name where this does not prevent the consumer from researching about the collector, such as using both the names "Cohen & Slamowitz" and "Law Offices of Cohen & Slamowitz."[681] And a collector can use a registered trade name even if that is

673 Glover v. Client Services, Inc., 2007 WL 2902209 (W.D. Mich. Oct. 2, 2007). *Cf.* Bryan v. Allied Interstate L.L.C., 513 F. Supp. 3d 686 (W.D.N.C. 2021) (intentionally causing phone number to appear as "Unknown" on caller ID may violate §§ 1692e and 1692e(10)).

674 Cunningham v. Radius Global Solutions L.L.C., 2020 WL 5518073 (E.D. Tex. Sept. 14, 2020); Mendoza v. Diversified Consultants, Inc., 2019 WL 2524117 (E.D. Pa. June 18, 2019); Bermudez v. Diversified Consultants, Inc., 2019 WL 415569 (E.D. Pa. Feb. 1, 2019); Horowitz v. GC Services L.P., 2015 WL 1959377 (S.D. Cal. Apr. 28, 2015) (using spoofing technology to make long distance calls appear local did not violate FDCPA); Bien v. Stellar Recovery, Inc., 2015 WL 5554670 (D.R.I. Sept. 21, 2015) (collection agency's caller ID disclosed its true name, but falsely displayed Rhode Island area code); Scheffler v. Integrity Fin. Partners, Inc., 2013 WL 9768539 (D. Minn. Oct. 28, 2013) (called from Minnesota, but used Kansas number that it owned). *But see* Charles v. Convergent Outsourcing, Inc., 2015 WL 13373812 (S.D. Fla. Mar. 26, 2015) (denying dismissal of § 1692e claim alleging that collection agency's spoofing call showed, on caller ID, local number when agency had no presence at all in area).

675 FTC Official Staff Commentary § 807(14)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *See also* Levins v. Healthcare Revenue Recovery Group L.L.C., 902 F.3d 274 (3d Cir. 2018) (name "ARS" in voicemail for consumer was neither collector's full business name, name under which it usually transacts business, or commonly used acronym for its registered name, "ARS Account Resolution Services"), *on remand*, 2020 WL 3169356 (D.N.J. June 15, 2020) (where defendant sent consumers three letters and left them five voicemails that identified the entity attempting to collect the debt as "HRRG" and made no mention of the ARS division, such use of "HRRG" was "plainly inconsistent" with HRRG's subsequent use of name "ARS").

676 *See* Reg. F § 1006.18(c)(4).

677 Boyko v. Am. Int'l Group, Inc., 2012 WL 2132390 (D.N.J. June 12, 2012) ("the Court holds that a debt collection company may excuse itself from liability under section 1692e(14) where it properly registers its incorporated name and any alternate trade names in any of 1) the debt collection company's place of incorporation, 2) the debt collection company's principal place of business, or 3) the state in which the plaintiff was injured"). *Contrast* McLain v. Head Mercantile Co., 2017 WL 3710073 (M.D. La. Aug. 28, 2017) (violation where used unregistered name even though also listed previous name with "fka" and included correct address and phone number).

678 *See* Boyko v. Am. Int'l Grp., Inc., 2009 WL 5194431, at *7 (D.N.J. Dec. 23, 2009) ("Given however that the purpose of the provision is to prevent fraud and misleading representations, and given that Congress used an exacting term like "true name," the Court is convinced that § 1692e(14) requires debt collectors to use a precise, official name when conducting debt collection activities."). *Cf.* 85 Fed. Reg. 76,734, 76,752 (Nov. 30, 2020) (discussing requirement under Reg. F § 1006.2(j)(1) for limited-content messages, Regulation F supplemental information notes that: "Including the debt collector's business name will enable consumers to verify the debt collector's legitimacy and make a better-informed decision about what action, if any, to take in response to the limited-content voicemail message. Consistent with the advice of several Federal agencies, consumers who are suspicious of a limited-content message can use the debt collector's business name to research the company and reply using contact information the consumer finds rather than relying on the telephone number included in the message.") (footnote omitted).

679 *See* Hsu v. Enhanced Recovery Co., L.L.C., 2018 WL 315758 (W.D. Tex. Jan. 5, 2018). *See also* Espinal v. Enhanced Recovery Co., L.L.C., 2020 WL 4048213 (D.N.J. July 16, 2020) (as long as debt collector is consistent when dealing with consumer, registered acronym can constitute collector's true name for FDCPA purposes); Cobb v. Enhanced Recovery Co., L.L.C., 2020 WL 1158468 (D. Conn. Mar. 10, 2020) (finding no violation and awarding defendant attorney fees of over $41,000 under § 1692k(a)(3) because, *inter alia*, consumer persisted in litigating the claim even in wake of *Hsu*). *But see* Urquiaga v. Fin. Bus. & Consumer Solutions, Inc., 2016 WL 6877735 (S.D. Fla. Nov. 22, 2016) (denying motion to dismiss where collector did not provide evidence that it registered its initials as alias).

680 Klein v. Credico Inc., 922 F.3d 393, 396 (8th Cir. 2019); McBroom v. Syndicated Office Sys., L.L.C., 2018 WL 6199014 (W.D. Wash. Nov. 28, 2018).

681 Suquilanda v. Cohen & Slamowitz, L.L.P., 2011 WL 4344044 (S.D.N.Y. Sept. 8, 2011). *See also* Starosta v. MBNA Am. Bank, 2007 WL 2007944 (11th Cir. July 12, 2007) (use of "P.A." after law firm's name not a violation even though firm was not entitled to use the initials P.A.); DiGiacomo v. Midland Credit Mgmt., Inc., 2019 WL 1349483, at *3 (E.D.N.Y. Mar. 26, 2019) ("The inclusion of a fictitious DBA name, previously used to obtain a judgment, in a postjudgment information subpoena, alongside the current, substantially similar registered business name, would not confuse the least sophisticated consumer. The acronym 'DBA' does not suggest that there are multiple companies to whom a debt might be owed. Rather, it suggests that there is one entity, Midland Funding, L.L.C., that is known by two names, and that that one entity is the sole debt collector."); Amina v. WMC Fin. Co., 2019 WL 112769 (D. Haw. Jan. 4, 2019); Scheffler v. Alltran Fin., LP, 2019 WL 93390 (D. Minn. Jan. 3, 2019). *But see* Boyko v. Am. Int'l Group, Inc., 2009 WL 5194431 (D.N.J. Dec. 23, 2009) (where Credit Control

not the formal name of the corporation.[682] A law firm can use its name even after it is dissolved where the firm was winding down its business and state law allowed it to file garnishments under its dissolved name.[683] Where a collector identifies its name in a communication, a court found no violation where a descriptor was added to that name— "PROFESSIONAL DEBT COLLECTORS." Consumers would not be misled into thinking that was the name of the collector.[684] A violation of FDCPA § 1692e(14) must be material in order to survive dismissal.[685]

7.2.14.3 Use of Employee Aliases

While FDCPA § 1692e(14) prohibits a debt collector from using a fictitious name, prior to the implementation of Regulation F, case law was divided as to whether a debt collector's employee must use the employee's real name or can use an alias.[686] Regulation F (effective November 30, 2021) now states that:

> This section does not prohibit a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided that the employee uses the assumed name consistently and that the debt collector can readily identify any employee using an assumed name."[687]

Here "this section" refers to the regulations implementing FDCPA § 1692e. Regulation F does not directly address the use of aliases in the context of other FDCPA provisions such as section 1692d(6)'s "meaningful disclosure of the caller's identity" requirement.[688]

The Regulation F supplemental information clarifies that responsibility for complying with this Reg. F requirement is not only on the employee, but also on the employer. "The Bureau finds that any system of managing assumed names must ensure that the employee uses the assumed name consistently and that the employer can readily identify the employee even if the employee is using the assumed name."[689]

The Regulation F Official Interpretations also place responsibility on the employer:

> A debt collector may use any method of managing assumed names that enables the debt collector to determine the true identity of any employee using an assumed name. For example, a debt collector may require an employee to use the same assumed name when communicating or attempting to communicate with any person and may prohibit any other employee from using the same assumed name.[690]

Use of this one-to-one link between an alias and the real name is not required, but the CFPB "anticipates, however, that a debt collector who permits many employees to use the same assumed name, e.g., for a specific letter campaign, would be unable to readily identify any employee communicating or attempting to communicate with any person."[691]

7.2.15 Misrepresenting How Consumer Should Respond to Legal Process, FDCPA § 1692e(15)

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> ***
>
> (15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.[692]

FDCPA § 1692e(15) prohibits a collector from misrepresenting the nature of a court summons for a collection lawsuit or misrepresenting that the consumer need not respond to the summons. A debt collector may not deceive a consumer into failing to respond to legal process by concealing the import

Services used the name Credit Collection Services, denying motion to strike; finding deception need not be pleaded).

682 Cruz v. Credit Control Services, Inc., 2017 WL 5195225 (E.D.N.Y. Nov. 8, 2017); Velez v. Healthcare Revenue Recovery Group, L.L.C., 2017 WL 1476144 (M.D.N.C. Apr. 24, 2017); Miles v. Retrieval-Masters Creditor's Bur., Inc., 2016 WL 1258481 (E.D.N.Y. Mar. 29, 2016); Mahan v. Retrieval-Masters Credit Bur., Inc., 777 F. Supp. 2d 1293 (S.D. Ala. 2011). *See also* Hubbard v. Med. Data Sys., Inc., 2019 WL 5459073, at *6 (N.D. Ga. June 24, 2019) (letter explicitly stated at bottom that it was from "MEDICAL DATA SYSTEMS, INC. D/B/A MEDICAL REVENUE SERVICE," and although top of letter indicated it was from "Medical Revenue Service," it also stated, albeit in smaller print, that it was from Medical Data Systems; "the use of a registered trade name is not an abusive, deceptive, or unfair debt collection practices meant to be prohibited by the FDCPA"), *adopted*, 2019 WL 5460663 (N.D. Ga. July 19, 2019).

683 Thomas v. Stokes & Clinton, P.C., 2014 WL 3385305 (N.D. Ala. July 10, 2014).

684 Klein v. Credico Inc., 922 F.3d 393, 396 (8th Cir. 2019); McBroom v. Syndicated Office Sys., L.L.C., 2018 WL 6199014 (W.D. Wash. Nov. 28, 2018).

685 *See* Tavernaro v. Pioneer Credit Recovery, Inc., 2020 WL 5747920 (D. Kan. Sept. 25, 2020); Poole v. MED-1 Solutions, L.L.C., 2020 WL 1317450, at *5 (S.D. Ind. Mar. 20, 2020); DiGiacomo v. Midland Credit Mgmt., Inc., 2019 WL 1349483, at *3 (E.D.N.Y. Mar. 26, 2019); Marciuleviciene v. Elmhurst Lake Apt., L.L.C., 2012 WL 2374676, at *2 (N.D. Ill. June 21, 2012); Midland Funding L.L.C. v. Ford, 2020 WL 1910207, at *6 (Minn. Ct. App. Apr. 20, 2020). *See also* Klein v. Credico Inc., 922 F.3d 393, 397 n.2 (8th Cir. 2019) (stating that there was no need to address propriety of district court's application of materiality standard for § 1692e(14) because statements at issue were not false, deceptive, or misleading, but noting that other circuits have adopted materiality standard for § 1692e).

686 *See* § 6.8, *supra*.

687 Reg. F § 1006.18(f).

688 *See* § 6.8, *supra*.

689 85 Fed. Reg. 76,734, 76,831 (Nov. 30, 2020).

690 Reg. F Official Interpretations § 18(f)-1.

691 85 Fed. Reg. 76,734, 76,832 (Nov. 30, 2020).

692 15 U.S.C. § 1692e(15). *See also* Reg. F § 1006.18(b)(1)(viii).
Section 807(15) was added by the Senate Consumer Affairs Subcommittee. Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 807(15) (1977).

of the papers, thereby subjecting the consumer to a default judgment.[693] For example, it should be a FDCPA § 1692e(15) violation for a collector, upon suing a consumer, to tell the consumer they need only send in a payment or agree to a payment plan, when in fact not answering the complaint results in a default judgment.

In *McCollough v. Johnson, Rodenburg & Lauinger, L.L.C.*,[694] the Ninth Circuit, without specifically citing FDCPA § 1692e(15), found unfair and deceptive in violation of the FDCPA requests for admissions in a collection lawsuit served on the consumer that asked the consumer to admit facts the consumer had denied in his answer. The collector was hoping that the consumer would not respond to the request and that court rules would thus deem admitted facts the consumer was disputing.

7.2.16 Implying Collector Is a Consumer Reporting Agency, FDCPA § 1692e(16)

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

***

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.[695]

FDCPA § 1692e(16) prohibits a debt collector from representing or implying that it operates or is employed by a consumer reporting agency (CRA).[696] A CRA is defined as one meeting the definition found in the Fair Credit Reporting Act (FCRA) at section 1681a(f):

> [A]ny person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.[697]

The provision prohibits a collector's use of a name including "credit reporting agency," "credit rating bureau,"[698] or words of similar meaning[699] where the collector is not a consumer reporting agency.[700] Courts in the past found violations in the use of the words "credit bureau" in a debt collector's name to be a violation.[701] At the time, most consumer reporting agencies had the words "credit bureau" in their names, and "credit bureau" was used to indicate a consumer reporting agency. Today that association is more tenuous, and courts may not find a violation when a debt collector has those words in its name.[702]

Logos and other messages in dunning letters that may create the false impression that the collector is a consumer reporting agency are also prohibited.[703] FDCPA § 1692e(16) was violated where a collection agency's letter included at the

693 FTC Official Staff Commentary § 807(15)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

694 637 F.3d 939 (9th Cir. 2011).

695 15 U.S.C. § 1692e(16). *See also* Reg. F § 1006.18(b)(1)(ii).

This section first appeared in the Senate Consumer Affairs Subcommittee. Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 807(16) (1977).

696 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*.

697 15 U.S.C. § 1681a(f). *See generally* National Consumer Law Center, Fair Credit Reporting (9th ed. 2018), *updated at* www.nclc.org/library.

698 Cater v. Credit Rating Bur., Inc., 1991 U.S. Dist. LEXIS 21731 (N.D. Ga. Oct. 31, 1991); Cravey v. Credit Rating Bur., Inc., 1991 U.S. Dist. LEXIS 21812 (N.D. Ga. Oct. 24, 1991); Fishman, FTC Informal Staff Letter (Jan. 26, 1982). *But see* Shrestha v. State Credit Adjustment Bur., Inc., 117 F. Supp. 2d 142 (D. Conn. 2000) (collector's name was not misleading, particularly in view of its written disclaimer stating that it was debt collector and not credit reporting agency).

699 *See* FTC Official Staff Commentary § 807(16)-2, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Shatsky, FTC Informal Staff Letter (June 19, 1978) (General Credit Control); DeCou, FTC Informal Staff Letter (Apr. 12, 1978) (Credit Bureau Collection Agency); Cole, FTC Informal Staff Letter (Mar. 28, 1978) (Credit Converters).

700 Difficult issues may arise if a debt collector is also a consumer reporting agency. *See* Charles v. Credit Bur. Services, 1999 U.S. Dist. LEXIS 19665 (E.D. La. Dec. 17, 1999) (company that operated as both credit reporting agency and collection agency did not deceive or mislead when it used name "credit bureau"); Byes v. Credit Bur. Enters., 1996 WL 99360 (E.D. La. Mar. 6, 1996) (using "Credit Bureau Enterprises" did not violated § 1692e(16) by deceptively suggesting defendant was consumer credit reporting company as collector operated as both credit reporting agency and collection agency); Byes v. Credit Bur. Enters., Inc., 1995 WL 540235 (E.D. La. Sept. 11, 1995) (discovery regarding collector's credit reporting activities was relevant to claim that collector used deceptive name); Anthes v. Transworld Sys., Inc., 765 F. Supp. 162 (D. Del. 1991) (debt collector's statement that debt would be referred to credit management services office, which it owned, was not deceptive); FTC Official Staff Commentary § 807(16)-3, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Ambrose, FTC Informal Staff Letter (Mar. 27, 1978).

701 McKenzie v. E.A. Uffman & Assoc., Inc., 119 F.3d 358 (5th Cir. 1997); Case v. Credit Bur., Inc., 1983 WL 931780 (D. Or. Jan. 10, 1983); Isgrigg, FTC Informal Staff Letter (Nov. 10, 1992); Nobel, FTC Informal Staff Letter (Jan. 18, 1980).

702 *See* Durr v. Rochester Credit Ctr., Inc., 2012 WL 2130953 (E.D. Pa. June 5, 2012) (question of fact whether use of name "Credit Bureau" is deceptive); Sakuma v. First Nat'l Credit Bur., 1989 U.S. Dist. LEXIS 19120 (D. Haw. Nov. 15, 1989) (use of term "credit bureau" in name of collection agency not misleading); Wright v. Credit Bur. of Ga., Inc., 555 F. Supp. 1005 (N.D. Ga. 1983), *rev'g* 548 F. Supp. 591 (N.D. Ga. 1982). *See also* Pettit v. Retrieval Masters Creditors Bur., Inc., 211 F.3d 1057 (7th Cir. 2000) (using "Retrieval Masters Creditors Bureau, Inc." did not create false impression); Dankowski, FTC Informal Staff Letter (Mar. 6, 2000).

703 Trull v. GC Services L.P., 961 F. Supp. 1199 (N.D. Ill. 1997) (collection letter containing statements: "Your name will be retained as part of our records along with others who, despite their good name and reputation, have shirked their payment responsibility"; "YOUR ACCOUNT HAS BEEN TRANSFERRED TO [agency's] MASTER DEBTOR FILE";

top the agency's name and the phrase "Affiliated with Trans Union Credit" (Trans Union is a major CRA) where its relationship with Trans Union Credit was not any different from the relationship Trans Union Credit had with many other debt collection agencies.[704] On the other hand, it would not be a violation simply to disclose that the debt collector would report information to a CRA such as Trans Union.[705]

7.3 General Deception Standards

7.3.1 Selected Text and Legislative History of FDCPA § 1692e

The first part of FDCPA § 1692e provides:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:[706]

FDCPA § 1692e then continues with sixteen examples of conduct violating the section. The text and analysis of each of these sixteen provisions is found at §§ 7.2.1 through 7.2.16, *supra*.

Early bills leading to the Act generally proscribed only "false or misleading" collection methods.[707] The Senate added the provision prohibiting "deceptive" representations and collection means.[708] Several previous bills had contained language identical to current FDCPA § 1692e(10) prohibiting the use of "deceptive means to collect or attempt to collect any debt."[709]

7.3.2 In Connection with Collection of Any Debt

FDCPA § 1692e applies to representations or means "in connection with the collection of any debt." Thus, the provision does not apply to debt collector communications not viewed as in connection with a debt.

For a general discussion of cases interpreting "in connection with the collection of any debt" that cuts across different sections of the FDCPA, see § 4.3, *supra*. The question of whether a contact is in connection with a debt most frequently arises in the context of mortgage loans, where the question becomes whether communications from a mortgage servicer may not be demanding payment, but are discussing loan modifications, escrow payments, and the like. Cases in this area are examined at both § 4.7.5.2.3, *supra*, and § 7.4.11.1, *infra*.

7.3.3 Relation of Enumerated FDCPA § 1692e Provisions to Its General Deception Standard

FDCPA § 1692e prohibits false, deceptive, or misleading representations or means. In addition, without limiting the general application of the foregoing, section 1692e then enumerates sixteen prohibited practices. A violation of any of the sixteen provisions is actionable, but if a practice does not fit within any of these sixteen, the general section 1692e prohibition of deception still applies.[710]

Congress recognized that it would be impossible to foresee every type of deceptive collection misbehavior and expressly provided a general standard to give courts the flexibility to proscribe improper conduct not specifically anticipated by and addressed in the Act.[711] "The Act prohibits a wide array of specific conduct, but it also prohibits, in general terms, any harassing, unfair, or deceptive debt collection practice, which enables 'the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.'"[712] Regulation F (effective November 30, 2021) also explicitly states that "debt collector must not use any false, deceptive, or misleading representation or means in connection with the collection of any debt, including, but not limited to, the conduct described in paragraphs (b) through (d) of this section [where the enumerated prohibitions are listed]."[713]

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and "We are anxious to clear our record as well as yours"); Mansfield, FTC Informal Staff Letter (Apr. 20, 1978).

704 Mandel v. Associated Collection Serv. Inc., 2015 WL 1508842 (D. Ariz. Mar. 31, 2015). *See also* Williams v. Northwest Collectors, Inc., 2018 WL 6505431 (N.D. Ill. Dec. 11, 2018) (although collection agency indicated elsewhere in its collection letter that it is a debt collection agency, its statement that it is a "reporting member" of national credit bureaus could reasonably imply that it operates as, or is employed by, a credit reporting agency); McCurdy v. Grant & Weber, Inc., 2018 WL 3831532 (N.D. Ill. Aug. 13, 2018) (consumer plausibly alleged that collection agency violated § 1692e(16) by including the phrase "Member of Experian" under agency's name on collector's initial letter to consumer), *related case*, 2019 WL 4735440 (N.D. Ill. Sept. 27, 2019) (granting defendant's motion for summary judgment where consumer failed to produce extrinsic evidence, such as a consumer survey, to demonstrate that the unsophisticated consumer would find the words "Member of Experian" misleading or deceptive).

705 *See* Davis v. Commercial Check Control, Inc., 1999 WL 89556 (N.D. Ill. Feb. 16, 1999).

706 15 U.S.C. § 1692e. *See also* Reg. F § 1006.18(a).

707 *See, e.g.*, H.R. 10191, 94th Cong., 1st Sess. § 804 (1975); S. 656, 95th Cong., 1st Sess. § 806 (1977).

708 S. 918, 95th Cong., 1st Sess. § 807 (1977).

709 *E.g.*, H.R. 13720, 94th Cong., 2d Sess. § 806(10) (1976); S. 3838, 94th Cong., 2d Sess. § 806(19) (1976).

710 Currier v. First Resolution Inv. Corp., 762 F.3d 529 (6th Cir. 2014); Clomon v. Jackson, 988 F.2d 1314, 1320 (2d Cir. 1993); Terry v. C & D Complete Bus. Solutions, 2011 WL 144920 (W.D. Mo. Jan. 18, 2011).

711 Congress included this general proscription in recognition of its inability to foresee every conceivable abusive debt collection method. According to the Senate report, "this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed." S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*. *See also* FTC Official Staff Commentary § 807, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

712 Currier v. First Resolution Inv. Corp., 762 F.3d 529, 533 (6th Cir. 2014).

713 Reg. F § 1006.18(a).

When one of the subsections of FDCPA § 1692e is clearly applicable to a particular consumer's case, the consumer should proceed under it as well as the section's general standard. Using the more specific provisions of FDCPA § 1692e(1) through (16) may avert proof problems and the possibility of unnecessarily narrowing judicial construction of the general standard.[714] Adding a claim under FDCPA § 1692e(10) may also be helpful, because its prohibition is very similar to the general section 1692e prohibition.[715] If for any reason the court finds a more specific provision found at FDCPA §§ 1692e(1) through (16) not to apply, the court may find that section 1692e's general prohibition still applies.

7.3.4 False vs. Deceptive or Misleading

FDCPA § 1692e prohibits false, deceptive, or misleading representations. Some literally true statements are deceptive or misleading, and thus can be violations, even if not false. Moreover, even if a representation does not mislead a consumer, if it is false, it may be actionable.[716] The Eleventh Circuit noted:

> The use of "or" in § 1692e means that, to violate the FDCPA, a representation by a "debt collector" must merely be false, or deceptive, or misleading. A false representation in connection with the collection of a debt is sufficient to violate the FDCPA facially, even where no misleading or deception is claimed.[717]

7.3.5 The Deception Standard

7.3.5.1 Generally

FDCPA 1692e borrows the legal concept of deception from the FTC Act.[718] Courts construing FDCPA § 1692e find decisions and principles of construction under the FTC Act persuasive. See NCLC's Unfair and Deceptive Acts and Practices § 4.2 (10th ed. 2021), *updated at* www.nclc.org/library, for a detailed discussion of the FTC deception standard.

Since the FDCPA expressly recognized the inadequacy of existing laws, including the FTC Act, to protect consumers,[719] the FDCPA standard of deception was intended to be even more protective of consumers than the standard applicable to the FTC Act.[720] The FDCPA standard approaches a requirement of collectors of honest openness and truthful frankness when dealing with consumers.[721] Applying these requirements furthers the congressional FDCPA purpose that "debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged."[722]

Many of the elements of common law fraud are irrelevant to an FDCPA claim for deception. There is no requirement that intent to deceive be established.[723] Knowledge of a statement's falsity is not a necessary element to establish deception.[724] The FDCPA provides for strict liability.[725] The fact that a practice is customary does not prevent it from being deceptive.[726]

The "capacity" or "tendency" to deceive should be sufficient, so that actual deception need not be shown except to establish actual damages.[727] The concept of deception protects even the ignorant, the unthinking, the credulous, and the least sophisticated consumer.[728] Showing detrimental reliance is unnecessary.[729]

Good faith is not a defense,[730] although bona fide error may be a defense if the collector can show all the elements of the

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714 *See* Graziano v. Harrison, 763 F. Supp. 1269, 1278 (D.N.J. 1991), *aff'd in part and rev'd in part on other grounds*, 950 F.2d 107 (3d Cir. 1991) (finding no maintainable violation of FDCPA where consumer alleged violation of § 1692g, but holding that violation was of § 1692e(10), not § 1692g, which consumer had not asserted). *See also* Amina v. WMC Mortg. Corp., 2011 WL 1869835 (D. Haw. May 16, 2011) (plaintiff must base violations of §§ 1692e and 1692f on conduct other than that already identified in other sections of FDCPA). *Cf.* Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009) (subsections of § 1692e are merely non-exclusive examples of ways section can be violated). *But cf.* Tarrant v. Portfolio Recovery Assoc., L.L.C., 2011 WL 5042057 (M.D. Tenn. Oct. 24, 2011) (identical facts can constitute distinct violations of different provisions of FDCPA).

715 *See* § 7.2.10, *supra*.

716 But see § 7.3.9, *infra*, where some courts suggest a false statement still must be material to the least sophisticated consumers.

717 Bourff v. Rubin Lublin, L.L.C., 674 F.3d 1238 (11th Cir. 2012).

718 15 U.S.C. § 45. *See* Jeter v. Credit Bur., Inc., 760 F.2d 1168 (11th Cir. 1985); Baker v. G.C. Services Corp., 677 F.2d 775, 778 (9th Cir. 1982); § 3.2.1, *supra*.

719 15 U.S.C. § 1692(b).

720 *See* Jeter v. Credit Bur., Inc., 760 F.2d 1168 (11th Cir. 1985); § 3.2.1, *supra*.

721 *See* Jeter v. Credit Bur., Inc., 760 F.2d 1168, 1178 (11th Cir. 1985) (one of the purposes of the FDCPA is "[t]hat every individual, whether or not he owes the debt, has a right to be treated in a reasonable or civil manner." 123 Cong. Rec. 10241 (1977) (statement of Representative Annuzio, Chairperson of Subcommittee which sponsored the legislation).

722 15 U.S.C. § 1692(e).

723 *See* § 3.2.4, *supra*, § 12.2, *infra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.4 (10th ed. 2021), *updated at* www.nclc.org/library.

724 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.5.1 (10th ed. 2021), *updated at* www.nclc.org/library. *See also* Clark v. Capital Credit & Collection Services, 460 F.3d 1162, 1176 (9th Cir. 2006); Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004); Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991, 995 (7th Cir. 2003). *But see* Jenkins v. Heintz, 124 F.3d 824 (7th Cir. 1997) (adopting narrow interpretation prohibiting deception only if debt collector knew statement was false).

725 *See* § 3.2.4, *supra*, § 7.2.2.2, *supra*.

726 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.8 (10th ed. 2021), *updated at* www.nclc.org/library.

727 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.9 (10th ed. 2021), *updated at* www.nclc.org/library. *But see* Adams v. Skagit Bonded Collections, L.L.C., 836 Fed. Appx. 544 (9th Cir. 2020) (debtor lacked standing to pursue claim that collection letters failed to clearly identify his current creditor; in absence of allegation of reliance, deception is insufficient to establish Article III standing). See § 11.15.3.1, *infra*, for a circuit-by-circuit overview of decisions applying *Spokeo, Inc. v. Robins* to FDCPA claims.

728 *See* § 3.2.1, *supra*.

729 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.12 (10th ed. 2021), *updated at* www.nclc.org/library.

730 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.6 (10th ed. 2021), *updated at* www.nclc.org/library.

defense.[731] "Puffing" is not a defense unless the deception has no capacity to deceive.[732] Some courts, for at least most FDCPA § 1692e violations, may require that the materiality of the deception be shown, or at least inferred.[733]

The misrepresentation need not be a factual one, but may be a misrepresentation of the consumer's legal rights.[734] The failure to disclose information is deceptive if necessary qualifications are not made, material information is omitted, or the disclosures made are too inconspicuous.[735] Note that disclosures are affirmatively required in several FDCPA § 1692e subsections,[736] illustrating the adoption of the principle that affirmative disclosures are sometimes necessary to avoid a statement's deceptive implication.

The language in a debt collection communication should not be viewed in isolation; the communication must be viewed "as a whole" to determine whether it runs afoul of the FDCPA.[737] Literally true, half-true, or ambiguous statements can be deceptive.[738] Accurate but confusing language can be deceptive. "Confusing language in a dunning letter can have an intimidating effect by making the recipient feel that he is in over his head and had better pay up rather than question the demand for payment."[739]

7.3.5.2 Seventh Circuit's Unique Approach

The Seventh Circuit has uniquely looked more to trademark law than FTC precedents to address the deception standard. Beginning with his decision in *Bartlett v. Heibl*, Judge Posner and most other the Seventh Circuit judges equate "confusion," a key operative term in trademark law, with "deception," and so look to see whether the least sophisticated consumer would be confused.[740]

7.3.5.3 Actual Injury

Proof of actual damage is not required to establish liability for statutory damages,[741] but proof that the deception caused injury will be required to recover actual damages.[742] In addition, a FDCPA claim brought in federal court must meet the Article III case or controversy standard for standing.[743] Whether a FDCPA § 1692e claim provides sufficient standing is examined at § 11.15.5, *infra*.

7.3.5.4 Literal Truth, Half-truths, and Deception

Literal truths and half-truths can be deceptive if they will mislead the least sophisticated consumer. Where such a statement is reasonably susceptible to more than one interpretation and one has the capacity to deceive, courts find such statements, even if literally true, to be actionable under FDCPA § 1692e.[744] This is consistent with well-established case law

731 *See* § 12.2, *infra*.

732 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.10 (10th ed. 2021), *updated at* www.nclc.org/library. *But cf.* Gruber v. Creditors' Prot. Serv., Inc., 742 F.3d 271 (7th Cir. 2014); Taylor v. Calvary Inv., L.L.C., 365 F.3d 572 (7th Cir. 2004); Blanchard v. N. Am. Credit Services, 2016 WL 1408592 (S.D. Ill. Apr. 11, 2016).

733 *See* § 7.3.9, *infra*.

734 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010); Haney v. Portfolio Recovery Assoc., 837 F.3d 918, 931 (8th Cir. 2016) (while not every debt collector's violation of state law violates FDCPA, "debt collectors' false representations about the availability of remedies or amounts owed under state law, like representations of fact, are to be viewed through the unsophisticated-consumer standard and [were] actionable pursuant to the FDCPA"); Currier v. First Resolution Inv. Corp., 762 F.3d 529 (6th Cir. 2014) (not every violation of state law is violation of FDCPA; proper question "is whether the [consumer] alleged an action that falls within the broad range of conduct prohibited by the Act; legality of the action taken under state law may be relevant," as it was in this case); Juras v. Aman Collection Serv., Inc., 829 F.2d 739 (9th Cir. 1987) (collector misrepresented state university's legal rights and obligations to withhold student transcripts); Ensminger v. Fair Collections & Outsourcing, Inc., 2016 WL 6905882 (D. Kan. Nov. 23, 2016); West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983) (collector violated § 1692e(2)(A), (B) by attempting to collect illegal $15 service charge on bad checks without disclosing that charge had been added to amount demanded and by implying charge was lawful); FTC Official Staff Commentary § 807(10)-4, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *See also* § 7.4.4, *infra*.

735 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.15 (10th ed. 2021), *updated at* www.nclc.org/library; Delgado v. Capital Mgmt. Services L.P., 2013 WL 1194708 (C.D. Ill. Mar. 22, 2013) (debt collector did not disclose that debt could not be enforced and, by offering settlement, implied that debt was enforceable); Anderson, FTC Informal Staff Letter (Nov. 18, 1988). *But see* Alvarado Martinez v. Eltman Law, P.C., 444 F. Supp. 3d 748 (N.D. Tex. 2020) ("violations of § 1692e require an affirmative misrepresentation or act, not inaction"), *citing* Todd v. Franklin Collection Serv., Inc., 694 F.3d 849 (7th Cir. 2012) (per curiam)

736 *See* 15 U.S.C. § 1692e(8), (11); §§ 7.2.8, 7.2.11, *supra*.

737 *See* Campuzano-Burgos v. Midland Credit Mgmt., Inc., 550 F.3d 294, 300 (3d Cir. 2008); Schweizer v. Trans Union Corp., 136 F.3d 233, 238 (2d Cir. 1998); Pierson v. Franklin Collection Serv., Inc., 965 F. Supp. 2d 957 (E.D. Tenn. 2013); Shami v. Nat'l Enter. Sys., 914 F. Supp. 2d 353 (E.D.N.Y. 2012); Adams v. J.C. Christensen & Assoc., Inc., 777 F. Supp. 2d 1193 (D. Minn. 2011).

738 *See* § 7.3.5.4, *infra*.

739 Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623 (7th Cir. 2009).

740 128 F.3d 497, 499 (7th Cir. 1997). *See also* Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623, 629 (7th Cir. 2009); Socha v. Collecto, Inc., 2006 WL 8443178, at *3 (E.D. Wis. May 24, 2006) ("In the Seventh Circuit, the pleading standard for an FDCPA claim of confusion is very low. The reason for the low standard is because courts are poor proxies for the unsophisticated consumer on the issue of whether a legal notice is confusing."); Young v. G.L.A. Collection Co., 2011 WL 6016650, at *2 (S.D. Ind. Dec. 1, 2011) ("[S]imple 'confusion' in the colloquial sense is not legal 'confusion' as contemplated in the FDCPA. Courts finding that a debt collector's communication is confusing have only done so when this confusion bears the potential to adversely affect the debtor.").

741 *See* § 11.9.4, *infra*. *See also* Jeter v. Credit Bur., Inc., 760 F.2d 1168 (11th Cir. 1985) (actual deception of plaintiff relevant to damages but not liability); Francisco v. Doctors & Merchants Credit Serv., 1998 WL 474107 (N.D. Ill. Aug. 3, 1998) (may determine violation of § 1692g without reference to evidence of actual consumer confusion); Berrios v. Sprint Corp., 1998 WL 199842 (E.D.N.Y. Mar. 16, 1998).

742 *See* § 11.8, *infra*.

743 *See* § 11.15, *infra*.

744 Schultz v. Midland Credit Mgmt., Inc., 905 F.3d 159, 163 (3d Cir. 2018) ("even if the language in a letter is true, it can still be deceptive where

under the FTC Act.[745] On the other hand, courts find a second deceptive meaning to a statement not actionable where even the most unsophisticated consumer would not understand the statement as having such a second meaning.[746]

Collectors often state that the consumer "could" be sued or other actions "might" be resorted to or the consumer would be impacted "if" the collector took certain actions. While this use of the conditional allows for one interpretation of the statement to be literally true, the consumer may understand the same statement as threatening the action. If the action cannot or will not be taken, this can be deceptive.

For example, a statement that a settlement may have tax consequences is deceptive where it is clear that a settlement will not have tax consequences for the particular consumer.[747] On the other hand, courts have found this not deceptive where a settlement for that consumer may or may not have tax consequences.[748]

7.3.6 The Least Sophisticated Consumer Standard

As discussed in § 3.2.1.2, *supra*, the majority of circuit courts have adopted the least sophisticated consumer standard to evaluate alleged FDCPA violations, while a few have adopted a similar standard evaluating whether the "unsophisticated consumer" would find the language of the collection letter deceptive. These tests are aimed at protecting the "naive"[749] and the "gullible."[750] On the other hand, some courts find an interpretation of a statement as deceptive is too "idiosyncratic" for even the least sophisticated consumer.[751] For a more detailed discussion of this standard, see § 3.2.1, *supra*.

7.3.7 Deception in Communications to the Consumer's Attorney

The majority view is that FDCPA § 1692e applies to communications to a consumer's attorney, but that the least sophisticated consumer standard should not be the standard to determine if such a communication is misleading. In *Heintz v. Jenkins*, the Supreme Court assumed that FDCPA § 1692e

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it can be reasonably read to have two or more different meanings, one of which is inaccurate"); Tatis v. Allied Interstate, L.L.C., 882 F.3d 422, 429 (3d Cir. 2018); Pantoja v. Portfolio Recovery Assoc., 852 F.3d 679, 687 (7th Cir. 2017); Buchanan v. Northland Grp., Inc., 776 F.3d 393, 396 (6th Cir. 2015); Walker v. Shermeta, Adams, Von Allmen, P.C., 623 Fed. Appx. 764, 767 (6th Cir. Aug. 10, 2015) (literally false statements may be deceptive); Lox v. CDA, Ltd., 689 F.3d 818, 825 (7th Cir. 2012); Grden v. Leikin Ingber & Winters P.C., 643 F.3d 169, 172 (6th Cir. 2011) ("Truth is not always a defense under this test, since sometimes even a true statement can be misleading."); Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055, 1062 (9th Cir. 2011) ("Nevertheless, it is well established that '[a] debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate' . . . and consumers are under no obligation to seek explanation of confusing or misleading language in debt collection letters."); Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 441 (6th Cir. 2008); Rosenau v. Unifund Corp., 539 F.3d 218, 221 (3d Cir. 2008) ("A debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate."); Campuzano-Burgos v. Midland Credit Mgmt., Inc., 550 F.3d 294 (3d Cir. 2008); Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. 2006) (A debt collection letter is deceptive where "it can be reasonably read to have two or more different meanings, one of which is inaccurate."); Avila v. Rubin, 84 F.3d 222, 227 (7th Cir. 1996); Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996); United States v. Nat'l Fin. Services, Inc., 98 F.3d 131 (4th Cir. 1996); Gammon v. GC Services, 27 F.3d 1254 (7th Cir. 1994); Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993). *But see* Winans v. Franklin Collection Serv., Inc., 2018 WL 3942073 (M.D.N.C. Aug. 16, 2018) (other than vaguely mentioning "further procedures" being taken and including unchecked boxes entitled "Employment Verified" and "Assets Located," collection letter contained no suggestion that collection agency would conduct an immediate investigation into consumer's employment status or assets, although it might been different if these boxes had been checked).

745 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.13 (10th ed. 2021), *updated at* www.nclc.org/library.

746 *See* Dunlap v. Credit Prot. Ass'n, L.P., 419 F.3d 1011, 1012 (9th Cir. June 7, 2005) (*per curiam*) ("CPA's letter would not impermissibly mislead the least sophisticated debtor into believing that his credit would be damaged by a failure to pay a de minimis debt. Any inference regarding credit reporting that can be drawn from CPA's name [Credit Protection Association] is, at best, very weak."); Durkin v. Equifax Check Services, Inc., 406 F.3d 410 (7th Cir. 2005); Hipolito v. Alliance Receivables Mgmt., Inc., 2005 WL 1662137 (N.D. Cal. July 15, 2005) (statement in initial dun to "pay in full to [stop] all collection activity" did not unlawfully suggest to least sophisticated consumer that payment was only method to stop subsequent collection).

747 Schultz v. Midland Credit Mgmt., Inc., 905 F.3d 159, 163 (3d Cir. 2018) (no tax consequences because debt under $600). *See also* Heredia v. Capital Mgmt. Services, L.P., 942 F.3d 811 (7th Cir. 2019); Tatis v. Allied Interstate, L.L.C., 882 F.3d 422, 429 (3d Cir. 2018) (alternative meaning that consumer subject to lawsuit is deceptive where the debt is time barred); Campuzano-Burgos v. Midland Credit Mgmt., Inc., 550 F.3d 294, 298 (3d Cir. 2008); Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 441 (6th Cir. 2008); Rosenau v. Unifund Corp., 539 F.3d 218, 222 (3d Cir. 2008); Brown v. Card Serv. Ctr., 464 F.3d 450, 455 (3d Cir. 2006); Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996); Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055, 1062 (9th Cir. 2011); Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993).

748 Dunbar v. Kohn Law Firm, S.C., 896 F.3d 762 (7th Cir. 2018) (statement that settlement "may" have tax consequences is literally true and not misleading to least sophisticated consumer). *But cf.* Heredia v. Capital Mgmt. Services, L.P., 942 F.3d 811, 815–816 (7th Cir. 2019) (clause stating that settling debt for less than balance owed may have tax consequences and creditor "may" file 1099C form violated FDCPA; "Information about filing a 1099C form . . . is information within the knowledge of the creditor. This makes the 1099C Clause materially different than the tax consequences clause at issue in Dunbar. Only the debtor knows whether, given her financial situation as a whole, she will have to pay taxes on the forgiven debt. The creditor, however, knows whether it will have to file a 1099C form or not.").

749 *E.g.*, United States v. Nat'l Fin. Services, Inc., 98 F.3d 131, 136–139 (4th Cir. 1996).

750 Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993) ("The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd. This standard is consistent with the norms that courts have traditionally applied in consumer-protection law."). *See also* Appx. E.2.2.4.1, *infra*.

751 *See, e.g.*, Gabriele v. Am. Home Mortg. Servicing, Inc., 503 Fed. Appx. 89 (2d Cir. 2012); Santiago v. A.R. Res., Inc., 2015 WL 851818 (E.D. Pa. Feb. 26, 2015); Kassel v. Universal Fid. L.P., 2014 WL 824335 (E.D.N.Y. Mar. 3, 2014).

applied to a settlement letter sent to the consumer's attorney.[752] While *Heintz* did not address specifically whether FDCPA § 1692e applies to representations to the consumer's attorney, *Heintz* has been persuasive to courts that communications to attorneys are covered.[753]

The Fourth,[754] Seventh,[755] Eighth,[756] Tenth,[757] and Eleventh[758]circuits apply the FDCPA to communications with the consumer's attorney. Despite earlier Second Circuit *dicta* suggesting communications to attorneys are not covered,[759] that circuit has clarified that it has not yet ruled on the issue.[760]

The only circuit to rule otherwise is the Ninth,[761] although several district courts follow the Ninth Circuit approach where their own circuit court has not yet ruled on the issue.[762] But other courts in districts that have not ruled on the issue follow the majority of circuits and find that FDCPA § 1692e applies to communications with attorneys.[763]

The majority view that attorneys are covered has the better of the argument. The FDCPA defines a covered communication as "the conveying of information regarding a debt directly or indirectly to any person through any medium."[764] A communication to consumer's counsel is an indirect communication to the consumer.[765] It would be odd if a debt collector could engage in deceptive conduct just because the consumer has legal representation.[766]

Even though the majority view is that communications to attorneys should be covered, courts often do not apply the least sophisticated consumer standard to see if the communication is misleading. A number of courts instead consider whether a competent lawyer (not necessarily a specialist in consumer law) would be deceived.[767] Of course, a competent lawyer could easily be deceived where the communication provided false information about the debt, such as the balance or certain other charges.[768] Moreover, courts apply the least sophisticated standard even to communications with an attorney if the attorney is also the consumer.[769]

7.3.8 *Proving Deception—Is It a Matter of Law or Fact?*

Whether a question is one of law or fact may determine whether the question is subject to a motion to dismiss[770] or a summary judgment motion, or whether the question must go to the jury. Questions of law are outside the province of the jury. If a question of law, it may be considered de novo on

752 Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995).

753 *See* Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 232–233 (4th Cir. 2007).

754 Sayyed v. Wolpoff & Abramson, 485 F.3d 226 (4th Cir. 2007).

755 Evory v. Nat'l Action Fin. Services, Inc., 505 F.3d 769 (7th Cir. 2007). *Accord* Bravo v. Midland Credit Mgmt., Inc., 812 F.3d 599 (7th Cir. 2016). *See also* Weber v. Seterus, Inc., 2018 WL 1519163 (N.D. Ill. Mar. 28, 2018); Matmanivong v. Unifund CCR Partners, 2009 WL 1181529 (N.D. Ill. Apr. 28, 2009) (communications to lawyers and court are subject to § 1692e just like communications to consumers); Anderson v. Gamache & Myers, P.C., 2007 WL 4365745 (E.D. Mo. Dec. 10, 2007) (communication to consumer's agent with power of attorney, mediation service that did not provide legal advice, was communication to consumer, following *Evory*).

756 Powers v. Credit Mgmt. Servs, Inc., 776 F.3d 567 (8th Cir. 2015). *See also* Ferkingstad v. Accounts Receivable Services, L.L.C., 2017 WL 1373261 (D. Minn. Apr. 13, 2017).

757 Dikeman v. Nat'l Educators, Inc., 81 F.3d 949 (10th Cir. 1996).

758 Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291 (11th Cir. 2015). *Accord* Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268 (11th Cir. 2016).

759 Kropelnicki v. Siegel, 290 F.3d 118 (2d Cir. 2002).

760 Sykes v. Mel S. Harris & Assoc., 780 F.3d 70, 97 n.6 (2d Cir. 2015).

761 Guerrero v. RJM Acquisitions L.L.C., 499 F.3d 926, 939 (9th Cir. 2007). *See also* Plumb v. Prof'l Account Services, Inc., 2020 WL 2476752 (D. Alaska May 13, 2020); Gonzalez v. Law Office of Allen Robert King, 195 F. Supp. 3d 1118 (C.D. Cal. 2016); Angel v. Am. Recovery Services Inc., 2012 WL 3594371 (W.D. Wash. Aug. 22, 2012).

762 *See* Villegas v. Weinstein & Riley, P.S., 723 F. Supp. 2d 755 (M.D. Pa. 2010); Wright v. Phelan, Hallinan & Schmieg, L.L.P., 2010 WL 786536 (E.D. Pa. Mar. 8, 2010).

763 *See* Polinsky v. Cmty. Health Partners Reg'l Health Sys., 858 F. Supp. 2d 891 (N.D. Ohio 2012); Misleh v. Timothy E. Baxter & Assoc., 786 F. Supp. 2d 1330 (E.D. Mich. 2011); Quesenberry v. Alliant Law Group, P.C., 2010 WL 1189457 (E.D. Tex. Mar. 5, 2010), *adopted*, 2010 WL 1189481 (E.D. Tex. Mar. 24, 2010).

764 15 U.S.C. § 1692a(2).

765 *See* Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 232–233 (4th Cir. 2007).

766 *See* Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1302–1303 (11th Cir. 2015); Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769 (7th Cir. 2007).

767 Bravo v. Midland Credit Mgmt., Inc., 812 F.3d 599 (7th Cir. 2016) (collection letters did not violate § 1692e because false representation that Bravo still owed a debt that was discharged in a prior settlement was made to attorney that negotiated settlement, and competent attorney can determine if client still owes a debt and would not be deceived by letters); Powers v. Credit Mgmt. Services, Inc., 776 F.3d 567 (8th Cir. 2015) (discovery requests); Simon v. FIA Card Services, 2015 WL 1969411 (D.N.J. Apr. 30, 2015); Sayyed v. Wolpoff & Abramson, L.L.P., 733 F. Supp. 2d 635 (D. Md. 2010); Duraney v. Washington Mut. Bank, 2008 WL 4204821 (W.D. Pa. Sept. 11, 2008), *aff'd*, 388 Fed. Appx. 102 (3d Cir. 2010).

768 *See* Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 775 (7th Cir. 2007) ("A false claim of fact in a dunning letter may be as difficult for a lawyer to see through as a consumer. Suppose the letter misrepresents the unpaid balance of the consumer's debt. The lawyer might be unable to discover the falsity of the representation without an investigation that he might be unable, depending on his client's resources, to undertake. Such a misrepresentation would be actionable whether made to the consumer directly, or indirectly through his lawyer."); Caprel v. Specialized Loan Servicing, Inc., 2017 WL 1739919, at *4 (N.D. Ill. May 4, 2017); Mehling v. Fullett Rosenlund Anderson P.C., 2016 WL 7231931 (N.D. Ill. Dec. 12, 2016).

769 *See* Woerthwein v. Midland Credit Mgmt., Inc., 2016 WL 6194908 (N.D. Ill. Oct. 24, 2016); Sulaiman v. Biehl & Biehl, Inc., 2016 WL 5720476 (N.D. Ill. Sept. 30, 2016); Gesten v. Phelan Hallinan, P.L.C., 57 F. Supp. 3d 1381 (S.D. Fla. 2014). *See also* Dikeman v. Nat'l Educators, Inc., 81 F.3d 949, 954 (10th Cir. 1996) ("[w]e are not holding here that an affirmative misrepresentation to a lawyer would be excusable merely because a lawyer could see through the false statement").

770 *See, e.g.*, Samuel v. Approved Credit Solutions, L.L.C., 2015 WL 4548745, at *2 (S.D. Ind. July 28, 2015) ("Only the rarest FDCPA complaint that alleges a dunning letter is misleading or confusing may be dismissed on the pleadings.").

appeal. If a question of fact, appellate deference must be given to the lower court's finding.

Circuit courts disagree as to whether deception is a matter of fact or law, and the result may also depend on how clear the case is that the communication is or is not deceptive. The Fourth, Eighth, and Ninth Circuits find deception often is a matter of law.[771] The Fifth, Sixth, and Eleventh Circuits hold that, where it is a close question, deception is a question of fact to be decided by the fact finder.[772] The Seventh Circuit has a similar standard: it is question of law when the statement is clearly deceptive or clearly not deceptive; and a question of fact when a reasonable fact finder could reasonably find the statement deceptive or not.[773] Lower courts in other circuits generally consider the issue one of fact[774] or a mixed question of fact and law for the jury.[775]

Where determination of a FDCPA § 1692e violation requires a factual determination, it will usually be one as to whether a communication or practice is misleading as to the least sophisticated consumer. In this case, testimony from experts in a relevant field will be very helpful as to whether the communication or practice would in fact mislead the least sophisticated consumer.[776] If a communication is false, rather than just misleading, the consumer's factual burden is different and may require different testimony, because the consumer need only show that the communication is false. But whether a communication is false or misleading, it may be important also to present evidence that the statement is material to the least sophisticated consumers. An expert witness may be helpful to show this materiality, but often such materiality should be obvious without extensive evidence. See the discussion at § 7.3.9, *infra*.

The Seventh Circuit uniquely has expressed a preference that expert testimony that the communication would be misleading as to the least sophisticated consumer be based on a survey of consumers, instead of other grounds for an expert opinion.[777] In part, this is based on the Seventh Circuit (largely alone) finding the trademark law concept of confusion a closer analogy to FDCPA § 1692e than the FTC Act concept of deception. Such surveys can be extremely expensive, and their required use as evidence, even in trademark law, is open to question.[778]

Moreover, even the Seventh Circuit finds that a survey may not always be required and the consumer's own testimony as to whether a communication was misleading and material can be determinative.[779] This is the case also under trademark law.[780] Moreover, as described earlier in this subsection, the Seventh

771 *E.g.*, Russell v. Absolute Collection Services, Inc., 763 F.3d 385, 395 (4th Cir. 2014); Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055, 1060–1062 (9th Cir. 2011) (debt buyer's letter threatening to report obsolete debts to credit reporting agencies when it would not do so was deceptive as matter of law); Peters v. General Serv. Bur., Inc., 277 F.3d 1051 (8th Cir. 2002) (collector's letter requesting consumer's voluntary appearance in lieu of service of process was not false, deceptive, or misleading on its face, in absence of evidence of its deceptiveness).

772 Kuehn v. Cadle Co., 335 Fed. Appx. 827, 830 (11th Cir. 2009) ("if there are two sets of reasonable inferences that could be drawn from a dunning letter, and one set of inferences would result in a violation of 15 U.S.C. § 1692e(10), while the other would not, it was appropriate for a jury to decide which set of inferences to draw"); Gonzalez v. Kay, 577 F.3d 600, 606–607 (5th Cir. 2009) (issue of deceptiveness was too close to treated as an issue of law and the lower court's dismissal of the complaint was reversed); Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 441 (6th Cir. 2008) ("a jury should determine whether the letter is deceptive and misleading-specifically, whether the letter gives the impression that it is from an attorney even though it is not").

773 *See* Lox v. CDA, Ltd., 689 F.3d 818, 822, 826, 827 (7th Cir. 2012). *See also* Janetos v. Fulton Friedman & Gullace, L.L.P., 825 F.3d 317 (7th Cir. 2016) (verification rights notice violated § 1692g as matter of law); Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623, 630 (7th Cir. 2009) (deception not clear, consumer's survey rejected, but not consumer's testimony that she was confused, and jury decision required on deception); Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 776 (7th Cir. 2007); Taylor v. Cavalry Inv., L.L.C., 365 F.3d 572 (7th Cir. 2004) (as matter of law. letter was not confusing or deceptive); Al v. Van Ru Credit Corp., 2019 WL 189248, at *3 (E.D. Wis. Jan. 14, 2019) (plaintiff raised triable issue of fact as to whether letter was misleading); Magee v. Portfolio Recovery Assoc., 2016 WL 2644763 (N.D. Ill. May 9, 2016).

774 *See, e.g.*, Schaefer v. ARM Receivable Mgmt., Inc., 2011 WL 2847768 (D. Mass. July 19, 2011); Brazier v. Law Offices of Mitchell N. Kay, P.C., 2009 WL 764161 (M.D. Fla. Mar. 19, 2009); Harry v. Pentagroup Fin., L.L.C., 2007 WL 812998 (E.D.N.Y. Mar. 14, 2007); Mejia v. Marauder Corp., 2007 WL 806486 (N.D. Cal. Mar. 15, 2007); Gonzales v. Arrow Fin. Services L.L.C., 489 F. Supp. 2d 1140 (S.D. Cal. 2007); Dupuy v. Weltman, Weinberg & Reis Co., 442 F. Supp. 2d 822, 824 (N.D. Cal. 2006); Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856, 873 (S.D. Ohio 2005); Shimek v. Weissman, Nowack, Curry & Wilso, P.C., 323 F. Supp. 2d 1344 (N.D. Ga. 2003); Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087, 1099 (D. Or. 2000).

775 *See, e.g.*, Martsolf v. JBC Legal Group, P.C., 2008 WL 275719 (M.D. Pa. Jan. 30, 2008); Baptist v. Global Holding & Inv. Co., L.L.C., 2007 WL 1989450 (E.D.N.Y. July 9, 2007); Dupuy v. Weltman, Weinberg & Reis Co., 442 F. Supp. 2d 822, 824 (N.D. Cal. 2006). *See also* Pescatrice v. Orovitz, 539 F. Supp. 2d 1375 (S.D. Fla. 2008).

776 *See, e.g.*, Rabideau v. Mgmt. Adjustment Bur., 805 F. Supp. 1086 (W.D.N.Y. 1992) (expert in organizational communication to testify about debt validation notice); Siler v. Mgmt. Adjustment Bur., 1992 WL 32333 (W.D.N.Y. Feb. 18, 1992) (expert's opinion usefulness). *See also* Beeman v. Lacy, Katzen, Ryen & Mittleman, 892 F. Supp. 405 (N.D.N.Y. 1995) (expert testimony may be presented regarding contradiction between demand and validation notice and effect on least sophisticated consumer).

777 *See* § 11.6.3, *infra*.

778 *See* Robert H. Thornburg, *Trademark Survey Evidence: Review of Current Trends in the Ninth Circuit*, 21 Santa Clara Computer & High Tech. L.J. 715, 717 (2005) (most basic trademark survey costs hundreds of thousands of dollars). *See also* Katie Brown, Natasha T. Brison, & Paul J. Batista, *An Empirical Examination of Consumer Survey Use in Trademark Litigation*, 39 Loy. L.A. Ent. L. Rev. 237, 258 (2018–2019) ("Obtaining and using survey evidence can also be time-consuming, expensive, and some experts may experience logistical issues associated with locating an appropriate universe of individuals to participate in the study."); Irina D. Manta, *In Search of Validity: A New Model for the Content and Procedural Treatment of Trademark Infringement Surveys*, 24 Cardozo Arts & Ent. L.J. 1027 n.5 (2007).

779 Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623 (7th Cir. 2009).

780 *See* McGraw-Edison Co. v. Walt Disney Prod., 787 F.2d 1163, 1172–1173 (7th Cir. 1986); Duncan McIntosh Co. Inc. v. Newport Dunes Marina L.L.C. 324 F. Supp. 2d 1078 (C.D. Cal. 2004) (plaintiff introduced evidence in form of declarations of other people to support finding of actual confusion).

Circuit finds deception a matter of fact only in close calls, but otherwise finds it a matter of law.[781]

7.3.9 Materiality in FDCPA § 1692e Claims

7.3.9.1 Generally

Many FDCPA § 1692e claims are based on misleading or deceptive communications. The Third, Fourth, Sixth, Seventh, Eighth and Ninth Circuits require that, for the deception to be actionable, it must be material to the least sophisticated consumer.[782] A non-precedential Second Circuit decision reaches the same conclusion.[783] The Supreme Court, though, has not ruled as to whether deception must be material, avoiding the issue in a 2016 case.[784] It is prudent to always plead and be prepared to prove the materiality of the deception.[785]

In addition to the materiality requirement that many courts impose, the consumer must have suffered a concrete injury in order to have Article III standing to file an FDCPA case in federal court. Whether or not a deceptive statement is material, practitioners need to consider and be prepared to address Article III standing when filing new litigation. Article III standing is discussed in § 11.15, *infra*.

Courts have found that materiality is not required where the FDCPA § 1692e violation is not based on deception, but on a statutory requirement. There is no materiality requirement for a violation of FDCPA § 1692e(11), which requires disclosure of certain information during a debt collection contact.[786] If the information is not disclosed, there is a violation whether or not the non-disclosure is material to the consumer.

Courts also find that it is always material for a collector to violate FDCPA § 1692e(8) by failing to communicate with a consumer reporting agency (CRA) that a debt it is reporting to the CRA is disputed; this always affects the consumer's credit rating, and is thus material.[787] So is reporting to the CRA false information.[788]

Courts applying a materiality requirement apply an objective test: whether a deceptive statement would make a difference to the least sophisticated consumer,[789] rather than a subjective test of how it would affect the plaintiff.[790] Nevertheless, lower federal courts, in determining materiality in practice, often will look at the deception's impact on the actual plaintiff, perhaps using the plaintiff as a rough approximation of the least sophisticated consumer.[791] Thus, it is prudent to explain why

781 *See* Lox v. CDA, Ltd., 689 F.3d 818, 822, 826, 827 (7th Cir. 2012).

782 *See, e.g.*, Boucher v. Fin. Sys. of Green Bay, Inc., 880 F.3d 362 (7th Cir. 2018); Coyne v. Midland Funding L.L.C., 895 F.3d 1035 (8th Cir. 2018); Afewerki v. Anaya Law Grp., 868 F.3d 771, 776 (9th Cir. 2017); Elyazidi v. SunTrust Bank, 780 F.3d 227 (4th Cir. 2015); Jensen v. Pressler & Pressler, 791 F.3d 413, 420–422 (3d Cir. 2015); Wallace v. Washington Mut. Bank, 683 F.3d 323 (6th Cir. 2012); Wiley v. Portfolio Recovery Assoc., 2021 WL 780763 (D. Minn. Mar. 1, 2021).

783 Gabriele v. Am. Home Mortg. Servicing, Inc., 503 Fed. Appx. 89, 94 (2d Cir. 2012). *See also* Bryan v. Credit Control, L.L.C., 954 F.3d 576 (2d Cir. 2020) (remanding for district court to consider issue of materiality on § 1692e claim and suggesting that collection letter's erroneous identification of creditor was not necessarily materially misleading to least sophisticated consumer).

784 Sheriff v. Gillie, 578 U.S. 317, 327 n.6, 136 S. Ct. 1594, 194 L. Ed. 2d 625 (2016) ("Because we conclude that the letters sent by petitioners were truthful, we need not consider the parties' arguments as to whether a false or misleading statement must be material to violate the FDCPA.").

785 Camarena v. Wells Fargo Bank, 2014 WL 4055631 (D. Minn. Aug. 14, 2014); Caulfield v. Am. Account & Advisors, Inc., 2013 WL 1953314 (D. Minn. May 10, 2013) (consumer did not articulate that statement undermined her ability to make intelligent choice); Giovia v. PHH Mortg. Corp., 2013 WL 6039039 (E.D. Va. Nov. 13, 2013) (consumer must plead why false statement of debt amount was misleading); Hegwood v. Lighthouse Recovery Assoc., L.L.C., 2012 WL 693658 (N.D. Ind. Mar. 1, 2012) (not argued to be material and dismissed).

786 Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 374 (4th Cir. 2012), *abrogated on other grounds by* Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016); Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201 (E.D.N.Y. 2019); Price-Richardson v. DCN Holdings, Inc., 2018 WL 902167 (D. Md. Feb. 15, 2018); Prendergast v. First Choice Assets, L.L.C., 317 F. Supp. 3d 1018, 1026 (N.D. Ill. 2018); Heyer v. Pierce & Assoc., 2017 WL 75739 (N.D. Ill. Jan. 9, 2017); Kagan v. Selene Fin. L.P., 210 F. Supp. 3d 535 (S.D.N.Y. 2016). *But see* Driesen v. RSI Enters. Inc., 2019 WL 283646, at *4 n.2 (D. Ariz. Jan. 22, 2019) (construing Ninth Circuit precedent as "requiring a showing of materiality in all § 1692e(11) cases," but acknowledging that the law is "unsettled in other Circuits as to whether materiality is required in the § 1692e(11) context"); Fausz v. NPAS, Inc., 237 F. Supp. 3d 559, 570 (W.D. Ky. 2017). *See* § 7.2.11.1, *supra*.

787 Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 349 (7th Cir. 2018); Wilhelm v. Credico, Inc., 519 F.3d 416 (8th Cir. 2008); Patterson v. Peterson Enters., Inc., 2018 WL 5269810 (E.D. Wash. Oct. 23, 2018); Daley v. A & S Collection Assoc., Inc., 717 F. Supp. 2d 1150 (D. Or. 2010).

788 Mehling v. Fullett Rosenlund Anderson P.C., 2016 WL 7231931 (N.D. Ill. Dec. 12, 2016) (inaccurately reporting amount of debt).

789 *See, e.g.*, Elyazidi v. SunTrust Bank, 780 F.3d 227 (4th Cir. 2015); Tourgeman v. Collins Fin. Services, Inc., 755 F.3d 1109, 1121 (9th Cir. 2014) ("[T]he factual errors in Paragon Way's letters to Tourgeman could easily cause the least sophisticated debtor to suffer a disadvantage in charting a course of action in response to the collection effort."); Powell v. Palisades Acquisition XVI, L.L.C., 782 F.3d 119, 127 (4th Cir. 2014) ("the inquiry is not whether the least sophisticated consumer would have acted differently . . . Instead, it is whether the information would have been *important* to the consumer *in deciding how to respond* to efforts to collect the debt." (emphasis in original)); Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623, 629 (7th Cir. 2009); Biber v. Pioneer Credit Recovery, Inc., 229 F. Supp. 3d 457 (E.D. Va. 2017); Kaymark v. Udren Law Offices, P.C., 2016 WL 7187840 (W.D. Pa. Dec. 12, 2016); Gorman v. Messerli & Kramer, P.A., 2016 WL 755618 (D. Minn. Feb. 25, 2016) (materiality requirement for § 1692e is objective, not subjective); Hudspeth v. Capital Mgmt. Services, L.P., 2013 WL 674019 (D. Colo. Feb. 25, 2013).

790 *See* Afewerki v. Anaya Law Group, 868 F.3d 771, 776 (9th Cir. 2017); Powell v. Palisades Acquisition XVI, L.L.C., 782 F.3d 119 (4th Cir. 2014); Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012); Pierre v. Midland Credit Mgmt., Inc., 2018 WL 723278 (N.D. Ill. Feb. 5, 2018); Richardson v. LVNV Funding, L.L.C., 2017 WL 4921971 (N.D. Ill. Oct. 31, 2017) (FDCPA claim satisfied materiality requirement where collection letter regarding time-barred debt could influence unsophisticated consumer to pay debt instead of doing nothing (which was favorable option)); Samuels v. Midland Funding, L.L.C., 921 F. Supp. 2d 1321 (S.D. Ala. 2013).

791 *See, e.g.*, Fears v. Sys. & Services Technologies, Inc., 2020 WL 7351112 (N.D. Ga. Mar. 25, 2020); Jimenez v. Trident Asset Mgmt., L.L.C., 2017 WL 4922251 (M.D. Fla. Oct. 31, 2017) (consumer could not demonstrate that misrepresentation materially misled her); Gonzalez

a deceptive communication is material not only to the least sophisticated consumer, but also to the consumer bringing the FDCPA § 1692e actions. If is not material to the consumer, stress to the court caselaw allowing the consumer to show the practice's materiality to the least sophisticated consumer.

For deception to be material, it must make a difference to a consumer. This occurs when, for example, a communication misleads the consumers as to the nature of the debt or impedes a consumer's ability to decide how to respond to, or whether to dispute, collection of the debt.[792] A misrepresentation might not be material if it makes no difference to the least sophisticated consumer—the consumer will pay no attention to it.[793]

But even if a consumer would not understand what the representation means, it can be material. As the Seventh Circuit stated: "Confusing language in a dunning letter can have an intimidating effect by making the recipient feel that he is in over his head and had better pay up rather than question the demand for payment."[794] Another court put it this way as to confusing language in a collection lawsuit: "[C]ourt proceedings are intimidating to the average individual. The inclusion of confusing or incomplete language in a court filing like the Motion could make the least sophisticated consumer feel even further out of his league . . ."[795]

7.3.9.2 Materiality As to Consequences of Payment or Non-Payment

Misleading the consumer as to the consequences of payment or non-payment will almost always be material because it will affect the consumer's decision-making as to payment of the debt. Misrepresentations that the amount due will continue to increase if payments are not promptly made are thus material,[796] because this can affect the consumer's decision to pay promptly.[797]

Conversely, misrepresentations as to the benefits of prompt payment are also material, such as that the collector will waive charges or part of the principal where the collector was not authorized to do so.[798] Misrepresenting the positive effects on the consumer's credit rating of a payment is also material,[799] as are misrepresentations as to the impact of non-payment on a consumer's credit rating.[800]

Threatening a lawsuit is material.[801] Misrepresenting the impact on the consumer if the collector files a collection

v. Credit Prot. Ass'n, L.P., 2017 WL 2798404 (N.D. Ill. June 28, 2017) (statement regarding effects of bounced check not material as plaintiffs would not be paying by check); Stockman v. Credit Prot. Ass'n, 2017 WL 2798403 (N.D. Ill. June 28, 2017) (consumer did not present any evidence showing that she intended to pay debts by check); Peterson v. Meyer, 2016 WL 5249219 (N.D. Ind. Sept. 22, 2016) (not materially misleading to debtor's husband); Datiz v. Int'l Recovery Assoc., Inc., 2016 WL 4148330 (E.D.N.Y. Aug. 4, 2016); Buckley v. Afni, Inc., 133 F. Supp. 3d 1140 (S.D. Ind. Jan. 6, 2016) (focused on plaintiff's confusion); Conteh v. Shamrock Cmty. Ass'n, Inc., 2015 WL 5177752 (D. Md. Sept. 3, 2015) (homeowners not misled by inaccurate statement of amount due, because homeowners paid only amount homeowners claimed was due); Burd v. Manley Deas Kochalski P.L.L.C., 2014 WL 12572908 (S.D. Ohio Mar. 31, 2014).

792 *See* Powell v. Palisades Acquisition XVI, L.L.C., 782 F.3d 119, 127 (4th Cir. 2014). *See also* Laporte v. Midland Funding L.L.C., 2020 WL 2814184, at *6 (W.D. Va. May. 29, 2020) (writ misrepresentation that wages would be garnished was material even if consumer was aware debt was already satisfied because defendant's "inconsistent representations are enough to cast doubt in the mind of the least sophisticated consumer"); Madison v. Equityexperts.org, L.L.C., 2020 WL 555249, at *4 (E.D. Mich. Feb. 4, 2020) (representing that attorney fees had been incurred and charged when they had was material "because it tends to mislead an unsophisticated debtor regarding the character of the debt, and impairs his ability to knowledgeably assess its validity"). *But see* Tiene v. Drexel Univ., 816 Fed. Appx. 707 (3d Cir. 2020) (because use of incorrect residential address prevented consumer from receiving notice of suit, it could not have affected his decision-making and therefore was not actionable).

793 *See* Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012), Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623, 629 (7th Cir. 2009); Hegwood v. Lighthouse Recovery Assoc., L.L.C., 2012 WL 693658, at *2 (N.D. Ind. Mar. 1, 2012) (false statement that collector had previously spoken with consumer not materially false: "[The plaintiff] knows whether he spoke to someone or did not. He can then assess that knowledge and disregard the assertion if it's false (as alleged here)."); Kromelbein v. Envision Payment Solutions, Inc., 2013 WL 3947109, at *9 (M.D. Pa. Aug. 1, 2013) (check collector misrepresenting that it had filed consumer's driver license number when consumer did not have one: "Even the least sophisticated consumer would not be misled by a statement that he knows to be false."). *But cf.* Wheeler v. Midland Funding L.L.C., 2020 WL 1469449, at *6 (N.D. Ill. Mar. 26, 2020) (although consumer already knew debt was time-barred, misrepresentation about this still material because the issue of whether debt is legally enforceable is central fact about character and status of debt).

794 Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623, 629 (7th Cir. 2009).

795 Schendzielos v. Borenstein, 2016 WL 614473 (D. Colo. Feb. 16, 2016)

796 *See* Lopez-Gordillo v. Fin. Recovery Services, Inc., 2019 WL 527627 (N.D. Ill. Feb. 11, 2019); Knepp v. Huffman, 2018 WL 4680020 (N.D. Ind. Sept. 28, 2018) (interest will accrue); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (17% collection charge); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (17% collection charge); Moran v. Greene & Cooper Attorneys L.L.P., 43 F. Supp. 3d 907 (S.D. Ind. 2014).

797 *See* Spuhler v. State Collection Services, Inc., 2018 WL 3651356 (E.D. Wis. Aug. 1, 2018) (accruing interest). Lukawski v. Client Services, Inc., 2013 WL 4647482 (M.D. Pa. Aug. 29, 2013) (that consumer might now know interest was accruing was material even where defendant offered to settle for less than 50% of amount due).

798 Franklin v. Nat'l Credit Audit Corp., 2018 WL 1155973 (C.D. Cal. Jan. 22, 2018) (statement that it would waive collection fees and interest that it was not authorized to assess).

799 Magee v. Portfolio Recovery Assoc., 2016 WL 2644763 (N.D. Ill. May 9, 2016) (misleading consumer to believe that obsolete debt was legally reportable to consumer reporting agencies, and that making payment on that debt would improve their credit score).

800 *See* Wheeler v. Credit Bur. of Santa Maria, 2015 WL 12669881 (C.D. Cal. Sept. 3, 2015) (could report to consumer reporting agencies that debtor's nonpayment was made "without reason" and that debtor "evidently [doesn't] care about [his] credit record"); Hudspeth v. Capital Mgmt. Services, L.P., 2013 WL 674019, at *7 (D. Colo. Feb. 25, 2013) (debt would remain on report indefinitely). *Cf.* Johnson v. Enhanced Recovery Co., L.L.C., 961 F.3d 975 (7th Cir. 2020) (threatening to report debt to consumer reporting agencies when had already done so survived motion to dismiss, but consumer failed to produce sufficient evidence using objective measure, so summary judgment granted to collector).

801 *See* Cadiz v. Credence Res. Mgmt., L.L.C., 2018 WL 4052159 (N.D. Ill. Aug. 24, 2018) (false threat of litigation).

lawsuit is material, even if the collection lawsuit is never filed.[802] Threatening seizure of assets or other unavailable creditor remedies should be material.[803] Mention of possible tax consequences or IRS reporting requirements in connection with a proposed settlement is material because it can imply to the least sophisticated consumer that failure to pay in full will involve the IRS in the consumer's affairs, and thus affect their decision-making process.[804]

7.3.9.3 Materiality As to Inaccuracy of the Amount Due

A collector's misstatement of the amount due, such as by including unauthorized charges, should almost always be considered material,[805] unless the discrepancy is found to be de minimis.[806] The misstatement of the amount due can lead to the consumer paying amounts not owed.[807] Understating the amount due can also be material in that this, too, may affect the consumer's repayment decision.[808] Confusing or conflicting demands for payment can also affect the consumer's determination if the amount is proper or if the debt should be disputed, and is thus material.[809]

The Seventh Circuit found it not material to a consumer who doesn't contest owing the amount claimed that the principal balance includes past interest charges added to principal, rather than breaking out the past due interest as a separate line item.[810] The Eighth Circuit found not material a representation that a small amount of interest was due based on application of one interest rate where the interest charge also included a small amount of interest assessed at a different interest rate, where both rates were legal.[811] Similarly not found material is that a statement in a letter that the amount was due on a date ten days prior to the letter's mailing.[812]

7.3.9.4 Materiality As to the Nature or Identity of the Creditor or Collector

The Ninth Circuit has stated that the identity of the original creditor is "a critical piece of information."[813] Misrepresenting

802 Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012).

803 Watkins v. Inv. Retrievers, Inc., 2018 WL 558833 (E.D. Cal. Jan. 24, 2018) (collection letter falsely stated "We understand you are still in possession of your vehicle"); Weisheit v. Roseberg & Assoc., 2017 WL 5478355 (D. Md. Nov. 15, 2017) (seizure of home).

804 Velez v. Enhanced Recovery Co., 2016 WL 1730721 (E.D. Pa. May 2, 2016). *See also* § 7.3.9.1, *supra*.

805 Coyne v. Midland Funding L.L.C., 895 F.3d 1035, 1038 (8th Cir. 2018) ("a false representation of the amount of a debt that overstates what is owed under state law materially violated § 1692e(2)(A)"); Afewerki v. Anaya Law Group, 868 F.3d 771 (9th Cir. 2017); Powell v. Palisades Acquisition XVI, L.L.C., 782 F.3d 119 (4th Cir. 2014); Walker v. Hill, 2021 WL 1062238, at *16 (E.D. Va. Mar. 19, 2021) (misrepresentation was material, as inflated fee misstated total amount due by $2450, or 16% of demand of $14,700, and "courts have typically found misstatements of more than 10% sufficient to be material to the least sophisticated consumer"); Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521, at *12 (D.N.J. July 27, 2017) ("failure to accurately represent an amount owed in a communication to a debtor, or failure to provide an explanation as to how that amount was calculated, are material errors under the FDCPA"); Munoz v. Cal. Bus. Bur., Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016) (seeking full amount of debt instead of agreed settlement amount); Hines v. HSBC Bank, 2016 WL 5716749 (E.D.N.Y. Sept. 30, 2016); Heling v. Creditors Collection Serv., Inc., 2016 WL 4625683 (E.D. Wis. Sept. 6, 2016) (overstating $518 debt balance by $20 could mislead an unsophisticated consumer and could have been factor in consumer's decision-making process); *In re* FDCPA Cognate Cases, 2016 WL 1273349 (W.D. Mich. Mar. 28, 2016) (claiming costs that were not due in garnishment action until garnishing party prevailed—even in small amounts as low as $10—was material misstatement); Gorman v. Messerli & Kramer, P.A., 2016 WL 755618 (D. Minn. Feb. 25, 2016) (including unauthorized court costs); Crafton v. Law Firm of Jonathan B. Levine, 2013 WL 3441243 (E.D. Wis. July 9, 2013) (false representation of the homeowner's association assessments and fees). *But see* Grunwald v. Midland Funding L.L.C., 172 F. Supp. 3d 1050 (D. Minn. 2016) (adding $30 cost of service—an amount roughly equal to three-tenths of one percent of actual total of debt—not material).

806 *See* Cummings v. Jaburg & Wilk P.C., 711 Fed. Appx. 418 (9th Cir. Feb. 14, 2018) (understating amount owed by $20 in debt of over $9000); Fuqua v. Associated Credit Serv., Inc., 2018 WL 2371102 (E.D. Wash. May 24, 2018) (bogus $5 notary fee not material); Archie v. Nagle & Zaller, P.C., 2018 WL 3475429, at *5 (D. Md. July 19, 2018); Cordova v. Jenkins, 2018 WL 5112907 (D.N.M. Oct. 19, 2018); Matuszczak v. Miramed Revenue Group L.L.C., 2017 WL 5467117 (N.D. Ind. Nov. 13, 2017) (45 cent rounding error); Gordon v. Bank of Am., 2017 WL 1377673 (D.N.J. Apr. 12, 2017) (seeking excess of $390 on nearly $222,000 that was concededly owing); Robbins v. Med-1 Solutions, L.L.C., 2016 WL 891329 (S.D. Ind. Mar. 9, 2016) (one dollar discrepancy); Akoundi v. FMS, Inc., 2014 WL 3632008 (S.D.N.Y. July 22, 2014) (rounding up by penny). *See also* Cicalo v. McCalla Raymer Leibert Pierce, 2018 WL 1514245 (D. Conn. Mar. 27, 2018).

807 Afewerki v. Anaya Law Group, 868 F.3d 771 (9th Cir. 2017).

808 *See* Fields v. Wilber Law Firm, P.C., 383 F.3d 562, 566 (7th Cir. 2004); DeFrancesco v. Veripro Solutions Inc., 2015 WL 179376 (M.D. Fla. Jan. 14, 2015). *But see* Arnett v. Hodges Law Office, P.L.L.C., 2019 WL 4195343, at *4 (E.D. Va. Sept. 4, 2019) (understatement of debt by $75, or 1.9%, was "minimal discrepancy" that did not rise to level of important misstatement that could affect consumer's decision-making); Cicalo v. McCalla Raymer Leibert Pierce, L.L.C., 2018 WL 1514245, at *1 (D. Conn. Mar. 27, 2018) (letter understating amount owed as $115,058.54, when true amount owed was $122,387.54; nothing in record indicated how miscalculation could have been material).

809 *See* Aubrey v. McCabe Trotter & Beverly, P.C., 2018 WL 3912353, at *6 (D.S.C. Aug. 14, 2018) ("Plaintiff had no way to assess which parts of the lump sum of $16,251.83 constituted her unpaid fines, assessments, attorneys' fees or costs, and therefore had no way to assess the validity of the debt."); Vogel v. McCarthy, Burgess, & Wolff, Inc., 2018 WL 3729329 at 4 (N.D. Ill. Aug. 6, 2018) (statement of debt as one lump sum of $3,036.83, without stating its fees and charges, was plausibly materially misleading on character of debt, because it could influence what consumer would do in reaction to debt-collection attempt); Boedicker v. Rushmore Loan Mgmt. Services, L.L.C., 2017 WL 1408158 (D. Kan. Apr. 20, 2017) (conflicting statements of amount due); Smith v. Am. Revenue Corp., 2005 WL 1162906 (N.D. Ind. May 16, 2005) (follow-up letter demanding payment of lump sum for fourteen accounts).

810 Hahn v. Triumph P'ships L.L.C., 557 F.3d 755, 757 (7th Cir. 2009); Wahl v. Midland Credit Mgmt., Inc., 556 F.3d 643 (7th Cir. 2009) (upholding rejection of claim that collector misrepresented character of debt). *But see* Reg. F § 1006.34(c)(2)(viii) (requiring itemization of debt since itemization date as part of validation information); § 9.4.7, *infra*.

811 Donohue v. Quick Collect, Inc, 592 F.3d 1027 (9th Cir. 2010).

812 Davis v. White, 2017 WL 6273488 (E.D. Va. Dec. 8, 2017).

813 Tourgeman v. Collins Fin. Services, Inc., 755 F.3d 1109, 1121 (9th Cir. 2014).

the original creditor can unduly complicate a consumer's efforts to investigate the nature of the debt or know how to respond to the collection effort.[814] So can a misrepresentation of who owns the debt at the time of collection, because, again, this affects the consumer's efforts to contact the owner.[815] It is also material for a collector to misrepresent that it owns the debt, because the consumer, after paying that party, may still owe the real owner.[816]

But some courts find it permissible for a mortgage loan owner's servicer to imply it owns the debt, because this might in fact help, not hinder, the consumer's effort at obtaining more information.[817] Similarly, where an auto dealer originates credit but immediately assigns the obligation to its financing arm, describing the latter as the original creditor may not be material.[818]

Deception is material where a collector tricks consumers into contacting them, pretending to be someone else.[819] Misrepresentation that the collector is licensed is material because it may prevent the consumer from raising a valid defense to a collection lawsuit.[820]

Misrepresenting that a communication or court document was drafted by an attorney is material to a consumer because it suggests that an attorney has reached a considered professional judgment that the consumer owes the debt and that the debt is a candidate for a collection lawsuit.[821] Misrepresenting that a solo law firm has multiple attorneys can influence how a consumer responds.[822]

On the other hand, a court has found not material the fact that a collector's communication did not disclose that the collector was a law firm.[823] Courts have found minor aspects of the collector's self-identification not to be material, such as where the collector represents itself as a certified debt collection specialist,[824] lists addresses in two states,[825] misrepresents that the collection agency is highly rated by an outside reviewer,[826] or describes itself both as a collector and a creditor.[827]

7.3.9.5 Materiality As to the Nature of the Debt and Debtor Rights

Deception concerning a consumer's legal rights can be material, such as where deception impairs a consumer's rights to verification of the debt,[828] prevents rights to dispute a debt,[829] or hides a consumer's legal defenses to a debt.[830] Courts, though, have found that some misrepresentations of legal rights are unlikely to be material.[831]

814 Tourgeman v. Collins Fin. Services, Inc., 755 F.3d 1109, 1121 (9th Cir. 2014); Winslow v. Forster & Garbus, L.L.P., 2017 WL 6375744 (E.D.N.Y. Dec. 13, 2017); McGinty v. Prof'l Claims Bur., Inc., 2016 WL 6069180 (E.D.N.Y. Oct. 17, 2016); Hall v. Global Credit & Collection Corp., 2016 WL 4441868 (M.D. Fla. Aug. 23, 2016); Burdick v. Bank of Am., 140 F. Supp. 3d 1325 (S.D. Fla. 2015); Green v. Monarch Recovery Mgmt., Inc., 2015 WL 4599480 (S.D. Ind. July 29, 2015); Jacobson v. Bayview Loan Servicing, L.L.C., 371 P.3d 397 (Mont. May 4, 2016) (servicer's misrepresentation that it was secured party was material). *But see* Klein v. Solomon and Solomon, P.C., 2011 WL 5354250 (D. Conn. Oct. 28, 2011).

815 Wallace v. Washington Mut. Bank, 683 F.3d 323, 327 (6th Cir. 2012).

816 McCrobie v. Palisades Acquisition XVI, L.L.C., 359 F. Supp. 3d 239 (W.D.N.Y. 2019); Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013). *See also* Eun Joo Lee v. Forster & Garbus L.L.P., 926 F. Supp. 2d 482 (E.D.N.Y. 2013).

817 Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75, 86 (2d Cir. 2018). *Cf.* Duffey v. Nationstar Mortg., 614 Fed. Appx. 330 (6th Cir. 2015) (listing Deutsche Bank as loan servicer, instead of Bank of America, not material, as statement identified correct entity to contact, which represented both creditor and loan servicer); Sedillos v. United Collection Bur., Inc., 2012 WL 13081650 (D.N.M. Mar. 29, 2012) (no evidence that anyone would have acted differently had they known the call was from agency rather than CitiBank).

818 *See* Golden v. Prosser, 2014 WL 4626489 (D. Minn. Sept. 15, 2014).

819 *See* Quinn v. Specialized Loan Servicing, L.L.C., 2016 WL 4264967 (N.D. Ill. Aug. 11, 2016) (door hanger asked consumer to call about property inspection, but number called was debt collector).

820 Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013).

821 Satran v. LVNV Funding, L.L.C., 2018 WL 2464486, at *7 (W.D. Wis. June 1, 2018) (complaint purportedly filed by attorney undoubtedly has ability to influence consumer's decision about how to proceed, since it "'implies that the attorney has reached a considered, professional judgment that the consumer is delinquent and is a candidate for legal action'"); Boerner v. LVNV Funding L.L.C., 326 F. Supp. 3d 665, 681 (E.D. Wis. 2018).

822 Jones v. Jason A. Craig & Assoc., 2019 WL 362273, at *3 (M.D. Ga. Jan. 29, 2019) ("The Court finds plausible that the misrepresentation of having more than one attorney in the law firm could have objectively affected the decision-making process of the least sophisticated consumer.").

823 Fondacaro v. Solomon & Solomon, P.C., 2018 WL 4054075 (N.D.N.Y. Aug. 24, 2018).

824 *See* Bassili v. CIR Law Offices, L.L.P., 2015 WL 11752142 (S.D. Cal. Feb. 11, 2015).

825 *See* Klein v. Credico, Inc., 2018 WL 3404156 (D. Minn. July 12, 2018), *aff'd on other grounds*, 922 F.3d 393 (8th Cir. 2019).

826 Bryan v. I.C. Sys., Inc., 2017 WL 4326041 (E.D.N.Y. Sept. 28, 2017) (false statement of Better Business Bureau A+ rating).

827 *See* Scheuer v. Jefferson Capital Sys., L.L.C., 43 F. Supp. 3d 772 (E.D. Mich. Sept. 9, 2014).

828 *See* Mikolajczyk v. Universal Fid., L.P., 2017 WL 706301 (E.D. Wis. Feb. 22, 2017); Hale v. AFNI, Inc., 2010 WL 380906, at *8 (N.D. Ill. Jan. 26, 2010) (statement that defendant was "unable to investigate due to insufficient information" was material as it impaired consumer's ability to challenge debt and her decision to pay debt).

829 *See* Abramov v. I.C. Sys., Inc., 54 F. Supp. 3d 270 (E.D.N.Y. 2014) (requiring disputes based on identity theft be in writing). *See also* Christopher v. RJM Acquisitions L.L.C., 2015 WL 437541 (D. Ariz. Feb. 3, 2015) (sending collection letter to someone who does not owe debt is material because it could confuse or mislead unsophisticated consumer).

830 *See* Hordge v. First Nat'l Collection Bur., Inc., 2018 WL 3741979 (S.D. Tex. Aug. 7, 2018) (time-barred debt); Richardson v. LVNV Funding, L.L.C., 2017 WL 4921971 (N.D. Ill. Oct. 31, 2017); Magee v. Portfolio Recovery Assoc., 2016 WL 2644763 (N.D. Ill. May 9, 2016).

831 *See* Lopez-Gordillo v. Fin. Recovery Services, Inc., 2019 WL 527627 (N.D. Ill. Feb. 11, 2019) (after cease communication letter, collector notified consumer it would cease communication); Berry v. Van Ru Credit, 2017 WL 8950428 (D. Utah Sept. 11, 2017), *adopted*, 2017 WL 4342072 (D. Utah Sept. 29, 2017) (false statement that all student loan rehabilitation agreements had to be verbal); Elliott v. Credit Control Services, Inc., 2010 WL 1495402 (S.D. Cal. Apr. 14, 2010) (heading collection letter with "warning" before required disclosure that this was attempt to collect debt).

A confusing communication about the status of a debt will often be material.[832] For instance, where a misrepresentation regarding the statute of limitations on the consumer's debt has the potential to affect the consumer's decision-making process, such misrepresentation is material.[833]

But some facts about a debt have been found not material, such as the date a debt buyer purchased a debt, where that would not affect a consumer's actions.[834]

7.3.9.6 Materiality of Deceptive Practices in Collection Litigation

A collector's deception in its collection action can be material to the consumer, since it can affect whether and how the consumer makes decisions relevant to the litigation. A collector's misrepresentation that it intends to prove its collection action, when it had no such intent, is material, because it can affect whether the consumer decides to pay the debt or defend the lawsuit.[835] Similarly, a collector filing an invalid claim is material because it can affect the consumer's decision to pay on the debt.[836]

An affidavit falsely stating that facts were based on personal knowledge can be material because it may affect whether the consumer challenges the affidavit's admissibility and whether the consumer might question the facts stated therein.[837] The same is the case where the affidavit has been fraudulently notarized[838] or contains false statements.[839]

Seeking amounts not owed in a collection case can be material in that it can lead to an excessive judgment against the consumer[840] or the consumer voluntarily paying more than the consumer would otherwise pay. A collector's misrepresentations about a consumer's ability to vacate a default judgment can also be material because this can affect the consumer's decision whether to seek to vacate the judgment.[841]

On the other hand, where the consumer does not deny a collector's allegations, minor inaccuracies in the proof of those allegations may not be material.[842] A minor error in legal pleadings is not actionable where the consumer does not show how the error affected the consumer's decision-making.[843] A mistake in a pleading can be corrected later in the litigation, and then the original mistake may no longer be material.[844]

A mistake in litigation documents can also be immaterial where even the least sophisticated consumer is not misled by a minor mistake.[845] A court has found a collector's representations that it had mailed a notice of trial a few days prior to its actual mailing was not material.[846] And a court found that any alleged confusion as to whether payment had to be sent by the consumer or received by the collection agency by the date specified in a collection letter was not material where the perceived ambiguity would merely cause the consumer to transmit payment a bit early.[847]

7.4 Application of FDCPA § 1692e to Selected Collection Topics

7.4.1 Nature of the Debt Collector and the Payment Process

A debt collector misrepresenting the debt collector's nature can be a FDCPA § 1692e violation. Examples are

832 Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623 (7th Cir. 2009).

833 Chandler v. NCB Mgmt. Services, Inc., ___F.3d ___, 2021 WL 1108637 (E.D.N.Y. Mar. 23, 2021).

834 Beaufrand v. Portfolio Recovery Assoc., 2018 WL 6065355 (E.D. Wis. Nov. 20, 2018).

835 Samuels v. Midland Funding, L.L.C., 921 F. Supp. 2d 1321 (S.D. Ala. 2013). *See also* § 7.4.10.4.2, *infra* (initiating lawsuit without sufficient evidence of debt).

836 *See* Bahena v. Jefferson Capital Sys., L.L.C., 363 F. Supp. 3d 914 (W.D. Wis. 2019) (failure to provide consumer with statutory right to cure); Boerner v. LVNV Funding L.L.C., 326 F. Supp. 3d 665, 681 (E.D. Wis. 2018) (same).

837 Toohey v. Portfolio Recovery Assoc., 2016 WL 4473016 (S.D.N.Y. Aug. 22, 2016); Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961, 971 (N.D. Ohio 2009).

838 *See* Newman v. Encore Capital Group, 2017 WL 3479510 (E.D. Mich. Aug. 14, 2017). *But see* Lembach v. Bierman, 528 Fed. Appx. 297 (4th Cir. 2013) (not material where wrong person signed complaint where debt was clearly owed and complaint's allegations were accurate).

839 *See* Winemiller v. Worldwide Asset Purchasing, L.L.C., 2011 WL 1457749 (D. Md. Apr. 15, 2011).

840 *See* Maronyan v. Fin. Credit Network Inc., 2017 WL 57835, at *5 (C.D. Cal. Jan. 3, 2017) (complaint sought attorney fees in excess of maximum allowed by state law was "undoubtedly material"); McInerney v. Roosen Varchetti & Olivier P.L.L.C., 2017 WL 4778724 (E.D. Mich. Oct. 23, 2017) (seeking costs before awarded by court); Heling v. Creditors Collection Serv., Inc., 2016 WL 4625683 (E.D. Wis. Sept. 6, 2016).

841 Heling v. Creditors Collection Serv., Inc., 2016 WL 4625683 (E.D. Wis. Sept. 6, 2016).

842 *See* Hill v. Accounts Receivable Services, L.L.C., 888 F.3d 343 (8th Cir. 2018).

843 Simon v. FIA Card Servs., 639 Fed. Appx. 885 (3d Cir. 2016) (subpoenas stating that sent to consumers personally was technically false); Jensen v. Pressler & Pressler, 791 F.3d 413, 420–422 (3d Cir. 2015) (subpoena included signature of retired, rather than sitting clerk); Lembach v. Bierman, 528 Fed. Appx. 297 (4th Cir. 2013) (forged signature on document); Miller v. Javitch, Block & Rathbone, 561 F.3d 588 (6th Cir. 2009) (calling credit card account a "loan").

844 *See* Kelsey v. Forster & Garbus, L.L.P., 353 F. Supp. 3d 223 (W.D.N.Y. 2019) (misrepresentation leading to default immaterial where default judgment set aside); Dolan v. Sentry Credit, Inc., 2018 WL 6604212 (W.D. Wash. Dec. 17, 2018) (consumer failed to show how any misrepresentation connected with mistake in calculating prejudgment interest was material where it was withdrawn and later corrected in subsequent motion); Browning-Fote v. Frederick J. Hanna & Assoc., 2011 WL 13279173 (S.D. Ga. May 20, 2011) (error immaterial where collection action dismissed three days later).

845 Carpenter v. Monroe Fin. Recovery Group, L.L.C., 119 F. Supp. 3d 623 (E.D. Mich. 2015) (false representation that consumer possessed credit card agreement not material where consumer would know whether she had a copy of agreement in her possession). *See also* Washington v. Roosen, Varchetti & Oliver, P.P.L.C., 894 F. Supp. 2d 1015 (W.D. Mich. 2012).

846 *See* Lang v. Automated Accounts, Inc., 2014 WL 6473670 (E.D. Wash. 2014). *See also* Scarbrough v. Rausch, Sturm, Israel, Enerson & Hornick, L.L.P., 2018 WL 5869647, at *3 (E.D. Mich. Nov. 9, 2018) (date of filing debt collection suit had no repercussion for consumer).

847 *See* Leifer v. United Collection Bur., Inc., 2020 WL 6507325 (E.D.N.Y. Nov. 5, 2020).

misrepresentations of the number of collection agency employees or that they include special investigators,[848] that the agency has widespread offices or affiliates,[849] or that the collector is an attorney,[850] a credit reporting agency,[851] or the owner of the debt.[852] Collectors can also misrepresent their identity by use of a misleading or false name.[853] It has been held to be deceptive for a debt buyer to claim it is a debt collection agency.[854]

A FDCPA § 1692e violation is stated where a collector for a debt buyer does not make clear why the debt buyer is demanding payment and the consumer only knows of liability to the original creditor. In that instance, the consumer is confused whether to pay the creditor or debt buyer.[855]

A FDCPA § 1692e violation can result from a debt collector masking its identity when contacting the consumer, such as using a false caller ID (spoofing),[856] intentionally blocking its telephone number,[857] or claiming the collector was investigating the consumer's Social Security number.[858] Other actionable misrepresentations involve the collector's success in collecting debts,[859] or that a collector was immune from the FDCPA.[860]

Also actionable under FDCPA § 1692e are misrepresentations of the relationship between the collector and the consumer. Examples include misrepresenting that the collector had communicated numerous times with the consumer,[861] or that the collector was handling the consumer's collection case when it was only sending out letters.[862]

It is deceptive for a collector to represent that the consumer's payment can be made only to the debt collector and not to the creditor where this is not the case.[863] Misrepresenting that the collector only has authority to accept payment in full can be a FDCPA § 1692e violation.[864] Where the collector will accept any form of payment, a letter can be deceptive where it states payment must be by a certain means, such as wire transfer or express mail.[865] For a discussion of unauthorized payment processing charges as a FDCPA § 1692e violation, see § 7.2.2.7, *supra*.

7.4.2 Debt Collector's Use of Social Media

Regulation F (effective November 30, 2021), implementing FDCPA § 1692e(10), prohibits the "use any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."[866] Regulation F Official Interpretations provide examples of two different ways that a debt collector using social media would violate this provision: one in contacting the consumer and one in contacting third parties for location information.

The Regulation F supplemental information explains:

> First, given the purpose of social media platforms marketed for social or professional networking purposes, such as Facebook or LinkedIn, a consumer who receives a "friend" or "connection" request on such a platform would take away from the request that the requester is interested in a social or professional networking relationship. This consumer takeaway would be false if the request is from a debt collector in connection with the collection of a debt, and this false claim may cause the consumer to accept a request that the consumer otherwise would not have accepted. Such deceptive means of engaging with the consumer violate [Reg. F] § 1006.18(d).[867]

The first example of a violation involves a debt collector that sends a private message, in connection with the collection of a debt, requesting to be added as one of the consumer's contacts on a social media platform marketed for social or professional networking purposes. There is a violation of Reg. F § 1006.18(d) if the debt collector does not disclose their identity as a debt collector in the request.[868]

848 *See* Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087 (D. Or. 2000) (had multiple detectives and investigating division).

849 United States v. First Fed. Credit Control, Inc., 1982 U.S. Dist. LEXIS 17964 (N.D. Ohio Mar. 11, 1982).

850 *See* FDCPA § 1692e(3). *See* § 7.2.3, *supra*.

851 *See* FDCPA § 1692e(16). *See* § 7.2.16, *supra*.

852 *See* Cole v. Noonan & Lieberman, Ltd., 2005 WL 2848446 (N.D. Ill. Oct. 26, 2005); Wright v. Asset Acceptance Corp., 2000 WL 33216031 (S.D. Ohio Dec. 30, 1999) (collection agency allegedly misrepresented its ownership of debt and its authority to sue).

853 *See* FDCPA § 1692e(14). *See* § 7.2.14, *supra*.

854 *See* Pacheco v. Joseph McMahon Corp., 698 F. Supp. 2d 291 (D. Conn. 2010).

855 ValleCastro v. Tobin, Melien & Marohn, 2015 WL 6478412 (D. Conn. Oct. 27, 2015).

856 *See* FDCPA § 1692e(14). *See* § 7.2.14, *supra*.

857 *See* Bryan v. Allied Interstate L.L.C., 513 F. Supp. 3d 686 (W.D.N.C. 2021) (intentionally causing phone number to appear as "Unknown" on caller ID may violate §§ 1692e and 1692e(10)).

858 Krapf v. Collectors Training Inst. of Ill., Inc., 2010 WL 584020 (W.D.N.Y. Feb. 16, 2010).

859 *See* Van Westrienen v. Americontinental Collection Corp., 1999 U.S. Dist. LEXIS 16069 (D. Or. Sept. 2, 1999), *later op. at* 94 F. Supp. 2d 1087 (D. Or. 2000) (debt collector claimed he was multimillionaire and always collects his debts).

860 Basinger-Lopez v. Tracy Paul & Assoc., 2009 WL 1948832 (N.D. Cal. July 6, 2009).

861 *See* Forsberg v. Fid. Nat'l Credit Services, LTD, 2004 WL 3510771 (S.D. Cal. Feb. 26, 2004). *See also* Baker v. Citibank, 13 F. Supp. 2d 1037 (S.D. Cal. 1998) ("[w]e have tried repeatedly to talk to you but [to] no avail" was misleading where collector called the wrong phone number).

862 Randle v. GC Services, L.P., 25 F. Supp. 2d 849 (N.D. Ill. 1998).

863 *See* Lake v. Consumer Adjustment Co., 2015 WL 8770719 (E.D. Mo. Dec. 14, 2015); Stroud v. AllianceOne Receivables Mgmt., Inc., 2015 WL 4620482 (E.D. Mo. July 31, 2015).

864 *See* Spinella, FTC Informal Staff Letter (Feb. 21, 1990); FTC Official Staff Commentary § 807(10)-3, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

865 *See* Ransom v. Telecredit Serv. Corp., 1992 U.S. Dist. LEXIS 22738 (D. Md. Feb. 5, 1992). *But see* Mebane v. GC Services L.P., 481 F. Supp. 2d 249 (S.D.N.Y. 2007) (letter restricting payment to cashier's check or money order did not violate FDCPA, even if collector would accept personal check).

866 Reg. F § 1006.18(d). *See* § 7.2.10, *supra*.

867 85 Fed. Reg. 76,734, 76,829 (Nov. 30, 2020).

868 *See* Reg. F Official Interpretation § 18(d)-1(i).

The second situation where a debt collector's use of social media can lead to deception is where a debt collector communicates privately with a third-party on a social media platform to obtain location information for the consumer. The Regulation F Official Interpretations state that a collector, in making such a third-party communication to seek location information, must communicate using a profile that accurately identifies the debt collector's individual name.[869] However, the employee may use an alias, if this complies with Regulation F, as set out at § 7.2.14.3, *supra*.[870]

In using social media to obtain location information, the debt collector also must comply with the other applicable Regulation F requirements for obtaining location information, such as those with respect to stating that the debt collector is confirming or correcting location information concerning the consumer and, only if expressly requested, identifying the name of the debt collector's employer.[871] The use of social media to obtain location information must also be viewable only by the person being contacted, and cannot be viewed on the social media by the general public or the person's social media contacts.[872]

7.4.3 Misrepresentations About Third-Party Contacts and Location Information

The FDCPA regulates a debt collector's third-party contacts, generally prohibiting them except when seeking information on the consumer's location.[873] Even seeking location information is regulated.[874]

Thus, sending a privacy statement to a consumer indicating that any information obtained can be shared with third parties is deceptive, even when the statement also states that it will do so to the extent allowed by law.[875] Courts also find actionable under FDCPA § 1692e threats to investigate the consumer's employment, because this suggests a threat of a prohibited third-party contact with the employer.[876]

Any threat to contact third parties contrary to the Act should be actionable under FDCPA § 1692e.[877] It can also be deceptive to pretend that a third-party contact is to obtain location information, where the real purpose of contacting the third party is to put pressure on the consumer to pay the debt.[878]

It can also be a FDCPA § 1692e violation to trick consumers into providing their telephone or other contact information. In one such instance, Western Union mailed debtors requesting them to call Western Union to confirm information to arrange delivery, and then forwarded to debt collectors the phone number they obtained.[879]

7.4.4 Misrepresentation As to Consumer's FDCPA Rights

FDCPA § 1692g provides certain rights for the consumer to obtain verification of a debt. While a collector's misconduct in this regard can violate FDCPA § 1692g,[880] misrepresentations of verification rights can also be deceptive in violation of section 1692e. A FDCPA § 1692e violation can be stated where the collector's validation notice omits that the consumer must write to the debt collector to obtain verification of the debt.[881] A validation notice can also violate FDCPA § 1692e where it is unclear what address the consumer should use to write to obtain verification.[882] A collection letter containing multiple addresses that does not specify to which address a consumer should send disputes may violate FDCPA § 1692e[883] unless the address is clearly designated within the context of the letter.[884] Where the collector presents evidence that the consumer could send a dispute to any of the addresses listed and such dispute would be properly processed, a court may nevertheless deny summary judgment for the collector in order to allow discovery to take place.[885]

869 *See* Reg. F Official Interpretation § 18(d)-1(ii).

870 *See* Reg. F Official Interpretation § 18(d)-1(ii).

871 *See* Reg. F Official Interpretation § 18(d)-1(ii), referencing Reg. F § 1006.10.

872 *See* Reg. F Official Interpretation § 18(d)-1(ii), referencing Reg. F § 1006.22(f)(4).

873 *See* FDCPA § 1692c(b). *See* § 5.7, *supra*.

874 *See* FDCPA § 1692b. *See* § 5.2, *supra*.

875 Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009); Castro v. Green Tree Servicing L.L.C., 959 F. Supp. 2d 698 (S.D.N.Y. Aug. 14, 2013) (privacy notice violated § 1692e since it stated that debt collector shares certain nonpublic information with third parties); Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007).

876 Swanson v. S. Oregon Credit Serv., 869 F.2d 1222 (9th Cir. 1988). *See also* §§ 7.2.11, *supra*.

877 *See* § 7.2.5.4.3, *supra*.

878 *See* Gearman v. Heldenbrand, 2015 WL 5255335 (D. Minn. Sept. 9, 2015).

879 Romine v. Diversified Collection Services, 155 F.3d 1142 (9th Cir. 1998).

880 *See* Ch. 9, *infra*.

881 *See* Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268 (11th Cir. 2016).

882 *See* Carbone v. Caliber Home Loans, Inc., 2016 WL 8711197 (E.D.N.Y. Sept. 30, 2016).

883 *See* Schmelczer v. Penn Credit Corp., 2021 WL 325982 (S.D.N.Y. Feb. 1, 2021); Rhee v. Client Services, Inc., 2020 WL 4188161 (D.N.J. July 21, 2020); Musarra v. Balanced Healthcare Receivables, L.L.C., 2020 WL 1166449 (E.D.N.Y. Mar. 11, 2020); Zevon v. Balanced Healthcare Receivables, L.L.C., 2020 WL 4188040 (M.D. Fla. Jan. 7, 2020); Pinyuk v. CBE Group, Inc., 2019 WL 1900985, at *7 (E.D.N.Y. Apr. 29, 2019) ("The letter on its face contains three different addresses and it is unclear which one the defendant is urging the consumer to contact.").

884 *See* Rajkumar v. FBCS, INC., 2021 WL 949867 (S.D.N.Y. Mar. 12, 2021); Leifer v. United Collection Bur., Inc., 2020 WL 6507325 (E.D.N.Y. Nov. 5, 2020); Kim v. Advanced Call Ctr. Techs., L.L.C., 2020 WL 5893964 (E.D.N.Y. Oct. 5, 2020) (though letter did not formally define "this office," multiple signs pointed to conclusion that one of the addresses was defendant's office address for disputes); Kucur v. Fin. Recovery Services, Inc., 2020 WL 1821334 (E.D.N.Y. Apr. 9, 2020); Park v. Forster & Garbus, L.L.P., 2019 WL 5895703 (E.D.N.Y. Nov. 12, 2019); Saraci v. Convergent Outsourcing, Inc., 2019 WL 1062098 (E.D.N.Y. Mar. 6, 2019).

885 Klein v. Transworld Sys. Inc., 2020 WL 5704715 (E.D.N.Y. July 9, 2020), *adopted*, 2020 WL 5678034 (E.D.N.Y. Sept. 24, 2020).

A communication can be deceptive where it conflicts with or overshadows verification rights. Examples include telling the consumer not to write to the collector[886] or a collector's statement that it need not provide information about a debt to an identity theft victim.[887] But not every collector demand for payment overshadows the consumer's right to demand verification of a debt.[888]

A consumer can always dispute a debt and this places certain obligations on the collector under the FDCPA. While a consumer has a limited period of time to request verification of a debt under FDCPA § 1692g, this does not foreclose the consumer from disputing a debt obligation after that time period. To represent that the consumer's dispute rights are limited in time can be a FDCPA § 1692e violation.[889] The same is the case with a collector communication stating that the consumer can only dispute a debt in writing,[890] or that the consumer must explain the basis of their dispute.[891]

Since the FDCPA gives consumer's rights to stop collection calls, it can be deceptive for a debt collector to claim it has the right to call the consumer no matter what.[892] Also deceptive is for a collector to misrepresent that the consumer has no rights under the FDCPA.[893]

7.4.5 Communications Where Format or Language Is Confusing

Even where a communication does not contain false or deceptive information, the manner of presenting the information can be so confusing or obscure as to present a FDCPA § 1692e violation.[894] "Confusing language in a dunning letter can have an intimidating effect by making the recipient feel that he is in over his head and had better pay up rather than question the demand for payment."[895] There can be a FDCPA § 1692e violation where a collection letter instructs the recipient to turn to the reverse side for important information, but the reverse side is blank,[896] or where a collection letter written in Spanish is sent to a non-Spanish speaker.[897]

7.4.6 Deception Related to Credit Reporting

FDCPA § 1692e(16) prohibits a debt collector from representing or implying that it operates or is employed by a consumer reporting agency (CRA), as discussed at § 7.2.16, *supra*. FDCPA § 1692e(8) prohibits communicating or threatening to communicate to a CRA or to any other person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.[898] This provision is examined at § 7.2.8, *supra*.

Even if the threatened communication to a CRA is not false, it can violate FDCPA § 1692e(5) for a collector to threaten to report a debt to a CRA when it has no intention of doing so.[899] Even if literally true, threats to report a debt to a CRA can be deceptive where they are confusing or misleading.[900]

A common misrepresentation actionable under FDCPA § 1692e is that payment will improve the consumer's credit rating when it will not.[901] This is certainly the case where, after a creditor has sent a debt to collection, neither it nor the debt collector subsequently furnishes payment information to a CRA.[902]

886 Vu v. Diversified Collection Services, Inc., 293 F.R.D. 343 (E.D.N.Y. 2013).

887 *See* Randall v. Midland Funding, L.L.C., 2009 WL 2358350 (D. Neb. July 23, 2009).

888 Zemeckis v. Global Credit & Collection Corp., 679 F.3d 632 (7th Cir. 2012) (letter's insistent language and repeated threats of legal action were mere puffery and did not overshadow verification rights notice).

889 *See* Grant-Fletcher v. Brachfeld Law Group, P.C., 2012 WL 2523094 (D. Md. June 28, 2012); Velderman v. Midland Credit Mgmt., Inc., 2005 WL 2405959 (W.D. Mich. Sept. 29, 2005). *See also* Nelson v. Select Fin. Services, Inc., 430 F. Supp. 2d 455 (E.D. Pa. 2006) (violating §§ 1692e and 1692e(10) where collector's letter falsely represented to plaintiff that her inaction "verified the validity" of debt).

890 Vetrano v. The CBE Grp., Inc., 2016 WL 4083384 (E.D.N.Y. Aug. 1, 2016).

891 Mikolajczyk v. Universal Fid., L.P., 2017 WL 706301 (E.D. Wis. Feb. 22, 2017).

892 Toth v. Stephens and Michaels Assoc., Inc., 2014 WL 5687418 (D. Nev. Nov. 4, 2014).

893 Toth v. Stephens and Michaels Assoc., Inc., 2014 WL 5687418 (D. Nev. Nov. 4, 2014).

894 Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623 (7th Cir. 2009). *See also* Swanson v. S. Oregon Credit Serv., Inc., 869 F.2d 1222, 1226 (9th Cir. 1988); Coulter v. Receivables Mgmt. Sys., 367 F. Supp. 3d 307 (E.D. Pa. 2019) (letter misleadingly suggested that consumer could raise insurance-related dispute regarding debt by telephone); Adler v. Penn Credit Corp., 2020 WL 4474624 (S.D.N.Y. Aug. 3, 2020) (claim stated based on appearance of detachable coupon and lack of clear instructions in letter). *But see* Beler v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 480 F.3d 470, 473 (7th Cir. 2007) ("rule against trickery differs from a command to use plain English and write at a sixth-grade level"; latter is not required by FDCPA). *Cf.* § 9.6, *infra*. (discussing Regulation F's requirements for form of validation information and safe harbor for those using model validation notice).

895 Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623 (7th Cir. 2009).

896 Papetti v. Rawlings Fin. Services, L.L.C., 121 F. Supp. 3d 340 (S.D.N.Y. 2015).

897 *See* Dykes v. Portfolio Recovery Assoc., L.L.C., 111 F. Supp. 3d 739 (E.D. Va. June 30, 2015).

898 15 U.S.C. § 1692e(8).

899 *See* § 7.2.5.3.3, *supra*.

900 Hartman v. Meridian Fin. Services, Inc., 191 F. Supp. 2d 1031 (W.D. Wis. 2002) (threat to report to credit bureau any debt left unpaid more than forty-five days from "date of placement," without any explanation of when account was so "placed," was confusing and misleading).

901 *But see* Franklin v. Nat'l Credit Audit Corp., 2018 WL 1155973 (C.D. Cal. Jan. 22, 2018) (no deception found where asserted that payment is "excellent opportunity" to improve credit score, as it only stated that there was chance score could improve).

902 *See* Fainbrun v. Southwest Credit Sys., L.P., 246 F.R.D. 128 (E.D.N.Y. 2007); CFPB, Bulletin 2013-8: Representations Regarding Effect of Debt Payments on Credit Reports and Scores (July 10, 2013); Am. Express Centurion Consent Order, Am. Express Bank, FSB Consent Order, and Am. Express Travel Related Services Co. Consent Order (collectively "American Express Consent Orders"), Oct. 1, 2012, *available at* https://www.consumerfinance.gov. *See also* Koller v. West Bay Acquisitions, L.L.C., 2012 WL 1189481, at *5 (N.D. Cal. Apr. 9, 2012) (while collectors would not report debt to CRA, statement that they would pursue "continued collection efforts" could be read by least sophisticated consumer "to include adverse credit reporting, as credit

Payment also is unlikely to improve a credit rating where a debt is so old (usually seven years) that pursuant to Fair Credit Reporting Act (FCRA) requirements it is considered obsolete.[903] The CRA is no longer permitted to report negative information on that debt.[904] Similarly, while there may be no FDCPA § 1692e requirement that a collector disclose that obsolete debts will not be reported,[905] it can be deceptive to represent that a debt will stay on a consumer's credit report longer than allowed by the FCRA (such as by indicating the seven years started later than they actually did)[906] or to threaten to report an obsolete debt to a CRA.[907]

Due to the complexity and largely proprietary computation of credit scores, a collector may have no basis to claim that a payment on a debt already in collection will improve a credit score.[908] The same can be said about promises that payment will improve a consumer's credit, credit rating, or creditworthiness—so many factors are involved in a creditor's decision to offer credit (including payment history on other debts and the total debt outstanding) and such factors will vary by creditor. Thus, a collector will have no basis to promise that a consumer will become more creditworthy by making a payment on a debt already in collection.[909]

Promises to completely remove a debt from the consumer's credit report may also be deceptive. Even if a debt is no longer past due, the credit report will still include the information that the debt had been past due and was in collection status, and this can seriously impact a consumer's credit rating.[910] While it may be accurate to say that payment will remove the current status of the debt as in default, it will not remove all indication of the default from a consumer's credit reports unless the collector acts to have the tradeline deleted entirely.

7.4.7 Deceptive Offers to Settle the Debt

7.4.7.1 Generally

A common debt collector practice is to seek payment by offering the consumer to settle for less than the full amount if the consumer makes one payment for the settlement amount, or starts a series of payments pursuant to the settlement, or just agrees to the settlement terms. Offers to settle a time-barred debt and use of such settlements to revive a time-barred debt are discussed at § 7.4.9, *infra*.

It can be deceptive for a collector to make a settlement offer without disclosing its true cost, such as that interest will continue to accrue while the consumer makes a series of payments under the settlement.[911] A court found deceptive a settlement offer that contained an open-ended clause providing for the payments to increase at a future date.[912] A court found misleading a collection letter stating that the consumer would not lose her FDCPA § 1692g dispute rights if she did not accept the settlement offer, but not explicitly describing what her FDCPA § 1692g dispute rights would be if she did accept the offer.[913]

The failure of the creditor and its collection agency to honor their settlement agreement states a FDCPA § 1692e claim.[914] A collector's misrepresentation of their authority to compromise and settle their creditor client's claim is also actionable.[915]

On the other hand, a FDCPA § 1692e claim was rejected where a collection letter congratulated the consumer on being "pre-approved for a discount program designed to save you money," invited the consumer to act now to "put this debt behind you," gave two discounted payment options, and indicated that the consumer can save an amount certain by taking advantage of the offers. The Seventh Circuit held that the meaning of the letter was clear that, if the consumer took

reporting is one of the most commonly taken steps in debt collection efforts," thus violating § 1692e).

903 *See* 15 U.S.C. § 1681c(a)(4); National Consumer Law Center, Fair Credit Reporting § 5.2 (9th ed. 2018), *updated at* www.nclc.org/library.

904 Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055 (9th Cir. 2011); CFPB, Bulletin 2013-8: Representations Regarding Effect of Debt Payments on Credit Reports and Scores (July 10, 2013).

905 Monroe v. Miramed Med. Grp., L.L.C., 2017 WL 4558007 (M.D. Pa. Oct. 12, 2017); Olsen v. Cavalry Portfolio Services, L.L.C., 2016 WL 4248009 (M.D. Fla. Aug. 11, 2016).

906 *See* Cobb v. A & S Collection Assoc., Inc., 2011 WL 4433579 (M.D. La. Sept. 21, 2011) (stated debt would stay on credit report until at least 2010, when debt could no longer appear on credit report after 2008); Creighton v. Emporia Credit Serv., Inc., 981 F. Supp. 411 (E.D. Va. 1997) (seven years from date of collection letter).

907 Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055 (9th Cir. 2011); Slick v. Portfolio Recovery Assoc., 2014 WL 4100416 (N.D. Ill. Aug. 20, 2014).

908 CFPB, Bulletin 2013-8: Representations Regarding Effect of Debt Payments on Credit Reports and Scores (July 10, 2013).

909 Dauval v. Preferred Collection and Mgmt. Services, Inc., 2012 WL 5928622 (M.D. Fla. Nov. 26, 2012); Nielsen v. United Creditors Alliance Corp., 1999 WL 674740 (E.D.N.Y. Aug. 19, 1999) (settlement of debt would not "repair" one's credit); CFPB, Bulletin 2013-8: Representations Regarding Effect of Debt Payments on Credit Reports and Scores (July 10, 2013). *But see* Burgess v. Portfolio Recovery Assoc., 726 Fed. Appx. 622 (9th Cir. 2018) (noting that there conceivably could be benefit to consumer's credit rating in paying on debt that is not obsolete).

910 *See* Elzaghal v. Ray Klein, Inc., 2012 WL 4863704 (D. Or. Oct. 11, 2012); White v. Fin. Credit Corp., 2000 WL 816783 (N.D. Ill. June 21, 2000) (granting class certification, because original delinquency would continue adversely to affect debtor's credit rating).

911 Watson v. Midland Credit Mgmt., *Inc.*, 2019 *WL* 2527295 (E.D.N.Y. June 19, 2019) (unclear whether interest and fees would accrue); Marucci v. Cawley & Bergmann, L.L.P., 66 F. Supp. 3d 559 (D.N.J. 2014). *See also* Jones v. Midland Funding, L.L.C., 2012 WL 13027349 (D. Conn. Aug. 13, 2012) (letter violated § 1692e where interest accrued on daily basis while settlement offer was open).

912 *See* Dixon v. Law Office of J. Scott Watson P.C., 2018 WL 705032 (E.D. Pa. Feb. 5, 2018).

913 *See* Anderson v. Capio Partners, L.L.C., 2021 WL 279612, at *5 (W.D. Va. Jan. 26, 2021) ("the least sophisticated consumer may reasonably believe that she may have no dispute rights if she accepts the settlement because Capio did not describe her dispute rights if she were to accept the settlement").

914 Russo v. United Recovery Sys., L.P., 2014 WL 7140498 (E.D.N.Y. Dec. 12, 2014) (final payment refused and demand made for original full balance); Figueroa v. Law Offices of Patenaude & Felix, 2014 WL 12597118 (C.D. Cal. May 30, 2014) (collection attorneys filed suit without waiting for consumer's timely payment).

915 *See* Duell v. First Nat'l Bank of Omaha, 2015 WL 4602008 (S.D. Cal. July 29, 2015).

advantage of one of the discounted payoff options, he would be rid of the debt. "A consumer who interpreted the letter to mean that the debt could survive the payoff and be sold to another debt collector either would be misreading the words or engaging in a flight of fancy."[916]

Sometimes, contrary to a settlement agreement, a different debt collection agency or a debt buyer will pursue collection, and then it may be unclear who is at fault—the original collector for not notifying the subsequent collector of the settlement or the subsequent collector for pursuing a debt which it should have known was settled.[917] The most prudent course may be to bring both collectors into the FDCPA claim.

Offers for settlement may imply that acceptance of the settlement will not harm a credit score or may even improve it. Such a deceptive representation was found where the collector's settlement offer stated "If you pay less than your full balance, we will report your account as Paid in Full for less than the full balance,"[918] implying that this will be a positive report. Other misrepresentations regarding the impact of a settlement on a consumer's credit rating are examined at § 7.4.6, *supra*.

7.4.7.2 Limited One-Time Offers to Settle

There is a tension when a debt collector makes a settlement offer. On the one hand, it is a FDCPA § 1692e violation to represent that a settlement offer to reduce the debt amount is a final offer, or that it is a one-time offer or must be accepted in a fixed time period, when that is not the case.[919] On the other hand, one cannot expect a debt collector to make an offer but also say that, if the consumer turns it down, the collector will offer the consumer a better deal.[920] The Seventh Circuit suggests that an offer not be considered as deceptively implying it is a final or one-time offer if the collector merely states "We are not obligated to renew this offer."[921] Even if this safe harbor language does not appear in the letter, there is no violation if the letter does not represent that no future settlement offers will be available or that it is the only opportunity to settle the debt.[922]

Where the collector said it was authorized to offer a reduced amount, but the offer is only valid for a fixed number of days, it is a question of fact whether the offer implied falsely that it was a final offer.[923] It can be deceptive for a collector to require the consumer to act promptly to accept an offer, when the collector does not define promptly, and it is willing to accept the offer for some extended time.[924]

But a court found not deceptive an offer "at this time" of a specific amount for a certain number of days, where the collector might make another offer in the future.[925] Also not deceptive is an offer that must be accepted within a certain number of days, otherwise accruing interest will require a higher settlement amount after that time,[926] or an offer that does not

916 Preston v. Midland Credit Mgmt., Inc., 948 F.3d 772, 787 (7th Cir. 2020). *See also* Cosio v. AFNI Inc., 2020 WL 836546 (D. Ariz. Feb. 20, 2020) (offer stating that payment of discounted amount would result in account being "closed and marked settled in full" was not internally inconsistent or materially misleading, since it was "unreasonable" for consumer to interpret to equate term "settled in full" with "paid in full").

917 *Cf.* Brunett v. Vital Recovery Services L.L.C., 2018 WL 3104441, at *4 (E.D. Wis. June 22, 2018) ("Defendant cannot be held liable because someone else may, at some unspecified time, unearth a record of Plaintiff's debt and fraudulently seek to collect it.").

918 Knight v. Midland Credit Mgmt., Inc., 755 Fed. Appx. 170 (3d Cir. Nov. 8, 2018), *on remand*, 2019 WL 1516941 (E.D. Pa. Apr. 5, 2019) (denying summary judgment for defendant since statement "We can't change the past, but we can help with the future" implies consumer could improve her credit score by paying debt; granting class certification). *But see* Dotson v. Nationwide Credit, Inc., 828 Fed. Appx. 150 154 (3d Cir. 2020) (rejecting as "speculation" argument that least sophisticated consumer may be misled into paying full amount based on mistaken belief that creditor would deny credit or offer less favorable terms in future if consumer did not pay full amount, or that paying in full would improve consumer's creditworthiness).

919 Goswami v. American Collections Enter., Inc.,377 F.3d 488 (5th Cir. 2004); Buzoiu v. Risk Mgmt. Alternatives, Inc., 2003 WL 22938052 (E.D. Pa. Sept. 15, 2003); Pleasant v. Risk Mgmt. Alternatives, Inc., 2003 WL 164227 (N.D. Ill. Jan. 23, 2003).

920 *See* DeKoven v. Plaza Assoc., 599 F.3d 578 (7th Cir. 2010). *See also* King v. Arrow Fin. Services, L.L.C., 2003 WL 21780973 (E.D. Pa. July 31, 2003) (consumer would understand first offer as settlement position that could be renewed).

921 Evory v. Nat'l Action Fin. Services, Inc.,505 F.3d 769 (7th Cir. 2007). *See, e.g.*, Schmeling v. United Collection Bur., Inc., 2020 WL 6382676 (E.D. Wis. Oct. 30, 2020) (safe harbor language did not violate FDCPA, even though more beneficial offers were extended later); Duarte v. Client Services, 2019 WL 1425734, at *4 (N.D. Ill. Mar. 29, 2019) ("An unsophisticated consumer is protected from receiving false impressions of their options when safe harbor language is included in a settlement offer."); Preston v. Midland Credit Mgmt., Inc., 2018 WL 4205420 (N.D. Ill. Sept. 4, 2018) (followed *Evory*), *aff'd in part, rejected in part*, 948 F.3d 772 (7th Cir. 2020); Bass v. Portfolio Recovery Assoc., 2018 WL 4005199 (N.D. Ill. Aug. 22, 2018) (citing *Evory*, finding that settlement letters did not violate §§ 1692e or 1692f where each contained "safe harbor" notice of "We are not obligated to renew this offer."); Kryluk v. Northland Group, Inc., 2014 WL 6676728 (E.D. Pa. Nov. 25, 2014) (no violation where safe harbor used).

922 Nagan v. Optio Solutions, L.L.C., 2020 WL 5061838 (E.D. Wis. Aug. 27, 2020) (letter represented amount that defendant was willing to settle for and included invitation to discuss debt).

923 *See* DeKoven v. Plaza Assoc., 599 F.3d 578 (7th Cir. 2010) (consumers did not present adequate surveys to show deception); Evory v. Nat'l Action Fin. Services, Inc., 505 F.3d 769 (7th Cir. 2007). *See also* Pettaway v. National Recovery Solutions, L.L.C., 955 F.3d 299 (2d Cir. 2020) (least sophisticated consumer would not be misled to believe that payment of settlement by date specified was only opportunity to settle debt, since letter explained how consumer could negotiate settlement online).

924 Al v. Van Ru Credit Corp., 2018 WL 1972486 (E.D. Wis. Apr. 26, 2018).

925 *See* Gully v. Arrow Fin. Services, L.L.C., 2006 WL 3486815 (N.D. Ill. Dec. 1, 2006). *See also* Waters v. J.C. Christensen & Assoc., Inc., 2011 WL 1344452 (D. Mass. Mar. 4, 2011), *adopted*, 2011 WL 1344544 (D. Mass. Mar. 22, 2011); Callanta v. GC Services, 2006 WL 1072028 (N.D. Cal. Apr. 21, 2006) (did not state that offer was effective "only" in that time frame); Kiliszek v. Nelson, Watson, & Assoc., L.L.C., 2006 WL 335788 (M.D. Pa. Feb. 14, 2006) (deadline did not imply that offer was one-time offer).

926 Jackson v. Midland Credit Mgmt., Inc., 445 F. Supp. 2d 1015 (N.D. Ill. 2006). *See also* Golubeva v. GC Services L.P., 767 F. Supp. 2d 369 (E.D.N.Y. 2010).

require a response within any set period of time and does not state it is a final offer.[927]

7.4.7.3 Representations Regarding Tax Consequences of Forgiven Debt

Forgiven debt may be taxable income to the consumer. For amounts forgiven of $600 or over, an IRS Form 1099-C must be sent to both the consumer and the IRS.[928] The amount reported on the 1099-C form does not include that portion of the forgiven debt that was incurred as interest or fees, but relates only to forgiven amounts of the loan principal. In many cases, the consumer need not treat even the amount of the forgiven principal balance as taxable income, such as where the consumer is insolvent (debts exceed assets), in bankruptcy, or where the debt is disputed.[929]

It is deceptive for a collector to state categorically that a consumer will have to pay taxes on any amount forgiven as part of a debt settlement. It is also deceptive to indicate that a Form 1099-C will be sent for the forgiven debt where the form will not be sent if the principal amount (not including interest) forgiven is under $600.[930]

On the other hand, in Dunbar v. Kohn Law Firm, S.C., the Seventh Circuit found not deceptive a statement that "this settlement may have tax consequences."[931] But the Seventh Circuit also found that a letter's 1099-C clause stating that settling a debt for less than the balance owed may have tax consequences and that the creditor "may" file a 1099-C form could violate the FDCPA. The court explained that information about filing a 1099-C form is information within the knowledge of the creditor: "This makes the 1099C Clause materially different than the tax consequences clause at issue in *Dunbar*. Only the debtor knows whether, given their financial situation as a whole, they will have to pay taxes on the forgiven debt. The creditor, however, knows whether it will have to file a 1099-C form or not."[932]

The Second Circuit has found that it is not deceptive for a collector to fail to disclose to the consumer that a settlement may have tax consequences.[933]

7.4.8 Student Loans

FDCPA violations involving student loans are also detailed in another NCLC's treatise, *Student Loan Law*, at § 14.2.3. Although generally not dischargeable in bankruptcy, federal student loans offer a number of special rights to discharge or restructure a student loan obligation, including closed school, false certification, disability, and bankruptcy discharges.[934] Thus, it can be deceptive for a student loan collector to indicate that a student is ineligible for a discharge where that is not the case. While the right to a bankruptcy discharge is limited, it is a FDCPA § 1692e violation to represent that the discharge is impossible.[935]

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927 *See* Pescatrice v. Nat'l Action Fin. Services, Inc., 2006 WL 8432179 (S.D. Fla. Oct. 18, 2006). *See also* Kubert v. Aid Assoc., 2006 WL 328239 (N.D. Ill. Feb. 9, 2006) (offer could not be reasonably interpreted to be limited time).

928 26 C.F.R. § 1.6050P-1(a). *See* § 11.14.2.6, *infra*.

929 Internal Revenue Code, 26 U.S.C. §§ 61(a)(12), 108.

930 Saroza v. LTD Fin. Services, L.P., 2018 WL 4204443, at *3 (D.N.J. Sept. 4, 2018) ("[A] reasonable finder of fact could find that Defendant's language would be confusing to the least sophisticated debtor. This is because nowhere within Defendant's letter is there mention of the $600 IRS threshold."); Konyo v. ARS Nat'l Services, Inc., 2018 WL 1420494 (D.N.J. Mar. 22, 2018) (mention of filing of 1099C makes no mention of exceptions for amounts under $600 or for interest and fees); Disla v. Northstar Location Services, L.L.C., 2017 WL 2799691 (D.N.J. June 27, 2017); Carlvin v. Ditech Fin. L.L.C., 2017 WL 635151 (N.D. Ill. Feb. 16, 2017); Bautz v. ARS Nat'l Services, Inc., 226 F. Supp. 3d 131 (E.D.N.Y. 2016); Foster v. Allianceone Receivables Mgmt., Inc., 2016 WL 1719824 (N.D. Ill. Apr. 28, 2016); Kaff v. Nationwide Credit, Inc., 2015 WL 12660327 (E.D.N.Y. Mar. 31, 2015) (mentioned exclusion for under $600, but did not mention exception for forgiven interest payments); Good v. Nationwide Credit, Inc., 55 F. Supp. 3d 742 (E.D. Pa. 2014) (mentioned exclusion for under $600, but did not mention exception for forgiven interest payments). *But see* Garretson v. Sentry Credit, Inc., 2018 WL 1659477 (S.D. W. Va. Apr. 3, 2018) (no deception where said may have to issue 1099-C if forgiven debt is over $600 and told to consult tax expert); Moses v. LTD Fin. Services I, Inc., 2017 WL 3421531 (N.D. Ill. Aug. 9, 2017) ("You will receive a copy of the Form 1099-C if one is required to be filed with the IRS" not deceptive where was possible that forgiven principal could be $600); Elmore v. Northeast Fla. Credit Bur., Inc., 2011 WL 4480419 (M.D. Fla. Sept. 27, 2011) (no violation where debt collector said it "may" file form 1099-C).

931 896 F.3d 762 (7th Cir. 2018). *See also* Ward v. I.C. Sys., Inc., 2020 WL 3604093, at *4 (D.N.J. July 2, 2020) (permissive language used in collection letter did not create "deceptive scenario" in which least sophisticated consumer "would equate a statement that there *may* be tax consequences with a statement that there *will be* tax consequences and that a tax form issue"); Simins v. Credit Control, L.L.C., 2020 WL 2066574 (W.D. Tex. Apr. 29, 2020); Church v. Fin. Recovery Services, Inc., 2018 WL 1383231 (W.D.N.Y. Mar. 19, 2018); Ceban v. Capital Mgmt. Services, L.P., 2018 WL 451637 (E.D.N.Y. Jan. 17, 2018); Antista v. Fin. Recovery Services, Inc., 2018 WL 259771 (D.N.J. Jan. 2, 2018) (settlement offer "may have tax consequences" not deceptive); Rhein v. Forster, Garbus & Garbus, L.L.P., 2017 WL 4969335 (D.N.J. Nov. 1, 2017); Smith v. Weltman, Weinberg & Reis Co., 2017 WL 2345600 (S.D. Ill. May 30, 2017).

932 Heredia v. Capital Mgmt. Services, L.P., 942 F.3d 811, 815–816 (7th Cir. 2019). *See also* Leonard v. Capital Mgmt. Services, 364 F. Supp. 3d 198, 203 (W.D.N.Y. 2019) (statement that creditor "may" file a 1099-C form could be misleading or deceptive: "One reasonable interpretation of the use of the word 'may' in the 1099-C clause is that, upon the debtor's acceptance of the settlement offer and settling the debt for less than the total due, CMS or Discover might choose to report the cancelled debt to the IRS, and the debtor might face adverse tax consequences. Interpreted in that fashion, the statement is false.").

933 Altman v. J.C. Christensen & Assoc., Inc., 786 F.3d 191 (2d Cir. 2015). *See also* Simins v. Credit Control, L.L.C., 2020 WL 2066574 (W.D. Tex. Apr. 29, 2020); Smith v. Nat'l Enter. Sys., Inc., 2017 WL 1194494, at *3 (W.D. Okla. Mar. 30, 2017); Daugherty v. Convergent Outsourcing, Inc., 2015 WL 3823654 (S.D. Tex. June 18, 2015), *rev'd on other grounds*, Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507, 512 (5th Cir. 2016); Landes v. Cavalry Portfolio Services, L.L.C., 774 F. Supp. 2d 800 (E.D. Va. 2011); Schaefer v. ARM Receivable Mgmt., Inc., 2011 WL 2847768 (D. Mass. July 19, 2011).

934 *See* National Consumer Law Center, Student Loan Law (6th ed. 2019), *updated at* www.nclc.org/library.

935 Easterling v. Collecto, Inc., 692 F.3d 229 (2d Cir. 2012).

Federal law also provides a right to rehabilitate a student loan after default, and it can be a FDCPA § 1692e violation to misrepresent that right.[936] Where federal law allowed student loan borrowers to make reasonable and affordable payments and avoid certain harsh student loan collection remedies, it was deceptive for a collector to fail to offer that option to a borrower.[937]

Defaulted federal student loans can lead to a unique administrative wage garnishment not dependent on a court judgment. However, certain hearing rights and the ability to enter into plans to avoid the garnishment accompany this remedy. It is deceptive to misrepresent those rights.[938]

Student loans offer other special collection remedies. But it can be a FDCPA § 1692e violation to claim remedies that are not available, such as the ability to withhold the student's school transcripts after the loan is discharged in bankruptcy.[939] Similarly deceptive is a claim that a student's grades and diploma could be cancelled for non-payment of a loan to the school.[940]

7.4.9 Unfair and Deceptive Practices Involving Time-Barred Debts

7.4.9.1 Generally

This section considers violations both of FDCPA § 1692e (deception) and § 1692f (unfairness) concerning a debt collector collecting on, threatening to sue on, or suing on time-barred debts. Additional court cases involving these issues are summarized in Appx. E.2.4.17, *infra*.

Litigants should not jump too quickly to a conclusion that a debt is or is not time-barred. Whether a statute of limitations on a debt has run often requires a determination of which state's law will apply (choice of law), the applicable limitations period among the different statutes of limitations in that state, whether the limitations period has been tolled or revived, and when the limitations period began to run on a debt. These issues are examined in detail in another NCLC treatise,[941] but briefly summarized at § 7.4.9.2, *infra*. Understanding these issues often is an essential first step in determining whether a FDCPA claim is available.

7.4.9.2 Statute of Limitations Law in Three Paragraphs

The determination of the statute of limitations that applies to the collection of a consumer debt may be a complicated legal question. The various considerations are discussed comprehensively in NCLC's Collection Actions,[942] and are summarized in the next three paragraphs.

With rare exceptions (such as federal student loans),[943] the applicable limitations period will be determined by state, not federal, law. Where a collection lawsuit is based on a contract that includes a choice of law provision, states differ as to whether the applicable statute of limitations is provided by the state chosen in the contract, the forum state, or the state with the shortest limitations period.[944] A state "borrowing" statute may also affect the state whose limitations period applies, and may allow the shorter of the limitations period of the consumer's home state and that of the creditor.[945]

A state typically has different limitations periods that apply to different causes of action, such as limitation periods for written contracts, non-written contracts, credit sales, enforcement of a note, *quantum meruit*, and the like.[946] Questions may arise as to the applicable limitations period for certain transactions—for example, for a credit card debt, utility service debt, or a deficiency action on a motor vehicle credit sale.[947]

Questions also may arise as to when a limitations period begins to run, such as for credit card debt—e.g., when the first payment is missed, the last payment is made, or when the debt is accelerated.[948] Partial payment, acknowledgment of the debt, bankruptcy, moving out of state, military service, or other actions may either temporarily pause the

936 Ellis v. Gen. Revenue Corp., 274 F.R.D. 53 (D. Conn. 2011) (claiming must make nine consecutive monthly payments when only had to make nine out of ten). *See also* Alexander v. Coast Prof'l Inc., 2016 WL 972793 (E.D. Pa. Mar. 7, 2016) (following class certification in this case in which collection agency allegedly did not properly calculate reasonable and affordable rehabilitation payment on defaulted FFEL Program loans or Direct Loans, court approved class settlement); Stinson v. Delta Mgmt. Assoc., Inc., 302 F.R.D. 160 (S.D. Ohio 2014) (approving class settlement in case alleging collection letters contained false or misleading information about loan rehabilitation).

937 Arroyo v. Solomon & Solomon, P.C., 2001 WL 1590520 (E.D.N.Y. July 19, 2001).

938 Kort v. Diversified Collection Services, Inc., 2001 WL 881449 (N.D. Ill. Aug. 2, 2001) (misrepresentations as to time period and nature of presentation of consumer defenses to administrative wage garnishment). Lawson v. Mgmt. Adjustment Bur., Inc., 1997 WL 283027 (N.D. Ill. May 15, 1997) (misrepresentation that debtor could not request hearing).

939 Juras v. Aman Collection Serv., Inc., 829 F.2d 739 (9th Cir. 1987) (misrepresentation of legal right to withhold school transcript from former state school student after loan discharged in bankruptcy and collector's false representation of legal obligation to withhold transcripts from delinquent graduates).

940 United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370 (N.D. Tex. 1986), *aff'd per curiam*, 823 F.2d 880 (5th Cir. 1987).

941 *See* National Consumer Law Center, Collection Actions § 3.7 (5th ed. 2020), *updated at* www.nclc.org/library.

942 National Consumer Law Center, Collection Actions § 3.7 (5th ed. 2020), *updated at* www.nclc.org/library.

943 *See* National Consumer Law Center, Collection Actions § 3.7.2.1 (5th ed. 2020), *updated at* www.nclc.org/library.

944 *See* National Consumer Law Center, Collection Actions § 3.7.3 (5th ed. 2020), *updated at* www.nclc.org/library.

945 *See* National Consumer Law Center, Collection Actions § 3.7.3.2 (5th ed. 2020), *updated at* www.nclc.org/library.

946 *See* National Consumer Law Center, Collection Actions § 3.7.4.1 (5th ed. 2020), *updated at* www.nclc.org/library.

947 *See* National Consumer Law Center, Collection Actions § 3.7.6 (5th ed. 2020), *updated at* www.nclc.org/library.

948 *See* National Consumer Law Center, Collection Actions § 3.7.7 (5th ed. 2017), *updated at* www.nclc.org/library.

running of the limitations period or re-start it from the beginning.[949]

7.4.9.3 Suits on Time-Barred Debts

Prior to Regulation F (effective November 30, 2021), numerous courts had concluded that suing on a time-barred debt violated FDCPA § 1692e (deception) or § 1692f (unfairness).[950] Regulation F codified this, providing that, "[a] debt collector must not bring or threaten to bring a legal action against a consumer to collect a time-barred debt."[951]

Regulation F defines "time-barred debt" as "a debt for which the applicable statute of limitations has expired"[952] and "statute of limitations" as "the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt."[953]

The provision applies to collectors bringing or threatening to bring a "legal action," not just a "lawsuit."[954] The only exception from this prohibition is for proofs of claim in the consumer's bankruptcy, as examined at § 7.4.9.5, *infra*. The Regulation F supplemental information explains that, "[t]he Bureau does not see a basis to categorically exclude other types of legal actions, such as garnishment and probate actions, from the prohibitions in [Reg. F] § 1006.26(b)."[955]

The Regulation F supplemental information makes clear "a debt collector may violate final [Reg. F] § 1006.26(b) even if the debt collector neither knew nor should have known that a debt was time barred."[956] "The Bureau is not finalizing the proposed knows-or-should-know standard and is instead finalizing a strict liability standard."[957] In addition, "threatening to bring a legal action to collect a time-barred debt is a deceptive practice under FDCPA section 807 [§ 1692e] even if expiration of the statute of limitations is an affirmative defense rather than a categorical bar to suit."[958]

Prior to Regulation F's effective date, some courts found that the bona fide error defense was available in certain cases alleging that the collector filed suit on a time-barred debt,[959] or otherwise found no violation of the FDCPA where state law was not clear as to whether a lawsuit is time-barred and the collector filed the lawsuit in good faith.[960] The Regulation F supplemental information notes that "a debt collector who brings or threatens to bring a legal action against a consumer to collect a time-barred debt may [have a bona fide error defense], depending upon the reason for the debt collector's error."[961] The bona fide error defense is discussed in detail at § 12.2, *infra*.

A collection action can in some instances raise multiple legal claims relating to the same debt, and each claim may have a different limitations period.[962] The Regulation F supplemental information makes clear that, in that situation, one legal claim may not violate Regulation F, while another time-barred claim would lead to a violation.[963]

Suing on a time-barred debt as well as seeking admissions that would undermine the consumer's ability to raise the

949 *See* National Consumer Law Center, Collection Actions § 3.7.8 (5th ed. 2017), *updated at* www.nclc.org/library.

950 Kaiser v. Cascade Capital, L.L.C., 989 F.3d 1127 (9th Cir. 2021); Crawford v. LVNV Funding, L.L.C., 758 F.3d 1254 (11th Cir. 2014); Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076 (7th Cir. 2013); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011) (rejecting bona fide error defense raised by debt collector that had sued on time-barred debt in violation of FDCPA); Deangelo v. LVNV Funding L.L.C., 2020 WL 3468061 (D.N.J. June. 25, 2020) (debt buyer initiated garnishment on default judgment in action that state court subsequently dismissed on merits as time-barred); Bright v. Bergstrom Law, Ltd., 2018 WL 3469011 (D. Nev. July 18, 2018) (law firm misrepresented in state court that student loan agreement was executed in 2016 when, in fact, it was executed in 2001 or 2002); Ferrell v. Midland Funding, L.L.C., 2015 WL 2450615 (N.D. Ala. May 22, 2015); Puffinberger v. Commercion, L.L.C., 2014 WL 120596 (D. Md. Jan. 10, 2014); Sierra v. Rubin & Debski, P.A., 2010 WL 4384216 (S.D. Fla. Oct. 28, 2010); Thompson v. D.A.N. Joint Venture III, L.P., 2007 WL 1625926 (M.D. Ala. June 5, 2007); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987). *See also* Pantoja v. Portfolio Recovery Assoc., 852 F.3d 679 (7th Cir. 2017); *In re* Dubois, 834 F.3d 522, 527 (4th Cir. 2016); Masters v. Harrison & Johnston P.L.C., 2018 WL 988097 (W.D. Va. Feb. 20, 2018); Appx. E.2.4.17, *infra*. *But see* Ordinario v. LVNV Funding, L.L.C., 2016 WL 852843 (S.D. Cal. Mar. 4, 2016) (where consumer made appearance in collection lawsuit and did not raise statute of limitations defense, consumer waived that claim in subsequent FDCPA litigation).

951 Reg. F § 1006.26(b).

952 Reg. F § 1006.26(a)(2).

953 Reg. F § 1006.26(a)(1).

954 86 Fed. Reg. 5766, 5781 (Jan. 19, 2021).

955 86 Fed. Reg. 5766, 5781 (Jan. 19, 2021).

956 86 Fed. Reg. 5766, 5777 (Jan. 19, 2021).

957 86 Fed. Reg. 5766, 5781 (Jan. 19, 2021).

958 86 Fed. Reg. 5766, 5779 (Jan. 19, 2021).

959 *See* Abdollahzadeh v. Mandarich Law Grp. L.L.P., 922 F.3d 810 (7th Cir. 2019) (bona fide error defense protected collector charged with attempting to collect time-barred debt that relied on data provided by its client which did not identify that debtor's last attempt at payment was reversed and final payment to clear was prior year); Gray v. Suttell & Assoc., 123 F. Supp. 3d 1283 (E.D. Wash. 2015) ("bona fide error defense may be available in a case alleging defendants filed suit outside the applicable statute of limitations where the applicable limitations period has not been provided by the state legislature or resolved by the state courts"); Hare v. Hosto and Buchan, P.L.L.C., 774 F. Supp. 2d 849 (S.D. Tex. 2011); Krawczyk v. Centurion Capital Corp., 2009 WL 395458 (N.D. Ill. Feb. 18, 2009); Simmons v. Miller, 970 F. Supp. 661 (S.D. Ind. 1997). *See also* Kaiser v. Cascade Cap., L.L.C., 989 F.3d 1127, 1140 (9th Cir. 2021) ("mistakes about the time-barred status of a debt can be bona fide errors"; treating mistake about whether a debt is time-barred as a mistake of fact). *But see* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011) (no bona fide error defense where reliance on creditor's representation was unreasonable); Pettitt v. Chiari & Ilecki, L.L.P., 419 F. Supp. 3d 627 (distinguishing *Abdollahzadeh* where, in this case, collector relied on communication from creditor, rather than on account information itself).

960 *See* Sprayberry v. Portfolio Recovery Assoc., 2021 WL 1109388 (D. Or. Jan. 28, 2021) ("PRA did not make a mistake of law about the applicable statute of limitations, but rather the applicable statute of limitations was unknowable."). *But see* Diaz v. Portfolio Recovery Assoc., 2012 WL 1882976 (E.D.N.Y. May 24, 2012) (fact that state has not ruled on applicable statute of limitations was no defense for collector where applicable statutes are clear on their face that lawsuit was time-barred).

961 86 Fed. Reg. 5766 at 5777 (Jan. 19, 2021).

962 See National Consumer Law Center, Collection Actions § 3.7.4 (5th ed. 2020), *updated at* www.nclc.org/library.

963 86 Fed. Reg. 5766 at 5777 (Jan. 19, 2021).

statute of limitations as a defense has been found abusive and unfair[964] and were among the activities leading to a large verdict for the consumer in the Ninth Circuit case *McCollough v. Johnson*.[965]

7.4.9.4 Threats to Sue on Time-Barred Debts

Prior to Regulation F (effective November 30, 2021), courts consistently found FDCPA § 1692e violations where a collector threatens to sue on time-barred debt.[966] FDCPA § 1692e(5) prohibits "the threat to take any action that cannot legally be taken" and suing on a time-barred debt is an action that cannot be legally taken.[967] The practice should also violate FDCPA § 1692e(2)(A) (debt's legal status) and § 1692e(10) (deception) because, by threatening, the collector "implicitly represented that it could recover in a lawsuit, when in fact it cannot properly do so."[968]

Regulation F codified this, providing that, "[a] debt collector must not bring *or threaten to bring* a legal action against a consumer to collect a time-barred debt."[969] Suits on time-barred debts and content relevant to both suits and threats of suits are discussed at § 7.4.9.3, *supra*.

The Regulation F supplemental information states that the prohibition applies to both explicit and implicit threats of legal action on time-barred debts.[970] Prior to Regulation F, courts have similarly held that a veiled threat of litigation on a time-barred claim may also be deceptive,[971] although merely seeking collection on a time-barred debt is not a threat to sue on the debt.[972]

7.4.9.5 Time-Barred Proofs of Claim in Bankruptcy Cases

In *Midland Funding, L.L.C. v. Johnson*,[973] the Supreme Court held that a debt buyer's proof of claim in a chapter 13 bankruptcy case on an obviously time-barred debt was not "false" or "deceptive" in violation of FDCPA § 1692e or unfair under FDCPA § 1692f. The debt collector, Midland Funding, filed a proof of claim that stated the last time that any charge appeared on Johnson's account was in May 2003, well beyond the six-year Alabama statute of limitations. On its face, the proof of claim indicated that the limitations period had run. The court found that the debt still constituted a "claim" or "right to payment" under the Bankruptcy Code because, under the relevant Alabama law, as it is in almost all states, the statute of limitations does not extinguish a debt, but only

964 *See* McCollough v. Johnson, Rodenburg & Lauinger, 610 F. Supp. 2d 1247 (D. Mont. 2009), *aff'd*, 637 F.3d 939 (9th Cir. 2011) (debt collector sued on time-barred debt; requested for admission from *pro se* consumer that payment was made when debt collector's records showed it was not in order to extend statute of limitat ons).

965 McCollough v. Johnson, Rodenburg & Lauinger, 645 F. Supp. 2d 917 (D. Mont. June 3, 2009) (jury awarded consumer $250,000 in compensatory damages, $1000 in FDCPA statutory damages, and $60,000 in state law punitive damages and court awarded attorney fees in full amount requested of over $93,000 commenting, *inter alia*, that litigation "confers a meaningful public benefit by discouraging illegal debt collection" in state), *aff'd*, 637 F.3d 939 (9th Cir. 2011).

966 *See* Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3d Cir. 2011) (*per curiam*) (whether there is FDCPA violation turns on whether collection letter threatens litigation); Castro v. Collecto, Inc., 634 F.3d 779 (5th Cir. 2011) (while threatening to sue on time-barred debt can violate FDCPA, debt in this case was within state statute of limitations and shorter FCC statute did not apply); Reyes v. Manchester Gardens Condo., 2020 WL 3791964 (D. Md. July. 7, 2020) (plausible § 1692e(5) claim based on debt collector's threat to file statement of lien that included allegedly time-barred homeowners' association dues); Chung v. U.S. Bank, 250 F. Supp. 3d 658, 682 (D. Haw. 2017); Cortes-Goolcharran v. Rosicki, Rosicki & Assoc., 2018 WL 3748154 (E.D.N.Y. Aug. 7, 2018); Todorov v. Easy Loans Corp., 2014 WL 2803423 (D. Nev. June 19, 2014); Puffinberger v. Commercion, L.L.C., 2014 WL 120596 (D. Md. Jan. 10, 2014); Janti v. Encore Capital Group, Inc., 2010 WL 3058260 (S.D. Cal. Aug. 3, 2010). *See also* Pantoja v. Portfolio Recovery Assoc., 852 F.3d 679 (7th Cir. 2017) (while not facts of this case, it is settled law that such threat is violation). *But see* Swann v. Dynamic Recovery Solutions, L.L.C., 2018 WL 6198997 (N.D. Ala. Nov. 28, 2018) (while threatening to sue on time-barred debt is deceptive, not violation to seek to resolve time-barred debt while disclosing that would not be sued on debt).

967 *See* e.g. Larsen v. JBC Legal Group, P.C., 533 F. Supp. 2d 290 (E.D.N.Y. 2008).

968 Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1489 (M.D. Ala. 1987). *See also* Janti v. Encore Capital Group, Inc., 2010 WL 3058260 (S.D. Cal. Aug. 3, 2010).

969 Reg. F § 1006.26(b) (emphasis added).

970 86 Fed. Reg. 5766, 5781, 5782 (Jan. 19, 2021).

971 *See* Holzman v. Malcolm S. Gerald & Assoc., Inc., 920 F.3d 1264, 1271–1272 (11th Cir. 2019) (concluding that "with regard to a collection letter seeking payment on a time-barred debt, an express threat of litigation is not required to state a claim for relief under § 1692e so long as one can reasonably infer an implicit threat"; here, letter's offer to "resolve" time-barred debt, together with deadline to accept reduced-payment offer and warning that offer might not be renewed if payment was not timely made, language "taken in its entirety, could plausibly deceive or mislead an unsophisticated consumer as to the legal status of the debt, even in the absence of an express threat of litigation"); Karr v. Med-I Solutions, L.L.C., 2014 WL 1870928 (S.D. Ind. May 7, 2014) (granting consumer summary judgment where showed that collector referenced "possible" legal action and stated that debt collector "could" take the consumer to court); Crawford v. Vision Fin. Corp., 2012 WL 5383280 (N.D. Ill. Nov. 1, 2012) (claim stated where collector mentioned "further financial liability," but not where collector offered to "settle").

972 Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3d Cir. 2011). *See also* Rozario v. Admin Recovery, L.L.C., 2020 WL 4188131, at *3 (D.N.J. July 21, 2020) (letter's use of offering to "close this account" did not qualify as legal threat, nor did it convey a false sense of urgency that may mislead consumer into believing debt was still enforceable; "The letter explicitly refers to Plaintiff's debt collection account and states that a partial payment will lead to the closure of that particular account. Defendants merely offered Plaintiff the opportunity to make a partial payment to resolve the debt."); Solis v. Commonwealth Fin. Sys., Inc., 2020 WL 2523047 (E.D.N.Y. May 15, 2020) (letter did not have any language that least sophisticated consumer could plausibly interpret as a settlement offer, demand for payment, or threat of litigation); Plumb v. Prof'l Account Services, Inc., 2020 WL 2476752, at *9 (D. Alaska. May 13, 2020) (although letter did not include disclaimer indicating that debt was time-barred or any language indicating that collection agency "will not sue," nothing falsely implied that debt was enforceable in court or that agency could bring legal action where letter contained "little beyond the debtor's balance and means of payment").

973 ___ U.S. ___, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017).

offers an affirmative defense to a collection lawsuit. The court concluded that "there is nothing misleading or deceptive in the filing of a proof of claim that follows the Code's similar system"[974] of allowing an objection to the proof of claim.

In addition, the court found that the filing of the proof of claim was neither misleading nor unfair, because the chapter 13 trustee "must examine proofs of claim and, where appropriate, pose an objection,"[975] including on the basis that the debt was time-barred.

Regulation F (effective November 30, 2021) generally follows *Midland* and provides that the prohibition on a debt collector bringing or threatening to bring a legal action against a consumer to collect a time-barred debt "does not apply to proofs of claim filed in connection with a bankruptcy proceeding."[976]

Neither *Midland* nor Regulation F address a proof of claim on an extinguished debt. Under state law in Mississippi, North Carolina (for debts owned by a debt buyer), and Wisconsin,[977] the running of the limitations period also extinguishes the legal right to collect as well as the legal remedy.[978] Where a time-barred debt is extinguished, a debt collector who files a time-barred proof of claim still risks FDCPA liability because the collector is not only seeking payment where a lawsuit would be time-barred, but also seeking payment on a debt that is no longer owed.[979] However, filing a proof of claim on a time-barred, extinguished debt still does not violate Reg. F § 1006.26(b) because of the specific exception for proofs of claim.

Neither *Midland* nor Regulation F address what happens when a debt collector files a proof of claim that is not obviously time-barred and contains misleading, deceptive, or false information related to the statute of limitations. The principal rationale behind the ruling in *Midland Funding* was that the claims allowance process prescribed by the bankruptcy court rules gave debtors and trustees an adequate opportunity to object to a proof of claim as time-barred. Even if it does not violate Reg. F § 1006.26(b), such a proof of claim may violate provisions in the FDCPA such as sections 1692e or 1692f that prohibit false, misleading, unfair and deceptive practices and make no exception for bankruptcy proofs of claim.

Courts applying the FDCPA to systemic practices have recognized this distinction. In *In re Thomas,*[980] the court held that a debt collector violated the FDCPA by engaging in a systemic practice of filing proofs of claim falsely reporting that the claim amounts were entirely principal when they also included interest, fees, and costs. By doing this, Midland avoided having to itemize these items in the Rule 3001 form and debtors were not aware of the amount of interest, fees, and costs they were being charged. The practice was designed to deter debtors from objecting to proofs of claim. According to the court, a mere failure to comply with Bankruptcy Rule 3001 might not trigger an FDCPA violation, but the misrepresentations calculated to frustrate use of the claims objection process amounted to distinct violations of the FDCPA under sections 1692e and 1692f. A similar rationale should apply to intentional, systemic misrepresentations of information related to the time-barred status of proofs of claim.

7.4.9.6 Deceptive Collection Contacts Related to Time-Barred Debts

7.4.9.6.1 Introduction

The statute of limitations is a defense to a lawsuit on a debt, but, except in Mississippi, Wisconsin, and, for debts owned by a debt buyer, North Carolina,[981] it does not extinguish the debt.[982] For that reason, it is not always deceptive to seek voluntary payment on a time-barred debt. There may be no FDCPA § 1692e violation as long as the collector does not imply that the debt can be legally enforced or otherwise engages in deception.[983] Where a time-barred debt is not obsolete under the Fair Credit Reporting Act (seven years old), there conceivably could be a benefit to the consumer's credit rating in paying on such a debt.[984]

Unlike other states, the running of the applicable limitations period under Mississippi, North Carolina (for debts owned by debt buyers), and Wisconsin law extinguishes the debt.[985] Thus, it is deceptive to collect or attempt to collect on a time-barred debt from a consumer where the debt has been extinguished under one of these state laws.[986]

In other states, collectors seek payment on time-barred debt at their own risk because such contacts can be deceptive in a number of ways. It is deceptive to even imply that a time-barred debt is legally enforceable, such as by making offers to

974 Midland Funding, L.L.C. v. Johnson, ___ U.S. ___, 137 S. Ct. at 1412, 197 L. Ed. 2d 790 (2017).

975 *Id.* At 1413.

976 Reg. F § 1006.26(b).

977 Miss. Code Ann. § 15-1-3(1); N.C. Gen. Stat. § 58-70-115(4) (debts owned by debt buyers); Wis. Stat. § 893.05.

978 *See* National Consumer Law Center, Collection Actions § 11.3.9.2 (5th ed. 2020), *updated at* www.nclc.org/library.

979 *See, e.g.*, §§ 7.2.2.3, 7.2.5, 7.2.10, *supra. But see In re* Martin, 617 B.R. 866, 878 (Bankr. S.D. Miss. 2020) (no FDCPA violation even though state law extinguishes debt).

980 2020 WL 6703166 (Bankr. W.D. W. Va. 2020).

981 Miss. Code Ann. § 15-1-3(1); N.C. Gen. Stat. § 58-70-115(4) (debts owned by debt buyers); Wis. Stat. § 893.05.

982 *See* Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3d Cir. 2011).

983 Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3d Cir. 2011); Freyermuth v. Credit Bur. Services, Inc., 248 F.3d 767 (8th Cir. 2001); Donaldson v. LVNV Funding, L.L.C., 97 F. Supp. 3d 1033 (S.D. Ind. 2015); Haynes v. Allied Interstate, L.L.C., 2015 WL 429800 (D. Neb. Feb. 2, 2015); Price v. M.R.S. Assoc., Inc., 2014 WL 2930723 (E.D.N.C. June 27, 2014); Johns v. Northland Group, Inc., 76 F. Supp. 3d 590 (E.D. Pa. 2014); Jenkins v. RJM Acquisitions, L.L.C., 2013 WL 589006 (W.D.N.C. Feb. 14, 2013); Schaefer v. ARM Receivable Mgmt., Inc., 2011 WL 2847768 (D. Mass. July 19, 2011); Johnson v. Capital One Bank, 2000 WL 1279661, at *1–3 (W.D. Tex. May 19, 2000).

984 Burgess v. Portfolio Recovery Assoc., 726 Fed. Appx. 622 (9th Cir. 2018). *See also* § 7.4.6, *supra.*

985 Miss. Code Ann. § 15-1-3(1); N.C. Gen. Stat. § 58-70-115(4) (debts owned by debt buyers); Wis. Stat. § 893.05.

986 *See* Klewer v. Cavalry Invs., L.L.C., 2002 WL 2018830 (W.D. Wis. Jan. 30, 2002).

"settle" or "resolve" a time-barred debt.[987] The terms "settle" and "resolve" may imply to an unsophisticated consumer that the debt is legally enforceable.

The Seventh Circuit has found that it is a FDCPA § 1692e deception violation to tell a consumer "because of the age of your debt we will not sue you for it."[988] This implies that the collector can sue the consumer, but chooses not to because the debt is old. The truth is that, because the debt is so old, the collector cannot sue on the debt.

Some courts go a step further and find a collector's failure to disclose that a time-barred debt is not legally enforceable may be actionable.[989]

It can be deceptive to represent that the consumer will save money by accepting the collector's offer of reduced payments on a time-barred debt, because the consumer legally need make no payments on the debt.[990]

Some debt is not only time-barred, but over seven years has elapsed since the last payment. In that case, the debt is obsolete under the Fair Credit Reporting Act, so that the debt cannot affect the consumer's credit score or be included in a credit report. It is deceptive to represent that payment of an obsolete debt will help the consumer's credit rating or that non-payment will result in damage to the consumer's rating.[991]

7.4.9.6.2 Failing to Disclose That Payment Revives the Limitations Period

In many states, even after the limitations period has run, the consumer's partial payment on the debt, or even just an agreement to make a payment on the debt, can revive the running of the limitations period. That is, for example, a four-year limitations period would still have four years to run after a partial payment or agreement to pay.[992] Debt collectors may seek an agreement from the consumer for small payments not primarily for the payment in itself, but for the increased leverage the payment or agreement to make a payment gives the collector—to be able to sue and threaten suit on the debt.

An offer that the consumer make reduced payments to satisfy a debt can be deceptive where it does not warn the

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987 Holzman v. Malcolm S. Gerald & Assoc., Inc., 920 F.3d 1264, 1271 (11th Cir. 2019) ("offer to 'resolve' a time-barred debt, combined with a deadline to accept the reduced-payment offer and a warning that the offer might not be renewed if payment is not timely made . . . could plausibly deceive or mislead an unsophisticated consumer as to the legal status of the debt, even in the absence of an express threat of litigation"); Tatis v. Allied Interstate, L.L.C., 882 F.3d 422 (3d Cir. 2018); Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507 (5th Cir. 2016) (regardless of whether litigation is expressly threatened, offering to "settle" time-barred debt, without explaining that debt is not enforceable, can violate §§ 1692e and 1692f); Buchanan v. Northland Grp., Inc., 776 F.3d 393 (6th Cir. 2015) (letter offering "settlement" on debt that is time-barred falsely implied underlying debt was enforceable); McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010 (7th Cir. 2014); Manuel v. Merchants & Prof'l Credit Bur., Inc., 402 F. Supp. 3d 361, 373 (W.D. Tex. 2019) (collection letter that does not inform consumer that judicial enforcement of debt is time-barred or that any partial payment could defeat otherwise absolute defense of statute of limitations is violation of § 1692e; "The Court believes that this determination is the one most consistent with the Fifth Circuit's edict to construe the FDCPA broadly in favor of the consumer. Further, this determination is necessary and appropriate to vindicate the broad remedial scope of the FDCPA, which was designed to eliminate abusive debt collection practices by debt collectors."), *aff'd*, 956 F.3d 822 (5th Cir. 2020); Filgueiras v. Portfolio Recovery Assoc., 2016 WL 1626958 (D.N.J. Apr. 25, 2016) (consumer stated claim that letter offering to settle debt was deceptive if debt was time-barred); Magee v. Portfolio Recovery Assoc., 2015 WL 535859 (N.D. Ill. Feb. 5, 2015) (certifying classes against debt buyer who mailed "settlement offers" without disclosing that debt was time-barred); Rice v. Midland Credit Mgmt., Inc., 2015 WL 302155 (N.D. Ill. Jan. 22, 2015) (settlement offer on time-barred debt deceptive). *See also* Thompson v. Resurgent Capital Services, L.P., 2015 WL 1486974 (N.D. Ala. Mar. 31, 2015) (collection calls and letters contained misleading statements and innuendo regarding enforceability of debt). *But see* Woodward v. Collection Consultants of California, 381 F. Supp. 3d 1234, 1238–1239 (C.D. Cal. 2019) (letter offered to "resolve" and "close" plaintiff's account, but did not use language that would imply potential suit (such as "settle") and did not make any statements as to what would happen if plaintiff continued not to pay debt; "The least sophisticated debtor would not construe the language in the letter as anything other than a prudential reminder that the debt is outstanding."), *aff'd*, 801 Fed. Appx. 521 (9th Cir. 2020); Olsen v. Cavalry Portfolio Services, L.L.C., 2016 WL 4248009 (M.D. Fla. Aug. 11, 2016) (allegations that collection agency offered to "settle" debt after statute of limitations expired did not state claim); Elrich v. Convergent Outsourcing, Inc., 2015 WL 6470453 (S.D. Fla. Oct. 27, 2015) (rejecting complaint based on debt buyer's offer to "settle" debt without disclosing that debt was time-barred).

988 Pantoja v. Portfolio Recovery Assoc., 852 F.3d 679 (7th Cir. 2017). *See also* Gunther v. Midland Credit Mgmt., Inc., 2018 WL 4621764, at *8 (D. Utah Sept. 26, 2018). *But see* Contreras v. Portfolio Recovery Assoc., 2020 WL 204114 (C.D. Cal. Jan. 10, 2020) (letter that contained disclosure that debt buyer would not sue on time-barred debt, but did not state it would be unlawful to sue, did not violate § 1692e); Goodman v. Asset Acceptance L.L.C., 428 F. Supp. 3d 526 (D. Colo. Dec. 20, 2019) (use of phrase "will not sue" rather than "cannot sue" was not misleading); Smith v. Portfolio Recovery Assoc., 2019 WL 2236264 (M.D. Ga. May 23, 2019); Cooper v. Midland Credit Mgmt., Inc., 2018 WL 6517448 (M.D. Ga. Dec. 11, 2018) (no violation for letter stating "The law limits how long you can be sued on a debt and how long a debt can appear on your credit report. Due to the age of this debt, we will not sue you for it or report payment or non-payment of it to a credit bureau."); Jones v. Synergetic Commc'n, Inc., 2018 WL 6062414 (S.D. Cal. Nov. 20, 2018).

989 *See* Tinsley v. Consumer Adjustment Co., 2020 WL 1558105, at *6 (C.D. Ill. Apr. 1, 2020) (denying motion to dismiss where collector failed to provide time-barred debt disclosure in payment portal); Odneal v. Midwest Recovery Sys. L.L.C., 2020 WL 1974375 (N.D. Ind. Apr. 24, 2020) (same); Alexander v. Consumer Adjustment Co., 2020 WL 1559861 (C.D. Ill. Apr. 1, 2020) (same); Snyder v. Ocwen Loan Servicing, L.L.C., 2015 WL 1910989 (N.D. Ill. Apr. 27, 2015); Harris v. Total Card, Inc., 2013 WL 5221631 (N.D. Ill. Sept. 16, 2013) (disclosure may be required if failure to disclose would mislead unsophisticated consumer about character or legal status of debt); McRill v. Nationwide Credit, Inc., 2012 WL 6727974 (C.D. Ill. Dec. 6, 2012), *adopted*, 2012 WL 6727722 (C.D. Ill. Dec. 28, 2012).

990 *See* Gunther v. Midland Credit Mgmt., Inc., 2018 WL 4621764, at *8 (D. Utah Sept. 26, 2018).

991 *See* Magee v. Portfolio Recovery Assoc., 2016 WL 2644763 (N.D. Ill. May 9, 2016) (granting summary judgment to consumer; misleading consumer to believe that obsolete debt was legally reportable, and that making payment on that debt would improve their credit score, was deceptive); Smith v. RJM Acquisitions, L.L.C., 2014 WL 3107291 (W.D.N.Y. July 7, 2014). *See also* § 7.4.6, *supra*.

992 National Consumer Law Center, Collection Actions § 3.7.8.3 (5th ed. 2020), *updated at* www.nclc.org/library.

consumer that payment or agreement to pay on a time-barred debt will revive the limitations period,[993] thus making the consumer worse off than before. Even if the collector has a policy of not suing on a revived debt, courts may still find a violation, since the least sophisticated consumer would not know about such an internal policy.[994]

The communication may not be deceptive, though, if a partial payment under state law will not revive the limitations period or lead to the consumer being sued.[995] The failure to provide specific legal advice as to the consequences of partial payment on a debt is not necessarily deceptive.[996]

7.4.10 Deceptive Practices in Collection Lawsuits

7.4.10.1 Generally

Millions of lawsuits are filed to collect on consumer debts, and almost all result in default judgments.[997] Collection law firms file these suits in astonishing volumes, and often will little effort to investigate a case or to carefully draft legal pleadings.[998]

This section examines whether the collector's conduct in such litigation violates FDCPA § 1692e. Another section considers whether litigation conduct is unfair and thus violates FDCPA § 1692f.[999] Section 7.2.5, *supra*, examines deceptive threats to file suit and § 7.4.9, *supra*, considers the filing of time-barred suits. Section 7.4.11, *infra*, analyzes the application of FDCPA § 1692e to foreclosure actions and mortgage servicing, while residential evictions are examined briefly at § 7.4.12, *infra*.

Of special relevance, § 4.3.3, *supra*, covers whether a debt collector's litigation practices are within the scope of the FDCPA. Section 7.3.7, *supra*, considers whether the fact that the consumer is represented in the collection action affects the debt collector's FDCPA liability.

A debt collector may raise a number of defenses when an FDCPA action is brought after a collection lawsuit alleging misconduct in the collection lawsuit—usually the FDCPA claim can be drafted to avoid these defenses:

- Whether the FDCPA claims should have been brought as compulsory counterclaims in the collection lawsuit;[1000]
- Whether rulings in the collection lawsuit collaterally estop an FDCPA claim;[1001]
- Whether the state court judgment in the collection case is *res judicata* on the FDCPA action;[1002]
- Whether the *Rooker-Feldman* doctrine deprives a federal court in the FDCPA action from having jurisdiction to review a state court judgment in the collection lawsuit;[1003]

993 Pantoja v. Portfolio Recovery Assoc., 852 F.3d 679 (7th Cir. 2017); Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507 (5th Cir. 2016) (regardless of whether litigation is expressly threatened, offering to "settle" time-barred debt, without explaining that debt is not enforceable, can violate §§ 1692e and 1692f); Buchanan v. Northland Grp., Inc., 776 F.3d 393 (6th Cir. 2015); McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010 (7th Cir. 2014); Wheeler v. Midland Funding L.L.C., 2020 WL 1469449 (N.D. Ill. Mar. 26, 2020); Gomes v. Portfolio Recovery Assoc., 2018 WL 4179059 (S.D. Fla. Aug. 22, 2018) (collection letter stating that "first payment must be received NO LATER than" a certain date, would mislead least sophisticated consumer into taking action that would serve to restart statute of limitations); Shadow v. Midland Credit Mgmt., Inc., 2018 WL 4357980 (S.D. Cal. Sept. 13, 2018) (no defense for collector that state law required written acknowledgment of debt in addition to partial payment); Baye v. Midland Credit Mgmt., Inc., 2017 WL 4918998 (E.D. La. Oct. 31, 2017) (consumer stated §§ 1692e and 1692f claims where debt buyer's letters attempting to collect time-barred debt disclosed that it would not be suing in view of age of debt, but did not disclose that payment may revive debt); Bereket v. Portfolio Recovery Assoc., 2017 WL 4409480 (W.D. Wash. Oct. 4, 2017); Palmer v. Dynamic Recovery Solutions, L.L.C., 2016 WL 2348704 (M.D. Fla. May 4, 2016); Smothers v. Midland Credit Mgmt., Inc., 2016 WL 7485686 (D. Kan. Dec. 29, 2016); Lopera v. Midland Credit Mgmt., Inc., 2016 WL 6650744 (M.D. Fla. Nov. 10, 2016); Yang v. Midland Credit Mgmt., Inc., 2016 WL 393726 (D. Kan. Feb. 2, 2016). *See also* Jennings v. Dynamic Recovery Solutions L.L.C., 441 F. Supp. 3d 106 (D. Md. 2020); Alston v. Midland Credit Mgmt., Inc., 2018 WL 3309725 (D.S.C. July 3, 2018).

994 *See, e.g.*, Perea v. Portfolio Recovery Assoc., 2020 WL 5763647 (N.D. Ill., Sept. 28, 2020); Pierre v. Midland Credit Mgmt., Inc., 2018 WL 723278 (N.D. Ill. Feb. 5, 2018).

995 Burgess v. Portfolio Recovery Assoc., 726 Fed. Appx. 622, 623 (9th Cir. 2018); Yip v. Dynamic Recovery Solutions, L.L.C., 2019 WL 5549263 (N.D. Ga. June 18, 2019) (under Georgia law, partial payment alone does not restart statute of limitations on alleged debt), *adopted*, 2019 WL 5549952 (N.D. Ga. Sept. 26, 2019); Stimpson v. Midland Credit Mgmt., Inc., 347 F. Supp. 3d 538 (D. Idaho 2018), *aff'd*, 944 F.3d 1190 (9th Cir. 2019); Miran v. Convergent Outsourcing, Inc., 2017 WL 1410296 (S.D. Cal. Apr. 20, 2017). *See also* Christie v. Contract Callers, Inc., 2021 WL 689548, at *4 (N.D. Tex. Feb. 23, 2021) (partial payment would not revive debt under applicable state law); Rozario v. Admin Recovery, L.L.C., 2020 WL 4188131, at *5 (D.N.J. July 21, 2020) (lack of disclosure created no additional risk for consumer, because partial payment would not restart statute of limitations, "and importantly, there is no indication, or even argument by Plaintiff, that if a debtor were to make a partial payment on the debt, he or she would also have to make a declaration that the entire debt would also be paid"); Domke v. MRS BPO, L.L.C., 2020 WL 513807, at *4 (M.D. Fla. Jan. 31, 2020) (no violation where letter stated that in many circumstances person can renew debt and restart time period for filing of a lawsuit if person takes specific action, such as making certain payment on debt; in Florida, partial payments may be evidence of intent to repay, but are not sufficient to restart statute of limitations, which requires written and signed document, and letter's statement was accurate); Goodman v. Asset Acceptance L.L.C., 428 F. Supp. 3d 526 (D. Colo. Dec. 20, 2019) (statute of limitations not revived by partial payment alone); Judah v. Total Card, Inc., 2017 WL 2345636 (D.N.J. May 30, 2017) (letter included statement that consumer would not be sued; rejecting arguments that payment would revive statute of limitations); Boedicker v. Midland Credit Mgmt., Inc., 227 F. Supp. 3d 1235 (D. Kan. 2016) (debt buyer had written policy not to use any payments to recalculate statute of limitations, even if permissible under state law).

996 *See* Stimpson v. Midland Credit Mgmt., 944 F.3d 1190, 1198 (9th Cir. 2019) (stating that nothing in FDCPA "require[s] debt collectors to provide legal advice on revival statutes").

997 *See* §§ 1.4.9.1, 1.4.9.4, *supra*.

998 *See* § 1.4.8, *supra*.

999 *See* § 8.3.6, *infra*.

1000 *See* § 12.6.2, *infra*.

1001 *See* § 12.6.2, *infra*.

1002 *See* § 12.6.2, *infra*.

1003 *See* § 12.6.4, *infra*.

- Whether litigation or witness immunity for conduct in the collection lawsuit protects an FDCPA defendant;[1004] and
- Where the collection lawsuit has not been concluded when the FDCPA claim is brought, that the federal court use its discretion to delay the FDCPA claim until the state action is resolved.[1005]

The fact that the collector does not prevail in its collection lawsuit does not in itself prove a FDCPA § 1692e violation.[1006] For example, the collector might not have engaged in any deception in its presentation of the case, but the court might find it has not met its burden of proof. Simply opposing the consumer's position is not deceptive even where the consumer prevails.[1007]

While not prevailing in a collection lawsuit in itself is not deceptive, the collector's conduct in that lawsuit can be deceptive. As set out in the remainder of this § 7.4.9, such conduct actionable under FDCPA § 1692e can include false or misleading statements or practices in the service of process, in the initial complaint and its attachments, in requests for admissions and other discovery, in affidavits, and in other documents submitted during the litigation. A federal court, while granting judgment on the pleadings for the debt buyer, noted a number of potential FDCPA violations involved with hypothetical facts in a collection case. "That they did not have accounts with Citibank; that the accounts at issue were fraudulently opened; that they did not incur a debt to Citibank; that their debt to Citibank was not included in the debts Cavalry purchased from Citibank in bulk; that the debt-amounts listed were inaccurate; that Cavalry sought unauthorized interest, fees, or charges; or that Cavalry sued the wrong persons. Any single one of these factual allegations could state a claim under the FDCPA."[1008]

Conversely, that the collector prevailed in the collection lawsuit is not a defense to a challenge to the collector's practices in that lawsuit, as long as the consumer does not directly challenge the court's ruling in that lawsuit.[1009] What is at issue is whether specific collector practices in that lawsuit are deceptive and affect the consumer's decision-making, not the court's eventual ruling.

1004 *See* § 12.6.6, *infra*.

1005 *See* § 12.6.3, *infra*.

1006 Heintz v. Jenkins, 514 U.S. 291, 295–296, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995); Hill v. Accounts Receivable Services, L.L.C., 888 F.3d 343, 346 (8th Cir. 2018). *See also* Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291 (11th Cir. 2015); Hemmingsen v. Messerli & Kramer, P.A. 674 F.3d 814 (8th Cir. 2012).

1007 Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291 (11th Cir. 2015); Hemmingsen v. Messerli & Kramer, P.A. 674 F.3d 814 (8th Cir. 2012); Anderson v. Midland Funding, L.L.C., 2018 WL 1779424, at *7 (N.D. Ga. Jan. 4, 2018), *adopted in relevant part*, 2018 WL 1779446 (N.D. Ga. Jan. 25, 2018); Chenault v. Credit Corp. Solutions, Inc., 2017 WL 5971727 (E.D. Pa. Dec. 1, 2017).

1008 Gordon v. Cavalry SPV I, L.L.C., 2018 WL 3545119 at *1, 2 (E.D. Mich. July 24, 2018).

1009 *See* § 12.6.4, *infra*.

7.4.10.2 Does FDCPA § 1692e Apply to Filings Submitted to the Court?

The Seventh Circuit has held that FDCPA § 1692e does not apply to collector representations directed at the court, such as where attachments to a pleading filed with the court were fabricated and were meant to deceive the court, not the defendant.[1010] But even the Seventh Circuit finds that legal pleadings filed with the court can violate FDCPA § 1692e where the claim is that the deception is on the consumer.[1011]

Other circuits also find that FDCPA § 1692e applies when the consumer's complaint alleges that deceptive court filings have an impact on the consumer's decision-making,[1012] or even just on that of the consumer's lawyer.[1013] As a routine matter, most documents a collector files with the court are also sent to the consumer, and misrepresentations in those documents can materially deceive the consumer, affecting the consumer's decision-making.[1014] To the extent that copies of the collector's filings with the court were not sent to the consumer, but should have been sent to the consumer, this can also be deception directed at the consumer.

Moreover, FDCPA § 1692e states "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." There is no limitation that FDCPA § 1692e applies only to representations directed primarily or only to consumers.[1015] Other FDCPA provisions (such as section 1692c(a)) apply only to representations received by consumers, but section 1692e does not have such a limitation.

7.4.10.3 Deceptive Initiation of a Case and Excessive Requests for Relief

7.4.10.3.1 Service of the complaint and accompanying documents

FDCPA § 1692e can be violated where a collector improperly serves a court summons or complaint and misrepresents in the affidavit of service that it was properly served—also known as sewer service.[1016] FDCPA § 1692a(6)(d) exempts

1010 O'Rourke v. Palisades Acquisition XVI, L.L.C., 635 F.3d 938 (7th Cir. 2011).

1011 Marquez v. Weinstein, Pinson & Riley, P.S., 836 F.3d 808, 810–812 (7th Cir. 2016). *Cf.* Ciesniewski v. Aries Capital Partners, 2020 WL 1493019, at *3 (S.D. Ind. Mar. 27, 2020) (rejecting plaintiff's contention that *Marquez* effectively adopted concurrence in *O'Rourke*).

1012 Hartman v. Great Seneca Fin. Corp., 569 F.3d 606, 613 (6th Cir. 2009). *See also* Brief of CFPB and FTC As Amicus Curiae Supporting Plaintiffs, Sykes v. Mel S. Harris & Assoc. L.L.C. (2d Cir. Nov. 15, 2013), *available at* https://www.ftc.gov.

1013 Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1297–1300 (11th Cir. 2015); Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 231 (4th Cir. 2007).

1014 Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814, 818 (8th Cir. 2012).

1015 *But see* O'Rourke v. Palisades Acquisition XVI, L.L.C., 635 F.3d 938, 941 (7th Cir. 2011) (finding legislative intent to cover only communications to consumers).

1016 *See* Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201 (E.D.N.Y. 2019); Guzman v. Mel S. Harris & Assoc., 2018 WL 1665252

from the FDCPA process servers "serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt." Courts hold that this exemption does not apply to a process server's filing of a false affidavit.[1017]

Moreover, debt collectors knowingly filing such affidavits violate FDCPA § 1692e.[1018] Collectors hiring such process servers also can be liable for the sewer service of their agents.[1019] Collectors knowing a judgment was obtained by sewer service also violate FDCPA § 1692e by seeking to enforce that judgment[1020] or by opposing the consumer's attempt to set aside the judgment.[1021]

It can violate FDCPA § 1692e to fail to send the consumer subsequent pleadings in a case. For example, it is deceptive to not send the consumer a copy of an amended complaint that results in a default judgment against the consumer.[1022]

A collector's inclusion of additional material with a complaint and summons served upon the consumer can be a FDCPA § 1692e violation. Examples include attachment of a motion for default to a state complaint;[1023] inclusion of a debt collection letter because it implies the letter is an official court document;[1024] inclusion of a FDCPA § 1692g validation notice with the complaint;[1025] inclusion of a letter that had the appearance that it was previously sent to the consumer, but that never was sent.[1026]

It is also deceptive to send a collection letter simulating legal process.[1027]

Some courts have found not deceptive such errors as a debt buyer's failure to post a state court bond before serving the consumer with a debt collection summons and complaint,[1028] failure to comply with state procedural rules requiring certain documents to be attached to state court complaints,[1029] failure to attach documents that the complaint indicates are attached,[1030] and failure to redact the consumer's loan account number, date of birth, and Social Security number in state court pleadings.[1031]

(S.D.N.Y. Mar. 22, 2018); Bevan v. Butler & Assoc., 2017 WL 6557418 (D. Kan. Dec. 22, 2017); Gary v. Badger Process Services, Inc., 2017 WL 5356487 (E.D. Wis. Nov. 13, 2017) (false affidavits of service); Rendon v. HBLC, Inc., 2017 WL 7275423 (N.D. Ill. Oct. 25, 2017); Scott v. Greenberg, 2017 WL 1214441 (E.D.N.Y. Mar. 31, 2017) (affidavit of service's physical description of person served does not match anyone in household); Polanco v. NCO Portfolio Mgmt., Inc., 132 F. Supp. 3d 567 (S.D.N.Y. Sept. 23, 2015); Rubio v. LVNV Funding, L.L.C., 2015 WL 13650046 (N.D. Cal. July 21, 2015); Holmes v. Elec. Document Processing, Inc., 966 F. Supp. 2d 925 (N.D. Cal. 2013); Sykes v. Mel Harris & Assoc., 757 F. Supp. 2d 413 (S.D.N.Y. 2010).

1017 *See* Makhnevich v. MTGLQ Investors, L.P., 2020 WL 764158 (S.D.N.Y. Feb. 14, 2020); Rubio v. LVNV Funding, L.L.C., 2015 WL 13650046 (N.D. Cal. July 21, 2015); Holmes v. Elec. Document Processing, Inc., 966 F. Supp. 2d 925 (N.D. Cal. 2013); Ansari v. Elec. Document Processing Inc., 2013 WL 4647621 (N.D. Cal. Aug. 29, 2013); Sykes v. Mel Harris & Assoc., L.L.C., 757 F. Supp. 2d 413 (S.D.N.Y. 2010).

1018 Greco-Rambo v. Prof'l Collection Consultants, 2011 WL 3759676 (S.D. Cal. Aug. 25, 2011) (consumer alleged that service was made at time when residence was "a foreclosed property which was locked and boarded up" and thus defendants knew that she was never properly served, but they went ahead with obtaining default judgment); Sykes v. Mel Harris & Assoc., L.L.C., 757 F. Supp. 2d 413 (S.D.N.Y. 2010). *See also* Armstead v. Feldman, 2020 WL 4753837 (D. Md. Aug. 17, 2020) (theory of liability was predicated not on actions of process server in providing false information in return of service affidavits, but on collector's act of filing those documents in collection action; no violation found).

1019 Rubio v. LVNV Funding, L.L.C., 2015 WL 13650046 (N.D. Cal. July 21, 2015).

1020 Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201 (E.D.N.Y. 2019).

1021 *See* Coble v. Cohen & Slamowitz, L.L.P., 824 F. Supp. 2d 568 (S.D.N.Y. 2011).

1022 Coleman v. Berman & Rabin, P.A., 2015 WL 4524599 (E.D. Mo. July 27, 2015).

1023 Grden v. Leiken Ingber & Winters, P.C., 643 F.3d 169 (6th Cir. 2011).

1024 Tolentino v. Friedman, 833 F. Supp. 697 (N.D. Ill. 1993). *But see* Edstrom-Smith v. Kass Shuler, P.A., 680 Fed. Appx. 813 (11th Cir. 2017) (nothing in FDCPA prohibited inclusion of notice in state complaint, and nothing about notice was confusing or deceptive); Morrison v. Hosto, Buchan, Prater & Lawrence, P.L.L.C., 2009 WL 3010917 (E.D. Ark. Sept. 17, 2009) (note attached to complaint was factually true, included statutorily mandated language, invited settlement, and contained no deception).

1025 Goldman v. Cohen, 445 F.3d 152, 155–156 (2d Cir. 2006); Payne v. Sansone Law, L.L.C., 2016 WL 827943 (E.D. Mo. Mar. 3, 2016); Campbell v. Sansone Law, L.L.C., 2016 WL 4089349 (E.D. Mo. Aug. 2, 2016) (including § 1692g in state collection complaint could confuse unsophisticated consumer, when initial communication triggering § 1692g had not occurred).

1026 Matmanivong v. Unifund CCR Partners, 2009 WL 1181529 (N.D. Ill. Apr. 8, 2009); Manlapaz v. Unifund CCR Partners, 2009 WL 3015166 (N.D. Ill. Sept. 15, 2009).

1027 See § 1692e(13) prohibiting "[t]he false representation or implication that documents are legal process," discussed at § 7.2.13, *supra*. *See also* Zimmerman v. Portfolio Recovery Assoc., 276 F.R.D. 174 (S.D.N.Y. 2011) (enclosing bogus summonses and complaint with cover letter that this is lawsuit collector intends to file).

1028 *See* Ramirez v. Portfolio Recovery Assoc., 2018 WL 4603277 (D. Minn. Sept. 25, 2018).

1029 Walsh v. Arrow Fin. Services, L.L.C., 2012 WL 255802 (N.D. Ill. Jan. 27, 2012).

1030 Washington v. Roosen, Varchetti & Oliver, P.P.L.C., 894 F. Supp. 2d 1015 (W.D. Mich. 2012).

1031 *See* Tschudin v. Brumbaugh & Quandahl, P.C., 2014 WL 7272668 (D. Neb. Dec. 18, 2014) (distinguishing *Douglass v. Convergent Outsourcing* by narrowly construing it). *See also* Elyazidi v. SunTrust Bank, 780 F.3d 227, 236 (4th Cir. 2015) ("While, conceivably, a threat to expose one's social security number might pressure a debtor to pay off a debt, there is no allegation that Appellees ever made such a threat."); Diaz v. Midland Funding, L.L.C., 2017 WL 4236060 (D.N.J. Sept. 22, 2017) (disclosure of four digits of Social Security number in state court debt collection complaint not violation of FDCPA); Pittenger v. John Soliday Fin. Group, L.L.C., 2010 WL 1856224 (N.D. Ohio May 10, 2010); Feltman v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 2008 WL 5211024 (N.D. Ill. Dec. 11, 2008). *Cf.* Husainy v. Gutwein L.L.P., 2020 WL 5076791, at *3 (N.D. Ind. Aug. 27, 2020) (dismissing § 1692e claim based on alleged disclosure of Social Security number, but denying dismissal of § 1692e claim based on alleged false representation to state court about whether it set as confidential documents containing Social Security number).

7.4.10.3.2 Complaints that mislead as to collector's right to sue the consumer

A complaint that misrepresents that the collector has a valid lawsuit against the consumer can violate FDCPA § 1692e. Filing a time-barred complaint as a FDCPA § 1692e violation is examined at § 7.4.9.3, *supra*. *Res judicata* may also bar a collection suit, and suing the consumer despite that can be deceptive.[1032]

It can be similarly deceptive to sue on a debt discharged in bankruptcy or in violation of a bankruptcy automatic stay.[1033] Most collectors use data servicers that "scrub" the names of consumers who have filed for bankruptcy protection, so that the collector should be aware of any bankruptcy. In any event, ignorance of the bankruptcy is not a defense unless the collector proves all the elements of the bona fide error defense.[1034]

Also deceptive is suing a member of the active duty military in violation of the Servicemembers Civil Relief Act.[1035] It can be a FDCPA § 1692e violation to file a complaint prior to expiration of a statutory right to cure a delinquency,[1036] or to sue a consumer while knowing that the debt was not owed.[1037]

A FDCPA § 1692e violation is stated where the plaintiff in a collection suit has not been properly assigned the obligation or has no proof of such an assignment, which would allow it to collect on the debt.[1038] Where state law requires that proof of ownership be included with the complaint, then failure to do so can violate FDCPA § 1692e, even if the collector could later obtain that information.[1039] It is also deceptive to allege ownership of the debt at the time the complaint is issued where that assignment of ownership only occurs later.[1040] Moreover, it can be a FDCPA § 1692e violation for an attorney to name the wrong trust as the owner of the debt.[1041]

It is deceptive for a complaint to be in the name of the originating creditor where the suit is being brought on behalf of a debt buyer.[1042] But where the complaint properly sets out the names of the merchant, originating creditor, and account holder, and state rules of procedure do not require more than what is found in the complaint, there may be no violation just because the complaint does not explain their relationship to the consumer.[1043]

It can violate FDCPA § 1692e for an attorney to verify "upon personal knowledge" the complaint with only minimal knowledge of the facts of a case.[1044] That might not be the case if the attorney only stated the facts "upon information and belief,"[1045] but even then it is actionable if the attorney knew the facts were inaccurate.[1046]

7.4.10.3.3 Suing on an inapplicable or unclear legal theory

Collectors may sue the consumer on a legal theory inapplicable to the facts pled in the case. This can be the result of sloppiness where the collector is filing thousands of complaints on a cookie-cutter basis without professional attention

1032 *See* Montgomery v. Donnett, 2006 WL 293727 (S.D. Ohio Feb. 7, 2006).

1033 *See* § 7.2.2.3, *supra*. *See also* Murphy v. Stupar, Schuster & Bartell, 337 F. Supp. 3d 837 (W.D. Wis. Feb. 21, 2018) (suing pursuant to invalid reaffirmation of debts discharged in bankruptcy); Mogg v. Jacobs, 2016 WL 1029396 (S.D. Ill. Mar. 15, 2016) (filing suit after notice of automatic stay).

1034 *See also* Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004).

1035 Maxwell v. St. Francis Health Ctr., 2017 WL 4037732 (D. Kan. Sept. 13, 2017) (collector knew consumer was on active duty); Owings v. Hunt & Henriques, 2010 WL 3489342 (S.D. Cal. Sept. 3, 2010) (defendant's false declaration that plaintiff was not in active military service).

1036 *See* Bahena v. Jefferson Capital Sys., L.L.C., 2019 WL 357936 (W.D. Wis. Jan. 29, 2019) (Wisconsin right to cure credit card delinquencies). *See also* Boerner v. LVNV Funding L.L.C., 358 F. Supp. 3d 767 (E.D. Wis. Jan. 8, 2019).

1037 *See, e.g.*, Gamble v. Midland Funding L.L.C., 2013 WL 979202 (N.D. Ala. Mar. 7, 2013). See also Gary v. Hladik Onorato & Federman, L.L.P., 509 F. Supp. 3d 368, 379 (W.D. Pa. Dec. 22, 2020) (denying motion to dismiss § 1692e claim based on allegation that foreclosure relied on fraudulent mortgage assignment).

1038 *See* Ferkingstad v. Accounts Receivable Services, L.L.C., 2017 WL 1373261 (D. Minn. Apr. 13, 2017); Matmanivong v. Unifund CCR Partners, 2009 WL 1181529 (N.D. Ill. Apr. 8, 2009); Royal Fin. Group, L.L.C. v. Perkins, 414 S.W.3d 501 (Mo. Ct. App. 2013) (debt buyer could not prove it owned the debt). *But see* Kearney v. Cavalry Portfolio Services, L.L.C., 2014 WL 3778746 (E.D.N.Y. July 31, 2014) (servicer for debt owner could bring collection lawsuit under New York law); Ness v. Gurstel Chargo, P.A., 933 F. Supp. 2d 1156 (D. Minn. 2013) (no FDCPA violation where record showed that debt buyer offered proof of its purchase of debt that was rejected by state court as not authenticated); Clark v. Unifund CCR Partners, 2007 WL 1258113 (W.D. Pa. Apr. 30, 2007) (no § 1692e violation where collector filed affidavit as to assignment of debt, but not actual assignment documents).

1039 *See* Grant-Hall v. Cavalry Portfolio Services, L.L.C., 856 F. Supp. 2d 929 (N.D. Ill. 2012); Day v. Check Brokerage Corp., 511 F. Supp. 2d 950 (N.D. Ill. 2007) (debt collector failed to offer evidence of written assignment required by state law).

1040 Ferkingstad v. Accounts Receivable Services, L.L.C., 2017 WL 1373261 (D. Minn. Apr. 13, 2017).

1041 Rosales v. Weltman, Weinberg & Reis Co., 2017 WL 1436957 (N.D. Ill. Apr. 24, 2017), *related case*, 2020 WL 6681362 (N.D. Ill. Nov. 12, 2020).

1042 *See* McDermott v. Barton, 2014 WL 6704544 (S.D. Ill. Nov. 26, 2014). *See also* Eul v. Transworld Sys., 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017); Moss v. Barton, 2016 WL 1441146 (E.D. Mo. Apr. 8, 2016).

1043 Beler v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 480 F.3d 470 (7th Cir. 2007).

1044 Lockett v. Freedman, 2004 WL 856516 (N.D. Ill. Apr. 21, 2004) (verified complaint including inflated collection attorney fees was deceptive, where complaint was verified based on personal knowledge, and not information and belief); Young v. Meyer & Njus, 1997 WL 452685 (N.D. Ill. Aug. 6, 1997). *But see* Haworth v. Midland Credit Mgmt., Inc., 2019 WL 7161230, at *5 (D. Neb. Oct. 17, 2019) ("Plaintiffs' claims in this case focus on the affiant's alleged lack of personal knowledge, not any knowingly false statements about the nature of the debt itself."); Delisis v. Midland Funding, L.L.C., 2015 WL 4393901 (E.D. Mo. July 16, 2015).

1045 Fisher v. Asset Acceptance, L.L.C., 2005 WL 1799275 (N.D. Ill. July 26, 2005); Gonzalez v. Lawent, 2004 WL 2036409 (N.D. Ill. Sept. 10, 2004) (on information and belief); Forgey v. Parker Bush & Lane, P.C., 2004 WL 1945737 (D. Or. Sept. 1, 2004); O'Chaney v. Shapiro & Kreisman, L.L.C., 2004 WL 635060 (N.D. Ill. Mar. 29, 2004) (collection attorney's affidavit based on information and belief, not based on personal knowledge).

1046 *See* Kamps v. Midland Funding, L.L.C., 2013 WL 622505 (N.D. Ala. Feb. 19, 2013) (allegation that debt buyer proceeded in state court knowing consumer did not owe debt).

of an attorney. Or the practice can be deliberate because the inapplicable theory authorizes a larger recovery (such as attorney fees or prejudgment interest) and the collector assumes it will prevail by default on the inapplicable theory.

It can violate FDCPA § 1692e to bring a collection suit on credit card debt using a claim for "materials or services" in order to collect attorney fees and prejudgment interest where that relief would not have been available otherwise.[1047] The credit card issuer did not provide any materials or services so that the claim was totally inappropriate.

Texas has a unique cause of action for "sworn account" and Texas intermediate appellate courts have found that this claim is not applicable to credit card debt.[1048] Nevertheless, in an unreported decision, the Fifth Circuit affirmed a ruling that bringing a sworn account claim on a credit card debt is not deceptive since the Texas Supreme Court had not ruled on the issue, and a contrary holding would deprive debt collectors of the right to seek a change in the jurisprudence.[1049]

Collectors often do not sue on the contract, but on an account stated theory—that the creditor had sent the consumer a statement of the amount due, and the consumer's actions or inactions should be deemed an admission of that obligation.[1050] Where state law allows for an account stated claim, it is not deceptive to seek recovery on this basis instead of breach of contract.[1051] But it may be deceptive to seek recovery on an account stated where a statement of account was never sent to the consumer showing the amount sought in the litigation.[1052]

The Seventh Circuit finds it can be a FDCPA § 1692e violation to state in a complaint that the debt is assumed valid unless the consumer disputes the debt within thirty days.[1053] This is a misrepresentation of the legal claim in the collector's collection lawsuit.

1047 Bassett v. Credit Mgmt. Services, Inc., 326 F. Supp. 3d 862 (D. Neb. 2018), *vacated by* 2019 WL 6767053 (D. Neb. July 29, 2019) (partial summary judgment vacated for purpose of facilitating settlement); Powers v. Credit Mgmt. Services, Inc., 2016 WL 612251 (D. Neb. Feb. 2, 2016).

1048 *See* National Consumer Law Center, Collection Actions § 4.9 (5th ed. 2020), *updated at* www.nclc.org/library.

1049 Drennan v. First Resolution Inv. Corp., 389 Fed. Appx. 352 (5th Cir. 2010).

1050 *See* National Consumer Law Center, Collection Actions § 4.7 (5th ed. 2020), *updated at* www.nclc.org/library.

1051 Nyberg v. Portfolio Recovery Assoc., 2017 WL 1055962 (D. Or. Mar. 20, 2017); Carpenter v. Monroe Fin. Recovery Group, L.L.C., 119 F. Supp. 3d 623 (E.D. Mich. 2015); Kniley v. Citibank, 2015 WL 1535668 (N.D. Cal. Apr. 6, 2015); Hadsell v. Mandarich Law Group, L.L.P., 2013 WL 1386299 (S.D. Cal. Apr. 4, 2013).

1052 *See* Klein v. Stewart Zlimen & Jungers, Ltd., 2019 WL 79317, at *6 (D. Minn. Jan. 2, 2019) (denying motion to dismiss since plaintiffs "may have difficulty demonstrating materiality" but "they should have the right to try to develop it"; stating that *Jorgensen* case is "not binding here"). *But see* Jorgensen v. Accounts Receivable Serv., 250 F. Supp. 3d 351, 354 (D. Minn. 2017) (not misleading or material).

1053 Marquez v. Weinstein, Pinson & Riley, P.S., 836 F.3d 808, 810–812 (7th Cir. 2016).

7.4.10.3.4 Amounts sought

A collection lawsuit can violate FDCPA § 1692e where it seeks amounts the plaintiff is not entitled to,[1054] including stating an amount due that includes amounts that the plaintiff might have a right to in the future, but is not yet entitled to.[1055] A collector violates FDCPA § 1692e where, in litigation, it alleges the plaintiff is owed attorney fees to which the collector is not entitled,[1056] where it alleges it is owed interest charges not owed,[1057] or seeks other charges to which the plaintiff is not entitled.[1058] It can also be deceptive to seek the wrong principal balance because of failing to credit consumer payments.[1059]

1054 Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) (FDCPA applied to deceptive practices during course of state debt collection suit by inflating amount claimed by adding charges for unauthorized force-placed insurance fees); Gionis v. Javitch, Block, Rathbone, L.L.P., 238 Fed. Appx. 24 (6th Cir. 2007); Kaymark v. Bank of Am., 783 F.3d 168, 176–177 (3d Cir. 2015).

1055 Kaymark v. Bank of Am., 783 F.3d 168, 176–177 (3d Cir. 2015).

1056 Kaymark v. Bank of Am., 783 F.3d 168, 176–177 (3d Cir. 2015); Gionis v. Javitch, Block, Rathbone, L.L.P., 238 Fed. Appx. 24 (6th Cir. 2007); Sanz v. Fernandez, 633 F. Supp. 2d 1356 (S.D. Fla. 2009) (nonlawyers sought fees where state law limited attorney fees to lawyers); Kirk v. Gobel, 622 F. Supp. 2d 1039 (E.D. Wash. 2009) (attorney fees prohibited by state law); McCollough v. Johnson, Rodenburg & Lauinger, 645 F. Supp. 2d 917 (D. Mont. 2009), *aff'd*, 637 F.3d 939 (9th Cir. 2011) (sought contractual attorney fees with no proof of contract); Lockett v. Freedman, 2004 WL 856516 (N.D. Ill. Apr. 21, 2004) (denying motion to dismiss where contract unclear regarding creditor's right to attorney fees).

1057 Haney v. Portfolio Recovery Assoc., 837 F.3d 918, 926 (8th Cir. Sept. 21, 2016) (seeking prejudgment interest on prior interest charges in violation of state law forbidding compounding of interest); Stratton v. Portfolio Recovery Assoc., 770 F.3d 443 (6th Cir. 2014) (debt buyer seeking interest after creditor waived all future interest charges); Mellish v. CACH, L.L.C., 2020 WL 1472405, at *5 (W.D. Pa. Mar. 26, 2020) (motion to dismiss denied where plaintiff alleged facts showing that defendants violated Pennsylvania's Consumer Discount Company Act by seeking to collect more interest than they were not entitled to by law); Eul v. Transworld Sys., 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017) (interest rate in excess of state law); Wade v. Account Resolution Corp., 2016 WL 4415353 (E.D. Mo. Aug. 19, 2016) (added prejudgment interest to default judgment where, no interest was accruing on debt prior to judgment); Unifund CCR Partners v. Harrell, 509 S.W.3d 25 (Ky. 2017). *See also* Tabiti v. LVNV Funding, L.L.C., 2019 WL 1382235, at *10 (N.D. Ill. Mar. 27, 2019) (plain language of purchase agreement did not transfer to debt buyer right to collect post-charge-off interest, and even if it did, creditor waived right to collect post-charge-off interest and debt buyer was bound by that waiver); Brooks v. Cama Self Directed IRA, L.L.C., 2019 WL 418412 (D. Md. Jan. 31, 2019) (even if later successor in interest retained right to charge interest or fees *prospectively*, plaintiffs plausibly alleged that there was no right to collect amounts dating back to December 2009 and, therefore claim to such amounts in foreclosure was misstatement). *But see* Yip v. Dynamic Recovery Solutions, L.L.C., 2019 WL 5549263 (N.D. Ga. June 18, 2019) (despite creditor's waiver, it was legal under Georgia law to apply statutory interest under the circumstances), *adopted*, 2019 WL 5549952 (N.D. Ga. Sept. 26, 2019).

1058 Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) (holding FDCPA applied to deceptive practices during course of state debt collection suit by inflating amount claimed by adding charges for unauthorized forced-placed insurance fees).

1059 Eckert v. LVNV Funding L.L.C., 647 F. Supp. 2d 1096 (E.D. Mo. 2009).

FDCPA § 1692e can be violated where a collector sues on a credit obligation that is usurious and thus void.[1060]

Questions arise as to whether an attorney is liable under FDCPA § 1692e for misstatements of the amount owed where the attorney is relying on information supplied by the client. As examined at § 7.2.2.2, *supra*, collectors are strictly liable for errors while demanding an amount due, subject only to the bona fide error defense.[1061] The same principle applies to errors in the amount demanded in litigation.[1062]

Whatever the liability of the collector's attorney, the attorney's client should be liable for misstatements of the amount due in the litigation if the client is within the FDCPA's coverage.[1063]

There may not be a FDCPA § 1692e violation where a collector seeks an amount in litigation less than the amount previously sought (unless the amount previously sought was in error, and then its prior demand for that erroneous amount could be a violation).[1064]

7.4.10.4 Initiating a Case Without Evidence or Review by the Attorney

7.4.10.4.1 Initiating lawsuit without meaningful attorney involvement

This subsection often overlaps with § 7.4.10.4.2, *infra*, on filing lawsuits without evidence of the claims in the lawsuit. In mass filing of collection lawsuits, collection firms may file complaints without meaningful review by an attorney or without possessing evidence to support the claim. These violations are distinct. One deceives consumers as to the involvement of an attorney in an action and the other misrepresents that there is evidence to substantiate the allegations in the complaint.

It is well accepted that it violates FDCPA § 1692e(3) for a communication to appear to be from an attorney where there has been no meaningful review by an attorney.[1065] This also extends to a complaint in a collection lawsuit that is signed by an attorney, but no attorney has meaningfully reviewed the matter.[1066] It is no defense to say that there can be no FDCPA § 1692e(3) liability if the attorney becomes meaningfully involved later on.[1067]

Evidence of lack of meaningful review can be shown by the number of suits the attorney filed in a fixed period of time,[1068] the attorney's heavy workload,[1069] attorney time sheets or

1060 Gerstle v. Nat'l Credit Adjusters, L.L.C., 76 F. Supp. 3d 503 (S.D.N.Y. 2015).

1061 See § 12.2.7, *infra*, on collector's reliance on information from the creditor as a basis for the bona fide error defense.

1062 *But see* Spangler v. Conrad, 2010 WL 2389481 (E.D. Tenn. June 9, 2010) (where amount uncertain, attorney can rely on client's computation).

1063 *See, e.g.*, Kelly v. Great Seneca Fin. Corp., 443 F. Supp. 2d 954 (S.D. Ohio June 16, 2005).

1064 *See* Nyberg v. Portfolio Recovery Assoc., 2017 WL 1055962 (D. Or. Mar. 20, 2017).

1065 *See* § 7.2.3.3, *supra*.

1066 Bahena v. Jefferson Capital Sys., L.L.C., 363 F. Supp. 3d 914 (W.D. Wis. 2019); Boerner v. LVNV Funding L.L.C., 326 F. Supp. 3d 665, 684 (E.D. Wis. 2018); Satran v. LVNV Funding, L.L.C., 2018 WL 2464486 (W.D. Wis. June 1, 2018); Anderson v. Midland Funding L.L.C., 2018 WL 1779446 (N.D. Ga. Jan. 25, 2018); Anderson v. Jefferson Capital Sys., L.L.C., 2016 WL 9558952 (N.D. Ga. Nov. 7, 2016); CFPB v. Frederick J. Hanna & Assoc., 114 F. Supp. 3d 1342, 1367 (N.D. Ga. 2015); Bock v. Pressler & Pressler, L.L.P., 30 F. Supp. 3d 283 (D.N.J. 2014) (four seconds review of complaint); Champion v. Target Nat'l Bank, 2013 WL 8699367 (N.D. Ga. Apr. 15, 2013); Miller v. Upton, Cohen & Slamowitz, 687 F. Supp. 2d 86 (E.D.N.Y. 2009), *on remand from* Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003); Berg v. Blatt, Hasenmiller, Leibsker & Moore L.L.C., 2009 WL 901011 (N.D. Ill. Mar. 31, 2009); CFPB v. Pressler & Pressler, L.L.P., 2016-CFPB-0009 (Apr. 25, 2016) (consent order), *available at* www.consumerfinance.gov. *Cf.* Musah v. Houslanger & Assoc., 962 F. Supp. 2d 636 (S.D.N.Y. 2013) (discussing situations requiring attorney involvement when seeking postjudgment remedies). *See also* Diehm v. Messerli & Kramer, P.A., 426 F. Supp. 3d 578 (W.D. Wis. 2019). *But see* Gordon v. Cavalry SPV I, L.L.C., 2018 WL 3545119 (E.D. Mich. July 24, 2018) (consumers provided no evidence of lack of attorney involvement); Cheslek v. Asset Acceptance Capital Corp., 2017 WL 7370983 (W.D. Mich. Dec. 22, 2017) (dismissing pleading as lacking allegations of facts supporting § 1692e(3) claim); Lopez v. Law Offices of Faloni & Assoc., 2016 WL 4820629 (D.N.J. Sept. 14, 2016) (evidence of filing 195 cases on the same day not sufficient to show lack of meaningful attorney involvement); Donatelli v. Warmbrodt, 2011 WL 2580442 (W.D. Pa. June 28, 2011) (attorney testified that he reviewed correspondence and attached evidence of debt, making sure that two were consistent); Midland Funding L.L.C. v. Ford, 2020 WL 1910207, at *5 (Minn. Ct. App. Apr. 20, 2020) ("Respondents submitted documents demonstrating that Messerli & Kramer P.A. conducted a thorough and meaningful review of Ford's account-documentation prior to signing the complaint.").

1067 Troutman v. Jefferson Capital Sys., L.L.C., 2019 WL 2656212, at *4 (M.D. Ga. June 27, 2019) ("The Defendants' theory appears to be that even if a complaint deceptively indicates that it was prepared with meaningful attorney involvement, there is no FDCPA liability if the attorney becomes meaningfully involved later on. However, there is nothing in the FDCPA, and the Defendants cite no authority, to support such a carve-out.").

1068 Rossi v. Messerli & Kramer, P.A., 2020 WL 869247 (W.D. Wis. Feb. 21, 2020); Satran v. LVNV Funding, L.L.C., 2018 WL 2464486 (W.D. Wis. June 1, 2018) (attorney who signed complaint was attorney of record in at least 10,161 other cases in Wisconsin); Diaz v. Portfolio Recovery Assoc., 2012 WL 661456 (E.D.N.Y. Feb. 28, 2012) (three attorneys filed over 13,000 complaints in one year), *adopted*, 2012 WL 1882976 (E.D.N.Y. May 24, 2012); Miller v. Upton, Cohen & Slamowitz, 687 F. Supp. 2d 86 (E.D.N.Y. 2009) (collection attorney and his partner signed 211 collection letters on the same day they signed plaintiff's letter and issued over 3000 letters in that month, leaving little time for legal review), *on remand from* Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003). *But see* Trivedi v. BD 112A L.L.C., 2020 WL 736239 (E.D. Wis. Feb. 13, 2020); Lopez v. Law Offices of Faloni & Assoc., 2016 WL 4820629 (D.N.J. Sept. 14, 2016) (evidence of filing 195 cases on same day not sufficient to show lack of meaningful attorney involvement).

1069 *See* Rossi v. Messerli & Kramer, P.A., 2020 WL 869247 (W.D. Wis. Feb. 21, 2020) (attorney's workload made it "extremely unlikely" that attorney had time or ability to review file withstood motion to dismiss); Diehm v. Messerli & Kramer, P.A., 426 F. Supp. 3d 578 (W.D. Wis. 2019); Boerner v. LVNV Funding, L.L.C., 326 F. Supp. 3d 665 (E.D. Wis. 2018). *But see* Trivedi v. BD 112A L.L.C., 2020 WL 736239 (E.D. Wis. Feb. 13, 2020); Richardson v. Midland Funding, L.L.C., 2013 WL 6719110 (D. Md. Dec. 18, 2013) (court rejected plaintiff's claim that attorney who signed complaint could not have been meaningfully involved because he had signed approximately 11,668 other collection complaints).

similar evidence of attorney time spent on a case,[1070] or the minimal information about the debt available to the attorney to make a meaningful review.[1071] Other evidence is the use of boilerplate forms,[1072] the fact that there is no electronic record that the attorney of record has accessed a consumer's file,[1073] or the fact that the complaint's allegations were inconsistent with the credit agreement or the law.[1074]

7.4.10.4.2 *Initiating a lawsuit without sufficient evidence of debt*

Debt buyers may file suit with insufficient evidence to prove their case, on the assumption they will win by default. If the consumer contests the case, the debt buyer may or may not have any access to account-level business records on the debts that they buy.[1075] It may be a factual issue whether a debt buyer has or can obtain (from the original creditor or a prior debt buyer) the additional information and documentation. In addition, some creditors may have destroyed or warehoused the key transactional documents, making them irretrievable.[1076]

Courts may find that it is not a FDCPA § 1692e violation where the consumer's only allegation is that, prior to filing the case, the collection attorney did not possess sufficient evidence to prove the case, and where there are no allegations that the attorney could not later obtain that evidence.[1077] This should be distinguished from a situation where the collector files a lawsuit even though it is unable or has no intention to obtain the evidence needed to prove its case, which may be a FDCPA § 1692e violation.[1078] For example, a collection attorney may have no intention of obtaining evidence to prove its case where the attorney drops the case whenever the consumer contests the case.[1079] Similarly, there can be a FDCPA § 1692e violation where the collection attorney knows or should know that it cannot prove its case.[1080]

The Consumer Financial Protection Bureau (CFPB) has alleged, in consent orders, a series of interrelated FDCPA § 1692e violations involving law firm practices in collection lawsuits where the law firms, without reviewing original account-level documentation, continued litigation:

- Implying that the law firm had a reasonable basis for the allegations in the complaint, even though it had no such substantiation;
- Knowing the consumer had disputed the debt and the law firm had no evidence to contest that dispute;
- Even though the law firm "had knowledge or reason to believe, based on its past course of dealing with its clients' accounts (including factors such as consumer disputes, inaccurate or incomplete information in the portfolio, and contractual disclaimers related to the accounts) that a

1070 Miller v. Upton, Cohen & Slamowitz, 687 F. Supp. 2d 86 (E.D.N.Y. 2009) (first noting time after complaint was filed).

1071 Miller v. Upton, Cohen & Slamowitz, 687 F. Supp. 2d 86 (E.D.N.Y. 2009).

1072 Anderson v. Midland Funding L.L.C., 2018 WL 1779446 (N.D. Ga. Jan. 25, 2018).

1073 *See* CFPB v. Pressler & Pressler, L.L.P., 2016-CFPB-0009 (Apr. 25, 2016) (consent order), *available at* www.consumerfinance.gov.

1074 Miller v. Upton, Cohen & Slamowitz, 687 F. Supp. 2d 86 (E.D.N.Y. 2009).

1075 *See* § 1.4.7.3, *supra*.

1076 *See, e.g.*, Johnson v. MBNA Am. Bank, 357 F.3d 426, 432 (4th Cir. 2004) ("MBNA relies on testimony that, pursuant to its five-year document retention policy, the original account application was no longer in MBNA's possession"; thus, MBNA did not have original evidence of who was obligated on credit card account).

1077 Eades v. Kennedy, PC Law Offices, 799 F.3d 161, 172 (2d Cir. 2015); Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006); Zachary v. Midland Funding, L.L.C., 2018 WL 3474691, at *3 (E.D. Pa. July 18, 2018) (dismissing §§ 1692e, 1692e(2), 1692e(10) and 1692f(1) claims: "Without more, the allegation that Defendant filed and pursued the underlying lawsuit without sufficient evidence fails to state a claim that the lawsuit was a false, deceptive, or misleading representation or means to collect a debt."); Zachary v. Midland Funding, L.L.C., 2018 WL 3474691 (E.D. Pa. July 18, 2018); Anderson v. Midland Funding, L.L.C., 2018 WL 1779424, at *7 (N.D. Ga. Jan. 4, 2018), *adopted in relevant part*, 2018 WL 1779446 (N.D. Ga. Jan. 25, 2018) (dismissing § 1692e(2) claim against debt buyer and its attorneys for allegedly failing to support collection law suit with proof or documentation); Bandy v. Midland Funding, L.L.C., 2013 WL 210730 (S.D. Ala. Jan. 18, 2013) (Alabama law already provided Bandy adequate protection against being sued without substantial justification); Polinsky v. Cmty. Health Partners Reg'l Health Sys., 858 F. Supp. 2d 891 (N.D. Ohio 2012) (collection lawyer need not conduct independent investigation prior to filing suit, but lawyer is strictly liable for misstating amount or consumer's liability for debt); Whittiker v. Deutsche Bank Nat'l Tr. Co., 605 F. Supp. 2d 914 (N.D. Ohio 2009) (filing of foreclosure action by plaintiff in process of obtaining assignment not yet fully documented was not deceptive); Clark v. Unifund CCR Partners, 2007 WL 1258113 (W.D. Pa. Apr. 30, 2007); Davis v. NCO Portfolio Mgmt., Inc., 2006 WL 290491 (S.D. Ohio Feb. 7, 2006); Deere v. Javitch, Block & Rathbone L.L.P., 413 F. Supp. 2d 886 (S.D. Ohio 2006).

1078 Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006) (not ruling on where evidence unavailable, only ruling where evidence could be obtained later); Woychesin v. Midland Funding, L.L.C., 2020 WL 5893815 (N.D. Ala. Oct. 5, 2020) (alleging that debt buyer filed "bogus" lawsuit to collect debt that plaintiff did not owe with no intention of proving case); Hinten v. Midland Funding, L.L.C., 2013 WL 5739035 (E.D. Mo. Oct. 22, 2013) (alleging "that defendant commenced a judicial action with no intention of further prosecution, with insufficient evidence, and no intention of further seeking evidence"); Samuels v. Midland Funding, L.L.C., 921 F. Supp. 2d 1321, 1333 (S.D. Ala. 2013); Kuria v. Palisades Acquisition XVI, L.L.C., 752 F. Supp. 2d 1293 (N.D. Ga. 2010); Mello v. Great Seneca Fin. Corp., 526 F. Supp. 2d 1020 (C.D. Cal. 2007) (claim that collection attorney unable to obtain evidence of plaintiff's alleged debt).

1079 Stubbs v. Cavalry SPV I, 2013 WL 1858587 (N.D. Ill. May 1, 2013) (consumers stated claim for fraudulent initiation of collection action in violation of § 1692e(4) when they alleged that debt collectors filed lawsuits without reviewing or even possessing records of borrowers' debts, and that they then typically dismissed collection action when borrower appeared to be knowledgeable about debt or retained counsel). *See also* Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017) (collection attorney on trial date, when seeing consumer represented, sought continuance). *But see* Velazquez v. Arrow Fin. Services, L.L.C., 2009 WL 2780372 (S.D. Cal. Aug. 31, 2009) (no violation, even where attorney dismissed suit because it knew it could not prove its allegations).

1080 Mason v. Midland Funding L.L.C., 2017 WL 6994577 (N.D. Ga. July 27, 2017), *adopted*, 2017 WL 8186866 (N.D. Ga. Sept. 29, 2017) (collection lawyers should have known they could not prove their claims).

specific portfolio of clients' accounts might contain unreliable data."[1081]

The CFPB also survived a motion to dismiss in alleging it was deceptive for a collection lawyer to not bother to determine whether any underlying documentation for the debt was available and where the collection lawyer "failed to review the contracts governing the sale of accounts to determine whether those contracts disclaimed any warranties regarding the accuracy or validity of the debts."[1082]

Even where a collection attorney filing of lawsuits in mass with minimal evidence prior to filing is not found to be a FDCPA § 1692e violation, the practice should be relevant to whether the collector can raise a good faith defense to other FDCPA violations. The filing of mass lawsuits can indicate an absence of reasonable procedures to avoid the error.[1083]

7.4.10.5 Deceptive Affidavits and Business Records

Debt collection litigation often includes affidavits submitted by the collector—attached to the complaint, used to introduce business records, and in support of summary judgment. Even where the collector has prevailed in its collection lawsuit, misrepresentations in affidavits may be actionable under FDCPA § 1692e. Litigation or witness immunity claims generally will not apply to such deceptive affidavits,[1084] nor will the *Rooker-Feldman* doctrine be a bar.[1085] For example, FDCPA § 1692e is violated where a collector's affidavit filed in a collection action contains misleading statements as to the collector's right to recovery in the action or the status of the debt.[1086]

Debt buyers bringing collection actions may have little information about a debt,[1087] but typically introduce affidavits making allegations about the debt or introducing supposed business records of the originating creditor. This can lead to a number of FDCPA § 1692e violations. The business records, in fact, may have been created by the debt buyer for purposes of the litigation, not by the originating creditor.[1088] The debt buyer may falsely state that an affidavit is from an employee of the originating creditor and then forge that employee's signature.[1089] A debt buyer employee may sign an affidavit purporting to be on personal knowledge despite having no such knowledge.[1090]

On the other hand, courts have found no deception where a debt buyer employee claims to have personal knowledge of the debt buyer records that incorporate records from the originating creditor—the affiant is not stating knowledge of how the original records were created, but only as to their incorporation in the debt buyer's records.[1091]

1081 *See* CFPB v. Pressler & Pressler, L.L.P., 2016-CFPB-0009 (Apr. 25, 2016) (consent order), *available at* www.consumerfinance.gov. *See also* Stipulated Final Judgment and Order, CFPB v. Encore Capital Group, Inc., Case No. 20CV1750 GPC KSC (S.D. Cal. filed Oct. 15, 2020), *available at* https://files.consumerfinance.gov; CFPB v. New Century Fin. Services, Inc., 2016-CFPB-0010 (Apr. 25, 2016) (consent order), *available at* www.consumerfinance.gov; CFPB v. Encore Capital Group, 2015-CFPB-0022 (Sept. 9, 2015) (consent order), *available at* www.consumerfinance.gov.

1082 CFPB v. Frederick J. Hanna & Assoc., 114 F. Supp. 3d 1342 (N.D. Ga. 2015) (denying motion to dismiss).

1083 *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011).

1084 *See* § 12.6.6, *infra*.

1085 *See* § 12.6.4, *infra*.

1086 *See* Gionis v. Javitch, Block, Rathbone, L.L.P., 238 Fed. Appx. 24 (6th Cir. 2007) (seeking attorney fees to the extent permitted by law where state law prohibited attorney fee recovery); Hartman v. Asset Acceptance Corp., 467 F. Supp. 2d 769 (S.D. Ohio 2004) (affidavit misrepresented that debt buyer was holder in due course).

1087 *See* § 1.4.7.3, *supra*.

1088 Hartman v. Great Seneca Fin. Corp., 569 F.3d 606 (6th Cir. 2009); Rice v. Javitch Block & Rathbone, L.L.P., 2011 WL 3861701 (S.D. Ohio Aug. 31, 2011); Manlapaz v. Unifund CCR Partners, 2009 WL 3015166 (N.D. Ill. Sept. 15, 2009). *But see* Myers v. Asset Acceptance L.L.C., 750 F. Supp. 2d 864 (S.D. Ohio 2010) (no deception where document indicated that it was created by debt buyer), *aff'd*, 472 Fed. Appx. 395 (6th Cir. 2012).

1089 Skinner v. Mountain Lion Acquisitions, Inc., 2014 WL 3853424 (N.D. Cal. Aug. 1, 2014). *But cf.* Berg v. Blatt, Hasenmiller, Leibsker & Moore L.L.C., 2009 WL 901011 (N.D. Ill. Mar. 31, 2009) (no violation where affiant alleged to be debt owner's "employee/agent," but was employed by part of same corporate family acting as owner's agent).

1090 Toohey v. Portfolio Recovery Assoc., 2016 WL 4473016 (S.D.N.Y. Aug. 22, 2016); CFPB v. Frederick J. Hanna & Assoc., 114 F. Supp. 3d 1342, 1375 (N.D. Ga. 2015); Rini v. Javitch, Block & Rathbone, L.L.C., 2013 WL 2476367 (N.D. Ohio June 7, 2013); Simmons v. Portfolio Recovery Assoc., 2012 WL 222935 (E.D. Tenn. Jan. 25, 2012) (debt buyer affiant stated on personal knowledge, but debt buyer did not possess any of account's relevant documents); Midland Funding L.L.C. v. Brent, 644 F. Supp 2d 961 (N.D. Ohio 2009) (employee merely signed affidavits *en masse*, about 400 each day, without any personal knowledge about amount claimed or owed, or ownership of claim), *modified on other grounds*, 2009 WL 3086560 (N.D. Ohio Sept. 23, 2009); Gutierrez v. LVNV Funding, L.L.C., 2009 WL 10699516 (W.D. Tex. Mar. 16, 2009) (certifying class action alleging § 1692e violation by debt buyer filing affidavits that falsely attested that affiant had "personal knowledge" of supporting account documents); Williams v. Javitch, Block & Rathbone, L.L.P., 480 F. Supp. 2d 1016 (S.D. Ohio 2007); Ison v. Javitch, Block & Rathbone, 2007 WL 2769674 (S.D. Ohio Sept. 18, 2007) *See also* Michelo v. National Collegiate Student Loan Tr. 2007-2, 419 F. Supp. 3d 668, 705 (S.D.N.Y. 2019). *But see* Haworth v. Midland Credit Mgmt., Inc., 2019 WL 7161230, at *5 (D. Neb. Oct. 17, 2019) ("claims in this case focus on the affiant's alleged lack of personal knowledge, not any knowingly false statements about the nature of the debt itself"); Hill v. Midland Funding, L.L.C., 2013 WL 1645553 (D. Md. Apr. 16, 2013) (no violation where did not state on personal knowledge, as required by law, and did not contain false statements); Myers v. Asset Acceptance L.L.C., 750 F. Supp. 2d 864 (S.D. Ohio 2010), *aff'd*, 472 Fed. Appx. 395 (6th Cir. 2012) (affiant only said competent to testify); Manlapaz v. Unifund CCR Partners, 2009 WL 3015166 (N.D. Ill. Sept. 15, 2009) (falsity would not affect consumer's reaction to lawsuit).

1091 Clark v. Main St. Acquisition Corp., 553 Fed. Appx. 510, 514 (6th Cir. 2014); Casso v. LVNV Funding L.L.C., 2016 WL 1359365 (N.D. Ill. Apr. 6, 2016); Delisi v. Midland Funding, L.L.C., 2015 WL 4393901 (E.D. Mo. July 16, 2015) (affidavit explained that it was based only on personal knowledge of debt buyer's records); Collins v. LVNV Funding, L.L.C., 2014 WL 7335169 (E.D. Tenn. Dec. 19, 2014) (granting judgment on the pleadings to collector on consumer's claim that debt buyer's affidavit of personal knowledge as to business records

Collection lawsuits for consumer debt are often filed *en masse*, almost on a cookie-cutter type of assembly line, producing hundreds of affidavits a day. This can lead to numerous problems with the affidavits, including some of the abuses described in the prior paragraphs. In addition, even the notarizations on an affidavit can be fraudulent, such as where a stamp is used without the notary present.[1092]

7.4.10.6 Requests for Admissions and Other Discovery

In seeking to win their case without producing evidence, collectors may send the consumer a request for admissions. The consumer's failure to timely respond, under applicable court rules, may be treated as admitting to all the statements in the request. For a discussion of the impact of failure to timely respond to requests for admission in the context of collection lawsuits, see NCLC's Collection Actions § 4.2.2 (5th ed. 2020), *updated at* www.nclc.org/library.

Collection attorney conduct in discovery of consumer debtors can be subject to FDCPA § 1692e challenges, just as other aspects of the litigation.[1093] It can be a deceptive practice for a collector suing a *pro se* consumer to send a request for admissions that does not conform to facts of the case, particularly where the collection attorney does not disclose that the statements are deemed admitted if not timely answered.[1094]

Other discovery can be served upon the consumer hoping that this will discourage the consumer defending the case or that the consumer's failure to respond will lead to a default judgment. In serving such discovery on a *pro se* consumer, it can be deceptive to use confusing language such as captioning the discovery "interlocking discovery," which has no standard meaning,[1095] or telling the consumer the discovery responses must be "sworn" and "filed."[1096] Also deceptive is misrepresenting that discovery must be returned in ten days when court rules allow thirty days.[1097] The CFPB challenged as deceptive engaging in prejudgment discovery for the purpose of discovering assets to seize postjudgment.[1098] Sending discovery after voluntarily dismissing the case against a consumer can be a violation.[1099] The scheduling of what is stated to be a postjudgment "deposition" in aid of execution of judgment "when at most [the collector] sought only an informal conversation regarding the debtor's ability to satisfy his or her debt" has been found to violate FDCPA § 1692e.[1100]

But there are limits to when misleading discovery is actionable. The Sixth Circuit found that the consumer did not have Article III standing[1101] to bring suit alleging that the collection agency violated the FDCPA by requiring that responses to requests for admission be sworn and notarized. Though the consumer alleged a procedural violation of state law, the court found no "concrete injury," as the type of harm alleged by the consumer, namely that he would have been required to visit a notary, was "not the type of harm the FDCPA was designed to prevent."[1102] Similarly, the Third Circuit found that an information subpoena was not "falsely represented to be a document authorized, issued, or approved by any court [or] official" just because by state law it is allowed to be prepared by the issuing lawyer, not by a court, while carrying the name of a court clerk. That it was signed by a retired clerk of a different court, rather than an actual clerk of the court with jurisdiction, was not material, because under New Jersey law such technical errors in a subpoena do not affect its validity.[1103]

7.4.10.7 Misrepresentations in Seeking a Default Judgment

Since collectors often do not want to try a case, but are litigating on the expectation of a default judgment,[1104] they may engage in a number of deceptive practices to obtain a default judgment. The collector may violate FDCPA § 1692e by obtaining the consumer's consent to judgment based on misrepresentations to the consumer.[1105] The collector also violates

was false or material); Jenkins v. Centurion Capital Corp., 2009 WL 3414248, at *3 (N.D. Ill. Oct. 20, 2009).

1092 *See* Newman v. Encore Capital Group, 2017 WL 3479510 (E.D. Mich. Aug. 14, 2017).

1093 Powers v. Credit Mgmt. Services, Inc., 776 F.3d 567, 573 (8th Cir. 2015) (declining to adopt an inflexible rule that the FDCPA can never apply to discovery requests made directly to the consumer's attorney during the course of debt collection litigation, but reversing grant of class certification on this issue for lack of predominance); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011). *See also* Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 229 (4th Cir. 2007).

1094 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011) (requests for admissions asked consumer to admit facts the consumer had already denied; further, collector had information in its possession demonstrating that the request was false); Dakowa v. MSW Capital, L.L.C., 2017 WL 662975 (D. Minn. Feb. 17, 2017) (*pro se* consumer asked to admit to untrue facts). *See also* Heroux v. Callidus Portfolio Mgmt. Inc., 2018 WL 2018069 (D. Minn. May 1, 2018). *Compare* Clark v. Main Street Acquisition Corp., 2013 WL 2295879 (S.D. Ohio May 24, 2013) (defendant's admission requests did not violate FDCPA because they did not ask for admission of anything false).

1095 Dakowa v. MSW Capital, L.L.C., 2017 WL 662975 (D. Minn. Feb. 17, 2017). *See also* Heroux v. Callidus Portfolio Mgmt. Inc., 2018 WL 2018069 (D. Minn. May 1, 2018) (interlocking discovery); Ardino v. Lyons, Doughty & Veldhuis, P.C., 2011 WL 6257170 (D.N.J. Dec. 14, 2011) ("Certified Discovery").

1096 Washington v. Brumbaugh & Quandahl, P.C., 2016 WL 1435665 (D. Neb. Apr. 11, 2016).

1097 Ardino v. Lyons, Doughty & Veldhuis, P.C., 2011 WL 6257170 (D.N.J. Dec. 14, 2011).

1098 CFPB v. Pressler & Pressler, L.L.P., 2016-CFPB-0009 (Apr. 25, 2016) (consent order), *available at* www.consumerfinance.gov.

1099 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017) (alleged § 1692f(1) violation by sending discovery requests after dismissing state court collection action).

1100 Barenbaum v. Hayt, Hayt & Landau, L.L.C., 2019 WL 4305761, at *6 (E.D. Pa. Sept. 10, 2019).

1101 *See* § 11.15, *infra*.

1102 Lyshe v. Levy, 854 F.3d 855, 859 (6th Cir. 2017).

1103 Jensen v. Pressler & Pressler, 791 F.3d 413 (3d Cir. 2015).

1104 *See* § 1.4.9.4, *supra*.

1105 Copeland v. Kramer & Frank, P.C., 2010 WL 2232712 (E.D. Mo. June 1, 2010).

FDCPA § 1692e by seeking a default judgment after misrepresenting to the consumer that a written answer was not necessary to respond to the collector's complaint[1106] or leaving the consumer with the impression that a settlement had ended the litigation.[1107]

There can be a FDCPA § 1692e violation where a collector attempts to obtain a default judgment by falsely representing to the court that the consumer had not responded to the collection complaint or a discovery request,[1108] or where the collector seeks a default judgment without properly notifying the consumer.[1109] State law may require the collector, before obtaining a default judgment against the consumer, to submit an affidavit showing the basis of the collector's claim.[1110] Such an affidavit can violate FDCPA § 1692e where the affidavit is false or misleading.[1111]

7.4.10.8 Garnishment; Postjudgment Remedies

7.4.10.8.1 Pursuing postjudgment remedies when debt no longer or never owed

It is a FDCPA § 1692e violation to agree to a settlement as full satisfaction for a judgment debt, but then continue pursuing postjudgment creditor remedies.[1112] Also deceptive is to continue to garnish or threaten garnishment even after prior garnishments had satisfied the judgment.[1113] Similarly it is a FDCPA § 1692e violation to collect on a judgment after it has been vacated.[1114] After the judgment has been vacated, it also violates FDCPA § 1692e to fail to timely return amounts previously garnished.[1115] It can also be deceptive where the creditor garnishes wages or levies on property of the wrong consumer.[1116] Where state law allows prejudgment garnishment in certain situations, prejudgment garnishment in other circumstances can be a FDCPA § 1692e violation.[1117]

7.4.10.8.2 Misrepresentations concerning exemptions

Exemptions may limit a collector's ability to garnish consumer income or assets or seize consumer property, and representations can be deceptive where they suggest a creditor can seize more than exemption law allows.[1118] State law may

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1106 Pate v. Law Office of Joe Pezzuto, L.L.C., 2014 WL 12586733 (C.D. Cal. June 16, 2014) (consumer stated § 1692e claim where collection attorney stated that consumer's telephone call was sufficient answer to collection complaint, that no further action was necessary, and then took default judgment against consumer); *In re* Humes, 496 B.R. 557 (Bankr. E.D. Ark. 2013) (false representations that lulled consumer into believing that he need not file answer to state court complaint, and then procuring default judgment against him).

1107 Foster v. D.B.S. Collection Agency, 2002 WL 32993859 (S.D. Ohio Mar. 8, 2002) (agreeing to settle state collection suit, but then obtaining default judgment and garnishment).

1108 Schendzielos v. Borenstein, 2016 WL 614473 (D. Colo. Feb. 16, 2016) (falsely claimed consumer had not filed response to complaint); Harrington v. CACV, L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007) (violating § 1692e(5)).

109 Weinstein v. Mandarich Law Group, L.L.P., 2018 WL 6199249 (W.D. Wash. Nov. 28, 2018) (failure to provide consumer with copy of motion for default judgment as required by state court rules). *See also* Mitchell v. Patenaude & Felix A.P.C., 2019 WL 4043974, at *5 (W.D. Wash. July. 15, 2019) ("the failure to serve a copy of a motion for default can constitute false, deceptive or misleading representations to a court in connection with the collection of a debt"), *adopted*, 2019 WL 4034958 (W.D. Wash. Aug. 27, 2019); Coleman v. Berman & Rabin, P.A., 2015 WL 4524599 (E.D. Mo. July 27, 2015) (failure to send consumer amended complaint which resulted in consumer's default judgment). *But see* Riess v. Messerli & Kramer, P.A., 2011 WL 5506290 (D. Minn. Nov. 10, 2011) (consumer only wrote informal letter to collection law firm); Harrington v. CACV, L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007) (falsely stating consumer had not responded).

0 *See* National Consumer Law Center, Collection Actions § 12.3.13 (5th ed. 2020).

1 Hasbrouck v. Arrow Fin. Services L.L.C., 2010 WL 1257885 (N.D.N.Y. Mar. 26, 2010) (denying defendant's motion for judgment on the pleadings where affidavit filed in state court was alleged to have falsely stated that it was based in part on account information provided by creditor).

2 *See* Kohli v. Javitch, Block, Rathbone, L.L.C., 2015 WL 3622353 (N.D. Ohio June 9, 2015) (from perspective of least sophisticated consumer, collection law firm's promise to accept monthly payments as part of "new agreement" would reasonably appear false, deceptive, or misleading in light of its act of garnishing consumer's wages shortly before new payment was due); Moore v. Diversified Collection Services, Inc., 2009 WL 1873654 (E.D.N.Y. June 29, 2009); Foster v. D.B.S. Collection Agency, 2002 WL 32993859 (S.D. Ohio Mar. 8, 2002) (agreeing to settle state collection suit, but then obtaining default judgment and garnishment).

1113 *See* Edwards v. Velocity Invs., L.L.C., 2011 WL 4007394 (N.D. Ohio Sept. 8, 2011).

1114 *See* Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961, 974 (D. Minn. 2019); Hunter v. Palisades Acquisition XVI, L.L.C., 2017 WL 5513636 (S.D.N.Y. Nov. 16, 2017). *But cf.* Oliphant v. Midland Funding L.L.C., 2020 WL 833636, at *3 (E.D. Mo. Feb. 20, 2020) (no violation where default judgment was void for lack of personal jurisdiction, since by filing garnishment application defendant did not represent that judgment was valid but "represented only that a default judgement was in fact entered against Oliphant, that it remained unsatisfied, and that Midland knew or had reason to believe Oliphant was indebted to Midland"); Carmona v. Gene Kazlow, P.C., 2017 WL 3316091 (E.D.N.Y. Aug. 2, 2017) (no violation where collector did not inform government official executing on wages that court had vacated judgment).

1115 Polanco v. NCO Portfolio Mgmt., Inc., 132 F. Supp. 3d 567 (S.D.N.Y. Sept. 23, 2015) (debt buyer's ten-month long refusal to comply with two court orders that vacated fraudulently obtained debt collection judgment against consumer and refusal to return consumer's funds violated FDCPA).

1116 Currier v. First Resolution Inv. Corp., 762 F.3d 529, 536 (6th Cir. 2014) (levy on property); Frias v. Patenaude & Felix, A.P.C., 2021 WL 1192421 (W.D. Wash. Mar. 30, 2021); Estes v. Love, Beal & Nixon, P.C., 2015 WL 4508601 (N.D. Okla. July 24, 2015). *But cf.* Alvarado Martinez v. Eltman Law, P.C., 444 F. Supp. 3d 748 (N.D. Tex. Mar. 11, 2020) (denying consumer default judgment where pleadings did not demonstrate that service of writ of garnishment on bank was fraudulent representation; upon law firm's discovery that there was no account that matched name it had judgment against, it took no action to collect debt).

1117 *See* Picht v. Jon R. Hawks, Ltd., 236 F.3d 446 (8th Cir. 2001) (state law did not allow remedy, because amount owed was uncertain and matter involved exercise of discretion).

1118 *See* Broughton v. Weltman, Weinberg and Reis Co., L.P.A., 2011 WL 1211461 (M.D. Fla. Mar. 31, 2011) (alleged threat to put lien on plaintiff's home stated legal impossibility because "home" qualified as a "homestead" and lien was not option legally available to defendant); Sunga v. Broome, 2010 WL 3198925 (E.D. Va. Aug. 12, 2010) (falsely stated that applicable state law homestead exemption was not

provide for differing amounts that can be garnished depending on the consumer's status (such as head of family). It can be a FDCPA § 1692e violation for a collector to state that it believes the consumer has a particular status that allows for a higher garnishment amount.[1119]

It may not be deceptive merely to oppose unsuccessfully the consumer's claim of exemption where the collector had a reasonable basis to do so.[1120] But, in opposing a consumer's claim for exemptions, it can be deceptive for the collector to misrepresent the required nature of the consumer's proof of exemption or to continue to oppose a consumer's claim for exemption by falsely stating that the collector had a reasonable basis for that opposition.[1121] It may also be deceptive for a collector seeking garnishment to falsely represent the extent of the consumer's nonexempt assets.[1122]

A collector's use of an outdated statutorily mandated exemption claim form may not violate FDCPA § 1692e if such use is not material.[1123] Where a garnishment notice does not contain all of the state-mandated disclosures regarding exemptions, the consumer may not have standing to bring an FDCPA case.[1124]

7.4.10.8.3 Misrepresentations concerning creditor rights or the amount owed postjudgment

Collectors can violate FDCPA § 1692e by misrepresenting to the consumer the collector's rights in pursuing postjudgment remedies. It can be deceptive to inform the consumer that joint bank accounts are subject to complete seizure when they are not.[1125] It can also violate FDCPA § 1692e where the garnishment order sent to the consumer's employer and/or to the consumer contains a misrepresentation of state law garnishment requirements.[1126]

Also deceptive is a notice to the consumer concerning rights to challenge a garnishment action with a validation notice on the back, where the two notices are conflicting.[1127] Even if this inconsistency results from the differing requirements of state and federal law, the collector should at least explain the ambiguity to the consumer.[1128] Where state law requires that a purchaser of a judgment debt notify the consumer before seeking to enforce the debt, it was deceptive to do so without first notifying the consumer.[1129]

It is deceptive to demand or seek postjudgment remedies in an amount greater than allowed by the court judgment.[1130] Where a judgment excluded the right to postjudgment interest, it was a FDCPA § 1692e violation to seek such interest through postjudgment remedies.[1131] But courts have found no violation where the judgment authorized postjudgment attorney fees and the collector sought an amount for such fees, subject to court approval,[1132] or where the collector sought to garnish less than the amount due.[1133]

7.4.11 Deception re Mortgage Servicing and Foreclosures

7.4.11.1 Generally

Enforcement of a mortgage is the collection of a debt. As described at § 4.7.5, *supra*, the FDCPA applies to a wide range of mortgage collection and foreclosure activities carried out by law firms, mortgage servicers, and other players in the mortgage lending industry.

available); Seabrook v. Onondaga Bur. of Med. Economics, Inc., 705 F. Supp. 81 (N.D.N.Y. 1989) (threat to garnish 10% of consumer's wages was *per se* violation because of failure to disclose exemption of first $100.50 in weekly disposable earnings).

1119 *See* Reynolds v. Credit Mgmt. Services, Inc., 2016 WL 756469 (D. Neb. Feb. 25, 2016).

1120 Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291 (11th Cir. 2015); Lee v. Javitch, Block & Rathbone L.L.P., 601 F.3d 654, 659 (6th Cir. 2010).

1121 *See* Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128 (2d Cir. 2017); Chalik v. Westport Recovery Corp., 677 F. Supp. 2d 1322 (S.D. Fla. 2009) (collectors' filing of sworn statement denying consumer's claim of exemption, without any specific knowledge regarding exemption). *But see* Fuqua v. Associated Credit Serv., Inc., 2018 WL 2371102 (E.D. Wash. May 24, 2018) (collector claimed "reason to believe" there were nonexempt funds, and state law places burden on consumer to identify any exempt funds).

1122 *See* Todd v. Weltman, Weinberg & Reis, Co., 434 F.3d 432 (6th Cir. 2006) (on interlocutory appeal from denial of judgment on the pleadings, rejecting collector's defense of immunity).

1123 Putnam v. Portfolio Recovery Assoc., 2020 WL 1878746 (E.D. Wash. Apr. 15, 2020).

1124 Kramer v. Ray Klein, 2019 WL 7756339 (D. Or. Dec. 10, 2019), *adopted*, 2020 WL 423380 (D. Or. Jan. 24, 2020). *See* § 11.15, *supra*.

1125 *See* Billiar v. Atl. Credit & Fin., Inc., 2011 WL 3418196, at *5 (D. Minn. Aug. 4, 2011).

1126 *See* Smeby v. Messerli & Kramer, P.A., 2015 WL 1897853 (D. Minn. Apr. 23, 2015) (summons directed employer to hold funds for 270 days instead of the correct 180 days).

1127 *See* Dorsey v. David B. Schumacher, P.C., 2015 WL 569958 (D. Or. Feb. 11, 2015) (one notice provides 120 days to challenge garnishment and indicates not to use form to challenge debt itself and validation notice provides 30 days for consumer to dispute debt).

1128 *Id.*

1129 Musah v. Houslanger & Assoc., 962 F. Supp. 2d 636 (S.D.N.Y. 2013).

1130 Overton v. Advanced Recovery Sys., 2018 WL 2752131 (S.D. Miss. June 7, 2018) (motion in state court attempting to force consumer's employer to continue garnishing wages overstated to state court amount owed); Drew v. Mamaroneck Capital, L.L.C., 2017 WL 4018854 (M.D. Ga. Sept. 12, 2017) (balance stated in collection letter was thousands of dollars more than amount shown on recent state collection court's postjudgment records). *See also* Arias v. Columbia Debt Recovery L.L.C., 2021 WL 952559 (W.D. Wash. Feb. 10, 2021), *adopted*, 2021 WL 948834 (W.D. Wash. Mar. 12, 2021); Trice v. Oliveri & Assoc., 2020 WL 4732139 (D. Md. Aug. 14, 2020) (attempt to collect postjudgment attorney fees by falsely representing that they were related to prior lien or judgment).

1131 Egletes v. Law Offices Howard Lee Schiff, P.C., 2010 WL 3025236, at *4 (D. Conn. July 30, 2010) ("inexcusable" for collection lawyers to seek interest).

1132 Lowe v. Maxwell & Morgan P.C., 2018 WL 4693532 (D. Ariz. Sept. 27, 2018).

1133 Madrid v. Asset Acceptance, L.L.C., 2018 WL 2323801 (D. Or. Mar. 12, 2018).

The Supreme Court has held that only certain FDCPA prohibitions apply to companies whose principal business purpose is the enforcement of security interests. A limited debt collector definition applies to certain foreclosure law firms and trustees when they engage in activities limited to enforcement of a mortgage through state non-judicial foreclosure statutes.[1134] As described at § 4.7.5, *supra*, unless this narrow exception applies, companies collecting on mortgage debt can be subject to the full range of FDCPA provisions. FDCPA § 1692e applies to mortgages and foreclosures where the defendant is a debt collector under the FDCPA's primary definition of debt collector and the representation or practice is in connection with collection of a debt.

That certain law firms or trustees enforcing mortgage interests may not qualify as debt collectors is separate from the question whether a practice is "in connection with the collection of any debt," as required by FDCPA § 1692e. As a general rule, as described at § 4.3.4, *supra*, representations involving mortgages and foreclosures are almost always in connection with collection of a debt. This is the case even if a communication does not request payment, such as a loss mitigation solicitation.[1135] A good clue that a communication is in connection with a debt is if the communication states it is from a debt collector and sets out the amount due.[1136] Certainly, almost any representation in furtherance of a foreclosure is in connection with collection of a debt.[1137]

A mortgage servicer's periodic statements can be seen as in connection with a debt. This was found to be the case even though sent after the consumer's bankruptcy discharge and the communication included a disclaimer that it was only for informational purposes with regard to the secured lien, and was not an attempt to collect a debt. Such a disclaimer cannot prevent the statement from being in connection with a debt where the disclaimer is not sufficiently conspicuous or is contradicted by other content.[1138]

Courts, though, may consider whether a misrepresentation violating FDCPA § 1692e is material.[1139] For example, the Sixth Circuit found a misrepresentation not material where a letter misstated that the creditor was the servicer, and the letter told the consumer to contact the real servicer's attorney to arrange a modification, but the consumer never contacted the attorney or disputed the foreclosure.[1140]

This section focuses on three particular types of FDCPA § 1692e violations involving mortgage servicing and foreclosures. Section 7.4.11.2, *infra*, examines misrepresentations of the homeowner's legal rights as to mortgage servicing, loan modifications, foreclosures, and post-foreclosure activity. Section 7.4.11.3, *infra*, considers misrepresentations as to the party owning the mortgage, the party servicing the mortgage, and related deception. Section 7.4.11.4, *infra*, reviews violations involving demands for the amount due.

7.4.11.2 Misrepresentation of the Homeowner's Legal Rights As to Mortgage Servicing and Foreclosures

It can be deceptive and FDCPA § 1692e may be violated in a variety of circumstances where a collector misrepresents some aspect of a homeowner's legal rights as to mortgage servicing or foreclosures. These include where:

- A demand for payment is made after the homeowner obtains a bankruptcy discharge, even where a lien remains on the home;[1141]
- Payment is sought after the servicer has settled the obligation with the consumer,[1142] or the servicer is contacting the wrong consumer;[1143]
- A short sale or deed in lieu extinguishes a debt, but the collector seeks additional payment;[1144]

134 Obduskey v. McCarthy & Holthus, L.L.P., ___U.S. ___, 139 S. Ct. 1029, 203 L. Ed. 2d 390 (2019).

135 Gburek v. Litton Loan Servicing L.P., 614 F.3d 380, 385 (7th Cir. 2010). *But see* Farquharson v. Citibank, 664 Fed. Appx. 793 (11th Cir. 2016) (loss mitigation not related to debt collection).

136 McLaughlin v. Phelan Hallinan & Schmieg, L.L.P., 756 F.3d 240 (3d Cir. 2014); Block v. Seneca Mortg. Servicing, 221 F. Supp. 3d 559, (D.N.J. 2016) (borrower-initiated loss mitigation communications did not constitute debt collection).

137 *In re* Holyfield, 740 Fed. Appx. 695, 697 (11th Cir. 2018).

138 Tabb v. Ocwen Loan Servicing, L.L.C., 798 Fed. Appx. 726 (3d Cir. 2020).

139 *See* § 7.3.9, *supra*.

140 Duffey v. Nationstar Mortg., 614 Fed. Appx. 330 (6th Cir. 2015) (listing of Deutsche Bank as loan servicer instead of Bank of America was not material where contact information was Bank of America's attorney and homeowner never tried to contact attorney).

1141 *See* Tabb v. Ocwen Loan Servicing, L.L.C., 798 Fed. Appx. 726 (3d Cir. 2020); Garfield v. Ocwen Loan Servicing, L.L.C., 811 F.3d 86 (2d Cir. 2016) (attempt by mortgagee to collect mortgage payments discharged in bankruptcy violated both Bankruptcy Code discharge injunction and FDCPA; there was no conflict between two laws); Best v. Newrez L.L.C., 2020 WL 5513433, at *17 (D. Md. Sept. 11, 2020) (denying motion to dismiss where, despite bankruptcy disclaimer, statement included "several notations that at least muddy the waters" as to demand for payment); Parente v. Fay Servicing, L.L.C., 2020 WL 1182714 (N.D. Ill. Mar. 12, 2020) (demanding payment following bankruptcy discharge); Miller v. Carrington Mortg. Services, L.L.C., 607 B.R. 1, 8–9 (D. Me. 2019) (denying motion to dismiss where postbankruptcy mortgage statements were replete with language that can be construed as payment demand); Green v. Specialized Loan Servicing, L.L.C., 2016 WL 3963255 (W.D. Wis. July 21, 2016) (implied that owed debt that had been discharged in bankruptcy); Parker v. CitiMortgage, Inc., 2014 WL 12577116 (M.D. Fla. July 10, 2014) (judicial foreclosure action that included demand for indebtedness discharged in bankruptcy). *See also* Ch. 13, *infra*. *But see* 11 U.S.C. § 524(j) (allowing certain post-discharge collections on mortgage debt limited to periodic payments due in order to prevent foreclosure).

1142 Pimental v. Wells Fargo Bank, 2015 WL 5243325 (D.R.I. Sept. 4, 2015) (collecting debt not owed because of settlement).

1143 *See* Chyba v. Bay View Loan Servicing, L.L.C., 2015 WL 4523265 (S.D. Cal. July 23, 2015).

1144 Owens-Benniefield v. Nationstar Mortg., L.L.C., 258 F. Supp. 3d 1300 (M.D. Fla. 2017) (servicer made false representation as to character, amount, and status of mortgage debt where repeatedly sought payment after having released debtor from liability through deed in lieu of foreclosure); Molina v. Caliber Home Loans Inc., 2016 WL 11472751 (N.D. Tex. Dec. 8, 2016) (seeking payment of over $100,000 where debt should have been extinguished by deed in lieu); Yarney v. Ocwen Loan Servicing, L.L.C., 929 F. Supp. 2d 569 (W.D. Va. 2013).

- In connection with loan modifications, communications misrepresent the status of the loan modification,[1145] the nature of the loan modification application process,[1146] the nature of loan modification options,[1147] or encourage the homeowner to submit additional paperwork after additional paperwork while knowing the modification application is hopeless[1148] provide the consumer with a confusing modification plan[1149] or seek payment on a plan different than the one agreed to;[1150]
- Despite there being no right to foreclose, a collector threatens to foreclose[1151] or actually pursues a foreclosure;[1152]
- A foreclosure is threatened or conducted in violation of federal regulations that prohibit foreclosures for a period of time while the servicer should be evaluating the homeowner for loss mitigation,[1153] or foreclosure is brought while a loan modification application is pending,[1154] or threatened while the homeowner is complying with a trial or regular loan modification plan;[1155]
- The collector misrepresents that acceptance of a loan modification plan will forestall a foreclosure if that is not the case;[1156]
- A foreclosure is threatened or occurs based on the terms of an unmodified mortgage when the servicer had modified

1145 Lucas v. New Penn Fin., L.L.C., 2019 WL 404033, at *6–7 (D. Mass. Jan. 31, 2019) (borrower pleaded potential violation of § 1692e involving servicer's misrepresentations to borrower's attorney about status of application for loan modification).

1146 Jacobson v. Bayview Loan Servicing, L.L.C., 371 P.3d 397 (Mont. 2016).

1147 *See* Childress v. Bank of Am., 2019 WL 3767464 (E.D. Ky. Aug. 9, 2019) (servicer incorrectly represented that escrow shortages were taken care of by loan modification); Ivey v. Deutsche Bank Nat'l Tr. Co., 2018 WL 2021225 (N.D. Ill. May 1, 2018) (representations misled homeowners as to availability of HAFA deed-in-lieu of foreclosure). *See also In re* Hart, 246 B.R. 709 (Bankr. D. Mass. 2000). *But see* Molina v. Caliber Home Loans Inc., 2016 WL 11472751 (N.D. Tex. Dec. 8, 2016) (while servicer's recommendation of short sale may have been improper, consumer failed to plead facts showing that suggested short sale rose to the level of false representation or deceptive means to collect debt).

1148 Deutsche Bank Tr. Co. Americas v. Garst, 2013 WL 4851493 (N.D. Ala. Sept. 11, 2013).

1149 Weiner v. Rushmore Loan Mgmt. Services, L.L.C., 327 F. Supp. 3d 268 (D. Mass. Aug. 15, 2018), *related op. at* 424 F. Supp. 3d 163 (D. Mass. 2019). *But see* Fennimore v. Bank of Am., 2015 WL 7075814 (E.D. Pa. Nov. 12, 2015) (no § 1692e claim where collector sent foreclosure notices mandated by state law despite loan modification plan); Bennett v. Bank of Am., 126 F. Supp. 3d 871 (E.D. Ky. 2015) (forbearance agreement did not misrepresent loss mitigation options where forbearance agreement did not suggest that it stated all loss mitigation options).

1150 Justice v. Ocwen Loan Servicing, 2015 WL 235738 (S.D. Ohio Jan. 16, 2015) (improperly increased monthly obligation agreed to in loan modification). *See also* Macholtz v. Carrington Mortg. Services, L.L.C., 499 F. Supp. 3d 434 (W.D. Mich. 2020).

1151 *See* Muir v. AM Solutions, L.L.C., 2019 WL 3530521 (E.D. Pa. Aug. 1, 2019) (law firm asserted that fraudulently obtained mortgage was valid); Truhn v. Equityexperts.org, L.L.C., 418 F. Supp. 3d 186 (E.D. Mich. 2019) (condo management firm threatened to enforce lien when it had not perfected any lien); Bauer v. Roundpoint Mortg. Servicing Corp., 2018 WL 5388206 (N.D. Ill. Oct. 29, 2018) (threatened to foreclose when action could not legally be taken because of Illinois' rule allowing only one refiling of foreclosure action); Baker v. Nationstar Mortg. L.L.C., 2018 WL 3496383 (S.D. Ohio July 20, 2018) (threatened foreclosure after statute of limitations to bring foreclosure action had expired); Hall v. Nationstar Mortg. L.L.C., 2016 WL 3971428 (N.D. Ala. July 25, 2016); Gritters v. Ocwen Loan Servicing, L.L.C., 2014 WL 7451682 (N.D. Ill. Dec. 31, 2014) (servicer falsely claimed consumer was in default). *See also* Kabir v. Freedman Anselmo Lindberg L.L.C., 2015 WL 4730053 (N.D. Ill. Aug. 10, 2015) (continued foreclosure action even after court had dismissed it with prejudice); Puryer v. HSBC Bank, 2018 WL 2271425 (Mont. May 18, 2018) (repeatedly threatening to foreclose when no right to do so under terms of deed of trust stated claim under § 1692f(6)).

1152 Tevere v. Weltman, Weinberg & Reis, Co., L.P.A., 2019 WL 2341389 (N.D. Ill. June 3, 2019) (foreclosure complaint filed in violation of Illinois single refiling rule); Machles v. McCabe, Weisberg & Conway, P.C., 2017 WL 5172516 (E.D. Pa. Nov. 7, 2017) (false statement in court proceedings that creditor had complied with FHA appraisal requirements); Bonfiglio v. Citifinancial Servicing, L.L.C., 2015 WL 5612194 (N.D. Ill. Sept. 23, 2015). *See also* O'Donnell v. Vial Fotheringham L.L.P., 2020 WL 6365521, at *4 (D. Or. Sept. 15, 2020) (filing of the foreclosure suit without satisfying statutory condition precedent deprived law firm of legal authority required by state law to seek foreclosure, "and courts have consistently held in a variety of different contexts that pursuing a legally defective foreclosure action violates the FDCPA"), *adopted*, 2021 WL 710725 (D. Or. Feb. 22, 2021).

1153 Cooke v. Carrington Mortg. Services, 2019 WL 3241128, at *5 (D. Md. July 18, 2019) ("Because RESPA prohibits a foreclosure sale before such an application has been denied and all appeal rights exhausted, the scheduling of this sale could constitute a debt collector's 'threat' to take an action 'that cannot legally be taken' in violation of § 1692e(5)"); Weisheit v. Rosenberg & Assoc., 2017 WL 5478355 (D. Md. Nov. 15, 2017) (falsely representing right to foreclose); Farber v. Brock & Scott, L.L.C., 2016 WL 5867042 (D. Md. Oct. 6, 2016). *But see* Dionne v. Fed. Nat'l Mortg. Ass'n, 2016 WL 6892465 (D.N.H. Nov. 21, 2016) (incorrectly asserting that solely state law not federal regulations control right to foreclose upon default). *But cf.* Landau v. RoundPoint Mortg. Servicing Corp., 2019 WL 2428443, at *5 (11th Cir. June 11, 2019) (mortgagee's motion to *reschedule* foreclosure sale was not "motion for order of sale," but rather "non-substantive, housekeeping-type motion").

1154 Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717 (5th Cir. 2013) (allowing state debt collection law claim that mortgagee encouraged application for mortgage modification while fast tracking foreclosure); White v. U.S. Bank, 2018 WL 4431416 (W.D. Tenn. Sept. 14, 2018) (borrower stated § 1692f(6) claim against foreclosure trustee who conducted sale while borrower's application for loss mitigation was pending); Johnson v. Specialized Loan Servicing, L.L.C., 2018 WL 4403838 (M.D. Fla. Sept. 17, 2018) (representation that it would not continue with foreclosure during its independent review process for loan modification was deceptive where servicer had no intention of complying as evidenced by motion to reschedule foreclosure sale filed eight days later); Farber v. Brock & Scott, L.L.C., 2016 WL 5867042 (D. Md. Oct. 6, 2016) (scheduling foreclosure sale while loan modification review pending).

1155 Finley v. Ocwen Loan Servicing, L.L.C., 2018 WL 1705802 (N.D. Ohio Apr. 9, 2018); Belcher v. Ocwen Loan Servicing, L.L.C., 2016 WL 7243100 (M.D. Fla. Dec. 15, 2016). *See also* Eisberner v. Weltman, Weinberg & Reis Co., 2014 WL 4064026 (E.D. Wis. Aug. 14, 2014) (consumer was successfully participating in state court-supervised repayment plan, but accused of not paying debt).

1156 Lucas v. New Penn Fin., L.L.C., 2019 WL 404033, at *6 (D. Mass. Jan. 31, 2019).

the loan and the borrower is in compliance with the modified terms;[1157]

- A debt validation notice is included with the foreclosure complaint and the consumer is presented with conflicting deadlines—to answer the foreclosure complaint within a certain number of days and also thirty days to dispute the debt with the collector (courts are divided as to whether this is deceptive in the absence of a clarification of the two deadlines);[1158]
- There are misrepresentations or failure to disclose about the mortgage loan's grace period,[1159] how imminent foreclosure is,[1160] whether the obligation has been or will be accelerated,[1161] the consumer's right to obtain information about the mortgage loan,[1162] the servicer's ability to postpone a foreclosure sale,[1163] the time periods set out by state law concerning foreclosure rights, [164] the consumer's cure rights,[1165] the consumer's redemption rights,[1166] and the time period when a homeowner must vacate after foreclosure;[1167] or
- The collector seeks to recover a deficiency balance where there is no right to seek a deficiency after a foreclosure,[1168] or misrepresents the value of the home that was foreclosed in connection with seeking a deficiency[169] or reports false information to a credit reporting agency about a debt's foreclosure status.[1170]

7.4.11.3 Misrepresentation As to the Parties Involved in the Mortgage Loan

Mortgages may involve multiple entities, including an originating creditor, an entity owning the loan (often a trust), one or more entities servicing the loan, and a foreclosure attorney. This complexity may lead to confusion and to representations and practices violating FDCPA § 1692e. The FDCPA also requires that, if the mortgage servicer qualifies as a debt collector and makes a communication covered by the FDCPA, then it must identify to the consumer the creditor to whom the debt is owed.[1171]

Thus, it can violate FDCPA § 1692e where the mortgage servicer falsely identifies itself as the mortgage loan owner.[1172] Other misidentification of the current owner is also actionable,

1157 Werner v. Selene Fin., L.L.C., 2019 WL 1316465 (S.D.N.Y. Mar. 22, 2019) (foreclosure despite complying with trial modification); Finley v. Ocwen Loan Servicing, L.L.C., 2018 WL 1705802 (N.D. Ohio Apr. 9, 2018) (threat to foreclose despite modified loan terms); Belcher v. Ocwen Loan Servicing, L.L.C., 2018 WL 1701964 (M.D. Fla. Apr. 2, 2018) (court certified class of homeowners who successfully completed HAMP trial period and, during that period, received written notice threatening foreclosure even though homeowners were complying with modified loan terms). *See also* Gersten v. Bank of Am., 2014 WL 3671201 (S.D. Ohio July 23, 2014); Memmott v. OneWest Reg'l Bank, 2014 WL 715441 (D. Or. Feb. 21, 2014) (servicer refused to accept payment under loan modification plan and then threatened foreclosure).

1158 *See also* Battle v. Gladstone Law Group, P.A., 951 F. Supp. 2d 1310 (S.D. Fla. 2013). *But see* Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504, 511 (6th Cir. 2007) (not deceptive); Coburn v. Gonzalez, 141 F. Supp. 3d 1339 (S.D. Fla. 2015).

1159 *See* Koepplinger v. Seterus, Inc., 2018 WL 4055268 (M.D.N.C Aug. 24, 2018), *adopted*, 2018 WL 4401738 (M.D.N.C. Sept. 14, 2018) (mortgage servicer falsely informed consumers that they had to pay entire default amount by expiration date, when, in reality, servicer would not then accelerate or foreclose because it had undisclosed 45-day grace period policy), *related case*, 2020 WL 2063416 (M.D.N.C. Apr. 29, 2020), *adopted*, 2020 WL 5705915 (M.D.N.C. Aug. 26, 2020); Rehman v. Pierce & Assoc., 2017 WL 131560 (N.D. Ill. Jan. 13, 2017).

1160 Hall v. Nationstar Mortg., L.L.C., 255 F. Supp. 3d 625 (E.D. Pa. 2015) (notice as to "approximate" time frame of possible foreclosure sale could have several meanings, at least one of which was factually inaccurate (too short by about a month) based on actual practice of sheriff's sales).

1161 Williams v. Seterus, Inc., 2020 WL 362874, at *2 (N.D. Ala. Jan. 22, 2020) (allegations that servicer did not accelerate loan in manner threatened by letter and that letter was nothing more than "empty threat" withstood motion to dismiss); Fisher v. Seterus, Inc., 2019 WL 5865605 (D. Minn. Oct. 21, 2019), *adopted*, 2019 WL 5865449 (D. Minn. Nov. 8, 2019) (threatened that loan will be accelerated if payment not made by date specified, when servicer's policy was not to accelerate if payment delayed); Clark v. Green Tree Servicing L.L.C., 69 F. Supp. 3d 1203 (D. Colo. 2014).

1162 Schneider v. Bank of Am., 2014 WL 2118327 (E.D. Cal. May 21, 2014).

1163 Schneider v. Bank of Am., 2014 WL 2118327 (E.D. Cal. May 21, 2014).

1164 Best v. Fed. Nat'l Mortg. Assn., 450 F. Supp. 3d 606 (D. Md. 2020) (foreclosure notice misrepresented time frame to foreclose under state statutes).

1165 Bonfiglio v. Citifinancial Servicing, L.L.C., 2015 WL 5612194 (N.D. Ill. Sept. 23, 2015); Jacobson v. Bayview Loan Servicing, L.L.C., 371 P.3d 397 (Mont. 2016).

1166 Myles v. Kaman & Cusimano, L.L.C., 2014 WL 4377854 (S.D. Ohio Sept. 4, 2014).

1167 Reese v. Ellis, Painter, Ratterree & Adams, L.L.P., 678 F.3d 1211 (11th Cir. 2012).

1168 Adams v. Albertelli, 2016 WL 931103 (M.D. Fla. Mar. 11, 2016) (no right to deficiency existed after foreclosure of reverse mortgage). *But cf.* DeFrancesco v. Veripro Solutions Inc., 2014 WL 4387570 (M.D. Fla. Sept. 5, 2014) (where have right to collect deficiency, can demand its payment prior to court judgment on deficiency); Hall v. HSBC Mortg. Services, Inc., 2014 WL 949997 (N.D. Ga. Mar. 11, 2014), *aff'd*, 581 Fed. Appx. 800 (11th Cir. 2014) (same).

1169 Miceli v. Dyck-O'Neal, Inc., 2016 WL 7666167 (M.D. Fla. Aug. 9, 2016) (debt buyer's knowing submission of inappropriately low appraisal to court to support deficiency claim).

1170 Memmott v. OneWest Bank, 2011 WL 1560985 (D. Or. Feb. 9, 2011) (reported false information to credit reporting agencies), *adopted*, 2011 WL 1559298 (D. Or. Apr. 25, 2011).

1171 *See* 15 U.S.C. § 1692g(a); Ch. 9, *infra*. *See also* § 4.7.5, *supra* (validation notices and mortgages).

1172 Bourff v. Rubin Lublin, L.L.C., 674 F.3d 1238 (11th Cir. 2012); Shoup v. McCurdy & Candler, L.L.C., 465 Fed. Appx. 882 (11th Cir. 2012); Best v. Fed. Nat'l Mortg. Ass'n., 450 F. Supp. 3d 606 (D. Md. 2020) (in validation response, servicer incorrectly identified itself, rather than Fannie Mae, as loan owner); Burdick v. Bank of Am., 140 F. Supp. 3d 1325 (S.D. Fla. 2015); Goodrow v. Friedman & MacFadyen, P.A., 2013 WL 3894842 (E.D. Va. July 26, 2013) (foreclosures done in name of servicer where ownership not properly transferred to servicer); Sciortino v. Barrett Daffin Frappie Levin & Brock, L.L.P., 9 F. Supp. 3d 1322 (N.D. Ga. 2013). *But see* Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75 (2d Cir. 2018) (attorneys' misrepresentation of servicer as creditor in judicial foreclosure pleading not sufficiently material to state § 1692e violation where under applicable state law servicer exercised rights of loan's owner); Aldom v. Phelan Hallinan & Diamond, P.C., 2015 WL 5722584 (D.N.J. Sept. 29, 2015) (no actionable § 1692e violation where Wells Fargo identified as "lender" where it was original lender, and current servicer, but not current creditor).

either in communications to the consumer or in a foreclosure action.[1173]

Because of the complexity of loan transfers in the mortgage market, the entity in whose name a foreclosure action is threatened or even brought may not be the owner at that time; transfer of the mortgage loan to that entity prior to the completion of the foreclosure may be intended. This practice may violate state law[1174] and such a false threat to foreclose or file a foreclosure action without current authority to do so should violate FDCPA § 1692e.[1175]

This scenario should be distinguished from a situation where, at the time of the filing of a foreclosure action, the foreclosing attorney does not have in its possession proof that the entity in whose name the foreclosure is initiated actually owns the mortgage, as long as the attorney can obtain that information when so challenged.[1176] But an allegation of ownership when there is no evidence that an entity in fact does own the loan or has falsely stated that it owns the loan can be a FDCPA § 1692e violation.[1177]

7.4.11.4 Misrepresentation of the Amount Owed

Mortgage servicers and collectors may be sloppy in their paperwork and accounting regarding mortgage debt. It can be a FDCPA § 1692e violation to demand amounts not owed,[1178] such as including an inaccurate amount to cure a default[1179] or seeking unauthorized fees,[1180] illegal

1173 Hageman v. Barton, 817 F.3d 611 (8th Cir. 2016) (foreclosure filed in name of prior owner); Stewart v. JP Morgan Chase Bank, 2020 WL 433888 (N.D. Ill. Jan. 28, 2020) (servicer identified owner of loan in one letter as Chase and in another as Freddie Mac); Machles v. McCabe, Weisberg & Conway, P.C., 2017 WL 5172516 (E.D. Pa. Nov. 7, 2017) (proceeding with foreclosure complaint without authority to foreclose as assignee of note and mortgage); Luna v. Bank of Am., 2015 WL 11120875 (N.D. Tex. Nov. 9, 2015) (foreclosing entity proceeding without appropriate transfer of note and deed of trust); Rivera v. JPMorgan Chase & Co., 2015 WL 12851710 (S.D. Fla. July 9, 2015) (foreclosure complaint falsely represented plaintiff as owner of note and mortgage); Ohuche v. Bank of Am., 2014 WL 12544772 (N.D. Ga. Apr. 8, 2014) (refusing to dismiss claim asserting that Fannie Mae, rather than bank, should have been designated as assignee with authority to foreclose); Hoffman v. Wells Fargo Bank, 2014 WL 6822359 (E.D. Pa. Dec. 4, 2014) (allegations of invalid assignment of loan ownership to party foreclosing); Wilson v. McCalla Raymer, L.L.C., 2013 WL 1147439 (N.D. Ga. Mar. 19, 2013) (deceptively implied that original lender had full authority to modify note, although collector had knowledge that Fannie Mae was note owner); Owens v. Ronald R. Wolf & Assoc., P.L., 2013 WL 6085121 (S.D. Fla. Nov. 19, 2013) (misrepresented in foreclosure complaint identity of party entitled to enforce note); Johnstone v. Aldridge Connors, L.L.P., 2013 WL 6086049 (S.D. Fla. Nov. 20, 2013); Jacobson v. Bayview Loan Servicing, L.L.C., 371 P.3d 397 (Mont. 2016) (servicer's misrepresentations about identity of beneficiary of deed of trust interfered with borrower's ability to cure default). *See also* Visceglie v. Seterus, Inc., 2017 WL 4862230 (M.D. Fla. Apr. 27, 2017) (law firm allegedly made false representations about identity of noteholder). *Cf.* Scheinman v. Glass & Brauss, L.L.C., 2020 WL 6875139 (D. Conn. Nov. 23, 2020) (§ 1692e claim regarding filing of partially filled out Registration Form was allowed to proceed where least sophisticated consumer could have believed that property had been conveyed to a named entity through foreclosure when it was not). *But see* Galati v. Manley Deas Kochalski, L.L.C., 622 Fed. Appx. 473, 475 (6th Cir. 2015) (state law allowed entity holding note to enforce loan, even if not properly assigned note); Markette v. HSBC Bank, 2018 WL 1695368 (N.D. Ill. Apr. 6, 2018) (inaccurate identification of trust on note not material misrepresentation); Lucero v. Cenlar, 2014 WL 12026660 (W.D. Wash. Oct. 3, 2014) (misrepresentations of authority to foreclose, including status as note holder and legitimacy of loan transfer documents, do not violate § 1692e(2)(A), because do not go to amount or character of debt); Montgomery v. PNC Bank, 2014 WL 11531624 (N.D. Ga. Aug. 22, 2014) (under Georgia law not misrepresentation to hold self out as beneficiary of mortgage loan when only assignee of mortgage, but not holder of note).

1174 *See* U.S. Bank v. Ibanez, 941 N.E.2d 40 (Mass. 2011).

1175 Wallace v. Wash. Mut. Bank, 683 F.3d 323 (6th Cir. 2012); Rivers v. U.S. Bank, 2013 WL 12098963 (N.D. Ga. Feb. 13, 2013), *adopted*, 2013 WL 12099410 (N.D. Ga. Mar. 5, 2013) (language in notice of foreclosure falsely suggested that bank, which had not yet been assigned mortgage, had present authority to foreclose); Akar v. Fed. Nat'l Mortg. Ass'n, 843 F. Supp. 2d 154 (D. Mass. 2011). *See also* Minnifield v. Johnson & Freedman, L.L.C., 448 Fed. Appx. 914 (11th Cir. 2011) (reversing lower court's dismissal where evidence showed that mortgagee's assignment to defendant foreclosure attorney authorizing it to proceed occurred two weeks after foreclosure and thus complaint stated a claim for violating § 1692f(6)'s prohibition against acting without "present right to possession of the property claimed as collateral through an enforceable security interest"). *But see* Kline v. Mortg. Elec. Sec. Sys., 2009 WL 6093372 (S.D. Ohio Nov. 24, 2009) ("[t]he filing of a foreclosure action by a plaintiff in the process of obtaining an assignment not yet fully documented is not [] deceptive"), *adopted*, 2010 WL 1133452 (S.D. Ohio Mar. 22, 2010).

1176 *See* Whittiker v. Deutsche Bank Nat'l Tr. Co., 605 F. Supp. 2d 914 (N.D. Ohio 2009) (filing foreclosure without immediate means of proving ownership of debt not deceptive).

1177 Bridge v. Ocwen Fed. Bank, 681 F.3d 355 (6th Cir. 2012) (can be violation where allege no evidence of ownership of loan); Williams v. Partners for Payment Relief Inc., 2020 WL 973753 (N.D. Ohio Feb. 28, 2020); Munger v. Deutsche Bank, 2011 WL 2930907 (N.D. Ohio July 18, 2011) (while inability to prove present debt ownership at time action is filed is not *per se* FDCPA violation, can be deceptive where knowingly misrepresented).

1178 McLaughlin v. Phelan Hallinan & Schmieg, L.L.P., 756 F.3d 240 (3d Cir. 2014); Muir v. AM Solutions, L.L.C., 2019 WL 3530521 (E.D. Pa. Aug. 1, 2019); Block v. Seneca Mortg. Servicing, 221 F. Supp. 3d 559 (D.N.J. 2016); Hall v. Nationstar Mortg. L.L.C., 2016 WL 3971428 (N.D. Ala. July 25, 2016); Webb v. Law Office of Ira T. Nevel, L.L.C., 2016 WL 946962 (N.D. Ill. Mar. 14, 2016) (misstatement of debt amount stated in § 1692g notice attached to foreclosure complaint); Schuh v. Druckman & Sinel, L.L.P., 602 F. Supp. 2d 454 (S.D.N.Y. 2009) (statement that payoff amount had to be verified before payment did not make incorrect payoff amount any less false); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002) (servicer demanded amounts borrower did not owe); *In re* Hart, 246 B.R. 709 (Bankr. D. Mass. 2000) (servicer misrepresented that consumer was obligated to repay amounts in "negative suspense account"). *But see* Ho v. ReconTrust Co., 858 F.3d. 568 (9th Cir. 2017) (trustee not acting as debt collector in sending notices claiming inflated amounts due when these notices were required procedural step under state's non-judicial foreclosure statute).

1179 Estate of Russel Morgan v. BWW Law Group, L.L.C., 2019 WL 2880984 (D. Md. July 3, 2019) (false statement of amount needed to cure).

1180 Pagan v. Rushmore Loan Mgmt. Services L.L.C., 2020 WL 7398788 (N.D. Ill. Dec. 17, 2020) (servicer did not have clear right to roll late fees into reinstatement amount and Notice of Debt did not specify that late charges would be applied only if homeowners opted to reinstate loan and not otherwise); Dawoudi v. Nationstar Mortg., L.L.C., 448 F. Supp. 3d 918 (N.D. Ill. 2020) (demands for late fees after loan

interest,[1181] or inaccurate amounts due related to taxes and insurance.[1182] The same can apply to a servicer's proof of claim in the homeowner's bankruptcy.[1183]

In Kaymark v. Bank of America,[1184] the Third Circuit reversed the lower court's dismissal of a FDCPA § 1692e claims where the foreclosure attorneys included in the state foreclosure complaint a current balance with attorney fees and property inspection fees[1185] for work that had not yet been performed. The court found that, notwithstanding the fact that the amounts recited were later actually incurred and were admittedly reasonable, the foreclosure attorneys misrepresented the amount of the debt due and attempted to collect unauthorized sums by including those fees without indicating that they were mere "estimates or imprecise amounts."

Also deceptive is failing to credit payments so as to give the appearance that the consumer is in default.[1186] It can also be deceptive to hide fees using confusing terminology[1187] or to report unreasonably fluctuating or confusing amounts owed.[1188] Where mortgage payments have been modified, FDCPA § 1692e is violated by computing the mortgage obligation based on the old payment obligation instead of based on the modified payments.[1189]

Additional discussion concerning misrepresentations as to the amount due is found at § 7.2.2, *supra*, in the discussion of FDCPA § 1692e(2)(a). Misrepresentations as to the amount due in collection lawsuits are examined at § 7.4.10.3.4, *supra*.

7.4.12 Deception Regarding Rental Debt

7.4.12.1 Residential Eviction Actions

The eviction process can lead to FDCPA § 1692e violations. Many of the violations are parallel to those involving collection lawsuits discussed at § 7.4.10, *supra*, and those involving foreclosures examined at § 7.4.11, *supra*.

acceleration not authorized by loan documents); Roche v. Rushmore Loan Mgt. Services, L.L.C., 2020 WL 1452346 (S.D. Fla. Mar. 25, 2020) (unauthorized fees); Rhodeman v. Ocwen Loan Servicing, L.L.C., 2019 WL 5955368 (C.D. Cal. Nov. 12, 2019), *reconsideration denied*, 2020 WL 1698709 (C.D. Cal. Apr. 3, 2020) (unauthorized loan modification charge). Muhammad v. Carrington Mortg. Services, L.L.C., 2019 WL 1259353 (S.D. Fla. Mar. 19, 2019) (servicer's periodic account statements included demand for late fees incurred after acceleration); Mansoorian v. Brock & Scott, P.L.L.C., 2018 WL 6413484 (M.D. Fla. Dec. 6, 2018) (failed to follow procedures to obtain attorney fees); Speights-Carnegie v. Blackstone Condo. Assoc., 2018 WL 1519158 (N.D. Ill. Mar. 28, 2018) (attorney fees, repair costs, and late charges); Kirk v. Seterus, Inc., 2018 WL 1684415 (W.D. Tenn. Jan. 3, 2018) (attorney fees to which not entitled); Spiegel v. Kim, 2017 WL 413616 (N.D. Ill. Jan. 31, 2017) (unauthorized attorney fees); Bowen v. Ditech Fin., L.L.C., 2017 WL 4183081 (D. Me. Sept. 20, 2017); Jackson v. Carrington Mortg. Services, L.L.C., 2017 WL 4347382 (S.D. Fla. Sept. 29, 2017) (improper demands for late fees incurred after loan accelerated); Belcher v. Ocwen Loan Servicing, L.L.C., 2016 WL 7243100 (M.D. Fla. Dec. 15, 2016) (demand for service of process fee when there had been no service); Kaymark v. Udren Law Offices, P.C., 2016 WL 7187840, at *10 (W.D. Pa. Dec. 12, 2016) (estimated/anticipated, but not-yet-incurred, fee demands" in foreclosure complaint); Harris v. LNV Corp., 2014 WL 12530946 (M.D. Tenn. Jan. 8, 2014) (unauthorized claims for attorney fees and late fees); Kevelighan v. Trott & Trott, P.C., 771 F. Supp. 2d 763 (E.D. Mich. 2010) (attorney fees in excess of amount allowed under state law); Pettway v. Harmon Law Offices, P.C., 2005 WL 2365331 (D. Mass. Sept. 27, 2005) (fees of foreclosing attorneys were overstated by including unaccrued fees that would later be rebated); Scott v. Fairbanks Capital Corp., 284 F. Supp. 2d 880 (S.D. Ohio 2003) ("padded" fees not permitted by contract); Porter v. Fairbanks Capital Corp., 2003 WL 21210115 (N.D. Ill. May 21, 2003) (property preservation services and broker's price opinions were not permitted under mortgage clause covering costs to protect value of property). *See also* Barrows v. Chase Manhattan Mortg. Corp., 465 F. Supp. 2d 347 (D.N.J. 2006) (allegation that legal fees and costs exceeded amount allowed under state law and court rules sufficiently stated § 1692f(1) claim).

1181 Gary v. Hladik Onorato & Federman, L.L.P., 2020 WL 871330 (W.D. Pa. Feb. 21, 2020) (interest rate that lender charged was unlawful because not licensed under state law); Kirk v. Seterus, Inc., 2018 WL 1684415 (W.D. Tenn. Jan. 3, 2018) (loan points to which creditor not entitled); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002) (servicer attempted to collect interest on mortgage even though it did not have possession of note and could not determine whether it was entitled to demand interest). See also Owens v. JP Morgan Chase Bank, 2020 WL 1888857, at *7 (W.D. Pa. Apr. 16, 2020) (genuine dispute as to whether statute governing usurious interest applied to mortgage).

1182 *See* Santo v. U.S. Bank, 2018 WL 4680090 (M.D. Pa. Sept. 28, 2018); Block v. Seneca Mortg. Servicing, 221 F. Supp. 3d 559 (D.N.J. 2016); *In re* Trevino, 615 B.R. 108 (Bankr. S.D. Tex. 2020).

1183 *In re* Bernadin, 610 B.R. 787 (Bankr. E.D. Pa. 2019). *See* § 13.7.3.2, *infra*.

1184 783 F.3d 168 (3d Cir. 2015).

1185 *See also* Rodriguez v. Seterus, Inc., 2015 WL 5677182, at *4 (S.D. Fla. Sept. 28, 2015) (allegations that defendant "*knew* . . . that an inspection of Plaintiffs' property was unnecessary and unreasonable, and that the purpose of the inspection was not for the benefit of the owner of the mortgage, but solely for the servicer's financial gain" survived motion to dismiss).

1186 Harris v. LNV Corp., 2014 WL 3015293 (M.D. Tenn. July 2, 2014).

1187 Flournoy v. Rushmore Loan Mgmt. Services, L.L.C., 2020 WL 1285504 (D. Md. Mar. 17, 2020) (servicer's vague demand for "corporate advances" disguised claims for improper attorney fees and other costs); Cortellessa v. Udren Law Offices P.C., 2016 WL 4554539 (E.D. Pa. Sept. 1, 2016) (misleading statement aggregating fees); Burdick v. Bank of Am., 140 F. Supp. 3d 1325 (S.D. Fla. 2015) (legal fees described as insurance advance disbursement); Dougherty v. Wells Fargo Home Loans, Inc., 425 F. Supp. 2d 599 (E.D. Pa. 2006) (collection attorney fees labeled as recoverable corporate advances).

1188 Tepper v Amos Fin., L.L.C., 2017 WL 3446886, at *8 (E.D. Pa. Aug. 11, 2017) (statements as to amounts owed on mortgage were so incomplete and misleading as to be false); Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521 (D.N.J. July 27, 2017) (validation letter and servicer transfer letter with conflicting payment information for same time period); Ruvalcaba v. Ocwen Loan Servicing, L.L.C., 2016 WL 7178855 (S.D. Cal. Dec. 9, 2016) (wildly fluctuating stated amounts impeded borrower's ability to respond appropriately to payoff dispute); McKinney v. Nationstar Mortg., L.L.C., 2016 WL 3659898 (E.D.N.C. July 1, 2016) (inconsistent balance statements); Gersten v. Bank of Am., 2014 WL 3671201 (S.D. Ohio July 23, 2014) (claiming as amount overdue based on both original and on modified loans); Castrillo v. Am. Home Mortg. Servicing, Inc., 2010 WL 1424398 (E.D. La. Apr. 5, 2010); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002).

1189 Rivera v. Bayview Loan Servicing, 2020 WL 1508328 (E.D. Pa. Mar. 30, 2020) (mortgagee claimed amounts due that had been capitalized through loan modification and therefore were not due); Finley v. Ocwen Loan Servicing, L.L.C., 2018 WL 1705802 (N.D. Ohio Apr. 9, 2018).

It also can be a FDCPA § 1692e violation if a collector agrees to dismiss its eviction action if the consumer vacates the premises, but then proceeds with a default judgment despite the tenant's vacating the premises.[1190] In addition, it is deceptive to file an eviction suit without alleging the required elements,[1191] or misrepresenting rental units as not subsidized, impeding the tenants' ability to discover potential defenses to eviction.[1192] Where a debt collector falsely represents the use and occupancy damages in an eviction action, the tenant may have viable FDCPA § 1692e claims.[1193]

Residential eviction actions often are brought by non-attorneys. It can be a FDCPA § 1692e violation for such a non-lawyer to seek legal fees in the eviction action.[1194] Also deceptive can be representations that a collection agency is the party to whom the rent is owed when it is owed instead to the landlord.[1195]

7.4.12.2 Regulation F Provisions Related to CDC COVID-19 Residential Eviction Halt

On April 22, 2021, the CFPB issued an interim final rule titled "Debt Collection Practices in Connection with the Global COVID-19 Pandemic (Regulation F)" that, effective May 3, 2021, required that debt collectors refrain from certain misrepresentations and provide certain disclosures to tenants facing eviction for non-payment of rent.[1196] The regulation was temporary and applied only during the effective period of the CDC order.[1197]

The CDC order is the order issued by the Centers for Disease Control and Prevention titled Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19,[1198] as extended by the Centers for Disease Control and Prevention.[1199] The CDC order generally limits the circumstances in which certain persons may be evicted from residential property.

The CFPB rule applies only during the effective period of the CDC rule, and there is lack of clarity as to when that effective period order ended— whether that date is July 31, 2021, or August 26, 2021. The original CDC order expired on July 31, 2021.[1200] The CDC, on August 6, 2021, published a separate order with a different title, "Temporary Halt in Residential Evictions in Communities with Substantial or High Levels of Community Transmission of COVID-19 to Prevent the Further Spread of COVID-19."[1201] An August 26, 2021, Supreme Court order[1202] vacated the stay of a lower court's decision that had set aside the August 6 CDC order,[1203] so that the subsequent CDC order ceased being effective on that date.

The interim final rule thus prohibits certain misrepresentations and requires certain debt collector disclosures only for the period from May 3, 2021, until July 31, 2021, or possibly until August 26, 2021. This subsection will have continued practical relevance only to debt collector interim rule violations that occurred during that period and where an FDCPA action is brought within the FDCPA statute of limitations.[1204]

The rule applies to debt collectors as defined by the FDCPA,[1205] and thus its application includes attorneys who regularly collect debts or regularly are involved in tenants' evictions.[1206] The Act does not apply to the landlord itself, unless the landlord is collecting in a name that is not its own.[1207] Nor does it apply to the landlord's employees when collecting in the landlord's name.[1208]

The rule applied only in those states that the CDC order was in effect. The CDC order did not apply in any state, local, territorial, or tribal area with a moratorium on residential evictions that provided the same or greater level of public-health protection than the requirements listed in the CDC order.[1209]

The interim final rule's requirements apply to debt collectors collecting a debt and in connection with the collection of that debt.[1210] "A consumer's unpaid residential rent would typically fall within the FDCPA's definition of debt because it is an obligation of a consumer to pay money arising out of a transaction for personal, family, or household purposes."[1211]

One interim rule requirement is that a debt collector cannot falsely represent or imply to a consumer that the consumer is ineligible for temporary protection from eviction under the CDC order.[1212]

1190 Gonzalez v. Law Office of Allen Robert King, 195 F. Supp. 3d 1118 (C.D. Cal. 2016).

1191 *See* Nelson v. Am. Power and Light, 2010 WL 3219498 (S.D. Ohio Aug. 12, 2010).

1192 Lipscomb v. The Raddatz Law Firm, P.L.L.C., 109 F. Supp. 3d 251 (D.D.C. 2015). *But see* Dimatteo v. Sweeney, Gallo, Reich & Bolz, L.L.P., 619 Fed. Appx. 7 (2d Cir. 2015) (no requirement in legal action to disclose tenancy involved rent control unit).

1193 *See* Cordeiro v. Carrington Mortg. Services, L.L.C., 2020 WL 3404742, at *5 (D.R.I. June 19, 2020).

1194 Sanz v. Fernandez, 633 F. Supp. 2d 1356 (S.D. Fla. 2009).

1195 Caparelli v. Alan H. Zimmerman P.C., 2018 WL 6250480 (D. Ariz. Nov. 29, 2018) (tenant stated §§ 1692e and 1692g claims alleging that collection agency stated that it was "creditor" when it had previously disclosed that her landlord was creditor).

1196 Reg. F § 1006.9, as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1197 Reg. F § 1006.9(c), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1198 86 Fed. Reg. 16731 (Mar. 31, 2021).

1199 Reg. F § 1006.9(b)(2), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1200 86 Fed. Reg. 34,010 (June 28, 2021).

1201 86 Fed. Reg. 43,244 (Aug. 6, 2021).

1202 Alabama Ass'n of Realtors v. Dep't of Health and Human Services, ___ U.S. ___, 141 S. Ct. 2485, ___ L. Ed. 2d ___ (2021).

1203 Alabama Ass'n of Realtors v. Dep't of Health and Human Services, 2021 WL 1779282 (D.D.C. May 5, 2021).

1204 *See* § 12.3, *infra*.

1205 *See* § 4.7, *supra*.

1206 *See* §§ 4.7.3.3, 4.7.3.5, *supra*.

1207 *See* § 4.7.4, *supra*.

1208 *See* § 4.8.1, *supra*.

1209 86 Fed. Reg. 21,163, 21,170 (Apr. 22, 2021).

1210 Reg. F § 1006.9(c), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1211 86 Fed. Reg. 21,163, 21,169 (Apr. 22, 2021) (footnote omitted).

1212 Reg. F § 1006.9(c)(2), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

The other requirement is that a debt collector cannot file an eviction action for nonpayment of rent against a consumer to whom the CDC order reasonably might apply without disclosing to the consumer that the consumer may be eligible for temporary protection from eviction under the CDC order.[1213] The disclosure must be provided, "in writing, on the date that the debt collector provides the consumer with an eviction notice or, if no eviction notice is required by applicable law, on the date that the eviction action is filed."[1214]

An eviction notice is "the earliest of any written notice that the laws of any State, locality, territory, or tribal area require to be provided to a consumer before an eviction action against the consumer may be filed."[1215] Examples are notices to quit, notices to pay rent or quit, and notices to terminate tenancy.[1216] The interim rule's supplemental information provides:

> Not all jurisdictions require such a notice, and some jurisdictions may require more than one. The definition clarifies that, for purposes of this interim final rule, the term eviction notice refers to the earliest of any such notice that must be provided. Jurisdictions that do require such a notice may refer to the notice using different names. The definition of eviction notice is meant to encompass all such required notices, regardless of the names by which those notices are known.[1217]

A debt collector may satisfy the disclosure requirement by delivering the disclosure to the address that is the subject of eviction proceedings.[1218] The debt collector is not required to ensure that the consumer receive the disclosure.[1219]

The disclosure must be delivered on the same *day* as the debt collector provides the consumer with the eviction notice or, if no eviction notice is required by applicable law, on the date that the eviction action is filed.[1220] A debt collector may, but is not required to, provide the disclosure at the same *time* that the debt collector provides the consumer with the eviction notice or serves the consumer with an eviction action.[1221] A debt collector may, but is not required to, include the disclosure in an envelope either on or with the eviction notice or in the same mailing in which the debt collector serves the consumer with an eviction action.[1222]

The disclosure does not have to be made more than once.[1223] The collector can do so if it chooses; sending multiple notices does not violate FDCPA §§ 1692e or 1692f.[1224] For example, it can do so with each subsequent communication.[1225]

The Official Interpretations explain that:

> A consumer to whom the CDC Order reasonably might apply is a consumer who reasonably might be eligible to be a covered person as defined in the CDC Order. A consumer is not reasonably eligible to be a covered person if the debt collector has knowledge that a consumer is not eligible for protection under the CDC Order. However, nothing in [Reg. F] § 1006.9(c)(1) prohibits a debt collector from providing the disclosure to a consumer even if the consumer might not reasonably be eligible to be a covered person. A debt collector therefore may comply with the requirement to provide the disclosure to any consumer to whom the CDC Order reasonably might apply by, for example, providing the disclosure to each consumer against whom the debt collector files an eviction action for nonpayment of rent. A debt collector does not violate FDCPA sections 807 [FDCPA § 1692e] or 808 [FDCPA § 1692f] merely because the debt collector provides the disclosure to consumers as described in this comment 9(c)(1)-2 even if the consumer is not reasonably eligible to be a covered person.[1226]

The disclosure requirement does not apply to all eviction actions, but only to those for nonpayment of rent. It does not apply if the debt collector files the eviction action based solely on the consumer engaging in one or more of the following actions:

- Criminal activity while on the premises;
- Threatening the health or safety of other residents;
- Damaging or posing an immediate and significant risk of damage to property;
- Violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or
- Violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).[1227]

1213 Reg. F § 1006.9(c)(1), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1214 Reg. F § 1006.9(c)(1), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1215 Reg. F § 1006.9(b)(3), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1216 Reg. F Official Interpretations § 9(b)(3)-1, as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1217 86 Fed. Reg. 21,163, 21,170 (Apr. 22, 2021) (footnote omitted).

1218 Reg. F Official Interpretations § 9(c)(1)-3, as issued at 86 Fed. Reg. 21,163, 21,180, 21,181 (Apr. 22, 2021).

1219 Reg. F Official Interpretations § 9(c)(1)-3, as issued at 86 Fed. Reg. 21,163, 21,180, 21,181 (Apr. 22, 2021).

1220 Reg. F § 1006.9(c)(1), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1221 Reg. F Official Interpretations § 9(c)(1)-3, as issued at 86 Fed. Reg. 21,163, 21,180, 21,181 (Apr. 22, 2021).

1222 Reg. F Official Interpretations § 9(c)(1)-3, as issued at 86 Fed. Reg. 21,163, 21,180, 21,181 (Apr. 22, 2021).

1223 Reg. F Official Interpretations § 9(c)(1)-4, as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1224 Reg. F Official Interpretations § 9(c)(1)-4, as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1225 Reg. F Official Interpretations § 9(c)(1)-4, as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1226 Reg. F Official Interpretations § 9(c)(1)-2, as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1227 Reg. F Official Interpretations § 9(c)(1)-1, as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

However, the requirement does apply if the eviction action is based in part on one of the above listed reasons, but also is based in part on non-payment of rent.[1228]

The disclosure must be made to the consumer clearly and conspicuously in writing.[1229] Clear and conspicuous means readily understandable.[1230] The disclosure cannot be via email or other electronic means, but must be in writing.[1231] The location and type size also must be readily noticeable and legible to consumers, although no minimum type size is mandated.[1232]

In making the disclosure, the debt collection has the option of using the language in either of the following two sample disclosures:

1. "Because of the global COVID-19 pandemic, you may be eligible for temporary protection from eviction under Federal law. Learn the steps you should take now: visit www.cfpb.gov/eviction or call a housing counselor at 800-569-4287."[1233]
2. "Because of the global COVID-19 pandemic, you may be eligible for temporary protection from eviction under the laws of your State, territory, locality, or tribal area, or under Federal law. Learn the steps you should take now: visit www.cfpb.gov/eviction or call a housing counselor at 800-569-4287."[1234]

A debt collector does not violate FDCPA §§ 1692e or 1692f merely because the debt collector provides this sample language to a consumer in a jurisdiction in which the CDC order does not apply (or in the case of the second disclosure if only the CDC order applies).[1235] The CFPB has also published Spanish translations of the sample disclosure language.[1236] But nothing in the rule requires debt collectors to provide the Spanish translation.

7.4.13 Unlicensed Debt Collection

Thirty-two states require at least some debt collectors to be licensed, registered, or bonded.[1237] Because section 1692e(5) of the FDCPA prohibits threats "to take any action that cannot legally be taken or that is not intended to be taken," a threat of a collection lawsuit by a debt collector that is not licensed according to state law may violate that provision. The FDCPA § 1692e(5) violation is not that the collector is unlicensed, but rather that the lack of a proper license according to state law makes the threatened action unlawful. This issue is discussed at § 7.2.5.4.2, *supra*.

Being unlicensed is not a *per se* violation under FDCPA § 1692e(5),[1238] but it can still be a violation to misrepresent oneself as licensed when one is not under FDCPA § 1692e(10), which prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

Courts are divided as to whether and when the lack of a state license or similar requirement, absent allegation of an explicit threat to bring suit, may still result in a violation of the FDCPA. Some cases find that simply attempting to collect a debt while unlicensed does not violate FDCPA § 1692e(10) because the violation is merely technical or immaterial.[1239] However, other courts find that by failing to register with the state as a debt collector and then taking action to collect a debt, the collector misrepresents its legal authority and engages in deceptive conduct that violates both state law and the FDCPA. Some cases finding a violation focus not on the sole fact that the collector was unlicensed while it attempted to collect a debt, but that it made affirmative misrepresentations as to its status.[1240] But a

1228 86 Fed. Reg. 21,163, 21,171 (Apr. 22, 2021).

1229 Reg. F § 1006.9(c)(1), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1230 Reg. F Official Interpretations § 9(c)(1)-6, as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1231 86 Fed. Reg. 21,163, 21,173 (Apr. 22, 2021).

1232 Reg. F Official Interpretations § 9(c)(1)-6, as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1233 Reg. F Official Interpretations § 9(c)(1)-5(i), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1234 Reg. F Official Interpretations § 9(c)(1)-5(ii), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1235 Reg. F Official Interpretations § 9(c)(1)-5(i), (ii), as issued at 86 Fed. Reg. 21,163, 21,180 (Apr. 22, 2021).

1236 *See* https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_sample_covid-19_tenant_eviction_protection_disclosure_language.pdf.

1237 *See* Appx. D, *infra*.

1238 *See* LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1192 (11th Cir. 2010) (state law violation does not constitute *per se* FDCPA violation, but defendant may have violated § 1692e(5) when it threatened to bring suit); Wade v. Reg'l Credit Ass'n, 87 F.3d 1098, 1100 (9th Cir. 1996) (defendant's attempts to collect, "although apparently in violation of state law, were innocuous and not in violation of the FDCPA" because defendant did not threaten to sue and thus did not violate § 1692e, e(5), or e(10)).

1239 *See, e.g.*, Richardson v. Allianceone Receivables Mgmt., Inc., 2004 WL 867732, at *3 (S.D.N.Y. Apr. 23, 2004) (violation of technical city ordinance not specific to debt collection activities resulting in no identifiable harm was insufficient to state claim); Ferguson v. Credit Mgmt. Control, Inc., 140 F. Supp. 2d 1293 (M.D. Fla. Mar. 23, 2001) (no violation of § 1692e(10) where unregistered collection agency did not state in collection notice that it had power to collect debts in Florida, nor did it indicate that it was licensed to act as collection agency in state). *Cf.* Stewart v. Bureaus Inv. Group, L.L.C., 2015 WL 7572312, at *20 (M.D. Ala. Nov. 24, 2015) (no violation of § 1692e(10) where lack of license in state had no bearing on defendant's right to file collection action, and thus representation that defendant was licensed to do business in state, though false, was not material). *But see* DeWan v. Seideman, 2017 WL 6048816 (S.D.N.Y. Dec. 5, 2017) (collection lawyer misrepresented in state court collection action that collection company was authorized to do business in New York); Collins v. Erin Capital Mgmt., L.L.C., 991 F. Supp. 2d 1195 (S.D. Fla. 2013); Scott v. J. Anthony Cambece Law Office, P.C., 600 F. Supp. 2d 479 (E.D.N.Y. 2009) (FDCPA claim stated against law firm for collecting debts without debt collection license as required by applicable New York City municipal code provision, since code does not contain *per se* exemption for attorneys).

1240 Derosia v. Credit Corp Solutions, Inc., 2018 WL 1513043 (E.D. Wis. Mar. 27, 2018) (§ 1692e claim made out where debt buyer stated in its dun that it was "licensed by the Division of Banking," because although debt buyer was licensed with Wisconsin Department of Financial Institutions as a "sales finance company," it was *not* licensed as collection agency; misrepresentation was material

number of cases find that the very act of attempting to collect while unlicensed or unregistered amounts to implicit misrepresentation sufficiently constituting a violation and do not require any affirmative act of misrepresentation by the debt collector.[1241] As one decision puts it: "[I]t would strain logic to conclude that if a debt collector is prohibited from engaging in debt collection activity in a state, he avoids the risk of liability under the FDCPA so long as he conceals this fact and does not make any representation that he actually has debt collection authority."[1242]

Allegations that an unlicensed or unregistered debt collector violated a state licensing statute simply by sending a collection letter may not be sufficient to establish a violation, but where the letter makes certain representations it may run afoul of FDCPA § 1692e(10) if those representations imply that the collector is authorized to collect the debt. A federal court in Florida found that where a letter stated that "[t]his communication is from a debt collection agency," that the collector had "been retained to collect this claim," and that "[t]his is an attempt to collect a debt and any information obtained will be used for that purpose," such statements "could reasonably be viewed as false, misleading, and deceptive because the Letter implies that Defendant is legally able to collect the debt, when it is not."[1243]

Likewise, where a collection agency enters into a settlement agreement with a consumer and collects the debt while unlicensed, a violation of FDCPA § 1692e(10) may be found, since the conduct goes beyond merely presenting information regarding the status of the debt and, instead, implies the authority to collect the debt. A Maryland federal court found that even though the collector did not affirmatively represent it was licensed by the state, its conduct with respect to the settlement "implicitly declared" that the collector was licensed to collect, and this conduct, notably, was "unlike sending a collection notice." In executing a settlement agreement to collect the debt, the collector "necessarily conveyed that it was legally able to do so."[1244]

Similar logic may compel a finding of a violation where the debt collector files suit to collect a debt, since filing suit is not the same as merely sending a notice to notify or remind the consumer about the debt's default status. A federal court in Pennsylvania found an FDCPA violation under these circumstances, concluding that such conduct "reaches far beyond a notice presenting information," since the collector "sued to

because it suggested that debt buyer had been approved by state, thereby enhancing its "legitimacy and power to collect the debt" in mind of unsophisticated consumer); Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163, 171 (E.D.N.Y. 2013) (filing state collection litigation in which it was falsely represented that debt collector was properly licensed pursuant to state law; "The false representation that Resurgent LLC held a debt-collection license could easily have led an unsophisticated consumer to forgo a valid defense."); Radaj v. ARS Nat'l Services, Inc., 2006 WL 2620394, at *4 (E.D. Wis. Sept 12, 2006) (debt collection letters stated that defendant "is licensed by Office of Administrator of Division of Banking" of state of Wisconsin; "The statement about licensing is akin to a 'vouched for' statement. It suggests that ARS has been approved by the state, thereby enhancing in the mind of the unsophisticated consumer ARS's legitimacy and power to collect the debt. Thus, the court cannot say that an unsophisticated consumer would not have been misled or harmed by the inclusion of the statement."). *But see* Berg v. Blatt, Hasenmiller, Leibsker & Moore L.L.C., 2009 WL 901011 (N.D. Ill. Mar. 31, 2009) (summary judgment for defendants as consumer failed to show false statemen that it was "authorized to do business in Illinois" was material).

1241 *See, e.g.*, Valle v. Westhill Exch., L.L.C., 2021 WL 1117282, at *10–11 (D. Md. Mar. 24, 2021) (allowing that "[c]ourts in this district have sided with those finding that, while a violation of MCALA's licensing requirement may support a cause of action under the FDCPA, it will not amount to a *per se* FDCPA violation," but finding here a violation of § 1692e and e(10) because even though no affirmative representation was made, the collector, in executing a settlement agreement to collect the debt "necessarily conveyed that it was legally able to do so"); Gartrell v. J.J. Marshall & Assoc., Inc., 2020 WL 3250219, at *3 (M.D. Fla. Mar. 23, 2020) (statements in letter from unlicensed collector that "[t]his communication is from a debt collection agency" and that collector "has been retained to collect this claim"' could reasonably be viewed as false, misleading, and deceptive under § 1692e(10) "because the Letter implies that Defendant is legally able to collect the debt, when it is not"), *adopted*, 2020 WL 3250037 (M.D. Fla. Apr. 28, 2020); Veras v. LVNV Funding, L.L.C., 2014 WL 1050512, at *6 (D.N.J. Mar. 17, 2014) ("Plaintiff's allegation that Defendants attempted to collect Plaintiff's debt in contravention of the NJCFLA is sufficient to at least support his claim under section 1692e(10), that Defendants used a false representation or deceptive means to collect or attempt to collect Plaintiff's debt."). *See also* Valentine v. Unifund CCR, Inc., 2021 WL 912854, at *5 (D.N.J. Mar. 10, 2021) (letter from unlicensed collector "deprived Plaintiff of truthful, non-misleading information about [the debt buyer's] ability to legally purchase and then collect the debt"); Wyche v. Tsarouhis, 385 F. Supp. 3d 392 (E.D. Pa. 2019) (plaintiff specifically and plausibly pleaded unlicensed collectors' state court complaint attempting to collect debt for which they had no legal right to do so constituted false, deceptive, or misleading representation in connection with collection of debt); Altenburg v. Caliber Home Loans, Inc., 2017 WL 2733803 (D. Md. June 26, 2017) (denying dismissal of FDCPA claim where collection agency initiated foreclosure proceedings without first being licensed as debt collector, as required by state law); Fiorenzano v. LVNV Funding, L.L.C., 2012 WL 2562415, at *4–5 (D.R.I. June 29, 2012) (allegation that defendant violated § 1692e(10) by failing to register as debt collector under Rhode Island Debt Collector Registration statute was sufficient to state claim under FDCPA where statute prohibited any person from acting as debt collector in state without first registering); Russey v. Rankin, 911 F. Supp. 1449, 1459 (D.N.M. 1995); Gaetano v. Payco of Wis., Inc., 774 F. Supp. 1404, 1414–1415 (D. Conn. 1990) (plaintiff entitled to summary judgment on § 1692e(10) claim because "the Court finds deceptive the defendant's attempt to collect a debt when prohibited from doing so by Connecticut law") *But see* Ross v. Vakulskas Law Firm, P.C., 2012 WL 4092419, at *8–9 (N.D. Iowa Sept. 17 2012) (finding no violation, distinguishing cases that have found violation from this one where statute had "within thirty days after commencing business" clause and where other state statutes required licensing or registration prior to operating as debt collector within state).

1242 Veras v. LVNV Funding, L.L.C., 2014 WL 1050512, at *5 (D.N.J. Mar. 17, 2014).

1243 Gartrell v. J.J. Marshall & Assoc., Inc., 2020 WL 3250219, at *3 (M.D. Fla. Mar. 23, 2020), *adopted*, 2020 WL 3250037 (M.D. Fla. Apr. 28, 2020).

1244 Valle v. Westhill Exch., L.L.C., 2021 WL 1117282, at *10–11 (D. Md. Mar. 24, 2021) (conduct described "affirmatively and materially misrepresented the defendant's status as a licensed collector").

collect the debt which it did not have the right to collect without a license."[1245]

Courts have also found that a consumer stated a FDCPA § 1692e(10) claim where a collection attorney attempted to collect a debt on behalf of the judgment creditor that was not licensed as a consumer lender, as required by New Jersey law.[1246]

1245 Wyche v. Tsarouhis, 385 F. Supp. 3d 392 (E.D. Pa. 2019) (plaintiff specifically and plausibly pleaded unlicensed collectors' state court complaint attempting to collect debt for which they had no legal right to do so constituted false, deceptive, or misleading representation in connection with collection of debt).

1246 *See* Tompkins v. Selip & Stylianou, L.L.P., 2019 WL 522143 (D.N.J. Feb. 11, 2019) (denying debt buyer's motion to dismiss § 1692e(10) claim that debt buyer was prohibited by New Jersey law from collecting on its judgment against consumer, as debt buyer failed to obtain required New Jersey consumer lender license); Latteri v. Mayer, 2018 WL 2317531 (D.N.J. May 22, 2018).

Chapter 8 FDCPA § 1692f: Unfair or Unconscionable Collections

8.1 General Prohibition; Construing "Unfair" and "Unconscionable," 15 U.S.C. § 1692f

8.1.1 *Relation of General Standard to More Specific Enumerated Prohibitions*

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:" [followed by eight enumerated provisions].[1]

FDCPA § 1692f provides a general prohibition of unfair or unconscionable collection means, as well as enumerating eight specific unfair or unconscionable collection means. Regulation F (effective November 30, 2021) reiterates the general prohibition and the eight specific unfair or unconscionable collection means.[2] It also adds two additional prohibitions and a safe harbor relating to emails, texts, and social media.[3] In addition, Regulation F, at sections 1006.30(a) and 1006.30(b), prohibits two specific practices that the CFPB finds to be unfair or unconscionable collection means.[4]

FDCPA § 1692f's general prohibition of unfair or unconscionable collection means applies even to conduct not specifically prohibited by one of the section's eight enumerated provisions. The section specifically provides "without limiting the general application of the forgoing." Thus, conduct can be unfair even if it does not fall within conduct prohibited by one of the eight enumerated provisions.[5] Congress recognized that it could not foresee and proscribe every possible type of unfair collection behavior, and so provided this general prohibition to apply to new forms of unfair conduct designed to evade the other eight prohibitions.[6] Regulation F is consistent with this approach. It states that "[a] debt collector must not use unfair or unconscionable means to collect or attempt to collect any debt, including, but not limited to, the conduct described in paragraphs (b) through (f) of this section."[7]

FDCPA § 1692f and Reg. F § 1006.22(a) apply broadly to any unfair or unconscionable collection means. The general principle of the FDCPA's liberal interpretation is discussed in § 3.2, *supra*.[8]

8.1.2 *Sources for the Unfairness Standard*

The FDCPA § 1692f prohibition of unfair collection methods was patterned after the Federal Trade Commission Act prohibition of unfair acts and practices.[9] At the time of the FDCPA's enactment, the FTC's unfairness standard was based on the Supreme Court's decision in *Federal Trade Commission v. Sperry & Hutchinson Co.*,[10] known as the *S&H* standard. The Court noted with approval the FTC's use of the following criteria for determining whether a practice is unfair:

- Whether the practice offends public policy. Is it within at least the penumbra of some common law, statutory, or other established concept of unfairness?
- Whether the practice is immoral, unethical, oppressive, or unscrupulous.
- Whether the practice causes substantial injury to consumers.

At the time that Congress was contemplating the FDCPA, Congress' deliberations were informed by a number of precedents regarding "unfair" debt collection practices under the Federal Trade Commission Act and state consumer protection statutes:

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1 15 U.S.C. § 1692f. *See also* Regulation F, 12 C.F.R. § 1006.22(a) (effective November 30, 2021) (cited hereinafter as "Reg. F").

The initial House bill generally prohibited "unfair" collection conduct. H.R. 10191, 94th Cong., 1st Sess. § 805 (1975). Subsequent bills did not, but specifically prohibited certain practices, a number of which were similar to those prohibited in the present subsections of § 1692f. *E.g.*, H.R. 11969, 94th Cong., 2d Sess. § 807 (1976); S. 656, 95th Cong., 1st Sess. § 807 (1977). S. 918 reintroduced a general prohibition of unfair and unconscionable conduct with language slightly different from the FDCPA's. S. 918, 95th Cong., 1st Sess. § 808 (1977).

2 Reg. F § 1006.22.

3 *See* §§ 8.8 to 8.11, *infra*.

4 *See* §§ 8.12, 8.13, *infra*.

5 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1199 (11th Cir. 2010); McMillan v. Collection Prof'ls Inc., 455 F.3d 754, 764 (7th Cir. 2006).

6 According to the Senate report, "this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed." S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*. *See also* Currier v. First Resolution Inv. Corp., 762 F.3d 529, 533 (6th Cir. 2014).

7 Reg. F § 1006.22(a).

8 *See also* § 7.3.9, *supra* (materiality element of deception claims); Cheslek v. Asset Acceptance Capital Corp., 2017 WL 7370983 (W.D. Mich. Dec. 22, 2017) (consumer failed to allege any conduct that would be materially unfair or unconscionable to the least sophisticated consumer). *Cf.* Cottle v. Associated Credit Serv., Inc., 2017 WL 2728206, at *2 (E.D. Wash. June 23, 2017) ("[Consumers] have failed to demonstrate how [debt collector] Defendant's actions that allegedly caused Plaintiffs to [falsely] believe their SSNs had been filed in court were 'unfair or unconscionable.'").

9 15 U.S.C. § 45. *See* Jeter v. Credit Bur., Inc., 760 F.2d 1168 (11th Cir. 1985).

10 405 U.S. 233, 244, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972). *See* Appx. E.2.5.1, *infra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 4.3, 4.4 (10th ed. 2021), *updated at* www.nclc.org/library. *See also* Douglass v. Convergent Outsourcing, 765 F.3d 299, 306 (3d Cir. 2014) (should be broadly construed to effect its remedial purposes); Caprio v. Healthcare Revenue Recovery Grp., L.L.C., 709 F.3d 142, 148 (3d Cir. 2013) ("As remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes.").

- Proposed FTC rules that would prohibit or restrict a dozen creditor remedies as "unfair," such as contractual confessions of judgment and wage assignments;[11]
- Suing the consumer in a distant forum to collect a debt;[12]
- Suing a consumer, but not serving them with the state-required notice of the suit;[13]
- Filing affidavits in state debt collection suits that failed to reveal that the underlying products were not delivered;[14]
- Taking a default judgment after accepting a payment from a consumer defendant in a state debt collection suit and advising the consumer to ignore the summons;[15]
- Calling a consumer at work after the consumer had asked the debt collector not to;[16] and
- Sending dunning letters to the consumer's employer.[17]

In 1994, Congress set out a new FTC Act definition of unfairness, but did not add a definition for purposes of the FDCPA:

> [T]he act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.[18]

Not unsurprisingly, the FTC, in its Staff Commentary on the FDCPA, adopts the unfairness standard then applicable to the FTC—the 1994 standard.[19]

The Seventh Circuit has rejected both FTC unfairness definitions as applicable to FDCPA § 1692f. For the *S&H* standard, "Because the *Sperry* Court is interpreting a different statute, and because it does not set forth such a test, *Sperry* is of marginal, if of any, assistance in our present inquiry."[20] And for the 1994 Congressional definition, the Seventh Circuit found that substantial injury is not required for a section 1692f violation, so that standard does not apply either.[21]

Courts are likely to give their own interpretation of the term "unfair." The Second Circuit has found that a practice is unfair if it gives the debt collector an unfair advantage over the debtor or is inherently abusive.[22] The Eighth Circuit finds that a practice can be unfair even when it is not deceptive.[23]

8.1.3 Sources for the Unconscionability Standard

"Unconscionable" in FDCPA § 1692f is a term of art borrowed from equity and the common law. It is codified in Uniform Commercial Code (UCC) sections 2-302, 2A-108, and 2-719(3), in Uniform Consumer Credit Code (UCCC) section 6.111(c), and in a number of state consumer protection statutes.[24] Case law interpreting all these unconscionability standards may be helpful in interpreting unconscionability under FDCPA § 1692f, although most cases deal with unconscionable contract terms, such as provisions in consumer arbitration agreements,[25] not with unconscionable conduct that will be the main focus of section 1692f claims. The FDCPA's legislative history offers little guidance.

8.1.4 Relation of FDCPA § 1692f to Other FDCPA Provisions

"Unfair" and "unconscionable" are different standards than "deceptive" and also not identical to other FDCPA requirements or prohibitions. A practice can be deceptive without being unfair, unfair without being deceptive,[26] or the same practice could, at least in principle, violate both FDCPA §§ 1692e and 1692f, since they are not mutually exclusive provisions.[27] Sections 1692e and 1692f are "broad, potentially overlapping, and are not mutually exclusive."[28]

11 Proposed Trade Regulation Rule on Creditor Remedies, 40 Fed. Reg. 16,347 (Apr. 11, 1976). The Federal Trade Commission (FTC) adopted its Credit Practices Rule March 1, 1984, effective March 1, 1985. *See* 16 C.F.R. § 444; National Consumer Law Center, Federal Deception Law § 2.3 (4th ed. 2022), *updated at* www.nclc.org/library. *See also* Am. Fin. Services Ass'n v. Fed. Trade Comm'n, 767 F.2d 957 (D.C. Cir. 1985).

12 Spiegel v. Fed. Trade Comm'n, 540 F.2d 287 (7th Cir. 1976).

13 *In re* New Rapids Carpet Ctr., Inc., 90 F.T.C. 64 (F.T.C. July 26, 1977).

14 Olive v. Graceland Sales Corp., 293 A.2d 658 (N.J. 1972).

15 Pay'N Save Corp., 86 F.T.C. 688 (F.T.C. 1975) (consent order).

16 *In re* Nosoma Sys. Inc., 88 F.T.C. 458 (F.T.C. 1976) (consent order); *In re* Intercontinental Services Corp., 86 F.T.C. 1098 (F.T.C. 1975) (consent order); *In re* Family Publication Serv., Inc., 63 F.T.C. 971 (F.T.C. 1963) (consent order); Bennett v. Tri-State Collection Serv., 1976 WL 38806 (Ohio Ct. Com. Pl. Aug. 24, 1976).

17 Bennett v. Tri-State Collection Serv., 1976 WL 38806 (Ohio Ct. Com. Pl. Aug. 24, 1976).

18 5 U.S.C. § 45(n). *See also* National Consumer Law Center, Unfair and Deceptive Acts and Practices (10th ed. 2021), *updated at* www.nclc.org/library.

19 FTC Official Staff Commentary § 808-2, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

20 McMillan v. Collection Prof'ls Inc., 455 F.3d 754, 764 n.13 (7th Cir. 2006).

21 Todd v. Collecto, Inc., 731 F.3d 734, 739 (7th Cir. 2013).

22 Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128, 136 (2d Cir. 2017).

23 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017).

24 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.4 (10th ed. 2021), *updated at* www.nclc.org/library.

25 *See* National Consumer Law Center, Consumer Arbitration Agreements ch. 8 (8th ed. 2020) *updated at* www.nclc.org/library.

26 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017).

27 Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128, 136 (2d Cir. 2017); Currier v. First Resolution Inv. Corp.,762 F.3d 529, 536 (6th Cir. 2014); LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1199 (11th Cir. 2010); McMillan v. Collection Prof'ls Inc., 455 F.3d 754, 760 (7th Cir. 2006); Duffy v. Landberg, 215 F.3d 871, 874–875 (8th Cir. 2000); Murray v. Hunter Warfield, Inc., 2021 WL 268382 (M.D. Fla. Jan. 27, 2021); Stevens v. Monterey Collections, L.L.C., 2021 WL 840354 (C.D. Cal. Jan. 8, 2021); Houser v. LTD Fin. Services L.P., 2021 WL 68178, at *5 (S.D. Tex. Jan. 7, 2021); Howard v. LVNV Funding, L.L.C., 2020 WL 978653, at *7 (W.D. Pa. Feb. 28, 2020).

28 Currier v. First Resolution Inv. Corp., 762 F.3d 529, 536 (6th Cir. 2014).

Although a good argument can be made that a violation of another FDCPA provision is a *per se* unfair practice,[29] courts typically hold that it is not enough to allege that a practice violates section 1692f simply because it violates section 1692e or some other FDCPA provision. Instead, the consumer should explain why the collector's conduct meets the definition of unfair or unconscionable conduct.[30]

A number of federal district courts go a step further and view the general prohibition of unfairness as a "backstop" not actionable where the identical conduct violates another FDCPA provision.[31] These courts limit section 1692f's general prohibition to where no other FDCPA provision applies. But even these courts reach a different result when the consumer pleads one of the eight enumerated prohibitions found in section 1692f—that the same conduct can violate that provision and other FDCPA provisions.[32]

From a conceptual viewpoint, these trial courts are wrong. As a number of circuit courts have ruled, the same conduct can be both unfair and also violative of another FDCPA provision. Perhaps these lower courts are only making an efficiency claim that where a specific FDCPA provision is violated, there is no reason for the court to also engage a more difficult inquiry if the more general unfairness or unconscionability standards apply to the exact same conduct.

For example, finding a specific conduct violates both FDCPA §§ 1692e and 1692f will not increase the consumer's recovery, but just increases the case's complexity. On the other hand, if the consumer pleads both provisions, and the court finds that FDCPA § 1692e is not violated, then the consumer can still present reasons why FDCPA § 1692f, as a backstop, is violated. Pleading both provisions is particularly sensible where the violation of the other FDCPA provision is not clear. On the other hand, adding a FDCPA § 1692f claim may needlessly clutter a case if the other FDCPA violation is clear.

8.1.5 *Strict Liability; Least Sophisticated Consumer; Conduct Addressed to Consumer's Attorney; Materiality; Constitutional Standing*

The FDCPA principle of strict liability, as discussed in § 3.2.4, *supra*, applies to section 1692f. Thus, the Third and Seventh Circuits rule that FDCPA § 1692f does not require the element of knowledge or intent.[33] What matters is how the practice affects the consumer.

The Second Circuit, however, noted that "[w]e did not hold that a debt collector's intent is irrelevant in determining whether its conduct is unfair or unconscionable under section 1692f. Here the restraint [of a bank account] is adequately alleged to have been wrongfully imposed for an abusive purpose."[34]

The least sophisticated or unsophisticated consumer analytical standard is widely applied in cases under FDCPA § 1692f.[35] The standard is examined in more detail at § 3.2.1, *supra*.

29 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices (10th ed. 2021), *updated at* www.nclc.org/library.

30 Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1308 (11th Cir. 2015) ("A catch-all is not a free-for-all. In order to proceed under § 1692f, . . . [the consumer] is still required to allege facts showing that the least sophisticated consumer would or could view Appellee's sworn reply as partial and unjust or as unscrupulous and unethical"); Soyinka v. Franklin Collection Serv., Inc., 472 F. Supp. 3d 463, 470 (N.D. Ill. 2020) (consumer must "provide some factual and substantive content to the unfair-means claim so that there is a clear legal distinction between it and the false-representation claim under § 1692e. Yes, the same factual allegations might serve as the basis for both claims, but the claims must be legally distinct."); Jennings v. Dynamic Recovery Solutions L.L.C., 441 F. Supp. 3d 106, 115 (D. Md. 2020) ("Plaintiff makes no argument as to how this conduct is 'separate and distinct' from the conduct covered by her [§ 1692e] claims"); Palmer v. Simon's Agency, Inc., 2020 WL 1332829, at *5 (N.D.N.Y. Mar. 23, 2020) (consumer specifically alleged which conduct was unfair and unconscionable); Schaefer v. IC Sys., Inc., 2020 WL 1083633 (E.D.N.Y. Mar. 6, 2020); Price-Richardson v. DCN Holdings, Inc., 2018 WL 902167 (D. Md. Feb. 15, 2018); Mills v. Turner, 2017 WL 3670967 (D. Mass. Aug. 25, 2017); Biber v. Pioneer Credit Recovery, Inc., 2017 WL 118037 (E.D. Va. Jan. 11, 2017); Davis v. Midland Credit Mgmt., Inc., 2016 WL 7117185 (D. Kan. Dec. 7, 2016); Cohen v. Dynamic Recovery Solutions, 2016 WL 4035433 (D.N.J. July 26, 2016); Gonzalez v. Law Office of Allen Robert King, 195 F. Supp. 3d 1118 (C.D. Cal. 2016); McNamee v. Nationstar Mortg., L.L.C., 2015 WL 5174776 (S.D. Ohio Sept. 4, 2015).

31 Alvarado Martinez v. Eltman Law, P.C., 444 F. Supp. 3d 748, 755 (N.D. Tex. 2020); Manuel v. Merchants & Prof'l Credit Bur., Inc., 402 F. Supp. 3d 361 (W.D. Tex. Aug. 5, 2019), *aff'd*, 956 F.3d 822 (5th Cir. 2020); Al v. Van Ru Credit Corp., 2019 WL 189248 (E.D. Wis. Jan. 14, 2019); Marshall v. CBE Grp., Inc., 2018 WL 1567852 (D. Nev. Mar. 30, 2018); Maxwell v. St. Francis Health Ctr., 2017 WL 4037732 (D. Kan. Sept. 13, 2017); Chisholm v. AFNI, Inc., 2016 WL 6901358 (D.N.J. Nov. 22, 2016); Jones v. Seas & Assoc., 2016 WL 4146192 (W.D. Tenn. Aug. 3, 2016); Evans v. Portfolio Recovery Assoc., 2016 WL 4059645 (D.N.J. July 27, 2016); Duran v. Midland Credit Mgmt., Inc., 2016 WL 3661538 (S.D.N.Y. June 30, 2016); Scott v. Portfolio Recovery Assoc., 139 F. Supp. 3d 956 (S.D. Iowa 2015); Schumacher v. Credit Prot. Ass'n, 2015 WL 5786139 (S.D. Ind. Sept. 30, 2015); Smith v. Greystone Alliance L.L.C., 2015 WL 5232812 (N.D. Ohio Sept. 8, 2015).

32 *See, e.g.*, Manuel v. Merchants & Prof'l Credit Bur., Inc., 402 F. Supp. 3d 361 (W.D. Tex. Aug. 5, 2019), *aff'd*, 956 F.3d 822 (5th Cir. 2020); Maxwell v. St. Francis Health Ctr., 2017 WL 4037732 (D. Kan. Sept. 13, 2017); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017); Cohen v. Dynamic Recovery Solutions, 2016 WL 4035433 (D.N.J. July 26, 2016).

33 Allen *ex rel.* Martin v. LaSalle Bank, 629 F.3d 364 (3d Cir. 2011); Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991 (7th Cir. 2003); Agostino v. Quest Diagnostics, Inc., 2011 WL 5410667 (D.N.J. Nov. 3, 2011) (collector can be liable under § 1692f(1) even where collector relied on creditor's statement of amount due); Beler v. Blatt, Hasenmiller, Leibsker, Moore, L.L.C., 2006 WL 1423118 (C.D. Ill. May 18, 2006). *See also* Young v. NPAS, Inc., 361 F. Supp. 3d 1171, 1188 (D. Utah 2019) (even if collector were not charged with knowledge that the accounts were subject to workers' compensation and thus not the responsibility of the consumer, it still violated § 1692f(1) "because the FDCPA is a strict liability statute").

34 Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128, 139 (2d Cir. 2017).

35 *See* Currier v. First Resolution Inv. Corp., 762 F.3d 529, 533 (6th Cir. 2014); McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010, 1019–1020 (7th Cir. 2014); LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1193–1194 (11th Cir. 2010); McMillan v. Collection Prof'ls Inc., 455

Some courts have held that FDCPA § 1692f applies to the debt collector's conduct addressed to the consumer's attorney.[36] Where there are no cases directly on point, the substantial body of decisions considering it under FDCPA § 1692e should be persuasive. As described in § 7.3.5, *supra*, the majority view is that FDCPA § 1692e applies to communications to a consumer's attorney. At least one court analyzing claims under FDCPA § 1692f applied a "competent attorney" standard, employed by some courts to analyze claims under FDCPA § 1692e,[37] rather than a least sophisticated consumer standard.[38]

Despite the absence of textual support in the language of the FDCPA, some courts have applied the concept of materiality to FDCPA § 1692f claims,[39] following precedent applying a materiality requirement to FDCPA § 1692e.[40]

In any FDCPA case—including those based on the FDCPA's restrictions on unfair or unconscionable collection methods—the consumer must be prepared to show that the matter presents a case or controversy as defined by Article III of the Constitution. This issue is discussed in detail in § 11.15, *infra*. The particular application of these standards to the restrictions in FDCPA § 1692f(1) on the collection of unauthorized amounts is discussed in § 11.15.5.2, *infra*; to the restrictions in FDCPA § 1692f(7) and (8) on sending mail to the debtor in a way that reveals the existence of the debt, in § 11.15.8, *infra*; and to the other provisions of FDCPA § 1692f in § 11.15.11, *infra*.

8.2 Conduct Prohibited Under FDCPA § 1692f General Standard

8.2.1 Unfair Collection Contacts

8.2.1.1 Unauthorized Taking of the Consumer's Money or Property

It is unfair to take money out of the consumer's bank account without authorization, such as through an unauthorized electronic funds transfer, a remotely created check (check produced by the collector without the consumer's signature), or a remotely created payment order.[41] For a discussion of various unauthorized transfers from a consumer's bank account and what suffices to be authorization, see § 14.7.2, *infra*.

On the other hand, if the consumer's payment bounces, the collector may be entitled, with certain limits, to re-present the check, either electronically or as a paper check.[42]

Mailing a homeowner a notice of sale when the foreclosure had been dismissed, causing them to give away their furnishings and move, could violate FDCPA § 1692f, because the home was taken without any right to take it.[43]

8.2.1.2 Aggressive or Overreaching Collection Conduct

In addition to potentially violating FDCPA § 1692d's prohibitions on conduct that can harass, oppress, or abuse a person, aggressive collection tactics can also be unfair or unconscionable under FDCPA § 1692f. This includes intimidating threats,[44] repeated calls after the consumer had asked that the debt collector stop,[45] or repeated

F.3d 754 (7th Cir. 2006); Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004); Wade v. Reg'l Credit Ass'n, 87 F.3d 1098, 1100 (9th Cir. 1996); Manuel v. Merchants & Prof'l Credit Bur., Inc., 402 F. Supp. 3d 361 (W.D. Tex. Aug. 5, 2019), *aff'd*, 956 F.3d 822 (5th Cir. 2020); Cordova v. Jenkins, 2018 WL 5112907 (D.N.M. Oct. 19, 2018) (applying standard, but finding amount of fees buyer's attorney falsely requested, namely $62.50, was de minimis and, therefore, not material); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987).

36 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 697 (8th Cir. 2017); Powers v. Credit Mgmt. Services, Inc., 776 F.3d 567, 574 (8th Cir. 2015); Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1302 (11th Cir. 2015); Allen ex rel. Martin v. LaSalle Bank, 629 F.3d 364 (3d Cir. 2011); Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 773 (7th Cir. 2007).

37 *See* § 7.3.5, *supra*.

38 Powers v. Credit Mgmt. Services, Inc., 776 F.3d 567, 574 (8th Cir. 2015).

39 Powers v. Credit Mgmt. Services, Inc., 776 F.3d 567 (8th Cir. 2015); Lembach v. Bierman, 528 Fed. Appx. 297 (4th Cir. 2013); Tavernaro v. Pioneer Credit Recovery, Inc., 2020 WL 5747920 (D. Kan. Sept. 25, 2020); Poole v. MED-1 Solutions, L.L.C., 2020 WL 1317450, at *6 (S.D. Ind. Mar. 20, 2020) (finding that use of "Attorney at Law" on envelope's return address naming debt collector's in-house counsel did not influence consumer's decision to pay the debt and was not material); Cordova v. Jenkins, 2018 WL 5112907 (D.N.M. Oct. 19, 2018) (finding amount of fees buyer's attorney falsely requested, $62.50, was de minimis and, therefore, not material); Cheslek v. Asset Acceptance Capital Corp., 2017 WL 7370983 (W.D. Mich. Dec. 22, 2017) (consumer failed to allege any conduct that would be materially unfair or unconscionable to the least sophisticated consumer).

40 *See* § 7.3.9, *supra*.

41 Villanueva v. Account Discovery Sys., L.L.C., 77 F. Supp. 3d 1058 (D. Colo. 2015); Muzuco v. ReSubmitIt, L.L.C., 297 F.R.D. 504 (S.D. Fla. 2013); Lovelace v. Stephens & Michaels Assoc., Inc., 2007 WL 3333019 (E.D. Mich. Nov. 9, 2007).

42 *See* § 14.7.5, *infra*.

43 *See* Friello v. Bank of N.Y., 2012 WL 4892856 (N.D. Ill. Oct. 15, 2012). *See also* Richardson v. Check Sys. Recovery, L.L.C., 2012 WL 6049703 (N.D. Ind. Dec. 5, 2012) (falsely informing plaintiff that defendant had sent process server to her house, even though no lawsuit had been filed).

44 *See also* Egbarin v. Lewis, Lewis & Ferraro, L.L.C., 2006 WL 236846 (D. Conn. Jan. 31, 2006) (threat to initiate bar grievance); Hosseinzadeh v. M.R.S. Assoc., Inc., 387 F. Supp. 2d 1104 (C.D. Cal. Mar. 3, 2005) (content of six telephone messages from debt collector). *But cf.* Caulfield v. Am. Account & Advisors, Inc., 2013 WL 1953314 (D. Minn. May 10, 2013) (screaming at consumer was not unfair); Wilson v. Merchants & Med. Credit Corp., Inc., 2010 WL 3488617 (E.D. Mich. Sept. 2, 2010) (statement that "we know where you work, we know where you live" did not violate § 1692f); Catherman v. Credit Bur., 634 F. Supp. 693 (E.D. Pa. 1986) (threatening consumer's ability to obtain credit); Harris v. BWS Credit Services, Inc., 1980 U.S. Dist. LEXIS 17840 (D. Neb. Dec. 4, 1980) (threat to "get" consumer).

45 *See* Toth v. Stephens & Michaels Assoc., Inc., 2014 WL 5687418 (D. Nev. Nov. 4, 2014). *See also* Williams v. Nat'l Credit Adjusters, L.L.C., 2015 WL 7180499 (E.D. Mo. Nov. 16, 2015) (claim of reprehensible phone calls would proceed to jury under §§ 1692d, 1692e, and 1692f); Hamburger v. Northland Grp., Inc., 2015 WL 631066 (M.D. Pa. Feb. 12, 2015) (denying summary judgment for collection agency on

calls after the debt had been paid[46] or discharged in bankruptcy.[47]

Accusing consumers of dishonesty in a dunning form letter just because a check was dishonored states a claim for unfair debt collection.[48] Similarly, demeaning the consumer by falsely stating that the consumer had taken out a credit card intending not to pay for their charges can also be unfair.[49]

False threats to sue can violate FDCPA § 1692e, but can also violate FDCPA § 1692f.[50] So can a letter referencing an arrest warrant.[51] Field visits to a consumer's home can be seen as unfair threats of foreclosure and intended to obtain payment on a mortgage.[52] A "payroll deduction request" impliedly threatened that the employer would become involved and a garnishment would occur, when the debt collector had no legal right to do either, was held to violate FDCPA § 1692f.[53]

On the other hand, while other FDCPA provisions may be implicated, not every hard-nosed collection tactic is unfair. Courts have found no FDCPA § 1692f(1) violation where the collector's frequent call attempts were unanswered by the consumer,[54] where the collector talked over the consumer and was condescending,[55] or where the collector refused to accept partial payments.[56] Bringing an account stated claim instead of a breach of contract claim in a collection lawsuit is not so aggressive as to be unfair.[57] Courts have also not found it unfair for a collector to fail to disclose the possible tax consequences to the consumer of the collector providing a certain amount of debt forgiveness.[58] Confusing or misleading information may be deceptive under FDCPA § 1692e, but may not always be unfair under FDCPA § 1692f.[59] The Seventh Circuit found it not unfair to report to a consumer reporting agency separately each of multiple medical debts owed to the same provider, instead of aggregating the different debts, when furnishing information to the consumer reporting agency.[60]

8.2.1.3 Hiding Key Information from the Consumer

"It is unfair to consumers under the FDCPA to hide the true character of the debt, thereby impairing their ability to knowledgeably assess the validity of the debt."[61]

Before Regulation F (effective November 30, 2021) required itemization of the debt,[62] some courts held that it was unfair to fail to itemize fees or costs as part of the total amount being sought because consumers might not realize the collector was seeking such additional charges and in what amount.[63]

While hiding the collector's identity or that of the account owner can be a FDCPA § 1692e violation, including the requirement that the collector identify itself as a collector, it can also be a FDCPA § 1692f violation.[64] This can include using the name of a fake caller on the caller ID[65] or showing

§ 1692f claim for failing to update its records to stop collection calls to plaintiffs, parents of debtor, once it had been advised that debtor did not reside with them and had been requested to stop calling). *But see* Johnson v. Portfolio Recovery Assoc., 2013 WL 10156241 (C.D. Cal. June 24, 2013) (not § 1692f violation to make frequent calls).

46 *See* Schore v. Renton Collections, Inc., 2018 WL 2018417 (W.D. Wash. May 1, 2018).

47 *See* Bruner v. AllianceOne Receivables Mgmt., Inc., 2017 WL 770993 (N.D. Ill. Feb. 28, 2017). *See also* Parente v. Fay Servicing, L.L.C., 2020 WL 1182714, at *5 (N.D. Ill. Mar. 12, 2020); Olivares v. Rausch, Sturm, Israel Emerson, & Hornik, L.L.C., 2013 WL 12109036 (W.D. Tex. Sept. 11, 2013). *But see* Buckley v. Afni, Inc., 133 F. Supp. 3d 1140 (S.D. Ind. 2016) (no § 1692f claim, but § 1692e claim allowed for collection on discharged debt).

48 McMillan v. Collection Prof'ls Inc., 455 F.3d 754 (7th Cir. 2006).

49 *See* Washington v. Roosen, Varchetti & Oliver, P.P.L.C., 894 F. Supp. 2d 1015 (W.D. Mich. 2012). Neill v. Bullseye Collection Agency, Inc., 2009 WL 1386155, at *2 (D. Minn. May 14, 2009) (allegations that printing at top of duns the acronym "WWJD," for phrase "what would Jesus do?," "has the effect of invoking shame").

50 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1199–1201 (11th Cir. 2010). *See also* Soyinka v. Franklin Collection Serv., Inc., 472 F. Supp. 3d 463 (N.D. Ill. 2020).

51 Powers v. Wilhite, 2012 WL 5413820 (S.D. Ind. Nov. 6, 2012).

52 *See* Fielding v. FCC Fin., L.L.C., 2015 WL 12532741 (M.D. Tenn. Jan. 22, 2015).

53 *See* Brown v. Collection Services of Athens, Inc., 2014 WL 7359560 (M.D. Ga. Dec. 23, 2014).

54 Carman v. CBE Grp., Inc., 782 F. Supp. 2d 1223 (D. Kan. 2011) (finding no evidence of unfair or unconscionable conduct as there was no evidence that collector had made intentional hang-up calls; instead, record revealed that plaintiff had intentionally refused to answer any calls where debt collector made repeated calls and chose not to leave messages).

55 Taufen v. Messerli & Kramer, P.A., 2014 WL 668019 (D. Minn. Feb. 19, 2014).

56 Medrano v. Great Mercantile Agency, Inc., 2018 WL 3105026 (E.D. Cal. June 20, 2018); Beeks v. ALS Lien Services, 2014 WL 7785745 (C.D. Cal. Feb. 18, 2014).

57 Drennan v. First Resolution Inv. Corp., 2010 WL 11619554 (E.D. Tex. Mar. 1, 2010), *aff'd*, 389 Fed. Appx. 352 (Aug. 4, 2010).

58 Moses v. LTD Fin. Services I, Inc., 275 F. Supp. 3d 893 (N.D. Ill. 2017); Daugherty v. Convergent Outsourcing, Inc., 2015 WL 3823654 (S.D. Tex. June 18, 2015).

59 Polak v. Kirschenbaum & Phillips, P.C., 2018 WL 1189337 (E.D.N.Y. Feb. 16, 2018), *adopted*, 2018 WL 1187400 (E.D.N.Y. Mar. 6, 2018) (where consumer stated §§ 1692e and g claims, where collection letter stated that interest was $ 0.00 and "may vary from day to day due to interest or other charges," there was § 1692e violation but not § 1692f violation). *See also* Winehouse v. GC Services L.P., 2017 WL 2455075 (E.D.N.Y. June 6, 2017). *But see* Fiddick v. Bay Area Credit Serv., L.L.C., 2019 WL 1858824 (S.D. Tex. Apr. 25, 2019) (declining to dismiss § 1692f claim where collection letters contained misleading and confusing information about nature and status of debts).

60 Zablocki v. Merchants Credit Guide Co., 968 F.3d 620 (7th Cir. 2020).

61 Fields v. Wilber Law Firm, P.C., 383 F.3d 562, 566 (7th Cir. 2004).

62 Reg. F § 1006.34(c)(2)(viii), discussed at § 9.4, *infra*.

63 Fields v. Wilber Law Firm, P.C., 383 F.3d 562, 566 (7th Cir. 2004); Park v. McCabe Trotter & Beverly, P.C., 2018 WL 3912356 (D.S.C. Aug. 14, 2018). *See also* Bender v. Elmore & Throop, P.C., ___ F. Supp. 3d ___, 2021 WL 1215057 (D. Md. Mar. 30, 2021) (no violation where, unlike in *Fields*, account ledger provided to consumers clearly and explicitly itemized costs, attorney fees, interest, and late fees).

64 *See also* § 14.3.3, *infra* (discussing caller ID and spoofing).

65 Knoll v. Allied Interstate, Inc., 502 F. Supp. 2d 943 (D. Minn. 2007); Knoll v. Intellirisk Mgmt., 2006 WL 2974190 (D. Minn Oct. 16, 2006). *But see* Horowitz v. GC Services L.P., 2015 WL 1959377 (S.D. Cal. Apr. 28, 2015) (using spoofing technology to make long distance calls appear local did not violate FDCPA); Scheffler v. Integrity Fin. Partners, Inc., 2013 WL 9768539 (D. Minn. Oct. 28, 2013) (same).

a local area code when the call is out-of-state.[66] But a court found that blocking the caller ID so that the caller was not identified was not unfair.[67]

Letters hiding the collector's identity can also be actionable under FDCPA § 1692f, such as letters signed by an outside attorney or other collector who had no knowledge of the debt.[68] Collectors also have to identify the creditor on whose behalf they are collecting, and failure to do so can be unfair.[69]

But a court found it not unfair to identify that the contact is from a debt collector without disclosing that the collector was employed at a law firm.[70] Courts may also find that a collector that properly identifies the collection agency may not be engaging in an unfair practice by not using the individual employee's real name.[71]

8.2.1.4 Evasion or Obfuscation of Other FDCPA Provisions

It can be unfair to engage in conduct obfuscating or evading other FDCPA provisions. For example, since a collector cannot communicate with a consumer represented by an attorney,[72] when the consumer informs the collector that the consumer is represented by an attorney, it can be unfair to try to convince the consumer not to hire the attorney, but instead pay the debt.[73]

It can also be unfair to send a debt verification notice in an envelope that looks like junk mail that would be discarded without being read.[74] The FDCPA provides rights concerning a consumer's ability to dispute a debt, so that a collector's informing the consumer that the debt could not be disputed can be unfair.[75] Similarly, failure to provide FDCPA-required disclosures can be unfair.[76]

8.2.1.5 State Law Violations

A collector violating state law is often viewed not as a *per se* FDCPA § 1692f violation,[77] but instead the violation may be a factor in determining whether, looking at the conduct as a whole, the collector's actions are unfair.[78] These issues are most frequently raised where the collector is not properly licensed, registered, or bonded—that is, whether the failure to be licensed, registered, or bonded is a FDCPA § 1692f violation.[79]

Courts find this to be a factor in considering whether the collector's conduct is unfair, such as where the collector threatens to engage or actually engages in conduct that is impermissible for an unlicensed collector.[80] On the other hand, merely alleging that the collector is unlicensed may not be enough to show a FDCPA § 1692f violation without showing how that failure makes the collection conduct unfair.[81]

66 *See* Charles v. Convergent Outsourcing, Inc., 2015 WL 13373812 (S.D. Fla. Mar. 26, 2015) (issue for the jury). *But see* Mendoza v. Diversified Consultants, Inc., 2019 WL 2524117 (E.D. Pa. June 18, 2019); Bermudez v. Diversified Consultants, Inc., 2019 WL 415569 (E.D. Pa. Feb. 1, 2019).

67 *See* Glover v. Client Services, Inc., 2007 WL 2902209 (W.D. Mich. Oct. 2, 2007).

68 *See* Masuda v. Thomas Richards & Co., 759 F. Supp. 1456 (C.D. Cal. 1991). *See also* Vela v. John B. Sage, P.A., 2007 WL 9701044 (S.D. Fla. Feb. 26, 2007) (denying dismissal where consumer alleged that collection agency did not engage in credit reporting for debts due to creditor medical center, at time it sent collection letter which mentioned possible credit reporting; unfair collection practice stated § 1692f claim based on general prohibition of "unfair means").

69 *See* Schnorrbusch v. Commercial Trade, Inc., 2018 WL 6436418 (N.D. Tex. Dec. 7, 2018).

70 *See* Fondacaro v. Solomon & Solomon, P.C., 2018 WL 4054075 (N.D.N.Y. Aug. 24, 2018).

71 Velazquez v. Fair Collections & Outsourcing, Inc., 2013 WL 4659564 (N.D. Ill. Aug. 30, 2013). *See also* Reg. F § 1006.18(f) (permitting the use of assumed names by individual employees in certain circumstances), *discussed at* § 7.2.14, *supra*.

72 15 U.S.C. § 1692c(a)(2). *See also* § 5.5, *supra*.

73 *See* Istre v. Miramed Revenue Grp., L.L.C., 2014 WL 4988201 (E.D. Mo. Oct. 7, 2014).

74 *See* Voris v. Resurgent Capital Services, L.P., 494 F. Supp. 2d 1156 (S.D. Cal. 2007).

75 *See* Grant-Fletcher v. Brachfeld Law Grp., P.C., 2012 WL 2523094 (D. Md. June 28, 2012).

76 Mallory v. McCarthy & Holthus, L.L.P., 2015 WL 2185413 (D. Nev. May 11, 2015) (consumers' allegation that law firm, in foreclosure, engaged in unfair or unconscionable means when it sent letters to collect and did not include required notices under § 1692g or § 1692e stated plausible claim for relief).

77 Gallego v. Northland Grp. Inc., 814 F.3d 123 (2d Cir. 2016); Currier v. First Resolution Inv. Corp., 762 F.3d 529, 536 (6th Cir. 2014); LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1192 (11th Cir. 2010); Beler v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 480 F.3d 470, 474 (7th Cir. 2007); Carlson v. First Revenue Assurance, 359 F.3d 1015, 1018 (8th Cir. 2004); Wade v. Reg'l Credit Ass'n, 87 F.3d 1098, 1099–1101 (9th Cir. 1996); Eul v. Transworld Sys., 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017) (dismissing § 1692f claim asserted by student loan cosigners who were sued without first being provided state's cosigner notice); Johnson v. Phillips & Cohen Assoc., Ltd., 2006 WL 2355340 (N.D. Cal. Aug. 15, 2006).

78 Currier v. First Resolution Inv. Corp., 762 F.3d 529, 536 (6th Cir. 2014); LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1192 (11th Cir. 2010); Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358, 366 (D. Md. 2010) (debt collector's failure to register under state debt collection law "is an appropriate consideration in deciding whether its means of collection were unfair or unconscionable").

79 Section 1692e claims related to unlicensed debt collection are discussed at § 7.4.13, *supra*.

80 *See* Ademiluyi v. PennyMac Mortg. Inv. Tr. Holdings I, L.L.C., 929 F. Supp. 2d 502 (D. Md. 2013); Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358, 366 (D. Md. 2010) (debt collector's failure to register under state debt collection law "is an appropriate consideration in deciding whether its means of collection were unfair or unconscionable"); St. Denis v. New Horizon Credit, Inc., 2006 WL 1965779 (D. Conn. July 12, 2006) (unfair to engage in unlicensed debt collection).

81 Velez v. Healthcare Revenue Recovery Grp., L.L.C., 2017 WL 1476144 (M.D.N.C. Apr. 24, 2017) (one letter, verifying debt, and requesting payment by entity that had not registered was not false representation of right to sue); Kuhn v. Asset Acceptance Capital Corp., 2015 WL 1505648 (S.D. Ind. Mar. 31, 2015) (FDCPA does not incorporate state licensing requirements); Cox v. Sherman Capital L.L.C., 2014 WL 1328147 (S.D. Ind. Mar. 31, 2014); Skinner v. Asset Acceptance, L.L.C., 876 F. Supp. 2d 473 (D.N.J. 2012) (attempt to collect debt without filing state required bond was not shown to be unfair); McDowell

8.2.2 Collecting Time-Barred Debts

FDCPA § 1692f case law on collection of time-barred debts is combined with the FDCPA § 1692e (deception) discussion on the same topic. They are treated together because case law relating to time-barred debts frequently finds violation of both sections without distinguishing the analysis as to the two. Section 7.4.9, *supra*, contains a general discussion of time-barred debts and a brief summary of some of the complexities in analyzing whether there is a violation. The section also considers FDCPA §§ 1692e and 1692f violations for:

- Time-barred collection lawsuits;[82]
- Threats to sue on time-barred debt;[83]
- Time-barred proofs of claim submitted in a bankruptcy;[84] and
- Collection contacts involving time-barred debt.[85]

8.2.3 Unfair Practices in Debt Collection Suits Against the Consumer

8.2.3.1 Service of Process

Sewer service is the practice of not properly serving a summons on the consumer and then falsifying an affidavit that attests to the method of service. Sewer service and other false affidavits as to the service or process can be an unfair or unconscionable practice in violation of FDCPA § 1692f.[86]

Similarly where a collection law firm is on notice that its process server engaged in a widespread pattern of sewer service, it can be unfair for the law firm to continue to prosecute cases based on such service of process without investigating whether the consumer defendants were in fact properly served.[87] Even when properly served, a summons can be unfair where the collector should know that the person served is the wrong debtor.[88] It can also be unfair to include with the service of process a notice from the collection law firm that the lawsuit will go away if the consumer makes monthly payments, but then the law firm obtains a default judgment.[89]

8.2.3.2 Suing Where There Is No Right to Sue

It can violate FDCPA § 1692f to sue the consumer where there clearly is no right to do so. This includes where the collector sues the consumer on behalf of the creditor, but without the creditor's authorization,[90] or sues as the debt owner but does not own the debt.[91] It can also be unfair for a collector to sue where the state does not authorize it to use the state's

v. Vengroff, Williams, & Assoc., Inc., 2006 WL 1720435 (E.D.N.Y. June 21, 2006).

82 *See* § 7.4.9.3, *supra*.

83 *See* § 7.4.9.4, *supra*.

84 *See* § 7.4.9.5, *supra*.

85 *See* § 7.4.9.6, *supra*.

86 *See* Scott v. Greenberg, 2017 WL 1214441 (E.D.N.Y. Mar. 31, 2017); Sykes v. Mel Harris & Assoc., 757 F. Supp. 2d 413 (S.D.N.Y. 2010), *aff'd*, 780 F.3d 70 (2d Cir. 2015); Holmes v. Elec. Document Processing, Inc., 966 F. Supp. 2d 925 (N.D. Cal. 2013). *See also* Mancilla v. Mid Valley Collection Bur., 2019 WL 8758894 (C.D. Cal. Dec. 13, 2019). *But see* Armstead v. Feldman, 2020 WL 4753837, at *8 (D. Md. Aug. 17, 2020) (dismissing § 1692f claims where alleged misrepresentations made in state court filings regarding service of process involved "no overt threat or act of harassment associated with the filing of the Returns of Service" and instead were subject of legitimate legal dispute before state court where consumers sought relief "to remedy the improper service"); Schroeder v. Meyer, 2017 WL 1238016 (N.D. Ind. Mar. 31, 2017) (where consumer was aware of improper service, matter should be dealt with by state court); Briscoe v. Cohen, McNeile & Pappas, P.C., 2014 WL 4954600 (D. Kan. Oct. 1, 2014) (no § 1692f violation where sheriff being directed to make service at wrong address was innocent mistake and not part of fraudulent scheme); Keylard v. Mueller Anderson, P.C., 2013 WL 4501446 (N.D. Ill. Aug. 22, 2013) (following Seventh Circuit precedent concerning improper court filings, improper service of process is not § 1692f violation).

87 *See* Coble v. Cohen & Slamowitz, L.L.P., 824 F. Supp. 2d 568 (S.D.N.Y. 2011). *But see* Rodrigo v. Barclays Bank, 2017 WL 1155373 (S.D. Cal. Mar. 27, 2017) (law firm had no reason to suspect service of process was improper); Mirshafiei v. Legal Recovery Law Offices, Inc., 2016 WL 11464745 (C.D. Cal. Oct. 5, 2016) (where defendant only later learned of improper service of process and did not immediately set aside default judgment, such conduct did not rise to level of "unfair or unconscionable" conduct even though §§ 1692d and 1692e were violated); Mandelas v. Gordon, 785 F. Supp. 2d 951 (W.D. Wash. 2011) (collection attorney did not violate § 1692f by executing on default judgment entered in underlying state collection case, since attorney relied on process server's facially valid return of service and consumer did not attempt to set aside default even once he learned of its entry).

88 Johnson v. Bullhead Inv., L.L.C., 2010 WL 118274 (M.D.N.C. Jan. 11, 2010).

89 *In re* Humes, 496 B.R. 557 (Bankr. E.D. Ark. 2013).

90 *See* Eul v. Transworld Sys., 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017). *See also* Mirshafiei v. Legal Recovery Law Offices, Inc., 2016 WL 11464745 (C.D. Cal. Oct. 5, 2016) (where collection lawyer lacked authority to continue collection action on behalf of client where client no longer in business); Young v. Unifund CCR Partners, 2014 WL 4698646 (N.D. Ill. Sept. 22, 2014) (collector failed to obtain proper assignment from its client allowing it under state law to pursue the collection action on behalf of its client).

91 Ferrell v. Midland Funding, L.L.C., 2015 WL 2450615 (N.D. Ala. May 22, 2015); McGinnis v. Dodeka, L.L.C., 2010 WL 1856450 (E.D. Tex. May 7, 2010) (claim stated where unclear who was current debt owner); Kuhn v. Asset Acceptance Capital Corp., 2015 WL 1505648 (S.D. Ind. Mar. 31, 2015). *See also* Williams v. Partners for Payment Relief Inc., 2020 WL 973753 (N.D. Ohio Feb. 28, 2020) (section 1692f claim survived where complaint alleged that law firm lacked standing to foreclose, because it could not show it was owner or holder of mortgage). *Cf.* Hoffman v. Transworld Sys. Inc., 2018 WL 5734641, at *8 (W.D. Wash. Nov. 2, 2018) (denying motion to dismiss where defendants filed affidavits purporting to establish that they were entitled to collect on the debts, although the affidavits lacked the necessary documentation and defendants knew that it was unavailable), *aff'd in part, rev'd in part*, 806 Fed. Appx. 549, 552 (9th Cir. 2020). *But cf.* Smith v. Stewart, Zlimen & Jungers, Ltd., 990 F.3d 640 (8th Cir. 2021) (affirming dismissal of § 1692f(1) claim where consumers did not allege that defendant sought to collect debts not owed but, rather, alleged that it lacked evidence demonstrating that its client had standing to sue on debts, since even though defendant failed to establish standing in collection suit, it was still entitled to bring good faith claim to collect alleged debts).

courts, such as where the collector is not licensed or registered in the state.[92]

It is also unfair for a collector to sue a consumer knowing the consumer does not owe the debt,[93] to bring a second collection lawsuit after the first was dismissed with prejudice,[94] or to sue an individual who has no connection to the debt being sued upon.[95] Where there are preconditions to a suit on a debt, such as a right to cure or notice, it can be unfair to proceed without such preconditions.[96] There can also be a FDCPA § 1692f violation for a collector to bring and keep a lawsuit in a venue prohibited by section 1692*i*.[97]

8.2.3.3 The Conduct of the Litigation

As a general rule, it is prudent to allege that a collector's litigation conduct is unfair or unconscionable when directed to the consumer, and not just directed to the court. A Seventh Circuit decision suggests that FDCPA § 1692e does not apply where deception is directed at the court.[98] While this ruling might be limited just to the Seventh Circuit, it should not be difficult to allege that unfair litigation conduct injures the consumer and not just the court—even the Seventh Circuit finds litigation conduct directed to the consumer to be actionable.[99]

A collection attorney may not be liable under FDCPA § 1692f if that attorney attests to a complaint where the attestation is on information and belief, instead of on personal knowledge.[100] But it can be an unfair practice to file a complaint alleging personal knowledge of the facts stated in the complaint where there is no such knowledge.[101]

The same is the case with affidavits attached to the complaint or later court filings. It can be unfair for an attorney to file affidavits where the affiant claims personal knowledge where the attorney knew or should have known the affiant had no such knowledge.[102] Also unfair is a collector engaging in a pattern of attaching to its complaints affidavits with false information.[103] Attachments to a complaint or other court documents can be unfair where they appear to be original business records, but were in fact created for purposes of the litigation.[104]

A collector's discovery practices can be unfair. The Ninth Circuit found that it was unfair or unconscionable to send a *pro se* consumer defendant a request for admissions that asked him to admit facts and liability that the consumer had explicitly denied in his state court answer, and where the request failed to inform the consumer that the requests would be deemed admitted if not objected to within thirty days.[105]

Not every improper step in state court litigation is a FDCPA § 1692f violation. Courts have found that, at least where the consumer did not allege additional facts, it was not unfair merely to fail to attach required documents to the complaint,[106] to sue on "an account" claim which might not apply to the facts,[107] or to engage in conduct inconsistent with state ethical requirements of attorneys.[108]

A number of courts have considered FDCPA § 1692f challenges where complaints in collection lawsuits include the consumer's Social Security number or other sensitive personal information. Where such inclusion is inadvertent, it is

92 Lilly v. RAB Performance Recoveries, L.L.C., 2013 WL 4010257 (E.D. Tenn. Aug. 5, 2013) (issue of fact whether collector violated § 1692f by failing to obtain a state license prior to bringing suit); Fiorenzano v. LVNV Funding, L.L.C., 2012 WL 2562415 (D.R.I. June 29, 2012) (section 1692 claim stated by filing collection lawsuit while unregistered). *But see* Fick v. Am. Acceptance Co., L.L.C., 2012 WL 1074288 (N.D. Ind. Mar. 28, 2012) (filing of state court collection case without being licensed under state law not § 1692f violation). *See also* § 8.2.1.5, *supra*.

93 Ferrell v. Midland Funding, L.L.C., 2015 WL 2450615 (N.D. Ala. May 22, 2015).

94 *See* Curto v. Palisades Collection, L.L.C., 2011 WL 5196708 (W.D.N.Y. Oct. 31, 2011). *But cf.* Wisniewski v. Asset Acceptance Capital Corp., 2009 WL 212155 (N.D. Ill. Jan. 29, 2009) (no claim stated for filing second debt collection suit as first suit was dismissed without prejudice).

95 Heathman v. Portfolio Recovery Assoc., 2013 WL 755674 (S.D. Cal. Feb. 27, 2013) (sued wrong person).

96 *See* Johnson v. LVNV Funding, 2016 WL 676401 (E.D. Wis. Feb. 18, 2016) (reasonable jury could rule for either party on facts).

97 *See* Boldon v. Riverwalk Holdings, Ltd., 2016 WL 900639 (D. Minn. Mar. 9, 2016). *But see* Chowdhury v. Velocity Invs., L.L.C., 2014 WL 12539348 (E.D.N.Y. Apr. 15, 2014) (innocent mistake to bring in wrong county).

98 O'Rourke v. Palisades Acquisition XVI, L.L.C., 635 F.3d 938 (7th Cir. 2011). *See* § 7.4.10.2, *supra*.

99 *Id.*

100 Fisher v. Asset Acceptance, L.L.C., 2005 WL 1799275 (N.D. Ill. July 26, 2005).

101 Ison v. Javitch, Block & Rathbone, 2007 WL 2769674 (S.D. Ohio Sept. 18, 2007) (falsely claimed affiant had "personal knowledge" of facts); Williams v. Javitch, Block & Rathbone, L.L.P., 480 F. Supp. 2d 1016 (S.D. Ohio 2007) (allegation that collection attorneys knew that accounts specialist affiant who attested to facts in complaint on personal knowledge did not have personal knowledge). *But see* Janson v. Katharyn B. Davis, L.L.C., 806 F.3d 435 (8th Cir. 2015) (no § 1692f claim where no allegation that swearing on personal knowledge was material to case).

102 CFPB v. Frederick J. Hanna & Assoc., 114 F. Supp. 3d 1342 (N.D. Ga. 2015). *See also* Toohey v. Portfolio Recovery Assoc., 2016 WL 4473016 (S.D.N.Y. Aug. 22, 2016) (affidavit contained false representation to obtain default judgment); Williams v. Javitch, Block & Rathbone, L.L.P., 480 F. Supp. 2d 1016, 1022 (S.D. Ohio 2007). *Compare* Myers v. Asset Acceptance L.L.C., 750 F. Supp. 2d 864 (S.D. Ohio 2010) (no violation where affiant swore information was accurate and that he was competent to express opinion on its correctness, but did not state based on any personal knowledge), *aff'd*, 472 Fed. Appx. 395 (6th Cir. 2012).

103 Robinson v. Sherman Fin. Grp., L.L.C., 2013 WL 1249567 (E.D. Tenn. Mar. 27, 2013).

104 Hartman v. Great Seneca Fin. Corp 569 F.3d 606 (6th Cir. 2009) (faked billing statements). *See also* Rice v. Javitch Block & Rathbone, L.L.P., 2011 WL 3861701 (S.D. Ohio Aug. 31, 2011).

105 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011).

106 Delisi v. Midland Funding, L.L.C., 2015 WL 4393901 (E.D. Mo. July 16, 2015); Glick v. Cavalry SPV I, L.L.C., 2015 WL 4393911 (E.D. Mo. July 16, 2015).

107 Drennan v. First Resolution Inv. Corp., 389 Fed. Appx. 352 (5th Cir. 2010) (suit on account that may not apply to credit card collections).

108 Sayyed v. Wolpoff & Abramson, L.L.P., 733 F. Supp. 2d 635 (D. Md. 2010) (ethical misconduct not unfair); Young v. Meyer & Njus, P.A., 1997 WL 452685 (N.D. Ill. Aug. 6, 1997) (attorney who may be witness in case to continue representation, even though prohibited by state bar ethical rules).

generally found not to be a violation,[109] but some courts do find the practice can be unfair.[110]

8.2.3.4 Litigation Mills As an Unfair Practice

Consumer collection lawsuits today are filed *en masse*, often with little intent to litigate the case on the merits, but instead to obtain a default judgment, which happens approximately ninety percent of the time or more. This leads to lawsuits filed with little evidence of the debt, its terms, amount, or ownership. Whether this may involve a FDCPA § 1692e deception violation is examined at § 7.4.10, *supra*.

In the context of FDCPA § 1692f unfairness, courts generally find it is not a violation where the collector does not have that evidence when filing the complaint, if the collector is capable of obtaining the evidence when the consumer contests the case.[111] Similarly, a court has found it not unfair if the attorney has not made an independent determination that the amount is owed,[112] or voluntarily dismisses a state debt collection suit when the attorney determines there is a lack of evidence.[113] Nor is it unfair where a motivation for filing a lawsuit is to obtain a default judgment.[114] A court has also found it not unfair, without more, that a collection suit is dismissed for lack of evidence.[115]

On the other hand, it can be unfair if the consumer can show that the collector never intended to investigate or verify the debt was owed when the consumer challenged the complaint.[116] A court has found it could be unfair that collection attorneys operated a litigation mill that used, in their collection cases, affidavits executed by their debt-buyer clients who the attorneys knew or should have known had no personal knowledge of the attested material facts. The collection attorneys did not determine whether any underlying documentation for the debt was available, and they also failed to review the contracts governing the sale of accounts to determine whether those contracts disclaimed any warranties regarding the accuracy or validity of the debts.[117]

8.2.4 *Unfair Postjudgment Practices*

Where a judgment has been vacated[118] or the collector knows the judgment is invalid,[119] enforcement of postjudgment remedies is premature and an unfair practice in violation of FDCPA § 1692f. Where the parties reach an agreement for installment payments in lieu of the creditor exercising postjudgment remedies, it can be unfair for the collector to engage in those remedies while the consumer is making the installment payments.[120]

It can also violate FDCPA § 1692f to continue postjudgment enforcement where the judgment has been paid.[121]

Where a collector has been informed it is seeking to enforce a postjudgment remedy on the wrong person, it can be unfair to continue to pursue that remedy without new information as to the correctness of the consumer's identity.[122] It also can be

109 *See* Elyazidi v. SunTrust Bank, 780 F.3d 227 (4th Cir. 2015); Tschudin v. Brumbaugh & Quandahl, P.C., 2014 WL 7272668 (D. Neb. Dec. 18, 2014); Pittenger v. John Soliday Fin. Grp., L.L.C., 2010 WL 1856224 (N.D. Ohio May 10, 2010); Feltman v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 2008 WL 5211024 (N.D. Ill. Dec. 11, 2008).

110 Qureshi v. OPS 9, L.L.C., 2015 WL 6407883 (D.N.J. Oct. 21, 2015) (account information "plainly visible" on reverse side of check stated § 1692f claim).

111 *See* Bandy v. Midland Funding, L.L.C., 2013 WL 210730 (S.D. Ala. Jan. 18, 2013); Deere v. Javitch, Block & Rathbone L.L.P., 413 F. Supp. 2d 886, 890 (S.D. Ohio 2006. *See also* Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006) (denying a similar claim based on violation of § 1692e).

112 Taylor v. Heath W. Williams, L.L.C., 510 F. Supp. 2d 1206 (N.D. Ga. 2007).

113 Juarez v. Portfolio Recovery Assoc., 2015 WL 4764226 (N.D. Ill. Aug. 12, 2015) (debt buyer's silence in three weeks prior to dismissal of collection action on trial date was not unfair); Lena v. Cach, L.L.C., 2015 WL 4692443 (N.D. Ill. Aug. 6, 2015).

114 Anderson v. Cavalry SPV I, L.L.C., 2015 WL 5853804 (E.D. Mo. Oct. 6, 2015).

115 *See* Chenault v. Credit Corp. Solutions, Inc., 2017 WL 5971727 (E.D. Pa. Dec. 1, 2017).

116 Kuria v. Palisades Acquisition XVI, L.L.C., 752 F. Supp. 2d 1293, 1303 (N.D. Ga. 2010).

117 CFPB v. Frederick J. Hanna & Assoc., 114 F. Supp. 3d 1342 (N.D. Ga. 2015).

118 Currier v. First Resolution Inv. Corp.762 F.3d 529 (6th Cir. 2014) (lien on home where judgment had been set aside and was not final); Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961 (D. Minn. Feb. 1, 2019) (judgment that had been vacated). *See also* Polanco v. NCO Portfolio Mgmt., Inc., 132 F. Supp. 3d 567 (S.D.N.Y. 2015) (retaining garnished funds after judgment vacated).

119 *See* Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201, 207 (E.D.N.Y. 2019) (collection law firm pursued garnishment "knowing full well the invalidity of the [sewer service related] judgment"). *Cf.* Rivera v. Dove Inv. Corp., 2020 WL 6266054 (S.D. Fla. Oct. 23, 2020) (default judgment against consumer had been dismissed ten years prior due to want of prosecution); Leib v. Thompson, Dunlap & Heydinger, Ltd., 2019 WL 358904 (S.D. Ohio Jan. 29, 2019) (judgment was dormant under state law). *But see* Mandelas v. Gordon, 785 F. Supp. 2d 951 (W.D. Wash. 2011) (collection attorney did not violate § 1692f by executing on default judgment, relying on process server's facially valid return of service and consumer did not attempt to set aside default even once he learned of its entry).

120 *See* Weinstein v. Mandarich Law Group, L.L.P., 798 Fed. Appx. 88, 91 (9th Cir. 2019); Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994).

121 *See* Gonzalez v. Allied Collection Services, Inc., 2018 WL 715359 (D. Nev. Feb. 5, 2018), *aff'd*, 852 Fed. Appx. 264 (9th Cir. 2021); Gomez v. Resurgent Capital Services, L.P., 129 F. Supp. 3d 147 (S.D.N.Y. 2015). *See also* Laporte v. Midland Funding L.L.C., 2020 WL 2814184 (W.D. Va. May 29, 2020) (§ 1692f claim alleging that debt collector twice collected on debt that no longer existed was sufficiently separate from § 1692e misrepresentation claims to be actionable). *But see* Moss v. Barton, 2016 WL 1441146 (E.D. Mo. Apr. 8, 2016) (garnishing consumer's wages after she sent personal check in payment when their consent judgment required cashier's check).

122 *See* Estes v. Love, Beal & Nixon, P.C., 2015 WL 4508601 (N.D. Okla. July 24, 2015); Basich v. Patenaude & Felix, A.P.C., 2013 WL 1755484 (N.D. Cal. Apr. 24, 2013); Billsie v. Brooksbank, 525 F. Supp. 2d 1290 (D.N.M. 2007). *See also* Frias v. Patenaude & Felix, A.P.C., 2021 WL 1192421, at *3 (W.D. Wash. Mar. 30, 2021) (sustaining § 1692f claim in mistaken identity case, because "attempting to garnish a consumer's wages or bank account when the consumer does not owe the debt is an 'unfair or unconscionable means to . . . attempt to collect [a] debt'" under § 1692f). *But cf.* Wagner v. Chiari & Ilecki, L.L.P., 973 F.3d

unfair to garnish one family member for a judgment against another family member,[123] to garnish the judgment debtor's partnership bank account where the judgment did not make liable that partnership,[124] or to seize all of a joint account without proof of net contributions by each of the account holders, as required by state law.[125]

It can violate FDCPA § 1692f to seek through a garnishment more than is owed pursuant to the judgment,[126] to seek costs for an unsuccessful garnishment,[127] or to violate a state's law by initiating a garnishment on a bank branch in that state while the consumer maintained an account in a branch of the same bank in another state.[128] Where state law requires notice to the consumer of a wage garnishment, it can be unfair to send the notice to an address the collector knows or should know is not the correct address.[129] Where state law allows a garnishment order to require a bank to hold the consumer's funds for a set period of time, it can be unfair to send a garnishment notice specifying a longer time period.[130]

Sending unenforceable letters entitled "Subpoena For Oral Deposition As Aid To Enforcement Of Execution" that command consumers to appear for in-person depositions and include threats of fines and imprisonment, and then sending follow-up letters indicating that the consumers could avoid the depositions by completing and returning financial disclosure forms, can violate FDCPA § 1692f where the collectors have no intention of conducting the depositions.[131] A demand for a debtor's examination in an inconvenient venue can be unfair.[132]

But another court found a notice of a postjudgment deposition in a distant location did not violate FDCPA § 1692f, since that was consistent with state law and the collector offered the option of a mutually convenient location.[133] Courts may find it not unfair to aggressively seek postjudgment remedies that are fully legal in the circumstances.[134]

It can be unfair to garnish a larger percentage of a consumer's wages than allowed by federal and state exemption law.[135] Courts generally find it not unfair to garnish a bank account, unless the collector has knowledge that all funds in a bank account are exempt.[136] But where the consumer has sent the collector persuasive evidence that 100% of funds in a bank account are exempt, it can be unfair for a collector to still garnish the bank account without first seeking other evidence to counter the consumer's evidence.[137]

Similarly, once the collector is given persuasive evidence of the exempt status of at least certain funds in an account, it can be unfair to object to the release of those exempt funds without a good faith basis for so objecting.[138]

On the other hand, it is not unfair for a collector to continue to contest the consumer's exemption claim where there is a reasonable basis for doing so.[139]

154 (2d Cir. 2020) (affirming summary judgment on § 1692f claim, finding no bad faith or abuse of New York debt collection practices since wrong judgment debtor plaintiff was not forced to attend debtor's exam or respond to informational subpoena, and debt collector agreed to hold subpoena in abeyance).

123 Shaw v. Hayt, Hayt & Landau, L.L.C., 2016 WL 3965204 (D.N.J. July. 21, 2016) (repeatedly and knowingly garnishing father's bank accounts for son's judgment could be unfair).

124 *See* Vanhuss v. Kohn Law Firm S.C., 127 F. Supp. 3d 980 (W.D. Wis. 2015).

125 Kieffer v. New Century Fin. Services, Inc., 2011 WL 1899272 (D.N.J. May 19, 2011).

126 Gonzalez v. Allied Collection Services, Inc., 2019 WL 489093 (D. Nev. Feb. 6, 2019) *aff'd*, 852 Fed. Appx. 264, 266 (9th Cir. 2021) ("service of a writ of execution or writ of garnishment that seeks to collect an inaccurate debt amount can constitute a violation" of § 1692f). *See also* Thomas v. Altschul, 2015 WL 5165334 (S.D.N.Y. Aug. 21, 2015) (months-long disregard of repeated requests to correct erroneous income execution amount).

127 Watkins v. Peterson Enters., Inc., 57 F. Supp. 2d 1102 (E.D. Wash. 1999).

128 *See* Baltazar v. Houslanger & Assoc., 2018 WL 3941943 (E.D.N.Y. Aug. 16, 2018), *adopted*, 2018 WL 4781143 (E.D.N.Y. Sept. 30, 2018).

129 Lewis v. Asset Acceptance, L.L.C., 2012 WL 1801987 (D. Or. Apr. 6, 2012), *adopted*, 2012 WL 1801982 (D. Or. May 17, 2012).

130 *See* Smeby v. Messerli & Kramer, P.A., 2015 WL 1897853 (D. Minn. Apr. 23, 2015).

131 Kranz v. Midland Credit Mgmt., Inc., 2020 WL 4905806 (W.D. Tex. Aug. 20, 2020).

132 Flores v. Quick Collect, Inc., 2007 WL 433239 (D. Or. Jan. 31, 2007).

133 *See* Barney v. LVNV Funding L.L.C., 2012 WL 2995471 (N.D. Ohio July 23, 2012).

134 *See* Davis v. Nebraska Furniture Mart, Inc., 567 Fed. Appx. 640 (10th Cir. 2014) (having consumer lawfully arrested pursuant to bench warrant for failing to appear at hearing in aid of execution shortly after court had dismissed similar hearing because judgment debtor was now receiving new income).

135 Waitkus v. Pressler & Pressler, L.L.P., 2012 WL 686025 (D.N.J. Mar. 2, 2012). *See also* Backlund v. Messerli & Kramer, P.A., 2012 WL 3582963 (D. Minn. Aug. 17, 2012) (no § 1692f violation to retain exempt property).

136 Gates v. MCT Grp., Inc., 678 Fed. Appx. 539 (9th Cir. 2017); Lee v. Javitch, Block & Rathbone L.L.P., 601 F.3d 654 (6th Cir. 2010) (attorneys had, in fact, conducted reasonable investigation that no other reasonable steps could have been taken that would have revealed that funds were exempt, and that suggested alternative of subpoenaing consumer's bank records prior to garnishment was an extraordinary measure that was not required under applicable reasonableness standard); Beler v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 480 F.3d 470 (7th Cir. 2007); Hargreaves v. Associated Credit Serv., Inc., 2017 WL 4767146 (E.D. Wash. Oct. 20, 2017) (creditor filed affidavit stating it had "reason to believe" that the account contained amounts exceeding those exempted from garnishment); Carney v. Unifund CCR, L.L.C., 2016 WL 7115974 (D. Minn. Dec. 6, 2016) (consumer failed to verify that funds in bank were exempt); Gates v. MCT Grp., Inc., 93 F. Supp. 3d 1182, 1190 (S.D. Cal. Mar. 13, 2015) ("It is unreasonable to conclude that a judgment creditor's failure to conduct a pre-levy consumer's exam, when there is no legal obligation or requirement to do so, constitutes unfair or unconscionable action.").

137 *See* Bray v. Cadle Co, 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010), Hogue v. Palisades Collection, L.L.C., 494 F. Supp. 2d 1043 (S.D. Iowa 2007). *See also* Jordan v. Thomas & Thomas, 2007 WL 2838474 (S.D. Ohio Sept. 26, 2007).

138 Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128 (2d Cir. 2017).

139 Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291 (11th Cir. 2015).

8.3 FDCPA § 1692f(1): Collecting an Amount Not Permitted by Law or Contract

8.3.1 Overview

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.[140]

Regulation F (effective November 30, 2021) restates this language at section 1006.22(b) with only "minor wording and organizational changes for clarity."[141]

Even though FDCPA § 1692f(1) only prohibits the "collection" of an amount not authorized by contract or permitted by law, courts interpret the word "collection" as applying not just to receiving an amount not authorized or permitted, but also seeking to collect such an amount.[142] Seeking to collect can include communications that do not demand payment, but specify an amount due.[143] Continuing to report a debt to consumer reporting agencies when the debt has been satisfied is a FDCPA § 1692f(1) violation, because it is collection of an amount not authorized by contract nor permitted by law.[144]

But there may be no FDCPA § 1692f(1) violation where a credit agreement allows for collection of an illegal amount, but the collector never sought to collect that illegal amount.[145] Some courts also provide that a collector's attempt to comply with FDCPA § 1692g's requirement of a statement of the amount due cannot be an unfair practice even if the amount is not accurate.[146]

FDCPA § 1692f(1) prohibits the collection of any amount *unless* authorized by contract or permitted by law.[147] Thus, the collector has the burden of proving that an amount it is seeking is either authorized by contract or permitted by law.[148] "The burden of proving a statutory exception falls on the party seeking to reap the benefit of the exception."[149] But, of course, the consumer should allege in the complaint that the amount sought is not authorized by contract or permitted by law—a conclusory allegation that there is no basis for a collection action may not be enough.[150]

The FDCPA is a strict liability statute.[151] Where the amount sought is not authorized by contract or permitted by law, there is no defense that the collector thought the amount was authorized or permitted.[152] Instead, the collector can raise the bona

140 15 U.S.C. § 1692f(1). *See also* Reg. F § 1006.22(b). Provisions similar to § 1692f(1) were included in each of the major bills leading to the Act. The language of the bills varied considerably before the adoption of the present language. *See* H.R. 11696, 94th Cong., 2d Sess. § 807(1) (1976) ("unless expressly authorized by the agreement creating the debt or by a court of competent jurisdiction"); S. 918, 95th Cong., 1st Sess. § 808(1) (1977) ("unless such amount is expressly authorized by law"); Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 808(1) (1977).

141 85 Fed. Reg. 76,734, 76,833 (Nov. 30, 2020).

142 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 697 (8th Cir. 2017) ("not necessary for the consumer to plead that the impermissible charge was paid"); Kaymark v. Bank of Am., 783 F.3d 168, 175 (3d Cir. 2015); Dimatteo v. Sweeney, Gallo, Reich & Bolz, L.L.P., 619 Fed. Appx. 7 (2d Cir. 2015) (demand for attorney fees in the housing court complaint constituted an attempt to collect a fee); Salvati v. Deutsche Bank Nat'l Tr. Co., 575 Fed. Appx. 49 (3d Cir. 2014); Stratton v. Portfolio Recovery Assoc., 770 F.3d 443, 451 (6th Cir. 2014), *as amended on denial of reh'g en banc* (Dec. 11, 2014) (§ 1692f(1) applies to state court suit since it is attempt to collect amount); Allen *ex rel.* Martin v. LaSalle Bank, 629 F.3d 364, 367 n.4 (3d Cir. 2011) ("collection" in § 1692f(1) includes attempted collection as well as actual collection); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 950 (9th Cir. 2011); Duffy v. Landberg, 215 F.3d 871, 875 (8th Cir. 2000) (letters seeking charges were an attempt to collect interest not permitted by law, and therefore a violation of the plain language of section 1692f(1)).

143 Allen *ex rel.* Martin v. LaSalle Bank, 629 F.3d 364 (3d Cir. 2011).

144 *See* Escobar v. Midland Credit Mgmt., 2019 WL 3751486, at *7 (D. Conn. Aug. 8, 2019), *related case at* 2020 WL 5411574, at *9) (D. Conn. Sept. 9, 2020); Miceli v. Dyck-O'Neal, Inc., 2016 WL 7666167 (M.D. Fla. Aug. 9, 2016). *But see* Darden v. Trans Union, L.L.C., 2013 WL 12125739 (E.D. Tex. Oct. 28, 2013) (use of legal collection method does not violate § 1692f).

145 Snyder v. Weiner, 539 F.3d 327 (6th Cir. 2008). *See also* Datiz v. Int'l Recovery Assoc., Inc., 2016 WL 4148330 (E.D.N.Y. Aug. 4, 2016) (consumer must allege collector attempted to collect prohibited fee, not just that processing fee was listed on collector's website).

146 Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991 (7th Cir. 2003); Goshon v. I.C. Sys., Inc., 2016 WL 742873 (D. Kan. Feb. 24, 2016) (no reasonable juror could find that sending single letter, which included § 1692g notice, amounted to unfair means to collect debt); Fong v. Franklin Collection Services, Inc., 2012 WL 3581171, at *4 (N.D. Ill. Aug. 16, 2012) ("When a collection letter provides the precise information required by the Act, the letter is not 'an unfair or unconscionable means of debt collection under § 1692f,' even if the debt collector may have falsely stated the amount of debt owed.").

147 *See* Danganan v. Guardian Prot. Services, 813 Fed. Appx. 769 (3d Cir. 2020) (affirming dismissal of state law claim based on its incorporation of the FDCPA because the collection of the challenged amounts complied with the Act; issue of whether or not state law permitted the payment was "irrelevant," as § 1692f(1) "states that a payment may be *either* expressly authorized by an agreement or permitted by law" and amount owed by consumer was expressly authorized by underlying agreement).

148 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 950 (9th Cir. 2011). *See also* Evankavitch v. Green Tree Servicing, L.L.C., 793 F.3d 355 (3d Cir. 2015) (FDCPA opinion discussing Supreme Court cases establishing that party claiming benefit of statutory exception bears burden of proof for establishing exception's applicability); § 11.6, *infra*.

149 Flores v. Collection Consultants of Cal., 2015 WL 4254032 (C.D. Cal. Mar. 20, 2015).

150 *See* Zachary v. Midland Funding, L.L.C., 2018 WL 3474691, at *3 (E.D. Pa. July 18, 2018). *See also* Gordon v. Cavalry SPV I, L.L.C., 2018 WL 3545119 (E.D. Mich. July 24, 2018).

151 *See* § 3.2.4, *supra*.

152 *See* Hylton v. Amerifinancial Solutions, L.L.C., 2018 WL 6044734 (E.D. Pa. Nov. 19, 2018).

fide error defense, but then must prove its procedures were designed to avoid such an error.[153]

For an amount to be "expressly authorized by the agreement creating the debt" there must be a binding agreement. Thus, the collector must produce an agreement and show that the consumer has consented to it.[154]

A unilateral contract set out by the creditor and not ratified by the consumer does not qualify. For example, a sign at a check cashing counter in a store announcing a charge for dishonored checks may not create a contract under state law. Moreover, the consumer must be a party to the contract. A debt collector's contract with its client creditor does not provide authorization for charges assessed to a consumer.[155]

For an amount to be permitted by law, the amount must be affirmatively permitted.[156] It is not enough that the relevant law does not prohibit the amount, or relevant law allows for the amount if authorized by contract, but it is not authorized by contract.[157]

Related to FDCPA § 1692f(1) is FDCPA § 1692e(2)(A) prohibiting false statements of the amount of the debt[158] and FDCPA § 1692g(a)(1)'s requiring disclosure of the amount of the debt.[159] Collecting a charge in violation of FDCPA § 1692f(1) may also violate the general prohibitions of deception and unfairness found respectively in FDCPA §§ 1692e[160] and 1692f.[161]

8.3.2 Where Debt Discharged, Extinguished, or Not Owed

Collection of a debt is a FDCPA § 1692f(1) violation as not authorized by contract or permitted by law where the debt is discharged, extinguished, or otherwise not owed.[162] This applies where:

- The debt is extinguished by a state court's dismissal with prejudice of the collector's lawsuit;[163]
- The debt has been paid or settled in full;[164]
- The collector seeks to ignore a settlement agreement and seeks amounts pursuant to the original debt;[165]
- Prior garnishments have satisfied in full a judgment debt;[166]
- The collector seeks payment from one family member where another family member is the only one responsible for the debt;[167]
- A consumer is mistakenly contacted about someone else's debt;[168]
- The debt is not owned by the debt buyer seeking payment;[169]
- Under state law, the debt must be paid by the worker's employer or insurer;[170] or
- The collector initiated a foreclosure during a time period where such action is prohibited by state law.[171]

The circuits are divided as to the availability of an FDCPA claim where a collector seeks to collect on a debt that has been discharged in bankruptcy. These issues are examined in § 13.7, *infra*. Assuming the court does not find an FDCPA

153 *See* Guzman v. Mel S. Harris & Assoc., 2018 WL 1665252 (S.D.N.Y. Mar. 22, 2018); § 12.2, *infra*.

154 Reed v. EOS CCA, 2016 WL 1639121 (S.D. Ind. Apr. 26, 2016); Reynolds v. EOS CCA, U.S. Asset Mgmt., Inc., 2016 WL 1639120 (S.D. Ind. Apr. 26, 2016); Shepherd v. Liberty Acquisitions, L.L.C., 2012 WL 2708518 (D. Colo. July 9, 2012) (debt collector could not rely on a contractual authorization it could not produce).

155 *See* Day v. Check Brokerage Corp., 511 F. Supp. 2d 950 (N.D. Ill. 2007).

156 *See* Fusco v. Ocwen Loan Servicing, L.L.C., 2020 WL 2519978, at *3 (S.D. Fla. Mar. 2, 2020) ("legal permission must be affirmatively given"; Speedpay fees not affirmatively permitted by Florida law or Electronic Fund Transfers Act).

157 Lockett v. Freedman, 2004 WL 856516 (N.D. Ill. Apr. 21, 2004); Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995); West v. Costen, 558 F. Supp. 564, 570 (W.D. Va. 1983); FTC Official Staff Commentary § 808(1)-2, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*).

158 *See* § 7.2.2, *supra*.

159 *See* § 9.11.3, *infra*.

160 *See* § 7.3, *supra*.

161 *See* § 8.1, *supra*.

162 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017). *See also* Sanchez v. Law Office of Lance E. Armo, 2021 WL 1214559 (E.D. Cal. Mar. 31, 2021) (allegations that collection attorneys attempted to collect amount not permitted by law, as Notice to Pay Rent or Quit indicated that tenant owed $396 in rent when, in fact, nothing was owed given change to Housing Assistance Payment Contract, stated claim under § 1692f), *adopted*, 2021 WL 2292779 (E.D. Cal. June 4, 2021). *But cf.* Patterson v. Ad Astra Recovery Serv., 2018 WL 6181175 (N.D. Ala. Nov. 27, 2018) (dismissing § 1692f claim (apparently not brought as § 1692f(1) claim) where consumer never alleged they informed collector they were wrong person).

163 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017).

164 Vangorden v. Second Round, L.P., 897 F.3d 433, 438 (2d Cir. 2018); Brake v. Slochowsky & Slochowsky, L.L.P., 504 F. Supp. 3d 103 (E.D.N.Y. 2020); Finch v. Slochowsky & Slochowsky, L.L.P., 2020 WL 5848616, at *4 (E.D.N.Y. Sept. 30, 2020); Bell v. Northland Grp., 2018 WL 1792368 (E.D. Mich. Apr. 16, 2018); Rushing v. Chase Auto Fin. Corp., 2012 WL 1752393 (E.D. Ky. May 15, 2012).

165 Mapother & Mapother, P.S.C., 2014 WL 1418224 (W.D. Ky. Apr. 14, 2014) (rejecting debt collector's argument that consumer's claims should be dismissed as improper attempt to convert violation of settlement agreement, governed by state law, into FDCPA claim; demand for more than agreed amount of settlement stated § 1692f(1) claim).

166 Edwards v. Velocity Invs., L.L.C., 2011 WL 4007394 (N.D. Ohio Sept. 8, 2011).

167 *See* Walter v. Palisades Collection, L.L.C., 2011 WL 1666869 (E.D. Pa. May 2, 2011); Karony v. Dollar Loan Ctr., L.L.C., 2010 WL 5186065 (D. Nev. Dec. 15, 2010) (pursuing plaintiff through litigation and credit reporting to pay separate debt that was incurred by his wife and for which he was not responsible stated claim); Kunda v. CBB Collections, Inc., 2008 WL 11349863 (D. Mont. Aug. 15, 2008) (one spouse not liable for other spouse's premarital debt).

168 Heathman v. Portfolio Recovery Assoc., 2013 WL 755674 (S.D. Cal. Feb. 27, 2013). *But see* Harter v. RJM Acquisitions, L.L.C., 2012 WL 162281 (N.D. Ill. Jan. 19, 2012) (one straightforward letter with verification notice not unfair, even where collector knew recipient might be wrong person).

169 Blackburn v. Cox v. Sherman Capital L.L.C., 2014 WL 1328147 (S.D. Ind. Mar. 31, 2014).

170 *See* Edwards v. BC Services, Inc., 2019 WL 6726232, at *9 (D. Colo. Dec. 10, 2019) (Utah workers' compensation statute, which provided that covered medical expenses are not owed by injured employee); Young v. NPAS, Inc., 361 F. Supp. 3d 1171 (D. Utah 2019).

171 Rehman v. Pierce & Assoc., 2017 WL 131560 (N.D. Ill. Jan. 13, 2017) (seeking to foreclose during state grace period).

claim displaced by the Bankruptcy Code's alternative method of relief, then there can be a FDCPA § 1692f(1) claim.[172]

Although a bankruptcy discharge may not prevent a collector from foreclosing on secured property, it does prevent the collector from seeking a deficiency.[173] Less clear is a collector's actions discussing the amount due on a secured loan. There may be no violation where the collector discloses it will not seek a deficiency and is only discussing payment options to avoid foreclosure.[174]

A few older cases take the stilted view that there is no FDCPA § 1692f(1) violation where the collector seeks to collect the facially correct amount of the debt, but where the agreement creating the debt is void, such as where someone else forged the consumer's signature or stole the consumer's identity.[175] These courts argue that the collector was seeking the correct amount as authorized by the agreement, even if the agreement is void. But an agreement cannot "authorize the debt" if it is void.

8.3.3 *Interest Charges Not Authorized or Permitted*

For a collector to seek interest pursuant to a contract, it must produce the contract and provide evidence that the consumer has consented to the contract, something that debt buyers in particular may have difficulty proving. Otherwise, seeking contractual interest without such evidence can be a FDCPA § 1692f(1) violation.[176]

A collector can violate FDCPA § 1692f(1) by seeking interest where the consumer is current in making payments,[177] seeking interest for payments not yet due,[178] computing interest at a higher rate than provided for in the credit agreement,[179] or seeking interest at a rate exceeding the state's usury cap.[180] But where it is unresolved under state law whether an interest charge is permissible, a court may not be willing to find for the consumer on a FDCPA § 1692f(1) claim.[181]

It is also a FDCPA § 1692f(1) violation to compound interest where not permitted by state law,[182] although it is not a violation to seek compound interest as allowed by the contract and as permitted by state law.[183] Unless prohibited by state law, a collector may be able to add prejudgment interest to a debt without first obtaining a court judgment, particularly where the amount owed was certain and the interest charge was not subject to the court's discretion.[184] Where a contract authorizes contractual prejudgment interest only on the principal amount of the debt, it is a violation to seek contractual interest on

172 Dunlap v. Caliber Home Loans, Inc., 2017 WL 3433915 (E.D. Pa. Aug. 10, 2017); Hennings v. Alltran Fin., L.P., 2017 WL 2312909 (E.D. Wis. May 26, 2017); Church v. Accretive Health, Inc., 2014 WL 7184340 (S.D. Ala. Dec. 16, 2014).

173 *See* Gagnon v. JPMorgan Chase Bank, 563 B.R. 835 (N.D. Ill. 2017); Green v. Specialized Loan Servicing, L.L.C., 2016 WL 3963255 (W.D. Wis. July 21, 2016); Coulter v. Manley Deas Kochalski L.L.C., 2014 WL 1891206 (S.D. Ind. May 9, 2014).

174 *See* Williams v. Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 1582515 (D. Conn. Mar. 31, 2018) (dismissing § 1692f(1) claim that was based on mortgage servicer's inclusion of allegedly improper late charges in its monthly statements and certain other communications, since post-discharge consumer could not reasonably interpret these communications as being in connection with collection of debt, in light of bankruptcy discharge disclaimers in statements).

175 Transamerica Fin. Services, Inc. v. Sykes, 171 F.3d 553 (7th Cir. 1999); Valdez v. Capital Mgmt. Services, L.P., 2010 WL 4643272 (S.D. Tex. Nov. 16, 2010). *But see* Heathman v. Portfolio Recovery Assoc., L.L.C., 2013 WL 755674 (S.D. Cal. Feb. 27, 2013).

176 *See* Reed v. EOS CCA, 2016 WL 1639121 (S.D. Ind. Apr. 26, 2016); Reynolds v. EOS CCA, U.S. Asset Mgmt., Inc., 2016 WL 1639120 (S.D. Ind. Apr. 26, 2016); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002). *See also* Jammeh v. HNN Assoc., L.L.C., 2020 WL 3266221 (W.D. Wash. June 17, 2020) (denying summary judgment for collector where prejudgment interest was not authorized by contract or law).

177 Asch v. Teller, Levit & Silvertrust, P.C., 2003 WL 22232801 (N.D. Ill. Sept. 26, 2003) (failed to credit payments on date received and added interest).

178 Melillo v. Shendell & Assoc., P.A., 2012 WL 253205 (S.D. Fla. Jan. 26, 2012) (seeking to collect five months of interest when only three months of interest would have been due); Acik v. I.C. Sys., Inc., 640 F. Supp. 2d 1019 (N.D. Ill. 2009).

179 Brooks v. Cama Self Directed IRA, L.L.C., 2019 WL 418412 (D. Md. Jan. 31, 2019) (charging fixed rate of interest where note provided for variable rate); Snyder v. Ocwen Loan Servicing, L.L.C., 2015 WL 1910989 (N.D. Ill. Apr. 27, 2015) (servicer calculated interest on mortgage improperly).

180 *See* Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000) (interest and late charges exceeded state limitation of 10%); Dunn v. Global Tr. Mgmt., L.L.C., 506 F. Supp. 3d 1214 (M.D. Fla. 2020) (denying motion to dismiss § 1692f claim where consumer alleged that debt buyer knowingly misrepresented validity of debts it knew were usurious and unenforceable); Grace v. LVNV Funding, Inc., 2014 WL 2167487 (W.D. Ky. May 23, 2014) (8% medical "service charge" was disguised interest and exceeded state's statutory rate); Mejia v. Marauder Corp., 2007 WL 806486 (N.D. Cal. Mar. 15, 2007) (illegal interest on payday loan); Conner v. Howe, 344 F. Supp. 2d 1164 (S.D. Ind. 2004) (usurious payday loan).

181 Hill v. Accounts Receivable Services, L.L.C., 888 F.3d 343 (8th Cir. 2018); Klein v. Credico, Inc., 2018 WL 3404156 (D. Minn. July 12, 2018). *But see* Gregory v. Barton, 510 F. Supp. 3d 829 (E.D. Mo. 2020) (predicting that state's supreme court would not hold husband responsible for prejudgment interest on wife's medical debt under doctrine of necessaries absent demand made on husband, court sustained § 1692f(1) claim).

182 *See* Coyne v. Midland Funding L.L.C., 895 F.3d 1035 (8th Cir. 2018) (contract did not provide for compound interest and debt collector's charging compound interest violated Minnesota law); Haney v. Portfolio Recovery Assoc., 837 F.3d 918, 926 (8th Cir. 2016) (debt buyer illegally compounded prejudgment interest on contractual interest under Missouri law); Owen v. I.C. Sys., Inc., 629 F.3d 1263, 1277 (11th Cir. 2011) (collector compounded interest monthly instead of annually as allowed in the contract); Martinez v. Albuquerque Collection Services, 867 F. Supp. 1495 (D.N.M. 1994) (compounding interest not permitted by state law).

183 *See* O'Byrne v. Portfolio Recovery Assoc., 596 Fed. Appx. 565 (9th Cir. 2015); Beler v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 480 F.3d 470 (7th Cir. 2007).

184 Diaz v. Kubler Corp., 785 F.3d 1326 (9th Cir. 2015). *But see* Lannan v. White, 186 F. Supp. 3d 77 (D. Mass. 2016) (granting summary judgment on § 1692e (2) claim that prejudgment interest on quasi-contract was unauthorized by state law).

additional fees and charges.[185] It is also a violation to seek postjudgment interest in excess of that allowed by state statute and where contractual postjudgment interest is not authorized.[186]

Even if the originating creditor can charge interest, it may be that a debt buyer cannot do so. This is clearly the case where the agreement between the originating creditor and debt buyer explicitly excludes the debt buyer charging additional interest.[187] The debt buyer's communications with the consumer may also indicate that it has waived further interest charges, and then it may be a violation to seek the waived charges.[188]

In addition, where the originating creditor, after writing off a debt, has waived additional contractual interest charges, a debt buyer of that account may not be able to charge additional contractual interest and certainly should not seek contractual interest for the period between when the creditor stopped charging contractual interest and the date the debt buyer purchased the debt.[189] But courts may require that the originating creditor's waiver of contractual interest be proven to be unequivocal.[190] In addition, even where contractual prejudgment interest has been waived, a collector, depending on the contract language and state law, may be able to charge interest under the state's prejudgment interest statute.[191]

A separate issue, apart from waiver considerations, is whether a debt buyer can charge interest at the same rate and in the same manner as the originating creditor for the period of time when an account is owned by the debt buyer. For example, a national bank credit card issuer has rate exportation rights to charge higher interest rates than allowed by the consumer's home state usury cap. A FDCPA § 1692f(1) claim is not likely to prevail where a debt buyer merely seeks to collect lawful interest charges already assessed by the card issuer.[192]

At present, though, the law is unclear whether a debt buyer (not being a federal depository), when it seeks to assess *new* interest charges, can also take advantage of the assignor's rate exportation rights, or whether it must comply with the consumer's home state usury law.[193] Similarly, if the debt buyer is not properly licensed or registered in some states, it may not be able to seek interest at all.[194] To the extent that the debt buyer's rights to seek interest at a certain rate or at all are unclear, courts will likely take varying positions as to whether a FDCPA § 1692f(1) claim is warranted.

8.3.4 Collection Costs

State law occasionally allows for collection fees even absent a contractual authorization, particularly in legislation regulating homeowner associations.[195] More commonly, state law restricts the size of collection costs or prohibits them outright,

185 *See* Lott v. Vial Fortheringham, L.L.P., 2017 WL 4558050 (D. Or. Oct. 12, 2017) (imposition of contractual interest rate on prevailing-party attorney fees violated § 1692f(1)).

186 *See* Hageman v. Barton, 817 F.3d 611 (8th Cir. 2016); Austin v. Frederick J. Hanna & Assoc., P.C., 2014 WL 4724885 (N.D. Ga. July 10, 2014), *adopted*, 2014 WL 7335467 (N.D. Ga. Dec. 23, 2014) (unauthorized postjudgment interest); Jarvis v. First Resolution Mgmt. Corp., 983 N.E.2d 380 (Ohio. Ct. App. 2012) (excessive postjudgment interest). *See also* Stone v. J&M Sec., L.L.C., 2020 WL 5909788, at *5 (E.D. Mo. Oct. 6, 2020) ("Even a minor overstatement of interest due . . . can constitute an attempt to collect interest or other amounts not permitted by law in violation of § 1692f(1).").

187 Tabiti v. LVNV Funding, L.L.C., 2017 WL 168176 (N.D. Ill. Jan. 17, 2017).

188 Grochowski v. Daniel N. Gordon, P.C., 2014 WL 1516586 (W.D. Wash. Apr. 17, 2014) (debt buyer may have waived interest at state statutory rate when it sent notices indicating that accrued interest was $0 and interest rate was 0%).

189 *See* Stratton v. Portfolio Recovery Assoc., 770 F.3d 443 (6th Cir. 2014) (claim stated where debt buyer charged for interest waived by the creditor); Unifund CCR Partners v. Harrell, 509 S.W.3d 25, 29 (Ky. 2017); Kuhn v. Asset Acceptance Capital Corp., 2015 WL 1505648 (S.D. Ind. Mar. 31, 2015) (denying motion to dismiss); Alexander v. AllianceOne Receivables Mgmt., Inc., 309 F. Supp. 3d 709 (W.D. Mo. 2015); Edwards v. Cavalry Portfolio Services, L.L.C., 2015 WL 5145559 (W.D. Ky. Sept. 1, 2015); McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513 (E.D. Mich. Aug. 7, 2013) (debt buyer could not collect interest knowingly waived by the original creditor). *See also* Madorskaya v. Frontline Asset Strategies, L.L.C., 2020 WL 423408 (E.D.N.Y. Jan. 27, 2020) (dismissal not appropriate where it was not clear whether original creditor waived its right to charge interest on the debt in the future); Simkus v. Cavalry Portfolio Services, L.L.C., 2014 WL 1775666 (N.D. Ill. May 5, 2014) (jury to decide whether creditor assignor had waived the interest that the assignee imposed); McDonald v. Richard J. Boudreau & Assoc., 2013 WL 3479273 (D.R.I. July 10, 2013).

190 Haney v. Portfolio Recovery Assoc., 837 F.3d 918, 926 (8th Cir. 2016); Stratton v. Portfolio Recovery Assoc., L.L.C., 171 F. Supp. 3d 585, 603 (E.D. Ky. 2016) (waiver not proved), *aff'd*, 706 Fed. Appx. 840 (6th Cir. 2017); Frost v. Resurgent Capital Services, L.P., 2016 WL 3479087 (N.D. Cal. June 27, 2016) (factual allegations were insufficient to support complaint's legal conclusion of waiver). *See also* Madorskaya v. Frontline Asset Strategies, L.L.C., 2020 WL 423408 (E.D.N.Y. Jan. 27, 2020) (inappropriate to dismiss § 1692f claim where it was unclear whether original creditor waived interest or late fees); Sivongxay v. MEDCAH, Inc., 2017 WL 5162799, at *6 (D. Haw. Nov. 7, 2017) (consumer did not offer support to assertion that creditors waived any claim to interest); LVNV Funding, L.L.C. v. Mavaega, 527 S.W.3d 128 (Mo. Ct. App. 2017).

191 Haney v. Portfolio Recovery Assoc., 837 F.3d 918, 926 (8th Cir. 2016); Walkabout v. Midland Funding L.L.C., 2016 WL 1169540 (W.D. Okla. Mar. 22, 2016); Brown v. LVNV Funding, L.L.C., 2014 WL 4986524 (E.D. Ky. 2014) (adding prejudgment statutory interest back to date of charge-off was authorized by Kentucky law). *But see* Stratton v. Portfolio Recovery Assoc., 770 F.3d 443 (6th Cir. 2014) (originating creditor's selection of contractual interest rate in excess of Kentucky prejudgment interest rate waived right to Kentucky's prejudgment statutory interest).

192 *See* Gissendaner v. Credit Corp Solutions, Inc., 358 F. Supp. 3d 213 (W.D.N.Y. 2019).

193 See National Consumer Law Center, Consumer Credit Regulation § 3.5.3.2 (3d ed. 2020), *updated at* www.nclc.org/library.

194 *See* Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (collector lacked legal capacity to seek interest. *But see* Niemiec v. NCO Fin. Sys., Inc., 2006 WL 1763643 (N.D. Ind. June 27, 2006) (purchaser of small loan without being licensed to make such loans collecting at regulated interest rate did not violate FDCPA).

195 *See* Tapia v. Nevada Ass'n Services, Inc., 2013 WL 1104429 (D. Nev. Mar. 15, 2013) (collection costs related to homeowners' association payments). *See also* Almada v. Kriger Law Firm, A.P.C., 2021 WL 1134388 (S.D. Cal. Mar. 8, 2021).

even where authorized by the contract.[196] If state law restricts collection fees, it should be a FDCPA § 1692f(1) violation to seek fees inconsistent with this state requirement.[197]

To obtain fees based on authorization from the contract, the collector must produce the actual contract and prove that the consumer has consented to that particular contract. Seeking collection fees without that proof violates FDCPA § 1692f(1).[198] Where a debt buyer or its collector seeks collection costs, there must be proof of an assignment of the contract to the debt buyer. FDCPA § 1692f(1) requires that the contract must "expressly" authorize collection fees. Where a contract provides the consumer is "responsible for all costs and fees, including attorney fees, and interest," this is not an express authorization.[199]

The fees also must be consistent with the contractual language and state law. Where state law or the contract requires the costs to be reasonable, it is a FDCPA § 1692f(1) violation to seek unreasonable collection costs.[200] Where the contract or state law allows only for collection costs incurred or the actual costs of collection, it is a FDCPA § 1692f(1) violation to seek percentage-based collection costs.[201] Where a lease authorized collection fees to a prevailing party, the collector was not permitted to seek them until it prevails in litigation.[202] The fact that the collection agency's commission is a percentage of the amount collected does not make these the actual costs of collection.[203]

The term "actual costs" generally applies to costs as of the date of the demand for payment, not prospective costs.[204] On the other hand, where a court interprets contract language as allowing for a recovery to cover collection-related costs past and future, it may not be a violation to seek actual costs to date and also a reasonable estimate of total collection costs.[205]

8.3.5 *Attorney Fees*

It is a FDCPA § 1692f(1) violation to seek attorney fees unless authorized by contract or permitted by law.[206] A

196 For an analysis of state restrictions on collection costs, see NCLC's Collection Actions § 6.6 (5th ed. 2020), *updated at* www.nclc.org/library.

197 Fields v. W. Mass. Credit Corp., 479 F. Supp. 2d 287 (D. Conn. 2007) (state law limited collection fees to $10 per debt, not 15% of balance claimed). *See also* Breckenridge v. Vargo, 225 F. Supp. 3d 1216 (D. Colo. 2016) (impermissible collection costs not authorized under Perkins regulations that cap collection fee at 30%); Torres v. Toback, Bernstein & Reiss L.L.P., 2014 WL 988480 (E.D.N.Y. Mar. 14, 2014), *as modified by* 2014 WL 1330957 (E.D.N.Y. Mar. 31, 2014) (student loan collector collected 40% collection fees in excess of applicable federal regulations and terms of Perkins Loan agreement); Padilla v. Payco Gen. Am. Credits, Inc., 161 F. Supp. 2d 264 (S.D.N.Y. 2001) (student loan collector assessed collection fees in excess of that permitted by federal regulations). *But cf.* Bjornsdotter v. Suttell & Hammer, P.S., 2020 WL 1049906, at *3 (D. Or. Mar. 4, 2020) (granting summary judgment for collection attorneys on claim alleging violation of § 1692f and 1692f(1) (*inter alia*) where they charged plaintiff $65 for service of process when state court awarded only "$45, the statutory amount the court routinely allows," because attorneys "had a good-faith basis for seeking $65").

198 Reed v. EOS CCA, 2016 WL 1639121 (S.D. Ind. Apr. 26, 2016); Reynolds v. EOS CCA, U.S. Asset Mgmt., Inc., 2016 WL 1639120 (S.D. Ind. Apr. 26, 2016). *See also* Lindsey v. EquityExperts.Org, L.L.C., 2020 WL 5548773 (N.D. Ga. July 31, 2020) (finding genuine issue of material fact where jury could decide that particular collection agreement governed and that it included provisions authorizing contested charges), *adopted*, 2020 WL 5548770 (N.D. Ga. Aug. 24, 2020).

199 Acik v. I.C. Sys., Inc., 640 F. Supp. 2d 1019 (N.D. Ill. 2009).

200 Madison v. Equityexperts.org, L.L.C., 2020 WL 555249 (E.D. Mich. Feb. 4, 2020) (plaintiff did not demonstrate that costs were unreasonable where debt balance rose from $695 to $1240 over three-month period); Francis v. Gen. Revenue Corp, 2020 WL 405886 (E.D.N.Y. Jan. 24, 2020) (45% of principal not reasonable); Fonseca v. Focus Fin. Services, 2016 WL 4146663 (S.D. Fla. Aug. 1, 2016) (35% collection cost could be unreasonable); Gomez v. Niemann & Heyer, L.L.P., 2016 WL 3562148 (W.D. Tex. June 24, 2016) (question of fact whether $200 payment plan administration fee reasonable where other homeowner associations charge $25); Beeks v. ALS Lien Services, 2014 WL 7785745 (C.D. Cal. Feb. 18, 2014) (question of fact whether debt collection fee of $395 for sending demand letter or charge of $125 for investigating consumer's dispute were "reasonable" under state law). *But cf.* Durham v. Cont'l Cent. Credit, 2009 WL 3416114 (S.D. Cal. Oct. 20, 2009) (no evidence that 40% collection fee not reasonable).

201 Bradley v. Franklin Collection Serv., Inc.,739 F.3d 606 (11th Cir. 2014) (agreement); Seeger v. AFNI, Inc., 548 F.3d 1107 (7th Cir. 2008) (state law); Kojetin v. C.U. Recovery, Inc., 212 F.3d 1318, 1318 (8th Cir. 2000) (agreement provided only for actual costs). *See also* Carney v. Russel P. Goldman, P.C., 2018 WL 2441766 (D.N.J. May 30, 2018); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (sought anticipated compensation if it successfully collected on the debt but contract required the consumer pay fees that were "incurred"); Annunziato v. Collecto, Inc., 207 F. Supp. 3d 249 (E.D.N.Y. 2016) (collection agency had added 42.85% to student loan balance); Richard v. Oak Tree Grp., Inc., 614 F. Supp. 2d 814 (W.D. Mich. 2008) (agreement to pay "collection costs and expenses incurred" not agreement to pay collection agency's maximum potential commission). *But see* Bernal v. NRA Grp., L.L.C., 930 F.3d 891, 894 (7th Cir. 2019) (percentage-based collection fee was based on cost incurred within meaning of the credit contract).

202 Gostony v. Diem Corp., 320 F. Supp. 2d 932 (D. Ariz. 2003) (granting partial summary judgment to plaintiff).

203 Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (sought anticipated compensation if it successfully collected on the debt but contract required the consumer pay fees that were "incurred"); Annunziato v. Collecto, Inc., 207 F. Supp. 3d 249 (E.D.N.Y. 2016) (collection agency added 42.85% to student loan balance); Richard v. Oak Tree Grp., Inc., 614 F. Supp. 2d 814 (W.D. Mich. 2008) (agreement to pay "collection costs and expenses incurred" not agreement to pay collection agency's maximum potential commission).

204 Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (contract authorizing costs incurred did not authorize prospective costs); Annunziato v. Collecto, Inc., 207 F. Supp. 3d 249 (E.D.N.Y. 2016) (42.85% collection costs did not represent actual costs, and where additional fees and costs had not accrued and were merely estimates of what might potentially be owed). *See also* Francis Gen. Revenue Corp., 2020 WL 4586392 (E.D.N.Y. Aug. 10, 2020) (granting summary judgment for § 1692f(1) claim for contingent collection fee that had not accrued and might never accrue).

205 *See* Robertson v. Enhanced Recovery Co., L.L.C., 2017 WL 5951584 (D.N.J. Nov. 30, 2017). *See also* Bass v. I.C. Sys., Inc., 316 F. Supp. 3d 1047 (N.D. Ill. 2018).

206 Samms v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, L.L.P., 163 F. Supp. 3d 109 (S.D.N.Y. 2016); Kline v. Mortg. Elec. Sec. Sys., 2013 WL 753839 (S.D. Ohio Feb. 27, 2013). *Compare* Cummings v. Jaburg & Wilk P.C., 711 Fed. Appx. 418 (9th Cir. 2018) (request for attorney fees in state collection court was authorized by consumer's contract, and law firm's request for such fees was

collector cannot rely on a credit agreement that supposedly authorizes its attorney fee demand, unless the collector can prove the existence of an agreement containing such a provision.[207] While a motor vehicle credit agreement may provide for attorney fees to be deducted from the repossession sale price, this provision does not provide authorization for a collector to later seek attorney fees for pursuing a deficiency claim.[208] A contract authorizing fees is not adequate where the consumer to whom fees are assessed is not a party to that contract.[209]

NCLC's Collection Actions Ch. 6 (5th ed. 2020), *updated at* www.nclc.org/library, examines state law restrictions on recovery of attorney fees in a collection lawsuit. Seeking fees not in accordance with those state law restrictions violates FDCPA § 1692f(1).[210] Where a statute does not prohibit attorney fees for the collector, but allows them when authorized by the contract, the statute does not "permit" the amount sought pursuant to FDCPA § 1692f(1) where the contract does not so authorize.[211] The statute must affirmatively provide for the fees, and the conditions for a fee award under the statute must be met.[212] Where a statute provides for fees under a certain claim, there is still a FDCPA § 1692f(1) violation to seek fees under that claim when it is clearly inapplicable to the collector's case.[213]

Where the contract allows fees for the prevailing party to be awarded by the court, it violates FDCPA § 1692f(1) to seek those fees from the consumer prior to prevailing in a lawsuit.[214] Similarly, a collector violates FDCPA § 1692f(1) if it seeks fees from the consumer alleging prevailing party status in a litigation where it has not prevailed.[215] There is a FDCPA § 1692f(1) violation where the current balance in a collection lawsuit's complaint includes attorney fees for work that has not yet been performed, and the fee demand is not labeled as an estimate, even if the fee demand is in a reasonable amount once the work is performed.[216] But it is not a FDCPA § 1692f(1) violation merely to seek in a complaint attorney fees as awarded by the court, where fees are authorized by the contract or permitted by law.[217]

It also violates FDCPA § 1692f(1) to seek fees greater than those awarded by the court.[218] But a contract in some states can allow for recovery of fees incurred prior to filing a lawsuit, and then there is no violation if allowed by agreement and where the fees are actually incurred.[219]

Where a contract authorizes fees based on actual time expended, it violates FDCPA § 1692f(1) to seek them as a percentage of the recovery.[220] Where the contract authorizes a reasonable fee, it is a FDCPA § 1692f(1) violation to seek an unreasonable fee or for work not performed.[221]

A court has found that it is a FDCPA § 1692f and 1692e violation to demand a total amount that includes attorney fees without specifying what portion of the amount is attorney fees. The consumer has no way of determining whether

reasonable in relation to litigation and authorized under state law); Cummings v. Jaburg & Wilk P.C., 711 Fed. Appx. 418 (9th Cir. 2018).

207 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011) (collector could not produce contract).

208 Lockett v. Freedman, 2004 WL 856516 (N.D. Ill. Apr. 21, 2004).

209 Erickson v. Johnson, 2006 WL 453201 (D. Minn. Feb. 22, 2006).

210 Maronyan v. Fin. Credit Network Inc., 2017 WL 57835, at *3 (C.D. Cal. Jan. 3, 2017) (seeking attorney fees in excess of $800 amount authorized by California statute); Ketchem v. Am. Acceptance, Co., L.L.C., 641 F. Supp. 2d 782 (N.D. Ind. 2008) (state rule barred fee recovery where substantial identity of interest between client and attorney).

211 Lockett v. Freedman, 2004 WL 856516 (N.D. Ill. Apr. 21, 2004).

212 *See, e.g.*, Malik v. Kim, 2016 WL 4709076 (N.D. Ill. Sept. 8, 2016) (while fees could be collected where condo owner owed back assessments, fees where not authorized where the prior owner owed the back assessments).

213 Martinez v. Albuquerque Collection Services, 867 F. Supp. 1495 (D.N.M. 1994) (false representation that debt was open account allowing award of attorney fees).

214 Amaya v. Crowson & Crowson, L.L.P., 2013 WL 12126245 (W.D. Tex. Aug. 16, 2013) (contract allowed only associated with collection lawsuit); Sunga v. Broome, 2010 WL 3198925 (E.D. Va. Aug. 12, 2010) (homeowner association debt); Reichert v. Nat'l Credit Sys., 2005 WL 5549677 (D. Ariz. Mar. 31, 2005) (attempt to collect $225 in attorney fees before judgment); Beuter v. Canyon State Prof'l Services, 2005 U.S. Dist. LEXIS 12281 (D. Ariz. June 13, 2005); Hage v. Gen. Serv. Bur., 306 F. Supp. 2d 883 (D. Neb. 2003) (collecting attorney fees before obtaining judgment); Axtell v. Collections U.S.A. Inc., 2002 WL 32595276 (D. Ariz. Oct. 22, 2002).

215 Menashe v. Baum, 2011 WL 4553097 (E.D.N.Y. Sept. 28, 2011). *See also* Speights-Carnegie v. Blackstone Condo. Ass'n, 2018 WL 1519158 (N.D. Ill. Mar. 28, 2018).

216 Kaymark v. Bank of Am., 783 F.3d 168 (3d Cir. 2015); Munoz v. Pipestone Fin., L.L.C., 513 F. Supp. 2d 1076 (D. Minn. 2007); Stolicker v. Muller, Muller, Richmond, Harms, Myers, & Sgroi, P.C., 2005 WL 2180481 (W.D. Mich. Sept. 9, 2005) (where credit card agreement allowed for "reasonable attorney's fees," defendant's statement in state court that it was entitled to 25% percent fee violated § 1692f(1); reasonable attorney fee required court determination). *See also* Reichenbach v. Hayes, Johnson & Conley, P.L.L.C., 2019 WL 4511698 (M.D. Pa. Sept. 19, 2019) (violation of § 1692f(1) to request unincurred attorney fees).

217 Robey v. Shapiro, Marianos & Cejda, L.L.C., 434 F.3d 1208 (10th Cir. 2006) (no violation where collection law firm's demand for "reasonable attorney fees" in its foreclosure actions as permitted by state law, without disclosing that it was operating under flat fee arrangement with its client).

218 Boatley v. Diem Corp., 2004 WL 5315892 (D. Ariz. Mar. 24, 2004).

219 Fields v. Wilber Law Firm, P.C., 383 F.3d 562, 565 (7th Cir. 2004). *See also* Allison v. McCabe Trotter & Beverly, P.C., 2018 WL 5122207 (D.S.C. Oct. 22, 2018) (granting summary judgment for homeowners' association attorneys who preemptively added attorney fees to their claim, because fees collected were ultimately paid to the attorneys and were, in fact, authorized and owing pursuant to contract); Lott v. Vial Fortheringham, L.L.P., 2017 WL 4558050 (D. Or. Oct. 12, 2017) (state law allowed the homeowners' association to charge pre-litigation attorney fees); Jaffri v. Thrasher Buschmann & Voelkel, P.C., 2015 WL 1119726 (S.D. Ind. Mar. 10, 2015) (homeowners' covenants allowed recovery of attorney fees, even if no lawsuit had been filed); Spangler v. Conrad, 2010 WL 2389481 (E.D. Tenn. June 9, 2010).

220 Kojetin v. CU Recovery, Inc., 212 F.3d 1318 (8th Cir. 2000).

221 Francis v. Gen. Revenue Corp, 2020 WL 405886 (E.D.N.Y. Jan. 24, 2020) (45% fee not reasonable); White v. Fein, Such & Crane, L.L.P., 2015 WL 6455142 (W.D.N.Y. Oct. 26, 2015) (cannot recover unreasonable fee or for work not performed); Gonzalez v. Codilis & Assoc., P.C., 2004 WL 719264 (N.D. Ill. Mar. 31, 2004); Piper v. Portnoff Law Assoc., 262 F. Supp. 2d 520 (E.D. Pa. 2003) ($150 in attorney fees unreasonable to prepare and mail form letter).

the amount sought is authorized by the contract and permitted by law.[222]

8.3.6 Court Costs

Generally it is a FDCPA § 1692f(1) violation to demand court costs prior to a court awarding such costs,[223] although it may be permitted to seek costs of a specific amount in the complaint filed in a collection lawsuit[224] or where the contract authorizes them.[225] It is also a violation to seek costs not included in the court's award.[226] It is certainly unfair to seek court costs where the collector is not authorized to use the state's courts.[227] Although in some states, a judgment creditor can recover its costs to enforce its judgment after filing a bill of costs, it violates FDCPA § 1692f(1) to seek costs without first filing that bill of costs.[228] It is also a violation to seek costs for expenses never incurred[229] or not permitted by law.[230]

222 Aubrey v. McCabe Trotter & Beverly, P.C., 2018 WL 3912353 at *6 (D.S.C. Aug. 14, 2018).

223 Shula v. Lawent, 359 F.3d 489, 493 (7th Cir. 2004); Anderson v. Jefferson Capital Sys., L.L.C., 2017 WL 3836126 (N.D. Ga. Jan. 27, 2017); Anda v. Roosen Varchetti & Olivier, P.L.L.C., 2016 WL 7157414 (W.D. Mich. Oct. 31, 2016) (garnishment amount that included garnishment filing fees that had not been adjudicated as costs); Cohn v. New Century Fin. Services, Inc., 2016 WL 4016993 (E.D.N.Y. June 7, 2016) (filing and service costs that state court had not yet awarded); Gorman v. Messerli & Kramer, P.A., 2016 WL 755618 (D. Minn. Feb. 25, 2016) (process server fees demanded prior to judgment); Oberg v. Blatt, 2015 WL 9478213 (N.D. Ill. Dec. 29, 2015).

224 Clark v. Main St. Acquisition Corp., 553 Fed. Appx. 510 (6th Cir. 2014) (debt buyer's request for costs in unspecified amount in its affidavit attached to its debt collection complaint where such costs were permitted by state law to the prevailing party and were provided by a credit card contract); Downey v. Midland Funding, L.L.C., 2018 WL 1230584 (N.D. Ga. Feb. 20, 2018) (seeking $105 court costs in collection complaint); Scioli v. Goldman & Warshaw P.C., 651 F. Supp. 2d 273 (D.N.J. 2009) (collector listed specific sum of statutory fees in space provided in court-approved form summons).

225 Jeffries v. Credit Bur. of Carbon Cty., 2015 WL 7075401 (D. Colo. Nov. 13, 2015).

226 Foster v. D.B.S. Collection Agency, 2002 WL 32993859 (S.D. Ohio Mar. 8, 2002). *See also* Russo v. Puckett & Redford, P.L.L.C., 2009 WL 3837529 (W.D. Wash. Nov. 17, 2009) (while order for costs included costs for a registered process server, unfair to seek those costs where process server not registered).

227 Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (lacking legal capacity to bring suit).

228 Hawksley v. Weltman, Weinberg & Reis Co., 2017 WL 63033 (W.D. Ky. Jan. 5, 2017).

229 Belcher v. Ocwen Loan Servicing, L.L.C., 2016 WL 7243100 (M.D. Fla. Dec. 15, 2016) (attempted to collect fee for service of process where process never served).

230 Russo v. Puckett & Redford, P.L.L.C., 2009 WL 3837529 (W.D. Wash. Nov. 17, 2009) (service fee for unregistered process server); Watkins v. Peterson Enters., Inc., 57 F. Supp. 2d 1102 (E.D. Wash. 1999) (Wash. law does not provide for judgment creditor to recover costs for unsuccessful garnishments); Dutton v. Wolhar, 809 F. Supp. 1130 (D. Del. 1992) (costs filed in inconvenient forum prohibited by Del. statute), *aff'd on other grounds*, 5 F.3d 649 (3d Cir. 1993).

8.3.7 Other Fees, Charges, or Any Other Amount

When a check is dishonored, collectors, in recovering the face value of the check, may seek to tack on extra fees, especially to make collection of a small amount profitable for them. FDCPA § 1692f(1) prohibits such fees unless authorized by contract or permitted by state law. If state law is silent or permits such charges only in other contexts, the collector can assess a bad check charge only if it is permitted by contract.[231] But a fee may not be authorized by agreement just because the fee is posted at the merchant's location.[232] A check diversion program fee can be actionable under FDCPA § 1692f(1) where it is not permitted by the applicable statute, even where approved by the district attorney.[233]

There is certainly a FDCPA § 1692f(1) violation where fees assessed to collect on an insufficient funds check exceed those allowed by state law,[234] where the collector seeks fees for a dishonored check in addition to those allowed by law,[235] or where the consumer stopped payment on a check so that the bad check law allowing for fees does not apply.[236] Nevertheless, some courts find that a fee is permitted by state law paralleling Uniform Commercial Code Article 2, recoverable as incidental damages.[237] Even then, the fee must

231 *See* West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983).

232 Irwin v. Mascott, 186 F.R.D. 567 (N.D. Cal. 1999) (posted notice of dishonored-check service charge was not enough to show express agreement); Ballard v. Equifax Check Services, 27 F. Supp. 2d 1201 (E.D. Cal. 1998) (no evidence that merchant's sign was in fact posted or that consumer read it). *See also* Still v. JBC Assoc., 2005 WL 1334715 (D.N.J. June 3, 2005); Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995); FTC Official Staff Commentary § 808(1)-4 (collector must show that consumer knew of the charge), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *But see* Tuttle v. Equifax Check, 190 F.3d 9 (2d Cir. 1999) (consumer consented to imposition of returned check fee if consumer knew of sign stating fee would be imposed).

233 Del Campo v. Am. Corrective Counseling Serv., Inc., 718 F. Supp. 2d 1116 (N.D. Cal. 2010). *See also* 15 U.S.C. § 1692p, discussed at § 4.8.11, *supra*.

234 Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002) (state law allowed $15 and collector sought $250); Duffy v. Landberg, 215 F.3d 871 (8th Cir. 2000) (demanding $100 civil penalty where state law allowed penalty *up to* $100); Day v. Check Brokerage Corp., 511 F. Supp. 2d 950 (N.D. Ill. 2007) (without certified mail, not entitled to higher dishonored-check charge).

235 Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002) (shoplifting penalties were unavailable for collection of dishonored checks); Scott v. Riddle, 2000 WL 33980013 (D. Utah Dec. 4, 2000) (shoplifting statute's penalties inapplicable to bad checks); Larsen v. JBC Legal Grp., P.C., 533 F. Supp. 2d 290 (E.D.N.Y. 2008) (service charge in addition to penalty under bad check law).

236 Ozkaya v. Telecheck Services, Inc., 982 F. Supp. 578 (N.D. Ill. 1997).

237 Freyermuth v. Credit Bur. Services, Inc., 248 F.3d 767 (8th Cir. 2001) (service charge on checks was permitted by UCC Article 2 as incidental damages); Tuttle v. Equifax Check, 190 F.3d 9 (2d Cir. 1999) (U.C.C. Art. 2 allowed check guarantee agency its actual costs of collection as incidental damages); Martsolf v. JBC Legal Grp., P.C., 2008 WL 275719 (M.D. Pa. Jan. 30, 2008) ($30 as returned check fee authorized as U.C.C. incidental damages); Maneval v. Jon R. Hawks, Ltd., 1999 WL 33911242 (D. Minn. Oct. 12, 1999) (state law allowed demand of

be a reasonable approximation of the collector's incidental damages.[238]

FDCPA § 1692f(1) is violated where late fees exceed state law limits,[239] are assessed when a payment is not late,[240] or are assessed where there is no authorization for the fee.[241] After a loan is accelerated, contractual and state law authorizations for late charges may no longer apply, and then charging a late fee would violate FDCPA § 1692f(1).[242]

Credit, check, debit card, or online payment fees not agreed to or disclosed prior to payment are neither authorized by contract nor permitted by law, even where the collector passed on the fee to a third party.[243] This should be distinguished from a situation where the collector will accept certain forms of payment with no fee and discloses that other forms of payment will include a fee, at the consumer's option, and where that fee is not prohibited by state law.[244]

FDCPA § 1692f(1)'s prohibition on the collection of "any amount" unless expressly authorized by contract or permitted by law is very broad and applies to attempts to collect:

- Taxes;[245]
- Force-placed insurance on a home that was already properly insured;[246]
- Inflated escrow account payments;[247]
- Property inspection fees that are marked up or that are assessed too frequently;[248]
- Charges upon termination of an apartment lease;[249] and
- Condominium repairs that were never performed.[250]

8.4 FDCPA § 1692f(2) to f(4): Restrictions on Postdated Payment Instruments

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

> (2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

$100 over amount of bounced check); Charles v. Check Rite, Ltd., 1999 WL 1576167 (D. Ariz. Dec. 14, 1998) ($25 check fee was authorized under U.C.C. § 2-709 as "incidental damages").

238 Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995).

239 *See* Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000) (interest and late charges exceeded state limitation of 10%); Ballard v. Equifax Check Services, 158 F. Supp. 2d 1163 (E.D. Cal. 2001) ($20 service charge does not meet California standards for liquidated damages); Ditty v. CheckRite, Ltd., 973 F. Supp. 1320 (D. Utah 1997) (exceeding state limit of $15). *See also* Hansen v. Ticket Track, Inc., 280 F. Supp. 2d 1196 (W.D. Wash. 2003) (charges for not paying parking fees prohibited by state law).

240 Randall v. Ditech Fin., L.L.C., 2018 WL 2355927 (Cal. Ct. App. May 24, 2018) (default fees and costs for loan that was not in default).

241 Speights-Carnegie v. Blackstone Condo. Ass'n, 2018 WL 1519158 (N.D. Ill. Mar. 28, 2018); Agostino v. Quest Diagnostics, Inc., 2011 WL 5410667 (D.N.J. Nov. 3, 2011). *See also* Reichenbach v. Hayes, Johnson & Conley, P.L.L.C., 2019 WL 4511698, at *5 (M.D. Pa. Sept. 19, 2019). *But cf.* Brancato v. Specialized Loan Servicing, L.L.C., 2018 WL 2770137 (D.N.J. June 8, 2018) (late fee authorized by parties' written agreement).

242 France v. Ditech Fin., L.L.C., 2018 WL 1695405 (M.D. Fla. Apr. 6, 2018). *See also* Muhammad v. Carrington Mortg. Services, L.L.C., 2019 WL 1259353 (S.D. Fla. Mar. 19, 2019) (denying motion to dismiss where court was unable to determine whether consumer still had a right to reinstate after the alleged acceleration at the time she received servicer's letters); Jackson v. Carrington Mortg. Services, L.L.C., 2017 WL 5513704 (S.D. Fla. Nov. 17, 2017). *But see* Rizzo v. Pierce & Assoc., 351 F.3d 791 (7th Cir. 2003) (post-acceleration late fee on mortgage authorized); Patel v. Seterus, Inc., 2015 WL 13547010 (M.D. Fla. June 19, 2015) (mortgage servicer had a contractual and legal right to require payment of post-acceleration late fees if the homeowners reinstated the loan).

243 *See* Torliatt v. Ocwen Loan Servicing, L.L.C., 2020 WL 1904596 (N.D. Cal. Apr. 17, 2020), *reconsideration denied*, 2020 WL 4495480 (N.D. Cal. June 22, 2020); Sanders v. LoanCare L.L.C., 2019 WL 441964 (C.D. Cal. Feb. 1, 2019); Roe v. Totleca Enters., Inc., 2018 WL 1900532 (E.D. Tex. Apr. 20, 2018); Schwartz v. I.C. Sys., Inc., 2018 WL 1582224 (E.D.N.Y. Mar. 30, 2018); McLain v. Head Mercantile Co., 2017 WL 3710073 (M.D. La. Aug. 28, 2017); McWhorter v. Ocwen Loan Servicing, L.L.C., 2017 WL 3315375 (N.D. Ala. Aug. 3, 2017); Fuentes v. AR Res., Inc., 2017 WL 1197814 (D.N.J. Mar. 31, 2017); Thomas v. Youderian, 232 F. Supp. 3d 656 (D.N.J. 2017); Simmet v. Collection Consultants of Cal., 2016 WL 11002359 (C.D. Cal. July 7, 2016). *See also* Manlangit *ex rel.* Manlangit v. FCI Lender Services, Inc., 2020 WL 5570092 (N.D. Ill. Sept. 16, 2020). *But see* Ketterman v. I.C. Sys., Inc., 2019 WL 3777635 (E.D. Mo. Aug. 12, 2019) (third-party credit card processor collects and retains entirety of contested processing fee and that party is not a debt collector).

244 Lee v. Main Accounts, Inc., 1997 WL 618803 (6th Cir. Oct. 6, 1997); Michael v. HOVG, L.L.C., 232 F. Supp. 3d 1229 (S.D. Fla. 2017); Campbell v. MBI Assoc., Inc., 98 F. Supp. 3d 568 (E.D.N.Y. 2015). *See also* Alexander v. Carrington Mortg. Services, L.L.C., 2020 WL 7319252 (D. Md. Dec. 11, 2020). *Cf.* Lembeck v. Arvest Cent. Mortg. Co., 498 F. Supp. 3d 1134 (declining to dismiss claim where fact that no-fee payment methods were available and fact that borrower selected method with fee did nothing to take fee outside plain language of statute).

245 Martinez v. Albuquerque Collection Services, 867 F. Supp. 1495 (D.N.M. 1994). *See also In re* Trevino, 615 B.R. 108 (Bankr. S.D. Tex. 2020) (improper attempt to collect *ad valorem* taxes).

246 *See In re* Breitner, 2018 WL 1162879 (Bankr. M.D. Pa. Mar. 1, 2018).

247 *See* Bowen v. Ditech Fin. L.L.C., 2017 WL 4183081, at *25 (D. Me. Sept. 20, 2017).

248 *See* Daniel v. Select Portfolio Servicing, L.L.C., 159 F. Supp. 3d 1333 (S.D. Fla. 2016); Millien v. Carrington Mortg. Services, L.L.C., 2015 WL 12817174 (S.D. Fla. Dec. 14, 2015) (contract did not authorize property inspections to occur monthly in absence of any indication that property had been allowed to deteriorate or fall to waste).

249 Dawson v. Genesis Credit Mgmt., L.L.C., 2017 WL 5668073 (W.D. Wash. Nov. 27, 2017); Jarzyna v. Home Props., L.P., 114 F. Supp. 3d 243 (E.D. Pa. 2015) ("30-day notice" fee); Hayden v. Rapid Collection Sys., Inc., 2006 WL 1127180 (D. Ariz. Apr. 27, 2006).

250 *See* Speights-Carnegie v. Blackstone Condo. Ass'n, 2018 WL 1519158 (N.D. Ill. Mar. 28, 2018).

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.[251]

Regulation F (effective November 30, 2021) restates this language at section 1006.22(c)(1) to (3).[252] Reg. F § 1006.22(c)(1) also adds a clarification of the term "business days" in FDCPA § 1692f(2).

These three FDCPA § 1692f subsections restrict when a collector may solicit, accept, or deposit a consumer's postdated check or other payment instrument. By the very language of these provisions, they apply not only to checks written by the consumer, but to any other payment instrument, such as a "preauthorized" check[253] or an electronic funds transfer.[254]

Some early versions of the FDCPA flatly prohibited collectors' acceptance or solicitation of a postdated check.[255] Collectors' trade associations argued that postdated checks were a convenient method of payment for many consumers.[256]

The present language focuses on the misuse of postdated payment instruments. FDCPA § 1692f(4) is a flat prohibition of a collector depositing a payment instrument prior to its payment date. A collector cannot surprise a consumer who hopes to have sufficient funds in an account by the payment date by withdrawing funds from the consumer's account early.

Moreover, a consumer, having written the check well before the payment date, may not remember that the payment date is approaching, and changed circumstances may alter the consumer's ability to make payment on that date. FDCPA § 1692f(2) requires the collector to warn the consumer of the impending payment date—the warning must be in a window between three and ten business days before the payment date.[257] This gives the consumer an opportunity to determine the consumer's present financial situation and to stop payment if that is advisable.

FDCPA § 1692f(3) prohibits collector solicitation of postdated payment instruments where the collector is hoping there will be insufficient funds for payment so that it can use that fact to threaten or actually institute criminal prosecution under a state criminal statute.[258] Collectors may make these threats, or even seek to institute proceedings, even though there are many reasons why a state's criminal bad check statute may not even apply. State criminal check writing laws frequently do not apply to postdated checks or checks covering an existing debt.[259] They may not apply where the consumer had no intent to bounce the payment. They may not apply where an action is brought by an assignee of the original payee.

It may be difficult to prove that the postdated instrument was solicited with the intent of later threatening to institute criminal prosecution;[260] the collector may assert that the check was solicited only to pay the debt. This can be countered where the collector demanded a postdated check, even though it knew the consumer did not have sufficient funds to cover the check.[261]

Other evidence of an unlawful intent would be a pattern of the collector threatening or instituting bad check prosecutions on postdated checks. Checking dockets of local criminal prosecutions or local prosecutors may supply useful leads. Where allowed by state law and state attorney ethics standards, the consumer may be able to record conversations whereby the collector procures the postdated instrument and later threatens criminal prosecution.[262]

8.5 FDCPA § 1692f(5): Causing Charges to a Person by Concealing Communications' Collection Purpose

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without

251 15 U.S.C. §§ 1692f(2), 1692f(3), 1692f(4). *See also* Reg. F § 1006.22(c).

The legislative history of these provisions was complicated by the variety of methods proposed to combat the misuse by debt collectors of postdated checks. Several bills completely prohibited the solicitation or acceptance of postdated checks. Others primarily used the present approach, with variations in time periods and wording. Some bills leading to the FDCPA flatly prohibited the acceptance or solicitation of a postdated check by collectors. H.R. 10191, 94th Cong., 1st Sess. § 805(5) (1975); H.R. 29, 95th Cong., 1st Sess. § 807(2) (1977). *E.g.*, H.R. 11969, 94th Cong., 2d Sess. § 807(2) (1976); H.R. 13720, 94th Cong., 2d Sess. §§ 807(2), 807(3), 807(4) (1976).

252 85 Fed. Reg. 76,734, 76,833–76,834 (Nov. 30, 2020).

253 *See* National Consumer Law Center, Consumer Banking and Payments Law § 3.13 (6th ed. 2018), *updated at* www.nclc.org/library.

254 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.9 (6th ed. 2018), *updated at* www.nclc.org/library.

255 H.R. 10191, 94th Cong., 1st Sess. § 805(5) (1975); H.R. 29, 95th Cong., 1st Sess. § 807(2) (1977).

256 *Senate Hearings, The Fair Debt Collection Practices Act: Hearings Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Hous. and Urban Affairs*, 95th Cong., 1st Sess. 171 (1977) (statement of John W. Johnson, American Collectors Ass'n, Inc.) ("[t]his section prohibits the debt collector from accepting postdated checks from debtors, even though the debtors might want to give them to the collector. The purpose is apparently to prevent the possibility that a collector might accept a postdated check from a debtor, and then, if the check bounces, threaten the debtor with prosecution under state bad check laws. That goal is laudable and could easily be reached by a rewording of this section, without precluding the convenience of postdated checks for both debtor and collector.") (out of print, but may be available for copying at U.S. government document depositories).

257 Regulation F defines business days for purposes of this provision as excluding public holidays identified in 5 U.S.C. § 6103(a), Saturdays, and Sundays. *See* Reg. F. § 1006.22(c)(1).

258 *See* United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370 (N.D. Tex. 1986), *aff'd per curiam*, 823 F.2d 880 (5th Cir. 1987).

259 *See* National Consumer Law Center, Collection Actions Ch. 8 (5th ed. 2020), *updated at* www.nclc.org/library.

260 *See, e.g.*, Grassley v. Debt Collectors, Inc., 1992 U.S. Dist. LEXIS 22782 (D. Or. Dec. 4, 1992).

261 *See* McGrady v. Nissan Motor Acceptance Corp., 40 F. Supp. 2d 1323 (M.D. Ala. 1998).

262 *See* § 11.5.2, *infra* (recording of phone conversations).

limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.[263]

Regulation F (effective November 30, 2021) restates this language at section 1006.22(d).[264]

FDCPA § 1692f(5) protects individuals from incurring charges for any type of collection communications when the debt collector has concealed the true purpose of the communication.[265] While early versions of this provision applied its protection only to "consumers,"[266] Congress made the decision in the final bill to apply the protections to "any person." The provision applies to a collector's communications not only with the consumer, but to any third party.

There is no FDCPA § 1692f(5) violation if an individual does not incur charges, either because the call, text, or email does not contribute to exceeding the amount included in a plan, or because someone else incurs the charges.[267]

In its discussion of Regulation F, the CFPB has stated the following about text messages to consumers that cause consumers to incur charges:

> [T]he Bureau does not believe . . . that a debt collector necessarily violates FDCPA section 808(5) [§ 1692c] by sending a text message to a consumer with a limited text messaging plan. Rather, the Bureau believes that . . . a violation of FDCPA section 808(5) [§ 1692c] would require the debt collector to engage in concealment of the true purpose of the text message. The Bureau believes that a debt collector who communicates by text message pursuant to the procedures in [Reg. F] § 1006.6(d)(5) would be unlikely to engage in such concealment . . ."[268]

This statement highlights that incurring charges is not sufficient on its own without also satisfying the element of "concealment of the true purpose of the communication." Whether the debt collector's caller ID reveals the "true purpose" of a call or text would be a factual issue in many cases.[269]

263 15 U.S.C. § 1692f(5). *See also* Reg. F § 1006.22(d).

264 85 Fed. Reg. 76,734, 76,833 (Nov. 30, 2020).

265 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*.

266 *E.g.*, S. 3838, 94th Cong., 2d Sess. § 807(6) (1976); S. 918, 95th Cong., 1st Sess. § 808(5) (1977).

267 *See* Horowitz v. GC Services L.P., 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016).

268 85 Fed. Reg. 76,734, 76,793 n.341 (Nov. 30, 2020).

269 *See* Horowitz v. GC Services L.P., 2015 WL 1959377 (S.D. Cal. Apr. 28, 2015) (consumer sufficiently alleged that collection agency caused charges to consumer's cell phone bill in the form of lost minutes when it used a false caller ID and left a voice mail for his cell phone, violating § 1692f(6)). *See also* § 14.3.3, *infra* (discuss.ng caller ID and spoofing).

8.6 FDCPA § 1692f(6): Threats and Actions to Dispossess Property Non-Judicially

8.6.1 Overview

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
(B) there is no present intention to take possession of the property; or
(C) the property is exempt by law from such dispossession or disablement.[270]

Regulation F (effective November 30, 2021) restates this language at section 1006.22(e).[271]

Section 1692f(6) is a unique FDCPA provision because it adds to the general definition of a debt collector, which states at FDCPA § 1692a(6) that, "[f]or the purpose of section 1692f(6) of this title such term also includes any person . . . in any business the principal purpose of which is the enforcement of security interests."[272] As a result, FDCPA § 1692f(6) clearly applies to repossession agents, foreclosure law firms, and others whose business is seizing collateral. The 2019 Supreme Court decision in *Obduskey v. McCarthy & Holthus L.L.P.*,[273] muddies the waters as to the application of *other* FDCPA provisions to such entities, but there is no question that FDCPA § 1692f(6) applies to those firms.

At the same time, FDCPA § 1692f(6) is not limited to firms whose principal purpose is enforcement of security interests. The provision also applies to any entity within the general FDCPA definition of debt collector. See § 4.7.5, *supra*, for a discussion of the FDCPA's general coverage as to those involved with repossession, foreclosures, and evictions.

FDCPA § 1692f(6) prohibits both threats[274] and the actual taking of the prohibited forms of nonjudicial actions. The threats or actual taking can be a dispossession or a disablement.

270 15 U.S.C. § 1692f(6). These provisions first appeared with only minor variations from the present language in S. 918, 95th Cong., 1st Sess. § 808(7) (1977). *See also* Reg. F § 1006.22(e).

271 85 Fed. Reg. 76,734, 76,833 (Nov. 30, 2020).

272 11 U.S.C. § 1692a(6) (third sentence).

273 ___ U.S. ___, 139 S. Ct. 1029, 203 L. Ed. 2d 390 (2019).

274 *See* Williams v. Republic Recovery Services, Inc., 2010 WL 2195519 (N.D. Ill. May 27, 2010) (threats are actionable; no need to take action); Robertson v. Horton Bros. Recovery, Inc., 2007 WL 2009703 (D. Del. July 3, 2007) (repo engaged in threatening and vulgar phone calls and visits violated § 1692f(6)(a)).

Prime examples of dispossession include foreclosing a home nonjudicially, locking out a consumer from a rental apartment, padlocking a manufactured home, repossessing a vehicle, or retaining, over the consumer's objection, a vehicle pursuant to a statutory lien.

A common example of disablement is the use of a starter interrupter device inserted into a motor vehicle whereby a collector can refuse to give a consumer a code to override the device that would allow the consumer to operate the vehicle. Disablement also applies to a repair shop disabling an item to be repaired until payment is received.

Nothing in FDCPA § 1692f(6) requires that the property involved in the violation be collateral. FDCPA § 1692f(6)(A) applies to property "claimed" as collateral. There is thus a violation if a creditor claims, but has not taken, a proper security interest in property, and seizes or threatens to seize the property.[275] It is unclear whether FDCPA § 1692f(6)(A) applies to repossession of a leased vehicle, since the vehicle is not collateral on a loan but owned by the lessor. On the other hand, FDCPA § 1692f(6)(B) and (C) are not limited to collateral or property that is claimed as collateral, and so apply to dispossessions and disablements even where the property is unsecured or leased.

By its terms, FDCPA § 1692f(6) applies to nonjudicial actions. The provision does not apply to judicial foreclosures or replevin of personal property.[276] It also does not apply to court-ordered garnishment of wages or a bank account.[277]

8.6.2 When Collector Has No Present Right to Property—FDCPA § 1692f(6)(A)

FDCPA § 1692f (6)(A) prohibits the threat or taking of an action to dispossess or disable property when "there is no present right to possession of the property claimed as collateral through an enforceable security interest." Whether there is such a present right is to be determined by state law.[278] This provision can apply to threatening to or enforcing a security interest where:

- The claimed security interest is not valid, such as where the security agreement is defective;[279]
- The entity in whose name the enforcement is conducted does not have that right, such as where the assignment to that entity is defective or the assignment is not effective until after that entity conducted the foreclosure[280] (the consumer, though, should produce some showing as to why the collector's claimed right is not valid);[281]

275 *See* S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 8, *reprinted at* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.2, *infra* (Act prohibits "repossessing property if there is not valid security interest or it is exempt by law from repossession").

276 *See* Mitchell v. Bank of N.Y. Mellon, 2019 WL 2409658 (D. Utah June 7, 2017) (challenged foreclosure sale was a judicial, not nonjudicial, foreclosure sale); Lienfactors, L.L.C. v. Belamour, 2011 WL 726169 (Conn. Super. Ct. Jan. 31, 2011) (does not apply to judicial foreclosure).

277 *See* § 8.6.4, *infra*.

278 Richards v. PAR, Inc., 954 F.3d 965 (6th Cir. 2020). *See also* Fed. Nat'l Mortg. Ass'n v. Obradovich, 2020 WL 2767578 (N.D. Ill. May. 28, 2020) (under relevant state law, jury could find that servicer, by telling its agent to go inside property without permission, breached peace and therefore violated § 1692f(6)).

279 For grounds why a claimed security interest in motor vehicles or other personal property is invalid, see National Consumer Law Center, Repossessions Ch. 3 (10th ed. 2022), *updated at* www.nclc.org/library. For grounds why a claimed security interest in real property is invalid, see National Consumer Law Center, Home Foreclosures § 7.15.5 (2019), *updated at* www.nclc.org/library. *See also* Oliver v. ARS Ohio L.L.C., 2019 WL 343249 (N.D. Ohio Jan. 28, 2019) (vehicle no longer titled in name of debtor); Meredith v. Pathfinders, 1983 U.S. Dist. LEXIS 20367 (D.S.C. Nov. 9, 1983) (repossession agency liable for $7500 FDCPA damages and FDCPA attorney fees when agency repossessed property for creditor when creditor had no present right to possession).

280 *See* Dowers v. Nationstar Morg., L.L.C., 852 F.3d 964, 971 (9th Cir. 2017) (servicer attempted to conduct non judicial foreclosure when lacked legal authority to enforce obligation); Minnifield v. Johnson & Freedman, L.L.C., 448 Fed. Appx. 914 (11th Cir. 2011) (assignment of mortgage to foreclosure attorney occurred two weeks *after* foreclosure); Titus v. Wells Fargo Bank, 2016 WL 807806 (W.D. Wash. Mar. 2, 2016); Kobialko v. Pierce & Assoc., P.C., 2014 WL 1339662 (N.D. Ill. Apr. 3, 2014); Hoffman v. Wells Fargo Bank, 2014 WL 6822359 (E.D. Pa. Dec. 4, 2014) (two recorded assignments based were invalidated by undisclosed, unrecorded assignments); McDonald v. OneWest Bank, 929 F. Supp. 2d 1079 (W.D. Wash. 2013); Diaz v. Bank of Am., 2013 WL 12248082, at *8 (N.D. Ga. Jan. 17, 2013), *adopted*, 2013 WL 12247808 (N.D. Ga. Feb. 5, 2013) (sent notice of foreclosure sale before receiving transfer of home loan); Garrett v. BNC Mortg. Inc., 929 F. Supp. 2d 1120 (D. Colo. 2013); Deutsche Bank Tr. Co. Americas v. Garst, 2013 WL 4851493 (N.D. Ala. Sept. 11, 2013); Bohannon v. PHH Mortg. Corp., 2012 WL 12844753 (N.D. Ga. Nov. 26, 2012), *adopted*, 2013 WL 12062836 (N.D. Ga. June 28, 2013); Moore v. Fed. Nat'l Mortg. Ass'n, 2012 WL 424583, at *5 (W.D. Wash. Feb. 9, 2012); Akar v. Fed. Nat'l Mortg. Ass'n, 2011 WL 6288055 (D. Mass. Dec. 1, 2011) (communicated intent to foreclose occurred prior to assignment); Lettenmaier v. Fed. Home Loan Mortg. Corp., 2011 WL 1938166 (D. Or. May 20, 2011), *later op. at* 2011 WL 3476661 (D. Or. Aug. 8, 2011); Pizan v. HSBC Bank, 2011 WL 2531104 (W.D. Wash. June 23, 2011); Matthews v. Mortg. Elec. Registration Sys., Inc., 2011 WL 2560329 (E.D. Mich. Apr. 5, 2011), *adopted*, 2011 WL 2563180 (E.D. Mich. June 28, 2011); Jackman v. Hasty, 2011 WL 854878 (N.D. Ga. Mar. 8, 2011); Armacost v. HSBC Bank, 2011 WL 825151 (D. Idaho Feb. 9, 2011), *adopted*, 2011 WL 809166 (D. Idaho Mar. 2, 2011). *See also* Ruffner v. Quality Loan Serv. Corp. of Wash., 2021 WL 1414205 (D. Or. Apr. 12, 2021) (disputed fact issues regarding possession of note preclude summary judgment for mortgage servicer on borrower's § 1692f(6) claim); Ponthieux v. Nationstar Mortg., 2021 WL 211252 (E.D. Cal. Jan. 21, 2021), *adopted*, 2021 WL 1089849 (E.D. Cal. Mar. 22, 2021); Weidman v. Carrington Mortg. Services, 2019 WL 2357997, at *5 (W.D. Wash. June 4, 2019) (borrower can bring § 1692f(6) claim over authority to foreclose, but pleading at issue is too vague to support claim); Bushlow v. MTC Fin., 2018 WL 1745803 (N.D. Cal. Apr. 11, 2018) (borrower would have standing to challenge trustee's actions under FDCPA based on lack of authority to foreclose, but here failed to allege facts sufficient to support such a claim), *later op. at* 2018 WL 3744022 (N.D. Cal. Aug. 7, 2018) (dismissing lack of authority to foreclose claim with prejudice, not discussing FDCPA), *aff'd*, 771 Fed. Appx. 375 (9th Cir. 2019); McDonald v. OneWest Bank, 929 F. Supp. 2d 1079 (W.D. Wash. Mar. 7, 2013) (trustee began the foreclosure process when it had not yet been appointed successor trustee); Mickelson v. Chase Home Fin., L.L.C., 2012 WL 3240241 (W.D. Wash. Aug. 7, 2012).

281 *See* Mbaku v. Carrington Mortg. Services L.L.C., 735 Fed. Appx. 533 (10th Cir. 2018) (conclusory allegation, without more, that foreclosing party lacked documentation to establish its right to enforce note and deed of trust was inadequate where foreclosing party filed documents

- The foreclosure trustee conducting a non-judicial foreclosure sale is not properly appointed in accordance with state law requirements;[282]
- There is no default that can justify enforcement of the security interest,[283] the delinquency is not of sufficient size to allow for foreclosure under state law,[284] or the credit obligation has been satisfied;[285]
- After allowing a practice of accepting late or partial payments, the security interest is enforced without notice of the changed practice;[286]
- After agreeing to forbear payments, the security interest is enforced without notice of the change;[287]
- It is prior to termination of a right to cure;[288]
- It is not in compliance with federal or state law preconditions to such enforcement, such as failing to provide a required notice or comply with a servicing requirement;[289]
- A servicer is proceeding to a non-judicial foreclosure while RESPA regulations[290] requires that foreclosure be delayed while the servicer completes a loss mitigation review;[291]
- It is not in compliance with contractual conditions on the right to enforce the security interest, such as failing to provide a notice prior to enforcement;[292]
- There is padlocking of property or turning off of utilities prior to a required court possession order;[293] or

supporting its nonjudicial foreclosure); Arias v. Select Portfolio Servicing, Inc., 2018 WL 1518676 (E.D. Cal. Mar. 28, 2018) (dismissing § 1692f(6) claim where consumer failed to provide any factual allegations indicating that mortgage servicer or trustee lacked right to possess property).

282 *See, e.g.*, Walker v. Quality Loan Serv. Corp., 308 P.3d 716, 726 (Wash. Ct. App. 2013).

283 *See* Amodio v. Ocwen Loan Servicing, L.L.C., 2019 WL 2162944 (M.D. Tenn. May 17, 2019) (denying foreclosure firm's motion for summary judgment on § 1692f(6) claim where firm proceeded with non-judicial foreclosure after borrower complied with standard paragraph 22 mortgage provision and cured default); Thomas v. Ocwen Loan Servicing, 2018 WL 3608398 (W.D. Wash. July 26, 2018) (debtors were not in default and had been tendering payments); Yadav-Ranjan v. Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 3328499, at *7 (N.D. Cal. July 6, 2018) (loan not in default); James v. Nationstar Mortg., L.L.C., 92 F. Supp. 3d 1190 (S.D. Ala. 2015) (home loan not in default when foreclosure threatened); Dunavant v. Sirote & Permutt, P.C., 2013 WL 5634425 (S.D. Ala. Oct. 15, 2013). *See also* Goodwin v. His Choice Towing & Recovery, L.L.C., 2019 WL 1212119 (N.D. Ga. Jan. 14, 2019) (where consumer paid all outstanding charges on the loan and obtained an extension of the maturity date, she was no longer in default), *adopted*, 2019 WL 7944075 (N.D. Ga. Dec. 3, 2019).

284 Hanson v. JQD, L.L.C., 2014 WL 3404945 (N.D. Cal. July 11, 2014) (state law regarding homeowner association foreclosures).

285 *See* Bynon v. Mansfield, 2016 WL 4089169 (E.D. Pa. Aug. 1, 2016); Carter v. Am. Note Servicing, 2014 WL 2002829 (W.D. Va. May 15, 2014).

286 Hendrickson v. Fifth Third Bank, 2019 WL 652417 (D. Minn. Feb. 15, 2019); Buzzell v. Citizens Auto. Fin., Inc., 802 F. Supp. 2d 1014 (D. Minn. 2011) (practice of accepting late payments); Akerlund v. TCF Nat'l Bank, 2001 WL 1631440 (D. Minn. June 11, 2001) (repossession without having sent notice that late payments will no longer be accepted might be FDCPA violation, but not shown here). *See also* National Consumer Law Center, Repossessions § 4.3.1.1 (9th ed. 2017).

287 Wright v. Santander Consumer USA, Inc., 2018 WL 2095171, at *4–5 (M.D. Fla. May 1, 2018) repossessing car after creditor told car owner that it would not repossess if payment was made in next month); Harris v. Americredit Fin. Services, Inc., 2005 WL 2180477 (W.D. Va. Sept. 9, 2005) (taking vehicle after agreeing to forbearance).

288 *See* Dallman v. Felt & Lukes, L.L.C., 2013 WL 6628996 (W.D. Wis. Dec. 17, 2013) (creditor violates FDCPA by repossessing without having sent right to cure notice required by state law, but not shown here); Meredith v. Pathfinders Detective & Recovery, Inc., 1983 U.S. Dist. LEXIS 11860 (D.S.C. Nov. 9, 1983); Foster v. Ford Motor Credit Co., 395 S.E.2d 440 (S.C. 1990).

289 *See* Cordeiro v. Carrington Mortg. Services, L.L.C., 2020 WL 3404742 (D.R.I. June 19, 2020) (failure to fulfill certain HUD prerequisites incorporated into mortgage), *judgment withdrawn in part by* 2021 WL 673482 (D.R.I. Feb. 22, 2021). *See also* Cooke v. Carrington Mortg. Services, 2019 WL 3241128 (D. Md. July 17, 2019) (claims stated under § 1692e where servicer proceeded with foreclosure without complying with HUD regulation requiring face-to-face loss mitigation meeting, but dismissing claim under § 1692f(6) based on same conduct as duplicative). *But see* Freeman v. Ally Fin. Inc., ___ F. Supp. 3d ___, 2021 WL 1099840 (D. Minn. Mar. 23, 2021) (dismissing § 1692f(6) claim because state common law requirement of pre-repossession notice that consumer contended was not provided did not apply). *See generally* 41 Pa. Cons. Stat. § 403 (requirement for pre-acceleration notice of right to cure), § 404 (post-acceleration right to cure, up to one hour before commencement of foreclosure sale); Mass Gen. Laws ch. 244, § 35A (requirement for notice of 90-day right to cure before foreclosure); Taylor v. Bayview Loan Servicing, L.L.C., 74 So. 3d 1115 (Fla. Dist. Ct. App. 2011); Pinti v. Emigrant Mortg. Co., 33 N.E.3d 1213 (Mass. 2015) (non-judicial foreclosure sale void due to non-compliance with contract-based pre-foreclosure notice requirement); Deutsche Bank Nat'l Tr. Co. v. Haller, 954 N.Y.S. 2d 551 (N.Y. App. Div. 2012); Fed. Nat'l Mortg. Ass'n v. Brunner, 986 N.E.2d 565 (Ohio Ct. App. 2013); National Consumer Law Center, Home Foreclosures § 5.2 (2019), *updated at* www.nclc.org/library.

290 12 C.F.R. § 1021.41(f), (g).

291 White v. U.S. Bank, 2018 WL 4431416 (W.D. Tenn. Sept. 14, 2018) (borrower stated § 1692f(6) claim against foreclosure trustee who conducted sale while borrower's application for loss mitigation was pending); Weisheit v. Rosenberg & Assoc., 2017 WL 5478355 (D. Md. Nov. 15, 2017) (allowing § 1692f(6) claim where law firm proceeded with a foreclosure sale while RESPA dual tracking protections in effect). *See also* Best v. Newrez L.L.C., 2020 WL 5513433 (D. Md. Sept. 11, 2020) (allowing FDCPA claim under § 1692e based on RESPA dual tracking violation while dismissing claim under § 1692f(6) based on same conduct as duplicative).

292 *See* Gosha v. Bank of N.Y. Mellon Corp., 2019 WL 5295466, at *7 (D. Or. Oct. 18, 2019) foreclosing entity did not meet conditions to exercise of right to foreclose, including compliance with notice requirements of paragraph 22 of standard GSE mortgage); Stevens v. Harveston Cmty. Assoc., 2019 WL 1670824, at *3 (C.D. Cal. Feb. 19, 2019) (foreclosure trustee added unlawful fees that led to non-judicial foreclosure sale); Puryer v. HSBC Bank, 419 P.3d 105 (Mont. 2018) (threatening to foreclose when there was no right to do so because of failure to give pre-foreclosure notices required under deed of trust); *In re* Pullen, 451 B.R. 206 (Bankr. N.D. Ga. 2011) (failure to comply with notice requirements in deed constituted a wrongful foreclosure under state law). *See* National Consumer Law Center, Home Foreclosures § 5.2 (2019) *updated at* www. nclc.org/library (discussing state law pre-foreclosure notice requirements).

293 Flippin v. Aurora Bank, 2012 WL 3260449 (N.D. Ill. Aug. 8, 2012); Matthews v. Homecoming Fin. Network, 2005 WL 2387688 (N.D. Ill. Sept. 26, 2005). *See also* Griffin v. Safeguard Props. Mgmt., L.L.C., 2020 WL 6118572, at *11 (N.D. Ill. Oct. 16, 2020) (genuine issue of

- A repossession breaches the peace, since the right to self-help repossession is limited to when the seizure can be conducted without breaching the peace.[294]

FDCPA § 1692f(6)(A) applies only to property claimed as collateral, so it does not apply to a collector's unreasonable requirements as to the return of personal property taken in conjunction with a vehicle repossession if the collector does not claim a security interest in that personal property.[295] FDCPA § 1692f(6)(A) also is violated if a collector refuses to return the personal property because it *claims* that the personal property is part of its collateral, even if, in fact, the personal property is not part of the collateral.

A motor vehicle "yo-yo" transaction involves a completed sale where the dealer claims financing has fallen through and the consumer must return the vehicle. If the dealer sends a repossession agent to threaten or to retrieve the vehicle, the agent may claim FDCPA § 1692f(6)(A) does not apply, because it is not seizing pursuant to a claimed security interest, as the sale was not final and the dealer still owns the vehicle.[296] The dealer may claim it is not dispossessing the vehicle pursuant to a security interest, because it is, in fact, the vehicle's owner.

But whether the dealer is still the owner is a factual issue—it turns on whether ownership has remained in the dealer until financing is approved (a condition precedent) or whether ownership has transferred to the consumer where the dealer has the right to unwind the sale if financing falls through (a condition subsequent). In a condition subsequent transaction, since ownership has passed to the consumer, the right to recover the vehicle must be based on enforcement of the security interest.[297] For a discussion of the indicia as to whether a yo-yo transaction is a condition precedent or condition subsequent, see NCLC's Automobile Fraud Ch. 4 (6th ed. 2018), *updated at* www.nclc.org/library.

8.6.3 When No Present Intent to Take Property—FDCPA § 1692f(6)(B)

FDCPA § 1692f(6)(A) prohibits threats if there is no present right to possession of the property claimed to be collateral. FDCPA § 1692f(6)(B) prohibits threats where there is no present intent to take property. FDCPA § 1692f(6)(B) thus differs in two ways from section 1692f(6)(A)—it applies even to property not claimed as collateral and it applies even where the collector has a present right to possession but does not intend to exercise that right.

In this latter regard, the provision is similar to FDCPA § 1692e(4) and (5). FDCPA § 1692e(4), among other things, prohibits threats that nonpayment will result in the seizure of any property where the collector does not intend to take such action. But FDCPA § 1692e(4) is also broader, and applies where the threat relates to arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person.[298] FDCPA § 1692e(5) is even broader and prohibits the "threat to take any action that cannot legally be taken or that is not intended to be taken."[299]

The repossessor's lack of intent to seize the collateral can be shown indirectly if only a minor amount is delinquent or outstanding, if the creditor has not repossessed similar collateral under similar circumstances in the past, if the debt collector has no authority to repossess the property, or if the repossessor fails to seize the collateral. Even if the collateral is eventually

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fact as to whether property preservation company was directed to enter the property, change the locks, and winterize it; if true, those actions would violate § 1692f(6)(A)).

294 *See* Richards v. PAR, Inc., 954 F.3d 965 (7th Cir. 2020) (reasonable jury could conclude that breach of peace occurred during repossession attempt); Rivin v. Patrick K. Willis Co., 2020 WL 8365251 (C.D. Cal. Dec. 4, 2020) (repossession company breached peace when, without permission, it entered property that was secured by locked gate and fence); Fed. Nat'l Mortg. Ass'n v. Obradovich, 2020 WL 2767578 (N.D. Ill. May. 28, 2020) (reasonable jury could find that servicer, by telling its agent to go inside property without permission, breached peace); Gerbasi v. NU Era Towing & Serv., Inc., 443 F. Supp. 3d 411 (W.D.N.Y. 2020); Thomas v. General Motors Fin. Co., 2020 WL 8771387 (W.D. Tex. Mar. 18, 2020) (repossession agent towed vehicle with consumer inside it, thereby committing breach of peace), *reconsideration denied*, 2020 WL 8771383 (W.D. Tex. Apr. 30, 2020); Russell v. Santander Consumer USA, Inc., 2019 WL 4572882 (E.D. Wis. Sept. 20, 2019), *related case at* 2020 WL 3077944 (E.D. Wis. June 9, 2020); O'Connell v. Pursuit, L.L.C., 2019 WL 456223 (E.D. Ky. Feb. 5, 2019); Gable v. Universal Acceptance Corp., 338 F. Supp. 3d 943 (E.D. Wis. 2018); Wright v. Santander Consumer USA, Inc., 2018 WL 2095171, at *4–5 (M.D. Fla. May 1, 2018) (repo man displayed pistol and damaged two other cars in car owner's driveway before repossessing car); Bednarz v. Lovald, 2016 WL 6304705, at *6 (E.D. Wis. Oct. 27, 2016) (parties' "vastly different versions of events" prevented summary judgment determination as to breach of peace); Vantu v. Echo Recovery, L.L.C., 85 F. Supp. 3d 939 (N.D. Ohio 2015); Clark v. PAR, Inc., 2015 WL 13781846 (C.D. Cal. July 22, 2015) (repossessed car that was fenced in and gate was locked); Aviles v. Wayside Auto Body, Inc., 49 F. Supp. 3d 216 (D. Conn. 2014); Smith v. AFS Acceptance, L.L.C., 2012 WL 1969415 (N.D. Ill. June 1, 2012); Marcum v. Eastman Credit Union, 2012 WL 1795058 (E.D. Tenn. May 7, 2012); Yeldell v. Wells Fargo Bank, 2011 WL 13287064, at 17 (N.D. Ala. Mar. 2, 2011) (denying cross motions for summary judgment because factual dispute remained as to whether breach of peace occurred depriving creditor of its right to repossess vehicle; unreported jury verdict later entered for consumer); Williams v. Republic Recovery Services, Inc., 2010 WL 2195519 (N.D. Ill. May 27, 2010); Alexander v. Blackhawk Recovery & Investigation, L.L.C., 731 F. Supp. 2d 674 (E.D. Mich. 2010); Fleming-Dudley v. Legal Investigations, Inc., 2007 WL 952026 (N.D. Ill. Mar. 22, 2007) (impersonating police officer); Purkett v. Key Bank, 2001 U.S. Dist. LEXIS 6126 (N.D. Ill. May 9, 2001) (broke into locked garage). *But see* Steube v. Santander Consumer USA Inc. & Phantom Recovery L.L.C., 2020 WL 7390494, at *5 (W.D. Wis. Dec. 16, 2020) (consumer's oral protest "*never* any disagreement that might have escalated into a disturbance of the peace"); Akerlund v. TCF Nat'l Bank, 2001 WL 1631440 (D. Minn. June 11, 2001) (creditor had present right of possession, even though repo had breached peace by criminal trespass).

295 *See* Nadalin v. Auto. Recovery Bur., 169 F.3d 1084 (7th Cir. 1999); Larranaga v. Mile High Collection & Recovery Bur., Inc., 807 F. Supp. 111 (D.N.M. 1992), *rev'g in part* 780 F. Supp. 780 (D.N.M. 1992).

296 Leguillou v. Lynch Ford, Inc., 2000 WL 198796 (N.D. Ill. Feb. 10, 2000) (yo-yo transaction where collector was not claiming to act under security agreement).

297 *See* National Consumer Law Center, Automobile Fraud § 4.4.4.3 (6th ed. 2018), *updated at* www.nclc.org/library.

298 *See* § 7.2.4, *supra*.

299 *See* § 7.2.4, *supra*.

repossessed, it may be a violation to imply that collateral will be seized sooner than the repossessor intends.[300]

8.6.4 Taking or Threatening to Take Exempt Property—FDCPA § 1692f(6)(C)

FDCPA § 1692f(6)(C) prohibits taking or threats to take non-judicial actions to dispossess property that is exempt by law from dispossession. FDCPA § 1692f(6)(C) differs from section 1692f(6)(A) in that it applies to any property, and not just property claimed as collateral.

This provision may apply when state law prohibits self-help repossession in certain circumstances or of certain property, such as manufactured homes. Most laws that exempt property from dispossession, however, apply to protect unsecured property from court-ordered postjudgment remedies. Such remedies, if they are in fact pursuant to a court judgment, are not non-judicial actions, and thus are outside the scope of FDCPA § 1692f(6).[301] Other FDCPA provisions do protect unlawful actions relating to postjudgment seizure or threats to seize exempt funds, wages, and property.[302] In addition, the general prohibition of unfair or unconscionable practices found in FDCPA § 1692f still applies to garnishment or other judicial actions to seize the consumer's property.[303]

8.7 FDCPA § 1692f(7): Sending Consumers a Postcard

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(7) Communicating with a consumer regarding a debt by post card.[304]

Regulation F (effective November 30, 2021) restates this language at section 1006.22(f)(1).[305]

FDCPA § 1692f(7) protects a consumer's privacy by prohibiting a collector communicating information about a debt by post card.[306]

The FTC Staff Commentary stated that "[a] debt collector does not violate this section if he sends a post card to a consumer that does not communicate the existence of the debt. However, if he had not previously disclosed that he is attempting to collect a debt, he would violate § 807(11), which requires this disclosure."[307] After that Commentary provision was drafted, the Act was amended to require identification that the communication is from a debt collector, not just in the initial communication, but in all subsequent communications.[308] Thus, any communication must disclose the existence of the debt, so that all post card communications are prohibited.

8.8 FDCPA § 1692f(8): Language and Symbols on Envelopes

8.8.1 Overview

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.[309]

Regulation F (effective November 30, 2021) restates this language at section 1006.22(f)(2),[310] and provides an official interpretation of "language or symbol" that is discussed at § 8.8.2, *infra*.

The legislative history indicates FDCPA § 1692f(8) is intended to prohibit symbols or language on an envelope that

300 *See* Fed. Trade Comm'n, Informal Staff Letter from Alan D. Reffken, Att'y, Div. of Credit Practices, to W. Allan Jones, Jr., Credit Bur. of Cleveland, Inc. (Nov. 20, 1979) (available online as companion material to this treatise).

301 Thompson v. CACH, L.L.C., 2014 WL 5420137 (N.D. Ill. Oct. 24, 2014) (inapplicable to garnishment proceeding); Pate v. Law Office of Joe Pezzuto, L.L.C., 2014 WL 12586733 (C.D. Cal. June 16, 2014) (inapplicable to garnishment summons); Davis v. Nebraska Furniture Mart, Inc., 2013 WL 3854462 (D. Kan. July 24, 2013) (not applicable to judicial garnishment), *aff'd on other grounds*, 567 Fed. Appx. 640 (10th Cir. 2014); Gallagher v. Gurstel, Staloch & Chargo, P.A., 645 F. Supp. 2d 795 (D. Minn. 2009) (§ 1692f(6) does not apply to garnishment summons); Parker v. Wetsch & Abbott, P.L.C., 2006 WL 4846042 (S.D. Iowa July 11, 2006) (garnishment was judicial act).

302 *See* §§ 1692c(4), 1692e(5).

303 *See, e.g.*, Vanhuss v. Kohn Law Firm S.C., 127 F. Supp. 3d 980 (W.D. Wis. 2015); § 8.1, *supra*.

304 15 U.S.C. § 1692f(7). This section first appeared late in the legislative process. Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 808(7) (1977). *See also* Reg. F § 1006.22(f)(1).

305 85 Fed. Reg. 76,734, 76,834 (Nov. 30, 2020).

306 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*. *See also* Gasser v. Allen Cty. Claims & Adjustment, Inc., 1983 U.S. Dist. LEXIS 20361 (N.D. Ohio Nov. 2, 1983).

307 FTC Official Staff Commentary § 808(7), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

308 *See* § 3.4.2.3, *supra*.

309 15 U.S.C. § 1692f(8). This subsection first appeared late in the legislative process, although a parallel provision had existed in location information sections of earlier drafts during most of the process. Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 808(8) (1977). *See also* Reg. F § 1006.22(f)(2).

310 85 Fed. Reg. 76,734, 76,834 (Nov. 30, 2020).

indicate a debt collection purpose.[311] The statutory language can be broken down into three sections:

1. No "language or symbol" other than a return address can be indicated on the envelope.[312]
2. The prohibition is to language or symbols "on" the envelope.[313]
3. The collector's business name can be on the envelope if the name does not indicate the collector is in the debt collection business.[314]

FDCPA § 1692f(8) applies to a debt collector's "communicating with a consumer." Thus, the provision does not apply to envelopes sent to third parties, such as those containing letters seeking the consumer's location information. A court has held the provision also does not apply to a letter sent to a relative who was the representative of a decedent's estate, since that person was not a "consumer."[315] The first sentence of FDCPA § 1692f prohibits "unfair or unconscionable means to collect or attempt to collect any debt," and the legislative history suggests section 1692f(8) applies only to envelopes used in the collection or the attempt of collection of a debt.[316]

Courts generally find a FDCPA § 1692f(8) violation gives a consumer federal court case or controversy standing because the consumer has suffered concrete injury[317] A more detailed discussion standing relating to FDCPA § 1692f is found at § 11.15.8, *infra*.

8.8.2 Language or Symbols

FDCPA § 1692f(8) prohibits the use of language or symbols on the envelope other than the collector's address. Regulation F (effective November 30, 2021) explains in its Official Interpretations that this prohibition does not include language or symbols that "facilitate communications by mail, such as the debtor's name and address, postage, language such as 'forwarding and address correction requested' and United States Postal Service's Intelligent Mail barcode."[318] This interpretation does not authorize the use of other barcodes, but only USPS barcodes.

Information on the envelope other than the above should be prohibited. The Fifth Circuit has found a violation where a federal student loan collector put on the envelope the Department of Education's name and address and language that the envelope was not to be used for private conversation.[319] Nevertheless, the Fifth[320] and Eighth[321] Circuits, and a number of other courts,[322] interpret FDCPA § 1692f(8) to permit "benign" language or innocuous markings on envelopes, as long as the language is not threatening or embarrassing and does not have the potential to cause an invasion of privacy. The Seventh Circuit, though, has rejected this approach, finding the language "Time Sensitive Document" on an envelope to be a violation.[323] Similarly, the Sixth Circuit has declined to read into FDCPA § 1692f(8) a "benign language" exception, finding that a letter containing a glassine window, through which were visible two unmarked checkboxes followed by "Payment in full is enclosed" and "I need to discuss this further," violated that provision.[324]

The Third Circuit has found that the disclosure of a consumer's account number on an envelope is a violation.[325] This was not "benign" or harmless language, even if such an exception were to exist, because the account number discloses information about the debt.[326] The court rejected the argument

311 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*.

312 *See* § 8.8.2, *infra*.

313 *See* § 8.8.3, *infra*.

314 *See* § 8.8.4, *infra*.

315 *See* Vullings v. Arcadia Recovery Bur., L.L.C., 2018 WL 3609085, at *3 (E.D. Pa. July 27, 2018).

316 *See* S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra* (provision applies to collection of a debt); Fletcher, FTC Informal Staff Letter (Feb. 21, 1978) (same).

317 Donovan v. FirstCredit, Inc., 983 F.3d 246, 250–252 (6th Cir. 2020) (visible indications on letter that it was from debt collector causes harm closely related to that which forms basis of common law invasion of privacy claim; consumer has standing); DiNaples v. MRS BPO, L.L.C., 2019 WL 3773014, at *2 (3d Cir. Aug. 12, 2019) ("We explained that, because the harm involves the invasion of privacy, it "is closely related to harm that has traditionally been regarded as providing a basis for a lawsuit in English and American courts"); St. Pierre v. Retrieval-Masters Creditors Bur., 898 F.3d 351, 356 (3d Cir. 2018).

318 Reg. F Official Interpretation § 22(f)(2)-1.

319 *See* Peter v. GC Services L.P., 310 F.3d 344 (5th Cir. 2002).

320 *See* Goswami v. Am. Collections Enter., Inc., 377 F.3d 488 (5th Cir. 2004) (priority letter language on envelope).

321 Strand v. Diversified Collection Serv., Inc., 380 F.3d 316 (8th Cir. Aug. 12, 2004) (envelope indicated collection agency's initials, corporate logo, and the statements "PERSONAL AND CONFIDENTIAL" and "IMMEDIATE REPLY REQUESTED.").

322 DeCraene v. Weber & Olcese, P.L.C., 300 F. Supp. 3d 978, 982 (W.D. Mich. 2018) (violation was benign where portion of enclosed subpoena visible through glassine window showed a "v" beside consumer's name and the words "Defendant(s)/Respondent(s)" above his name; markings and language were "benign, because they do not signal debt collection"); Belichenko v. Gem Recovery Sys., 2017 WL 6558499 (E.D.N.Y. Dec. 22, 2017) (debt account number benign); Estate of Domenic Caruso v. Fin. Recoveries, 2017 WL 2704088 (D.N.J. June 22, 2017) (same); Perez v. Budget Control Services, Inc., 2017 WL 1230472 (D. Colo. Mar. 3, 2017) (same); Rodriguez v. I.C. Sys., Inc., 2016 WL 5415680 (E.D.N.Y. Sept. 28, 2016) (same); Whyte v. Commonwealth Fin. Sys., 2016 WL 3556770 (E.D.N.Y. Mar. 3, 2016), *adopted*, 2016 WL 3545701 (E.D.N.Y. June 24, 2016) (same); FTC Official Staff Commentary § 808(8)-3 ("Personal" or "Confidential" on envelope is permitted), *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Mezines, FTC Informal Staff Letter (Nov. 15, 1983) (Western Union symbol and name); Gilbert, FTC Informal Staff Letter (Apr. 28, 1978) (minute man symbol on envelope is permissible).

323 Preston v. Midland Credit Mgmt., Inc., 948 F.3d 772 (7th Cir. 2020) (statutory language is clear so there was no need to not consult legislative history or agency interpretation).

324 Donovan v. FirstCredit, Inc., 983 F.3d 246 (6th Cir. 2020).

325 Douglass v. Convergent Outsourcing, 765 F.3d 299, 303 (3d Cir. 2014).

326 *See also* McRobie v. Credit Prot. Ass'n, 2020 WL 1181974, at *11–12 (E.D Pa. Mar. 11, 2020) (although "client number" appeared "relatively benign," as it revealed only the identity of a creditor, court concluded that the client number pertained to plaintiff's status as a debtor and defendant's debt collection effort, and was "an unauthorized display of information that is not disconnected from McRobie's status as a debtor

that the consumer's account number was a meaningless string of numbers and letters and that its disclosure had not harmed and could not possibly harm the consumer. But a number of federal district courts find a visible number on the envelope or visible through the envelope's window to be benign,[327] particularly where there is no evidence the number is linked to the consumer.[328]

The Third Circuit has found a FDCPA § 1692f(8) violation where an envelope contained a barcode ("QR" code) that, when scanned by a smart phone or other device, revealed the consumer's account number.[329] But where a bar code contains no information about the consumer,[330] or where it will be impossible for a consumer to read the bar code without the collector's proprietary software,[331] courts may find the inclusion of a bar code to be benign.

8.8.3 *"On" an Envelope*

The Third and Sixth Circuits have held that FDCPA § 1692f(8)'s prohibition against language and symbols on envelopes applied to markings that are visible through the transparent window of an envelope,[332] since section 1692f(8) applies to language "on any envelope." The FTC Staff Commentary has also stated: "A debt collector may not use a transparent envelope, which reveals language or symbols indicating his debt collection business, because it is the equivalent of putting information on an envelope."[333]

8.8.4 *Names Indicating Sender Is a Debt Collector*

FDCPA § 1692f(8) only allows use of the collector's return address on the envelope, not the debt collector's name. But the provision also states "a debt collector may use his business name if such name does not indicate that he is in the debt collection business." A collector cannot put its name on the envelope if the name contains a variant of the word "debt" or "collect" or other terms indicating the sender is in the debt collection business.[334] Thus, a debt collector's name, Judgment Enforcement Law Firm, indicates it is in the debt collection business.[335]

The factual issue of whether a company's name indicates its business is debt collection may be for the jury.[336]

Today, a quick internet search can determine that an innocuous name on an envelope is actually a debt collection firm. But courts have refused to extend the FDCPA § 1692e(8) prohibition to use of a company name where the company's website, but not its name, indicates it is a debt collector.[337]

8.9 Reg. F § 1006.22(a), (g): Language and Symbols in Emails and Texts

(g) *Safe harbor for certain emails and text messages relating to the collection of a debt.* A debt collector who communicates with a consumer by sending an email or text

or from CPA's efforts to collect a debt"); *In re* ACB Receivables Mgmt., 2015 WL 5248567 (D.N.J. Sept. 9, 2015).

327 Belichenko v. Gem Recovery Sys., 2017 WL 6558499 (E.D.N.Y. Dec. 22, 2017); Estate of Domenic Caruso v. Fin. Recoveries, 2017 WL 2704088 (D.N.J. June 22, 2017); Perez v. Budget Control Services, Inc., 2017 WL 1230472 (D. Colo. Mar. 3, 2017); Rodriguez v. I.C. Sys., Inc., 2016 WL 5415680 (E.D.N.Y. Sept. 28, 2016); Whyte v. Commonwealth Fin. Sys., 2016 WL 3556770 (E.D.N.Y. Mar. 3, 2016), *adopted*, 2016 WL 3545701 (E.D.N.Y. June 24, 2016); Gardner v. Credit Mgmt. L.P., 140 F. Supp. 3d 317 (S.D.N.Y. 2015); Brooks v. Niagara Credit Solutions, Inc., 2015 WL 6828142 (D. Kan. Nov. 6, 2015); Gelinas v. Retrieval-Masters Creditors Bur., Inc., 2015 WL 4639949 (W.D.N.Y. July 22, 2015); Perez v. Global Credit & Collection, Corp., 2015 WL 4557064 (S.D.N.Y. July 27, 2015); Davis v. MRS BPO, L.L.C., 2015 WL 4326900 (N.D. Ill. July 15, 2015); Gonzalez v. FMS, Inc., 2015 WL 4100292 (N.D. Ill. July 6, 2015).

328 Chavez v. MCS Claim Services, Inc., 2016 WL 1171586, at *2 (E.D.N.Y. Mar. 23, 2016) (refusing § 1692f(8) claim: "Plaintiff has failed to allege that the account number viewable from the glassine window contained any specific identifying information").

329 DiNaples v. MRS BPO, L.L.C., 934 F.3d 275, 280 (3d Cir. Aug. 12, 2019). *See also* Michael v. HOVG, L.L.C., 232 F. Supp. 3d 1229 (S.D. Fla. 2017); Whyte v. Commonwealth Fin. Sys., 2016 WL 3556770 (E.D.N.Y. Mar. 3, 2016), *adopted*, 2016 WL 3545701 (E.D.N.Y. June 24, 2016); Datta v. Asset Recovery Solutions, L.L.C., 2016 WL 1070666 (N.D. Cal. Mar. 18, 2016); Styer v. Prof'l Med. Mgmt., Inc., 114 F. Supp. 3d 234 (M.D. Pa. 2015).

330 Estate of Domenic Caruso v. Fin. Recoveries, 2017 WL 2704088, at *4 (D.N.J. June 22, 2017) ("barcode . . . reveale[d] no private information regarding the deceased debtor"); Anenkova v. Van Ru Credit Corp., 201 F. Supp. 3d 631 (E.D. Pa. 2016). *See also* Sampson v. MRS BPO, L.L.C., 117 F. Supp. 3d 1032 (N.D. Ill. 2015).

331 Kokans v. ACB Receivables Mgmt., Inc., 2015 WL 4638279 (D.N.J. Aug. 4, 2015).

332 Cagayat v. United Collection Bur., Inc., 952 F.3d 749 (6th Cir. 2020) ("collection bureau" was on inside of letter but bled through the paper and was visible through the glassine window); Douglass v. Convergent Outsourcing,765 F.3d 299 (3d Cir. 2014). *Accord* Brown v. Asset Acceptance, L.L.C., 2019 WL 7582832, at *6 (W.D. Mich. Oct. 31, 2019) (language reading "Defendant's name and address (judgment debtor)" that was visible through glassine window violated § 1692f(8): "The term 'debtor' clearly suggests the purpose of the communication, to wit: a collection action."); Adkins v. Fin. Recovery Services, Inc., 2015 WL 5731842 (N.D. Ill. Sept. 30, 2015).

333 FTC Official Staff Commentary § 808(8)-4, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

334 *See* Garcia v. Creditors Specialty Serv., Inc., 2016 WL 6778681 (N.D. Cal. Nov. 16, 2016); Datta v. Asset Recovery Solutions, L.L.C., 2016 WL 1070666 (N.D. Cal. Mar. 18, 2016); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979); FTC Official Staff Commentary § 808(8)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *But see* Mathis v. Omnium Worldwide, 2006 WL 1582301 (D. Or. June 4, 2006) (use on envelope of name "Estate Recoveries, Inc.," with "Over 15 Years of Service to the Financial Industry" did not violate § 1692f(8)).

335 *See* Keasey v. Judgment Enforcement Law Firm, P.L.L.C., 2014 WL 1744268 (W.D. Mich. Apr. 30, 2014).

336 *See* Davis v. Baron's Creditors Serv. Corp., 2001 WL 1491503 (N.D. Ill. Nov. 19, 2001) (envelope's return address of "Baron's Creditor's Service Corporation" raised question of fact for jury).

337 *See* DeCraene v. Weber & Olcese, P.L.C., 300 F. Supp. 3d 978, 981–982 (W.D. Mich. 2018); Johnson v. I.C. Sys., Inc., 2016 WL 304545 (E.D. Mo. Jan. 25, 2016); Lake v. Consumer Adjustment Co., 2015 WL 8770719 (E.D. Mo. Dec. 14, 2015). *See also* Valentine v. Unifund CCR, Inc., 2021 WL 912854 (D.N.J. Mar. 10, 2021).

message in accordance with the procedures described in § 1006.6(d)(3) does not violate paragraph (a) of this section by revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt.[338]

Unlike the FDCPA's treatment of languages and symbols on envelopes,[339] Regulation F (effective November 30, 2021) provides that it is not an unfair or unconscionable means in violation of Reg. F § 1006.22(a) to collect or attempt to collect any debt using an email or text message that reveals the debt collector's name or other information indicating that the email or text message relates to collection of a debt. This safe harbor applies only to emails and texts if in compliance with Reg. F § 1006(d)(3).[340]

The safe harbor protects the collector only from claims related to revealing of the debt collection purpose, and only protects the collector from claims brought as a violation of the general standard for unfairness and unconscionability found in Reg. F § 1006.22(a).

The safe harbor does not apply to other Reg. F. § 1006.22 violations or violations of other FDCPA provisions. For example, an email or text can still be a violation of provisions dealing with deceptive communications,[341] communications where the consumer is represented by an attorney,[342] or where the consumer has asked that email or text messages stop.[343] Nor does the safe harbor protect the collector from violating Reg. F. § 1006.22(f)(3), which limits emails sent to an address provided to the consumer by the consumer's employer.[344]

For the safe harbor to apply to an email or text, the collector must take steps to reasonably confirm and document that the email or text is sent in accordance with the procedures set out in Reg. F § 1006.6(d)(3). Reg. F § 1006.6(d)(3) in turn references three different procedures. First, an email must comply with procedures in § 1006.6(d)(4), depending on whether the collector obtained the email address,[345] the creditor obtained the email address,[346] or a prior collector obtained the email address.[347] A text must comply with procedures in § 1006.6(d)(5).[348] In addition, for both emails and text messages, the communication must not be sent to an address or phone number that the collector knows[349] has led to a disclosure prohibited by § 1006.6(d)(1) relating to disclosure to third parties.[350]

8.10 Reg. F § 1006.22(f)(3): Emails to Employer-Provided Email Addresses

(f) *Restrictions on use of certain media.* A debt collector must not:

* * *

(3) Communicate or attempt to communicate with a consumer by sending an email to an email address that the debt collector knows is provided to the consumer by the consumer's employer, unless the email address is one described in § 1006.6(d)(4)(i) or (iii).[351]

The Act does not address email communications. Regulation F (effective November 30, 2021) defines sending certain emails to an address provided by the consumer's employer to be unfair or unconscionable.[352] Reg. F § 1006.22(3) prohibits collection communications or attempts to communicate with a consumer by sending an email to an address that the collector knows is provided to the consumer by the consumer's employer. The provision does not require that the email be in connection with collection of a debt, so applies to any email for any purpose.

The CFPB supplemental information accompanying the rule indicates the reason for the prohibition of emails to employer-provided email addresses:

> As discussed in the proposal, employers often have the right to access, and may monitor, email accounts they provide to employees. And the risks of harm to consumers from debt collectors sending messages to an employer-provided email address are particularly high because of the risk of adverse employment consequences, which can cause economic harm and exacerbate a consumer's financial distress, including by making it more difficult to satisfy outstanding financial obligations. The legislative history of the FDCPA indicates an emphasis on preventing such risks to a consumer's employment from debt collection communications.[353]

Nevertheless, the provision applies only where the collector knows the email address is provided by the consumer's employer. The CFPB rejected a "knew or should have known standard,"[354] and has even stated:

> The standard is consumer-specific; that is, a debt collector does not necessarily know that a consumer's email address is employer provided merely because the domain name for

338 Reg. F § 1006.22(g).
339 *See* § 8.8, *supra*.
340 *See* § 5.7.9, *supra*.
341 *See* Ch. 7, *supra*.
342 Reg. F § 1006.6(b)(2).
343 Reg. F § 1006.14(h).
344 *See* § 8.10, *infra*.
345 *See* § 5.7.9.2, *supra*.
346 *See* § 5.7.9.3, *supra*.
347 *See* § 5.7.9.4, *supra*.
348 *See* § 5.7.9.5, *supra*.
349 Reg. F Official Interpretation § 6(d)(3)(ii)-1 ("For purposes of § 1006.6(d)(3)(ii), a debt collector knows that sending an email to an email address or a text message to a telephone number has led to a disclosure prohibited by § 1006.6(d)(1) if any person has informed the debt collector of that fact.").
350 Reg. F § 1006.6(d)(3)(ii). *See* § 5.7, *supra*.
351 Reg. F § 1006.22(f)(3).
352 85 Fed. Reg. 76,734, 76,834 (Nov. 30, 2020).
353 85 Fed. Reg. 76,734, 76,835 (Nov. 30, 2020).
354 85 Fed. Reg. 76,734, 76,835 (Nov. 30, 2020).

that email address is the same as the domain name for an email address that a different consumer has told the debt collector is employer provided.[355]

In addition, Reg. F. § 1006.22(3) allows emails sent to an employer-provided address if complying with either Reg. F § 1006.6(d)(4)(i), where the collector obtains the email address itself,[356] or Reg. F. § 1006.6(d)(4)(iii), where a prior collector obtains the email address.[357] No exception is made for compliance with Reg. F § 1006.6(d)(4)(ii), where the collector obtains the email address from the *creditor*, because Reg. F § 1006.6(d)(4)(ii)(E) already specifies that a creditor must use an email address that "has a domain name that is available for use by the general public, unless the debt collector knows the address is provided by the consumer's employer" when sending a notice to consumers to allow them to opt out of having their email address transferred to debt collectors.[358]

8.11 Reg. F § 1006.22(f)(4): Use of Social Media

(f) *Restrictions on use of certain media.* A debt collector must not:

* * *

(4) communicate or attempt to communicate with a person in connection with the collection of a debt through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts.[359]

The Act does not address collector communications via social media. Regulation F (effective November 30, 2021) defines certain collector communications via social media to be unfair or unconscionable.[360] Regulation F § 1006.22(f)(4) is a blanket prohibition of a debt collector communicating or attempting to communicate on social media in connection with collection of a debt where third parties in the general public can see the message. It also prohibits a debt collector from posting a message for a person on a social media web page if the person's social media contacts can see the message.[361]

The prohibition applies to communications or attempts to communicate with a "person," and thus applies to any person, even a person not alleged to owe a debt.[362] Social media is not defined in the regulations, and thus should be given its ordinary meaning.

The provision does not prohibit a collector from sending a message on social media if neither the general public nor the person's social media contacts can view the message.[363] The CFPB's supplemental information for the rule indicates that the CFPB rejected suggestions to ban such private social media messages.[364] The supplemental information also indicates that the social medium platform provider is neither the public nor a social media contact, so that the collector can send a message by social media viewable by only the consumer and the platform provider.[365]

But even if only the consumer and platform provider can view the social media message so that there is no Reg. F § 1006.22(f)(4) violation, the social media posting can still violate other statutory or regulation provisions.[366] For example, a posting can still be a violation where it communicates with a consumer represented by an attorney,[367] where the consumer has requested the collector not use that medium of communication,[368] or the communication is sent to the wrong person.[369] Sending a deceptive private message on social media also can be a violation, such as requesting to be added to the consumer's contacts without disclosing the collector's identity as a collector.[370]

8.12 Reg. § 1006.30(a): Preconditions to Furnishing Information to Reporting Agencies

(a) *Required actions prior to furnishing information.*

(1) *In general.* Except as provided in paragraph (a)(2) of this section, a debt collector must not furnish to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)), information about a debt before the debt collector:

(i) Speaks to the consumer about the debt in person or by telephone; or

(ii) Places a letter in the mail or sends an electronic message to the consumer about the

355 85 Fed. Reg. 76,734, 76,835 (Nov. 30, 2020).

356 *See* § 5.7.9.2, *supra.*

357 *See* § 5.7.9.4, *supra.*

358 *See* Reg. F Official Interpretation § 22(f)(3)-1.

359 Reg. F § 1006.22(f)(4). *See also* Colin Hector, Federal Trade Commission, Debt collectors: You may "like" social media and texts, but are you complying with the law? (Mar. 28, 2016), *available at* https://www.ftc.gov; Federal Financial Institutions Examination Council, Social Media: Consumer Compliance Risk Management Guidance (Dec. 11, 2013) ("Communicating via social media in a manner that discloses the existence of a debt or to harass or embarrass consumers about their debts (e.g., a debt collector writing about a debt on a Facebook wall) or making false or misleading representations may violate the FDCPA"); Appx. B.4.2, *infra.*

360 85 Fed. Reg. 76,734, 76,836 (Nov. 30, 2020).

361 Reg. F Official Interpretation § 22(f)(4)-1.

362 *See* 85 Fed. Reg. 76,734, 76,839 (Nov. 30, 2020).

363 Reg. F Official Interpretation § 22(f)(4)-1.

364 85 Fed. Reg. 76,734, 76,838 (Nov. 30, 2020).

365 85 Fed. Reg. 76,734, 76,837 (Nov. 30, 2020).

366 Reg. F Official Interpretation § 22(f)(4)-1.

367 Reg. F § 1006.6(b)(2). *See* § 5.5, *supra.*

368 Reg. F § 1006.14(h). *See* § 6.9, *supra.*

369 Reg. F § 1006.6(d)(1). In contrast to emails and text messages, § 1006.6(d), discussed at § 5.7.9, *supra*, does not outline procedures under Reg. F § 1006.6(d)(3) that are reasonably adapted to avoid a bona fide error in sending a social media message that would result in a third-party disclosure.

370 Reg. F Official Interpretation § 18(d)-1; § 7.4.2, *supra.*

debt and waits a reasonable period of time to receive a notice of undeliverability. During the reasonable period, the debt collector must permit receipt of, and monitor for, notifications of undeliverability from communications providers. If the debt collector receives such a notification during the reasonable period, the debt collector must not furnish information about the debt to a consumer reporting agency until the debt collector otherwise satisfies paragraph (a)(1) of this section.

(2) *Special rule—information furnished to certain specialty consumer reporting agencies.* Paragraph (a)(1) of this section does not apply to a debt collector's furnishing of information about a debt to a nationwide specialty consumer reporting agency that compiles and maintains information on a consumer's check writing history, as described in section 603(x)(3) of the Fair Credit Reporting Act (15 U.S.C. 1681a(x)(3)).[371]

Regulation F (effective November 30, 2021) prohibits so-called "passive collections" or "parking" a debt on a credit report. Both terms refer to the practice of a debt collector furnishing to a consumer reporting agency (CRA)[372] information regarding a debt before communicating with the consumer about the debt. The CFPB considers this practice both as an unfair or unconscionable means to collect a debt in violation of FDCPA § 1692f and as conduct the natural consequence of which is to harass, oppress, or abuse in violation of FDCPA § 1692d.[373]

The CFPB explained this in the rule's supplemental information:

> [C]onsumers who have not been informed about the debt are likely to be unaware that they have a debt in collection unless they obtain and review their consumer report. In turn, many consumers may not obtain their consumer reports until they apply for credit, housing, employment, or another product or service provided by an entity that reviews consumer reports during the application process. At that point, consumers may feel pressure to pay debts that they otherwise would dispute, including debts they do not owe, or may face the denial of an application, a higher interest rate, or other negative consequences.

Reg. F. § 1006.30(a) prohibits a debt collector from furnishing information about a debt to a CRA until the collector first contacts the consumer, in person, by telephone, by a mailed letter, or electronic message.[374] The contact to the consumer must contain information about the debt, such as the validation information found in a validation notice.[375] The information must be sent to the person who owes or allegedly owes the debt, and not to the consumer's spouse, parent (if the consumer is a minor), or legal guardian.[376]

If the communication is by letter or electronic message, the collector must wait a reasonable time to make sure the message is delivered, and then monitor for non-deliveries. A period of fourteen consecutive days after the date that the debt collector places a letter in the mail or sends an electronic message is a reasonable time period.[377]

If there is evidence that the message was not delivered during that reasonable period of time, the collector cannot furnish information to a CRA until it attempts to contact the consumer again.[378] After waiting a reasonable period of time after the subsequent attempted contact, monitoring for undeliverability, and receiving no such evidence, the collector does not violate the provision if it furnishes the information to a CRA,[379] even if it subsequently discovers the message was not delivered,[380] and even after that subsequent discovery continues to furnish information to a CRA.[381]

Reg. F § 1006.30(a) requirements do not apply where the collector reports information to a specialized CRA that compiles and maintains files on consumers on a nationwide basis relating to check-writing history.[382] Examples of such check verification CRAs are ChexSystems, Certegy SCAN, and TeleCheck.

8.13 Reg. F § 1006.30(b): Sale or Placement for Collection of Cancelled Debt

8.13.1 Overview

Regulation F (effective November 30, 2021) outlines certain prohibited practices, including:

> (b) *Prohibition on the sale, transfer for consideration, or placement for collection of certain debts—*
>
> (1) *In general.* Except as provided in paragraph (b)(2) of this section, a debt collector must not sell, transfer for consideration, or place for collection a debt if the debt collector knows or should know that the debt has been paid or settled or discharged in bankruptcy.[383]

371 Reg. F § 1006.30(a).
372 A consumer reporting agency is defined at 15 U.S.C. 1681a(f).
373 86 Fed. Reg. 5766, 5783 (Jan. 19, 2021).
374 Reg. F § 1006.30(a)(1).
375 Reg. F Official Interpretation § 30(a)(1)-1.
376 86 Fed. Reg. 5766, 5784 (Jan. 19, 2021).
377 Reg. F Official Interpretation § 30(a)(1)-2.
378 Reg. F § 1006.30a(1)(ii). *See also* Reg. F Official Interpretation § 30(a)(1)-3(i).
379 Reg. F Official Interpretation § 30(a)(1)-3(ii).
380 Reg. F Official Interpretation § 30(a)(1)-3.
381 Reg. F Official Interpretation § 30(a)(1)-3(iii).
382 Reg. F § 1006.30(a)(2) referencing the definition found at 15 U.S.C. 1681a(x)(3). *See* National Consumer Law Center, Fair Credit Reporting § 2.6.2.2 (9th ed. 2018), *updated at* www.nclc.org/library.
383 Reg. F § 1006.30b(1).

The CFPB has stated in the rule's supplemental information that it enacted Reg. F section 1006.30(b)(1) to prohibit unfair or unconscionable practices:

> The Bureau has determined that the sale, transfer for consideration, or placement for collection of a debt that a debt collector knows or should know has been paid or settled or discharged in bankruptcy constitutes an unfair or unconscionable means to collect or attempt to collect the debt under FDCPA section 808 because consumers do not owe or cannot legally be subject to collections on alleged debts that have been paid or settled or discharged in bankruptcy, and yet the debt collector receives or expects to receive compensation for the sale, transfer, or placement of such debt.[384]

The regulation provides that, with five exceptions discussed at § 8.13.2, *infra*, a debt collector must not sell, transfer for consideration, or place for collection a debt if the debt collector knows or should know that the debt:

- Has been paid;
- Has been settled; or
- Has been discharged in bankruptcy.

The rule's supplemental information indicates that the CFPB declined to extend the provision to other forms of debt, such as time-barred debt, disputed debt, debt lacking ownership documentation, debt subject to litigation, debt in which the consumer has an uncompleted settlement agreement, or other types of debt.[385] On the other hand, the supplemental information states: "[i]t clearly is an unfair or unconscionable practice under FDCPA section 808 [§ 1692f] for a debt collector to sell, transfer for consideration, or place for collection a debt that the debt collector knows or should know has been extinguished pursuant to State law or is counterfeit or fictitious."[386]

Reg. F § 1006.30(b) overlaps with, but in no way limits the Fair Credit Reporting Act provision[387] prohibiting any person from selling, transferring for consideration, or placing for collection a debt if a consumer reporting agency (CRA) has first notified the person who might sell, transfer, or place for collection the debt[388] that the debt resulted from identity theft.[389]

A debt collector transfers a debt for consideration when the debt collector receives or expects to receive compensation for the transfer of the debt.[390] The transfer refers to a transfer of ownership and not just for a transfer of information about the debt, such as transfer of data about the debt to another person for analytics, "scrubbing," or archiving.[391] A debt collector also does not transfer a debt for consideration when it furnishes information to a CRA that the debt has been paid or settled or discharged in bankruptcy.[392] "Placement for collection" should refer to a debt buyer placing the debt with a collection agency or collection attorney, or a collection agency placing the debt with another collection agency or a collection attorney.

The CFPB in the rule's supplemental information explained the adoption of the "knows or should know" standard as to the debt being paid, settled, or discharged in bankruptcy:

> As to concerns about the breadth of the "know or should know" language, the Bureau notes that the prohibition in § 1006.30(b)(1) is limited to specific account circumstances. These account circumstances will, in general, be within the debt collector's ability to know or obtain the necessary knowledge. For example, whether a debt has been paid or settled is a fact that a debt collector knows or should know because it should be within the debt collector's account management system. Although bankruptcy may not be within the debt collector's own system in the same manner as paid or settled debts, a debt collector should be able to utilize a commercial database or publicly available records to reasonably assess whether a debt has been discharged in bankruptcy. Because of the limited nature of the transfer ban as finalized, the Bureau believes the "know or should know" standard is appropriate but will monitor this issue for any potential consumer harm or compliance concerns and revisit at a later time if needed.[393]

8.13.2 Exceptions

(2) *Exceptions*—

(i) *In general.* A debt collector may transfer for consideration a debt described in paragraph (b)(1) of this section if the debt collector:

(A) Transfers the debt to the debt's owner;

(B) Transfers the debt to a previous owner of the debt, if the transfer is authorized under the terms of the original contract between the debt collector and the previous owner; or

(C) Transfers the debt as a result of a merger, acquisition, purchase and assumption transaction, or a transfer of substantially all of the debt collector's assets.

(ii) *Secured claims in bankruptcy.* A debt collector may sell, transfer for consideration, or place for collection a debt that has been discharged in bankruptcy if the debt is secured by an enforceable lien and the debt collector notifies the transferee that the consumer's personal liability for the debt was discharged in bankruptcy.

384 85 Fed. Reg. 76,734, 76,841 (Nov. 30, 2020).
385 85 Fed. Reg. 76,734, 76,841 (Nov. 30, 2020).
386 85 Fed. Reg. 76,734, 76,842 (Nov. 30, 2020).
387 15 U.S.C. 1681m(f)(1). *See* National Consumer Law Center, Fair Credit Reporting § 9.2.4.2.2 (9th ed. 2018), *updated at* www.nclc.org/library. Note that due to a scrivener's error, there is no private right of action for violations of this provision. *See* National Consumer Law Center, Fair Credit Reporting § 8.5.5 (9th ed. 2018), *updated at* www.nclc.org/library.
388 15 U.S.C. § 1681c-2.
389 Reg. F Official Interpretation § 30(b)(1)-2.
390 Reg. F Official Interpretation § 30(b)(1)-1.
391 Reg. F Official Interpretation § 30(b)(1)-1.
392 Reg. F Official Interpretation § 30(b)(1)-1.
393 85 Fed. Reg. 76,734, 76,841 (Nov. 30, 2020) (footnotes omitted).

(iii) *Securitizations and pledges of debt.* Paragraph (b)(1) of this section does not prohibit the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing.[394]

Regulation F (effective November 30, 2021) provides five exceptions to the prohibition on the sale, transfer or placement of debts that are paid, settled, or discharged in bankruptcy at section 1006.30(b)(2). The debt collector can transfer the debt to the debt's owner,[395] but not to another entity on behalf of the debt owner.[396] The collector can transfer the debt to a previous owner if authorized by a contract between the previous owner and the collector.[397] The debt transfer can also be the result of a merger, acquisition, purchase and assumption transaction, or a transfer of substantially all of the debt collector's assets.[398] These three exceptions all relate to transfer for consideration, and do not authorize sales or placement for collection of debts in these three situations.[399]

When a secured debt is discharged in bankruptcy, the personal obligation is discharged, but the secured creditor retains the right to foreclose on the security if the debt is not paid, as modified by the bankruptcy proceeding. In this case, the collector can sell, transfer for consideration, or place for collection such a debt, but only if the collector notifies the transferee that the consumer's personal liability for the debt was discharged in bankruptcy.[400]

In addition, the debt can be sold, transferred for consideration, or placed for collection as part of a securitization of the debt or the pledging of a portfolio of debt as collateral in connection with a borrowing.[401]

394 Reg. F § 1006.30(b)(2).
395 Reg. F § 1006.30(b)(2)(i)(A).
396 Reg. F Official Interpretation § 30(b)(2)-1.
397 Reg. F § 1006.30(b)(2)(i)(B).
398 Reg. F § 1006.30(b)(2)(i)(C).
399 Reg. F § 1006.30(b)(2)(i), as discussed at 85 Fed. Reg. 76,734, 76,842 (Nov. 30, 2020).
400 Reg. F § 1006.30(b)(2)(ii). *See* § 13.7.2.7, *infra*.
401 Reg. F § 1006.30(b)(2)(iii).

Chapter 9 Validation Notices, Disputes, and Verification, FDCPA § 1692g

9.1 Introduction

This chapter discusses the specific requirements the Fair Debt Collection Practices Act (FDCPA) imposes on debt collectors under 15 U.S.C. § 1692g, as well as related provisions under Regulation F (effective November 30, 2021).[1] FDCPA § 1692g requires debt collectors to provide notice to consumers of their rights to dispute a debt and to obtain verification of the debt when the consumer requests it in writing.[2] This is intended to minimize instances of mistaken identity of a debtor, mistakes over the amount or existence of a debt, or similar errors.[3]

The rights and obligations established by FDCPA § 1692g were considered by the Senate to be a "significant feature" of the Act.[4] The rise of the debt buying industry,[5] with a model of not obtaining business records and documentation for the debts they purchase, makes this provision even more important to consumers and the integrity of our civil court system.[6] It is an informal method of dispute resolution that potentially conserves tax dollars and judicial resources.

FDCPA § 1692g is a strict liability provision; an unintentional violation of its requirements violates the Act,[7] unless the debt collector successfully establishes a bona fide error defense.[8] The provision applies to all covered "debt collectors."[9] It should be construed to protect unsophisticated consumers.[10] Courts have inferred that a deceptive statement must be "material" to violate another FDCPA provision, section 1692e. However, several courts have held that materiality is not a requirement of FDCPA § 1692g.

Another federal statute, the Real Estate Settlement Procedures Act (RESPA), may provide even greater rights to consumers to determine the charges and payments on their mortgages.[11] The Fair Credit Reporting Act may also provide strong remedies for disputes that involve an inaccurate credit report.[12]

In any FDCPA case—including those based on section 1692g—the consumer must be prepared to show that the matter presents a case or controversy as defined by Article III of the Constitution. To meet this standard, the FDCPA violation must have caused the consumer a harm—or a "risk of real harm"—that is both concrete and particularized. Constitutional standing is discussed in detail in § 11.15, *infra*. The particular application of these standards to claims under FDCPA § 1692g is discussed in § 11.15.6, *infra*.

9.2 When Validation Notice Must Be Given

9.2.1 *Meaning of "Initial Communication"*

> NOTICE OF DEBT; CONTENTS.—Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice . . .[13]

1 12 C.F.R. Part 1006.

2 15 U.S.C. § 1692g. *See* Appx. E.2.6, *infra*.

3 "This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*. *See* Hart v. FCI Lender Services, Inc., 797 F.3d 219, 221 (2d Cir. 2015) ("A particular goal of Congress was to address 'the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.'"); Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85 (2d Cir. 2008). *See also* Udell, FTC Informal Staff Letter (Jan. 20, 1987).

4 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*.

5 *See* § 1.3.4, *supra*.

6 See LHR, Inc. v. T-Mobile USA, Inc., 930 N.Y.S.2d 731 (N.Y. App. Div. 2011) (holding creditor had no duty under FDCPA to preserve and retain its underlying documents necessary to verify debts in debt buyer's suit against original creditor for breach of contract and other claims).

7 See Russell v. Equifax A.R.S., 74 F.3d 30, 36 (2d Cir. 1996) ("Once it is shown that defendant sent the February and March notices and that they failed to fulfill the [§ 1692g] requirements of the Act, strict liability is imposed."). *See also* Anderson v. Credit Bur. Collection Services, Inc., 422 Fed. Appx. 534 (7th Cir. 2011) (FDCPA is strict-liability statute, and consumer is entitled to sue to enforce its provisions, even "highly technical" ones like notice requirement and prohibition against sharing personal information with third parties; requiring proof of injury would run afoul of statutory scheme); Ellis v. Solomon and Solomon, P.C., 591 F.3d 130, 135 (2d Cir. 2011); Booth v. Collection Experts, Inc., 969 F. Supp. 1161 (E.D. Wis. 1997); § 3.2.4, *supra*.

8 *See* § 12.2, *infra*.

9 Kelly, FTC Informal Staff Letter (Oct. 16, 1978). *See also* Stewart, FTC Informal Staff Letter (Jan. 5, 1993); Zager, FTC Informal Staff Letter (Nov. 10, 1992).

10 *See* § 3.2.1, *supra*. *See also* Riccio v. Sentry Credit, Inc., 954 F.3d 582, 594 (3d Cir. 2020) ("A hypothetical 'least sophisticated debtor' should be able to read the notice and reasonably discern her rights."); Garcia-Contreras v. Brock & Scott, P.L.L.C., 775 F. Supp. 2d 808 (M.D.N.C. 2011).

11 12 U.S.C. § 2605(e). *See* National Consumer Law Center, Mortgage Servicing and Loan Modifications Ch. 3 (2019), *updated at* www.nclc.org/library.

12 *See* § 14.6, *infra*; National Consumer Law Center, Fair Credit Reporting Ch. 6 (9th ed. 2018), *updated at* www.nclc.org/library. *See also* National Consumer Law Center, Truth in Lending § 7.9 (10th ed. 2019), *updated at* www.nclc.org/library (credit card billing error dispute rights).

13 15 U.S.C. 1692g(a). *See also* Reg. F § 1006.34(a).

Under FDCPA § 1692g(a) debt collectors do not need to provide a validation notice until there is an "initial communication"[14] from the debt collector to the consumer.[15] The validation notice must be provided in the initial communication or sent in writing within five days of the initial communication,[16] unless the consumer pays the debt before the expiration of the five-day period.[17]

The critical issue then becomes what qualifies as an initial communication in connection with the collection of any debt. Regulation F (effective November 30, 2021) defines initial communication as "the first time that, in connection with the collection of a debt, a debt collector conveys information, directly or indirectly, regarding the debt to the consumer."[18]

Subsection 9.2.2, *infra*, describes certain communications that are not initial communications, but otherwise almost any communication to collect a debt can be an initial communication. For example, a letter making only an implicit demand for payment can be an initial communication.[19] An initial communication can be one the consumer initiates.[20]

The Seventh Circuit has found that a collector sending an email indicating that it is a secure message and that the consumer should click a link to view a secure package is not an initial communication where the consumer does not click the link that would eventually lead to a validation notice. Instead, the collector must provide the validation notice in a subsequent communication. The text of the email did not reference the debt, and the link itself provided only a "digital pathway to access the required information."[21]

9.2.2 *Exclusions from "Initial Communication"*

The FDCPA was amended in 2006[22] to add section 1692g(d), stating that "[a] communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a)."[23]

As a result, a formal legal pleading is not a communication triggering the obligation to provide the validation notice, postponing the requirement to provide the notice until a later communication.[24] The term "formal pleading" is not defined,[25] but it would ordinarily include complaints, answers, and counterclaims.[26]

Providing the validation notice in or with a summons and complaint may be confusing for consumers,[27] but this is not

14 *See* § 1692a(2) (defining "communication"); § 4.2, *supra*.

15 15 U.S.C. § 1692g(a). *See, e.g.*, Clark v. Shapiro & Pickett, L.L.P., 452 Fed. Appx. 890 (11th Cir. 2012) (HUD-required letter to occupants of dwelling in foreclosure informing them of how to apply to remain in dwelling was not "initial communication with a consumer in connection with the collection of any debt"); O'Connell v. Bayview Loan Servicing, L.L.C., 2016 WL 1069079 (E.D. Wis. 2016) (account transfer notification sent by servicer did not trigger notice obligations under § 1692g(a)); Jackson v. Eltman, Eltman & Cooper, P.C., 128 F. Supp. 3d 980 (E.D. Mich. 2015) (consumer's call to collection law firm to inquire about fax sent to her employer was not communication that triggered § 1692g obligation where firm confirmed identifying information, but refused to discuss debt); Zarichny v. Complete Payment Recovery Services, Inc., 80 F. Supp. 3d 610 (E.D. Pa. 2015) (initial communication was prerecorded message requesting call back); Thompson v. BAC Home Loans Serv., L.P., 2010 WL 1286747 (N.D. Ind. 2010) (notice informing consumer that his mortgage loan was transferred to new servicer was not made "in connection with the collection of any debt" and thus "it was not a communication that triggered the requirement to send a verification notice"); Robinson v. TSYS Total Debt Mgmt., Inc., 447 F. Supp. 2d 502 (D. Md. 2006) (collector's request for collection probability score from credit reporting agency not communication with consumer); Acosta v. Campbell, 2006 WL 146208 (M.D. Fla. 2006) (no obligation to disclose right to dispute debt prior to filing suit). *But cf.* Berberyan v. Asset Acceptance, L.L.C., 2013 WL 1136525 (C.D. Cal. 2013) (letter sent in response to plaintiff's inquiry about item on her credit report did not serve as "initial communication" with consumer in connection with collection of a debt for purposes of § 1692g; debt collector must do something more than allegedly place notice of disputed debt on plaintiff's credit report to trigger its disclosure duties).

16 Caceres v. McCalla Raymer, L.L.C., 755 F.3d 1299 (11th Cir. 2014); Allen v. Bank of Am., 2012 WL 5412654 (N.D. Ill. 2012) (five-day period means calendar days, not business days). *See* Allen v. Checkredi of Kentucky, L.L.C., 2010 WL 4791947 (E.D. Ky. 2010) (defendant violated § 1692g(a); rejecting defendant's excuse that it sent first written notice late because plaintiff refused to provide their correct address). *See also* Phillips v. N. Am. Capital Corp., 1999 WL 299872 (N.D. Ill. 1999); Reg. F § 1006.34(a)(1).

17 *See* 15 U.S.C. § 1692g(a) (first sentence). *See also* Reg. F 1006.34(a)(2); Gingiloski v. Commercial Recovery Services, 2017 WL 2334946 (E.D. Mich. May 30, 2017).

18 Reg. F §. 1006.34(b)(2). The full definition contains exclusions, which are discussed in § 9.2.2, *infra*.

19 Caceres v. McCalla Raymer, L.L.C., 755 F.3d 1299 (11th Cir. 2014). *See also* Geary v. Green Tree Servicing, L.L.C., 2015 WL 1286347 (S.D. Ohio Mar. 20, 2015).

20 See Vu v. Diversified Collection Services, Inc., 293 F.R.D. 343 (E.D.N.Y. 2013).

21 Lavallee v. Med-1 Solutions, L.L.C., 932 F.3d 1049, 1056 (7th Cir. 2019).

22 *See* § 3.4.2.4, *supra*.

23 15 U.S.C. § 1692g(d). *See also* Reg. F § 1006.34(b)(2).

24 Pub. L. No. 109-351, § 802(a), 120 Stat. 2006 (Oct. 13, 2006). *See* Carlin v. Davidson Fink L.L.P., 852 F.3d 207, 213 (2d Cir. 2017); Cruz v. Fin. Recoveries, 2016 WL 3545322 (D.N.J. 2016) (no § 1692g claim where communications involved legal pleadings); Lane v. Fein, Such & Crane, L.L.P., 767 F. Supp. 2d 382 (E.D.N.Y. 2011) (only communication from debt collector was a § 1692g(d) exempt "formal pleading").

25 *See* Townsend v. Quantum3 Group, L.L.C., 535 B.R. 415 (M.D. Fla. 2015) (proofs of claim filed in bankruptcy proceeding qualified as "formal pleadings" made in connection with legal action that did not trigger § 1692g notice).

26 See Wood v. Lerner Sampson & Rothfuss, 2014 WL 4249785 (N.D. Ohio Aug. 27, 2014) (foreclosure suit was formal pleading); Sebrow v. Fein, Such, Kahn, & Shephard, P.C., 2010 WL 4553559 (D.N.J. Nov. 1, 2010) (foreclosure complaint formal pleading); Hill v. Javitch, Block & Rathbone, L.L.P., 574 F. Supp. 2d 819 (S.D. Ohio Sept. 2008) (since summons/complaint need not contain statutory notices, court dismissed plaintiff's complaint based on failure to give notices); Black's Law Dictionary (8th ed. 2004) ("pleading").

27 *See* Veness v. Heywood, Cari & Anderson, S.C., 2017 WL 6759382 (W.D. Wis. 2017) (granting motion for preliminary approval of class action settlement agreement in case alleging that serving validation notice with summons and complaint is likely to confuse consumers about when and how they need to respond to complaint). *But see* Edstrom-Smith v. Kass Shuler, P.A., 680 Fed. Appx. 813 (11th Cir. 2017).

specifically prohibited by FDCPA § 1692g.[28] The best and simplest collection industry practice is to provide the validation notice well before initiating litigation.[29] In addition to diminishing confusion, this allows the collector to hear and evaluate the consumer's defenses to and disputes of the debt collector's claim before the debt collector invests in drafting a debt collection suit and pays court filing and service fees.[30]

The Second Circuit[31] held that a document attached to a state foreclosure complaint that stated the consumer's FDCPA § 1692g(a) verification rights was not an initial communication triggering the disclosure requirement, because the document was part of a formal pleading that was exempted by FDCPA § 1692g(d). The Second Circuit later held that required documents filed separately with a foreclosure complaint are also not initial communications.[32]

A lower court held that an unfiled "courtesy copy" of the lawsuit was not an initial communication, but was instead an exempt "formal pleading." However, because the cover letter that accompanied the exempt formal pleading could have been an initial communication, the court refused to dismiss the FDCPA § 1692g(a) claim.[33] The Eleventh Circuit held that a letter was an initial communication and not a pleading, despite the fact that it contained a case caption.[34]

The Official Interpretations to Regulation F (effective November 30, 2021) provide that: "A proof of claim that a debt collector files in a bankruptcy proceeding in accordance with the requirements of the United States Bankruptcy Code (Title 11 of the U.S. Code) is a communication in the form of a formal pleading in a civil action and therefore is not an initial communication for purposes of [Reg. F] § 1006.34."[35] Regulation F though does not exclude other communications in the consumer's bankruptcy proceeding from the definition of an initial communication,[36] although a court prior to the Regulation's enactment held that a motion to lift the automatic stay is a formal pleading and not an "initial communication."[37]

Also added by the 2006 amendments was another exception to the initial communication rule, contained at FDCPA § 1692g(e), which states:

> (e) NOTICE PROVISIONS.—The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.[38]

This exception though states that it only applies if the notice does not otherwise relate to the collection of a debt and the notice is expressly required by the applicable law.

Where a Gramm-Leach-Bliley Act notice misrepresented the consumer's FDCPA § 1692c(b) privacy protections, it was deceptive, violating the FDCPA.[39] Under those circumstances the Gramm-Leach-Bliley Act notice may not be "expressly required," and then would not be not exempt under FDCPA § 1692g(e) from being an initial communication.[40] A notice required by RESPA[41] does not qualify as one of the three types of legal notices described in FDCPA § 1692g(e) and may be an initial communication triggering section 1692g rights.[42] The Regulation F supplemental information explicitly declines to exclude mortgage servicing transfer notices from the definition of an initial communication.[43]

A collector leaving a voice mail that meets all the requirements of a limited-contact message found in Reg. F § 1006.2(j) is not a communication under Reg. F,[44] and thus is not an initial communication under Reg. F that triggers the validation notice requirement.[45]

9.2.3 *Validation Notice Where Consumer Is Deceased*

The Official Interpretations to Regulation F (effective November 30, 2021) provide that if the debt collector knows or

28 *See* Edstrom-Smith v. Kass Shuler, P.A., 680 Fed. Appx. 813 (11th Cir. 2017) (nothing in § 1692g prohibits providing § 1692g notice in pleading).

29 Ellis v. Solomon & Solomon, P.C., 591 F.3d 130 (2d Cir. 2010). *See also* Hodges v. Sasil Corp., 915 A.2d 1 (N.J. 2007) (court convened bar committee to harmonize N.J. summary process procedure and FDCPA debt verification rights).

30 *See* §§ 9.7.7, 9.8.3, *infra*.

31 Carlin v. Davidson Fink L.L.P., 852 F.3d 207, 213 (2d Cir. 2017) ("[Congress] adopted a broad exclusion that, on its face, applies to any communication forming any part of a pleading. Such an exclusion naturally extends to exhibits attached to a complaint . . .").

32 Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75, 88 (2d Cir. 2018) (request for judicial intervention and certificate of merit documents are not initial communications).

33 *See* Nikkel v. Wakefield & Assoc., Inc, 2011 WL 4479109 (D. Colo. Sept. 26, 2011).

34 Caceres v. McCalla Raymer, L.L.C., 755 F.3d 1299 (11th Cir. 2014).

35 Reg. F Official Interpretations § 1006.34(b)(2)-1.

36 *See* 86 Fed. Reg. 5766 at 5791 (Jan. 19, 2021).

37 Styrczula v. Pierce & Assoc., 2014 WL 5420272 (N.D. Ill. 2014).

38 Added by Pub. L. No. 109-351, § 802(b), 120 Stat. 2006 (Oct. 13, 2006). *See* § 3.4.2.4, *supra*. *See also* Reg. F § 1006.34(b)(2).

39 *See* Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009); Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007) (Gramm-Leach-Bliley notice's reservation of defendants' right to disclose debtor's information unless debtor opted out constituted false representation of debtor's rights, in violation of § 1692e(10)); Blair v. Sherman Acquisition, 2004 WL 2870080 (N.D. Ill. Dec. 13, 2004) (if Gramm-Leach-Bliley notice was communication in effort to collect debt, requiring consumers to affirmatively notify Sherman that they do not want their information shared is misstatement of consumers' Gramm-Leach-Bliley privacy rights that violated § 1692e(5), (10)).

40 *Cf.* Miller v. Midland Credit Mgmt., Inc., 2009 WL 528796 (N.D. Ill. 2009) (certifying class on raising issue).

41 12 U.S.C. § 2605 (Real Estate Settlement Procedures Act).

42 *See* Hart v. FCI Lender Services, Inc., 797 F.3d 2.9 (2d Cir. 2015).

43 *See* 86 Fed. Reg. 5766 at 5791 (Jan. 19, 2021).

44 Reg F Official Interpretations § 2(d)-2.

45 *See* § 4.9, *supra*.

should know that the consumer is deceased, and if the debt collector has not previously provided the validation information to the deceased consumer, then a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of the validation information requirements.[46] In the initial communication or within five days, the validation information must be provided.

The debt collector must provide the validation information to an individual that the debt collector identifies by name who is authorized to act on behalf of the deceased consumer's estate.[47] It cannot send the notice to the "estate of":

> The Bureau declines to adopt the suggestion to allow mortgage servicers to address a validation notice to the deceased consumer or to "the estate of" the deceased consumer. As discussed in the proposal, the Bureau shares the view of the FTC, which stated in its Policy Statement on Decedent Debt that individuals who lack the authority to resolve the estate but who wish to be helpful are likely to open communications addressed to the decedent's estate, or to an unnamed executor or administrator, which makes such communications insufficiently targeted to a consumer with whom the debt collector may generally discuss the debt. The Bureau, therefore, shares the view of the FTC that "communication[s] addressed to the decedent's estate, or an unnamed executor or administrator, [are] location communication[s] and must not refer to the decedent's debts." Accordingly, comment 34(a)(1)-1 specifies that a debt collector must provide the validation information to an individual that the debt collector identifies by name who is authorized to act on behalf of the deceased consumer's estate.[48]

9.2.4 *Each Debt Collector Must Send the Notice*

The weight of authority requires each debt collector to send a validation notice.[49] In a comprehensive opinion in *Hernandez v. Williams, Zinman & Parham P.C.*, the Ninth Circuit held that "the FDCPA unambiguously requires each debt collector—first or subsequent—to send a § 1692g(a) validation notice within five days of its first communication with a consumer in connection with the collection of any debt."[50] Any other approach would allow easy avoidance of the dispute resolution approach in FDCPA § 1692g that Congress deemed a "significant feature" of the FDCPA.[51]

However, a series of lower court decisions have ignored this rule and declared that *only the first debt collector* involved in collecting a debt must comply with FDCPA § 1692g.[52]

The cases requiring each collector to send a validation notice fit the realities of debt collection practice. Many creditors employ a low-cost, flat-rate, letter-only collection agency as the initial debt collector. That collector would send the FDCPA § 1692g validation notice, but stop sending collection letters if the

46 Reg. F Official Interpretations § 34(a)(1)-1.

47 Reg. F Official Interpretations § 34(a)(1)-1.

48 *See* 86 Fed. Reg. 5766 at 5774 (Jan. 19, 2021) (footnotes omitted).

49 *See* Hernandez v. Williams, Zinman & Parham P.C., 829 F.3d 1068 (9th Cir. 2016); Sanchez v. Jackson, 2016 WL 6833974 (N.D. Ill. 2016) (attorney debt collector acting as agent on behalf of another debt collector must provide his own § 1692g notice listing himself, not his client, as entity providing verification or name of original creditor); Tocco v. Real Time Resolutions, Inc., 48 F. Supp. 3d 535, 539 (S.D.N.Y. 2014); Lewis v. Nationstar Mortg., 5 F. Supp. 3d 890 (E.D. Mich. 2014); Robinson v. Nationstar Mortg., L.L.C., 2012 WL 5596421 (S.D. Ohio 2012) ("It is implausible to think that Congress, concerned with 'dunning the wrong person,' would limit disclosure requirements to a narrow range of debt collectors—those that are the first to seek recovery on a given debt. Instead, an interpretation that requires all debt collectors to comply with the validation and disclosure requirements best promotes the goal of protecting consumers."); Stair v. Thomas & Cook, 254 F.R.D. 191, 197 (D.N.J. 2008); Goray v. Unifund CCR Partners, 2007 WL 4260017, at *8 (D. Haw. 2007); Nichols v. Byrd, 435 F. Supp. 2d 1101, 1106–1107 (D. Nev. 2006); Turner v. Shenandoah Legal Group, P.C., 2006 WL 1685698 (E.D. Va. 2006) (collection attorney required to provide notice); Senftle v. Landau, 390 F. Supp. 2d 463, 475 (D. Md. 2005); Tipping-Lipshie v. Riddle, 2000 WL 339639167 (E.D.N.Y. 2000) (prior collection agency. *See also* FTC Official Staff Commentary § 809(a)-7, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra* (collection agency employee not required to provide another § 1692g notice if employer has already provided one; collection agency's lawyer is required to provide validation notice when debt collection begins); Durham v. Continental Cent. Credit, 2010 WL 2776088 (S.D. Cal. 2010) (second notice required because of great amount of time and possibility that debts were different); Weiss v. Zwicker & Assoc., 664 F. Supp. 2d 214 (E.D.N.Y. 2009) (no duty to provide new disclosures regarding increased balance); Thomas v. Law Firm of Simpson & Cybak, 2001 WL 1516746 (N.D. Ill. 2001), *rev'd on other grounds*, 392 F.3d 914 (7th Cir. 2004); § 9.4.1, *infra*.

50 829 F.3d 1068, 1080 (9th Cir. 2016). *See also* Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1176 (9th Cir. 2006). *But see* Laak v. Quick Collect, Inc., 2017 WL 6559909 (E.D. Wash. 2017) (distinguishing and misunderstanding *Hernandez*; granting summary judgment for collection attorney for failing to send § 1692g(a) notice within five days of serving consumer with garnishment papers, as agent for principal, Quick Collect, which had long before provided verification disclosure and obtained default judgment).

51 *See* § 9.2.1, *supra*.

52 *See* Eilert v. Turner, 2016 WL 1529914 (S.D. Tex. 2016); Moore v. Mortg. Elec. Registration Sys., 2013 WL 1773647 (D.N.H. 2013); Martin v. Gordon & Weinberg, P.C., 2013 WL 11246900 (E.D. Pa. Jan. 28, 2013); Lee v. Cohen McNeile & Pappas, P.C., 2012 WL 2449857 (D. Kan. 2012) ("[Section] 1962g imposes an obligation on the initial debt collector to supply validation of the debt. It does not require separate validation by successive debt collectors."), *aff'd*, 520 Fed. Appx. 649 (10th Cir. 2013); Waters v. J.C. Christensen & Assoc., Inc., 2011 WL 1344452 (D. Mass. Mar. 4, 2011), *adopted*, 2011 WL 1344544 (D. Mass. 2011) (acknowledging issue as "close call"); Marshall v. Deutsche Bank Nat'l Trust Co., 2011 WL 345988, at *5 (E.D. Ark. 2011), aff'd, 445 Fed. Appx. 900 (8th Cir. 2011); Oppong v. First Union Mortg., 566 F. Supp. 2d 395, 403–404 (E.D. Pa. 2008), *aff'd*, 326 Fed. Appx. 663 (3d Cir. 2009); Goray v. Unifund CCR Partners, 2007 WL 4260017 (D. Haw. Dec. 4, 2007); Worch v. Wolpoff & Abramson, L.L.P., 477 F. Supp. 2d 1015 (E.D. Mo. 2007); Nichols v. Byrd, 435 F. Supp. 2d 1101, 1106 (D. Nev. 2006); Thomas v. Law Firm of Simpson & Cybak, 2001 WL 1516746, at *3–4 (N.D. Ill. Nov. 28, 2001) (Coar, J.), *rev'd on other grounds*, 392 F.3d 914 (7th Cir. 2004); Senftle v. Landau, 390 F. Supp. 2d 463, 473 (D. Md. 2005); Ditty v. CheckRite, 973 F. Supp. 1320, 1329 (D. Utah 1997); Donohue v. Nielson, 255 P.3d 760 (Wash. Ct. App. 2011). See also Weinstein v. Fink, 2001 WL 185194, at *7 (N.D. Ill. 2001) (where collection agency had provided consumer verification, creditor's lawyer validation notice was not required in order to comply with § 1692g(a)).

consumer disputed the debt, since the flat-rate collector would generally not be retained to address disputes.[53] If the creditor then referred the account to a contingent-fee, full-service debt collector or collection lawyer or debt buyer, all common practices, the second debt collector would have no obligation under FDCPA § 1692g to address the consumer's dispute, and the consumer's dispute would most likely not be addressed.

In a slight twist on this theme, a lower court held that where a debt buyer did not directly engage in debt collection activities, but hired a debt collection agency to do the collection work, the agency's validation notice, which named the debt buyer as the creditor, satisfied the FDCPA § 1692g(a) obligations for both.[54] A different lower court found that where a collection law firm changed its name, and explained that change to the consumer, the new firm was not required to send a new FDCPA § 1692g(a) notice.[55]

A debt collector may only be required to send one notice regarding a debt, even if the collection is spread over time.[56] Moreover, a collector can send a single validation notice for multiple debts it seeks to collect from a consumer.[57]

A debt collector may be required to send a validation notice to each person alleged to be responsible for the debt.[58] A collector who fails to properly provide the validation notice violates the FDCPA.[59] Notice should be sent after judgment, if that is when a collector begins to collect a debt.[60] A consumer reporting agency must provide the notice if it acts as a debt collector.[61]

53 A debt collector has the option under FDCPA § 1692g(b) of verifying the debt or discontinuing its collection of the debt. *See* § 9.8.1, *infra*.

54 See May v. NCEP, L.L.C., 2014 WL 2009081 (E.D. Mo. 2014).

55 Heffington v. Gordon, Aylworth & Tami, P.C., 2017 WL 6626317 (D. Or. 2017).

56 *See* Townsend v. Fed. Nat'l Mortg. Ass'n, 2013 WL 5595932 (W.D. Va. 2013); Tapia v. Nevada Ass'n Services, Inc., 2013 WL 1104429 (D. Nev. 2013).

57 *See* Reg. F Official Interpretations § 34(c)(2)(viii)-4 (discussing itemization requirements for collectors that combine multiple debts on single validation notice); Reg. F Official Interpretations § 34(c)(2)(ix)-2 (discussing representation of sum owed when collecting multiple debts with single validation notice); Wilkins v. Accounts Receivable Res., Inc., 2016 WL 6805303 (M.D. Fla. Nov. 17, 2016) (§ 1692g notice regarding several bills was not confusing). *See also* 86 Fed. Reg. 5766 at 5806 (Jan. 19, 2021) ("Some debt collectors may have legitimate reasons to combine multiple debts on a single validation notice.").

58 *See* Fooks v. Heritage Payment Recovery, 2015 WL 4393903 (M.D. Pa. 2015). *See also* Peterson v. Meyer, 2016 WL 5249219 (N.D. Ind. 2016). *But see* Molesky v. State Collection & Recovery Serv., L.L.C., 2015 WL 5746835 (N.D. Ohio 2015) (where validation notices for three debts had been sent addressed to consumer/wife at address where she and her husband resided, finding no violation of § 1692g(a) in later adding husband to their dunning letters, without providing him his own validation notice, as he could be responsible for his wife's medical bills).

59 See cases summarized at Appx. E.2.6.5, *infra*. *See also* Betskoff v. Cosby, 2013 WL 4587634 (D. Md. 2013); Beal, FTC Informal Staff Letter (May 22, 1987).

60 Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992); Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988).

61 Sutton, FTC Informal Staff Letter (Oct. 23, 1986).

9.3 Delivery of Validation Information

9.3.1 Oral Notice

The purpose of the debt validation information is to ensure that the consumer can avoid mistaken claims, without having to go to court, simply by requiring the collector to verify the debt. This purpose is frustrated by oral notice of verification rights, since the content of the notice is too long and involved to be effectively conveyed orally as part of a dunning conversation.[62] In addition, oral notice allows a sharp operator to excuse its failure to provide any validation information by later falsely asserting that it had given notice orally. The result is a swearing contest with the possibility that a sharp operator may be the more skilled witness.

There is no question that a validation notice sent after the initial communication must be in writing or electronic and cannot be oral. The question is where the initial communication is oral, can the validation information be included in that oral communication. This, in turn, depends upon an interpretation of the following statutory language:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless *the following information* is contained in the initial communication or the consumer has paid the debt, send the consumer a *written* notice containing . . .[63]

Is the written notice requirement applicable to "the following information is contained in the initial communication," even where the information is provided in the initial communication itself? Regulation F (effective November 30, 2021) provides that the validation information can be provided orally in the initial communication itself.[64] But even the Regulation F supplemental information acknowledges that the amount of validation information that is required will make oral disclosures largely impractical.[65] In addition, the oral disclosure of the required validation information must be clear and conspicuous,[66] which means that it must be "readily understandable."[67] Regulation F states that, "[i]n the case of oral disclosures, the disclosures also must be given at a volume and speed sufficient for the consumer to hear and comprehend them."[68]

Before Regulation F's enactment, only one court had approved the provision of oral validation information.[69] Some

62 *See* Swanson v. S. Oregon Credit Serv., 869 F.2d 1222 (9th Cir. 1988) (validation notice must be provided effectively).

63 15 U.S.C. § 1692g(a) (emphasis added).

64 Reg. F § 1006.34(a)(1)(ii). *See also* § 9.3.2.3 (discussing CFPB's determination that the FDCPA does not require the validation notice information to be provided in writing in the initial communication).

65 *See* 86 Fed. Reg. 5766 at 5788 (Jan. 19, 2021) ("The Bureau agrees that there may be significant challenges to conveying the required validation information orally.").

66 Reg. F § 1006.34(d)(1).

67 Reg. F § 1006.34(b)(1).

68 Reg. F § 1006.34(b)(1).

69 *See* Kasalo v. Trident Asset Mgmt., L.L.C., 53 F. Supp. 3d 1072 (N.D. Ill. 2014). *Cf.* Silbert v. Asset Res., Inc., 2000 WL 680243 (D. Minn.

old FTC informal staff letters and the commentary have lent support to the argument that oral notices are permitted, while other FTC informal letters have disagreed.[70]

This construction of FDCPA § 1692g(a) should be rejected in favor of requiring written notices, despite the Regulation F provision. The legislative history of this provision only refers to the requirement of written notice of verification rights.[71] This provision was amended several times during the legislative process.[72] There is nothing to suggest that it was amended to permit oral validation information. Rather, the amendments served to reduce the burden on collectors of providing the written validation notice, in two ways: 1) by not requiring a notice to be sent when the consumer pays the debt immediately after the initial communication and 2) by allowing the validation notice to be sent in the initial communication (rather than within five days after the initial communication), reducing the collector's mail expense.

9.3.2 Electronic Notices

9.3.2.1 Generally

Regulation F (effective November 30, 2021) defines a validation notice as a written or electronic notice that provides the validation information required by Regulation F.[73] Regulation F allows for emailed or other electronic validation notices. But the notice must be sent in a way that complies with Reg. F § 1006.42 and other Regulation F provisions.

For example, Reg. F § 1006.6(e) requires disclosure in all electronic communications as to the right to opt out of such communications.[74] Such a disclosure must be included in all electronic validation notices, even though this is not defined in the regulation as information specifically required for validation notices.[75] The Reg. F supplemental information provides:

> A debt collector who sends a validation notice electronically may provide the [Reg. F] § 1006.6(e) disclosure in the electronic communication outside of the validation notice. A debt collector who provides the model validation notice electronically will not lose the safe harbor described in [Reg. F] § 1006.34(d)(2) by including the [Reg. F] § 1006.6(e) disclosure in the electronic communication outside the model notice.[76]

Regulation F provides the consumer can be sent a validation notice (including an electronic notice) "in the manner required by [Reg. F] § 1006.42" in either the initial communication itself or within five days of the initial communication.[77] Reg. F. § 1006.42 in turn provides that a validation notice found either in the initial communication or sent within five days must comply with Reg. F § 1006.42(a) and only a notice sent within five days must comply with Reg. F § 1006.42(b).

9.3.2.2 Expected to Provide Actual Notice and In Form Consumer Can Keep

Regulation F (effective November 30, 2021) requires that a notice sent in writing or electronically "must do so in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later."[78] The Regulation F Official Interpretations provide three relevant factors as to whether a communication is reasonably expected to provide actual notice. These are whether the debt collector:

1. "Identified the purpose of the communication by including, in the subject line of an electronic communication, the name of the creditor to whom the debt currently is owed and one additional piece of information identifying the debt, other than the amount;"[79]
2. "Permitted receipt of notifications of undeliverability from communications providers, monitored for any such notifications, and treated any such notifications as precluding a reasonable expectation of actual notice for that delivery attempt;"[80] and
3. "Identified itself as the sender of the communication by including a business name that the consumer would be likely to recognize."[81]

The Official Interpretations provide six examples of an additional piece of information identifying the debt, in compliance with the first factor listed above. These are: a truncated account number, the name of the original creditor, the name of any store brand associated with the debt, the date of sale of a

Feb. 14, 2000) (claim for failing to provide validation notice that was not provided within five days of phone call).

70 See FTC Official Staff Commentary § 809(a)-5, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Clement, FTC Informal Staff Letter (Nov. 12, 1985); Mezines, FTC Informal Staff Letter (Mar. 20, 1980). *See also* Cranmer, FTC Informal Staff Letter (Apr. 25, 1989). *But see* Freeman, FTC Informal Staff Letter (Nov. 15, 1988).

71 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 5, 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*.

72 S. 918, 95th Cong., 1st Sess. § 809(a) (Mar. 4, 1977) ("Within five days after the initial communication with the consumer in connection with the collection of any debt, a debt collector shall, unless such is contained in the initial communication *or the consumer has paid the debt*, send the consumer a written notice containing the following information.") (emphasis added); S. 656, 95th Cong., 1st Sess. § 808(a) (Feb. 7, 1977) ("Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, *unless such is contained in the initial communication*, send the consumer a written notice containing the following information.") (emphasis added); H.R. 5294, 95th Cong., 1st Sess. § 808(a) (Mar. 22, 1977) ("Within five *working* days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall send the consumer a written notice containing the following information.") (emphasis added); H.R. 29, 95th Cong., 1st Sess. § 808(a) (Jan. 4, 1977) (does not contain word "working"); H.R. 13,720, 94th Cong., 2d Sess. § 808 (July 28, 1976) (does not contain word "working"). Prior House bills contained a wholly different approach to this problem.

73 Reg. F § 1006.34 (b)(4).

74 *See* § 5.9, *supra*.

75 *See* 86 Fed. Reg. 5766 at 5814 (Jan. 19, 2021).

76 *See* 86 Fed. Reg. 5766 at 5814 (Jan. 19, 2021).

77 Reg. F § 1006.34(a)(1)(i).

78 Reg. F § 1006.42(a)(1).

79 Reg. F Official Interpretations 42(a)(1)-1(i).

80 Reg. F Official Interpretations 42(a)(1)-1(ii).

81 Reg. F Official Interpretations 42(a)(1)-1(ii).

product or service giving rise to the debt, the physical address of service, and the billing or mailing address on the account.[82]

The Official Interpretations provide two examples of a business name that the consumer would recognize, in compliance with the third factor listed above. One is where, pursuant to Reg. F § 1006.6(d)(4)(ii)(C), the *creditor* has sent the consumer a notice indicating that the consumer's email address is being transferred to a named debt collector and that debt collector may contact the consumer using that email address. The other is where a debt collector has sent a voice mail message to the consumer that meets the definition of a limited-content message, and thus must include a business name for the debt collector that does not indicate that the debt collector is in the debt collection business.[83]

If the debt collector receives a notice that the validation notice was not delivered, then the collector has not sent the disclosure in a manner that is reasonably expected to provide actual notice.[84] In addition, a validation notice is not sent in a manner that is reasonably expected to provide actual notice if it is sent by email or text message and the consumer has opted out[85] of emails to that email address or texts to that phone number.[86]

Prior to Regulation F, the Seventh Circuit found that the debt collector failed to "send" the consumer a validation notice when it had emailed the consumer a link to a website where the consumer could have downloaded the validation notice, but only if the consumer was willing to risk opening a file from a stranger against the advice of computer experts.[87]

9.3.2.3 Compliance with the E-SIGN Act

When an electronic validation notice is sent after the initial communication (i.e., not found in the initial communication itself), then Regulation F (effective November 30, 2021) requires that the notice be sent in accordance with 15 U.S.C. § 7001(c), Electronic Signatures in Global and National Commerce Act (E-SIGN Act) § 101(c).[88] That provision requires that, before the electronic validation notice is sent to the consumer, the consumer must have first affirmatively consented to electronic communication, which consent has not been withdrawn.

Before the consent is provided, certain disclosures must be made and the consumer must be informed as to the hardware and software required to access and retain the notice, and provisions are made if the hardware or software requirements later change. The consent must either be electronic or confirmed electronically in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the validation notice. These E-SIGN requirements are examined in another NCLC treatise, Consumer Banking and Payments Law § 11.4 (12th ed. 2020), *updated at* www.nclc.org/library.

The CFPB is deliberately leaving unresolved whether the collector must obtain that consent from the consumer directly, or whether the consent could have been obtained by the originating creditor with the collector relying on that consent.[89]

Regulation F § 1006.42(b) does not apply to a validation notice sent in the initial communication. The supplemental information to Regulation F explains that "[t]he Bureau has determined that the FDCPA does not require the validation notice information to be provided in writing when it is contained in the initial communication."[90] Since E-SIGN consumer-consent requirements only apply where applicable law requires a that a disclosure be made in writing,[91] the CFPB concludes that collectors need not comply with the E-SIGN Act if the validation notice is in the initial communication.[92] As a result of this analysis, the CFPB states that, "a debt collector may electronically deliver the validation notice information within the debt collector's initial communication to a consumer without obtaining the consumer's E-SIGN consent."[93]

Providing an electronic validation notice to consumers as an initial communication without the consumer's consent may increase the likelihood that the consumer does not see the validation notice as the email address may be old or incorrect, emails may be sent to spam folders the consumer does not check, or consumers may simply delete an electronic message coming from an unfamiliar debt collector.

Validation information sent in an initial electronic communication still must be sent "in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later."[94] The CFPB has also noted that a validation notice sent in an initial communication must also be "contained" in that communication,[95] in contrast to *Lavallee v. Med-1 Solutions, L.L.C.*,[96] where access to the validation notice depended on the consumer taking additional actions after receiving the email.

9.3.3 Written Notices and Burden of Proving Mail Delivery

Regulation F (effective November 30, 2021) provides standards for sending a written validation notice. As with electronic validation notices,[97] debt collector must send a written

82 Reg. F Official Interpretations 42(a)(1)-1(i).
83 Reg. F § 1006.2(j)(1)(i).
84 Reg. F Official Interpretations 42(a)(1)-2.
85 Reg. F § 1006.6(e); § 5.9, *supra*.
86 Reg. F Official Interpretations 42(a)(1)-4.
87 Lavallee v. Med-1 Solutions, L.L.C., 932 F.3d 1049 (7th Cir. 2019).
88 Reg. F § 1006.42(b).
89 *See* 85 Fed. Reg. 76,734, 76,851 (Nov. 30, 2020).
90 85 Fed. Reg. 76,734, 76,854 (Nov. 30, 2020). The CFPB explains their reasoning for this determination as follows: "FDCPA section 809(a) permits the validation notice information to be contained in the initial communication. In turn, FDCPA section 807(11) indicates that the initial communication with the consumer may be oral. Accordingly, the Bureau interprets the FDCPA as not requiring that the validation notice information be provided in writing when it is contained in the initial communication." *Id.* at n.584.
91 15 U.S.C. § 7001(c)(1).
92 85 Fed. Reg. 76,734, 76,854 n.585 (Nov. 30, 2020).
93 85 Fed. Reg. 76,734, 76,854 (Nov. 30, 2020).
94 Reg. F § 1006.42(a)(1). *See also* 85 Fed. Reg. 76,734, 76,854 (Nov. 30, 2020).
95 *See also* 85 Fed. Reg. 76,734, 76,854 n.586 (Nov. 30, 2020).
96 Lavallee v. Med-1 Solutions, L.L.C., 932 F.3d 1049 (7th Cir. 2019).
97 *See* § 9.3.2, *supra*.

validation notice in a manner that is reasonably expected to provide actual notice and in a form that the consumer can keep and access later.[98]

The "reasonably expected to provide actual notice" prong is not satisfied if the collector receives a notice that the written disclosure was not delivered.[99] Both requirements in Reg. F § 1006.42(a)(1) are satisfied where, in accordance with the safe harbor provision, a debt collector mails a written validation notice to the consumer's last known address, unless at the time of mailing the debt collector knows or should know that the consumer does not currently reside at, or receive mail at, that location.[100] Post office boxes are included in this safe harbor, unless the debt collector knows or should know that the consumer does not currently use this address, but does not include a commercial address.[101]

Prior to Regulation F, courts held that, upon a showing by the debt collector that the notice was sent to the consumer at the consumer's current address and not returned, the burden of proof that the FDCPA § 1692g notice was sent by the debt collector shifts to the consumer.[102] According to the Ninth Circuit, the debt collection agency must prove that the FDCPA § 1692g notice was sent to the consumer's home address, not that it was received by the consumer. Absent any evidence other than a consumer's bare denial of receipt or claim that the letter was sent to the wrong address and the debt collector's testimony describing its mailing system, the court held that the common-law mailbox rule controlled.[103] According to the Eleventh Circuit, "[w]hile the plain language of the statute might not require the debt collector to ensure actual receipt of the written notice, the plain language does require the debt collector to send the written notice to a valid and proper address where the consumer may actually receive it."[104]

To overcome the debt collector's evidence that the notice was sent to the proper address, the consumer would have to show that the letter was sent to the wrong address or find other consumers or locate a credible former employee of the defendant to establish a pattern or practice of not mailing the notice. Where the debt collector's records show that the validation notice was returned to the collector as undeliverable, the consumer rebutted the mailbox rule by testifying that he had not lived for five years at the address to which the validation notice was mailed and prevailed on the claim that the debt collector subsequently failed to send the notice to the current address.[105] Where the consumer's evidence was that he had never resided at or received mail at the address listed as the address to which the debt collector sent the notice, it created an issue of fact as to whether the letter was properly sent.[106]

If the collector has not presented business record evidence confirming mailing the notice to the right address and the consumer denies receiving it, some courts hold that the fact finder must decide whether the notice was mailed.[107] Where the timeliness of the sending notice was disputed, summary judgment

98 Reg. F § 1006.42(a)(1).

99 Reg. F Official Interpretations 42(a)(1)-2.

100 Reg. F Official Interpretations 42(a)(1)-3.

101 *See* 85 Fed. Reg. 76,734, 76,850 (Nov. 30, 2020).

102 *See* Reed v. IC Sys., Inc., 2017 WL 89047 (W.D. Pa. 2017); Nikkel v. Wakefield & Assoc., Inc., 2012 WL 5571058 (D. Colo. 2012); Coachella Valley Collection Serv. v. Raskov, 2012 WL 1427848 (Cal. Ct. App. 2012) (testimony as to standard procedure was sufficient to prove sending letter).

103 Mahon v. Credit Bur., 171 F.3d 1197 (9th Cir. 1999). *See also* Girdler v. Convergent Outsourcing, Inc., 2016 WL 7479541 (D. Mass. 2016); Ebanks v. Old Republic Equity Credit Serv., Inc., 2016 WL 7321291 (M.D. Fla. 2016); Carlisle v. Nat'l Commercial Services, Inc., 2015 WL 4092817 (N.D. Ga. 2015) (collector failed to provide any evidence that its alleged notice complied with § 1692g); May v. NCEP, L.L.C., 2014 WL 2009081 (E.D. Mo. 2014) (mailing to last known address suffices); Phillips v. NCO Fin. Sys., Inc., 2014 WL 1405217 (E.D. Mich. 2014); Woodward v. Pressler & Pressler, L.L.P., 2014 WL 809003 (D.N.J. Feb. 28, 2014) (consumer must offer rebuttal); Karimian v. CMRE Fin. Services Inc., 2013 WL 12114825 (C.D. Cal. May 14, 2013); Peck v. Midland Funding, L.L.C., 2012 WL 2913263 (D. Utah 2012); Carpenter v. RJM Acquisitions, L.L.C., 787 F. Supp. 2d 971 (D. Minn. 2011); Belcher v. Cent. Credit Services, Inc., 2011 WL 13229640 (N.D. Ala. June 22, 2011); Webb v. Envision Payment Solutions, Inc., 2011 WL 2160789 (W.D. Pa. May 31, 2011); McLain v. Gordon, 2010 WL 3340528 (W.D. Wash. 2010); Nichols v. GC Services, L.P., 2009 WL 3488365 (D. Ariz. Oct. 27, 2009), *aff'd*, 423 Fed. Appx. 744 (9th Cir. 2011); Krawczyk v. Centurion Capital Corp., 2009 WL 395458 (N.D. Ill. Feb. 18, 2009); Zamos v. Asset Acceptance, L.L.C., 423 F. Supp. 2d 777 (N.D. Ohio 2006); Moore v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 2006 WL 1806195 (C.D. Ill. June 29, 2006); McGinley v. Law Office of Shapiro & Kreisman, 2003 WL 21466936 (N.D. Ill. 2003); Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087 (D. Or. 2000). *See also* Johnson v. Revenue Mgmt. Corp., 52 F. Supp. 2d 889 (N.D. Ill. 1999) (debt collector found evidence of letter well into case). *Cf.* Edwards v. Cavalry Portfolio Services, L.L.C., 2015 WL 5145559 (W.D. Ky. Sept. 1, 2015) (consumer should be given opportunity to offer evidence rebutting mail box presumption, making motion to dismiss premature); Silbert v. Asset Res., Inc., 2000 WL 680243 (D. Minn. Feb. 14, 2000) (declining to infer in defendant's favor that validation notice was sent solely because defendant alleged that validation notices were routinely mailed day that they are generated).

104 Ponce v. BCA Fin. Services, Inc., 467 Fed. Appx. 806, 807 (11th Cir. 2012). *See also* Estate of Domenic Caruso v. Fin. Recoveries, 2017 WL 2704088 (D.N.J. 2017); Duranseau v. Portfolio Recovery Assoc., 2015 WL 632144 (D. Minn. Feb. 13, 2015); Johnson v. CFS II, Inc., 2013 WL 1809081 (N.D. Cal. 2013).

105 Johnson v. Midland Credit Mgmt. Inc., 2006 WL 2473004 (N.D. Ohio 2006). *See also* Johnson v. Midland Credit Mgmt. Inc., 2012 WL 5996391 (N.D. Ohio 2012); Palisades Collection, L.L.C. v. O'Brien, 873 N.E.2d 923 (Ohio Ct. App. 2007) (remanding for determination whether dispute notice had been sent to valid address).

106 Ponce v. BCA Fin. Services, Inc., 467 Fed. Appx. 806 (11th Cir. 2012) (while plain language of statute might not require debt collector to ensure actual receipt of written notice, plain language does require debt collector to send written notice to a valid and proper address where consumer may actually receive it; cannot say district court erred in determining that September 2009 telephone call, and not prior letter sent to an address where consumer had not lived for eight years, was initial communication); Johnson v. Prof'l Collection Consultants, 2010 WL 2196571 (S.D. Cal. 2010).

107 *See* Schroeder v. Meyer, 2017 WL 1238016 (N.D. Ind. 2017); Reed v. IC Sys., Inc., 2017 WL 89047 (W.D. Pa. 2017); Gatter v. Richland Holdings, Inc., 2016 WL 1384787 (D. Nev. 2016); Greiner v. Spiwin & Co., 2014 WL 3864521 (E.D. Mich. Aug. 6, 2014); Beuter v. Canyon State Prof'l Services, 2005 U.S. Dist. LEXIS 12281 (D. Ariz. June 13, 2005) (disputed issues precluded summary judgment).

would not be appropriate.[108] In a case where the debt collector outsourced the sending of the validation notice, its employee's affidavit was nothing but inadmissible hearsay, and misleading at best as to whether or not the statutory notice was mailed to the plaintiff.[109] Additionally, courts sometimes compel collectors to reveal other consumer complaints and suits.[110]

While the debt collector's burden is often considered minimal by the courts, a lower court decision found that the debt collector's evidence that it had mailed the FDCPA § 1692g notice failed on six points:[111]

- First, the debt collector did not unequivocally state that an initial letter was mailed to the consumer. Instead, he testified that its system *generates* a letter whenever a new account is loaded in the database and concluded that a letter "would have been sent" to the consumer in October 2012.
- Second, the collector failed to point to any evidence establishing that the letter was sent to the proper address.
- Third, the collector did not point to any evidence establishing that the letter was not returned as undeliverable.[112]
- Fourth, the collection notes did not reflect the mailing of the FDCPA § 1692g notice.
- Fifth, collector did not produce the testimony of the agent who sent the letter. He could only testify that the letter would have been sent by "somebody in admin."
- Sixth, and "most fatal" to its position, was the failure to produce a copy of the initial notice letter. Instead, it provided the court with a copy of a generic notice and a copy of a settlement letter dated much later.[113]

108 *See* Farmer v. Buffaloe & Assoc., 2012 WL 6045976 (E.D. Tenn. 2012) (did not send follow-up letter within five days of communication with proper disclosures); Wood v. GC Services, L.P., 2012 WL 987761 (M.D. Fla. 2012).

109 Anderson v. Credit Bur. Collection Services, Inc., 422 Fed. Appx. 534 (7th Cir. 2011). *See also* Searle v. Credit Adjustments, Inc., 2012 WL 1079328 (M.D. Pa. 2012); Lee v. Credit Mgmt., L.P., 846 F. Supp. 2d 716 (S.D. Tex. 2011) (defendant's reliance on notations of codes contained in its documentation log, which indicated that letter should have been sent along with "form" letter showing what letters would have stated, fell short of establishing that letter was, in fact, sent and that it was sent within prescribed time). *See also* Kimmel v. Cavalry Portfolio Services, L.L.C., 2011 WL 3204841 (E.D. Pa. 2011) (affidavit of debt buyer's mailing service was insufficient to establish mailing of § 1692g notice where it stated that letter was mailed on appropriate date, but did not identify letter as containing notice).

110 *See* § 2.5.9, *supra*.

111 Currier v. PDL Recovery Group, L.L.C., 2017 WL 712887, at *17 (E.D. Mich. 2017).

112 *See also* Nogali v. Transcon Fin., Inc., 2015 WL 12656934 (C.D. Cal. 2015).

113 Currier v. PDL Recovery Group, L.L.C., 2017 WL 712887 (E.D. Mich. 2017). *See also* Heling v. Creditors Collection Serv., Inc., 2016 WL 4625683 (E.D. Wis. 2016) (court noted absurdity of arguing that agency had no liability as long as it sent a letter somewhere, or anywhere).

9.3.4 Delivery of Notice to Consumer's Attorney

If the consumer is represented by an attorney, the Fourth,[114] Seventh,[115] and Eleventh[116] Circuits hold that the validation notice should be sent to the attorney, while a split Ninth Circuit decision held the FDCPA inapplicable to communications to a consumer's attorney.[117] FTC staff once believed the notice need not be given to a consumer's attorney (who may be unaware of verification rights),[118] but the safer course in circuits that have not addressed the issue is to provide the notice to a consumer's attorney.[119] One court has held that a fax about the debt sent to the consumer's attorney was the initial debt collection communication, triggering validation notice obligations.[120]

9.3.5 Notice Must Effectively Convey Required Information

Regulation F (effective November 30, 2021) outlines required and optional validation information.[121] It provides instructions about the format of validation information and includes a model validation notice.[122]

Regulation F also requires that the validation notice be sent in a manner that is reasonably expected to provide actual

114 Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999). *See also* Sayyed v. Wolpoff & Abramson, 485 F.3d 226 (4th Cir. 2007) (letters to consumer's lawyer must comply with FDCPA).

115 *See* Evory v. Nat'l Action Fin. Services, Inc., 505 F.3d 769 (7th Cir. 2007); Huff v. Dobbins, Fraker, Tennant, Joy & Perlstein, 1999 U.S. App. LEXIS 12055 (7th Cir. 1999). *See also* Dikeman v. Nat'l Educators, Inc., 81 F.3d 949 (10th Cir. 1996); Wright v. Phillips & Cohen Assoc., Ltd., 2014 WL 4471396 (E.D.N.Y. 2014) (although collection letter was addressed to consumer via his attorney, it was clear that information letter contained was designed to be conveyed, albeit indirectly, to consumer, and constituted initial communication).

116 Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268 (11th Cir. 2016) (refusing to adopt "competent lawyer" standard for communications to attorneys, based on facts in this case; omission of "in writing" requirement is not something less likely to mislead attorney than consumer).

117 *See* Guerrero v. RJM Acquisitions L.L.C., 499 F.3d 926 (9th Cir. 2007). *See also* Baiser v. Braje & Nelson, L.L.P., 2006 WL 1285143 (N.D. Ind. 2006).

118 Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988).

119 *See* Matthews v. HSS Systems, L.L.C., 2016 WL 356033 (E.D. Okla. 2016) (letter directed to consumer's attorney must include proper § 1692g notice); Spencer v. Hendersen-Webb, 81 F. Supp. 2d 52 (D. Md. 1999) (debt collector's fax of bill to father of consumer's boyfriend in response to his request for information on debt was deemed to be attempt to collect debt, since debt collector believed father was consumer's attorney and that information would reach consumer indirectly; determining that fax was debt collector's initial communication and thus failure to provide validation notice in connection with fax violated FDCPA); § 5.5, *supra* (regarding contacting attorney of represented consumer).

120 Spencer v. Hendersen-Webb, 81 F. Supp. 2d 582 (D. Md. 1999) (debt collector's fax of bill to father of consumer's boyfriend in response to his request for information on debt was deemed to be attempt to collect debt since debt collector believed father was consumer's attorney and that information would reach consumer indirectly).

121 Reg. F § 1006.34(c), (d)(3). *See* §§ 9.4, 9.6, *infra*.

122 Reg. F § 1006.34(d)(1), (d)(2), (d)(4), (e). *See* § 9.5, *infra*.

notice and in a form that the consumer can keep and access later.[123] In addition, Regulation F states that, during the thirty-day validation period, a debt collector must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's rights to dispute the debt and to request the name and address of the original creditor.[124]

Use of the model validation notice found at Reg. F Appendix B-1 provides a safe harbor from liability for overshadowing.[125] The extent to which use or approximate use of the model form provides a safe harbor is examined at §§ 9.5.2 and 9.6, *infra*.

The remainder of this subsection examines case law about effective conveyance of required validation information that was issued prior to the Regulation F effective date.

The form of the validation notice must be sufficient to effectively convey the required information. A least sophisticated consumer test is used in determining whether the information is effectively conveyed. The least-sophisticated-consumer test adopted by the courts is an objective standard[126] and is not affected by the consumer plaintiff's perception of the debt collector's statements.[127] The courts generally add a reasonableness approach when applying the least-sophisticated-consumer test.[128]

In the leading case on the placement of a validation notice, *Swanson v. Southern Oregon Credit Service*,[129] the Ninth Circuit held that a validation notice violated FDCPA § 1692g because it would not "effectively" convey notice of FDCPA verification rights to the least sophisticated consumers.[130] The Ninth Circuit held:

> The statute is not satisfied merely by inclusion of the required debt validation notice; the notice Congress required must be conveyed effectively to the debtor. It must be large enough to be easily read and sufficiently prominent to be noticed—even by the least sophisticated debtor. Furthermore, to be effective, the notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication from the collection agency.[131]

The validation notice not only failed the least-sophisticated test,[132] but also failed the effectively-provided test, because it was dwarfed and contradicted by the dunning message.

In a 2006 amendment to the FDCPA,[133] Congress codified important aspects of the *Swanson* decision by adding the following language at the end of FDCPA § 1692g(b):

> Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. *Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.*[134]

The *Swanson* decision was followed by the Fourth Circuit, a few years later in *Miller v. Payco General American Credits, Inc.*[135] The debt collector's single letter to the consumer was described as follows:

> The front of the Payco form demands "IMMEDIATE FULL PAYMENT" and commands the consumer to "PHONE US TODAY," emphasized by the word "NOW" emblazoned in white letters nearly two inches tall against a red background. The message conveyed by those statements on the face of the form, flatly contradicts the information contained on the back.[136]

Quoting from *Ost v. Collection Bureau, Inc.*,[137] the Fourth Circuit concluded that "[s]creaming headlines, bright colors and huge lettering 'all point to a deliberate policy on the part

123 Reg. F § 1006.42(a)(1). *See* §§ 9.3.2.2, 9.3.3, *supra*.
124 Reg. F § 1006.38(b)(1).
125 Reg. F § 1006.38(b)(2).
126 *See, e.g.*, Swanson v. S. Oregon Credit Serv., 869 F.2d 1222 (9th Cir. 1988). *See also* § 3.2.1, *supra*, Appx. E.2.6.1, *infra*.
127 *See, e.g.*, Hart v. FCI Lender Services, Inc., 797 F.3d 219, 225 (2d Cir. 2015); Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85 (2d Cir. 2008) (language unlawfully overshadowed or contradicted validation notice when it would make least sophisticated consumer uncertain as to their rights, regardless of whether plaintiff was actually confused); Durkin v. Equifax Check Services, Inc., 406 F.3d 410 (7th Cir. 2005); Tilatitsky v. Medicredit, Inc., 2016 WL 5906819 (E.D. Mo. 2016); Garcia v. Solomon, Grindle, Silverman & Wintringer APC, 2012 WL 12846995 (S.D. Cal. 2012).
128 *See* § 3.2.1, *supra*, Appx. E.2.6.1, *infra*. *See also* Cicalo v. McCalla Raymer Leibert Pierce, L.L.C., 2018 WL 1514245, at *1 (D. Conn. 2018) (attorney's document served with foreclosure suit explaining requirement to respond to state foreclosure suit and consumer's § 1692g rights did not violate § 1692g); Cooper v. Portfolio Recovery Assoc., 2017 WL 4098824 (E.D. Mich. 2017).
129 869 F.2d 1222 (9th Cir. 1988).
130 *See* Appx. E.2.6.1, *infra*. *See also* § 3.2.1, *supra*.
131 869 F.2d 1222, 1225 (9th Cir. 1988) (citation omitted).
132 *See also* Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268 (11th Cir. 2016); Ellis v. Solomon & Solomon, P.C., 591 F.3d 130 (2d Cir. 2010); Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85, 90–92 (2d Cir. 2008); Sims v. GC Services L.P., 445 F.3d 959 (7th Cir. 2006); Smith v. Computer Credit, Inc., 167 F.3d 1052 (6th Cir. 1999); Goldberg v. Transworld Sys., Inc., 1998 WL 650793 (2d Cir. 1998) (unpublished); Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Terran v. Kaplan, 109 F.3d 1428 (9th Cir. 1997); Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996); Smith v. Transworld Sys., Inc., 953 F.2d 1025 (6th Cir. 1992); Swanson v. S. Oregon Credit Serv., 869 F.2d 1222 (9th Cir. 1988); Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982).
133 *See* § 3.4.2.4, *supra*.
134 15 U.S.C. § 1692g(b) (emphasis added). *See* § 9.8.1, *infra*.
135 943 F.2d 482 (4th Cir. 1991).
136 Miller v. Payco Gen. Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991). *See also* Caprio v. Healthcare Revenue Recovery Group, L.L.C., 709 F.3d 142 (3d Cir. 2013) (asking consumer to "please call" (bolded, as was phone number) or write with any questions or if did not owe amount overshadowed disclosure of written verification right on reverse); Colmon v. Payco-G.A.C., Inc., 1992 U.S. Dist. LEXIS 22733 (D. Conn. 1992).
137 493 F. Supp. 701, 702–703 (D.N.D. 1980).

of the collector to evade the spirit of the notice statute, and mislead the debtor into disregarding the notice.'"[138]

The Ninth Circuit has held that the question of whether the validation notice was conveyed effectively to a least sophisticated consumer was a question of law where the decision did not require reference to extrinsic facts.[139] The Seventh Circuit considers the question to be one of law where the source of the confusion is apparent on the face of the letter, without extrinsic evidence.[140] Uniquely, the Seventh Circuit has sometimes required the use of extrinsic evidence, such expert testimony or surveys, to resolve cases where the violation is not clear.[141] In a Seventh Circuit case, the majority and the concurring opinions disagreed on the utility of using survey evidence to resolve issues of whether unsophisticated consumers would be confused. The majority recommended survey evidence while the concurring opinion pointed out that the very high cost of survey evidence may prevent the pursuit of FDCPA claims.[142] Moreover, expert testimony on this issue runs a risk of being excluded under *Daubert*.[143]

Placing the validation information on the back of a dunning letter may comply with FDCPA § 1692g(a) if there is a conspicuous reference on the front, and if other language on the letter does not further obscure the notice.[144] However, the Seventh Circuit rejected the argument that the placement of the validation information on page two of the letter violated FDCPA § 1692g, despite the fact that the first page referred to the back, which was blank.[145] Other methods of hiding or obscuring such information would clearly violate the Act.[146]

138 Miller v. Payco Gen. Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991). *See also* Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991), *overruled on other grounds by*, Riccio v. Sentry Credit, Inc., 954 F.3d 582, 594 (3d Cir. 2020) ("To comply with the terms of the Act, statutory notice must not only explicate a debtor's rights; it must do so effectively."); Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995) (adequacy of validation notice in minuscule print following big, bold threat of suit would be determined by trial); Vaughn v. CSC Credit Services, Inc., 1995 WL 51402 (N.D. Ill. 1995) (whether warnings required by §§ 1692g and 1692e(11) were legible was question of fact for jury); Roudebush v. Collecto, Inc., 2004 WL 3316168 (S.D. Ind. 2004) (jury could reasonably find that debt collector's validation notice on reverse side of initial dun seeking payment on underlying telephone bill was physically overshadowed and thus not effectively conveyed where front side of dun referred debtor to "important rights" on reverse side, yet validation notice on reverse side appeared under unrelated heading "FOR MEDICAL USE ONLY" and not under heading "NOTICE OF IMPORTANT RIGHTS"). *But see* Latimer v. Transworld Sys., Inc., 842 F. Supp. 274 (E.D. Mich. 1993) (although validation notice and debt collection warning were in smaller print than other portions of letter, §§ 1692g and 1692e(11) not violated). *Accord* United States v. Nat'l Fin. Services, Inc., 98 F.3d 131 (4th Cir. 1996) (notice on back of payment demand letter which stated conflicting deadlines and overshadowed notice by being in larger typeface).

139 Terran v. Kaplan, 109 F.3d 1428 (9th Cir. 1997). *See also* Perry v. Trident Asset Mgmt., L.L.C., 2015 WL 417588 (E.D. Mo. Feb. 2, 2015); Oberther v. Midland Credit Mgmt., Inc., 45 F. Supp. 3d 125 (D. Mass. 2014); McCormick v. Wells Fargo Bank, 640 F. Supp. 2d 795 (S.D. W. Va. 2009) (Fourth Circuit would find contradiction/overshadowing issue question of law).

140 *See* Durkin v. Equifax Check Services, Inc., 406 F.3d 410 (7th Cir. 2005); Marshall-Mosby v. Corporate Receivables, Inc., 205 F.3d 323 (7th Cir. 2000).

141 *E.g.*, Durkin v. Equifax Check Services, Inc., 406 F.3d 410 (7th Cir. 2005); Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057 (7th Cir. 1999). *See* § 7.3.8, *supra*. *See also* Marshall-Mosby v. Corporate Receivables, Inc., 205 F.3d 323 (7th Cir. 2000); Walker v. Nat'l Recovery, Inc., 200 F.3d 500 (7th Cir. 1999); Omaraie v. A. Alliance Collection Agency, Inc., 2007 WL 2409794 (N.D. Ill. Aug. 21, 2007); Nance v. Lawrence Friedman P.C., 2000 WL 1230462 (N.D. Ill. 2000); § 2.5.14, *supra*.

142 Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057 (7th Cir. 1999).

143 *See* Durkin v. Equifax Check Services, Inc., 406 F.3d 410 (7th Cir. 2005); Hernandez v. Attention, L.L.C., 429 F. Supp. 2d 912 (N.D. Ill. 2005). *See also* § 7.3.8, *supra*; § 11.5.4, *infra*.

144 *See* Sims v. GC Services L.P., 445 F.3d 959 (7th Cir. 2006); McStay v. I.C. Sys., Inc., 308 F.3d 188 (2d Cir. 2002); Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. 2018); Spann v. Midland Credit Mgmt. & Midland Funding, L.L.C., 2016 WL 5390671 (E.D. Pa. 2016); Molina v. Healthcare Revenue Recovery Group, L.L.C., 2012 WL 3067883 (M.D. Fla. 2012). *See also* Hawk v. EOS CCA, 2014 WL 948059 (E.D. Pa. 2014); Panto v. Prof'l Bur. of Collections, 2011 WL 843899 (D.N.J. 2011) (notice below signature line not violation); Weber v. Computer Credit, Inc., 259 F.R.D. 33 (E.D.N.Y. 2009); Stark v. RJM Acquisitions L.L.C., 2009 WL 605811 (E.D.N.Y. Mar. 9, 2009); Sorey v. Computer Credit, Inc., 2006 WL 1896401 (S.D.N.Y. 2006); Hernandez v. Affiliated Group, Inc., 2006 WL 83474 (E.D.N.Y. 2006) (creditor's name was on reverse and front of letter referred reader to reverse); Youngblood v. GC Services L.P., 186 F. Supp. 2d 695 (W.D. Tex. 2002); Gaetano v. Payco, Inc., 774 F. Supp. 1404 (D. Conn. 1990); *In re* Belile, 209 B.R. 658 (Bankr. E.D. Pa. 1997). *But cf.* United States v. Nat'l Fin. Services, Inc., 98 F.3d 131 (4th Cir. 1996) (conflicting deadlines with § 1692g and overshadowed); United States v. Nat'l Fin. Services, Inc., 820 F. Supp. 228 (D. Md. 1993), *aff'd*, 98 F.3d 131 (4th Cir. 1996) (smaller print referred to reverse side); Siler v. Mgmt. Adjustment Bur., 1992 WL 32333 (W.D.N.Y. 1992) (information regarding credit card payment overshadowed § 1692g notice); Appx. E.2.6.1, *infra*.

145 O'Boyle v. Real Time Resolutions, Inc., 910 F.3d 338, 344 (7th Cir. 2018) ("It is reasonable and fair to expect an unsophisticated consumer to read the second page of a debt-collection letter and see this notice.").

146 *See* Jarzyna v. Home Prop., L.P., 763 F. Supp. 2d 742 (E.D. Pa. 2011) (section 1692g notice in small print on bottom of letter was overshadowed by prominent bold printed statement, "Pay in full online anytime"); Carbajal v. Capital One, 2003 WL 22595265 (N.D. Ill. 2003) (allegation that otherwise proper validation notice was "buried" among "flurry of papers" so as to obscure its message stated claim); Law Offices of David J. Stern, P.A. v. Martinez, 271 B.R. 696 (S.D. Fla. 2001), *aff'd*, 311 F.3d 1272 (11th Cir. 2002) (validation notice was confusing where it was inserted as page eight of sixteen-page foreclosure suit package); Macarz v. Transworld Sys., Inc., 26 F. Supp. 2d 368 (D. Conn. 1998) (notice was at bottom of page in passive voice and small print "where it appears to look purposefully insignificant"). *See also* Scott v. Enhanced Recovery Corp., 2006 WL 1517755 (E.D.N.Y. 2006) (light gray ink was illegible); Levin v. Kluever & Platt, L.L.C., 2003 WL 22757763 (N.D. Ill. 2003) (on eighth page of sixteen-page foreclosure document); Rahe, FTC Informal Staff Letter (Aug. 6, 1980); Mezines, FTC Informal Staff Letter (Mar. 4, 1980); Boyle, FTC Informal Staff Letter (Jan. 30, 1980); Shnaider, FTC Informal Staff Letter (Feb. 21, 1978); Miller, FTC Informal Staff Letter (Feb. 14, 1978); Crawford, FTC Informal Staff Letter (Jan. 24, 1978). But *cf.* Elliott v. Credit Control Services, Inc., 2010 WL 1495402 (S.D. Cal. 2010) (heading "Warning Notice-Warning Notice" did not overshadow); Osborne, FTC Informal Staff Letter (Mar. 1, 1979).

9.4 Required Validation Information Under Reg. F § 1006.34(c)

9.4.1 Overview

Regulation F (effective November 30, 2021) has detailed requirements as to the substance of verification information that must be provided to the consumer, whether the information is conveyed in a written or electronic notice or conveyed orally as part of an initial oral communication.[147]

The information the regulation requires is set out in § 9.4, *infra*. Information specifically required by the statute as interpreted by case law prior to Regulation F is set out in § 9.7, *infra*. Section 9.5, *infra*, details Regulation F format requirements. Section 9.6, *infra*, sets out optional information that Regulation F allows to be included with the required information and still retain the safe harbor provided a debt collector that uses the model validation notice found at Reg. F Appx. B-1.

An important concept in understanding three of the Reg. F § 1006.34(c) required disclosures is "itemization date," which the collector can choose from any one of five dates: the last statement date, the charge-off date, the last payment date, the transaction date, and the judgment date. The concept of an itemization date is examined at § 9.4.2, *infra*.

The following list enumerates all the Reg. F § 1006.34(c) validation information requirements, and many of these are examined in more detail in following subsections:

- The debt collector communication disclosure required by Reg. F § 1006.18(e);[148]
- The debt collector's name and the mailing address at which the debt collector accepts disputes and requests for original-creditor information;[149]
- The consumer's name and mailing address;[150]
- If the debt collector is collecting a debt related to a consumer financial product or service as defined in Reg. F § 1006.2(f),[151] the name of the creditor to whom the debt was owed on the itemization date;[152]
- The account number or a truncated number associated with the debt on the itemization date;[153]
- The name of the creditor to whom the debt currently is owed;[154]
- Except for certain residential mortgages,[155] the itemization date;[156]
- Except for certain residential mortgages,[157] the amount of the debt on the itemization date,[158] including any fees, interest, or other charges owed as of that date;[159]
- Except for certain residential mortgages,[160] an itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date;[161]
- The current amount of the debt;[162]
- The end date of the validation period and consumer rights upon disputing the debt prior to that end date;
- The end date of the validation period and consumer rights upon requesting the name and address of the original creditor prior to that end date;[163]
- The end date of the validation period and the consequences of failing to dispute the debt by that end date;[164]
- If the debt collector is collecting a debt related to a consumer financial product or service as defined in Reg. F § 1006.2(f),[165] a statement that additional information regarding consumer protections in debt collection is available on the CFPB website at www.cfpb.gov/debt-collection;[166]
- For electronic validation notices, a statement explaining how a consumer can electronically dispute the debt or request original-creditor information;[167] and
- Prompts facilitating the consumer disputing the debt and requesting original creditor information, with addresses to send the consumer response to the debt collector.

In a FAQ, the CFPB summarized the five categories of required validation information as:

- Debt Collector Communication Disclosure (12 CFR § 1006.34(c)(1));
- Debt-Related Information (12 CFR § 1006.34(c)(2)(i)-(v); 34(c)(2)(ix));
- Itemization-Related Information (12 CFR § 1006.34(c)(2)(vi)-(viii));
- Information about Consumer Protections (12 CFR § 1006.34(c)(3)); and
- Consumer-Response Information (12 CFR § 1006.34(c)(4)).[168]

147 Reg. F § 1006.34(c).
148 Reg. F § 1006.34(c)(1). *See also* § 9.4.3, *infra*.
149 Reg. F § 1006.34(c)(2)(i). *See also* § 9.4.4, *infra*.
150 Reg. F § 1006.34(c)(2)(ii). *See also* § 9.4.5, *infra*.
151 See the discussion at § 9.4.6, *infra*.
152 Reg. F § 1006.34(c)(2)(iii). *See also* § 9.4.6, *infra*.
153 Reg. F § 1006.34(c)(2)(iv). *See also* § 9.4.6, *infra*.
154 Reg. F § 1006.34(c)(2)(v). *See also* § 9.4.6, *infra*.
155 *See* Reg F § 1006.34(c)(5); § 9.4.7.5, *infra*.
156 Reg. F § 1006.34(c)(2)(vi). *See* § 9.4.2, *infra*.
157 *See* Reg F § 1006.34(c)(5); § 9.4.7.5, *infra*.
158 Reg. F § 1006.34(c)(2)(vii). *See* § 9.4.7, *infra*.
159 Reg. F Official Interpretations § 34(c)(2)(vii)-1.
160 *See* Reg F § 1006.34(c)(5); § 9.4.7.5, *infra*.
161 Reg. F § 1006.34(c)(2)(viii). *See* § 9.4.7, *infra*.
162 Reg. F § 1006.34(c)(2)(ix). *See* § 9.4.7, *infra*.
163 Reg. F § 1006.34(c)(3)(ii). *See* § 9.4.8, *infra*.
164 Reg. F § 1006.34(c)(3)(iii). *See* § 9.4.8, *infra*.
165 See the discussion at § 9.4.6, *infra*.
166 Reg. F § 1006.34(c)(3)(iv). *See* § 9.4.9, *infra*.
167 Reg. F § 1006.34(c)(3)(v). *See* § 9.4.10, *infra*.
168 CFPB, FAQ, Validation Information: Residential Mortgage Debt #1, *available at* https://www.consumerfinance.gov.

9.4.2 The Itemization Date

9.4.2.1 Generally

In Regulation F (effective November 30, 2021), several items required to be disclosed in the validation information refer to the "itemization date." The itemization date is any one five reference dates for which a debt collector can ascertain the amount of the debt:

- The last statement date;
- The charge-off date;
- The last payment date;
- The transaction date; and
- The judgment date.[169]

A debt collector may select any of these dates as the itemization date to comply with Reg. F § 1006.34.[170] "Once a debt collector uses a reference date in a communication with a consumer, the debt collector must use that reference date for that debt consistently when providing the [validation] information."[171] The Reg. F Official Interpretations provide an example. If a debt collector uses the last statement date to determine and disclose the account number associated with the debt (a required disclosure for the validation notice), the collector may not use the charge-off date to determine and disclose the amount of the debt, another required disclosure.[172] But a collector can use a different reference date than used by a prior collector.[173]

The validation information must include the itemization date (e.g., September 1, 2021).[174] However, Regulation F does not require the debt collector to indicate which reference date is being used, or explain the significance of that date. In its supplemental information, the CFPB explained:

> [T]he Bureau determines that the reference dates that a debt collector may use to determine the itemization date have a significant likelihood of being meaningful to consumers because they correspond to notable events in a debt's history that consumers may recall or be able to verify with records. Because each of the reference dates may be meaningful to consumers, the Bureau determines that no additional disclosure explaining their relevance is necessary.[175]

9.4.2.2 The Five Reference Dates

In Regulation F (effective November 30, 2021), the first reference date is "[t]he last statement date, which is the date of the last periodic statement or written account statement or invoice provided to the consumer by a creditor."[176] The last statement may be provided by a creditor or a third party acting on the creditor's behalf, including a creditor's service provider.[177] However, a statement or invoice provided by a *debt collector* is not a last statement, unless the debt collector is also a creditor.[178] A creditor-issued statement after the debt has gone into collection can still be a last statement date.[179] The Regulation F supplemental information indicates that a date on which the government provided a written invoice or tax bill may constitute a last statement date for tax debt.[180]

The second reference date is "the charge-off date, which is the date the debt was charged off."[181] Guidance issued by the CFPB explained that the charge-off date is not limited to a charge-off by a creditor but would include, for example, the date that a mortgage servicer charged off a residential mortgage loan.[182]

The third reference date is "the last payment date, which is the date the last payment was applied to the debt."[183] A third-party payment applied to the debt, such as a payment from an auto repossession agent or an insurance company, can be a last payment.[184] So can a payment the consumer sends to a prior debt collector.[185] Non-periodic, partial, and non-conforming payments can also be last payments.[186] The last payment date can be the date that someone other than the creditor, including a debt collector or payment processor, applied a payment to the account.[187]

The fourth possible reference date is "the transaction date, which is the date of the transaction that gave rise to the debt."[188] "The transaction date is the date that the good or service that gave rise to the debt was provided or made available to the consumer."[189] The Official Interpretations provide these examples: "the transaction date for a debt arising from a medical procedure may be the date the medical procedure was performed, and the transaction date for a consumer's gym membership may be the date the membership contract was executed."[190] The Regulation F supplemental information provides further examples: "[P]otential transaction dates may include the date a service or good was provided to a consumer or the date that a consumer signed a contract for a service or good. In the case of a consumer's tax debt, the date a government assessed the tax may be a transaction date for purposes of [Reg. F] § 1006.34(b)(3)(iv)."[191] "For a residential mortgage, the transaction date may

169 Reg. F § 1006.34(b)(3).
170 Reg. F Official Interpretations § 34(b)(3)-1.
171 Reg. F Official Interpretations § 34(b)(3)-1.
172 Reg. F Official Interpretations § 34(b)(3)-1.
173 Reg. F Official Interpretations § 34(b)(3)-2.
174 Reg. F § 1006.34(c)(2)(vi).
175 86 Fed. Reg. 5766 at 5803 (Jan. 19, 2021).
176 Reg. F § 1006.34(b)(3)(i).
177 Reg. F Official Interpretations § 34(b)(3)(i)-1.
178 Reg. F Official Interpretations § 34(b)(3)(i)-1. *See* § 4.7.4, *supra*.
179 *See* 86 Fed. Reg. 5766 at 5794 (Jan. 19, 2021).
180 *See* 86 Fed. Reg. 5766 at 5793 (Jan. 19, 2021).
181 Reg. F § 1006.34(b)(3)(ii).
182 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 7 (Oct. 29, 2021).
183 Reg. F § 1006.34(b)(3)(iii).
184 Reg. F Official Interpretations § 34(b)(3)(iii)-1.
185 *See* 86 Fed. Reg. 5766 at 5795 (Jan. 19, 2021).
186 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 7 (Oct. 29, 2021).
187 *Id.*
188 Reg. F § 1006.34(b)(3)(iv).
189 Reg. F Official Interpretations § 34(b)(3)(iv)-1.
190 Reg. F Official Interpretations § 34(b)(3)(iv)-1.
191 *See* 86 Fed. Reg. 5766 at 5795 (Jan. 19, 2021) (footnote omitted).

be the date the mortgage was originated, but is not, for example, the date of a mortgage servicing transfer."[192]

In some cases, a debt may have more than one transaction date, such as when a contract for a service is executed on one date and the service is performed on another date.[193] The debt collector may use any applicable transaction date for the itemization date, but the collector must consistently use whichever transaction date is selected.[194]

In some cases, services are provided by the same creditor over multiple days, such as where a medical debt is incurred over multiple days. In such cases, the debt collector "may select any of the dates the procedures were performed as the transaction date," but must use whatever date is selected consistently in the validation notice.[195]

The fifth possible reference date is the judgment date. This is "the date of a final court judgment that determines the amount of the debt owed by the consumer."[196] "In the case of a final judgment renewal, depending on the facts and circumstances, the final judgment renewal may be the judgment date."[197]

9.4.3 Disclosure That Notice Is from a Debt Collector

Under Regulation F (effective November 30, 2021), the validation information must include the FDCPA § 1692e(11) disclosures, which correspond to Reg. F § 1006.18(e).[198]

Where the validation information is in the initial communication, the debt collector complies with Reg. F § 1006.34(c)(1) by making the disclosure required by Reg. F § 1006.18(e)(1), which requires the validation notice disclose that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.[199]

Where the validation information is provided in a written or electronic notice provided within five days of the initial communication, the debt collector complies with Reg. F § 1006.34(c)(1) by making *either* the disclosure required by Reg. F § 1006.18(e)(1) or the disclosure required by Reg. F § 1006.18(e)(2), which requires the debt collector to disclose that the communication is from a debt collector.[200]

9.4.4 Debt Collector's Name and Mailing Address

Under Regulation F (effective November 30, 2021), the validation information must include "the debt collector's name and the mailing address at which the debt collector accepts disputes and requests for original-creditor information."[201] A debt collector may disclose its trade or doing-business-as (dba) name, instead of its legal name.[202] A debt collector also may disclose its vendor's mailing address, if that is an address at which the debt collector accepts disputes and requests for original-creditor information.[203] But the collector can only include one mailing address in the validation information. The Reg. F supplemental information states that "[t]he Bureau declines to affirmatively permit the use of more than one mailing address as validation information."[204]

9.4.5 Consumer's Name and Mailing Address

Under Regulation F (effective November 30, 2021), the validation information must include the consumer's name and mailing address.[205] A debt collector must disclose the version of the consumer's name that the debt collector reasonably determines is "the most complete and accurate version of the name about which the debt collector has knowledge."[206] A debt collector does not do so if it "omits known name information in a manner that creates a false, misleading, or confusing impression about the consumer's identity."[207]

The Regulation F Official Interpretations provide the following example: "[A]ssume the creditor provides the consumer's first name, middle name, last name, and name suffix to the debt collector. In this scenario, the debt collector would reasonably determine that the most complete and accurate version of the consumer's name about which the debt collector has knowledge includes the first name, middle name, last name, and name suffix. If the debt collector omits any of this information, the debt collector has not satisfied the requirement to provide the consumer's name pursuant to [Reg. F] § 1006.34(c)(2)(ii)."[208]

9.4.6 Creditor's Name and the Account Number

Under Regulation F (effective November 30, 2021), the validation information must include the name of the creditor to whom the debt currently is owed.[209] The Official Interpretations to Regulation F specify that the debt collector can use the creditor's legal name, trade name or doing-business-as (dba) name.[210]

If the debt collector is collecting a debt related to a consumer financial product or service, the validation notice must contain the name of the creditor to whom the debt was owed

192 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 7 (Oct. 29, 2021).
193 Reg. F Official Interpretations § 34(b)(3)(iv)-1.
194 Reg. F Official Interpretations § 34(b)(3)(iv)-1.
195 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 8 (Oct. 29, 2021).
196 Reg. F § 1006.34(b)(3)(v).
197 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 8 (Oct. 29, 2021).
198 Reg. F § 1006.34(c)(1). *See* § 7.2.11, *supra*.
199 Reg. F Official Interpretations § 34(c)(1)-1.
200 Reg. F Official Interpretations § 34(c)(1)-1.
201 Reg. F § 1006.34(c)(2)(i).
202 Reg. F Official Interpretations § 34(c)(2)(i)-1.
203 Reg. F Official Interpretations § 34(c)(2)(i)-2.
204 *See* 86 Fed. Reg. 5766 at 5800 (Jan. 19, 2021).
205 Reg. F § 1006.34(c)(2)(ii).
206 Reg. F Official Interpretations § 34(c)(2)(ii)-1.
207 Reg. F Official Interpretations § 34(c)(2)(ii)-1.
208 Reg. F Official Interpretations § 34(c)(2)(ii)-1.
209 Reg. F § 1006.34(c)(2)(v).
210 Reg. F Official Interpretations § 34(c)(2)(v)-1.

on the itemization date.[211] Even if the debt is not related to a consumer financial product or service, a debt collector can disclose this information and not lose its safe harbor when it uses the CFPB's model form.[212]

The creditor to whom the debt was owed on the itemization date is not always the same as the originating creditor.[213] A debt collector may disclose trade or doing-business-as name of the creditor for the debt on the itemization date, instead of its legal name.[214]

A consumer financial product or service is defined as having the same meaning as given to it in 12 U.S.C. § 5481(5).[215] That U.S. Code provision in turn at § 5481(5)(A) defines a consumer financial product or service as any financial product or service listed at 12 U.S.C. § 5481(15)[216] that is offered or provided for use by consumers primarily for personal, family, or household purposes. Alternatively, 12 U.S.C. § 5481(5)(B) lists four items listed in 12 U.S.C. § 5481(15)[217] that are delivered, offered, or provided in connection with a consumer financial product or service. One of the items that falls under both section 5481(5)(A) and (B) is "extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit (other than solely extending commercial credit to a person who originates consumer credit transactions)."[218]

The validation information must also include the account number, if any, associated with the debt on the itemization date,[219] or a truncated version of that number.[220] This account number is thus typically the one assigned by the originating creditor, not by the debt collector. The Reg. F Official Interpretations provide: "If a debt collector uses a truncated account number, the account number must remain recognizable. For example, a debt collector may truncate a credit card account number so that only the last four digits are provided."[221]

9.4.7 The Debt Amount and Its Itemization

9.4.7.1 Generally

Under Regulation F (effective November 30, 2021), the validation information must include three different disclosures related to the debt amount: the debt amount on the itemization date,[222] an itemization of the current debt amount,[223] and the total of the current amount of debt.[224]

The itemization date itself must also be disclosed as part of the validation information.[225] The definition of that term and the five possible reference dates are discussed at § 9.4.2, *supra.*

As described in § 9.4.7.5, *infra*, an exception is made for certain residential mortgage loans, which have different requirements. However, the itemization date, amount of the debt as of the itemization date, itemization of the current amount of the debt since the itemization date, and the current amount of the debt is otherwise required, and a debt collector violates Regulation F if they are not disclosed to the consumer.[226]

Debt collectors can provide the required information by following these four steps:

1. Select the itemization date;
2. Determine the amount of the debt as of the itemization date;
3. Determine the Itemized amounts since the itemization date; and
4. Determine the current amount of the debt.[227]

9.4.7.2 Debt Amount As of Itemization Date

Under Regulation F (effective November 30, 2021), the required disclosure of the debt amount on the itemization date[228] includes any fees, interest, or other charges owed as of that date.[229] Guidance provided by the CFPB explains that "the amount of the debt as of the itemization date may be the amount of the debt that is required to bring the account current as of that date or the total outstanding debt as of that date."[230]

The itemization date, as described at § 9.4.2, *supra*, is one of the following reference dates the collector consistently uses:

- The last statement date;
- The charge-off date;
- The last payment date;
- The transaction date; and
- The judgment date.[231]

9.4.7.3 Itemization of Charges Since Itemization Date

Under Regulation F (effective November 30, 2021), the second disclosure related to the amount of the debt that must be included as part of the validation information is an itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date.[232]

Regulation F does not specify a particular method for calculating interest. The CFPB's guidance states that debt collectors

211 Reg. F § 1006.34(c)(2)(iii).
212 Reg. F § 1006.34(d)(3)(viii). *See* § 9.6.1, *infra.*
213 *See* 86 Fed. Reg. 5766 at 5802 (Jan. 19, 2021).
214 Reg. F Official Interpretations § 34(c)(2)(iii)-1.
215 Reg. F § 1006.2(f).
216 *Available at* https://www.govinfo.gov.
217 12 U.S.C. § 5481(5)(B) ("clause (i), (iii), (ix), or (x) of paragraph (15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (A)").
218 15 U.S.C. § 5481(15)(A)(i).
219 *See* § 9.4.2, *supra.*
220 Reg. F § 1006.34(c)(2)(iv).
221 Reg. F Official Interpretations § 34(c)(2)(iv)-1.
222 Reg. F § 1006.34(c)(2)(vii).
223 Reg. F § 1006.34(c)(2)(viii).
224 Reg. F § 1006.34(c)(2)(ix).
225 Reg. F § 1006.34(c)(2)(vi).
226 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 4 (Oct. 29, 2021).
227 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 4 (Oct. 29, 2021).
228 Reg. F § 1006.34(c)(2)(vii).
229 Reg. F Official Interpretations § 34(c)(2)(vii)-1.
230 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 8 (Oct. 29, 2021).
231 Reg. F § 1006.34(b)(3).
232 Reg. F § 1006.34(c)(2)(viii).

"may use the interest accrual method (e.g., monthly, simple interest, average daily balance method) in any underlying debt agreement, or may use a method that is otherwise customarily used for the debt."[233]

The Reg. F supplemental information states:

> Depending on the facts and circumstances, a third-party payment or insurance adjustment may be disclosed as a "payment" or a "credit" in the itemization. Also depending on the facts and circumstances, a payment that is returned may be omitted from the itemization provided that the payment and the return offset each other, and provided that the amount of the debt owed on the itemization date pursuant to [Reg. F] § 1006.34(c)(2)(vii) and the current amount of the debt pursuant to [Reg. F] § 1006.34(c)(2)(ix) are accurately disclosed.[234]

CFPB guidance states that debt collectors can omit interest, fees, payments, or credits that were made after the itemization date but returned or reversed before the current date.[235]

In a validation notice, there must be fields for interest, fees, payments, and credits, even if none of the items have been assessed or applied to the debt since the itemization date, and the debt collector may not leave a required field blank.[236] If there has been no charge for an item, the debt collector may indicate "0," "none," or may state that no interest, fees, payments, or credits have been assessed or applied to the debt.[237] The Regulation F supplemental information specifically rejects the use of N/A because its meaning is not clear to consumers.[238] The use of "U" for unknown or unavailable is not allowed—the collector must determine the itemization amounts and disclose them.[239]

CFPB guidance states that the amount of the debt listed on the itemization date plus the itemized amounts need not add up to the current amount of the debt.[240] This may be because some amounts cannot be categorized as interest, fees, payments, or credits.[241] For example, a creditor may provide another service to the consumer after the itemization date that is part of the debt being collected.[242] This amount still needs to be reflected in the current amount due, although not included in the itemization.[243]

The Supplemental Information also provides that the itemization of the current amount of the debt should not be more detailed than the categories specified in the regulation (e.g., it should not include a detailed list of all payments).[244]

The Reg. F Official Interpretations provide:

> If a debt collector is required by other applicable law to provide an itemization of the current amount of the debt with the validation information, the debt collector may comply with [Reg. F] § 1006.34(c)(2)(viii) by disclosing the itemization required by other applicable law in lieu of the itemization described in [Reg. F] § 1006.34(c)(2)(viii), if the itemization required by other applicable law is substantially similar to the itemization that appears on Model Form B-1 in appendix B to this part.[245]

The Regulation F supplemental information indicates that only New York[246] requires a substantially similar disclosure.[247]

A debt collector who combines multiple debts on a single validation notice can disclose either a single, cumulative itemization as the validation information or a separate itemization of each debt on a separate page or pages provided in the same communication as the validation notice.[248] If a debt collector discloses the itemization on a separate page provided in the same communication with a validation notice, the collector must include on the validation notice, where the itemization would have appeared, a statement referring to that separate page.[249] Such a reference on the validation notice could be: "See the enclosed separate page for an itemization of the debt," situated next to the information about the current amount of the debt.[250] For both methods, the debt collector must use a single itemization date for all accounts.[251]

A debt collector that provides itemizations on a separate page can still take advantage of the safe harbor, but it does not apply to any content on a separate page.[252]

9.4.7.4 Current Amount Due

Under Regulation F, the third disclosure related to the amount of the debt that must be included as part of the validation information is the current amount of the debt,[253] that is the amount as of when the validation information is provided.[254] The disclosure is proper as long as the collector provides the correct balance as of the date the validation information is submitted (e.g., not some earlier date).[255]

"For residential mortgage debt subject to Regulation Z, 12 C.F.R. § 1026.41,[256] a debt collector may comply with the requirement to provide the current amount of the debt by

233 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 8 (Oct. 29, 2021).
234 *See* 86 Fed. Reg. 5766 at 5807 (Jan. 19, 2021).
235 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 10 (Oct. 29, 2021).
236 Reg. F Official Interpretations § 34(c)(2)(viii)-1.
237 Reg. F Official Interpretations § 34(c)(2)(viii)-1.
238 *See* 86 Fed. Reg. 5766 at 5807 (Jan. 19, 2021).
239 *See* 86 Fed. Reg. 5766 at 5807 (Jan. 19, 2021).
240 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 10–11 (Oct. 29, 2021).
241 *Id.* at 10.
242 *Id.* at 11.
243 *Id.* at 10–11.
244 *See* 86 Fed. Reg. 5766 at 5807 (Jan. 19, 2021).
245 Reg. F Official Interpretations § 34(c)(2)(viii)-2.
246 23 N.Y. Codes, Rules and Regulations § 1.2(b)(2).
247 *See* 86 Fed. Reg. 5766 at 5807 (Jan. 19, 2021).
248 Reg. F Official Interpretations § 34(c)(2)(viii)-4.
249 Reg. F § 1006.34(c)(2)(viii).
250 Reg. F Official Interpretations § 34(c)(2)(viii)-3.
251 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 26–27 (Oct. 29, 2021).
252 CFPB, Debt Collection Rule: Disclosing the Model Validation Notice Itemization Table 2 (Oct. 29, 2021).
253 Reg. F § 1006.34(c)(2)(ix).
254 Reg. F Official Interpretations § 34(c)(2)(ix)-1.
255 *See* 86 Fed. Reg. 5766 at 5808 (Jan. 19, 2021).
256 *See* § 9.4.7.5, *infra*.

providing the consumer the total balance of the outstanding mortgage, including principal, interest, fees, and other charges."[257]

While a dynamic balance disclosure is not required validation information, the Regulation F supplemental information indicates that "debt collectors may include a disclosure pursuant to a judicial decision or order that the current amount of the debt may increase or vary due to interest, fees, or other charges."[258] Such information would be a permissible optional disclosure if it is "specifically required by, or that provide safe harbors under, applicable law."[259]

Debt collectors who combine multiple debts in a single validation notice must disclose a single cumulative figure that is the sum of the current amount of all the debts.[260] Even if the debt collector provides separate itemizations for each debt, there must be only one total for the amount due, calculated as of the date the validation information is provided.

9.4.7.5 Exception for Certain Residential Mortgage Debt

Regulation F (effective November 30, 2021) has an exception as to information found on the validation notice for certain residential mortgage debt. The exception applies to the amount of the debt as of the itemization date, an itemization of the current amount of the debt, and the itemization date itself.[261]

The exception applies to residential mortgage debt, if a periodic statement is required under Truth in Lending Reg. Z, 12 C.F.R. § 1026.41, as of the time a debt collector provides the validation notice.[262] The Regulation F exception is limited only to mortgages covered by this specific Regulation Z provision.[263]

The Regulation Z provision requires a periodic statement only for closed-end consumer credit transaction secured by a dwelling.[264] It does not apply to open-end credit, such as home equity lines of credit[265] or credit card debt secured by a dwelling. The Regulation Z provision also explicitly excludes certain other mortgages. It does not apply to reverse mortgages,[266] timeshare plans or any mortgage (even closed-end consumer credit transactions secured by a dwelling) if the consumer's payment obligation is set out in a coupon book meeting certain requirements set out in Regulation Z.[267] See generally NCLC's Truth in Lending § 5.15.12.1 (10th ed. 2019), *updated at* www.nclc.org/library.

If Reg. Z § 1026.41 applies, then it has its own disclosure requirements as to the amount owing, and Regulation F allows the validation notice not to include the debt amount as of the itemization date, an itemization of the current debt, and the itemization date itself.[268] If Reg. Z § 1026.41 applies, the collector then instead must provide the consumer, in the same communication with the validation notice, a copy of the most recent periodic statement provided to the consumer under Reg. Z § 1026.41(b).[269]

In a FAQ, the CFPB clarifies that, "the most recent periodic statement is the periodic statement required under Regulation Z, 12 C.F.R. § 1026.41, that was most recently provided to the consumer," and that this, "may be one that is provided by a debt collector (who is not a creditor), as long as that periodic statement was required by Regulation Z, 12 C.F.R. § 1026.41, at the time it was provided. 12 C.F.R. § 1006.34(c)(5)."[270] The FAQ provides the following example:

> [A]ssume the servicing of a mortgage account was transferred to a mortgage servicer who is also a debt collector (as defined in the Rule) and who plans to use the Special Rule when providing the validation information. A periodic statement (required by Regulation Z, 12 C.F.R. § 1026.41) provided to the consumer by that debt collector after the transfer of servicing can be the most recent periodic statement for purposes of the Special Rule, if it was the last periodic statement provided to the consumer.[271]

The collector must also include on the validation notice, where the itemization information would have appeared, a statement referring to that periodic statement.[272] An example of a statement referring to the periodic statement would be: "See the enclosed periodic statement for an itemization of the debt."[273]

In a FAQ, the CFPB cautions that:

> [E]ven though, under the Special Rule, no itemization date is required to be disclosed on the validation notice, a debt collector who uses the Special Rule must still determine the itemization date so that the other validation information tied to the itemization date may be disclosed. This includes the name of the creditor to whom the debt was owed on the itemization date and the account number, if any, associated with the debt on the itemization date. 12 C.F.R. § 1006.34(c)(2)(iii) and (iv).[274]

The CFPB further clarifies that this itemization date must be the "the date of the most recent periodic statement that is provided to the consumer under the Special Rule."[275]

The FAQ also clarifies that:

> [W]hile the Itemization Table on the model validation notice includes the validation information that may be

257 Reg. F Official Interpretations § 34(c)(2)(ix)-1.
258 *See* 86 Fed. Reg. 5766 at 5808 (Jan. 19, 2021).
259 Reg. F § 1006.34(d)(3)(iv). See § 9.6.2, *infra*.
260 Reg. F Official Interpretations § 34(c)(2)(ix)-2.
261 Reg. F Official Interpretations § 34(c)(5).
262 Reg. F § 1006.34(c)(5).
263 *See* 86 Fed. Reg. 5766 at 5818, 5819 (Jan. 19, 2021).
264 12 C.F.R. 1026.41(a).
265 *See* 86 Fed. Reg. 5766 at 5818, 5819 (Jan. 19, 2021).
266 *See* 86 Fed. Reg. 5766 at 5818 (Jan. 19, 2021).
267 12 C.F.R. 1026.41(e).
268 Reg. F § 1006.34(c)(5).
269 Reg. F § 1006.34(c)(5)(i).
270 CFPB, FAQ, Validation Information: Residential Mortgage Debt #4, *available at* https://www.consumerfinance.gov.
271 *Id.*
272 Reg. F § 1006.34(c)(5)(ii).
273 Reg. F Official Interpretations § 34(c)(5)-1.
274 CFPB, FAQ, Validation Information: Residential Mortgage Debt #2, *available at* https://www.consumerfinance.gov.
275 CFPB, FAQ, Validation Information: Residential Mortgage Debt #5, *available at* https://www.consumerfinance.gov.

omitted, it also includes the current amount of the debt, which is validation information that **may not** be omitted from the validation notice under the Special Rule. 12 C.F.R. § 1006.34(c)(2)(ix) and 34(c)(5). A debt collector who uses the Special Rule must still disclose the current amount of the debt on the validation notice.[276]

A debt collector that uses the model validation notice but uses the exception in Reg. F § 1006.34(c)(5) can qualify for a safe harbor, but that safe harbor would not apply to the content or format of the periodic mortgage statement.[277]

9.4.8 Notice of Rights to Dispute or Request Original Creditor Information

9.4.8.1 Calculating the End of the Validation Period

Regulation F (effective November 30, 2021) sets out as required validation information disclosures about three sets of consumer rights, all of which include disclosure of the date that the debt collector will consider the end date of the validation period.[278]

The validation period is defined in Regulation F as starting on the date that a debt collector provides the validation information and ending thirty days after the consumer "receives or is assumed to receive" the validation information.[279] The debt collector may assume that a consumer receives the validation information on any date that is at least five days (excluding legal public holidays identified in 5 U.S.C. 6103(a), Saturdays, and Sundays) after the debt collector provides it.[280]

Regulation F Official Interpretations provide:

> If a debt collector provides the validation information in writing or electronically, then, at the time that the debt collector calculates the validation period end date, the debt collector will know only the date on which the consumer is assumed to receive the validation information. In such cases, the debt collector may use that date to calculate the validation period end date even if the debt collector later learns that the consumer received the validation information on a different date.[281]

Where the consumer did not receive the original validation notice and the debt collector sends a subsequent validation notice, the collector calculates the validation period's end date based on the date the consumer receives or is assumed to receive the subsequent validation notice.[282] The Regulation F Official Interpretations provide an example:

> For example, assume a debt collector sends a consumer a validation notice on January 1, and that notice is returned as undeliverable. After obtaining accurate location information, the debt collector sends the consumer a subsequent validation notice on January 15. Pursuant to [Reg. F] § 1006.34(b)(5), the end date of the validation period specified in the [Reg. F] § 1006.34(c)(3) disclosures is based on the date the consumer receives or is assumed to receive the validation notice sent on January 15.[283]

In Regulation F's supplemental information, the Bureau clarifies that the consumer just needs to send or submit the dispute or request for original creditor information "within the 30-day period established in [Reg. F] § 1006.34(b)(5), even if the debt collector does not receive the request until after the 30-day period."[284]

9.4.8.2 Three Disclosures of Consumer Rights

Under Regulation F (effective November 30, 2021), the debt collector in providing the validation information must make three disclosures of consumer rights, where each require disclosure of the date that the debt collector will consider the end date of the validation period.[285] The calculation of this date is discussed in § 9.4.8.1, *supra*. This subsection considers the rest of the content of the three disclosures. But each of the three must disclose the end date—it is not enough if one of the three disclose this date.[286]

The first disclosure of consumer rights involving the validation period end date is the disclosure that, if the consumer notifies the debt collector in writing, on or before the end of the validation period, that the debt or any portion of the debt is disputed, the debt collector must cease collection of the debt or the disputed portion of the debt until the debt collector sends the consumer either verification of the debt or a copy of a judgment.[287] The Regulation F supplemental information notes that "consumer testing indicates that knowing about the collections pause was important to consumers and would encourage them to exercise their dispute right if they questioned a debt's validity."[288]

The second disclosure is that, if the consumer requests in writing, on or before the end of the validation period, the name and address of the original creditor, the debt collector must cease collection of the debt until the debt collector sends the consumer the name and address of the original creditor, if different from the current creditor.[289]

The third disclosure is that, unless the consumer contacts the debt collector to dispute the validity of the debt or any portion of the debt on or before the end of the validation period,

276 CFPB, FAQ, Validation Information: Residential Mortgage Debt #2, *available at* https://www.consumerfinance.gov.
277 CFPB, FAQ, Validation Information: Residential Mortgage Debt #3, *available at* https://www.consumerfinance.gov.
278 Reg. F § 1006.34(c)(3)(i), (ii), (iii).
279 Reg. F § 1006.34(b)(5).
280 Reg. F § 1006.34(b)(5).
281 Reg. F Official Interpretations § 34(b)(5)-1.
282 Reg. F Official Interpretations § 34(b)(5)-2.
283 Reg. F Official Interpretations § 34(b)(5)-2.
284 86 Fed. Reg. 5766 at 5797 (Jan. 19, 2021).
285 Reg. F § 1006.34c)(3)(i), (ii), (iii).
286 Reg. F § 1006.34c)(3)(i), (ii), (iii). *See, e.g.*, Reg. F Appx. B, B-1 Model Form for Validation Notice.
287 Reg. F § 1006.34(c)(3)(i).
288 86 Fed. Reg. 5766 at 5810 (Jan. 19, 2021).
289 Reg. F § 1006.34(c)(3)(ii).

the debt collector will assume that the debt is valid.[290] This third disclosure, unlike the other two, does not require the dispute be provided in writing. The Regulation F supplemental information takes the position that the dispute can be in writing or oral,[291] and the model validation notice states for this disclosure "call or write to us."[292] It should thus be a violation if the disclosure requires this dispute be in writing.[293]

9.4.9 Disclosure of CFPB Website for More Information

If the debt collector is collecting debt related to a consumer financial product or service,[294] Regulation F (effective November 30, 2021) requires the validation information to include a statement that informs the consumer that additional information regarding consumer protections in debt collection is available on the Bureau's website at www.cfpb.gov/debt-collection.[295] Even if the debt is not related to a consumer financial product or service, a debt collector can disclose this information and not lose its safe harbor when it uses the CFPB's model validation form.[296] The Regulation F supplemental information states "[t]he Bureau's website will disclose more information about consumer protections in debt collection, including about the cease communication right."[297]

The debt collector cannot disclose the url for the CFPB's general landing page; it must disclose the specific link.[298]

The web address need not be a live hyperlink, but only include the text of the address, even if disclosed in an electronic validation notice.[299]

9.4.10 Method of Consumer Electronically Requesting Creditor's Address or Disputing the Debt

If the debt collector sends the validation notice electronically, then the collector must also make an additional disclosure on that notice. It must provide a statement explaining how a consumer can, as described in the consumer response disclosure discussed at § 9.4.10, *supra*, electronically dispute the debt or request original-creditor information.[300]

The Reg. F Official Interpretations provide that a debt collector may comply with this requirement by including two statements. The first is "We accept disputes electronically at," using that phrase or a substantially similar phrase, followed by an email address or website portal that a consumer can use to dispute the debt.[301] The second is "We accept original creditor information requests electronically," using that phrase or a substantially similar phrase, followed by an email address or website portal that a consumer can use to request the original creditor information.[302]

If a debt collector accepts electronic communications from consumers through more than one medium, such as by email and through a website portal, the debt collector is required to provide information regarding only one of these mediums.[303] Nevertheless, the collector can provide information on additional mediums through which it accepts electronic communications.[304]

9.4.11 Consumer Response Information

Regulation F (effective November 30, 2021) provides that the collector must specify how the consumer can dispute the debt or request information about the creditor. The consumer response information must be segregated from all other required or optional information contained in the validation notice.[305] If the consumer response information is provided on a validation notice, it must be located at the bottom of the notice under the headings, "How do you want to respond?" and "Check all that apply: . . ."[306]

The regulation provides for separate prompts for disputing the debt and requesting original creditor information that are situated alongside possible consumer responses. The Reg. F Official Interpretations provide that a prompt may be formatted as a checkbox as in Reg. F Appendix B-1, the Model Validation Notice.[307]

For disputing the debt, the collector must provide a series of statements in the following order, and using the following phrasing or substantially similar phrasing, each next to a prompt:

- "I want to dispute the debt because I think: . . .";
- "This is not my debt";
- "The amount is wrong"; and
- "Other (please describe on reverse or attach additional information)."[308]

For requesting original creditor information, the collector must provide the following phrase or a substantially similar phrase next to a prompt: "I want you to send me the name and address of the original creditor."[309]

This separate area with the consumer response information must contain the mailing addresses for the consumer and the debt collector.[310] The consumer's mailing address presumably is to assist the collector in identifying the consumer requesting

290 Reg. F § 1006.34(c)(3)(iii).
291 *See* 86 Fed. Reg. 5766 at 5811 (Jan. 19, 2021).
292 Reg. F Appx. B-1 Model Form for Validation Notice.
293 *See* § 9.7.5, *supra*.
294 Consumer financial product or service is defined in Reg. F § 1006.2(f). *See* § 9.4.6, *supra*.
295 Reg. F § 1006.34(c)(3)(iv).
296 Reg. F § 1006.34(d)(3)(viii). *See* § 9.6.1, *infra*.
297 *See* 86 Fed. Reg. 5766 at 5809 (Jan. 19, 2021).
298 *See* 86 Fed. Reg. 5766 at 5812 (Jan. 19, 2021).
299 *See* 86 Fed. Reg. 5766 at 5813 (Jan. 19, 2021).
300 Reg. F § 1006.34(c)(3)(v).
301 Reg. F Official Interpretations § 34(c)(3)(v)-1.
302 Reg. F Official Interpretations § 34(c)(3)(v)-1.
303 Reg. F Official Interpretations § 34(c)(3)(v)-1.
304 Reg. F Official Interpretations § 34(c)(3)(v)-1.
305 Reg. F § 1006.34(c)(4).
306 Reg. F § 1006.34(c)(4).
307 Reg. F Official Interpretations § 34(c)(4)-1.
308 Reg. F § 1006.34(c)(4)(i).
309 Reg. F § 1006.34(c)(4)(i).
310 Reg. F § 1006.34(c)(4)(iii).

the information. The regulation[311] requires that the debt collector's and the consumer's names and mailing addresses be identical to those disclosed earlier in the validation notice.[312]

The model validation notice allows the consumer to tear off the consumer response information so that the consumer can indicate the consumer's reply directly on that part of the notice, tear it off, and send it to the debt collector.[313] If the collector's validation notice does not allow for a tear off, it loses the safe harbor of otherwise using the model notice.[314]

The Reg. F supplemental information provides that "the consumer-response information section should be formatted for use with a return envelope."[315] But the collector is not required to include return envelopes with validation notices, even if they use the model notice.[316]

9.5 Form of Required Validation Information Under Reg. F § 1006.34

9.5.1 Clear and Conspicuous

Regulation F (effective November 30, 2021) requires validation information, as specified in § 9.5, *supra*, to be "clear and conspicuous."[317] "Clear and conspicuous" is a defined term, meaning:

> [R]eadily understandable. In the case of written and electronic disclosures, the location and type size also must be readily noticeable and legible to consumers, although no minimum type size is mandated. In the case of oral disclosures, the disclosures also must be given at a volume and speed sufficient for the consumer to hear and comprehend them.[318]

The Regulation F supplemental information concludes that, "debt collectors satisfying State-law minimum-font-size requirements will also satisfy the standard in [Reg. F] § 1006.34(b)(1) for a type size that is readily noticeable and legible to consumers."[319]

9.5.2 The Model Form B-1 Safe Harbor

9.5.2.1 Extent of the Safe Harbor

Regulation F (effective November 30, 2021) provides a safe harbor for debt collectors providing validation information. A debt collector who uses the model validation notice found at Reg. F Appx. B-1 complies with the Regulation F information and form requirements of section 1006.34(c) and (d)(1).[320] A debt collector who uses the model validation note also complies with Reg. F § 1006.38(b)(1), as discussed in § 9.6.1, *infra*.

The safe harbor does not apply to the delivery of the validation notice,[321] manner in which a validation notice is provided (e.g., envelope notice is mailed in),[322] or other collector communications during the validation period.[323]

Nor does the safe harbor apply to inaccurate or deceptive information provided on a validation notice otherwise complying with the model form.[324] The Regulation F supplemental information clarifies:

> The Bureau declines to extend the [Reg. F] § 1006.34(d)(2) safe harbor to cover compliance with FDCPA section 807's [§ 1692e's] prohibition on false or misleading statements. A debt collector who uses the model validation notice is still capable of making false or misleading statements to consumers in the notice. For example, a debt collector using the model validation notice could include false or misleading information about the debt, such as an inflated current amount of the debt.[325]

Use of the model validation notice is optional.[326] As the CFPB's FAQ explains:

> [T]he Rule requires compliance with the validation information content and format requirements in Regulation F. 12 C.F.R. § 1006.34(d)(2); *see also* 12 C.F.R. § 1006.34(c) and 34(d)(1). The model validation notice provides one way to comply with those requirements . . . However, if a debt collector makes changes to the content or format of the model validation notice such that the notice is not substantially similar to the model validation notice, the debt collector generally will not obtain the Rule's safe harbor for the validation information content and format requirements. 12 C.F.R. § 1006.34(d)(2); *see also* 12 C.F.R. § 1006.34(c) and 34(d)(1).[327]

9.5.2.2 Optional Information and the Safe Harbor

Regulation F (effective November 30, 2021) provides that any and all optional information found on the model validation notice

311 Reg. F § 1006.34(c)(4)(iii).
312 *See* §§ 9.4.4, 9.4.5, *supra*.
313 *See* Reg. F, Appx. B-1, Model Form of Validation Notice.
314 *See* 86 Fed. Reg. 5766 at 5815 (Jan. 19, 2021).
315 *See* 86 Fed. Reg. 5766 at 5815 (Jan. 19, 2021).
316 *See* 86 Fed. Reg. 5766 at 5815 (Jan. 19, 2021).
317 Reg. F § 1006.34(d)(1).
318 Reg. F § 1006.34(b)(1).
319 86 Fed. Reg. 5766 at 5789 (Jan. 19, 2021).
320 Reg. F § 1006.34(d)(2)(i).
321 *See* 86 Fed. Reg. 5766 at 5820 (Jan. 19, 2021) ("The Bureau recognizes the risk that a debt collector could deliver the model validation notice in an ineffective manner and that, as a result, the notice would be delayed or never received by the consumer.").
322 *See* 86 Fed. Reg. 5766 at 5835 (Jan. 19, 2021).
323 *See* 86 Fed. Reg. 5766 at 5835 (Jan. 19, 2021).
324 *See* CFPB, FAQ, Validation Information: Residential Mortgage Debt #2, *available at* https://www.consumerfinance.gov ("Generally, the validation information content and format safe harbor does not apply to other provisions of the Rule or the FDCPA. For example, when a debt collector obtains the safe harbor for the content and format requirements, if the debt collector discloses an incorrect amount in the model validation notice, the debt collector violates the prohibition against providing false or misleading information").
325 86 Fed. Reg. 5766 at 5821 (Jan. 19, 2021).
326 CFPB, FAQ, Validation Information: Residential Mortgage Debt #3, *available at* https://www.consumerfinance.gov.
327 *Id. See* § 9.5.2.3, *infra*.

can be omitted and the validation notice still can benefit from the safe harbor.[328] Similarly, the collector still benefits from the safe harbor if it includes optional information not already found on the model validation notice, as described at § 9.6, *infra*, provided such optional disclosures are no more prominent than any of the required validation information.[329] The Regulation F supplemental information provides: "A debt collector who chooses to include one or more of the [Reg. F] § 1006.34(d)(3) optional disclosures that do not appear on the model validation notice, but who violates the no-more-prominent requirement, loses the safe harbor under [Reg. F] § 1006.34(d)(2) and may violate [Reg. F] § 1006.34 depending on the facts and circumstances."[330]

The Reg. F supplemental information provides:

> The Bureau clarifies that, if a debt collector includes disclosures other than (1) the required validation information, (2) any optional disclosures described in [Reg. F] § 1006.34(d)(3), or (3) any disclosures that, if included, still leave the form substantially similar in substance, clarity, and meaningful sequence to the model notice, then the safe harbor does not apply with respect to the entirety of the validation notice.[331]

9.5.2.3 Permitted Deviations from the Model Validation Notice

Regulation F (effective November 30, 2021) states that certain validation information can be on a separate page,[332] if properly referenced in the validation notice. The debt collector who uses the model validation notice and properly references the separate page in the validation notice receives a safe harbor as to the validation notice, but not as to the information on the separate page.[333] The information on the separate page can still violate the Regulation F form and information requirements.

The debt collector can also make changes to the form and retain a safe harbor, provided that the form remains substantially similar to the model validation notice.[334] On the other hand, a debt collector receives no safe harbor if the validation notice does not use the model validation notice or use a substantially similar form.[335] A validation notice that does not qualify for a safe harbor does not necessarily violate Regulation F.[336]

The Regulation F Official Interpretations require that the form remain "substantially similar in substance, clarity, and meaningful sequence to Model Form B-1" to retain the safe harbor.[337] The Official Interpretations then provide five examples of permissible changes:

1. Modifications to remove language that could suggest liability for the debt if such language is not applicable. For example, if a debt collector sends a validation notice to a person who is authorized to act on behalf of the deceased consumer's estate (see comment 34(a)(1)-1), and that person is not liable for the debt, the debt collector may use the name of the deceased consumer instead of "you";
2. Relocating the consumer-response information required by [Reg. F] § 1006.34(c)(4) to facilitate mailing;
3. Adding barcodes or QR codes, as long as the inclusion of such items does not violate [Reg. F] § 1006.38(b) [the prohibition on overshadowing];
4. Adding the date the form is generated; and
5. Embedding hyperlinks, if delivering the form electronically.[338]

In a FAQ the CFPB clarifies that:

> [A] debt collector may choose to add content that is not required by the Rule and is not enumerated in the optional content provisions. The Rule would not necessarily prohibit that additional content, as long as the other requirements and prohibitions in the Rule and the FDCPA are met, such as the prohibition against overshadowing the consumer's rights to dispute or request original-creditor information. However, if that change results in a notice that is not substantially similar to the model validation notice, the debt collector would not receive the validation information content and format safe harbor.[339]

9.5.3 Form of Electronic Validation Notice

Regulation F (effective November 30, 2021) authorizes optional formatting for electronic validation notices.[340] Although a debt collector need not follow this format, use of a different format must otherwise comply with Regulation F.

Prompts as required for the consumer response information,[341] the optional payment option disclosures,[342] and the optional request for the form in Spanish,[343] may be displayed electronically as a fillable field.[344] Hyperlinks may be embedded that, when clicked:

- Connect a consumer to www.cfpb.gov/debt-collection to comply with one of the required validation disclosures;[345]
- Permit a consumer to respond to the dispute and original-creditor information prompts required as the consumer response information disclosures;[346] or
- Connect a consumer to the debt collector's website.[347]

328 Reg. F § 1006.34(d)(2)(i)(A).
329 Reg. F § 1006.34(d)(2)(i)(B).
330 *See* 86 Fed. Reg. 5766 at 5821 (Jan. 19, 2021).
331 *See* 86 Fed. Reg. 5766 at 5822 (Jan. 19, 2021).
332 Reg. F § 1006.34(c)(2)(viii) or (5). *See* §§ 9.4.7.3, 9.4.7.5, *supra*.
333 Reg. F § 1006.34(d)(2)(ii).
334 Reg. F § 1006.34(d)(2)(iii).
335 Reg. F Official Interpretations § 34(d)(2)-1.
336 CFPB, FAQ, Validation Information: Residential Mortgage Debt #4, *available at* https://www.consumerfinance.gov.
337 Reg. F Official Interpretations § 34(d)(2)(iii)-1.
338 Reg. F Official Interpretations § 34(d)(2)(iii)-1.
339 CFPB, FAQ, Validation Information: Residential Mortgage Debt #4, *available at* https://www.consumerfinance.gov.
340 Reg. F § 1006.34(d)(4).
341 Reg. F § 1006.34(c)(4)(i), (ii). *See* § 9.4.10, *supra*.
342 Reg. F § 1006.34(d)(3)(iii)(B). *See* § 9.6.1, *infra*.
343 Reg. F § 1006.34(d)(3)(vi)(B). *See* § 9.6.3, *infra*.
344 Reg. F § 1006.34(d)(4)(i).
345 Reg. F § 1006.34(c)(3)(iv). *See* § 9.4.9, *supra*.
346 Reg. F § 1006.34(c)(4)(i), (ii). *See* § 9.4.11, *supra*.
347 Reg. F § 1006.34(d)(4)(ii).

9.5.4 Translations into Other Languages

Regulation F (effective November 30, 2021) allows for the validation notice to be provided in any language when specific requirements are met. First, the validation notice must be completely and accurately translated.[348] Regulation F provides a safe harbor for the notice being completely and accurately translated if the collector obtains the language of a validation notice from the CFPB's website.[349] The Regulation F supplemental information states:

> Regarding the request by a group of consumer advocate commenters that the Bureau translate the validation notice into Spanish and seven other languages and deem the Bureau translations as complete and accurate, the Bureau plans to make available on its website, prior to the effective date of the final rule, a Spanish-language translation of the validation notice, and it will consider taking such action in the future with respect to one or more of the other languages cited by these commenters following implementation of the final rule.[350]

Since issuing the final rule, the Bureau has provided a Spanish-language model validation notice.[351] Debt collectors are permitted to use other validation notice translations if they are complete and accurate.[352]

An English-language version must be included in the same communication as the translated validation notice,[353] unless the collector has already sent the consumer an English language version.[354] For example, where the consumer requests a Spanish language version after receiving the English language version, the collector can send the Spanish language version without sending again the English language version.

The use of a validation notice in other languages is optional and it also optional to provide either or both of the disclosures about the ability to request a Spanish language translation.[355] But if the debt collector includes in the validation information either or both of the optional disclosures, and then the consumer requests a Spanish-language validation notice, the collector must provide the consumer a validation notice completely and accurately translated into Spanish.[356]

9.6 Optional Validation Information Under Reg. F § 1006.34

9.6.1 Overview

Under Regulation F (effective November 30, 2021), a debt collector adding any of the eight types of optional validation information does not lose a safe harbor where the debt collector otherwise complies or substantially complies with Reg. F § 1006.34(d)(2), as described at § 9.6.2, *supra*.[357] A collector providing any additional disclosures, beyond those eight types of optional disclosures, loses the safe harbor. Then it will be a question as to whether the validation notice violates any Regulation F provisions, such as the prohibition on overshadowing.

The eight types of optional validation information are:

1. The debt collector's telephone contact information.[358] Contact information includes not only the number, but the times that the debt collector accepts consumer telephone calls.[359]
2. A number or code that the debt collector uses to identify the debt or the consumer.[360]
3. Either or both of the following phrases:
   - The statement, "Contact us about your payment options," using that phrase or a substantially similar phrase; and
   - Below the consumer-response information described at § 9.4.10, *supra*, the statement, "I enclosed this amount:"—using that phrase or a substantially similar phrase, payment instructions after that statement, and a prompt.[361]
4. Disclosures under applicable law, as described at § 9.6.2, *infra*.[362]
5. The debt collector's website and email address. If the validation information is not provided electronically, a statement explaining how a consumer can electronically dispute the debt or request original-creditor information, as described at § 9.4.9, *supra*.[363]
6. Disclosures regarding a consumer's ability to request a Spanish-language translation of a validation notice, as described at § 9.6.3, *infra*.[364]
7. The merchant brand, affinity brand, or facility name, if any, associated with the debt, as described at § 9.6.4, *infra*.[365]
8. Where a debt is not related to a consumer financial product or service,[366] the required disclosures where

348 Reg. F § 1006.34(e)(1).
349 Reg. F Official Interpretations § 34(e)-1.
350 *See* 86 Fed. Reg. 5766 at 5833 (Jan. 19, 2021).
351 *See* CFPB, Debt Collection Model Forms: Model Validation Notice—Spanish translation (Oct. 2021), *available at* https://files.consumerfinance.gov.
352 Reg. F Official Interpretations § 34(e)-1.
353 Reg. F § 1006.34(e)(1)(i).
354 Reg. F § 1006.34(e)(1)(ii).
355 Reg. F § 1006.34(d)(3)(vi)(A), (B). *See* § 9.6.3, *infra*.
356 Reg. F § 1006.34(e)(2).
357 Reg. F § 1006.34(d)(3).
358 Reg. F § 1006.34(d)(3)(i).
359 Reg. F Official Interpretations § 34(d)(3)(i)-1.
360 Reg. F § 1006.34(d)(3)(ii).
361 Reg. F § 1006.34(d)(3)(iii).
362 Reg. F § 1006.34(d)(3)(iv).
363 Reg. F § 1006.34(d)(3)(v).
364 Reg. F § 1006.34(d)(3)(vi).
365 Reg. F § 1006.34(d)(3)(vii).
366 Consumer financial product or service is defined at Reg. F § 1006.2(f). *See* § 9.4.6, *supra*.

a debt relates to a consumer financial produce or service: the creditor's name on the itemization date[367] and a statement that informs the consumer that additional information regarding consumer protections in debt collection is available on the Bureau's website at www.cfpb.gov/debt-collection.[368]

9.6.2 Optional Disclosures Under Applicable Law

9.6.2.1 Generally

"Disclosures required under applicable law" is one of the eight optional types of validation information that can be added to the model validation notice.[369] Collectors can add one or more of these types of optional validation information and still retain the safe harbor for use of the model validation notice.[370]

The rules specify where disclosures required under applicable law can be placed on the validation notice. Time-barred debt disclosures that otherwise meet the requirements may be placed on the front of the validation notice.[371] Other disclosures under applicable law must be on the back of the validation notice to retain the safe harbor.[372]

9.6.2.2 Applicable Law Disclosures on Front of Validation Notice

Under Regulation F (effective November 30, 2021), debt collectors can place the optional validation information "disclosures under applicable law" on the front of the validation notice (under disclosure of the current amount of the debt)[373] in certain circumstances. Specifically, the debt collector must be collecting time-barred debt, the applicable law must require a time-barred debt disclosure or provides a safe harbor, and the applicable law must specify the content of the disclosure.[374] The definition of time-barred debt is found at Reg. F § 1006.26(a)(2) and discussed at § 7.4.9.3, *supra*.

The Regulation F Official Interpretations provide this example:

> [I]f applicable State law requires a debt collector who is collecting time-barred debt to disclose to the consumer that the law limits how long a consumer can be sued on a debt and that the debt collector cannot or will not sue the consumer to collect it, the debt collector may include that disclosure on the front of the validation notice.[375]

Disclosures about revival of debt collectors' right to bring a legal action to enforce the debt are another example of a time-barred debt disclosure that may be provided on the front of a validation notice if they otherwise comply with the requirements outlined above.[376]

Multiple jurisdictions have time-barred debt disclosure requirements.[377] However, not all provisions related to disclosures of time-barred debt specify required language or language that would provide a safe harbor.[378] In jurisdictions that do not specify the language, debt collectors would still be able to include the required disclosure on the back of the validation notice.[379]

The CFPB has found no example of a state law requiring disclosure on the front of the validation notice other than those relating to time-barred debt.[380] But if there were such an applicable law, the debt collector should comply with the applicable law, make the disclosure on the front of the validation notice, and lose the safe harbor in Reg. F § 1006.34(d)(2) that would otherwise be available for using the model validation notice.[381] Losing the safe harbor does not mean that the validation notice necessarily violates Regulation F.[382]

9.6.2.3 Applicable Law Disclosures on Back of Validation Notice

Under Regulation F (effective November 30, 2021), other than the disclosures examined at § 9.6.2.2, *supra*, all other "disclosures under applicable law" must be on the back of the validation notice if the collector is to retain a safe harbor under Reg. F § 1006.34(d)(2)[383] when using the model validation notice.

Disclosures placed on a second page do not qualify for the safe harbor.[384] Their placement on the back cannot be opposite the consumer response information[385] found on the front, so that the disclosure(s) are not returned with the consumer-response information.[386]

If disclosures required by law are included on the back of the validation notice, a statement on the front of the validation notice must refer to those disclosures.[387] A complying statement referencing disclosures on the back is "Notice: See reverse side for important information," or a substantially

367 Reg. F § 1006.34(c)(2)(iii). *See* § 9.4.6, *supra*. For more about the link to the Bureau's website required by Reg. F § 1006.34(c)(3)(iv), see § 9.4.9, *supra*.
368 Reg. F § 1006.34(d)(3)(viii).
369 Reg. F § 1006.34(d)(3)(iv).
370 Reg. F § 1006.34(d)(2). *See* § 9.5.2, *supra*.
371 Reg. F § 1006.34(d)(3)(iv)(B). *See* § 9.6.2.2, *infra*.
372 Reg. F § 1006.34(d)(3)(iv)(A). *See* § 9.6.2.3, *infra*.
373 Reg. F § 1006.34(c)(2)(ix). *See* § 9.4.7.4, *supra*.
374 Reg. F § 1006.34(d)(3)(iv)(B).
375 Reg. F Official Interpretations § 34(d)(3)(iv)(B)-1.
376 Reg. F Official Interpretations § 34(d)(3)(iv)(B)-1.
377 Cal. Civ. Code § 1788.14(d); Conn. Gen. Stat. § 36a-805(a)(14); Mass. Regs. Code tit. 940, § 7.07(24); N.M. Admin. Code § 12.2.12.9; N.Y. Comp. Codes R. & Regs. tit. 23, § 1.3; N.Y.C. Admin. Code § 20-493.2(b); N.C. Gen. Stat. § 58-70-115(1); Tex. Fin. Code Ann. § 392-307(e); W. Va. Code § 46a-2-128(f); Code Vt. R. 6-31-4 § 104 05(a); City of Yonkers Code § 31-162.1(B). *See also* Nev. Rev. Stat. § 649.332(2)(a)(2) (requiring revival disclosure when collecting debts on behalf of hospital regardless of whether debt is currently time-barred).
378 *See, e.g.*, N.C. Gen. Stat. § 58-70-115(1); Code Vt. R. 6-31-4 § 104.05(a).
379 Reg. F Official Interpretations § 34(d)(3)(iv)(A)-1.
380 86 Fed. Reg. 5766 at 5827 (Jan. 19, 2021).
381 *See* § 9.5.2, *supra*.
382 *See* 86 Fed. Reg. 5766 at 5827 (Jan. 19, 2021).
383 *See* § 9.5.2, *supra*.
384 *See* 86 Fed. Reg. 5766 at 5829 (Jan. 19, 2021).
385 Reg. F § 1006.34(d)(4). *See* § 9.4.11, *supra*.
386 Reg. F § 1006.34(d)(3)(iv)(A). *See* 86 Fed. Reg. 5766 at 5829 (Jan. 19, 2021).
387 Reg. F § 1006.34(d)(3)(iv)(A).

similar statement.[388] On the other hand, to retain the safe harbor, the reference to information on the back cannot be on the front if there is no such information on the back.[389]

If the validation notice is provided in an email, the debt collector may include the applicable law disclosures in the same communication below the content of the validation notice.[390] In that case, the collector may comply with the requirement to refer to the disclosures on the front of the validation notice by stating instead, "Notice: See below for important information," or a substantially similar statement.[391]

The disclosures under applicable law that may be placed on the back of the validation notice and retain the safe harbor are limited to disclosures "specifically required by, or that provide safe harbors under applicable law."[392] This includes specific "disclosures required by federal, state, or municipal statutes or regulations, and specific disclosures required by judicial or administrative decisions or orders, including administrative consent orders."[393] The Regulation F Official Interpretations provide this example: "Such disclosures could include, for example, time-barred debt disclosures and disclosures that the current amount of the debt may increase or vary due to interest, fees, or other charges, provided that such disclosures are specifically required by applicable law."[394]

Disclosures that allow the collector to retain the safe harbor are strictly limited to those required by law. The Reg. F supplemental information states: "On the other hand, the Bureau declines to allow debt collectors to include disclosures on the validation notice that are merely permitted by other applicable law and still retain the safe harbor."[395] The Reg. F supplemental information explains:

> As such, the Bureau emphasizes that this provision is not intended to capture circumstances in which a debt collector is not providing a disclosure that is required under a specific law, decision, or order, but rather the debt collector is providing a disclosure to try to comply with a more general legal requirement. For example, if the debt collector were to add language to the validation notice to try to avoid a finding of an unfair, deceptive, or abusive practice under Dodd-Frank Act section 1031 or the FDCPA, that is not an optional disclosure covered by [Reg. F] § 1006.34(d)(3)(iv). Debt collectors are not precluded from making such disclosures, but they will not receive the safe harbor under [Reg. F] § 1006.34(d)(2).[396]

9.6.3 *Disclosure of Ability to Request Spanish Language Translation*

Regulation F (effective November 30, 2021) provides two disclosures regarding a consumer's ability to request a Spanish-language translation of a validation notice.[397] The collector has the option to provide both, only one, or neither and retain the safe harbor under Reg. F § 1006.34(d)(2)[398] when using the model validation notice.

One optional statement is "Póngase en contacto con nosotros para solicitar una copia de este formulario en español" (which means "Contact us to request a copy of this form in Spanish"), using that phrase or a substantially similar phrase in Spanish.[399] A debt collector may also include supplemental information in Spanish that specifies how a consumer may request a Spanish-language validation notice.[400] For example, a debt collector may include a statement in Spanish that a consumer can request a Spanish-language validation notice by telephone or email, if the debt collector accepts consumer requests through those communication media.[401]

The other optional disclosure regarding a consumer's ability to request a Spanish-language translation of a validation notice must be placed with the consumer response information discussed at § 9.4.10, *supra*.[402] The disclosure states "Quiero este formulario en español" (which means "I want this form in Spanish"), using that phrase or a substantially similar phrase in Spanish, next to a prompt, such as a checkbox.[403]

It is optional to provide either or both disclosures.[404] But if the debt collector includes in the validation information either or both disclosures, and then the consumer requests a Spanish-language validation notice, the collector must provide the consumer a validation notice completely and accurately translated into Spanish.[405] For a discussion of the term "complete and accurate," see § 9.5.4, *supra*.

The Bureau declined to mandate that the Spanish-language validation notice would restart the validation period, but noted that debt collectors that do restart the validation period with the new notice do not violate Regulation F.[406] A debt collector sending the validation notice in Spanish is not obligated to use the Spanish language in subsequent communications.[407]

388 Reg. F Official Interpretations § 34(d)(3)(iv)(A)-2.
The model validation notice uses this format to disclose this reference to the back of the form: it is in bold, separated from the rest of the text, and "Notice" is bold and underlined. This was a considered decision by the CFPB. *See* 86 Fed. Reg. 5766 at 5828–5829 (Jan. 19, 2021).
389 *See* 86 Fed. Reg. 5766 at 5829 (Jan. 19, 2021).
390 Reg. F Official Interpretations § 34(d)(3)(iv)(A)-1.
391 Reg. F Official Interpretations § 34(d)(3)(iv)(A)-2.
392 Reg. F § 1006.34(d)(3)(iv)(A).
393 Reg. F Official Interpretations § 34(d)(3)(iv)(A)-1.
394 Reg. F Official Interpretations § 34(d)(3)(iv)(A)-1.
395 *See* 86 Fed. Reg. 5766 at 5828 (Jan. 19, 2021).
396 *See* 86 Fed. Reg. 5766 at 5827 (Jan. 19, 2021).
397 Reg. F § 1006.34(d)(3)(vi).
398 *See* § 9.5.2, *supra*.
399 Reg. F § 1006.34(d)(3)(vi)(A).
400 Reg. F § 1006.34(d)(3)(vi)(A).
401 Reg. F Official Interpretations § 34(d)(3)(vi)(A)-1.
402 Reg. F § 1006.34(d)(3)(vi)(B).
403 Reg. F § 1006.34(d)(3)(vi)(B).
404 Reg. F § 1006.34(d)(3)(vi).
405 Reg. F § 1006.34(e)(2).
406 *See* 86 Fed. Reg. 5766 at 5830 (Jan. 19, 2021).
407 *See* 86 Fed. Reg. 5766 at 5830 (Jan. 19, 2021).

9.6.4 Merchant Brand, Affinity Brand, or Facility Name

Regulation F (effective November 30, 2021) allows debt collectors to provide information about any merchant brand, affinity brand, or facility name associated with the debt.[408]

The Regulation F Official Interpretations give an example of a merchant brand. "For example, assume that a debt collector is attempting to collect a consumer's credit card debt. The credit card was issued by ABC Bank and was co-branded XYZ Store. "XYZ Store" is the merchant brand."[409]

The Regulation F supplemental information provides that an affinity brand "may reflect the labelling or branding of an entity that is not necessarily commercial but one with which the consumer has a relationship."[410] As an example: "[A]ssume that a debt collector is attempting to collect a consumer's credit card debt. The credit card was issued by ABC Bank, and the logo for the College of Columbia appears on the credit card. 'College of Columbia' is the affinity brand."[411]

The Regulation F Official Interpretations also give an example of a facility name. "For example, assume that a debt collector is attempting to collect a consumer's medical debt. The medical debt relates to a treatment that the consumer received at ABC Hospital. 'ABC Hospital' is the facility name."[412]

9.7 Substance of Validation Notice Prior to Regulation F

9.7.1 Overview

> (a) NOTICE OF DEBT; CONTENTS.—Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.[413]

The FDCPA specifies the contents of the validation notice that collectors are required to send consumers. Each element of the required notice must be effectively conveyed.[414]

An incomplete statement of the FDCPA § 1692g(a)(1) through (5) information violates the Act.[415] Prior to Regulation F (effective November 30, 2021), courts held that the language of the validation notice must be substantively the same as the statutory language.[416]

408 Reg. F § 1006.34(d)(3)(vii).

409 Reg. F Official Interpretations § 34(d)(3)(vii)-1.

410 *See* 86 Fed. Reg. 5766 at 5831 (Jan. 19, 2021).

411 Reg. F Official Interpretations § 34(d)(3)(vii)-2.

412 Reg. F Official Interpretations § 34(d)(3)(vii)-3.

413 15 U.S.C. § 1692g(a).

414 *See* § 9.3.5, *supra.*

415 *See* Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982); Lombardi v. Columbia Recovery Group, L.L.C., 2013 WL 5569465 (W.D. Wash. 2013) (omitted "any portion" of the debt); Wilson v. Mattleman, Weinroth & Miller, 2013 WL 2649507 (D.N.J. 2013) (failed to state that the debt would be assumed valid); Wenig v. Messerli & Kramer P.A., 2013 WL 1176062 (D. Minn. 2013) (failed to state thirty-day time period in which to submit written dispute); Welker v. Law Office of Horwitz, 626 F. Supp. 2d 1068 (S.D. Cal. 2009) (notice of written request requirement); McCabe v. Crawford & Co., 272 F. Supp. 2d 736 (N.D. Ill. 2003) (failure to state any portion of debt may be disputed and omitting words "in writing"); Dolan v. Schreiber & Assoc., P.C., 2002 U.S. Dist. LEXIS 6005 (D. Mass. 2002), *adopted*, 2002 U.S. Dist. LEXIS 5998 (D. Mass. 2002) (identity of original creditor misstated); Grief v. Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P., 217 F. Supp. 2d 336 (E.D.N.Y. 2002) (request for verification of debt or identity of original creditor must be in writing; amount of debt); McCabe v. Crawford & Co., 210 F.R.D. 631 (N.D. Ill. 2002) (omitted dispute must be "in writing" and may dispute "any portion" of debt); Prevete v. Margolin & Meltzger, 1998 WL 426700 (E.D.N.Y. 1998); Altergott v. Modern Collection Techniques, 1994 WL 319229 (N.D. Ill. 1994); Appx. E.2.6.5, *infra*. *Cf.* Henley v. Trustmark Recovery Services, 2016 WL 5922835 (N.D. Ill. Oct. 11, 2016) (§ 1692g notice's failure to repeat phrase "or any portion thereof" in second of its two sentences did not violate § 1692g). *But cf.* Bezpalko v. Gilfillan, Gilpin & Brehman, 1998 WL 321268 (E.D. Pa. 1998) (omission of right to dispute "any portion" of debt acceptable.

416 *See, e.g.*, Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982); Bankston v. Phycom Corp., 2007 WL 4170627 (N.D. Cal. 2007); Dikun v. Streich, 369 F. Supp. 2d 781 (E.D. Va. 2005); Smith v. Hecker, 2005 WL 894812 (E.D. Pa. 2005); Foresberg v. Fid. Nat'l Credit Services, Ltd., 2004 WL 3510771 (S.D. Cal. 2004); Carbajal v. Capital One, 2003 WL 22595265 (N.D. Ill. 2003); Rosenburg v. Transworld Sys., Inc., 2000 WL 420865 (N.D. Ill. Apr. 13, 2000); Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1981). *See also* Nero v. Law Office of Sam Streeter, P.L.L.C., 655 F. Supp. 2d 200 (E.D.N.Y. 2009); FTC Official Staff Commentary §§ 809(a)-3, 809(a)-4, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; VerSteegh, FTC Informal Staff Letter (Apr. 4, 1988); Samuels, FTC Informal Staff Letter (Nov. 1, 1979). But see Campbell v. Hall, 624 F. Supp. 2d 991 (N.D. Ind. 2009) (omission of "receipt" language from start of thirty-day dispute period acceptable); Sebrow v. NCO Fin. Sys., Inc., 2009 WL 2707341 (E.D.N.Y. 2009). *But cf.* Galuska v. Collectors Training Inst., Inc., 2007 WL 4080679 (M.D. Pa. 2007) (omission of "by the debt collector" acceptable); Rosenberg, FTC Informal Staff Letter (Jan. 16, 1991); Clement, FTC Informal Staff Letter (Nov. 12, 1985).

Regulation F's provisions for required and optional information as outlined in Reg. § 1006.34 are discussed in §§ 9.4 to 9.6, *supra*. Regulation F's model validation notice contains sample language.[417] Prior to Regulation F's expansion of the required validation information,[418] the debt collector only had to include the amount of the debt,[419] the name of the current creditor,[420] the debt collector's name and address,[421] a statement of the right to obtain the name of the original creditor,[422] a statement that the debt collector will assume the debt is valid if the consumer does not dispute the debt or a portion of it in thirty days,[423] and an explanation of the procedure for obtaining verification of the debt.[424] The validation notice must state that a portion of the debt may be disputed or verified.[425] The notice should be included in a single communication.[426]

This notice and its contents should be strictly required by the courts.[427] However, two courts have indicated that the notice may be effective if it instructs that the consumer may request verification of the debt without mention of the right to dispute the debt.[428] One court found that a debt collector's validation notice, which gave the consumer the option to dispute the debt on the debt collector's website, did not violate FDCPA § 1692g, as electronic requests could be considered "in writing."[429] Regulation F clarifies that a debt collector sending a validation notice electronically must allow disputes and requests for original-creditor information to be submitted electronically,[430] and, if the validation information is not provided electronically, the collector may include information about how to dispute or request original-creditor information electronically.[431]

The debt collector should not misstate on the validation notice the time the debtor has to request verification as thirty days from the date of the notice, rather than the statutorily required thirty days from the consumer's receipt of the notice.[432] Regulation F's rules for calculating and disclosing the validation period are discussed at § 9.4.8, *supra*. In addition the FDCPA gives the consumer thirty days from receipt of the notice to mail the request.[433]

9.7.2 *Amount of the Debt*

The validation notice must disclose "the amount of the debt."[434] Regulation F (effective November 30, 2021) has detailed

417 Reg. F Appx. B-1 Model Form for Validation Notice.

418 *See* § 9.4, *supra* (discussing Reg. F § 1006.34(c)'s required validation information).

419 15 U.S.C. § 1692g(a)(1); §§ 9.3.6.4, 9.3.6.5, *infra*.

420 15 U.S.C. § 1692g(a)(2). *See* Moran v. Greene & Cooper Attorneys L.L.P., 43 F. Supp. 3d 907 (S.D. Ind. 2014); Eun Joo Lee v. Forster & Garbus L.L.P., 926 F. Supp. 2d 482 (E.D.N.Y. 2013). *Cf.* Devito v. Zucker, Goldberg & Ackerman, L.L.C., 908 F. Supp. 2d 564 (D.N.J. 2012) (failure to name creditor may be violation if confusing); Jablonski v. Capital Mgmt. Services L.P., 2011 WL 7142994 (N.D. Ohio 2011) (dun's accurate disclosure of names of current and original creditors provided sufficient identification of debt to avoid confusion); Dokes v. LTD Fin. Services, 328 F. Supp. 3d 1270, 1283 (N.D. Ala. 2018) (collector identification of original creditor did not violate § 1692g(a)(2) when current creditor is also identified).

421 See Wegmans Food Mkts., Inc. v. Scrimpsher, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) (address appeared only on envelope). *But see* Blanchard v. N. Am. Credit Serv., 2016 WL 1408592 (S.D. Ill. Apr. 11, 2016) (confusing statements about address to send dispute to were not so confusing as to violate § 1692g).

422 15 U.S.C. § 1692g(a)(5).

423 15 U.S.C. § 1692g(a)(3). *See* Hart v. FCI Lender Services, Inc., 797 F.3d 219, 227 (2d Cir. 2015); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1028–1029 (6th Cir. 1992). *See also* Sunga v. Rees Broome, P.C., 2010 WL 1138319 (E.D. Va. 2010) (using words "intent to dispute" instead of word "dispute" acceptable).

424 15 U.S.C. § 1692g(a)(4).

425 *E.g.*, Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982); Patton v. Prober & Raphael, 2012 WL 294537 (N.D. Cal. Jan. 13, 2012), *adopted*, 2012 WL 294511 (N.D. Cal. Jan. 30, 2012); Dutterer v. Thomas Kalperis Int'l, Inc., 767 F. Supp. 2d 504 (E.D. Pa. 2011); Forsberg v. Fid. Nat'l Credit Services, 2004 U.S. Dist. LEXIS 7622 (S.D. Cal. Feb. 25, 2004); McCabe v. Crawford & Co., 272 F. Supp. 2d 736 (N.D. Ill. 2003); Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1981); Castillo v. Balsamo Rosenblatt & Cohen, P.C., 930 N.Y.S.2d 789 (N.Y. City Civ. Ct. 2011); Weiss, FTC Informal Staff Letter (Apr. 17, 1986).

426 *See* Castro v. Green Tree Servicing L.L.C., 959 F. Supp. 2d 698 (S.D.N.Y. Aug. 14, 2013).

427 *See* Douyon v. N.Y. Med. Health Care, P.C., 894 F. Supp. 2d 245 (E.D.N.Y. 2012). *But cf.* Devito v. Zucker, Goldberg & Ackerman, L.L.C., 908 F. Supp. 2d 564 (D.N.J. 2012).

428 *See, e.g.*, Borucki v. Vision Fin. Corp., 2013 WL 2477067 (E.D. Wis. June 7, 2013). *See also* Hillman v. NCO Fin. Sys., Inc., 2013 WL 5356858 (E.D. Pa. Sept. 25, 2013).

429 Blanchard v. N. Am. Credit Serv., 2016 WL 1408592 (S.D. Ill. 2016), *citing* Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 295 (7th Cir. 2002).

430 Reg. F § 1006.34(c)(3)(v). *See* § 9.4.10, *infra*.

431 Reg. F § 1006.34(d)(3)(v)(B). *See* § 9.6.1, *infra*.

432 *See* Henhaffer v. Simeone & Raynor, L.L.C., 2016 WL 6305939 (D.N.J. Oct. 27, 2016); Diaz v. Residential Credit Solutions, Inc., 965 F. Supp. 2d 249 (E.D.N.Y. 2013); In re Turner, 2010 WL 3211030 (M.D. Ala. Aug. 13, 2010); Rivera v. Amalgamated Debt Collection Services, Inc., 462 F. Supp. 2d 1223 (S.D. Fla. 2006); Cavallaro v. Law Offices of Shapiro & Kriesman, 933 F. Supp. 1148 (E.D.N.Y. 1996). *See also* Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85, 90–92 (2d Cir. 2008) (notice's clear statement that thirty days started from receipt of notice was obscured by request for notice within thirty days); Monokrousos v. Computer Credit, Inc., 984 F. Supp. 233 (S.D.N.Y. 1997) (collector's second letter shortened thirty-day time); *In re* Hathcock, 437 B.R. 696 (Bankr. M.D. Fla. 2010); Spears v. Brennan, 745 N.E.2d 862 (Ind. Ct. App. 2001) (omitted thirty days was calculated from receipt).

433 86 Fed. Reg. 5766 at 5797 (Jan. 19, 2021) (clarifying that consumer just needs to send or submit dispute or request for original creditor information "within the 30-day period established in § 1006.34(b)(5), even if the debt collector does not receive the request until after the 30-day period"). *See* Jacobson v. Healthcare Fin. Services, Inc., 516 F.3d 85 (2d Cir. 2008). *See also* Chauncey v. JDR Recovery Corp., 118 F.3d 516, 519 (7th Cir. 1997) (demand for receipt of payment within thirty days contradicted validation notice); Homer v. Law Offices of Frederic I. Weinberg & Assoc., 292 F. Supp. 3d 629 (E.D. Pa. 2017); Diaz v. Residential Credit Solutions, Inc., 965 F. Supp. 2d 249 (E.D.N.Y. 2013); Burke v. Messerli & Kramer P.A., 2010 WL 3167403 (D. Minn. Aug. 9, 2010); Swift v. Maximus, Inc., 2004 WL 1576618, at *3–4 (E.D.N.Y. July 15, 2004) (following *Chauncey*).

434 15 U.S.C. § 1692g(a)(1). *See also* Reg. F § 1006.34(c)(2)(ix) (required validation information includes the "current amount of the debt").

provisions related to the disclosure of the amount of the debt and its itemization, which are discussed at § 9.4.7, *supra*.

The amount specified must be the amount due as of the time of the notice.[435] Regulation F Official Interpretations clarify that the amount of the debt is the "current amount of the debt (*i.e.*, the amount as of when the validation information is provided)."[436]

In its supplemental information about Regulation F, the Consumer Financial Protection Bureau noted that it "declines to incorporate an increasing-interest-or-fee disclosure or to structure the current amount of the debt as a dynamic balance."[437] Because the amount of the debt provided as required validation information must be the current amount, "a debt collector satisfies the requirement in [Reg. F] § 1006.34(c)(2)(ix) [current amount of the debt] without providing a dynamic balance or increasing-interest-or-fee disclosure."[438]

Prior to Regulation F, many court decisions held that a validation notice or other letter violates FDCPA § 1692e(2)(A),[439] or FDCPA § 1692g(a)(1),[440] or both,[441] unless it discloses that the amount of the debt will increase due to interest or other charges. Two of these courts would also require disclosure of the rate(s) at which these charges accrue.[442] Other courts, however, rejected that position, and held that FDCPA § 1692g(a)(1)'s requirement that an initial communication disclose "the amount of the debt" does not imply an obligation to disclose that interest is accruing.[443] Instead, these cases hold that the FDCPA only requires that a validation notice state the total amount of the debt (including accrued interest and any other charges) as of the date the letter is sent, and some note that further reference to accruing

435 Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872, 875–876 (7th Cir. 2000) (section 1692g(a)(1) requires collector to "state the total amount due—interest and other charges as well as principal—on the date the dunning letter was sent"). *See also* Carlin v. Davidson Fink L.L.P., 852 F.3d 207, 216 (2d Cir. 2017); Taylor v. Fin. Recovery Serv., Inc., 886 F.3d 212, 215 (2d Cir. 2018) ("[I]f a collection notice correctly states a consumer's balance without mentioning interest or fees, and no such interest or fees are accruing, then the notice will neither be misleading within the meaning of Section 1692e, nor fail to state accurately the amount of the debt under Section 1692g."); Chuway v. Nat'l Action Fin. Services, Inc., 362 F.3d 944 (7th Cir. 2004) (collector needs to be clear and careful in directing consumer to 800 number for current balance amount, because unsophisticated consumer could be confused as to whether amounts in verification notice were owed as of date of the notice or at later date); Gesten v. Phelan Hallinan, P.L.C., 57 F. Supp. 3d 1381 (S.D. Fla. 2014); Loreaux v. ACB Receivables Mgmt., 2014 WL 6685469 (D.N.J. Nov. 26, 2014) (that correspondence referenced two amounts—$191.57 as amount "due" and $130.00 as amount "owed"—stated plausible claim for violation of FDCPA); Rivera v. Ralph F. Casale & Assoc., L.L.C., 2014 WL 2571555 (D.N.J. June 9, 2014) (providing five-year-old amount for balance stated claim); Jolly v. Shapiro, 237 F. Supp. 2d 888 (N.D. Ill. 2002) (may be disclosed as of stated date); Welker v. Law Office of Daniel J. Horwitz, 699 F. Supp. 2d 1164 (S.D. Cal. 2010); Stanley v. Stupar, Schuster & Cooper, S.C., 136 F. Supp. 2d 957 (E.D. Wis. 2001) ("$987.71, plus attorneys fees" stated claim); Leffler v. Miller & Steeno, P.C., 2014 WL 1613946 (E.D. Mo. Apr. 22, 2014) ("there is no FDCPA violation if the amount listed in the . . . collection letter is the entire debt that [the debt collector] was hired to collect"); Lilly v. RAB Performance Recoveries, L.L.C., 2013 WL 3834008 (E.D. Tenn. July 23, 2013). *But see* Hutton v. Law Offices of Collins & Lamore, 668 F. Supp. 2d 1251 (S.D. Cal. 2009) ("the outstanding balance due . . . may not include accruing interest" acceptable); Campbell v. Hall, 624 F. Supp. 2d 991 (N.D. Ind. 2009) (consumer could add three figures).

436 Reg. F Official Interpretations § 1006.34(c)(2)(ix)-1. *See* § 9.4.7, *infra*.

437 86 Fed. Reg. 5766 at 5808 (Jan. 19, 2021).

438 86 Fed. Reg. 5766 at 5808 (Jan. 19, 2021).

439 *See* Avila v. Riexinger & Assoc., 817 F.3d 72, 77 (2d Cir. 2016); Deporter v. Credit Bur. of Carbon Cty., 2015 WL 1932336 (D. Colo. Apr. 28, 2015).

440 *See* Stonecypher v. Finkelstein Kern Steinberg & Cunningham, 2011 WL 3489685, at *5 (E.D. Tenn. Aug. 9, 2011) (notice failed to indicate that interest was accruing); Jones v. Midland Funding, L.L.C., 755 F. Supp. 2d 393, 397–398 (D. Conn. 2010) ("a validation notice fails to correctly state the amount of the debt as required by § 1692g unless it discloses the fact that interest is accruing and informs the consumer of the applicable interest rate"), *adhered to on reconsideration*, 2012 WL 1204716 (D. Conn. 2012); Akram v. Cal. Bus. Bur., Inc., 2016 WL 7029262 (S.D. Cal. Oct. 3, 2016); Smith v. Lyons, Doughl, & Veldhuius, P.C., 2008 WL 2885887, at *6 (D.N.J. July 23, 2008) (unpublished) (letter failed to indicate date on which stated interest had been calculated, and also failed to disclose that interest would continue to accrue). *See also* Jackson v. Aman Collection Serv. Inc., 2001 WL 1708829, at *3 (S.D. Ind. Dec. 14, 2001) ("The absence in Aman's letter of a statement of the date from which interest is accruing leaves to proof whether the phrase 'plus accruing interest' means interest accruing from the date of the letter, as Aman suggests, interest accruing from the date the letter was sent, or interest accruing on the principal debt owed"; claim stated where it was unclear whether "TOTAL DUE" was amount due as of date letter was drafted, sent, or received); Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872, 875 (7th Cir. 2000) (debt collector must "state the total amount due—interest and other charges as well as the principal—on the date the dunning letter was sent"; fashioning "safe harbor" formula that explicitly deals with accrual of interest). *But see* Heffington v. Gordon, Aylworth & Tami, P.C., 2017 WL 6626317 (D. Or. Dec. 28, 2017) (no violation when notice stated interest that had accrued and provided toll-free number for consumer to call to check for updated interest amounts); Beasley v. Sessoms & Rogers, P.A., 2010 WL 1980083 at *5 (E.D.N.C. Mar. 1, 2010) (no violation as "stating that 'interest may still be continuing to accrue' would not confuse the 'least sophisticated debtor' as to the amount of the debt").

441 *See* May v. Consumer Adjustment Co., 2015 WL 4506688 (E.D. Mo. July 24, 2015); Wideman v. Kramer & Frank, P.C., 2015 WL 1623814 (E.D. Mo. Apr. 10, 2015); Marucci v. Cawley & Bergmann, L.L.P., 66 F. Supp. 3d 559, 564–567 (D.N.J. 2014); Hepsen v. J.C. Christensen & Assoc., Inc., 2009 WL 3064865 (M.D. Fla. Sept. 22, 2009) (dunning letter must state exact and correct amount of debt in order to comply with § 1692g(a)(1); when debt collector demands incorrect amount of money in dunning letter, it makes false and misleading representation in violation of § 1692e(2)(A); defendant overstated amount of debt, when compared with later letter), *aff'd*, 383 Fed. Appx. 877 (11th Cir. 2010). *But see* Ghulyani v. Stephens & Michaels Assoc., Inc., 2015 WL 6503849 (S.D.N.Y. Oct. 26, 2015).

442 Stonecypher v. Finkelstein Kern Steinberg & Cunningham, 2011 WL 3489685, at *5 (E.D. Tenn. Aug. 9, 2011); Jones v. Midland Funding, L.L.C., 755 F. Supp. 2d 393, 397–398 (D. Conn. 2010); Smith v. Lyons, Doughl, & Veldhuius, P.C., 2008 WL 2885887, at *6 (D.N.J. July 23, 2008) (not for publication).

443 *See* Schaefer v. ARM Receivable Mgmt., Inc., 2011 WL 2847768, at *5 (D. Mass. July 19, 2011); Pifko v. CCB Credit Services, 2010 WL 2771832, at *3–4 (E.D.N.Y. July 7, 2010); Adlam v. FMS, 2010 WL 1328958, at *3 (S.D.N.Y. Apr. 5, 2010). *See also* Bodine v. First Nat. Collection Bur., Inc., 2010 WL 5149847, at *2 (D.N.J. Dec. 13, 2010).

interest or fees may be confusing.[444] Lower courts have split over whether a false statement indicating that the amount of the debt may increase over time violates the FDCPA.[445]

Prior to Regulation F, the Seventh Circuit offered safe harbor language for debt collectors trying to collect the listed balance plus the interest running on it or other charges.[446] The Regulation F supplemental information addresses the permissibility of disclosures about dynamic balances by noting that "the final rule affirmatively permits debt collectors to include along with the required validation information other disclosures specifically required by applicable law."[447] In order to maintain the safe harbor for use of the model validation notice, collectors can only use "optional disclosures under applicable law" if they are "specifically required by, or . . . provide safe harbors under, applicable law," and such disclosures would have to appear on the reverse of the validation notice if allowed.[448]

444 *See also* Weiss v. Zwicker & Assoc., 664 F. Supp. 2d 214, 217 (E.D.N.Y. 2009) (confusing statement that "balance may include additional charges including delinquency charges, as applied at the direction of American Express, if said charges are permissible in accordance with the terms of [the parties'] agreement" violated FDCPA because it is unclear what balance includes); Kalebaugh v. Berman & Rabin, P.A., 43 F. Supp. 3d 1215 (D. Kan. 2014). *But see* Stroud v. AllianceOne Receivables Mgmt., Inc., 2015 WL 4620482 (E.D. Mo. July 31, 2015) (not deceptive to state that interest "may" be added where consumer could not show that interest was not authorized by law or agreement; failure to add interest did not establish that statement was deceptive).

445 *Compare* Reeseg v. Gen. Revenue Corp., 2015 WL 4525869 (D.N.J. July 27, 2015) (misrepresentation that balance may increase if not paid immediately overshadowed § 1692g notice), *with* Derosa v. Computer Credit, Inc., 295 F. Supp. 3d 290, 296 (E.D.N.Y. 2018), *and* Ghulyani v. Stephens & Michaels Assoc., Inc., 2015 WL 6503849 (S.D.N.Y. Oct. 26, 2015) (dismissing claims under §§ 1692e(10) and 1692g(a)(1) alleging that describing amount owed with language "Total Balance Due as of the Date of This Letter" falsely implied that interest or other fees may apply to consumer's balance).

446 Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., 214 F.3d 872, 876 (7th Cir. 2000). *See also* Williams v. OSI Educ. Services, Inc., 505 F.3d 675 (7th Cir. 2007) (statement that amount of debt might increase because of daily interest did not make its itemized statement of stated amount of debt deceptive; safe harbor language of *Miller* was not requirement for compliance); Rozier v. Fin. Recovery Sys., Inc., 2011 WL 2295116 (E.D.N.Y. June 7, 2011) ("while the letter in the instant case used the safe harbor language laid out in *Miller*, the additional 'may or may not be applicable' language also used in the letter could create even further confusion"); Jones v. Midland Funding, L.L.C., 755 F. Supp. 2d 393 (D. Conn. 2010) ("a validation notice fails to correctly state the amount of the debt as required by § 1692g unless it discloses the fact that interest is accruing and informs the consumer of the applicable interest rate"), *adhered to on reconsideration*, 2012 WL 1204716 (D. Conn. Apr. 11, 2012); Brill v. Fin. Recovery Services, Inc., 2010 WL 5825480 (D. Neb. Nov. 10, 2010) (no violation because debt collector's statement that interest, late charges, and other charges "may or may not be" applicable to debtor's account was close to "safe-harbor" language in *Miller*). *Cf.* Avila v. Riexinger & Assoc., 817 F.3d 72, 77 (2d Cir. 2016) (adopting safe harbor to prevent collector liability under section 1692e for failing to disclose that the consumer's balance may increase); § 7.4.2.6, *supra*. *But see* Boucher v. Fin. Sys. of Green Bay, Inc., 880 F.3d 362, 367 (7th Cir. Jan. 17, 2018) (*Miller* safe harbor language did not immunize collector from liability where state law did not allow late charges or other charges to accrue).

447 86 Fed. Reg. 5766 at 5808 (Jan. 19, 2021).

448 Reg. F § 1006.34(d)(3)(iv)(A). *See* § 9.3c.2, *infra*.

In addition to requiring debt collectors to provide the current amount of the debt, Regulation F now requires itemization of the debt as discussed at § 9.4.7, *supra*. Prior to Regulation F, some courts held that itemization was not needed,[449] but found no violation of FDCPA § 1692g(a)(1) where the collector did itemize the debt.[450]

Regulation F's model validation notice at Appendix B-1 provides guidance about how the itemization and the current amount of the debt should appear. Previously, courts evaluated a variety of language about account balances for compliance with FDCPA § 1692g(a)(1).[451]

9.7.3 Name of Person to Whom the Debt Is Owed

The validation notice must contain the name of the current creditor to whom the debt is owed.[452] As the Seventh Circuit said in *Steffak v. Client Services, Inc.*, the FDCPA requires the debt collector to "identify the current creditor clearly, without leaving the matter to guesswork."[453] In *Bryan vs. Credit Control, L.L.C.*, the Second Circuit looked to the relevant credit card agreement to determine that the collector incorrectly listed Kohl's as the creditor when Kohl's was simply the agent for servicing the account and Capital One was the actual creditor.[454]

In *Bourff v. Rubin Lublin, L.L.C.*, the Eleventh Circuit found it was deceptive under FDCPA § 1692e for a debt collector to name a bank as the creditor that had not yet received the assignment of the mortgage debt. The court noted that the

449 Kolbasyuk v. Capital Mgmt. Services, L.P., 918 F.3d 236, 240 (2d Cir. 2019); Walker v. Shermeta, Adams, & Von Allmen, P.C., 2014 WL 11309742 (E.D. Mich. Apr. 25, 2014), *aff'd*, 623 Fed. Appx. 764 (6th Cir. 2015).

450 Degroot v. Client Services, Inc., 2020 WL 5951360, at *3 (7th Cir. Oct. 8, 2020).

451 Olson v. Risk Mgmt. Alternatives, Inc., 366 F.3d 509 (7th Cir. 2004) (unsophisticated consumer would understand that amount of debt is "Balance" and that amount "Now Due" is portion of balance that creditor will accept for the time being until next bill arrives); Koehn v. Delta Outsource Grp., Inc., 2019 WL 4666297 (7th Cir. Sept. 25, 2019) (statement of "current balance" does not mislead consumer about amount owed on the debt); Garcia v. Law Offices Howard Lee Schiff, P.C., 2019 WL 3842658, at *6 (D. Conn. Aug. 15, 2019) (consumer may be misled by validation notice listing different amounts for "current balance" and "charge off balance"); Garcia v. Miramed Revenue Group, L.L.C., 2018 WL 701283 (N.D. Ill. Jan. 30, 2018) (consumer stated claim under § 1692g(a)(1) where communication stated "Amount Due" was $100 but "Total Charges were $3665 for medical bill).

452 15 U.S.C. § 1692g(a)(2); Reg. F § 1006.34(c)(2)(v). *See* Sparkman v. Zwicker & Assoc., 374 F. Supp. 2d 293 (E.D.N.Y. 2005) (collector failed to clearly identify current creditor). *Cf.* Dikun v. Streich, 369 F. Supp. 2d 781 (E.D. Va. 2005) (name that differed slightly from creditor's actual name was acceptable).

453 Steffek v. Client Services, Inc., 948 F.3d 761, 765 (7th Cir. 2020) (listing original creditor without identifying it is insufficient); Janetos v. Fulton Friedman & Gullace, L.L.P., 825 F.3d 317, 321 (7th Cir. 2016) ("Nowhere did the letter say that Asset Acceptance currently owned the debts in question. Asset Acceptance was identified as the 'assignee' of another company, not as the current creditor or owner of the debt.").

454 Bryan v. Credit Control, L.L.C., 954 F.3d 576, 581 (2d Cir. 2020).

false statement was "a serious matter."[455] The same result was reached by the Sixth Circuit in *Wallace v. Washington Mutual Bank*,[456] dealing with similar allegations in a complaint.

Prior to Regulation F (effective November 30, 2021), some courts found that the validation notice may identify the current creditor and the original creditor as such by name.[457] However, a lower court found that a collection letter may be confusing in the absence of an explanation of the difference between "Original Creditor" and "Creditor,"[458] or an identification of which entity was the debt collector's "client," as an unsophisticated consumer would be confused as to which entity held the debt.[459] Under Regulation F (effective November 30, 2021), a debt collector that is collecting debt related to a consumer financial product or service[460] will need to provide the name of the creditor to whom the debt was owed on the itemization date[461] in addition to the name of the creditor to whom the debt is currently owed.[462]

Prior to Regulation F, some courts found that it was a violation to use a name for the creditor that is unfamiliar to the consumer or otherwise unclear.[463] Regulation F's Official Interpretations state that "[a] debt collector may disclose its trade or doing-business-as name, instead of its legal name."[464]

Identifying the current creditor as the "assignee"[465] or "current owner"[466] could be confusing to the consumer, and violate FDCPA § 1692g(a)(2). Giving the name of the mortgage servicer, rather than Fannie Mae, as the current creditor, stated

455 674 F.3d 1238 (11th Cir. 2012). *See also* Akar v. Fed. Nat'l Mortg. Ass'n, 843 F. Supp. 2d 154 (D. Mass. 2012) (allegation that law firm sought to collect on behalf of entity that did not yet own mortgage stated a cause of action for failure to identify creditor). *But see* Livermore v. Unifund CCR L.L.C., 2017 WL 6459483 (E.D. Wis. Dec. 15, 2017) (disclosure of name and address of original creditor in debt buyer's letter did not violate FDCPA).

456 683 F.3d 323 (6th Cir. 2012).

457 *See, e.g.*, Dennis v. Niagara Credit Solutions, Inc., 946 F.3d 368, 370 (7th Cir. 2019) (finding no confusion in notice that identified current and original creditors); Zuniga v. Asset Recovery Solutions, 2018 WL 1519162 (N.D. Ill. Mar. 28, 2018); Dokes v. LTD Fin. Services, 328 F. Supp. 3d 1270, 1283 (N.D. Ala. 2018).

458 *See* Bentkowsky v. Benchmark Recovery, Inc., 2014 WL 12579797 (N.D. Cal. Oct. 30, 2014), as amended by 2015 WL 502948 (N.D. Cal. Feb. 3, 2015) (granting summary judgment for consumer on § 1692g(a)(2) claim where collection agency's disclosure identified creditor, Bank of the West, as "Original Creditor" but did not identify it was "current" creditor; letter was confusing and left reader unaware of identity of current creditor). *See also* Kirkpatrick v. TJ Services, Inc., 379 F. Supp. 3d 539, 542 (E.D. Va. 2019) (denying collector's motion to dismiss when notice identified only "Original Creditor" without clearly identifying current creditor).

459 *See* Pardo v. Allied Interstate, L.L.C., 2015 WL 5607646 (S.D. Ind. 2015) (where collection letter's body referred to "Resurgent Capital Services LP" as Allied Interstate's "Client" and offered no explanation of the relationship between LVNV and Resurgent Capital or why/how Resurgent Capital was involved with debt, consumer stated valid § 1692g(a)(2) claim). *See also* Fosnight v. LVNV Funding, L.L.C., 310 F.R.D. 389 (S.D. Ind. 2015) (class action certified); Deschaine v. Nat'l Enterprise Sys., Inc., 2013 WL 12121197 (N.D. Ill. 2013) (denying dismissal of claims under §§ 1692g(a)(2) and 1692e(10) where letter "failed to disclose the name of the current creditor effectively without any explanation of what, if any, the relationship is between the 'Current Creditor' and the debt collector's 'Client'"). *But see* Smith v. Simm Assoc., 926 F.3d 377, 381 (7th Cir. 2019) (by disclosing current creditor, Community Capital Bank, as "original" creditor, and by identifying PayPal Credit as "client"—the name consumer would recognize—letter complied with § 1692g(a)(2); use of term "current creditor" was not required by § 1692g); Maximiliano v. Simm Assoc., Inc., 2018 WL 783104, at *1 (S.D. Fla. 2018); Romano v. Schachter Portnoy, L.L.C., 2017 WL 2804930 (E.D.N.Y. June 28, 2017) (describing creditor as "client" sufficient; "creditor" or "the owner of the debt" were not "magic" words); Johnson v. Simm Assoc., 335 F. Supp. 3d 680, 686 (D. Del. 2018) ("client" designation sufficient given context of letter); Marti v. Schreiber/Cohen, L.L.C., 454 F. Supp. 3d 122, 127 (D. Mass. 2020). *Cf.* Demonte v. Client Services, Inc., 2015 WL 12556159 (S.D. Fla. 2015) (no § 1692g(a) claim stated where letter containing validation notice stated "RE: FIRESTONE-TIRES PLUS," with no mention of CFNA, creditor for store-branded credit card).

460 Reg. F § 1006.2(f). *See* § 9.3a.6, supra.

461 Reg. F § 1006.34(b)(3). *See* § 9.3a.2, supra.

462 Reg. F § 1006.34(c). *See* § 9.3a.1, *supra*.

463 *See* Lait v. First Fed. Credit Control, Inc., 2017 WL 3601951 (N.D. Ohio 2017) (denying collection agency summary judgment on § 1692g(a)(2) claim as there was dispute of material fact as to whether creditor's name was effectively stated where collection agency disclosed creditor's name as "Physicians Associates" rather than its full name, "Physicians Associates, LLC." The court found that "the seemingly minimal addition of 'LLC' gained importance because the name 'Physician Associates' is so common across the country"); Amina v. WMC Mortg. Corp., 2011 WL 1869835 (D. Haw. 2011) (genuine issue of material fact as to whether collector properly identified current creditor, especially given multiple entities that use name "Chase"); Blarek v. Encore Receivable Mgmt., Inc., 2007 WL 984096 (E.D. Wis. 2007) (use of registered acronym which consumer had never encountered before could be confusing); Schneider v. TSYS Total Debt Mgmt., Inc., 2006 WL 1982499 (E.D. Wis. 2006) (collector may have violated Act by disclosing name of current creditor in confusing shorthand fashion, by using only its first name, "Target," which unsophisticated consumer would not recognize because it identifies several unrelated business entities with same first name). But see Leonard v. Zwicker & Assoc., 713 Fed. Appx. 879, 885 (11th Cir. 2017) (identifying current creditor as "American Express" was permissible, as consumer would more confused if creditor was correctly identified as "American Express Centurion Bank"); Stricklin v. First Nat'l Collection Bur., Inc., 2012 WL 1076679 (S.D. Ill. 2012) (identification of original creditor as "Sprint Services," rather than "Sprint Nextel Corporation" without more did not violate FDCPA); Hammett v. AllianceOne Receivables Mgmt., Inc., 2011 WL 3819848 (E.D. Pa. 2011) (reference to original creditor as "PNC Bank" was not confusing); Bode v. Encore Receivable Mgmt., Inc., 2007 WL 2493898 (E.D. Wis. 2007) (using similar name "Capital One Services, Inc." was not confusing).

464 Reg. F Official Interpretations § 34(c)(2)(i)-1.

465 *See* Neff v. Schlee & Stillman, L.L.C., 2017 WL 1058847 (E.D. Mich. 2017); Dewees v. Legal Servicing, 506 F. Supp. 2d 128 (E.D.N.Y. 2007) (disclosure that debt had been "assigned to this office" might convey that defendant had purchased debt and was confusing about identity of current creditor).

466 *See* Pardo v. Allied Interstate, L.L.C., 2015 WL 5607646, at *3 (S.D. Ind. 2015); Walls v. United Collection Bur., Inc., 2012 WL 1755751 (N.D. Ill. 2012). *But see* Crawford v. Am. Home Mortg. Servicing, Inc., 2012 WL 12995303 (W.D. Wis. 2012) (granting summary judgment for collection attorneys on § 1692g(a) claim where letter listed servicer rather than mortgage holder as creditor). *Cf.* Keasey v. Judgment Enforcement Law Firm, P.L.L.C., 2014 WL 1744268 (W.D. Mich. 2014) (acceptable for collection lawyer to identify creditor by name, but label it as his client, not as creditor).

a claim.[467] Giving the creditor's name in the letter only following "Re:" without identifying the creditor as the creditor may violate FDCPA § 1692g(a)(2).[468] Listing five entities could confuse the least sophisticated consumer about which entity was the current creditor.[469] A validation notice may violate FDCPA § 1692g(a) if it does not clearly indicated that the consumer's written response should be sent to the debt collector, rather than the creditor.[470]

9.7.4 Assumption of Validity Unless Dispute

A debt collector must include "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector."[471]

The consumer is entitled to dispute a debt orally to overcome a collector's assumption that a debt is valid,[472] although only a written dispute of the debt triggers the collector's duty to provide verification of the debt.[473] Accordingly, the validation notice may *not* state that the consumer must use a written request to dispute the debt in order to overcome the FDCPA § 1692g(a)(3) assumption by the debt collector that the debt is valid.[474] The model validation notice in Regulation F (effective November 30, 2021) states "call or write to us" for this disclosure.[475]

One court has held that a debt collector is not required to provide debtors with a telephone number in order to assist debtors in disputing the debt orally.[476] Another court found that the collector's did not violate FDCPA § 1692g(a)(3) when it limited the debtor's means of disputing the debt to one mailing address and two phone numbers.[477] Regulation F also lists telephone contact information as optional information that a debt collector can include on a validation notice.[478] Fortunately phone numbers have become easier to find on state debt collection licensing and complaint websites.

In *Hart v. FCI Lender Services, Inc.*,[479] the Second Circuit noted the serious nature of a validation notice omitting the required language that assumption of the validity of the debt only applies to the debt collector. "[U]nder [FDCPA] § 1692g(a) . . . such an unchallenged debt may be assumed to be valid only by the *debt collector*, leaving the consumer free to contest the debt with the lender either directly or in the courts."[480]

Unfortunately, a number of other appellate courts have disagreed. The Sixth Circuit considered the following collector's statement of the information required by FDCPA § 1692g(a)(3): "All portions of this claim shall be assumed valid unless disputed within thirty days of receiving this notice."[481] The

467 See Best v. Fed. Nat'l Mortg. Ass'n, 450 F. Supp. 3d 606, 628 (D. Md. 2020); Sciortino v. Barrett Daffin Frappie Levin & Brock, L.L.P., 9 F. Supp. 3d 1322 (N.D. Ga. 2013). *See also* Bourff v. Rubin Lublin, L.L.C., 674 F.3d 1238 (11th Cir. 2012) (naming future purchaser of mortgage debt as the creditor was deceptive); Shoup v. McCurdy & Candler, L.L.C., 465 Fed. Appx. 882, 883–884 (11th Cir. 2012) (listing MERS as the creditor violated FDCPA); Long v. Fenton & McGarvey Law Firm P.S.C., 223 F. Supp. 3d 773 (S.D. Ind. 2016) (identifying current creditor as "original creditor" when current creditor had bought debt from original creditor stated claim); Aribal v. GMAC Mortg., L.L.C., 2013 WL 3895282 (N.D. Ill. 2013) ("language suggests that another entity, namely, the recorded holder of the security deed, may also be a potential creditor"); Beckles v. Aldridge Connors, L.L.P., 2013 WL 5355481 (N.D. Ga. 2013) (letter may violate § 1692g when it stated creditor "may not be the current recorded holder of the security deed," and was simply "authorized to collect payment on your loan" and when trust was later identified as note holder).

468 *See* Dix v. Nat'l Credit Sys., Inc., 2017 WL 4865259 (D. Ariz. 2017) (granting summary judgment for consumer on § 1692g(a)(2) claim, but granting summary judgment for agency on § 1692e claim for same conduct); Macelus v. Capital Collection Serv., 2017 WL 5157389 (D.N.J. Nov. 7, 2017) (rejecting consumer's § 1692g(a)(2) claim where letter contained name of creditor stated as "Account for: Advanced Endoscopy & Surgical Ctr., LLC." with debt collector's name at top of letterhead; there was no other way to read statement); McGinty v. Prof'l Claims Bur., Inc., 2016 WL 6069180 (E.D.N.Y. 2016); Neff v. Schlee & Stillman, L.L.C., 2016 WL 4264203 (E.D. Mich. 2016); Datiz v. Int'l Recovery Assoc., Inc., 2016 WL 4148330 (E.D.N.Y. 2016) (sole reference to current creditor was in header stating "Re: John T. Mather Hospital"). *But see* Goldstein v. Diversified Adjustment Serv., Inc., 2017 WL 5592683 (E.D.N.Y. 2017) (where subject line stated that letter was sent "Re Sprint" and had multiple references to "your service with Sprint" and similar usages, reading of letter as a whole compelled conclusion that consumer was on notice that she owed money to Sprint); Santibanez v. Nat'l Credit Sys., Inc., 2017 WL 126111 (D. Or. 2017) (disclosing creditor only as Re: Encompass Management Consultants complied with § 1692g(a)(1)); Demonte v. Client Services, Inc., 2015 WL 12556159 (S.D. Fla. July 29, 2015) (no § 1692g(a) claim stated where letter containing validation notice stated "RE: FIRESTONE-TIRES PLUS," with no mention of CFNA, creditor for store-branded credit card).

469 *See* Smith v. Cohn, Goldberg & Deutsch, L.L.C., 296 F. Supp. 3d 754 (D. Md. 2017).

470 *See* Santoro-Wanek v. Trojan Prof'l Services, Inc., 2011 WL 13238379 (D.N.J. June 30, 2011).

471 15 U.S.C. § 1692g(a)(3); Reg. F Reg. F § 1006.34(c)(2)(ix). 1006.34(c)(3)(iii).

472 Riccio v. Sentry Credit, Inc., 954 F.3d 582 (3d Cir. 2020); Macy v. GC Serv. L.P., 897 F.3d 747, 758 n.9 (6th Cir. 2018); Clark v. Absolute Collection Serv., Inc., 741 F.3d 487, 491 (4th Cir. 2014); Hooks v. Forman, Holt, Eliades & Ravin, L.L.C., 717 F.3d 282 (2d Cir. 2013). Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078 (9th Cir. 2005). *See also* 86 Fed. Reg. 5766 at 581 (Jan. 19, 2021) ("The Bureau agrees with every circuit court that has addressed this issue and interprets the absence of a reference to a writing requirement in FDCPA section 809(a)(3) to mean that a writing is not required.").

473 15 U.S.C. § 1692g(b). *See* § 9.10, *infra*.

474 *See, e.g.*, Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078 (9th Cir. 2005). *But see* Riggs v. Prober & Raphael, 681 F.3d 1097, 1099 (9th Cir. 2012) ("a validation notice violates § 1692g(a)(3) of the FDCPA only where it expressly requires a consumer to dispute her debt in writing").

475 Reg. F Appx. B-1 Model Form for Validation Notice.

476 Nasca v. GC Services, Ltd., 2002 WL 31040647 (S.D.N.Y. 2002).

477 Rodriguez v. Cascade Collections L.L.C., 2021 WL 1222147, at *9 (D. Utah 2021).

478 Reg. F § 1006.34(d)(3)(i).

479 797 F.3d 219 (2d Cir. 2015).

480 797 F.3d 219, 227 (2d Cir. 2015). *See also* Reg. F Appx. B-1 Model Form for Validation Notice (instructing the consumer to "call or write to us . . . If you do not, we will assume that our information is correct."); McWilliams v. Advanced Recovery Sys., Inc., 174 F. Supp. 3d 936 (S.D. Miss. 2016); Allah-Mensah v. Law Office of Patrick M. Connelly, P.C., 2016 WL 6803775 (D. Md. 2016).

481 Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1028–1029 (6th Cir. 1992).

court ruled that "even under the 'least sophisticated consumers' standard" the language satisfied the Act.[482] In *Greco v. Trauner, Cohen & Thomas, L.L.P.*,[483] the Second Circuit held that the debt collector's addition to the validation notice that the *creditor* would also assume that the debt was valid if the consumer did not dispute the debt in thirty days was not a violation of the FDCPA.[484] The Eleventh Circuit has agreed.[485]

Some lower courts have disagreed and held that the courts should give full effect to the language Congress chose, specifically "the debt will be assumed valid by the debt collector," and that the omission of that assumption by the debt collector may violate the FDCPA.[486] The statement that *all the information in the letter* providing the validation notice will be assumed valid in the absence of a consumer dispute was overly broad and violated FDCPA § 1692g.[487]

9.7.5 *Verification Required If Consumer Timely Disputes Debt in Writing*

A debt collector must include "a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector."[488]

The validation notice must state that a *written* response *is* required from the consumer requesting verification or the name of the original creditor in order for debt verification to be required of the debt collector under FDCPA § 1692g(a)(4).[489]

In *Bishop v. Ross Earle & Bonan, P.A.*,[490] the Eleventh Circuit rejected the debt collector's argument that omitting the "in writing" requirement should trigger a waiver by the debt collector of the FDCPA § 1692g(a)(4) requirement that disputes be made in writing. The court held that the FDCPA does not allow the debt collector to waive the Congressional scheme providing written notice by the consumer to trigger a verification or the termination of debt collection.[491] In a footnote, the court clarified that debt collectors can choose to cooperate with consumers who dispute their debts orally, but this cooperation does not cure improper notice under FDCPA § 1692g.[492]

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482 *Id. But cf.* Philip v. Sardo & Batista, P.C., 2011 WL 5513201 (D.N.J. 2011) (complaint stated § 1692g(a) claim by alleging that validation disclosure that "the debt will be assumed valid" omitted statutorily required phrase "by the debt collector"); Koch v. Atkinson, Diner, Stone, Mankuta, & Ploucha, P.A., 2011 WL 4499100 (S.D. Fla. 2011); Galuska v. Collectors Training Inst. of Illinois, Inc., 2008 WL 2050809 (M.D. Pa. 2008); Smith v. Hecker, 2005 WL 894812 (E.D. Pa. 2005).

483 412 F.3d 360, 363 (2d Cir. 2005).

484 *See also* Dibattista v. Buckalew, Frizell & Crevina, L.L.P., 574 Fed. Appx. 107 (3d Cir. 2014) (statement that client as well as lawyer would assume debt to be valid did not violate § 1692g). *But cf.* Baker v. G.C. Services, 677 F.2d 775, 777 (9th Cir. 1982).

485 *See* Caceres v. McCalla Raymer, L.L.C., 755 F.3d 1299 (11th Cir. 2014).

486 *See* Panzer v. Alternative Claims Mgmt., L.L.C., 2016 WL 3771251 (S.D.N.Y. July 8, 2016); Matmanivong v. Nat'l Creditors Connection, Inc., 79 F. Supp. 3d 864 (N.D. Ill. 2015); Walker v. Greenspoon Marder, P.A., 2014 WL 7174220 (S.D. Fla. Dec. 17, 2014); DeCapri v. Law Offices of Shapiro Brown & Alt, L.L.P., 2014 WL 4699591 (E.D. Va. Sept. 19, 2014); Martin v. Butler & Hosch, P.A., 2014 WL 3593622 (M.D. Fla. July 18, 2014); Carbonell v. Weinstein Pinson & Riley, P.S., 2014 WL 2581043 (S.D. Fla. May 30, 2014); Diaz v. Residential Credit Solutions, Inc., 965 F. Supp. 2d 249 (E.D.N.Y. 2013); Iyamu v. Clarfield, Okon, Salomone, & Pincus, 950 F. Supp. 2d 1271 (S.D. Fla. 2013); Orr v. Westport Recovery Corp., 941 F. Supp. 2d 1377 (N.D. Ga. 2013); Smith v. Hecker, No. Civ. A. 04-5820, 2005 WL 894812, at *6 (E.D. Pa. Apr. 18, 2005).

487 Diaz v. Residential Credit Solutions, Inc., 2013 WL 1820948 (E.D.N.Y. Apr. 29, 2013).

488 15 U.S.C. § 1692g(a)(4); Reg. F § 1006.34(c)(3)(i).

489 *See* Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268, 1271–1272 (11th Cir. 2016); Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078, 1081 (9th Cir. 2005); Miller v. Payco Gen. Am. Credits, Inc., 943 F.2d 482 (4th Cir. 1991); Henry v. Radius Global Solutions, L.L.C., 357 F. Supp. 3d 446, 458 (E.D. Pa. 2019) (use of conditional language may have given consumer impression that an oral notice was sufficient in Third Circuit); Homer v. Law Offices of Frederic I. Weinberg & Assoc., ___ F. Supp. 3d ___, 2017 WL 5184193 (E.D. Pa. Nov. 9, 2017) (where collection letter stated that collection law firm had to "hear from" consumer, language was deceptive because it suggested that verification request could be made orally); Conquest v. Plaza Services, L.L.C., 2017 WL 3401513 (E.D. Va. Aug. 8, 2017); Macy v. GC Services L.P., 2016 WL 5661525 (W.D. Ky. Sept. 29, 2016); Morgan v. Vogler Law Firm, P.C., 2016 WL 3958608 (E.D. Mo. July 22, 2016); Pearson v. Convergent Outsourcing, Inc., 132 F. Supp. 3d 1355 (M.D. Fla. Sept. 21, 2015); Grant-Fletcher v. McMullen & Drury, P.A., 2013 WL 4051890 (D. Md. Aug. 8, 2013) (section 1692g disclosure that collector would send verification in event of oral telephone dispute overshadowed statute's writing requirement); Crafton v. Law Firm of Jonathan B. Levine, 2013 WL 3441243 (E.D. Wis. July 9, 2013); Bicking v. Law Offices of Rubenstein & Cogan, 783 F. Supp. 2d 841, 845 (E.D. Va. 2011); Welker v. Law Office of Daniel J. Horwitz, 699 F. Supp. 2d 1164 (S.D. Cal. 2010); Beasley v. Sessoms & Rogers, P.A., 2010 WL 1980083 (E.D.N.C. Mar. 1, 2010); Nero v. Law Office of Sam Streeter, P.L.L.C., 655 F. Supp. 2d 200, 206 (E.D.N.Y. 2009); Bankston v. Phycom Corp., 2007 WL 4170627 (N.D. Cal. Nov. 19, 2007); McCabe v. Crawford & Co., 272 F. Supp. 2d 736 (N.D. Ill. 2003); Grief v. Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P., 217 F. Supp. 2d 336 (E.D.N.Y. 2002). *See also* McCabe v. Eichenbaum & Stylianou, L.L.C., 2012 WL 6624229 (D.N.J. Dec. 19, 2012) (notice stated "[i]f, for any reason, you dispute this debt or any portion thereof, you may notify us of the same in writing within thirty (30) days from receipt of this notice;" consumer could have interpreted letter to mean that debt could be contested in writing or through some other form; this ambiguity indicates possible violation of FDCPA); Hernandez v. Guglielmo, 2012 WL 993676 (D. Nev. Mar. 23, 2012); Osborn v. Ekpsz, L.L.C., 821 F. Supp. 2d 859 (S.D. Tex. 2011). *Cf.* Conti v. Messerli & Kramer, P.A., 2016 WL 3566221 (E.D. Wis. June 27, 2016) (defense that allowing oral requests for verification was consumer-friendly was not stricken because it was possible factor in computation of statutory damages); Langley v. Weinstein & Riley, P.S., 2013 WL 1896964 (S.D. Tex. May 6, 2013) (stating in one place that writing is required and then omitting that statement in other parts of notice may confuse consumer). *But see* Kagan v. Selene Fin. L.P., 2016 WL 5660255 (S.D.N.Y. Sept. 28, 2016) (validation notice stating that dispute of debt's validity "may be" made in writing, followed immediately by telephone number, rather than that dispute will be acted on "if the consumer notifies the debt collector in writing," did not violate § 1692g(4)).

490 817 F.3d 1268 (11th Cir. 2016).

491 *See also* Chandler v. Eichel, 2017 WL 4236569 (S.D. Ind. Sept. 25, 2017); Bicking v. Law Offices of Rubenstein and Cogan, 783 F. Supp. 2d 841 (E.D. Va. 2011); Welker v. Law Office of Daniel J. Horwitz, 699 F. Supp. 2d 1164 (S.D. Cal. 2010); McCabe v. Crawford & Co., 272 F. Supp. 2d 736 (N.D. Ill. 2003); Grief v. Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P., 217 F. Supp. 2d 336 (E.D.N.Y. 2002).

492 *See also* Adams v. Homeward Residential, Inc., 2014 WL 12573389 (S.D. Ala. June 25, 2014) (dismissing § 1692e claim where mortgage

A lower court allowed a validation notice to give the consumer forty-five days to request verification and the original creditor's name and to dispute the debt.[493]

Consumer disputes are discussed at § 9.10, *infra*.

9.7.6 Name and Address of Original Creditor If Timely Requested

A debt collector must include "a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor."[494]

Prior to Regulation F (effective November 30, 2021), some courts held that notice of the right to obtain the name and address of the original creditor (under FDCPA § 1692g(a)(5)) need not be given if there was only one creditor.[495] A lower court found that there was no violation for the validation notice to offer to identify the original creditor, when the identified current creditor was also the original creditor.[496] The Eighth Circuit would allow the debt collector to disclose the original creditors and their addresses and omit the offer to provide their name and address.[497] The Regulation F supplemental information states that "[t]he Bureau did not propose an exception to this disclosure requirement if the original creditor and the current creditor" and notes that the CFPB proposed Reg. F § 1006.34(c)(3)(ii) to implement the requirement in FDCPA § 1692g(a)(5).

9.7.7 Courts' Recommended Notices

Regulation F (effective November 30, 2021) created a model validation notice, which can provide certain safe harbors to debt collectors. The notice and its possible safe harbors are discussed at § 9.5.2, *supra*.

Prior to Regulation F, three appellate decisions suggested that additional language should be added to validation notices to avoid confusion or deception when the debt collector is demanding immediate payment, threatening suit, or filing suit in the period the consumer has the right to obtain verification of the debt. In order to maintain the safe harbor for use of the Regulation F model validation notice, collectors can only use "optional disclosures under applicable law" if they are "specifically required by, or that provide safe harbors under, applicable law" and such disclosures would have to appear on the reverse of the validation notice if allowed.[498]

In *Savino v. Computer Credit, Inc.*, the collection agent's violation of the FDCPA "consisted of its decision to ask for immediate payment without also explaining that its demand did not override the consumer's rights under FDCPA § 1692g to seek verification of the debt."[499] The court explained:

> CCI could have both sought immediate payment and complied with the Act simply by inserting into the text of its letter transitional language that referred the addressee to the validation notice. For example, CCI might have added one of the following paragraphs to its demand letter:
>
> "Although we have requested that you make immediate payment or provide a valid reason for nonpayment, you still have the right to make a written request, within thirty days of your receipt of this notice, for more information about the debt. Your rights are described on the reverse side of this notice.
>
> "Our demand for immediate payment does not eliminate your right to dispute this debt within thirty days of receipt of this notice. If you choose to do so, we are required by law to cease our collection efforts until we have mailed that information to you. Your rights are described on the reverse side of this notice."[500]

In *Bartlett v. Heibl*, Judge Posner announced a "safe haven" validation notice for the Seventh Circuit where the letter threatens suit during the validation period. That "safe haven" language unfortunately has a legal error in it along with its good ideas:[501]

> We commend this redaction as a safe harbor for debt collectors who want to avoid liability for the kind of suit that Bartlett has brought and now won. The qualification "for the kind of suit that Bartlett has brought and now won" is important. We are not certifying our letter as proof against challenges based on other provisions of the statute; those provisions are not before us. With that caveat, here is our letter:
>
> "Dear Mr. Bartlett:
>
> "I have been retained by Micard Services to collect from you the entire balance, which as of September 25, 1995,

servicer, long after validation period had expired, sent notice that re-offered to verify debt and was not limited to written request; court deemed servicer's actions "consumer-friendly, effectively conferring on Adams an additional layer of procedural protection over and above what the FDCPA requires," and consumer produced no evidence that offer was false or not made in good faith).

493 *See* Greig v. Backer Aboud Poliakoff & Foelster, L.L.P., 2017 WL 57026 (S.D. Fla. Jan. 5, 2017).

494 15 U.S.C. § 1692g(a)(5); Reg. F § 1006.34(c)(3)(ii).

495 *See* Cavallaro v. Law Offices of Shapiro & Kriesman, 933 F. Supp. 1148 (E.D.N.Y. 1996); FTC Official Staff Commentary § 809(a)-2, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988); Kodner, FTC Informal Staff Letter (Mar. 7, 1979); Cope, FTC Informal Staff Letter (Dec. 23, 1977). See also Robertson v. Horton Bros. Recovery, Inc., 2007 WL 2009703 (D. Del. July 3, 2007); Foresberg v. Fid. Nat'l Credit Services, Ltd., 2004 WL 3510771 (S.D. Cal. Feb. 26, 2004); Brenker v. Creditors Interchange, Inc., 2004 WL 594502 (S.D.N.Y. Mar. 25, 2004). *Cf.* Dolan v. Schreiber & Assoc., 2002 U.S. Dist. LEXIS 6005 (D. Mass. 2002), *adopted*, 2002 U.S. Dist. LEXIS 5998 (D. Mass. Mar. 29, 2002) (claim for misidentified original creditor).

496 See Islam v. Credit Control, L.L.C., 2017 WL 2788938 (E.D.N.Y. 2017).

497 Volden v. Innovative Fin. Sys., Inc., 440 F.3d 947 (8th Cir. 2006). *See also* Spangler v. Conrad, 2010 WL 2389481 (E.D. Tenn. 2010).

498 Reg. F § 1006.34(d)(3)(iv)(A). *See* § 9.3c.2, *supra*.

499 164 F.3d 81, 86 (2d Cir. 1998).

500 *Id.*

501 See Bartlett v. Heibl, 128 F.3d 497, 501–502 (7th Cir. 1997).

was $1,656.90, that you owe Micard Services on your MasterCard Account No. 5414701617068749.

"If you want to resolve this matter without a lawsuit, you must, within one week of the date of this letter, either pay Micard $316 against the balance that you owe (unless you've paid it since your last statement) or call Micard at 1-800-221-5920 ext. 6130 and work out arrangements for payment with it. If you do neither of these things, I will be entitled to file a lawsuit against you, for the collection of this debt, when the week is over.

"Federal law gives you thirty days after you receive this letter to dispute the validity of the debt or any part of it. If you don't dispute it within that period, I'll assume that it's valid. If you do dispute it—by notifying me in writing to that effect—I will, as required by the law, obtain and mail to you proof of the debt. And if, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor (Micard Services), I will furnish you with that information too.

"The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you.

"Sincerely,

"John A. Heibl"

We cannot require debt collectors to use "our" form. But of course if they depart from it, they do so at their risk. Debt collectors who want to avoid suits by disgruntled debtors standing on their statutory rights would be well advised to stick close to the form that we have drafted. It will be a safe haven for them, at least in the Seventh Circuit.

While the model letter has many salutary features, it fails to clearly inform the consumer that a dispute of a part of the debt—for example, a mysterious service charge or the method by which the current balance was determined—triggers the obligation of the collector to validate that part of the debt. Such an omission would violate the FDCPA, at least in other circuits.[502]

The Seventh Circuit in *Thomas v. Law Firm of Simpson & Cybak*[503] again took the precautionary step of suggesting how collection law firms could best provide the validation notice without confusing consumers if a debt collection suit was filed about the same time that the validation notice was provided. The court noted that the consumers might not understand that they had to respond to the summons to avoid a default judgment. While an amendment to the FDCPA overruled the main holding in *Thomas*, the court's advice regarding the notice may still be worth noting. The court recommended that collectors avoid that potential confusion altogether by sending the debt validation notice thirty days before suit, making it easier for consumers to understand that the requirements of the FDCPA and the summons are separate. Where that was not possible, the court gave collectors in the Seventh Circuit sample language to add to the FDCPA validation notice that the court believes will reduce consumer confusion:

> This advice pertains to your dealings with me as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint. The summons is a command from the court, not from me, and you must follow its instructions even if you dispute the validity or amount of the debt. The advice in this letter also does not affect my relations with the court. As a lawyer, I may file papers in the suit according to the court's rules and the judge's instructions.[504]

9.8 Collector Actions After Providing Notice

9.8.1 Overview

Some debt collection activities are permitted during the thirty-day period in which the consumer may dispute the debt and request original-creditor information.[505] In 2006 Congress amended the FDCPA to codify this construction of the FDCPA.[506] However, the debt collection activities must be

502 *See, e.g.*, Baker v. G.C. Services, 677 F.2d 775 (9th Cir. 1982). *But see* Pescatrice v. Nat'l Action Fin. Services, Inc., 2006 WL 8432179 (S.D. Fla. Oct. 18, 2006) (use of Miller safe harbor language protected collection agency from being in violation of § 1692g).

503 392 F.3d 914 (7th Cir. 2004).

504 *Id.* at 919. *Cf.* Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988).

505 15 U.S.C. 1692g(b). *See* Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85 (2d Cir. 2008); Durkin v. Equifax Check Services, Inc., 406 F.3d 410 (7th Cir. 2005) (validation period is not grace period); Palmer v. Stassinos, 348 F. Supp. 2d 1070 (N.D. Cal. 2004) (debt collector was not required to suspend debt collection activities, including pursuing litigation options, during period for requesting verification); Smith v. Computer Credit, Inc., 167 F.3d 1052, 1055 (6th Cir. 1999); Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Croftcheck v. Computer Credit, Inc., 2010 WL 4916213 (M.D. Pa. Nov. 24, 2010) (continued collection activities did not overshadow notice); Bey v. Daimler Chrysler Services, L.L.C., 2006 WL 361385 (D.N.J. 2006) (collection attorneys' filing of replevin action within thirty-day dispute period did not violate FDCPA); Mezines, FTC Advisory Opinion (Mar. 31, 2000). *See also* Weber v. Computer Credit, Inc., 259 F.R.D. 33 (E.D.N.Y. 2009) (thirty-day validation period is not grace period, and, unless debt is disputed, debt collector may demand immediate payment and continue collection activity).

506 Pub. L. No. 109-351, § 802(c), 120 Stat. 1966 (Oct. 13, 2006). E.g., Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Miller v. Payco Gen. Am. Credits, Inc., 943 F.2d 482 (4th Cir. 1991). *See* Tilatitsky v. Medicredit, Inc., 2016 WL 5906819 (E.D. Mo. Oct. 11, 2016) (seeking

carefully conducted so that they do not undermine the effectiveness of the debt verification process.

The courts have built on the principle that the validation notice must be provided *effectively*[507] to develop the principle that the debt collection activities must not contradict, confuse, or obscure the notice of those rights. Congress codified the case law and an FTC Formal Advisory Opinion[508] by stating that a debt collector's activities "may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt."

The essence of the decisions is that any debt collection activities during the validation period should not significantly interfere with the effective communication of the consumer's debt verification rights. The effectiveness may be unlawfully compromised by debt collection activities that: 1) obscure or overshadow; 2) are inconsistent with or contradict; or 3) deceive or confuse an unsophisticated consumer about their legal right to obtain verification of the debt. To do so renders the debt validation notice ineffective.

In addition, Regulation F (effective November 30, 2021) states that during the validation period, "a debt collector must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's rights to dispute the debt and to request the name and address of the original creditor.[509] Use of the model validation notice found at Reg. F Appendix B-1 provides a safe harbor from liability for overshadowing found on the validation notice itself.[510]

The consumer must dispute the debt in writing before the debt collector is required to stop all of its collection efforts and not resume collection until it has verified the debt. On the other hand, the debt collector must not engage in activities during the thirty-day period that may undermine the effectiveness of the validation notice. So, the collector should not threaten collection activities in a way that could confuse the consumer about the right to obtain or how to obtain verification of the debt.

In *Ellis v. Solomon & Solomon, P.C.*,[511] the Second Circuit held that a validation notice was overshadowed by the debt collector's service of a collection lawsuit on the consumer during the thirty-day period for a consumer to request verification of the debt, since the collector failed to explain or clarify in either the dun or a notice provided with the summons and complaint that the commencement of the lawsuit had no effect on the information conveyed in the validation notice.

A court has required collectors in Oklahoma to refrain from taking a default judgment during the validation period to avoid a state law conflict with the FDCPA.[512] On the other hand, the Sixth Circuit found it possible to give the debt validation notice and file a foreclosure on the same day, despite the different time periods for the response to each, as long as the schedule was clearly explained.[513]

9.8.2 Limits on Immediate Demand for Payment

Many courts have found a collector's demand for payment within a short time frame—for example, five days—misleading when made in the same letter as the validation notice[514] or in

payments and calls okay); Sprouse v. City Credits Co., 126 F. Supp. 2d 1083 (S.D. Ohio 2000); Tipping-Lipshie v. Riddle, 2000 WL 33963916 (E.D.N.Y. Mar. 1, 2000); Ditty v. CheckRite, Ltd., 973 F. Supp. 1320 (D. Utah 1997). *See also* Spears v. Brennan, 745 N.E.2d 862 (Ind. Ct. App. 2001). *See* § 3.4.2.4, *supra*.

507 *See* Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Miller v. Payco Gen. Am. Credits, Inc., 943 F.2d 482 (4th Cir. 1991); Swanson v. S. Oregon Credit Serv., 869 F.2d 1222 (9th Cir. 1988); § 9.3.5, *supra*.

508 Mezines, FTC Advisory Opinion (Mar. 31, 2000).

Previous FTC informal staff letters were not consistent on this issue. *See* Freeman, FTC Informal Staff Letter (Nov. 15, 1988). *Cf.* Miller, FTC Informal Staff Letter (May 13, 1994); Evenchick, FTC Informal Staff Letter (May 30, 1978); Fardell, FTC Informal Staff Letter (Aug. 1, 1980). *But cf.* FTC Official Staff Commentary § 809(b)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988); Wagner, FTC Informal Staff Letter (June 29, 1987); Herold, FTC Informal Staff Letter (Feb. 28, 1983); Berhenke, FTC Informal Staff Letter (May 21, 1979); Brown, FTC Informal Staff Letter (May 15, 1978).

509 Reg. F § 1006.38(b)(1).

510 Reg. F § 1006.38(b)(2).

511 591 F.3d 130 (2d Cir. 2010). *But cf.* Clark v. Shapiro & Pickett, L.L.P., 452 Fed. Appx. 890 (11th Cir. 2012) (actions by foreclosure lawyer to foreclose during validation period did not interfere with notice of consumer's right to verification, noting consumer's attorney timely requested verification).

512 Mendus v. Morgan & Assoc., 994 P.2d 83 (Okla. Civ. App. 1999). *See also* Spears v. Brennan, 745 N.E.2d 862 (Ind. Ct. App. 2001). *But see* Weinstein v. Fink, 2001 WL 185194 (N.D. Ill. 2001).

513 *See* Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504 (6th Cir. 2007). *See also* Hall v. Leone Halpin & Konopinski, L.L.P., 2008 WL 608609 (N.D. Ind. Feb. 28, 2008).

514 Savino v. Computer Credit, Inc., 164 F.3d 81, 86 (2d Cir. 1998). *See* Taylor v. Fink, 365 F.3d 572 (7th Cir. 2004); Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057 (7th Cir. 1999); Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997); United States v. Nat'l Fin. Services, Inc., 98 F.3d 131 (4th Cir. 1996); Avila v. Rubin, 84 F.3d 222, 226 (7th Cir. 1996); Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996); Mills v. Turner, 2017 WL 3670967 (D. Mass. Aug. 25, 2017); Balke v. Alliance One Receivables Mgmt., Inc., 2017 WL 2634653 (E.D.N.Y. June 19, 2017); Wolff v. Stellar Recovery, Inc., 2016 WL 461619 (N.D. Ill. Feb. 5, 2016); Schuller v. AllianceOne Receivables Mgmt., Inc., 2016 WL 427961 (E.D. Mo. Feb. 4, 2016); Reeseg v. Gen. Revenue Corp., 2015 WL 4525869 (D.N.J. July 27, 2015); O'Connor v. Diversified Consultants, Inc., 2014 WL 859822 (E.D. Mo. Mar. 5, 2014); Vu v. Diversified Collection Services, Inc., 293 F.R.D. 343 (E.D.N.Y. 2013); Read v. Messerli and Kramer, P.A., 2012 WL 1439046 (D. Minn. Apr. 26, 2012); McCafferty v. Schwartzkopf Law Office, 2011 WL 4916382 (E.D. Mo. Oct. 17, 2011); Kight v. Eskanos & Adler, P.C., 2007 WL 173825 (S.D. Cal. Jan. 8, 2007); Francis v. Snyder, 389 F. Supp. 2d 1034 (N.D. Ill. Sept. 30, 2005); Aramburu v. Healthcare Fin. Services, 361 F. Supp. 2d 21 (D. Conn. 2005); Swift v. Maximus, Inc., 2004 WL 1576618 (E.D.N.Y. July 15, 2004); Mistretta v. Babb, 2003 WL 1868717 (N.D. Ill. Apr. 9, 2003); Rhoades v. West Virginia Credit Bur. Reporting Services, 96 F. Supp. 2d 528 (S.D. W. Va. 2000); Sokolski v. Trans Union Corp., 53 F. Supp. 2d 307 (E.D.N.Y.

a phone call.[515] In *Mashiri v. Epsten Grinnell & Howell*,[516] the Ninth Circuit found that a demand for payment thirty-five days from the date of the letter containing the validation notice was "inconsistent" with the right to dispute the debt for thirty days after receipt of the letter, as the thirty-five-day deadline could expire before the statutory thirty-day deadline. This analysis may also apply to a follow-up letter sent in close proximity to the notice that the consumer has thirty days to request verification of the collector's claim.[517] A request for payment in thirty days may be confusing when further action is threatened if the payment is not made.[518]

In *Graziano v. Harrison*, which was overturned on other grounds, the Third Circuit held that an attorney's letter demanding payment within ten days upon the threat of immediate legal action would mislead the least sophisticated debtor, in violation of FDCPA § 1692g, as well as violating FDCPA § 1692e(10).[519] The Seventh Circuit held that collection letters which requested "prompt payment" or "call our office immediately" stated a cause of action under FDCPA § 1692g sufficient to withstand a rule 12(b)(6) motion to dismiss.[520] In *Miller v. Payco-General American Credits, Inc.*,[521] the Fourth Circuit found that the overriding demand for immediate payment violated the Act.[522]

As discussed in § 9.7.7, *supra*, the Second Circuit has offered language to a dunning letter that would in its view harmonize the demand for immediate payment and the validation notice, which explains that a demand for payment does not eliminate the right to dispute the debt.[523]

1999); Talbot v. GC Services L.P., 52 F. Supp. 2d 846 (W.D. Va. 1999); Garner v. Kansas, 1999 WL 262100 (E.D. La. Apr. 30, 1999); Veillard v. Mednick, 24 F. Supp. 2d 863 (N.D. Ill. 1998); Jenkins v. Union Corp., 999 F. Supp. 1120 (N.D. Ill. 1998); Rachoza v. Gallas & Schultz, 1998 WL 171280 (D. Kan. Mar. 23, 1998); Hairston v. Whitehorn & Delman, 1998 WL 35112 (S.D.N.Y. Jan. 30, 1998); Creighton v. Emporia Credit Serv., Inc., 981 F. Supp. 411 (E.D. Va. 1997); Savino v. Computer Credit, Inc., 960 F. Supp. 599 (E.D.N.Y. 1997); Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521 (E.D. Pa. 1996); Lee v. CBC Co., 1996 U.S. Dist. LEXIS 21993 (S.D. Ohio Sept. 26, 1996); Edwards v. Nat'l Bus. Factors, Inc., 897 F. Supp. 455 (D. Nev. 1995); Johnson v. Eaton, 873 F. Supp. 1019 (M.D. La. 1995); Avila v. Van Ru Credit Corp., 1995 WL 55255 (N.D. Ill. Feb. 8, 1995), aff'd sub nom. Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996); Cortright v. Thompson, 812 F. Supp. 772 (N.D. Ill. 1992); Colman v. Payco-GAC Inc., 1992 U.S. Dist. LEXIS 22733 (D. Conn. Jan. 22, 1992), rev'g 774 F. Supp. 691 (D. Conn. 1990); Masuda v. Thomas Richards & Co., 759 F. Supp. 1456 (C.D. Cal. 1991); Weber v. Payco-General Am. Credits, 1990 WL 341654 (D. Conn. Dec. 13, 1990); Ost v. Collection Bur., Inc., 493 F. Supp. 701 (D.N.D. 1980); Appx. E.2.6.2, *infra*. *Cf.* Gingiloski v. Commercial Recovery Services, 2017 WL 2334946 (E.D. Mich. May 30, 2017) (whether demand for payment in five days would overshadow consumer's dispute right was question of fact for jury subject to expert testimony); Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995). But see Renick v. Dun & Bradstreet Receivable Mgmt. Services, 290 F.3d 1055 (9th Cir. 2002); Wilson v. Quadramed Corp., 225 F.3d 350 (3d Cir. 2000); Terran v. Kaplan, 109 F.3d 1428 (9th Cir. 1997); Eddis v. Midland Funding, L.L.C., 2012 WL 664812 (D.N.J. Feb. 28, 2012); Lerner v. Forster, 240 F. Supp. 2d 233 (E.D.N.Y. 2003); Bernstein v. Howe, 2003 WL 1702254 (S.D. Ind. Mar. 31, 2003); Rumpler v. Phillips & Cohen Assoc., Ltd., 219 F. Supp. 2d 251 (E.D.N.Y. 2002); Taylor v. Cavalry Invest., L.L.C., 210 F. Supp. 2d 1001 (N.D. Ill. 2002); Chapman v. ACB Bus. Services, 1997 U.S. Dist. LEXIS 23743 (S.D. W. Va. Feb. 13, 1997); Smith v. Fin. Collection Agencies, 770 F. Supp. 232 (D. Del. 1991); Higgins v. Capitol Credit Services, Inc., 762 F. Supp. 1128 (D. Del. 1991). *But cf.* Goldberg v. Transworld Sys., Inc., 1998 WL 650793 (2d Cir. 1998) (unpublished).

515 *See* McHugh v. Valarity, L.L.C., 2014 WL 6772469 (E.D. Mo. 2014); Glackin v. LTD Fin. Services, L.P., 2013 WL 3984520 (E.D. Mo. Aug. 1, 2013).

516 845 F.3d 984 (9th Cir. 2017). *Cf.* § 9.4.8.1, *supra* (discussing calculating and disclosing the end of the validation period under Regulation F).

517 *See* Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996); Lane v. Bayview Loan Serv., L.L.C., 2016 WL 3671467 (N.D. Ill. 2016); Kaminsky v. Nat'l Bur. Collection Corp., 2008 WL 11330728 (S.D. Fla. Dec. 19, 2008); Allen v. ATG Credit L.L.C., 2004 WL 2931298 (N.D. Ill. Dec. 14, 2004); Allen v. NCO Fin. Services, Inc., 2002 WL 1291791 (N.D. Ill. June 10, 2002); Borcherding-Dittloff v. Corporate Receivables, Inc., 59 F. Supp. 2d 822 (W.D. Wis. 1999); Withers v. Equifax Risk Mgmt. Services, 40 F. Supp. 2d 978 (N.D. Ill. 1999); Seplak v. IMBS, Inc., 1999 WL 104730 (N.D. Ill. Feb. 23, 1999); Withers v. Eveland, 988 F. Supp. 942 (E.D. Va. 1997); Monokrousos v. Computer Credit, Inc., 984 F. Supp. 233 (S.D.N.Y. 1997); Badon v. Transworld Sys., Inc., 1997 WL 149986 (E.D. La. Mar. 26, 1997); Tsenes v. Trans-Continental Credit & Collection Corp., 892 F. Supp. 461 (E.D.N.Y. 1995); Robinson v. Transworld Sys., Inc., 876 F. Supp. 385 (N.D.N.Y. 1995); Rabideau v. Mgmt. Adjustment Bur., 805 F. Supp. 1086 (W.D.N.Y. 1992); Higgins v. Capitol Credit Services, Inc., 762 F. Supp. 1128 (D. Del. 1991); Appx. E.2.6.2, *infra*. See also Durham v. Cont'l Cent. Credit, 2009 WL 3416114 (S.D. Cal. Oct. 20, 2009); Gilmore v. Account Mgmt., Inc., 2009 WL 2848278 (N.D. Ga. Apr. 27, 2009), *rev'd on other grounds*, 2009 WL 4826953 (11th Cir. Dec. 16, 2009); Tychewicz v. Dobberstein, 1996 U.S. Dist. LEXIS 22555 (W.D. Wis. Aug. 28, 1996). *But see* Smith v. Computer Credit, Inc., 167 F.3d 1052 (6th Cir. 1999).

518 *See* Lodish v. Stellar Collection Services, Inc., 2010 WL 4235407 (N.D.N.Y. 2010).

519 Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991), *overruled on other grounds by*, Riccio v. Sentry Credit, Inc., 954 F.3d 582 (3d Cir. 2020). *See also* Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Blum v. Lawent, 2003 WL 22078306 (N.D. Ill. Sept. 8, 2003).

520 Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057 (7th Cir. 1999). *See also* Marshall-Mosby v. Corporate Receivables, Inc., 205 F.3d 323 (7th Cir. 2000) (threat of "immediate," "aggressive" collection stated claim); Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997) (payment within thirty days demanded); Avila v. Rubin, 84 F.3d 222, 226 (7th Cir. 1996); Guzman v. HOVG, L.L.C., 340 F. Supp. 3d 526, 532 (E.D. Pa. 2018) (discussion of immediate payment in notice conflicted with validation language); Norman v. Allied Interstate, L.L.C., 310 F. Supp. 3d 509, 520 (E.D. Pa. 2018); Osborn v. Ekpsz, L.L.C., 821 F. Supp. 2d 859 (S.D. Tex. 2011) (requiring payment that would eliminate debt before debtor can challenge the validity of that debt directly conflicts with protections in § 1692g); Puczko v. Law Office of Sipe & Landon, 2010 WL 11519290 (D. Ariz. Mar. 16, 2010); Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643 (S.D.N.Y. 2006). But see Roudebush v. Collecto, Inc., 2004 WL 3316168 (S.D. Ind. Nov. 12, 2004).

521 943 F.2d 482 (4th Cir. 1991).

522 *Id.* at 484. *See* United States v. Nat'l Fin. Services, Inc., 98 F.3d 131 (4th Cir. 1996) (back of payment demand letter stated conflicting deadlines with notice deadlines and overshadowed notice by being in larger typeface).

523 Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998). *See* Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85 (2d Cir. 2008) (followed *Savino* and held payment demand was expressed as alternative to requesting verification).

The Second,[524] Third,[525] Fifth,[526] Sixth,[527] Seventh,[528] and Ninth[529] Circuits have added their view that a collector's low-key request for immediate payment combined with a restatement of the consumer's verification rights does not automatically contradict the right to verify the debt. The Seventh Circuit found that the words "Now Due"[530] and "Act now to satisfy your debt"[531] did not amount to language that would confuse unsophisticated consumers about their verification rights.[532] The Seventh Circuit characterized the latter language as "in the nature of puffing, e.g.,—'Buy Now!' 'Best Deal Ever!'"[533]

However, these courts agree that the demand for payment must made in a way that does not contradict or obscure the verification rights or confuse an unsophisticated consumer about those rights. For example, a demand that payment or a verification request be received by the collector within thirty days would be confusing even though the validation notice indicated that the request for verification must be made within thirty days of receipt of the notice.[534] Many courts have applied these same standards to letters with demands for payments within the debt verification request period that were stated in such a manner that there was no contradiction, overshadowing, or confusion.[535]

524 Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85, 92 (2d Cir. 2008) ("It presented [plaintiff] with two alternate ways of avoiding 'further action': either pay the debt 'within 30 days,' or submit a notice of dispute, 'within 30 days.' This right to seek validation of the debt was further explained, not on the back of the demand letter, but on its face, below the initial statement, and in clear terms."); Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998) (demand for payment in itself did not violate FDCPA, but defendant's violation "consisted of its decision to ask for immediate payment without also explaining that its demand did not override the consumer's rights under section 1692g to seek validation of the debt"). *See also* Shapiro v. Dun & Bradstreet Receivable Mgmt. Services, Inc., 2003 WL 1025581 (2d Cir. Mar. 7, 2003) (statement that debtor could "disregard this letter" if payment had been made was not at odds with validation notice and was not reasonably susceptible to misinterpretation or likely to cause debtor to misunderstand his rights); McStay v. I.C. Sys., Inc., 308 F.3d 188 (2d Cir. 2002) (statement on front of letter that if debt was not paid after unspecified thirty days it would be forwarded to credit reporting agency when read in conjunction with validation notice's statement on reverse that thirty days ran from receipt did not contradict notice); Lotito v. Recovery Assoc. Inc., 2014 WL 4659464 (E.D.N.Y. Sept. 17, 2014); Lerner v. Forster, 240 F. Supp. 2d 233 (E.D.N.Y. 2003); Harrison v. NBD Inc., 968 F. Supp. 837 (E.D.N.Y. 1997) (offer to accept payment of 65% of balance for period slightly shorter than validation period); Madonna v. Academy Collection Serv., Inc., 1997 WL 530101 (D. Conn. Aug. 12, 1997) (request that consumer "contact" collector within validation period).

525 Wilson v. Quadramed Corp., 225 F.3d 350 (3d Cir. 2000) (offer to accept immediate payment was found not to contradict or overshadow debt validation notice that followed on same side of letter in same font, but acknowledging it was close question). *See also* Jarzyna v. Home Props., L.P., 114 F. Supp. 3d 243 (E.D. Pa. 2015).

526 *See* McMurray v. ProCollect, Inc., 687 F.3d 665 (5th Cir. 2012) (request for timely payment did not overshadow § 1692g notice). *See also* Mahmoud v. De Moss Owners Ass'n, Inc., 865 F.3d 322, 331 (5th Cir. 2017) ("[L]etter stated once on page one that Mahmoud and Jackson needed to pay 'on or before the expiration of thirty (30) days from and after the date hereof' or nonjudicial foreclosure would occur. But three times on page two, the letter repeated that '[U]NLESS YOU DISPUTE THE VALIDITY OF THIS DEBT OR ANY PORTION THEREOF WITHIN THIRTY (30) DAYS AFTER RECEIVING THIS LETTER, WE WILL ASSUME THE DEBT IS VALID.' This notice does not demand a concrete action period shorter than 30-days from receipt of the letter when read by the least sophisticated consumer.").

527 *See* Smith v. Computer Credit, Inc., 167 F.3d 1052 (6th Cir. 1999) (subsequent dun within validation period which purported to "advise [the consumer] of our final position" failing payment (before expiration of validation period) or dispute, did not contradict verification right where it mentioned possibility of disputing debt and where collector's final action was, in fact, to return debt to original creditor).

528 *See* Olson v. Risk Mgmt. Alternatives, Inc., 366 F.3d 509 (7th Cir. 2004) (words "Now Due," do not eviscerate message conveyed in debt validation notice; "The phrase 'Now Due,' even to an unsophisticated consumer, simply means that the debt collector is willing to accept less than the total amount of the debt to bring the account to a current status. The consumer has the option of paying the amount due, paying the total balance, or doing neither and contesting the debt. These options do not contradict one another. When used in conjunction with a 'Balance' figure, simply listing an amount 'Now Due' does not contradict or overshadow the validation notice."); Taylor v. Calvary Inv. Co., 365 F.3d 572 (7th Cir. 2004).

529 Renick v. Dun & Bradstreet Receivable Mgmt. Services, 290 F.3d 1055 (9th Cir. 2002) (stating "send your payment today" and "PROMPT PAYMENT was REQUESTED" was more in nature of request than demand and carried no sense of urgency). *See also* Long v. McMullen, Drury & Pinder, P.A., 2011 WL 4458849 (D. Md. Sept. 23, 2011); Lockey v. CMRE Fin. Services, Inc., 2011 WL 2971085 (S.D. Miss. July 20, 2011); Peterson v. Midland Credit Mgmt., Inc., 2011 WL 781538 (N.D. Ind. Feb. 28, 2011).

530 Olson v. Risk Mgmt. Alternatives, Inc. 366 F.3d 509 (7th Cir. 2004). *See also* Sims v. GC Services L.P., 445 F.3d 959 (7th Cir. 2006) ("[t]he statement that the collection agency would continue with collection efforts until the matter is handled does not obscure the debtor's statutory entitlement to a 30-day period in which to dispute the debt").

531 Taylor v. Calvary Inv. Co., 365 F.3d 572, 575 (7th Cir. 2004).

532 *Id. See also* Harry v. Pentagroup Fin., L.L.C., 2007 WL 812998 (E.D.N.Y. Mar. 14, 2007) (rejecting contention that Pentagroup's collection letter overshadowed validation notice by stating "if payment is not made in a timely manner, further collection activity may be instituted"; portion of letter that read "your prompt attention to this matter will be appreciated" did not overshadow validation notice).

533 Taylor v. Calvary Inv. Co., 365 F.3d 572, 575 (7th Cir. 2004).

534 *See* Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85 (2d Cir. 2008). *But see* Mahmoud v. De Moss Owners Ass'n, Inc., 865 F.3d 322, 331 (5th Cir. 2017) (demanding payment within 30 days of date of letter with validation notice permitted where letter stated three times that consumer could obtain verification of debt by mail within 30 days of receipt of notice).

535 *See* Sarno v. Midland Credit Mgmt., Inc., 435 Fed. Appx. 44 (2d Cir. 2011) (sentence following statutorily required validation notice that read "Please remember, even if you make payment within 30 days after receiving this notice, you still have the remainder of the 30 days to exercise the rights described above" did not violate FDCPA); Taylor v. Cavalry Invest., L.L.C., 365 F.3d 572 (7th Cir. 2004) ("act now to satisfy this debt" did not violate FDCPA); Berkseth v. Cont'l Cent. Credit, Inc., 119 F. Supp. 3d 1316 (M.D. Fla. 2015) (where validation notice was same size and color as other paragraphs, plaintiffs must point to some other element of collection letter that overshadows § 1692g disclosure); Jablonski v. Capital Mgmt. Services L.P., 2011 WL 7142994 (N.D. Ohio 2011); Jacobson v. Healthcare Fin. Services, Inc., 434 F. Supp. 2d 133 (E.D.N.Y. 2006) (initial dun's required disclosure of consumer's right to dispute debt within thirty days from receipt of dun cured any possibility that least sophisticated consumer would be confused by separate demand for payment or dispute within thirty days

Some settlement offers have been found not to create confusion about the consumer's verification rights.[536] Two letters demanding payment but not setting deadlines and a phone call within the validation period did not *clearly* overshadow or contradict the validation notice. "[T]he simple act of demanding payment in a collection letter during the validation period does not automatically create an unacceptable level of confusion so as to entitle the plaintiffs to summary judgment." The debt collector need not remind the consumer of the dispute right particularly where the validation notice contained the safe harbor language from the *Bartlett* decision: "The law does not require us to wait until the end of the 30-day period before taking action to collect this debt."[537]

9.8.3 Limits on Suit or Threat of Suit

In *Ellis v. Solomon & Solomon, P.C.*,[538] the Second Circuit held that a validation notice was overshadowed by the debt collector's service of a collection lawsuit on the consumer during the validation period, since the collector failed to explain or clarify in either the dun or a notice provided with the summons and complaint that the commencement of the lawsuit had no effect on the information conveyed in the debt validation notice.[539]

The court noted that the easiest course for a debt collector was simply to wait until the end of the validation period to serve a debt collection suit on the consumer.[540]

Similarly, the FDCPA may be violated by a threat to file suit within the validation period that is made so strongly as to suggest that the collector will not cease collection efforts while validating the debt pursuant to the consumer's request.[541] In *Graziano v. Harrison*, which was overruled on other grounds, the Third Circuit held that an attorney's letter demanding payment within ten days upon the threat of immediate legal action would mislead the least sophisticated debtor, in violation of FDCPA § 1692g, as well as violating FDCPA § 1692e(10).[542]

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that omitted time when thirty days began to run); Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643 (S.D.N.Y. 2006) (initial communication telling debtor that matter required "immediate attention" did not overshadow since there was "no suggestion that the thirty-day verification period should be disregarded, or that immediate payment is required"); Hernandez v. Attention, L.L.C., 429 F. Supp. 2d 912 (N.D. Ill. 2005) (debt collector's letter containing § 1692g notice was not confusing and did not violate FDCPA by stating "truism" that collection efforts would continue if debt remained unpaid); Dikun v. Streich, 369 F. Supp. 2d 781 (E.D. Va. 2005) (attorney collector's threat to file suit thirty days after consumer's receipt of initial dun did not overshadow or contradict validation notice); Palmer v. Stassinos, 348 F. Supp. 2d 1070 (N.D. Cal. 2004) (second dun sent within validation period did not overshadow § 1692g validation notice or cause confusion since its demand for payment did not state time period within which to pay and thus could not be construed as shortening available thirty-day period); Gostony v. Diem Corp., 320 F. Supp. 2d 932 (D. Ariz. 2003) (invitation to call about questions or concerns, or about methods available for payment, did not overshadow or contradict validation notice); Bernstein v. Howe, 2003 WL 1702254 (S.D. Ind. Mar. 31, 2003) (payment arrangements should be made by date prior to expiration of validation period); Young v. Meyer & Njus, P.A., 183 F.R.D. 231 (N.D. Ill. 1998) (payment by "return mail" did not mean immediate payment); Vasquez v. Gertler & Gertler, Ltd., 987 F. Supp. 652 (N.D. Ill. 1997) (request for immediate attention by payment or contacting collection attorney); Burns v. Accelerated Bur. of Collections, 828 F. Supp. 475 (E.D. Mich. 1993). *See also* Hennings v. Alltran Fin., L.P., 2017 WL 2312909 at 3 (E.D. Wis. May 26, 2017) (settlement offer may set its expiration date near or after expiration of 30-day verification request period without overshadowing validation notice).

536 *See* Santora v. Capio Partners, L.L.C., 2017 WL 4334128 (E.D.N.Y. Sept. 28, 2017); Hamilton v. Capio Partners, L.L.C., 237 F. Supp. 3d 1109 (D. Colo. 2017); Akoundi v. FMS, Inc., 2014 WL 3632008 (S.D.N.Y. July 22, 2014); D'Addario v. Enhanced Recovery Co., L.L.C., 798 F. Supp. 2d 570 (D.N.J. 2011) (settlement offer deadline within thirty-day period for dispute did not overshadow); Carpenter v. RJM Acquisitions, L.L.C., 787 F. Supp. 2d 971 (D. Minn. 2011) (same as *D'Addario*); Day v. Allied Interstate, Inc., 2009 WL 1139474 (E.D.N.Y. Apr. 27, 2009) (mere inclusion of payment coupon would not confuse least sophisticated consumer about right to dispute debt and did not violate FDCPA); Gervais v. Riddle & Assoc., 479 F. Supp. 2d 270 (D. Conn. 2007) (giving settlement offer in validation notice if paid shortly before end of validation period not confusing); Soffer v. Nationwide Recovery Sys., Inc., 2007 WL 1175073 (E.D.N.Y. Apr. 19, 2007) (merely presenting consumer with settlement offer does not blunt effectiveness of validation notice explaining consumer's right to dispute); Omogbeme v. Risk Mgmt. Alternatives, Inc., 2003 WL 21909773, at *3 (E.D.N.Y. Aug. 4, 2003).

537 *See* § 9.8.6, *supra*.

538 591 F.3d 130 (2d Cir. 2010). *See also* Battle v. Gladstone Law Group, P.A., 951 F. Supp. 2d 1310 (S.D. Fla. June 28, 2013); Garcia-Contreras v. Brock & Scott, P.L.L.C., 775 F. Supp. 2d 808 (M.D.N.C. 2011); Curto v. Palisades Collection, L.L.C., 2011 WL 5196708 (W.D.N.Y. Oct. 31, 2011). *Cf.* Bunting v. Phillips Lytle L.L.P., 2011 WL 2516933 (N.D.N.Y. June 23, 2011) (rejecting argument that defendants violated FDCPA by serving summonses with 20-day period in which to answer and by advising plaintiffs that they had to contest "debt" within 30-day period as there was explanatory language about discrepancy and no action was taken within 20-day period). *But cf.* Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504 (6th Cir. 2007) (finding it possible to give debt validation notice and file foreclosure on same day despite different time periods for response to each as schedule was clearly explained).

539 *See also* Carbonell v. Weinstein Pinson & Riley, P.S., 2014 WL 2581043 (S.D. Fla. May 30, 2014) (motion for judgment on pleadings was granted, where state court collection complaint included § 1692g notice that gave thirty days, but response to complaint was due in twenty days).

540 *See* Philhower v. Express Recovery Services, Inc., 2014 WL 692908 (D. Utah Feb. 21, 2014).

541 *See* 15 U.S.C. § 1692g(b).

542 Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991), *overruled on other grounds by*, Riccio v. Sentry Credit, Inc., 954 F.3d 582 (3d Cir. 2020). *See also* Wenig v. Messerli & Kramer P.A., 2013 WL 1176062 (D. Minn. Mar. 21, 2013); Blum v. Lawent, 2003 WL 22078306 (N.D. Ill. Sept. 8, 2003); Shaver v. Trauner, 1998 WL 35333712 (C.D. Ill. May 29, 1998); Booth v. Collection Experts, Inc., 969 F. Supp. 1161 (E.D. Wis. 1997) (letter conflicted by stating that consumer had to pay debt within five days or face "more extreme measures"; acknowledgment of debt would not be waiver of that claim); Rabideau v. Mgmt. Adjustment Bur., 805 F. Supp. 1086 (W.D.N.Y. 1992) (sent fifteen days after initial communication, second notice, which advised debt must be paid in five days "to avoid further collection measures"). *But cf.* Wan v. Commercial Recovery Sys., Inc., 369 F. Supp. 2d 1158 (N.D. Cal. 2005) (collector's letter to consumer did not overshadow debt validation notice simply because it suggested that consumer "consult with [her] attorney about what laws in [her] state will allow our client to do to recover moneys owed to it and further consequences of nonpayment").

The Seventh Circuit took a similar approach in *Bartlett v. Heibl.*[543]

However, in *Zemeckis v. Global Credit & Collection Corp.*,[544] the Seventh Circuit distinguished *Bartlett* and found that the debt collector's exhortations to pay now and threatening suit did not involve the same type of deadlines falling within the validation period for requesting verification. The court stated that "[e]ven the most unsophisticated debtor would realize that debt collectors wish to expedite payment, and urging him to hurry does not confuse or undermine his right to his validation period." In reaching its result, the court emphasized the lack of specific deadlines in the threat to take legal action. The court acknowledged that whether a dunning letter is confusing to an unsophisticated consumer is ordinarily a question of fact, but it found that as a matter of law no significant segment of unsophisticated consumers could have been misled or confused about their FDCPA § 1692g debt verification rights by the debt collector's letters. Numerous district courts have taken that position, as well.[545]

In *Pollard v. Law Office of Mandy L. Spaulding*,[546] the First Circuit pointed out a serious problem not addressed by the Seventh Circuit's *Zemeckis* decision. The First Circuit held that a law firm's validation notice stating "we further inform you that despite the fact that you have a thirty (30) day period to dispute the debt may not preclude [sic] the filing of legal action against you prior to the expiration of the period" would suggest to the unsophisticated consumer that a lawsuit was going to proceed without delay, whether the consumer disputed the debt or not. It overshadowed the validation notice, in violation of FDCPA § 1692g, as the other affirmative statements in the text of the letter—to the effect that the writer was "not inclined to use further resources attempting to collect this debt before filing suit" and was going to "pursue the next logical course of action without delay"—reinforced this reading. Although a debt collector is free to demand immediate payment or (sometimes) even to file suit during the validation period, pursuing a multidirectional course can lead to confusion, and debt collectors remain firmly bound by the FDCPA's command not to have collection activities or communications overshadow or be inconsistent with the validation notice.

A lower court left it to a jury to decide whether a "least sophisticated consumer" would be intimidated into forgoing their verification rights by a threat of possible foreclosure near the end of the time in which verification could be sought.[547] Where the debt collection threat is veiled, the courts have been less likely to find the validation notice ineffective.[548] Similarly,

543 128 F.3d 497 (7th Cir. 1997). *See also* McCafferty v. Schwartzkopf Law Office, 2011 WL 529967 (E.D. Mo. 2011) (threat of judgment within thirty days).

544 679 F.3d 632 (7th Cir. 2012).

545 *See* Henhaffer v. Simeone & Raynor, L.L.C., 2016 WL 6305939 (D.N.J. Oct. 27, 2016); Kalebaugh v. Cohen, McNeile & Pappas, P.C., 76 F. Supp. 3d 1251 (D. Kan. 2015); McGhee v. Buffaloe & Assoc., 2014 WL 1333730 (E.D. Tenn. Apr. 2, 2014); Pierson v. Franklin Collection Serv., Inc., 965 F. Supp. 2d 957 (E.D. Tenn. 2013) (urging consumer to confer with lawyer about collector's remedies and consumer defenses); Fisher v. Bernhardt and Strawser, P.A., 2013 WL 3990744 (W.D.N.C. Aug. 2, 2013) (stating legal remedies not contradictory); Lilly v. RAB Performance Recoveries, L.L.C., 2013 WL 3834008 (E.D. Tenn. July 23, 2013) (referring to legal remedies acceptable); Seeley v. Nevada Ass'n Services, Inc., 2011 WL 4470840 (D. Nev. Sept. 26, 2011) (threatened ten days before recording of a notice of delinquent assessment lien); Price v. Brock & Scott, P.L.L.C., 2011 WL 1326934 (M.D.N.C. Apr. 6, 2011) (letter threatening immediate suit overshadowed validation notice in that letter); Terry v. C & D Complete Bus. Solutions, 2011 WL 144920 (W.D. Mo. Jan. 18, 2011); Dunn v. Derrick E. McGavic, P.C., 653 F. Supp. 2d 1109 (D. Or. 2009); Register v. Reiner, Reiner & Bendett, P.C., 488 F. Supp. 2d 143 (D. Conn. 2007); Blum v. Lawent, 2003 WL 22078306 (N.D. Ill. Sept. 8, 2003); Greer v. Shapiro & Kreisman, 152 F. Supp. 2d 679 (E.D. Pa. 2001); Laster v. Cole, 2000 WL 306848 (E.D.N.Y. Mar. 20, 2000); Frey v. Satter, Beyer & Spires, 1999 WL 301650 (N.D. Ill. May 3, 1999); Baker v. Citibank, 13 F. Supp. 2d 1037 (S.D. Cal. 1998); Hairston v. Whitehorn & Delman, 1998 WL 35112 (S.D.N.Y. Jan. 30, 1998). *See also* Ellis v. Cohen & Slamowitz, L.L.P., 701 F. Supp. 2d 215 (N.D.N.Y. 2010). *Cf.* Lerner v. Forster, 240 F. Supp. 2d 233 (E.D.N.Y. 2003) (letter as whole left no doubt that litigation was merely option); Barrientos v. Law Offices of Mark L. Nichter, 75 F. Supp. 2d 510 (S.D.N.Y. 1999) (granting consumer's motion for summary judgment; letter stated attorney collector was authorized "to take any lawful action"); Borcherding-Dittloff v. Corporate Receivables, Inc., 59 F. Supp. 2d 822 (W.D. Wis. 1999) (second letter sent only fourteen days after first letter overshadowed validation notice because it did not explain how threat affected period for requesting debt verification). *But see* Palmer v. Stassinos, 348 F. Supp. 2d 1070 (N.D. Cal. 2004) (threat of litigation made within validation period did not cause debtor confusion); Gostony v. Diem Corp., 320 F. Supp. 2d 932 (D. Ariz. 2003) (threat of litigation did not contradict validation notice); Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988); FTC Official Staff Commentary § 809(b)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Leiter, FTC Informal Staff Letter (Mar. 7, 1988).

546 766 F.3d 98, 105 (1st Cir. 2014).

547 Cavallaro v. Law Offices of Shapiro & Kriesman, 933 F. Supp. 1148 (E.D.N.Y. 1996) (stating that dunning language in validation notice that overshadowed or contradicted notice and would make "least sophisticated consumer" unsure of his rights would violate § 1692g). *See also* Rivera v. Ralph F. Casale & Assoc., L.L.C., 2014 WL 2571555 (D.N.J. June 9, 2014) (collection letter following validation notice stating that suit and non-abeyance might occur before end of 30-day period could mislead a consumer); Kafele v. Lerner, Sampson & Rothfuss, L.P.A., 2005 WL 1379107 (S.D. Ohio June 9, 2005), appeal of different case reported at 2005 WL 3528921 (6th Cir. Dec. 22, 2005) (awarding $500 as statutory damages for defendant's failure to provide effective thirty-day validation notice at time of serving summons with twenty-eight-day deadline and complaint in underlying state court foreclosure action). *But see* Solomon v. HSBC Mortg. Corp., 2012 WL 1066141 (W.D. Okla. Mar. 29, 2012) (filing of foreclosure petition did not overshadow), *aff'd*, 504 Fed. Appx. 702 (10th Cir. 2012); Palmer v. Stassinos, 348 F. Supp. 2d 1070 (N.D. Cal. 2004) (threat of litigation made within validation period did not cause debtor confusion regarding her right to validate amount of debt where there was no statement that could be construed to shorten 30-day validation period).

548 *See* Peter v. GC Services L.P., 310 F.3d 344 (5th Cir. 2002) (language, "FULL COLLECTION ACTIVITY WILL CONTINUE UNTIL THIS ACCOUNT IS PAID IN FULL. . . . TO AVOID FURTHER COLLECTION ACTIVITY, YOUR STUDENT LOAN MUST BE PAID IN FULL" did not violate § 1692g); Farmer v. Buffaloe & Assoc., 2012 WL 6045976 (E.D. Tenn. Dec. 5, 2012) ("client may consider additional remedies"); Kramsky v. Mark L. Nichter, P.C., 166 F. Supp. 2d 912 (S.D.N.Y. 2001) (validation notice was not overshadowed by language that collection law firm "has been engaged to proceed against you because of your failure to make payment," that it "will not

another lower court found a violation in the statement that the consumer "needed" to send $500 or call to avoid referral of the claim to an attorney, presumably for suit, within forty-five days. Relying on *Pollard*,[549] the court found that the stated deadline conflicted with the consumer's right to be free of collection activities until the debt was verified.[550]

The Eleventh Circuit held that a debt collector may threaten to file a lien against the consumer's condominium in the same letter that the debt collector provides the debt validation notice without running afoul of the FDCPA.[551] In an unpublished decision, the Eleventh Circuit abandoned the objective least sophisticated consumer approach, and found there was not overshadowing by filing foreclosure during the validation period for the consumer to request verification because the consumer's attorney had actually requested verification during that period.[552] The consumer had lost the argument in the district court that the lien against the condo would overshadow the notice of the consumer's right to request that the debt be validated by the collector. However, the Eleventh Circuit did not consider the overshadowing problem, basing its decision on the FDCPA allowing legal debt collection, such as the Georgia lien process, to be undertaken during the validation period, until the consumer actually requested verification.

9.8.4 Limits on Credit Reporting

Similarly, the FDCPA may be violated by a threat, within the validation period, to file a credit report if payment is not sent immediately, if the threat is made strongly enough to suggest that the collector would not cease its collection efforts and validate the debt pursuant to the consumer's request.[553] A lower court found that a letter stating that the collector "could" report the debt to a credit reporting agency during the validation period did not overshadow the validation notice.[554]

9.8.5 Limits on Informing Consumer to Telephone Debt Collector

In *Caprio v. Healthcare Revenue Recovery Group, L.L.C.*,[555] the Third Circuit found that the boldly formatted request for the consumer to call the debt collector overshadowed and contradicted the FDCPA § 1692g requirement disclosed on the back of the letter that the consumer must write to obtain verification of the debt. "We therefore conclude that the Collection Letter was deceptive because . . . 'it can be reasonably read to have two or more different meanings, one of which is inaccurate,' i.e., that Caprio could dispute the debt by making a telephone call."[556]

Caprio followed a decision by the Fourth Circuit that a similar strong demand for a phone call in big type made the validation notice on the back ineffective. "The front of the Payco form demands "IMMEDIATE FULL PAYMENT" and commands the consumer to "PHONE US TODAY," emphasized by the word "NOW" emblazoned in white letters nearly two inches tall against a red background."[557]

The *Caprio* decision distinguished the Second Circuit's decision in *Miller v. Wolpoff & Abramson, L.L.P.*,[558] as the dunning letter before the Second Circuit repeatedly instructed the consumer to refer to the validation notice on the back of the letter and suggested telephoning the debt collector on payment issues, but not requesting a call regarding disputes.

In *Terran v. Kaplan*,[559] the Ninth Circuit held that a request that the alleged debtor immediately telephone a collection assistant did not overshadow the language in the FDCPA § 1692g notice that the alleged debtor has thirty days in which to

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permit this debt to be ignored," and that "it would definitely be in your best interest to satisfy in full your outstanding balance"); Kramsky v. Trans-Cont'l Credit & Collection Corp., 166 F. Supp. 2d 908 (S.D.N.Y. 2001) (validation notice was not contradicted or overshadowed by statement: "This past due statement reflects a balance due the above stated creditor. This account has been referred to collection and we must ask that you remit the balance shown in full using the enclosed envelope.").

549 *See* Pollard v. Law Office of Mandy L. Spaulding, 766 F.3d 98, 103 (1st Cir. 2014).

550 *See* Oberther v. Midland Credit Mgmt., Inc., 45 F. Supp. 3d 125 (D. Mass. 2014).

551 Shimek v. Forbes, 374 F.3d 1011 (11th Cir. 2004). *But see* Elliott v. GC Services, L.P., 2011 WL 5975671 (M.D. Fla. 2011).

552 Clark v. Shapiro & Pickett, L.L.P., 452 Fed. Appx. 890 (11th Cir. 2012).

553 *See* Swanson v. S. Oregon Credit Serv., 869 F.2d 1222 (9th Cir. 1988); Elliott v. GC Services, L.P., 2011 WL 5975671 (M.D. Fla. Nov. 28, 2011); Wells v. Thomas McDonough, 1999 WL 966431 (N.D. Ill. Sept. 29, 1999); Creighton v. Emporia Credit Serv., Inc., 981 F. Supp. 411 (E.D. Va. 1997) (threat was also false representation of urgency where collector's policy was not to report debt to credit reporting agency for sixty days); Peters v. Collection Tech. Inc., 1991 U.S. Dist. LEXIS 21810 (D. Or. Dec. 5, 1991). *See also* Velazquez v. Fair Collections & Outsourcing, Inc., 2013 WL 4659564 (N.D. Ill. Aug. 30, 2013); Lee v. CBC Co., 1996 U.S. Dist. LEXIS 21993 (S.D. Ohio Sept. 26, 1996) (threat to credit combined with demand for immediate payment). *But see* McStay v. I.C. Sys., Inc., 308 F.3d 188 (2d Cir. 2002) (statement on front of collection letter that if debt was not paid after 30 days it would be forwarded to credit reporting agency when, read in conjunction with validation notice on reverse side, did not contradict 30-day validation notice); Schuerkamp v. Afni, Inc., 2011 WL 5825969 (D. Or. Nov. 16, 2011) (statement that "We may report information about your account to credit bureaus" is insufficient to support finding of overshadowing); Wetzel v. AFNI, Inc., 2011 WL 6122963 (D. Or. Oct. 20, 2011) ("we may report information about your account to credit bureaus" did not overshadow), *adopted*, 2011 WL 6122957 (D. Or. Dec. 8, 2011).

554 *See* Founie v. Midland Credit Mgmt., Inc., 2014 WL 6607197 (E.D. Mo. Nov. 19, 2014) (noting that no evidence of overshadowing was presented).

555 709 F.3d 142 (3d Cir. 2013), *abrogated on other grounds by*, Riccio v. Sentry Credit, Inc., 954 F.3d 582 (3d Cir. 2020).

556 *Id.* at 152 (citations omitted). *See also* Coulter v. Receivables Mgmt. Sys., 367 F. Supp. 3d 307, 315–316 (E.D. Pa. 2019).

557 Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 483 (4th Cir. 1991). *See also* Laniado v. Certified Credit & Collection Bur., 705 Fed. Appx. 87 (3d Cir. Aug. 29, 2017) (second letter sent ten days before expiration of § 1692g dispute period overshadowed validation notice by asking consumer to "please call if there is any discrepancy"). *But see* Terran v. Kaplan, 109 F.3d 1428, 1434 (9th Cir. 1997) ("[T]he request that the alleged debtor immediately telephone a collection assistant does not overshadow the language in the notice that the alleged debtor has thirty days in which to dispute the debt.").

558 321 F.3d 292 (2d Cir. 2003).

559 109 F.3d 1428, 1434 (9th Cir. 1997).

dispute the debt. Some lower courts have held that the request to telephone would be confusing to the least sophisticated consumer and contradicted the notice.[560] But other courts disagree with the analysis, finding that confusion does not necessarily result. For example, urging the consumer to call about paying the debt was not confusing where the letter twice called attention to the information in the validation notice on the back of the dunning letter.[561] Another court found that the request to call if the debt had been paid did not overshadow the requirement to dispute or seek verification of the debt in writing.[562]

A lower court was not persuaded that the directive to call the creditor in the event of suspected identity theft "overshadowed" or "contradicted" the verification right notice. The letter clearly conveyed to the debtor that, in order to dispute the underlying debt, he must contact I.C. System, and if identity theft was suspected, he must also contact the creditor.[563]

9.8.6 Restrictions on Other Debt Collection Activity During Validation Period

A threat of other consequences may also overshadow the notice.[564] Telecheck's warning that "any delay" in payment "may affect your ability to use checks" may have been deceptive because it could confuse the unsophisticated consumer by failing to explain how this comports with their thirty-day right to contest the debt.[565] One court has held that an initial

560 *See* Kassin v. AR Resources, Inc., 2017 WL 4316391 (D.N.J. 2017) (allegations that collection letter containing validation notice that directed consumer to call collection agency if debt was covered by his insurance plan stated claim for violation of §§ 1692g and 1692e); O'Brien v. Waldman & Kaplan, P.A., 2016 WL 3583810 (D.N.J. June 30, 2016); Vu v. Diversified Collection Services, Inc., 293 F.R.D. 343 (E.D.N.Y. 2013) (request to refrain from writing collector overshadow § 1692g notice); Derry v. Buffalo & Assoc., P.L.C., 2013 WL 3865242 (E.D. Tenn. 2013) ("if you fail to contact this office, our client may consider additional remedies to recover the balance due" did not cause confusion); Riess v. Messerli & Kramer, P.A., 2011 WL 5506290 (D. Minn. 2011) (second letter insinuated that deadline for taking action had already passed); *In re* Almodovar, 2011 WL 381742 (Bankr. D. P.R. 2011) (insisting that it was extremely important for consumer to contact defendant within five days); Ehrich v. I.C. Sys. Inc., 681 F. Supp. 2d 265 (E.D.N.Y. 2010) (Spanish language sentence, which was placed in otherwise compliant English language validation notice immediately following § 1692g(a)(4) written dispute disclosure and which advised consumers to telephone debt collector at listed toll-free number if they had any questions regarding debt, would leave "the Spanish-speaker uncertain as to his or her rights"); Seplak v. IMBS, Inc., 1999 WL 104730 (N.D. Ill. 1999); Macarz v. Transworld Sys., 26 F. Supp. 2d 368 (D. Conn. 1998); Blair v. Collectech Sys., 1998 WL 214705 (N.D. Ill. Apr. 24, 1998); Withers v. Eveland, 988 F. Supp. 942 (E.D. Va. 1997) (combined with request for immediate payment); Beeman v. Lacey, Katzen, Ryen & Mittleman, 892 F. Supp. 405 (N.D.N.Y. 1995); Stebbins v. Allied Account Services, 1991 U.S. Dist. LEXIS 21778 (D. Conn. Sept. 9, 1991); Read v. Amana Collection Services, 1991 WL 5155 (W.D.N.Y. Jan. 15, 1991); Woolfolk v. Van Ru Credit Corp., 783 F. Supp. 724 (D. Conn. 1990); Gaetano v. Payco, Inc., 774 F. Supp. 1404 (D. Conn. 1990). *But cf.* Sebrow v. ER Solutions, Inc., 2009 WL 136026 (E.D.N.Y. 2009) (threat to report to credit bureaus was not false, did not create false sense of urgency, and did not overshadow verification right notice; fact that defendant failed to do so after fact has no bearing on its intent at time it sent letter; nor is it evidence that letter threatened unintended reporting to credit agencies).

561 See Durkin v. Equifax Check Services, Inc., 406 F.3d 410 (7th Cir. 2005) (toll free number in follow-up letters did not detract from disclosure regarding written disputes); Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003); Terran v. Kaplan, 109 F.3d 1428 (9th Cir. 1997) (demand that consumer telephone collection lawyer's office immediately did not make notice of verification rights that followed in letter ineffective; type for both messages was same and request for telephone call from consumer was not contradictory of right to request verification in writing); Wade v. DCS Fin., Inc., 2016 WL 6267803 (W.D. Wash. Oct. 26, 2016) ("To prevent further collection efforts you must contact this office" did not overshadow § 1692g notice); Vayngurt v. Southwest Credit Sys., L.P., 2016 WL 6068132 (E.D.N.Y. Oct. 14, 2016) (rejecting consumer's argument that statement "We are willing to work with you, but you must contact our office promptly" in collection letter overshadowed validation notice); Vetrano v. The CBE Grp., Inc., 2016 WL 4083384 (E.D.N.Y. Aug. 1, 2016) ("Call us at (800) 348-3304 to discuss paying with a check by phone, credit card or debit card" would not "lead the least sophisticated consumer to believe that her dispute must be in writing"); Cruz v. Recoveries, 2016 WL 3545322 (D.N.J. 2016) ("The challenged provision, requesting insurance information if Plaintiff believed the insurer would cover the debt, does nothing to impact the bold-faced language outlining the debt dispute process."); Max v. Gordon & Weinberg P.C., 2016 WL 475290 (D.N.J. Feb. 8, 2016); Oberther v. Midland Credit Mgmt., Inc., 45 F. Supp. 3d 125 (D. Mass. 2014); Lerner v. Forster, 240 F. Supp. 2d 233 (E.D.N.Y. 2003) (dun requesting full payment or call to creditor to arrange partial payment did not contradict or overshadow debt validation notice in following paragraph); Wallace v. Capital One Bank, 168 F. Supp. 2d 526 (D. Md. 2001) (debt collector did not overshadow validation notice simply by including telephone number in its letter; sentence inviting debtor to call with questions did not overshadow validation notice because of its font, language, tenor, or placement); Philipps v. GC Services, 1994 WL 127283 (N.D. Ill. Apr. 7, 1994) ("[r]emit your balance in full promptly or phone the number listed above," without highlighting that phone call would not protect the consumer's verification rights did not violate § 1692g when statement that consumer must contest validity of debt in writing within thirty days or loan would be presumed valid was contained elsewhere in letter). *See also* Wyler v. Computer Credit, Inc., 2006 WL 2299413 (E.D.N.Y. Mar. 3, 2006) (collection agency's letter not deceptive because it advised consumer that he could phone creditor hospital to discuss debt when hospital failed advise collection agency that consumer had called informing hospital that his insurance had paid hospital).

562 *See* Rosa v. Encore Receivable Mgmt., Inc., 2016 WL 4472951 (D.N.J. Aug. 23, 2016). *See also* Moyer v. Patenaude & Felix, A.P.C., 458 F. Supp. 3d 265, 272 (E.D. Pa. 2020).

563 Abramov v. I.C. Sys., Inc., 54 F. Supp. 3d 270 (E.D.N.Y. 2014). *See also* Friedman v. Leading Edge Recovery, Solutions, L.L.C., 2014 WL 1674083 (N.D. Ill. Apr. 28, 2014).

564 *See* Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984 (9th Cir. 2017) (threat to file lien on consumer's home within 35 days if payment not made overshadowed consumer's right to request verification of debt and obtain freedom from debt collection activities until verification was sent); DeSantis v. Roz-Ber, Inc., 51 F. Supp. 2d 24 (E.D.N.Y. 1999) (used "IMMEDIATE ATTENTION!" in bold letters and implicitly threatened that if consumer did not remit payment in full or call to arrange settlement, he would not receive "cooperation"); Booth v. Collection Experts, Inc., 969 F. Supp. 1161 (E.D. Wis. 1997) (face "more extreme measures"). *See also* Harlan v. Transworld Sys., Inc., 2014 WL 1414508 (E.D. Pa. Apr. 14, 2014) (proper verification disclosure on reverse side of the dun was overshadowed by language on front side that implied that collector's "diligent collection of your account" would continue without consumer's telephone response).

565 Ozkaya v. Telecheck Services, Inc., 982 F. Supp. 578 (N.D. Ill. 1997). *See also* Johnson v. Equifax Risk Mgmt. Services, 2004 WL 540459

dun that threatened dishonored-check penalties if the debt were not paid within thirty days unlawfully overshadowed the FDCPA validation notice's requirement that the consumer be given thirty days from receipt of the notice to dispute the debt.[566] The consumer, misdirected to turn to the reverse side of the letter to find "important information," only to find that such reverse side was blank, cannot be expected to know with certainty that another enclosed document in fact contains this "important information."[567] The debt buyer's request that the consumer confirm the amount of the debt in the same letter containing its validation notice would be confusing.[568] The debt buyer's "preapproved" credit card junk mail envelopes may have overshadowed the validation notice.[569] In another case, sending communications about reinstating the mortgage overshadowed the FDCPA § 1692g notice to hundreds of thousands of mortgage holders.[570]

The validation notice was not contradicted by language stating "Act now to satisfy your debt"[571] or "[w]e believe you want to pay your just debt,"[572] as both were "in the nature of puffing." Nor would the unsophisticated consumer be confused by language that interest would continue to accrue.[573] A collector's explicit instruction to the consumer that she must dispute the validity of the debt in writing clearly overshadowed the proper FDCPA § 1692g(a)(3) disclosure below that statement.[574] A lower court found that the misrepresentation, that the balance may increase if not paid immediately, overshadowed the FDCPA § 1692g notice.[575]

A request that the consumer "contact" the collector within the validation period and other language which did not demand payment in less than thirty days did not contradict the validation notice.[576] A letter requesting payment "to avoid further contact" did not overshadow the validation notice.[577] An initial dun that referred the consumer to the creditor to make payments or for additional information, but which clearly told the consumer to contact the collector to dispute the debt and seek verification, did not unlawfully contradict the validation notice by encouraging the debtor to dispute the debt with the creditor, rather than with the debt collector.[578] Threats to take actions after the validation period would not ordinarily violate the FDCPA.[579] A lower court rejected the claim that a dun

(S.D.N.Y. Mar. 17, 2004) (collector's dun to collect dishonored check, while not expressly demanding immediate payment, overshadowed 30-day validation period by effectively threatening that consumer's check-writing privileges within collector's national network could only be restored by tendering full payment). *But cf.* Goldberg v. Transworld Sys., Inc., 1998 WL 650793 (2d Cir. 1998) (unpublished) (language, "grace period about to expire" did not suggest to least sophisticated consumer that he had less than thirty days to dispute debt; in addition, stating that consumer "may eliminate the possibility of additional costs" is "no threat whatsoever, false or otherwise").

566 Bishop v. Global Payments Check Recovery Services, Inc., 2003 WL 21497513 (D. Minn. June 25, 2003). *See also* Turner v. Shenandoah Legal Group, P.C., 2006 WL 1685698 (E.D. Va. June 12, 2006) (collection letter which contained two different thirty-day periods (1) thirty days from date of letter and (2) thirty days from receipt of letter, as well as reference to adversarial proceeding in "re" line, raised question of fact whether letter contradicted or overshadowed validation notice or contained misleading statement in violation of FDCPA); Gervais v. Riddle & Assoc., 363 F. Supp. 2d 345 (D. Conn. 2005) (where debt collector's letter presented consumer with opportunity to satisfy outstanding balance at fifty-percent discount of over $4000 if paid within thirty days of date of letter, it violated § 1692g because consumer was entitled to full thirty days from receipt of collection letter to request debt verification and shorter period for discount overshadowed and contradicted validation notice), *aff'd in part, rev'd in part*, 479 F. Supp. 2d 270 (D. Conn. 2007).

567 *See* Papetti v. Rawlings Fin. Services, L.L.C., 121 F. Supp. 3d 340 (S.D.N.Y. 2015).

568 *See* McKinney v. Cadleway Properties Inc., 2006 WL 208707 (N.D. Ill. 2006). *See also* Van v. Grant & Weber, 2008 WL 5427975 (9th Cir. Dec. 29, 2008) (collection letter containing reminder of state law requiring debtors to provide new contact information, while warning debtors that information will be used for purposes of debt collection, did not conflict with §§ 1692e, 1692f, or 1692g); Mejia v. Marauder Corp., 2007 WL 806486 (N.D. Cal. 2007) (where dispute notice asked consumer to call if debt had been paid or someone made mistake, least sophisticated consumer could conclude that debt cannot be disputed without proof of payment in violation of § 1692g).

569 *See* Voris v. Resurgent Capital Services, L.P., 494 F. Supp. 2d 1156 (S.D. Cal. 2007).

570 *See* Martin v. Trott Law, P.C., 198 F. Supp. 3d 794, 812 (E.D. Mich. 2016). *But see* Lane v. Bayview Loan Serv., L.L.C., 2016 WL 3671467 (N.D. Ill. July 11, 2016) (advising homeowner of refinancing options and disclosing principal balance during time for requesting payment did not overshadow validation notice).

571 Taylor v. Calvary Inv. Co., 365 F.3d 572 (7th Cir. 2004). *See also* Hipolito v. Alliance Receivables Mgmt., Inc., 2005 WL 1662137 (N.D. Cal. July 15, 2005) (statement in initial dun to "pay in full to [stop] all collection activity" was not demand for payment in fewer than thirty days and thus did not overshadow or contradict validation notice).

572 Gruber v. Creditors' Prot. Serv., Inc., 742 F.3d 27 (7th Cir. 2014).

573 *Id.*

574 Vega v. Credit Bur. Enters., 2005 WL 711657 (E.D.N.Y. Mar. 29, 2005). *See also* § 9.10, *supra*. *But see* Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. 2018).

575 *See* Reeseg v. Gen. Revenue Corp., 2015 WL 4525869 (D.N.J. July 27, 2015).

576 Madonna v. Academy Collection Serv., Inc., 1997 WL 530101 (D. Conn. Aug. 12, 1997) (contact creditor for payment or information); Gammon v. Belzer, 1997 WL 189291 (N.D. Ill. Apr. 11, 1997) (requested immediate attention).

577 *See* Kane v. Prof. Medical Mgmt., Inc., 2016 WL 5012320 (D.N.J. Sept. 16, 2016).

578 *See* Shapiro v. Dun & Bradstreet Receivable Mgmt. Services, Inc., 2003 WL 1025581 (2d Cir. Mar. 7, 2003). *See also* Watson v. Certified Credit & Collection Bur., 2009 WL 3068387 (D.N.J. Sept. 23, 2009) (language at issue, "if you believe that these services should have been covered by your insurance company please call your insurance carrier immediately," sufficient to provide notice of debt, and insufficient upon which to build actionable violation of FDCPA; language does not appear overly antagonistic or intimidating so as to overshadow § 1692g notice); *In re* Hathcock, 437 B.R. 696 (Bankr. M.D. Fla. Oct. 1, 2010) (multiple references to creditor acceptable).

579 West v. Check Alert Sys., 2001 WL 1699196 (W.D. Mich. Sept. 7, 2001) (following statement in collection letter did not contradict or overshadow debt validation notice on back of letter: "Please be advised that if after thirty days your account is not paid in full or otherwise closed, the account information will be forwarded to the National Credit Reporting Agencies. This may hinder your ability to obtain credit in the future."). *See* McGinty v. Prof'l Claims Bur., Inc., 2016 WL 6069180 (E.D.N.Y. Oct. 17, 2016); Mashiri v. Grinnell, 2014 WL 12498213 (S.D. Cal. Oct. 31, 2014); Schimmel v. Slaughter, 975 F. Supp.

that paraphrased the FDCPA § 1692c(c) cease communication rights overshadowed the FDCPA § 1692g notice.[580] Inclusion of three reply-by date statements where that date was almost two weeks after the validation notice window closed was found to be consistent with the consumer's right to dispute her debt within the thirty days.[581]

9.9 Where Consumer Does Not Dispute a Debt

> (c) ADMISSION OF LIABILITY.—The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.[582]

The National Consumer Law Center urged that this provision be adopted in order to prevent the "assumption of validity" (mentioned in the notice of verification rights[583] and intended only to motivate consumers to raise disputes promptly) from diminishing the consumer's opportunity to contest the debt later.[584]

A collection letter which gives the impression, contrary to this section, that a debt not timely disputed by the consumer would be presumed valid by a court, was deceptive violating the FDCPA.[585]

The Third Circuit, in *McLaughlin v. Phelan Hallinan & Schmieg, L.L.P.*,[586] the Fourth Circuit, in *Russell v. Absolute Collection Services, Inc.*,[587] and the Second Circuit, in *Vangorden v. Second Round, L.P.*,[588] all found nothing in the text of the FDCPA suggests that a debtor's ability to state a section 1692e or section 1692f claim is dependent upon the debtor first disputing the validity of the debt in accordance with section 1692g, rejecting the argument that a consumer must exercise her section 1692g(b) rights seeking verification of the debt as a prerequisite to an FDCPA claim or a claim that the debt is invalid.[589] A number of lower courts had reached the opposite conclusion,[590] without pointing to any language of the FDCPA that supports their view or explaining how their view could possibly be reconciled with section 1692g(c), which those opinions failed to consider.

9.10 Consumer Dispute or Request for Creditor's Identity

9.10.1 Text of FDCPA § 1692g(b)

> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.[591]

1357 (M.D. Ga. 1997) (threat that "suit will follow after thirty (30) days" (from date of letter) did not deceptively shorten or contradict validation period).

580 *See* Illobre v. Fin. Recovery Services, Inc., 2016 WL 6581332 (S.D.N.Y. Nov. 3, 2016).

581 *See* Koller v. Midland Credit Mgmt., Inc., 2017 WL 4102744 (W.D. Mo. Sept. 15, 2017).

582 15 U.S.C. § 1692g(c). *See also* Reg. F § 1006.38(d)(1); Dunn v. Premier Capital, Inc., 2013 WL 3466826 (D.N.J. July 9, 2013).

583 15 U.S.C. § 1692g(a)(3). *See* § 9.11.3, *supra*.

584 The Fair Debt Collection Practices Act: Hearings Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Hous. and Urban Affairs, 95th Cong., 2d Sess. 96–97 (1977) (out of print, but available for copying at U.S. government document depositories).

585 *See* Velderman v. Midland Credit Mgmt., Inc., 2005 WL 2405959 (W.D. Mich. Sept. 29, 2005); Burdett v. Harrah's Kansas Casino Corp., 294 F. Supp. 2d 1215 (D. Kan. 2003); Neely, FTC Informal Staff Letter (Apr. 29, 1980). *See also* Nelson v. Select Fin. Services, Inc., 430 F. Supp. 2d 455, 457 (E.D. Pa. 2006); McCabe v. Crawford & Co., 272 F. Supp. 2d 736 (N.D. Ill. 2003). *Cf.* Gigli v. Palisades Collection, L.L.C., 2008 WL 3853295 (M.D. Pa. Aug. 14, 2008). *But see* D'Allesandro v. Vision Fin. Corp., 2009 WL 816082 (N.J. Super. Ct. App. Div. Mar. 31, 2009).

586 756 F.3d 240, 247 (3d Cir. 2014).

587 763 F.3d 385, 392–393 (4th Cir. 2014).

588 2018 WL 3595759, at *4 (2d Cir. 2018). *See also* Wong v. Alternative Claims Mgmt., L.L.C., 2017 WL 5635533 (S.D.N.Y. 2017) (consumer can sue under § 1692e even if they did not use statutory verification procedure set forth in § 1692g).

589 *See also* Girdler v. Convergent Outsourcing, Inc., 2016 WL 7479541 (D. Mass. Dec. 29, 2016); Psaros v. Green Tree Serv., L.L.C., 2015 WL 9412922 (D.N.J. Dec. 21, 2015); Riley v. Portfolio Recovery Assoc., 2015 WL 1594298 (N.D. Ill. Apr. 7, 2015); Velazquez v. NCO Fin. Sys. Inc., 2011 WL 2135633 (E.D. Pa. May 31, 2011); Russell v. Absolute Collection Services, Inc., 2011 WL 13116532 (M.D.N.C. Jan. 10, 2011).

590 *See, e.g.*, Golden v. Prosser, 2014 WL 4626489 (D. Minn. 2014); Mellinger v. Midwestern Audit Serv., Inc., 2012 WL 405008 (E.D. Mich. 2012); Carpenter v. RJM Acquisitions, L.L.C., 787 F. Supp. 2d 971 (D. Minn. 2011); Milton v. LTD Fin. Services, 2011 WL 291363 (S.D. Ga. 2011); Wright v. North Shore Agency, Inc., 2008 WL 11338704 (C.D. Cal. May 22, 2008); Whitaker v. Hudson & Keyse, L.L.C., 2007 WL 2265057 (S.D. Ind. 2007) (failure to dispute may bar consumer's later dispute); Palmer v. I.C. Sys., Inc., 2005 WL 3001877, at *5 (N.D. Cal. 2005).

591 15 U.S.C. § 1692g(b).

9.10.2 Regulation F Requirements As to Consumer Dispute or Request for Creditor's Identity

9.10.2.1 Generally

For certain debt collector obligations to apply (see § 9.11, *infra*), Regulation F (effective November 30, 2021) specifies that the consumer's dispute of the debt or a request for the name and address of the original creditor be submitted in writing within the validation period.[592] The validation period is a defined term,[593] examined in § 9.4.8.1, *supra*, and the end of the period is disclosed in the validation information at the section disclosing the consumer's rights, examined at § 9.4.8.2, *supra*.

A consumer's dispute or request for original-creditor information is timely if has been sent or submitted within the validation period, even if the collector receives the dispute beyond the period.[594] If the debt collector sends a second validation notice because it assumes the consumer did not receive the first one, then the end of the validation period is based on when the second notice was sent.[595]

The consumer must submit the dispute or request in "writing." The Regulation F Official Interpretations provide four examples of submissions in "writing":

- Mailing a written dispute or request to the debt collector;
- Returning to the debt collector the consumer-response form that the Regulation requires to appear on the validation notice,[596] and indicating on the form the dispute or request;
- Using a medium of electronic communication through which the debt collector accepts electronic communications from consumers, such as an email address or a website portal; or
- Delivering the written dispute or request in person or by courier to the debt collector.[597]

The Regulation F Official Interpretations also explain that the consumer's use of electronic media to submit a dispute or request for original-creditor information despite the statutory requirement that such submissions be "in writing" is consistent with the federal E-SIGN Act. While E-SIGN § 101(b) does not require a person to accept electronic communication in lieu of a writing, the CFPB views the consumer's use of an electronic medium through which the collector otherwise accepts communications from consumers as evidence that the collector has accepted the use of such an electronic medium.[598]

The Regulation F supplemental information states that debt collectors can request that consumers send disputes and requests for original-creditor information through designated web portals or email addresses, but clarifies that:

> The final rule's prohibitions on harassing, deceptive, and unfair practices in [Reg. F] §§ 1006.14, 1006.18, and 1006.22 continue to apply such that a debt collector should not ignore a consumer's dispute or request for original-creditor information received through an online portal or to an email address not designated by the debt collector for receiving such disputes or requests.[599]

9.10.2.2 Requests or Disputes from a Deceased Consumer's Estate

As discussed at § 9.2.3, *supra*, if the debt collector knows or should know that the consumer is deceased, and if the debt collector has not previously provided the validation information to the deceased consumer, a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of the validation information requirements.[600] The debt collector must provide the validation information to an individual that the debt collector identifies by name who is authorized to act on behalf of the deceased consumer's estate.[601]

Similarly, "[i]f the debt collector knows or should know that the consumer is deceased, and if the consumer has not previously disputed the debt or requested the name and address of the original creditor, a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of [disputes and requests for original-creditor information]." In such circumstances, the debt collector must then respond to a request for the name and address of the original creditor or to a dispute timely submitted in writing by a person who is authorized to act on behalf of the deceased consumer's estate.[602] Such a request by a person authorized to act on behalf of the estate should also trigger a collection pause until the collector complies with its obligations in response to the request.[603]

9.10.3 A Sufficient Consumer Request or Dispute Prior to Regulation F

This section examines court decisions issued prior to Regulation F (effective November 30, 2021) about consumer disputes and requests for original-creditor information. Regulation F provisions are discussed at § 9.10.2, *supra*.

A consumer's written statement that "I dispute the debt"[604] or requesting "verification"[605] is sufficient to dispute the validity of a debt under the FDCPA.

592 Reg. F §§ 1006.38(c), (d)(2).
593 Reg. F § 1006.34(b)(5).
594 *See* 86 Fed. Reg. 5766 at 5798 (Jan. 19, 2021).
595 Reg. F Official Interpretations § 34(b)(5)-2.
596 Reg. F § 1006.34(c)(4). *See* § 9.4.10, *supra*.
597 Reg. F Official Interpretations § 38-1.
598 Reg. F Official Interpretations § 38-2. There is a drafting error in the interpretation where the clear intent is to reference Reg. F Official Interpretations § 38-1(iii), not (ii).
599 85 Fed. Reg. 76,734 at 76,844, n.552 (Nov. 30, 2020).
600 Reg. F Official Interpretations § 34(a)(1)-1.
601 Reg. F Official Interpretations § 34(a)(1)-1.
602 Reg. F Official Interpretations § 38-3.
603 *See* § 9.11, *infra*.
604 Castro v. ARS Nat'l Services, Inc., 2000 WL 264310 (S.D.N.Y. 2000).
605 Gruber v. Creditors' Prot. Serv., Inc., 742 F.3d 271 (7th Cir. 2014) (section 1692g notice instructing consumer to seek verification rather than disputing debt was not violation of Act).

The validation notice must not impose additional burdens on the consumer.[606] In *Castro v. ARS National Services, Inc.*,[607] a district court in New York held that a debt collector had violated the FDCPA by including language in its validation notice that the least sophisticated consumer could read as imposing requirements beyond those set out in the FDCPA. The debt collector's validation notice listed six types of documents as suitable for dispute purposes, such as a cancelled check or a final billing statement. The word "dispute" need not be used in the request for verification if the meaning is otherwise clear.[608] The consumer's statement in the letter to the collector that the account had been paid in full was sufficient to obtain verification.[609] In the context of a consumer's exercise of rights under FDCPA § 1692c, the Seventh Circuit in *Horkey*[610] noted that the consumer should not be required to use sophisticated methods to exercise FDCPA rights and that this policy should be applied to consumers' disputes and requests for verification. An attorney seeking verification may be held to a higher standard, though.[611]

In *DeSantis v. Computer Credit, Inc.*, the Second Circuit found that a debt collector may not add the requirement that the consumer's request for verification contain a "valid reason for nonpayment."[612]

The thirty-day period during which a consumer may request verification of a debt runs from the date of receipt of the notice of verification rights by the consumer.[613] The consumer must send the dispute or verification request within the thirty days of receiving of the validation notice.[614] If the consumer does not act in that time period, the debt collector is not obligated to provide verification of the debt.[615]

606 *See* Henhaffer v. Simeone & Raynor, L.L.C., 2016 WL 6305939 (D.N.J. 2016); Jones-Bartley v. McCabe, Weisberg & Conway, P.C., 59 F. Supp. 3d 617 (S.D.N.Y. 2014) (denying mortgage attorneys' motion to dismiss § 1692g(a) claim that was based upon collection letter's statement that consumer should "indicate the nature of the dispute" to lodge dispute); Dutterer v. Thomas Kalperis Int'l, Inc., 2011 WL 382575 (E.D. Pa. 2011) (may not instruct debtor to "supply us with substantive information proving payment within 30 days"); Beasley v. Sessoms & Rogers, P.A., 2010 WL 1980083 (E.D.N.C. 2010); Walters v. PDI Mgmt. Services, 2004 WL 1622217 (S.D. Ind. 2004) (no certified mail); Sambor v. Omnia Credit Services, 183 F. Supp. 2d 1234 (D. Haw. 2002) ("suitable dispute documentation"); Whitten v. ARS Nat'l Services, Inc., 2002 WL 1332001 (N.D. Ill. 2002) (suitable dispute documentation); Frey v. Satter, Beyer & Spires, 1999 WL 301650 (N.D. Ill. 1999) (nature of dispute); Krisor, FTC Informal Staff Letter (Mar. 3, 1992). *See also* Johnson v. Equifax Risk Mgmt. Services, 2004 WL 540459 (S.D.N.Y. 2004) (affidavit of forgery acceptable, but should not imply that consumer's verification dispute was ineffective); Forsberg v. Fid. Nat'l Credit Services, Ltd., 2004 U.S. Dist. LEXIS 7622 (S.D. Cal. 2004) (requested documentation). *Cf.* Mendez v. M.R.S. Assoc., 2004 WL 1745779 (N.D. Ill. 2004) (explain nature of dispute). *But see* Renick v. Dun & Bradstreet Receivable Mgmt. Services, 290 F.3d 1055 (9th Cir. 2002) (collector's letter made it clear that phone company should be contacted only with questions pertaining to phone account and that inquiries about collection of money owed should be directed to collector); Franzos v. Pinnacle Credit Services L.L.C., 332 F. Supp. 2d 682 (S.D.N.Y. 2004) (listing documents to submit as proof that debt was not owed acceptable); Foresberg v. Fid. Nat'l Credit Services, Ltd., 2004 WL 3510771 (S.D. Cal. 2004) ("please include documentation"); Valdez v. Hunt, 2002 WL 433595 (N.D. Cal. 2002) (directing consumer to creditor to make payments would not confuse consumer as to whom to direct verification request); Sandlin v. Shapiro & Fishman, 919 F. Supp. 1564 (M.D. Fla. 1996) ($60 fee for payoff figures acceptable).

607 2000 WL 264310 (S.D.N.Y. Mar. 8, 2000).

608 Gruber v. Creditors' Prot. Serv., Inc., 742 F.3d 271, 274 (7th Cir. 2014); Webster v. ACB Receivables Mgmt., Inc., 15 F. Supp. 3d 619 (D. Md. 2014) (requesting validation rather than verification acceptable); Clark's Jewelers v. Humble, 823 P.2d 818 (Kan. Ct. App. 1991). *See also* Kasalo v. Trident Asset Mgmt., L.L.C., 53 F. Supp. 3d 1072 (N.D. Ill. 2014) (FDCPA complaint provided the consumer's timely written dispute of the debt by stating it had been paid); Mendez v. M.R.S. Assoc., 2005 WL 1564977 (N.D. Ill. June 27, 2005) ("explain nature of dispute").

609 *See* Devlin v. Law Offices Howard Lee Schiff, P.C., 2012 WL 4469139 (D. Mass. Sept. 25, 2012). *See also* Hair v. Lazega & Johanson L.L.C., 2014 WL 12571424 (N.D. Ga. July 7, 2014), *adopted*, 2014 WL 12575746 (N.D. Ga. Aug. 6, 2014) (statements that "debt is being handled through another agency" and "[p]ayment terms have been accepted and agreed" were sufficient to raise question of fact).

610 Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769 (7th Cir. 2003). *See also* Gruber v. Creditors' Prot. Serv., Inc., 742 F.3d 271, 274 (7th Cir. 2014); March v. Fed. Nat'l Mortg. Ass'n, 2011 WL 3648235 (E.D. Mich. Aug. 18, 2011) (issue of material fact existed as to whether letter could lead a trier of fact to conclude that plaintiff's letter was meant as RESPA qualified written request and not as request to verify plaintiff's debt); Reese v. CAC Services, Inc., 2011 WL 830084 (D. Or. Mar. 3, 2011) ("the ordinary usage of "dispute" is defined as "to call into question; . . . to struggle against; . . . to contend over"; could not conclude as a matter of law that plaintiff's letter did not constitute notice of his dispute); Burke v. Messerli & Kramer P.A., 2010 WL 3167403 (D. Minn. Aug. 9, 2010) (prior correspondence during period sufficient; written dispute of paid debt).

611 *See* Andrade v. Erin Capital Mgmt. L.L.C., 2010 WL 1961843 (S.D. Fla. May 17, 2010).

612 269 F.3d 159, 162 (2d Cir. 2001). *See also* Mikolajczyk v. Universal Fid., L.P., 2017 WL 706301 (E.D. Wis. Feb. 22, 2017) (requiring reasons for dispute); Mendez v. M.R.S. Assoc., 2005 WL 1564977 (N.D. Ill. June 27, 2005) ("explain the nature of the dispute").

613 *See* § 9.7.5, *supra*. *See also* Settle v. Bank of Am., 2010 WL 682296 (E.D. Mo. Feb. 23, 2010) (*pro se* consumer requested verification prior to receipt of defendant's initial debt collection communication, mortgagee's alleged failure to respond did not amount to § 1692g violation). *Cf.* Slanina v. United Recovery Sys., L.P., 2011 WL 5008367 (M.D. Pa. Oct. 20, 2011) (consumer does not have a verification right until claim goes into collection, usually after default); Settle v. Bank of Am., 2010 WL 682296 (E.D. Mo. Feb. 23, 2010).

614 *See* § 9.10.2.1, *supra;* Jacobson v. Healthcare Fin. Services, Inc., 516 F.3d 85 (2d Cir. 2008). *See also* Kasalo v. Trident Asset Mgmt., L.L.C., 53 F. Supp. 3d 1072 (N.D. Ill. 2014) (service of complaint from consumer's lawyer provided consumer's timely written dispute of debt).

615 *See* Crain v. Pinnacle Fin. Group, Inc., 2007 WL 3408540 (E.D. Mich. Nov. 14, 2007) (where consumer did not request verification within 30-day period, she had no claim); Shah v. Collecto, Inc., 2005 WL 2216242 (D. Md. Sept. 12, 2005) (consumer's request for verification outside request period did not impose liability under § 1692g); Senftle v. Landau, 390 F. Supp. 2d 463 (D. Md. 2005); Asset Acceptance L.L.C. v. Davis, 2004 WL 2940747 (Ohio Ct. App. Dec. 13, 2004) (debt collector's failure to provide verification, which was requested by consumer more than three years after collector sent its initial communication containing § 1692g notice, was not unlawful since that section requires collector to comply only with such requests lodged within 30 days after consumer's receipt of communication containing validation notice).

However, certain actions by the debt collector can extend the validation period.[616]

While the verification request is generally mailed, an emailed request to the debt collector may also be effective.[617] The consumer should write down the date of receiving the validation notice from the debt collector and the date and address to which the consumer mailed their request to the debt collector disputing, or requesting verification of, the debt. With that information, the consumer may take advantage of the "mailbox rule," that presumes that a letter sent to correct address is received at that address.[618] The consumer may authorize their attorney or agent to request the debt be verified so long as the authorization is clearly provided to the debt collector.[619]

The clear language of FDCPA § 1692g(b) requires the debt collector to cease collection of the debt until it provides verification of the debt.[620] This provision is silent on whether the debt collector that ceases collection must still provide verification. The courts generally do not require verification if the debt collector ceases collection.[621]

616 *See* Reg. F Official Interpretations § 34(b)(5)-2 (if debt collector sends second validation notice, because it assumes consumer did not receive first one, then end of validation period is based on when second notice was sent); Young v. G.L.A. Collection Co., 2011 WL 6016650 (S.D. Ind. Dec. 1, 2011) (considered collector's offer of a second 30-day period to request verification binding on collector).

617 *See* Caldwell v. JPMorgan Chase Bank, 2016 WL 10592261 at 7 (W.D. Tenn. 2016).

618 *See, e.g.*, Boatswain v. RJM Acquisitions, L.L.C., 2010 WL 11483195 (E.D.N.C. 2010). *See also* § 9.3.3, *supra* (discussing the "mailbox rule").

619 *See* Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769 (7th Cir. 2003) (collection agency failed to provide validation notice to consumer, violating FDCPA; collection agency's ignorance of consumer's new address was not excuse when it could have sent validation notice to consumer's attorney); Kasalo v. Trident Asset Mgmt., L.L.C., 53 F. Supp. 3d 1072 (N.D. Ill. 2014) (FDCPA complaint written by consumer's lawyer provided consumer's timely written dispute of debt); Cowell v. Creditors Interchange Receivable Mgmt., L.L.C., 2009 WL 465580 (W.D. Pa. Feb. 25, 2009) (debt settlement company's request for verification was proper); Owens v. Howe, 2004 WL 6070565, at *38 (N.D. Ind. Nov. 8, 2004) (debt collector must respond to dispute letter written by debtor's wife; "communication was clearly sent at [plaintiff's] direction"); Gostony v. Diem Corp., 320 F. Supp. 2d 932, 942 (D. Ariz. 2003) (dispute letter from someone claiming to be plaintiff's father).

620 *See* § 9.8.1, *infra*.

621 *See* Guerrero v. RJM Acquisitions, L.L.C., 499 F.3d 926, 940 (9th Cir. 2007) ("[n]othing in [§ 1692g(b)] suggests an independent obligation to verify a disputed debt where the collector abandons all collection activity with respect to the consumer"); Jang v. A.M. Miller & Assoc., 122 F.3d 480, 482 (7th Cir. 1997) ("[w]hen a collection agency cannot verify a debt, the statute allows the debt collector to cease all collection activities at that point without incurring any liability for the mistake"); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1031 (6th Cir. 1992) (debt collector did not violate FDCPA when it ceased collection activity after receiving request for validation); Wilhelm v. Credico, Inc., 519 F.3d 416, 419 (8th Cir. 2008); Jacques v. Solomon & Solomon P.C., 886 F. Supp. 2d 429 (D. Del. 2012); F.T.C. Staff Opinion Letter, 1997 WL 33791232 (Dec. 23, 1997) ("[t]here is nothing in the FDCPA that requires a response to a written dispute if the debt collector chooses to abandon its collection effort with respect to the debt at issue"); F.T.C. Staff Opinion Letter, 1992 WL 12144210 (Mar. 3, 1992) ("[i]n the event the collector decides not to pursue the collection efforts, there is no requirement to furnish the documentation of the indebtedness to the consumer").

9.11 Collector Response to Consumer Dispute or Request for Creditor's Identity

9.11.1 Debt Collector Obligations Under Regulation F

9.11.1.1 Obligations After a Dispute

Under Regulation F (effective November 30, 2021), upon receipt of a dispute submitted by the consumer in writing or electronically (where the collector accepts such electronic communication from consumers)[622] and within the validation period,[623] a debt collector must cease collection of the debt, or any disputed portion of the debt.[624] The collector must cease such collection until it sends to the consumer, in writing or electronically in the proper manner,[625] a copy either of verification of the debt or of a judgment.[626]

The Regulation F supplemental information explains that the Bureau declined "to define what it means to verify a debt" and that "the Bureau generally expects that debt collectors will respond to non-duplicative disputes by providing verifications of debts (or copies of judgments) as they do today."[627]

If the debt collector reasonably determines that the consumer's dispute is a duplicative dispute, the collector can still send the verification or judgment.[628] Alternatively, it can notify the consumer that the dispute is duplicative, provide a brief statement of the reasons for the determination in the proper manner,[629] and refer the consumer to the debt collector's response to the earlier dispute.[630] The Regulation F Official Interpretations state concerning duplicative disputes:

> A debt collector complies with the requirement to provide a brief statement of the reasons for its determination if the notice states that the dispute is substantially the same as an earlier dispute submitted by the consumer and the consumer has not included any new and material information in support of the earlier dispute. A debt collector complies with the requirement to refer the consumer to the debt collector's response to the earlier dispute if the notice states that the debt collector responded to the earlier dispute and provides the date of that response.[631]

Regulation F defines a duplicative dispute as one the consumer submits in writing within the validation period that is

622 *See* § 9.10.2, *supra*.

623 *See* §§ 9.4.1, 9.10.2, *supra*.

624 Reg. F § 1006.38(d)(2).

625 *See* § 9.11.1.3, *infra*.

626 Reg. F § 1006.38(d)(2)(i).

627 85 Fed. Reg. 76,734 at 76,847 (Nov. 30, 2020). *See* § 9.11.2, *infra* (discussing pre-Regulation F verification practices).

628 Reg. F § 1006.38(d)(2)(ii)(B).

629 *See* § 9.11.1.3, *infra*.

630 Reg. F § 1006.38(d)(2)(ii)(A).

631 Reg. F Official Interpretations § 38(d)(ii)-1.

substantially the same as a dispute the consumer previously submitted in writing within the validation period for which the debt collector already has sent to the consumer in writing in the proper manner a copy either of verification of the debt or of a judgment.[632] A later dispute can be substantially the same as an earlier dispute, even if the later dispute does not repeat verbatim the language of the earlier dispute.[633]

Even if the dispute is substantially the same, it is not duplicative if it contains new and material information to support the dispute.[634] Information is new if the consumer did not provide the information when submitting an earlier dispute.[635] Information is material if it is reasonably likely to change the verification the debt collector provided or would have provided in response to the earlier dispute.[636] The Regulation F Official Interpretations provide an example where the consumer disputes a debt and the collector provides verification. "The consumer then sends a cancelled check showing the consumer paid the debt. The cancelled check is new and material information."[637]

9.11.1.2 Obligations After a Request for Original-Creditor Information

Regulation F (effective November 30, 2021) provides that upon receipt of a request for the name and address of the original creditor submitted by the consumer in writing or electronically (where the collector accepts such electronic communication from consumers)[638] and within the validation period,[639] a debt collector must cease collection of the debt.[640] It must cease such collection actions until the debt collector sends to the consumer in writing or electronically in the proper manner[641] the name and address of the original creditor.[642]

Regulation F provides an alternative option for a collector where the name of the original creditor and current creditor are the same. In utilizing that option, the debt collector ceases collection until it reasonably determines that the original creditor is the same as the current creditor and until it notifies the consumer of that fact in writing or electronically in the proper manner,[643] and refers the consumer to the validation information previously provided that includes the name of the current creditor.[644] This is a strange option, because the referenced validation information does not include the address of the current creditor, so the consumer's request for the original creditor's address is not fulfilled.

632 Reg. F § 1006.38(a)(1)(i).
633 Reg. F Official Interpretations § 38(a)(1)-1.
634 Reg. F § 1006.38(a)(1)(ii).
635 Reg. F Official Interpretations § 38(a)(1)-2.
636 Reg. F Official Interpretations § 38(a)(1)-2.
637 Reg. F Official Interpretations § 38(a)(1)-2(i).
638 *See* § 9.10.2, *supra*.
639 *See* §§ 9.4.1, 9.10.2, *supra*.
640 Reg. F § 1006.38(c).
641 *See* § 9.11.1.3, *infra*.
642 Reg. F § 1006.38(c)(1).
643 *See* § 9.11.1.3, *infra*.
644 Reg. F § 1006.38(c)(2).

9.11.1.3 Form of Collector Responses

As noted above, Regulation F (effective November 30, 2021) provides that the collector must submit to the consumer in the proper manner the four different collector responses:

- Verification of the debt or of a judgment;
- Notice regarding a duplicative dispute;
- The original creditor's name and address; and
- Notification where the original creditor is the current creditor.

All of these responses must be sent in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later.[645]

If the collector sends any of these notices electronically, other than the notice of a duplicative dispute, it must do so in accordance with E-SIGN § 101(c), 15 U.S.C. § 7001(c).[646] The requirements of E-SIGN § 101(c), including its consumer consent requirement, are described at § 9.3.2, *supra*.

Even though an electronic duplicative dispute notice need not comply with E-SIGN § 101(c), it still must be sent in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later.[647] All four responses must be written or electronic, and cannot be made orally.[648]

9.11.2 Ceasing Collection Prior to Regulation F

9.11.2.1 Generally

This section examines court decisions issued prior to Regulation F (effective November 30, 2021) about ceasing collection after consumers dispute or request original-creditor information. Regulation F provisions outlining obligations after a dispute or request for original-creditor information are discussed at § 9.11.1, *supra*.

The collector must cease collection activities on the date it receives the request for verification,[649] and will be held liable if it continues to collect the debt until it provides an appropriate verification.[650] The collector may not resume collection

645 Reg. F §§ 1006.38(c)(1), (c)(2), (d)(2)(i), (d)(2)(ii)(A) (all referencing § 1006.42); § 9.3.2, *supra*.
646 Reg. F § 1006.38(c)(1), (c)(2), (d)(2)(i) (all referencing § 1006.42); § 9.3.2, *supra*.
647 Reg. F § 1006.38 (d)(2)(ii) (referencing § 1006.42(a)(1)); § 9.3.2, *supra*.
648 85 Fed. Reg. 76734 at 76847 (Nov. 30, 2020).
649 *See* Leeb v. Nationwide Credit Corp., 806 F.3d 895 (7th Cir. 2015); Dragon v. I.C. Sys., Inc., 483 F. Supp. 2d 198 (D. Conn. 2007); Jeffries v. Dutton & Dutton, P.C., 2006 WL 1343629 (N.D. Ill. May 11, 2006); United States v. Cent. Adjustment Bur., Inc., 667 F. Supp. 370 (N.D. Tex. 1986), *aff'd per curiam*, 823 F.2d 880 (5th Cir. 1987); Appx. E.2.6.7, *infra*. *But see* Kaschak v. Raritan Valley Collection Agency, 1989 WL 255498 (D.N.J. May 22, 1989) (no liability where collector sent collection letter day after it received request for verification, but before it had processed it).
650 Leeb v. Nationwide Credit Corp., 806 F.3d 895 (7th Cir. 2015); Thebert v. Potestivo & Assoc., 2017 WL 3581322 (E.D. Mich. Aug. 18, 2017); Garcia-Contreras v. Brock & Scott, P.L.L.C., 775 F. Supp. 2d 808

activities,[651] including affirmative steps in a debt collection suit[652] or filing a lien on the consumer's property,[653] until it mails[654] verification to the consumer, even if the consumer was already aware of the basis of the claim.[655] If only a portion of the debt remains unverified, continuing to collect on that unverified portion of a debt violates FDCPA § 1692g(b).[656] The consumer need not dispute the validity of the debt to recover for a validation notice violation.[657]

Key to the informal dispute resolution device of debt verification is the requirement that the debt collector cease collecting the debt when the collector receives a timely written dispute of the debt or a written request for verification of the debt. The cessation requirement gives the debt collector an incentive to investigate the dispute and provide the required information about its claim to the consumer, because its fee often depends on the amount collected.[658] The FDCPA does not require that consumers be notified that debt collectors, after receiving a timely written dispute or request for verification, must suspend collection until they verify the debt.[659] However, under Regulation F debt collectors will be required to inform consumers about the collection pause.[660]

In *Leeb v. Nationwide Credit Corp.*,[661] the Seventh Circuit rejected the collection agency's argument that the plaintiff consumer was not misled by its request for payment after receiving the consumer's dispute and held that an objective standard is appropriate for determining whether a debt collector has failed to "cease collection" by sending a particular letter. That objective analysis considers the content of the letter and the context in which it was sent, including the nature and scope of the parties' relationship, the consumer's request for an acknowledgment of the dispute, and the consumer's belief that he did not owe the debt as his medical insurance was obligated to pay it.

9.11.2.2 Putting Lawsuits on Hold

The Eleventh Circuit joined the Seventh Circuit in holding that a debt verification request during a suit requires the collector to put the collection suit on hold.[662] The Eleventh Circuit

(M.D.N.C. 2011) (rejecting argument that contents of lawsuit could constitute verification; defendants violated FDCPA by filing their lawsuit before complying with requirement a verification be "mailed"), *adopted in part, rejected in part by* 775 F. Supp. 2d 808 (M.D.N.C. 2011); Casas v. Midland Credit Mgmt., Inc., 2009 WL 249992 (S.D. Cal. 2009); Spencer v. Hendersen-Webb, 81 F. Supp. 2d 582 (D. Md. 1999); *In re* Young, 280 B.R. 864 (Bankr. S.D. Ala. 2001). *See also* Dikun v. Streich, 369 F. Supp. 2d 781 (E.D. Va 2005); Martinez v. Credit Bur., 2005 WL 1972538 (S.D. Fla. 2005); Bohensky v. Hosp. Billing & Collection Services, Ltd., 1999 WL 294726 (E.D.N.Y. 1999). *Cf.* Allen v. ATG Credit L.L.C., 2004 WL 2931298 (N.D. Ill. 2004) (called consumer five times to confirm that verification information was received, not to collect).

651 Lupia v. Medicredit, Inc., 445 F. Supp. 3d 1271, 1283 (D. Colo. 2020) (phone call after receipt of dispute violated FDCPA; however, letter confirming receipt of dispute that invited call, but did not demand payment, did not violate statute); Gilmore v. Account Mgmt., Inc., 2009 WL 2848278 (N.D. Ga. 2009), *rev'd on other grounds*, 2009 WL 4826953 (11th Cir. 2009); Zaborac v. Mut. Hosp. Serv., Inc., 2004 WL 2538643 (S.D. Ind. 2004) (collector may continue settlement negotiations initiated by consumer's attorney); Johnson v. Statewide Collections, Inc., 778 P.2d 93 (Wyo. 1989). *See also* Spencer v. Hendersen-Webb, 81 F. Supp. 2d 582 (D. Md. 1999) (did not comply by faxing printout itemizing debt to consumer's future father-in-law); Castle, FTC Informal Staff Letter (June 13, 1995).

652 *See* Shimek v. Forbes, 374 F.3d 1011 (11th Cir. 2004); Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); U.S. Bank Nat'l Ass'n v. Martin, 2015 WL 2227792 (D. Haw. Apr. 23, 2015) (bank was precluded from proceeding with its case—including serving consumer); Garcia-Contreras v. Brock & Scott, P.L.L.C., 2010 WL 4962940 (M.D.N.C. Nov. 30, 2010), *adopted in part, rejected in part by* 775 F. Supp. 2d 808 (M.D.N.C. 2011); Forman v. Lauinger, 2007 WL 1580082 (D. Mont. May 31, 2007); Lietz v. Mikel M. Boley Attorney at Law, 2006 WL 335854 (D. Utah Feb. 14, 2006); Recker v. Cent. Collection Bur., Inc., 2005 WL 2654222 (S.D. Ind. Oct. 17, 2005); McDaniel v. South & Assoc., P.C., 325 F. Supp. 2d 1210 (D. Kan. 2004); Levin v. Kluever & Platt, L.L.C., 2003 WL 22757763 (N.D. Ill. Nov. 19, 2003); Frey v. Satter, Beyer & Spires, 1999 WL 301650 (N.D. Ill. May 3, 1999); Taylor v. Fink, 1994 WL 669605 (N.D. Ill. Nov. 25, 1994).

653 *See* Haddad v. Alexander, Zelmanski, Danner & Fioritto, P.L.L.C., 758 F.3d 777, 786 (6th Cir. 2014); Essique v. Walnut Woods Condo. Ass'n, 2016 WL 7337246 (E.D. Mich. Dec. 19, 2016); Morgan v. Vogler Law Firm, P.C., 2016 WL 3958608 (E.D. Mo. July 22, 2016).

654 *See* Puczko v. Law Office of Sipe & Landon, 2010 WL 11519290 (D. Ariz. Mar. 16, 2010). *See also* Ghanta v. Immediate Credit Recovery, Inc., 2017 WL 1423597 (N.D. Tex. Apr. 18, 2017) (plain language of § 1692g requires that verification be "mailed," and it was therefore "irrelevant" that debtor received some part of verifying information through the CFPB portal). *Cf.* § 9.11.1.3, *supra* (discussing acceptable ways to provide consumer response information under Regulation F).

655 *See* Leeb v. Nationwide Credit Corp., 806 F.3d 895, 898 (7th Cir. 2015) (applying objective test and determining that debt collector did not cease collecting debt where its collection letter requesting more information about consumer's § 1692g dispute also requested payment; consumer's subjective belief that he did not owe debt did not strip him of his § 1692g(b) protections).

656 Haddad v. Alexander, Zelmanski, Danner & Fioritto, P.L.L.C., 758 F.3d 777 (6th Cir. 2014).

657 Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982).

658 Although it is common for some debt collectors to cease their collection efforts and return the debt to creditor who is not bound directly by the FDCPA or the debt verification request. However, other laws may compel the creditor to respond to the consumer's dispute of the debt. *See* § 16.3.4, *infra*; National Consumer Law Center, Fair Credit Reporting Ch. 6 (9th ed. 2017), *updated at* www.nclc.org/library.

659 *See also* Bartlett v. Heibl, 128 F.3d 497, 502 (7th Cir. 1997) (Judge Posner's safe haven model validation notice does inform consumer that collector must suspend its collection efforts pending its response to consumer's verification request).

660 Reg. F §§ 1006.34(c)(3)(i)–(ii). *See* § 9.4.8.2, *supra*.

661 806 F.3d 895 (7th Cir. 2015). *See also* McCray v. Deitsch & Wright, P.A., 356 F. Supp. 3d 1358, 1360 (M.D. Fla. 2019) (demand in validation notice to immediately contact creditor overshadowed consumer's rights and violated § 1692g(b)).

662 *See* Shimek v. Forbes, 374 F.3d 1011 (11th Cir. 2004); Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Forman v. Lauinger, 2007 WL 1580082 (D. Mont. 2007); McDaniel v. South & Assoc., 325 F. Supp. 2d 1210 (D. Kan. 2004) (collector violated FDCPA by initiating judicial foreclosure action seeking money judgment as well as foreclosure after receiving timely verification request, but before responding to it); Levin v. Kluever & Platt, L.L.C., 2003 WL 22757763 (N.D. Ill. 2003) (may not seek default judgment); Lietz v. Mikel M. Boley Attorney at Law, 2006 WL 335854 (D. Utah 2006) (claim was stated where defendant filed complaint and summons after verification was requested and before it had been provided); Recker v. Cent. Collection Bur., Inc., 2005 WL

acknowledged that the FDCPA prohibited the debt collector from taking further steps to collect the debt until it had validated the debt once the consumer had requested debt verification. However, the court found that the debt collector had no obligation to stop the clerk from recording the previously filed lien against the condominium after receiving the consumer's request for verification.[663] The lower courts had looked to the Seventh Circuit decision by Judge Posner in *Bartlett v. Heibl*,[664] which recognized the confusion created by the threat to bring suit during the period that the consumer could request verification of the debt, because the consumer's verification request would force a suspension of collection efforts, including suit, until verification of the debt was provided.

While FDCPA § 1692g(b) requires a collector to cease collection activities pending its verification of a debt after a written request from the consumer disputing the debt, FTC staff letters erroneously believed it was permissible for the collector to continue litigation proceedings—for example, filing suit, taking a default judgment, and enforcing the judgment—during the cessation period.[665] The FTC staff did not believe that pursuing legal remedies pending verification was "unfair,"[666] although it believed a warning to the consumer that the collector might undertake legal proceedings during the thirty-day period or the cessation period would be appropriate, to avoid "confusion."[667] The courts have held otherwise—that, where verification was requested, suit may not be initiated or actively pursued until verification of the debt has been provided.

A lower court denied the debt collector summary judgment on its bona fide error defense that it had somehow lost the consumer's debt verification request and filed suit, as the debt collector failed to show reasonable procedures to prevent such an error.[668]

9.11.2.3 Limits on Credit Reporting

A debt collector which receives a dispute of the debt is required by FDCPA § 1692e(8) to report the dispute to any credit reporting agency to which it reports the debt.[669] The Fair Credit Reporting Act requires that a dispute of any debt reported to a credit reporting agency triggers a requirement that the furnisher, including a debt collector, investigate the dispute.[670]

In *Ewers v. Rainmaker Recovery 3, Inc.*,[671] the Eastern District of Michigan found that the collector violated FDCPA § 1692g(b) by reporting the debt at issue to Equifax after receiving a letter disputing the debt and seeking verification. In recognizing the critical nature of credit reporting as collection activity, the court stated: "A credit rating is extremely important to consumers, and can affect the ability to obtain credit, the rate of interest on loans, and even insurance rates. The reporting mechanism can thus pressure the consumer to pay the debt, perhaps to an even greater extent that a letter or a telephone call."[672]

9.11.3 Collector's Verification of Debt

9.11.3.1 Generally

The FDCPA does not define the operative word "verification" used in section 1692g(b).[673] The Regulation F (effective November 30, 2021) supplemental information explains that the Bureau declined "to define what it means to verify a debt" and that "the Bureau generally expects that debt collectors will respond to non-duplicative disputes by providing verifications

2654222 (S.D. Ind. 2005) (attaching verification of debt to small claims complaint was improper); Frey v. Satter, Beyer & Spires, 1999 WL 301650 (N.D. Ill. 1999) (validation notice should also state that if debt verification was requested, suit would be paused until verification was provided); Taylor v. Fink, 1994 WL 669605 (N.D. Ill. 1994).

663 Shimek v. Forbes, 374 F.3d 1011 (11th Cir. 2004). *See also* McNichols v. Moore Law Group, 2012 WL 667760 (S.D. Cal. 2012) (allegations that defendant attorney collector filed suit to collect debt without first providing verification as consumer had requested in writing stated claim for relief); Humphrey v. Brown, 2011 WL 53081 (D. Md. 2011) (debt collector properly ceased collection, but FDCPA did not required collector to unwind foreclosure relief scam).

664 128 F.3d 497 (7th Cir. 1997). *But see* Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914, 920 (7th Cir. 2004) (providing validation notice language to collection lawyers who planned to file suit during period for consumer to request verification).

665 FTC Official Staff Commentary § 809(b)-1, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Weinberg, FTC Informal Staff Letter (Dec. 16, 1992); Wytychak, FTC Informal Staff Letter (Dec. 16, 1992); Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988); Goldfarb, FTC Informal Staff Letter (Jan. 16, 1987); Polito, FTC Informal Staff Letter (Jan. 8, 1987); Kent, FTC Informal Staff Letter (Dec. 10, 1986).

666 Levin, FTC Informal Staff Letter (Nov. 12, 1986). *See also* § 8.2, *supra*.

667 Luby, FTC Informal Staff Letter (Dec. 5, 1986); McPhee, FTC Informal Staff Letter (Nov. 17, 1986); Levin, FTC Informal Staff Letter (Nov. 12, 1986).

668 *See* VanHuss v. Rausch, Sturm, Israel, Enerson & Hornik, 2017 WL 1379402 (W.D. Wis. Apr. 14, 2017).

669 *See* § 7.2.8, *supra*.

670 *See* § 14.6, *infra*.

671 393 F. Supp. 3d 614 (E.D. Mich. 2019).

672 *Id.* at 621.

673 See Reg. F § 1006.38(d)(2)(i).

See also H.R. Rep. No. 131, 95th Cong., 1st Sess. 5 (1977) ("Although the term "certification" [later changed to "verification"] which is used in section 808, validation of debts, is not defined in the bill, the committee feels compliance would be achieved by a debt collector if the debt collector obtained from the creditor a statement which includes an itemization of the amount of the debt, and the name of the consumer, a statement that the debt has not been paid, and a statement that the creditor (to whom the debt was originally owed), in consideration of the consumer's debt, had either delivered a merchantable product or properly rendered a service."); H.R. Rep. No. 1202, 94th Cong., 2d Sess. 4 (1976) (nearly identical language).

The Consumer Credit Protection Act, of which the Fair Debt Collection Practices Act is part, cautions against reliance on captions, removing the word "validation" from contention in interpreting this provision. See Brady v. Credit Recovery Co., 160 F.3d 64, 65 (1st Cir. 1998) ("Pub. L. 90-321, § 502 (May 29, 1968), 82 Stat. 146, 147, reported as a note following 15 U.S.C. § 1601 (forbidding reliance on captions)"); Appx. E.2.6.4, *infra*.

of debts (or copies of judgments) as they do today."[674] The common meaning of "verification" is to "prove by evidence."[675]

As discussed in § 9.11.3.2, *infra*, the Fourth, Seventh, and Ninth Circuits have departed from the common meaning of the word in a way that may undermine the effectiveness of this error resolution procedure that was considered by the Senate to be a "significant feature" of the Act.[676]

In contrast, the Sixth Circuit provides for more robust verification rights as discussed in § 9.11.3.3, *infra*.

A collector may attempt to verify a debt before a consumer requests it to avoid requests for verification, but a request for verification calling for information not previously provided would require the provision of new information.[677]

A debt collector's verification may be deceptive violating FDCPA § 1692e.[678]

FDCPA § 1692g(b) references a response "mailed" to the consumer by the debt collector. Regulation F has expanded the permissible ways that a response to a dispute may be provided to the consumer as discussed in § 9.11.1.3, *supra*. A debt collector's record that the verification was mailed to the consumer may create a presumption that it was mailed.[679] The consumer may rebut that presumption by evidence that it was sent to the wrong address.[680]

Verification requirements should vary depending upon the reason for the dispute over the alleged debt. For example, a consumer claiming mistaken identity as a debtor or forgery needs very different verification than a consumer claiming full payment or uncredited payments or no contract because of lack of acceptance, or delivery, or breach of warranty. Where the amount of the debt was disputed, the collector must verify the amount.[681] Where the balance of the debt is disputed, monthly statements of the amount owed may be probative and verify the debt.[682] Responding to a consumer's request to verify a debt pursuant to FDCPA § 1692g with incomplete information may be deceptive and unfair.[683] Verification regarding a car deficiency claim which included a retail installment contract, a loan application, a notice of sale, and an accounting of the sale was sufficient.[684]

Copies of original billing statements that verified that the amount demanded and showed the dates on which charges were incurred, together with a supporting "Affidavit of Claim and Certification of Amount Due," was sufficient verification.[685] Palisades properly validated the account by informing the consumer that it had acquired the account from Discover Card

674 85 Fed. Reg. 76,734 at 76,847 (Nov. 30, 2020). *See* § 9.8.2, *infra* (discussing pre-Regulation F verification practices).

675 "[V]erify: 1. To prove the truth of by presentation of evidence or testimony; substantiate. 2. To determine or test the truth or accuracy of, as by comparison, investigation, or reference." The American Heritage Dictionary of the English Language (4th ed. 2000).

676 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *reproduced at* Appx. A.3, *infra*.

677 Castle, FTC Informal Staff Letter (June 13, 1995); FTC Official Staff Commentary § 809(a)-8, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Freeman, FTC Informal Staff Letter (Nov. 15, 1988); Xiao-lin, FTC Informal Staff Letter (Aug. 3, 1987); Polito, FTC Informal Staff Letter (Jan. 8, 1987). See Bridge v. Ocwen Fed. Bank, 681 F.3d 355, 361 (6th Cir. 2012) ("debt collector must verify a disputed debt even if he has included proof of the debt with the first communication, because the section is intended to assist the consumer when a debt collector inadvertently contacts the wrong consumer at the start of his collection efforts"). *See also* Essique v. Walnut Woods Condo. Ass'n, 2016 WL 7337246 (E.D. Mich. 2016) (denying summary judgment for collection attorney who did not show that ledger included in initial communication was sufficient to satisfy § 1692g(b)); Feuerstack v. Weiner, 2014 WL 3619675 (D.N.J. 2014) (lawyer did not violate § 1692g by failing to notify consumer that he could request verification, because defendant had sent verification, doctor's bill for medical services, with initial letter).

678 *See* McMahon v. LVNV Funding, L.L.C., 2012 WL 2597933 (N.D. Ill. 2012) (claim stated for violating §§ 1692e and 1692f where defendant responded to consumer's validation request and omitted fact that debt was fifteen years old and instead disclosed that debt was most recently sold to defendant in previous recent months).

679 *See* Mahon v. Credit Bur., 171 F.3d 1197 (9th Cir. 1999).

680 *See* Schroeder v. Meyer, 2017 WL 1238016 (N.D. Ind. 2017) (denying collector summary judgment dismissing consumer's claim that debt collector's failed to properly mail requested verification of debt and initiated state debt collection suit; debt collector mailed verification of debt to consumer's prior address after consumer alleged he informed collector that he was moving, and mail should be sent to his mother's address; noting that mailbox rule would not apply if finder of fact found consumer's allegations to be true); Campbell v. Credit Bur. Sys., Inc., 2009 WL 211046 (E.D. Ky. 2009).

681 Glover, FTC Informal Staff Letter (June 23, 1986). *See* Bey v. Daimler Chrysler Services, L.L.C., 2006 WL 361385 (D.N.J. 2006) (as verification which was higher than amount initially demanded did not violate FDCPA, since higher amount was merely interim accrued attorney fees). *See also* Dikeman v. Nat'l Educators, Inc., 81 F.3d 949 (10th Cir. 1996) (jury found debt had not been verified when verification given was inaccurate because it overstated collector's claim, but jury excused violation as bona fide error); Wollman, FTC Informal Staff Letter (Mar. 10, 1993).

682 *See* Martinez v. Johnson, 2013 WL 1031363 (D. Utah 2013) (monthly credit card statements sufficient); Bascom v. Dubin, 2007 WL 210387 (W.D.N.Y. 2007) (provided plaintiffs copies of original billing statements); Weissman v. Unifund CCR Partners Assignee of Discover, 2009 WL 6407538 (Tex. App. 2009) (some monthly statements acceptable). *See also* Wittenberg v. Wells Fargo Bank, 852 F. Supp. 2d 731 (N.D. W. Va. 2012) (debt collector satisfied its burden to verify debt by providing deed of trust, misdated note, and loan history in response to homeowner's claim that note was invalid), *aff'd*, 2013 WL 3929082 (4th Cir. July 31, 2013); Griggs v. Howell & Vail, L.L.P., 2011 WL 7169021 (D. Idaho 2011) (granting summary judgment to defendant on *pro se* consumers' § 1692g claims since defendant, when debt was disputed, provided proper verification comprised of a copy of installment contract and its client's statement showing balance owed), *adopted*, 2012 WL 405047 (D. Idaho 2012); Ayers v. Flagstar Bank, 2011 WL 2433394 (E.D. Mich. 2011) (payment history was sufficient verification and was not deficient even though it was not "competent evidence" of underlying contract that consumer requested). *Cf.* Holland v. Draper, 2013 WL 1914388 (W.D. Wash. 2013) (contract and print out showing the balance sufficient for truck loan balance request).

683 Young v. Meyer & Njus, P.A., 1997 WL 452685 (N.D. Ill. 1997). *See also* Zirogiannis v. Nat'l Recovery Agency, Inc., 2015 WL 8665448 (E.D.N.Y. 2015) (collection letter responding to consumer's debt verification request was materially misleading under FDCPA, as letter erroneously suggested that consumer's dispute and verification requests were governed only by FCRA).

684 *See* Blome v. Johnson, Rodenburg & Lauinger, 2007 WL 4374498 (D. Mont. 2007).

685 *See* Bascom v. Dubin, 2007 WL 210387 (W.D.N.Y. 2007).

and by providing the account application with the consumer's signature and the relevant account statements, in response to her request for verification that it was her debt.[686]

One court held that billing statements alone were sufficient.[687] Where there was a judgment resolving a disputed debt, providing the judgment verified the debt.[688] A court held that a verification which was higher than the amount initially demanded did not violate the FDCPA, since the higher amount reflected accrued attorney fees.[689]

9.11.3.2 Fourth, Seventh, and Ninth Circuits Provide Weak Verification Rights

Fourth, Seventh, and Ninth Circuit decisions may diminish consumers' FDCPA § 1692g debt dispute rights.

In *Clark v. Capital Credit & Collection Services, Inc.*,[690] the Ninth Circuit announced it was adopting a lower, "reasonable" standard for the response required of debt collectors when a consumer timely disputes the debt in writing.

The consumer in *Clark* had consistently disputed a series of medical bills first with the provider, then with the doctor that purchased the provider's practice, then with the collection agency that purchased the debt, and then with a collection lawyer for the collection agency. The consumer had detailed records which she presented at every step. In response, the doctor who purchased the account provided an eight-page[691] itemization of the medical services and "information about the nature and balance of the . . . bill" to the collection agency, which used it for verification of the debt and provided it to the collection attorney who also used it for verification. The Court in *Clark*, however, cited to the Fourth Circuit's dicta in *Chaudhry v. Gallerizzo* stating that "verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed."[692] It is important to note that while the debt collector in Clark was found to have provided sufficient verification, it was found liable for not stating the amount of the debt accurately.

In the Fourth Circuit's *Chaudhry* decision adopted by the *Clark* court, the collection attorney's verification response was a detailed statement of all the charges and payments to the account, but only a statement that the inspection fees had been verified. The $8600 collection lawyer fee was verified with detailed billing statements that were redacted with a black marker to avoid disclosing confidential information under attorney-client privilege. This was held sufficient verification. The verification would have been meaningfully improved if the collection attorney had obtained a copy of the lender's check to the inspection company. However, in unfortunate dicta the court stated that verification involves confirming in writing the amount demanded. "The debt collector is not required to keep detailed files of the alleged debt."[693]

In *Walton v. EOS CCA*,[694] the Seventh Circuit adopted the Fourth and Ninth Circuits' weak approach to FDCPA debt verification. "It would be both burdensome and significantly beyond the Act's purpose to interpret [FDCPA] § 1692g(b) as requiring a debt collector to undertake an investigation into whether the creditor is actually entitled to the money it seeks."

In *Dunham v. Portfolio Recovery Associates, L.L.C.*,[695] the Eighth Circuit also allowed weak verification of the debt, but not as weak as in *Clark* and *Chaudhry*. The plaintiff exercised his FDCPA § 1692g rights by requesting that the debt buyer verify the debt. The court found that the debt buyer, PRA's, response to the alleged consumer, a lawyer, satisfied FDCPA § 1692g:

> Here, PRA's . . . [verification] letter sufficiently notified Dunham that he was not the "James Dunham" who owed

686 *See* Palisades Collection, L.L.C. v. Besthorne, 2007 WL 506101 (N.J. Super. Ct. App. Div 2007). *See also* Frees v. Pioneer Credit Recovery, Inc., 2012 WL 600785 (S.D. Ohio 2012) (validation sufficient where Pioneer sent plaintiff name of USA Funds, Inc., and told him how to obtain copies of his promissory note and account information from it); Uche v. Brumbaugh & Quandahl, P.C., 2010 WL 5256351 (D. Neb. 2010) (collector sufficiently showed debt was still owed by consumer).

687 *See* Worch v. Wolpoff & Abramson, L.L.P., 477 F. Supp. 2d 1015 (E.D. Mo. 2007).

688 *See* Marshall v. Deutsche Bank Nat'l Trust Co., 2011 WL 345988 (E.D. Ark. 2011).

689 *See* Bey v. Daimler Chrysler Services, L.L.C., 2006 WL 361385 (D.N.J. 2006).

690 460 F.3d 1162 (9th Cir. 2006).

691 *See* Clark v. Capital Credit & Collection Services, Inc., 2004 WL 1305326 (D. Or. Jan. 23, 2004).

692 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1174 (9th Cir. 2006). *See also* Lee v. Sec. Check, L.L.C., 2010 WL 3075673 (M.D. Fla. Aug. 5, 2010); Rudek v. Frederick J. Hanna & Assoc., 2009 WL 385804 (E.D. Tenn. 2009); Holsinger v. Wolpoff & Abramson, L.L.P., 2006 WL 2092632 (N.D. Cal. 2006) (NAF MBNA claim sent to consumer constituted sufficient verification even though it listed attorney fees that could have been unreasonably high); Frederick v. Discover Bank, 901 N.E.2d 79 (Ind. Ct. App. 2009) (no copy of signed contract and detailed payment history acceptable); Weathersby v. Citibank, 928 So. 2d 941 (Miss. Ct. App. 2006) (copies of periodic statements and employee affidavits stating they were sent was sufficient despite not providing requested signed agreement).

693 Chaudhry v. Gallerizzo, 174 F.3d 394, 406 (4th Cir. 1999). *See also* Tripoli v. Branch Banking & Trust Corp., 2012 WL 2685090 (D. Utah 2012) (detailed accounting of debt and credit application not required; uncertified copies of the note, deed of trust, and the assignment sufficient); Smith v. MERS, 2012 WL 1963605 (E.D. Mich. 2012) (response complied with § 1692g(b) where it provided the borrower's name, the property address, origination date, loan amount, the current mortgagee and its address, and the original mortgagee and its address), *adopted*, 2012 WL 1963604 (E.D. Mich. 2012); Nikiforuk v. Citimortgage, Inc., 2011 WL 7113469 (E.D. Mich. 2011 ("[T]he note, mortgage, application, payment history, and the owner and servicer of the mortgage was more than ample to 'verify' under the statute."), *adopted*, 2012 WL 262531 (E.D. Mich. Jan. 30, 2012); Anderson v. Frederick J. Hanna & Assoc., 361 F. Supp. 2d 1379 (N.D. Ga. 2005); Zaborac v. Mut. Hosp. Serv., Inc., 2004 WL 2538643 (S.D. Ind. 2004) (provided detailed billing statement).

694 885 F.3d 1024, 1027–1028 (7th Cir. 2018).

695 663 F.3d 997 (8th Cir. 2011). *See also* Jarzyna v. Home Props., L.P., 114 F. Supp. 3d 243 (E.D. Pa. 2015) (in responding to § 1692g dispute, debt collector is not charged with auditing creditor's records or forming opinion about debt's validity; collector must merely forward supporting information to consumer so that consumer can better understand alleged debt's origin and perhaps dispute it further).

> PRA a payment obligation. In response to Dunham's dispute letter, PRA sent Dunham a . . . letter containing the debtor's name, address, and the last four digits of the debtor's social security number; the date of the payment obligation; the date PRA purchased the payment obligation; and the current outstanding balance on the payment obligation. Additionally, PRA attached to the . . . letter the affidavit of one of its employees, averring that, according to PRA's records, Dunham incurred a debt that now totaled $2,906.55 to Credigy Receivables, and, on January 31, 2008, Credigy Receivables sold, assigned, and transferred that debt to PRA. Upon receiving this letter, Dunham glanced at the last four digits of the debtor's social security number and knew that he did not owe the payment obligation.[696]

Significantly, the court recognized that a response that was adequate in this situation might not suffice in other situations.

One reading of *Clark* and *Chaudhry* could be that the very detailed statements and confirmation of the balance that were provided by the debt collectors in those cases are all that is required to verify a debt, where the consumer disputes the amount claimed, but not liability for some of the debt. Another, more dangerous reading of those decisions would be that the debt collector need only get a "certification" from the creditor that the balance claimed reflects the creditor's current belief and that no reexamination of the claim by the debt collector or the creditor is required in response to the consumer's dispute.[697] This could flow from the *Chaudhry* statement that "confirming in writing that the amount being demanded is what the creditor is claiming is owed" is all that is required.

However, that approach to the *Chaudhry* decision ignores the plain language of the statute and the legislative history leading to the replacement of the word "certification"[698] with the word "verification" in the FDCPA and undermines a requirement of a "significant"[699] debt collector response to consumers' disputes.

For one thing, the *Chaudhry* standard does not begin to deal with the myriad of common consumer disputes. For example, if the consumer disputes the balance of an account, based on the misapplication of the last installment payment, a meaningful response would be to check primary records to see if the payment in fact had been received, but not credited or applied to the wrong account. If, on the other hand, the consumer disputes the common mistaken debt collector claim that they are responsible for one of their relative's bills, an examination of the signatures to the underlying agreement is called for to determine whether they actually accepted the obligation for the debt. If the consumer asserts their name was forged on a check, an examination of the signature is required to compare the signature with the consumer's signature and a disclosure of the time and place where the check was signed to compare with the consumer's location that day. If the consumer asserts they were a minor without capacity to contract on the day the debt was incurred, the transaction date would be the relevant focus. If the consumer alleges they had responded to a debt buyer's offer of full settlement with payment of a portion of the balance, the debt buyer's offer and the date and amount of the consumer's payment are the relevant information. Consumers disputing debts under this provision of the FDCPA, at least in other circuits, may have better responses if they can specify the basis of their dispute.

Where a debt collector was collecting a debt discharged in bankruptcy, the court, following *Chaudhry*, found that the collection agency had adequately verified the debt by forwarding the creditor's confirmation of the amount of the car deficiency claim, even though this court agreed with the consumer's legal argument that the consumer had fully paid the deficiency in her chapter 13 plan.[700]

Even if the courts apply the weak *Chaudhry* approach, the consumer should be entitled to engage in discovery about the verification the debt collector received from the creditor.[701]

The Seventh and the Ninth Circuits disagree on whether the debt collector's verification to the consumer's lawyer must comply with the FDCPA and whether the collector must cease its collection activities with regard to the consumer's attorney.[702]

If the consumer telephones before verification is provided, the debt collector may not request payment.[703] The debt collector may ask for clarification upon receiving a timely dispute of the debt, as long as payment is not requested.[704]

9.11.3.3 Sixth Circuit Provides More Robust Verification Rights

The Sixth Circuit in *Haddad v. Alexander, Zelmanski, Danner & Fioritto, P.L.L.C.* rejected the weak verification approach taken by the Fourth and Ninth Circuits and found

696 *Id.* at 1003.

697 *See* Maynard v. Cannon, 401 Fed. Appx. 389 (10th Cir. 2010) (debt collector complied with § 1692g(b) when it responded to consumer's verification request since it "nam[ed] the original creditor, and correctly identify[ied] the mortgage amount in default"); Reed v. AFNI, Inc., 2011 WL 112430 (D. Utah Jan. 13, 2011); Poulin, Jr. v. Thomas Agency, 2011 WL 159889 (D. Me. 2011). Hollis v. Stephen Bruce & Assoc., 2007 WL 4287623 (W.D. Okla. 2007).

698 *See, e.g.*, H.R. Rep. No. 131, 95th Cong., 1st Sess. 5 (1977).

699 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *reproduced at* Appx. A.3, *infra* (identifying validation of debts as "significant feature" of FDCPA).

700 *See* Goodwyn v. Capital One, 127 F. Supp. 3d 1367 (M.D. Ga. 2015).

701 *See, e.g.*, Panzer v. Alternative Claims Mgmt., L.L.C., 2016 WL 3771251 (S.D.N.Y. July 8, 2016).

702 *See* Evory v. Nat'l Action Fin. Services, Inc., 505 F.3d 769 (7th Cir. 2007) ("[w]e conclude that any written notice sent to the lawyer must contain the information that would be required by the Act if the notice were sent to the consumer directly"), *citing* National Consumer Law Center, Consumer Credit Law Manual § 8.02[5][b] (2004). *See also* Moriarty v. Capital Mgmt. Services, Inc., 2005 WL 2042302 (D. Neb. 2005). *Cf.* Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). *Contra* Guerrero v. RJM Acquisitions L.L.C., 499 F.3d 926 (9th Cir. 2007).

703 *See* Luxenburg v. Equifax Credit Info. Services, 2005 WL 78947 (N.D. Ill. Jan. 12, 2005).

704 *See* Marro v. Crosscheck, Inc., 2004 WL 3688137 (E.D. Va. Aug. 6, 2004), *aff'd*, 115 Fed. Appx. 168 (4th Cir. 2004).

support in other circuit court decisions[705] on the debt verification issue and the debt collection industry's practice of providing more information to resolve disputes. *Haddad* held:[706]

> The verification provision must be interpreted to provide the consumer with notice of how and when the debt was originally incurred or other sufficient notice from which the consumer could sufficiently dispute the payment obligation. This information does not have to be extensive. It should provide the date and nature of the transaction that led to the debt, such as a purchase on a particular date, a missed rental payment for a specific month, a fee for a particular service provided at a specified time, or a fine for a particular offense assessed on a certain date.[707]

In so holding, the court clarified that its earlier statement[708] that no "independent investigation" is required under the FDCPA only applies to avoiding liability under 1692e(2)(A), and not to verification under 1692g(b).[709]

705 758 F.3d 777 (6th Cir. 2014). *See* Dunham v. Portfolio Recovery Assoc., L.L.C., 663 F.3d 997, 1004 (8th Cir. 2011); Mahon v. Credit Bur. of Placer County Inc., 171 F.3d 1197 (9th Cir. 1999); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991).

706 758 F.3d 777 (6th Cir. 2014). *See also* Cooper v. Portfolio Recovery Assoc., 2017 WL 4098824 (E.D. Mich. Sept. 15, 2017); Ghanta v. Immediate Credit Recovery, Inc., 2017 WL 1423597 (N.D. Tex. Apr. 18, 2017); Mack v. Progressive Fin. Services, Inc., 2015 WL 123742 (E.D. Tex. Jan. 8, 2015) (adopting analysis in *Haddad*); Appx. E.2.6.4, *infra*.

707 *Id.* at 785–786.

708 Smith v. Transworld Sys., Inc., 953 F.2d 1025 (6th Cir. 1992).

709 *See also* Thebert v. Potestivo & Assoc., 2017 WL 3581322 (E.D. Mich. 2017) (by reciting $125,000 loan amount and $106,777.03 principal amount, but not mentioning prior-referenced debt amount of $115,267, let alone not addressing what payments had been made, foreclosure lawyer's letter verifying debt could plausibly mislead or deceive least sophisticated consumer about the amount of debt, violating § 1692e, even if it did comply with § 1692g(b)).

Chapter 10 FDCPA §§ 1692h, 1692*i*, 1692j: Applying Payments; Distant Forum Abuse; False Impression of Debt Collector Involvement

10.1 Introduction

This chapter discusses the specific requirements the Fair Debt Collection Practices Act (FDCPA) imposes on debt collectors under 15 U.S.C. §§ 1692h, 1692*i*, and 1692j. FDCPA § 1692h addresses the application of payments when a consumer owes multiple debts to a debt collector. FDCPA § 1692*i* defines the acceptable venues where lawsuits can be filed to collect a debt. FDCPA § 1692j prohibits certain practices related to the creation or provision of forms that give a false impression of a collection agency's, attorney's, or another entity's participation in the collection of the debt.

10.2 Consumer May Direct Application of Payments When a Collector Holds Multiple Accounts

> If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.[1]

FDCPA § 1692h gives a consumer the right to decide how to allocate payments among multiple debts being collected by the same collector.[2] A consumer in this situation may thus choose to give preference, for example, to a secured debt over an unsecured debt. The section also requires that a collector apply a consumer's payments to debts not disputed by the consumer.

The section of Regulation F (effective November 30, 2021) implementing FDCPA § 1692h, 12 C.F.R. § 1006.30(c), rearranges the statutory text for clarity but does not provide any additional substantive guidance.[3]

There is no provision for providing consumers with notice of this right, and there has been little enforcement of the right in the courts.[4] One court has held that this does not give the consumer the right to direct how payments of a single debt be applied between disputed and undisputed parts of the debt.[5] That right may exist under other laws, such as the Fair Credit Billing Act.[6]

Another court found that FDCPA § 1692h does not require a collector to refund payments made to a collector when one account is settled, but a debt is owed on another account.[7]

10.3 Restrictions Against Bringing Suits in Inconvenient Forums

10.3.1 Text of FDCPA § 1692i, Legislative History, and Regulations

> (a) Any debt collector who brings any legal action on a debt against any consumer shall—
>
> (1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
>
> (2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—
>
> (A) in which such consumer signed the contract sued upon; or

1 15 U.S.C. § 1692h.

The initial House debt collection bill contained more detailed requirements for the application of payments among different accounts than the section now does, including formula to apply when the consumer gave the collector no instructions or when there was no dispute. H.R. 10191, 94th Cong., 1st Sess. § 808 (1975). Subsequent bills addressed only the application of payments to disputed debt. *E.g.*, H.R. 11969, 94th Cong., 2d Sess. § 809 (1976); S. 3838, 94th Cong., 2d Sess. § 809 (1976). The requirement that the collector follow the consumer's instructions was reintroduced in S. 918, 95th Cong., 1st Sess. § 810 (1977).

2 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*; Glover, FTC Informal Staff Letter (June 23, 1986). *See also* Torrie v. Goodman Law Offices P.C., 2014 WL 5594452 (D. Ariz. Nov. 4, 2014) (§ 1692h applies only when a debtor owes two separate debts and directs a payment to a particular debt; it does not require a debt collector to accept a payment when only one debt is unpaid); Denman v. W. Mercantile Agency, Inc., 2012 WL 1698173 (D. Or. May 11, 2012) (finding that the plaintiff presented "just enough evidence" to create a genuine issue of material fact as to whether he gave specific instructions to the defendant regarding the allocation of his payments with instruction not to apply the payments to the judgment but to another account).

3 12 C.F.R. § 1006.30(c) (eff. Nov. 30, 2021). *See also* 85 Fed. Reg. 76,734, 76,843 ("The proposed provision generally restated the statutory text, with only minor revisions for clarity.").

4 *Cf.* Silver v. Law Offices of Howard Lee Schiff, P.C., 2010 WL 3000053 (D. Conn. July 28, 2010) (claim required trial).

5 *See* Dowling v. Litton Loan Serv., L.P., 2006 WL 3498292 (S.D. Ohio Dec. 1, 2006).

6 *See* National Consumer Law Center, Truth in Lending § 7.9.8 (10th ed. 2019), *updated at* www.nclc.org/library.

7 Turner v. Syndicated Office Sys., L.L.C., 2018 WL 1230599 (N.D. Ga. Jan. 16, 2018), *adopted*, 2018 WL 1311250 (N.D. Ga. Feb. 5, 2018), *aff'd*, 741 Fed. Appx. 767 (11th Cir. 2018).

(B) in which such consumer resides at the commencement of the action.

(b) Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.[8]

Early bills differed on how to deal with venue abuse, but subsequent major bills uniformly prohibited it.[9] The word "signed" in FDCPA § 1692*i*(a)(2)(A) was used consistently in the earlier bills, dropped in favor of "entered" by the Senate Consumer Affairs Subcommittee,[10] and reintroduced during the Senate Banking Committee markup. This indicates that Congress rejected the idea of setting venue on the basis of where the creditor was located at the time the contract was formed, choosing instead to set venue on the basis of where the consumer physically signed the contract.

Many earlier bills restricted the use of process servers. They appeared redundant, given the requirements of other state and federal laws.[11] FDCPA § 1692*i*(b) was first contained in S. 918.[12] The National Consumer Law Center urged the inclusion of section 1692*i*(b) in order to state explicitly that the FDCPA does not alter state laws prohibiting suits by a debt collector (for example, those proscribing unauthorized practice of law).

The section of Regulation F (effective November 30, 2021) implementing FDCPA § 1692*i*, 12 C.F.R. § 1006.30(d), rearranges the statutory text for clarity, but does not provide any additional substantive guidance.[13]

10.3.2 Where Suit Can Be Filed

This section prohibits a debt collector, including attorney debt collectors, from taking legal action to collect a consumer obligation in a "judicial district or similar legal entity" other than where the consumer resides or signed the contract[14] or, in the case of real estate, where the property is located.[15] This section is built upon an approach adopted by the FTC and the courts prior to the FDCPA's enactment.[16]

To determine the proper "judicial district or similar legal entity" for the purposes of FDCPA § 1692*i*, the courts have generally looked to the administrative structure of the state courts.[17] As the Seventh Circuit explained, the "correct interpretation of 'judicial district or similar legal entity' in § 1692*i*

8 15 U.S.C. § 1692*i*.

9 *Cf.* H.R. 11969, 94th Cong., 2d Sess. § 811 (1976); S. 656, 95th Cong., 1st Sess. § 810 (1977).

10 Senate Comm. Print No. 1, 95th Cong., 1st Sess. § 811(a)(2)(A) (1977).

11 *See, e.g.*, H.R. 13720, 95th Cong., 2d Sess. §§ 810(b), 810(c) (1976).

12 95th Cong., 1st Sess. § 811(b) (1977).

13 12 C.F.R. § 1006.30(d) (eff. Nov. 30, 2021); *see also* 85 Fed. Reg. 76,734, 76,843 ("The proposed provision generally restated the statutory text, with only minor revisions for clarity.").

14 *See* Suesz v. Med-1 Solutions, L.L.C., 757 F.3d 636 (7th Cir. 2014) (*en banc*); Addison v. Braud, 105 F.3d 223 (5th Cir. 1997); Fox v. Citicorp Credit Serv., Inc., 15 F.3d 1507 (9th Cir. 1994); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992); Dixon v. J. Scott Watson, P.C., 2018 WL 4110605 (E.D. Pa. Aug. 28, 2018) (tuition collection suit filed where college was located violated § 1692*i* as student did not sign tuition agreement in that state or live there); Samms v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, L.L.P., 163 F. Supp. 3d 109 (S.D.N.Y. 2016); Holton v. Huff, 2012 WL 1354024 (M.D. Pa. Apr. 16, 2012) (under state law venue would have been proper, but the FDCPA "preempts state law for venue purposes" and is a strict liability statute); Harrington v. CACV, L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007) (FDCPA violation even though venue would have been proper under state law in that district); Flores v. Quick Collect, Inc., 2007 WL 433239 (D. Or. Jan. 31, 2007); Hester v. Graham, Bright & Smith, 2005 WL 994704 (E.D. Tex. Apr. 1, 2005); Canady v. Wisenbaker Law Offices, P.C., 372 F. Supp. 2d 1379 (N.D. Ga. 2005); McKnight v. Benitez, 176 F. Supp. 2d 1301 (M.D. Fla. 2001) (initiation of replevin action on behalf of secured creditor, as required by state law, in judicial district where secured vehicle was being held by local sheriff as allegedly having been used in drug deal, violated § 1692*i* when replevin action also sought money damages against consumer); Crawford v. Credit Collection Serv., 898 F. Supp. 699 (D.S.D. 1995); Blakemore v. Pekay, 1995 WL 399460 (N.D. Ill. June 27, 1995); Asset Acceptance Corp. v. Robinson, 625 N.W.2d 804 (Mich. Ct. App. 2001); Jack Mailman & Leonard Flug D.D.S., P.C. v. Whaley, 2002 WL 31988623 (N.Y. Civ. Ct. Nov. 25, 2002); Appx. E.2.7, *infra*. *See also* Wadlington v. Credit Acceptance Corp., 76 F.3d 103 (6th Cir. 1996) (attorneys who filed suit on behalf of financer were debt collectors and liable under FDCPA for filing suit in venue not permitted by § 1692*i*(a)(2), but remanding issue of whether venue protection was waived by sales contract); Kucker v. Kaminsky & Rich, 2001 U.S. Dist. LEXIS 9877 (S.D.N.Y. July 12, 2001) (motion to reassign case from division where consumer received dun to another division within federal district was denied); Durve v. Oker, 1996 WL 355311 (Ohio Ct. App. July 8, 1996) (trial court erred by granting summary judgment to collectors against consumer's claim under § 1692*i* that collectors had filed their collection action in improper venue).

15 Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992), *aff'g* Zartman v. Shapiro & Meinhold, 811 P.2d 409 (Colo. App. 1990); Candlewood Lake Assoc. v. Scott, 2001 Ohio 8873 (Ohio Ct. App. Dec. 27, 2001).

16 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 5, 8, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*. *See* Spiegel, Inc. v. Fed. Trade Comm'n, 540 F.2d 287 (7th Cir. 1976) (nationwide mail order retailer sued and obtained judgments against its distant customers in court in Cook County, Ill; practice was "unfair"). *See also* Aguchak v. Montgomery Ward Co., 520 P.2d 1352 (Alaska 1974) (using distant forums violation of due process rights); Keever; FTC Informal Staff Letter (May 19, 1989); Reffkin, FTC Informal Staff Letter (Jan. 29, 1988); § 15.6.3, 16.2.4.4, 16.3.5, *infra* (unfair use of distant courts for collection suits).

17 *See, e.g.*, Suesz v. Med-1 Solutions, L.L.C., 757 F.3d 636 (7th Cir. 2014) (*en banc*) (judicial district in Marion County, Indiana, was township, not county); Hess v. Cohen & Slamowitz L.L.P., 637 F.3d 117 (2d Cir. 2011) (interpreting § 1692*i* in light of New York state jurisdiction rules for city and county courts); Fox v. Citicorp Credit Serv., Inc., 15 F.3d 1507 (9th Cir. 1994) (where Arizona provided formal transfer mechanism between courts in different counties, county was "judicial district or similar legal entity"); McKay v. Scott & Assoc., 2018 WL 548678 (W.D. Tex. Jan. 24, 2018) (judicial district or similar legal entity in § 1692*i* should be interpreted in Texas as precinct—smallest geographic area relevant to venue in Texas court system); Linehan v. AllianceOne Receivables Mgmt., Inc., 2015 WL 13567494, at *2 (W.D. Wash. Nov. 18, 2015) (three divisions of King County District Court constitute judicial entities for purposes of § 1692*i*); Nichols v. Byrd, 435 F. Supp. 2d 1101 (D. Nev. 2006) (relevant Nevada judicial district was township); Crawford v. Credit Collection Serv., 898 F. Supp. 699 (D.S.D. 1995) (relevant South Dakota judicial district was state judicial circuit); Dutton v. Wolhar, 809 F. Supp. 1130 (D. Del. 1992), *aff'd*, 5 F.3d 649 (3d Cir. 1993) (relevant Delaware judicial district was county).

is the smallest geographic area that is relevant for determining venue in the court system in which the case is filed."[18]

If a consumer did not sign a contract, the collector may only sue the consumer where the consumer resides.[19]

With respect to mortgage debt, one court said that FDCPA § 1692*i* venue for a postforeclosure deficiency action was the place of mortgage loan, not the consumer's current, out-of-state residence.[20]

A lawyer for a bankruptcy trustee or debtor may not file claims against consumers in the bankruptcy court unless it is a proper venue under FDCPA § 1692*i*.[21]

One court held that use of National Arbitration Services did not violate FDCPA § 1692*i*, as the arbitration could be requested in the consumer's locale.[22]

One court held that the FDCPA venue provision preempted a state joinder rule allowing suit on all accounts in a venue proper for some accounts, and summary judgment was granted in favor of the consumer where the debt collector brought a single suit on several accounts, where venue on some of the accounts was improper within the FDCPA.[23]

An FTC informal staff letter recommended that when a collector proceeds against real property in which it has no interest—for example, by attachment or execution—the action should be brought either where the consumer resides or where the contract was signed.[24] FTC staff warned that a lawyer would violate this provision if the creditor filed *pro se* in an improper forum and the lawyer entered an appearance retaining control over the case.[25] FTC staff also warned that suit may not be filed in the venue of the consumer's employment if it is not a venue specified in FDCPA § 1692*i*.[26]

10.3.3 Applicability of FDCPA § 1692i Protections in Different Types of Proceedings

Under FDCPA § 1692*i*, a "legal action on a debt against any consumer" includes a lawsuit against a consumer to collect alleged consumer debts.[27]

The courts have split on the availability of the FDCPA § 1692*i* protections for consumers facing a garnishment of their wages or bank account. The Ninth Circuit[28] and lower courts in other circuits[29] have held that an application for a writ of garnishment was a "legal action on a debt" covered by FDCPA § 1692*i*, and that seeking garnishment in a venue other

18 Suesz v. Med-1 Solutions, L.L.C., 757 F.3d 636 (7th Cir. 2014) (*en banc*).

19 Fox v. Citicorp Credit Serv., Inc., 15 F.3d 1507 (9th Cir. 1994); Crawford v. Credit Collection Serv., 898 F. Supp. 699 (D.S.D. 1995) (may only be filed where that spouse resided when she did not join in signing contract); Martinez v. Albuquerque Collection Serv., 867 F. Supp. 1495 (D.N.M. 1994). *See also* FTC Official Staff Commentary §§ 811-2, 811-4, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Krisor, FTC Informal Staff Letter (Feb. 10, 1994); Giloley, FTC Informal Staff Letter (Aug. 6, 1992); Masters, FTC Informal Staff Letter (Sept. 10, 1992); Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988); Benedict, FTC Informal Staff Letter (May 5, 1987); Thomasson, FTC Informal Staff Letter (July 19, 1978); Eskanos, FTC Informal Staff Letter (July 19, 1978). *See also* Frazier v. Matrix Acquisitions, L.L.C., 873 F. Supp. 2d 897 (N.D. Ohio 2012) (denying collector's motion for summary judgment on § 1692*i* claim where collector could not prove consumer resided in or signed contract in venue; evidence of credit card purchases in venue not sufficient where lacked signed receipts or case law supporting the idea that such evidence was sufficient to establish venue under § 1692*i*). *Cf.* Crawford v. Credit Collection Serv., 898 F. Supp. 699 (D.S.D. 1995) (finding no violation of § 1692*i* where "Patient Registration Form" that recited credit terms was signed in judicial district where legal action was brought).

20 *See* Huthsing v. Law Offices of Daniel C. Consuegra, P.L., 2015 WL 6777466 (M.D. Fla. Oct. 27, 2015). *But see* Aluia v. Dyck-O'Neal, Inc., 205 So. 3d 768 (Fla. Dist. Ct. App. 2016) (§ 1692*i* does not apply to claim for deficiency decree following foreclosure sale; a "deficiency suit is not a 'legal action on' the note; it is an action on the final judgment of foreclosure").

21 Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988).

22 *See* Lamb v. Javitch, Block & Rathbone, L.L.P., 2005 WL 4137778 (S.D. Ohio Jan. 24, 2005).

23 Harper v. Collection Bur., Inc., 2007 WL 4287293 (W.D. Wash. Dec. 4, 2007).

24 *See* FTC Official Staff Commentary §§ 811-2, 811-3, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Sweigart, FTC Informal Staff Letter (Apr. 25, 1978). *See also* Smith v. Kramer & Frank, P.C., 2009 WL 4725285 (E.D. Mo. Dec. 2, 2009) (application for writ of garnishment, as action in enforcement of previously obtained judgment, is "legal action" which falls within § 1692*i*); Celebrezze v. United Research, Inc., 482 N.E.2d 1260 (Ohio Ct. App. 1984) (enjoined distant forum abuse under FDCPA as well as UDAP).

25 Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988). *See also* Keever, FTC Informal Staff Letter (May 19, 1989); FTC Official Staff Commentary § 811-6, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Shuman, FTC Informal Staff Letter (Feb. 19, 1987).

26 Kwait, FTC Informal Staff Letter (Jan. 24, 1989); Goldfarb, FTC Informal Staff Letter (Nov. 23, 1988). *See also* Garvett, FTC Informal Staff Letter (Mar. 10, 1987).

27 *See* Beeler-Lopez v. Dodeka, L.L.C., 711 F. Supp. 2d 679, 681 (E.D. Tex. 2010) ("The Court finds that to 'bring an action' means '[t]o sue; institute legal proceedings.'").

28 Fox v. Citicorp Credit Services, Inc.,15 F.3d 1507 (9th Cir. 1994). *See also* Cole v. Cardez Credit Affiliates, L.L.C., 2015 WL 1281651 (D. Idaho Mar. 19, 2015) (collection agency's application for postjudgment garnishment of consumer's bank account constituted bringing of legal action on that debt for § 1692*i* purposes; where state debt collection suit against consumer was brought in wrong venue, later garnishment action was not insulated from FDCPA as not being "against the consumer"); Flores v. Quick Collect, Inc., 2007 WL 2769003, at *3 (D. Or. Sept. 18, 2007). *Cf.* Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 341–342, 89 S. Ct. 1820, 1822–1823, 23 L. Ed. 2d 349 (1969) (finding that prejudgment garnishment of worker's wages without notice and hearing violated worker's right to due process, recognized garnishment as action against worker). *But see* Randall v. Maxwell & Morgan, P.C., 321 F. Supp. 3d 978, 981–982 (D. Ariz. 2018) (declining to apply *Fox* because debtor had contested underlying action and, thus, had day in court); Muhammad v. Reese Law Grp., 2017 WL 4557194 (S.D. Cal. Oct. 12, 2017) (FDCPA's venue provision does not apply because wage garnishment procedures in California do not qualify as actions against a consumer as defined under § 1692*i*).

29 Barboza v. Weinstein & Riley, P.S., 2020 WL 5849549, at *4 (E.D. Tex. Oct. 1, 2020) ("When a debt collector brings a garnishment action based on a default judgment obtained in the wrong venue, the Court finds it reasonable to interpret the action as 'against any consumer,' for the consumer, while not the subject of the garnishment action, experiences the inability to have his day in court, in a proper venue, on the merits of the judgment."); Adkins v. Weltman, Weinberg & Reis Co., L.P.A., 2012 WL 604249 (S.D. Ohio Feb. 24, 2012).

than where the consumers resided or the contract was signed violated section 1692*i*.

The First,[30] Seventh,[31] Eighth,[32] and Eleventh Circuits,[33] as well as lower courts in other circuits,[34] all disagreed and found that FDCPA § 1692*i* does not apply to garnishment where the state garnishment procedure is not a "legal action brought on a debt *against any consumer*," but rather one brought against the consumer's employer.

Similarly, some courts have held that garnishment of the consumer's bank account was not a legal proceeding against the consumer, and therefore was not subject to FDCPA § 1692*i*.[35]

Provisions of the FDCPA other than section 1692*i* may apply to postjudgment garnishment.[36] For example, a debt collector that fails to comply with procedural obligations, such as serving proper garnishment notices on the debtor, may engage in a false representation under FDCPA § 1692e.[37]

In addition to garnishment, some courts have held that other types of postjudgment proceedings do not need to comply with FDCPA § 1692*i*.[38] The FTC stated in its Staff Commentary that "[i]f a judgment is obtained in a forum that satisfies the requirements of this section, it may be enforced in another jurisdiction, because the consumer previously has had the opportunity to defend the original action in a convenient forum."[39] One court held that collection attorneys' counterclaim in federal FDCPA case in order to collect underlying debt "is not the same thing as filing a lawsuit in a distant forum" and therefore did not violate the FDCPA's distant forum provision.[40]

The term "brings legal action" in FDCPA § 1692*i* includes a collector's court filing to reinstate a dismissed lawsuit due to the consumer's default on the settlement.[41]

One court found that a student loan administrative hearing may not be a "legal action" to which this provision applies.[42]

10.3.4 Additional Issues Related to the Debt Collector's Choice of Forum

A consumer's participation in a collection action filed in a distant forum did not waive[43] or preclude[44] the consumer's right to bring an FDCPA action for that violation of FDCPA § 1692*i*.

Some state courts have held that violation of FDCPA § 1692*i* was not a valid *defense* to a judgment transferred from

30 Smith v. Solomon & Solomon, P.C., 714 F.3d 73 (1st Cir. 2013).

31 Jackson v. Blitt & Gaines, P.C., 833 F.3d 860 (7th Cir. 2016) (§ 1692*i*'s consumer protections do not apply to Illinois garnishment of a consumer's funds).

32 Hageman v. Barton, 817 F.3d 611 (8th Cir. 2016).

33 Ray v. McCullough Payne & Haan, L.L.C., 838 F.3d 1107 (11th Cir. 2016) (garnishment is an action between the judgment-creditor and the garnishee); Marshall v. Hanna, 671 Fed. Appx. 766 (11th Cir. 2016).

34 *See, e.g.*, Fish v. Stone, Higgs & Drexler, P.C., 2017 WL 6757575, at *9 (W.D. Tenn. Dec. 29, 2017) (granting summary judgment for collection law firm on § 1692*i* claim because "[w]age garnishment proceedings in Tennessee are not legal actions 'against any consumer' under § 1692*i*"); Turnbull v. O'Reilly Rancilio P.C., 2017 WL 4572334 (E.D. Mich. Oct. 13, 2017) (Michigan garnishment proceedings do not constitute legal action *against* consumer subject to § 1692*i*); Schuback v. Law Offices of Phillip S. Van Embden, P.C., 2013 WL 432641 (M.D. Pa. Feb. 1, 2013) (pursuant to New Jersey law, garnishment or a writ of execution to enforce previous judgment was not "any legal action on a debt against any consumer" covered by § 1692*i*, but rather action against employer or bank); Geffrard v. Rolfe & Lobello, P.A., 2010 WL 1924434 (S.D. Tex. May 11, 2010); Pickens v. Collection Serv. of Athens, Inc., 165 F. Supp. 2d 1376 (M.D. Ga. 2001), *aff'd*, 273 F.3d 1121 (11th Cir. 2001) (postjudgment garnishment action was against garnishee, and consumer was not party; therefore, FDCPA's venue provisions did not apply).

35 *See, e.g.*, Ray v. McCullough Payne & Haan, L.L.C., 838 F.3d 1107 (11th Cir. 2016) (assuming garnishment at issue was bank account garnishment); Baltazar v. Houslanger & Assoc., 2018 WL 3941943, at *2 (E.D.N.Y. Aug. 16, 2018), *adopted*, 2018 WL 4781143 (E.D.N.Y. Sept. 30, 2018) (no violation of § 1692*i* where state bank garnishment was not "against the consumer").

36 *See* §§ 7.2.4.1, 8.3.6, *supra*. *See also* § 16.2.4.4.6, *infra*.

37 Lewis v. Hiday & Ricke, P.A., 2018 WL 6308672 (S.D. Fla. Sept. 18, 2018) (granting summary judgment to consumer when collector proceeded to garnish pursuant to an order made invalid by collector's failure to provide notice).

38 Hendricks v. LVNV Funding, L.L.C., 2014 WL 12534774 (E.D. Tenn. Sept. 30, 2014) (issuance of postjudgment discovery subpoena in wrong § 1692*i* venue was considered not to be debt collection, since collection lawyer was just seeking information about consumer's assets); Golem v. Palisades Acquisition XVI, L.L.C., 2012 WL 2995480 (N.D. Ohio July 23, 2012) (postjudgment deposition in distant county did not violate § 1692*i*, since it was not "legal action," but simply discovery request); Barney v. LVNV Funding L.L.C., 2012 WL 2995471 (N.D. Ohio July 23, 2012) (same); Aluia v. Dyck-O'Neal, Inc., 205 So. 3d 768, 773 (Fla. Dist. Ct. App. 2016) (§ 1692*i* does not apply to claim for deficiency decree following foreclosure sale; a "deficiency suit is not a 'legal action on' the note; it is an action on the final judgment of foreclosure").

39 FTC Official Staff Commentary §§ 811-5, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

40 McNeill v. Graham, Bright & Smith, P.C., 2006 WL 1489502, at *2 (N.D. Tex. May 26, 2006).

41 *See* Glazewski v. CKB Firm, P.C., 2015 WL 661278 (N.D. Ill. Feb. 15, 2015).

42 Lawson v. Mgmt. Adjustment Bur. Inc., 1997 WL 283027 (N.D. Ill May 15, 1997) (collector's assertion to debtor in collection letter that pre-wage garnishment administrative hearings would be held in Colorado when debt originated in, and debtor resided in, Illinois, was not in violation of § 1692*i*(a)(2) because hearing, which could be conducted by documents or telephone, was not "legal action" for purposes of FDCPA).

43 Cole v. Cardez Credit Affiliates, L.L.C., 2015 WL 1281651 (D. Idaho Mar. 19, 2015) (consumer's failure to challenge venue in state debt collection suit did not waive § 1692*i* claim for collector's garnishment proceeding against consumer's bank account); Blakemore v. Pekay, 1995 WL 399460 (N.D. Ill. June 27, 1995) (debtor does not waive FDCPA venue claims by appearing in "judicial district" other than where they resided or signed contract). *See also* Canady v. Wisenbaker Law Offices, P.C., 372 F. Supp. 2d 1379 (N.D. Ga. 2005) (consumer's failure to notify attorney collection firm of its violation of FDCPA venue provision or otherwise object to its filing in improper venue was irrelevant to firm's defense to violation or its establishment of its putative bona fide error defense). *But cf.* Wadlington v. Credit Acceptance Corp., 76 F.3d 103 (6th Cir. 1996) (remanding issue of whether venue protection was waived by sales contract as not addressed by lower court).

44 Begum v. Harrison, 2021 WL 1748102, at *2 (D.N.J. May 3, 2021) (debtor's participation in state law medical debt lawsuit involved substantively different issues than § 1692*i* claim and, therefore, did not result in claim or issue preclusion).

another, improper jurisdiction.[45] It may be a counterclaim, however.[46]

Filing in an improper venue may not violate the FDCPA where the lawsuit was filed but never served on the consumer.[47]

While the threat of filing in an improper venue did not violate FDCPA § 1692*i*, it did violate FDCPA § 1692e(5) by threatening action that legally could not be taken.[48] A lower court denied dismissal of FDCPA § 1692d and 1692f claims for the filing and then the intentional and knowing continuation of a collection suit in a venue prohibited by FDCPA § 1692*i*.[49]

While creditors are generally exempt and usually not bound by the requirements of FDCPA § 1692*i*,[50] other laws may impose similar requirements on creditors.[51]

Section 1692*i*(b) establishes that the FDCPA does not authorize debt collectors to bring suit, leaving that decision to the states.[52]

A debt collector may assert the FDCPA's bona fide error defense to a section 1692*i* violation. This defense is discussed in § 12.2, *infra*.

Plaintiffs filing FDCPA § 1692*i* claims can encounter questions about when the FDCPA's statute of limitations has run. This issue is covered in § 12.3.2.2, *infra*, discussing applicable date for violations involving collection lawsuits.

For a discussion of standing in FDCPA § 1692*i* cases, see § 11.15.12, *infra*.

10.4 Forms Providers Who Misrepresent Their Collection Involvement Violate the Act, FDCPA § 1692j

10.4.1 Flat-Rate and Other Collectors Covered

The text of FDCPA § 1692j says:

> *Furnishing certain deceptive forms.* (a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.
>
> (b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.[53]

Although it does not use the term "flat-rate," this section targets flat-rate companies that charge a few dollars or less to mail a debt collection letter in its name. "Flat-rating" is the practice of designing or selling to creditors form letters on a per item basis. That method of billing is not illegal, but is often associated with deception, which is proscribed. If the flat-rater's name is on the letterhead, thereby falsely suggesting the flat-rater's active participation in the collection process, it violates FDCPA § 1692j.[54] At least one court has required the collector to actually sell the letterhead, rather than allow the creditor to use it, to state a claim under FDCPA § 1692j.[55] In reported cases, the flat fee ranged from $.50 to $2.45 per letter.[56]

If the collector participated actively in the collection of the debt in addition to sending a series of letters, this section does not apply,[57] unless the collector's participation

45 Marina Assoc. v. Mase, 1994 WL 669635 (Conn. Super. Ct. Nov. 10, 1994). *See also* Wade v. TBF Fin., L.L.C., 2019 WL 1051599 (Tex. App. Mar. 6, 2019) (finding that raising FDCPA issue was insufficient to contest venue absent Motion to Transfer).

46 *See* Midland Funding, L.L.C. v. Hottenroth, 26 N.E.3d 269 (Ohio Ct. App. 2014).

47 *See* Orellana-Sanchez v. Pressler & Pressler, L.L.P., 2015 WL 532517 (D.N.J. Feb. 6, 2015), *adopted*, 2015 WL 758522 (D.N.J. Feb. 23, 2015); Gillis v. Blitt & Gaines, P.C., 2015 WL 5821637 (N.D. Ill. Oct. 1, 2015). *But see* Desfassiaux v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 142 F. Supp. 3d 667 (N.D. Ill. 2015) (§ 1692*i* violation which occurred at filing was not cured by dismissing the suit before service).

48 Wiener v. Bloomfield, 901 F. Supp. 771 (S.D.N.Y. 1995). *See also* Halverson, FTC Informal Staff Letter (Nov. 15, 1993).

49 *See* Boldon v. Riverwalk Holdings, Ltd., 2016 WL 900639 (D. Minn. Mar. 9, 2016). *But cf.* Beeler-Lopez v. Dodeka, L.L.C., 711 F. Supp. 2d 679 (E.D. Tex. 2010) (no violation of § 1692*i* where defendant took over lawsuit after another law firm filed it in wrong venue, since second law firm did not bring lawsuit).

50 Farmers Nat'l Bank v. Hall, 791 P.2d 752 (Kan. Ct. App. 1990).

51 *See* §§ 15.6.3, 16.2.4.3, 16.3.5, *infra*.

52 Bey v. Daimlerchrysler Serv., L.L.C., 2005 WL 2090207 (D.N.J. Aug. 29, 2005). *See* Kolker v. Sanchez, 1991 WL 11691589 (D.N.M. Dec. 10, 1991) (§ 1692*i*(b) does not authorize debt collectors to file any lawsuits).

53 15 U.S.C. § 1692j.

54 S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 5, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*; Christy, FTC Informal Staff Letter (Jan. 19, 1981); Connelly, FTC Informal Staff Letter (Dec. 10, 1980). *But see* Johnson v. Hamilton Point Prop. Mgmt., L.L.C., 2017 WL 8186857, at *9 (N.D. Ga. Nov. 8, 2017) (use of publicly available court-supplied forms does not trigger liability), *adopted*, 2018 WL 1246984 (N.D. Ga. Feb. 15, 2018).

55 Himmelfarb v. Nat'l Bur. Collection Corp. 2018 WL 5456649, at *4 (E.D.N.Y. Sept. 28, 2018).

56 *See, e.g.*, Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002) (defendant, lawyer, was paid $2.45 per letter and paid mailing service $0.99 per letter for printing and mailing them); Peters v. AT&T Corp., 43 F. Supp. 2d 926 (N.D. Ill. 1999) (paid GC Services $0.54 per account for collection letters).

57 *See* Bonfiglio v. Citifinancial Servicing, L.L.C., 2015 WL 5612194 (N.D. Ill. Sept. 23, 2015); Echlin v. PeaceHealth Sw. Med. Ctr., 2015 WL 1538569 (W.D. Wash. Apr. 7, 2015); Epps v. Etan Indus., 1998 WL 851488 (N.D. Ill. Dec. 1, 1998); Watson v. Auto Advisors, Inc., 822 N.E.2d 1017 (Ind. Ct. App. 2005) (no misrepresentation of car dealer's assignee's participation in seeking small claims court judgment,

was less than that reasonably implied from the collection message.[58]

Flat-rate fees are less common in the collection industry than contingent fees. Most commonly, a creditor hires a collector on a contingency basis, and the collector is paid by keeping a portion of the money collected, often twenty to thirty percent. Many recent court decisions and older FTC staff letters deal with the question of when the level of participation of a flat-rate debt collector[59] was so minimal as to create liability under this provision. These are discussed in the next subsection.

This section is the only proscription of the Act not limited to "debt collectors." Even creditors[60] and others specifically excluded from the FDCPA definition of "debt collector" should be liable for violations of this section based on the statutory language. A debt collection agency or collection lawyer that supplies dunning letters to a creditor without any additional involvement in the collection process runs the risk of getting both of them in trouble under this provision of the FDCPA.[61] To avoid violating this section, a flat-rate supplier of form letters to creditors should remove its name from the letter.[62] This provision may not bring a printing and mailing service that was not involved in drafting or designing collection letters within the restrictions of the Act.[63]

The section of Regulation F (effective November 30, 2021) implementing FDCPA § 1692j(a), 12 C.F.R. § 1006.30(e), rearranges the statutory text for clarity, but does not provide any additional substantive guidance.[64] The CFPB did not issue regulations interpreting FDCPA § 1692j(b). In its draft of the regulations, the CFPB explained that this was "[b]ecause the Bureau's rulemaking authority under FDCPA section 814(d) [§ 1692*l*(d)] is limited to debt collectors, as that term is defined in the FDCPA, proposed § 1006.30(e)'s coverage is more limited than that of FDCPA section 812(a), which applies to any person."[65] As the CFPB recognizes, the limited scope of their rule does not narrow coverage under the statute.[66]

although assignment may have been invalid); Lipsett, FTC Informal Staff Letter (May 22, 1990); Rackett, FTC Informal Staff Letter (Nov. 15, 1985) (letter writing service covered); Smith, FTC Informal Staff Letter (July 5, 1984); Mezines, FTC Informal Staff Letter (May 21, 1982); Warwood, FTC Informal Staff Letter (Oct. 20, 1980); Berhenke, FTC Informal Staff Letter (May 21, 1979) (flat-rating not per se illegal); Feldman, FTC Informal Staff Letter (Apr. 30, 1979). *See also* FTC Official Staff Commentary § 812-5, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

58 Sullivan, FTC Informal Staff Letter (Feb. 21, 1984). *See also* FTC Official Staff Commentary § 812-5, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

59 While the legislative history of this section emphasized prohibiting flat-rate debt collection, FTC staff letters have construed the statutory language to be concerned about misrepresenting the extent of the collector's participation in collecting the debt rather than the method of the collector's compensation.

60 *See* Domico v. Etan Indus., 1998 WL 765058 (N.D. Ill. Oct. 26, 1998). *See also* Denkers v. United Compucred Collections, Inc., 1996 WL 724784 (N.D. Cal. Nov. 27, 1996) (issue of whether public utility was debt collector where it hired collection agency only to send out dunning letters); Fratto v. Citibank, 1996 WL 554549 (N.D. Ill. Sept. 25, 1996) (issue of whether Citibank was covered by Act where it hired collection agency only to send out form letters on attorney's letterhead); Villarreal v. Snow, 1996 WL 473386 (N.D. Ill. Aug. 19, 1996) (lender did not become debt collector by "using" an attorney's name when attorney spent about one minute on each account); FTC Informal Staff Letter (Dec. 13, 1996); FTC Official Staff Commentary §§ 812-2, 812-5, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*. *But see* Erceg v. Concord Servicing Corp., 2019 WL 658828, at *3 (S.D. Fla. Feb. 13, 2019) (stating that creditors could not be held liable under § 1692j); Busby v. Vacation Resorts Int'l, 2019 WL 669641, at *10 (S.D. Tex. Feb. 19, 2019) (same); Wegmans Food Mkts., Inc. v. Scrimpsher, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) (grocery store that hired agency to send series of computer printed letters demanding payment to store was not covered by § 1692j). *See generally* Gallaher v. Estates at Aloma Woods Homeowners Ass'n, Inc. 316 F. Supp. 3d 1358, 1364 (M.D. Fla. 2018) (noting that § 1692j is not limited to debt collectors, but dismissing for failing to allege sufficient facts); Johnson v. Hamilton Point Prop. Mgmt., L.L.C., 2017 WL 8186857, at *6 (N.D. Ga. Nov. 8, 2017) (although § 1692j applies beyond debt collectors, the use of court-supplied forms does not trigger liability), *adopted*, 2018 WL 1246984 (N.D. Ga. Feb. 15, 2018); § 4.7.4, *supra*, Appx. E.1.3, E.2.8, *infra*.

10.4.2 *Extent of Participation in the Collection Process*

Federal courts have wrestled with the issue of when a flat-rate relationship with a collector triggers liability for a creditor through FDCPA §§ 1692a(6) or 1692j. In *Nielsen v. Dickerson*, the court found a collection firm liable under FDCPA § 1692j when it furnished a form letter that gave the consumer the false impression that the firm was meaningfully involved in the case.[67] Similarly, in *Sokolski v. Trans Union Corp.*,[68] the court found a flat-rating arrangement in violation of the Act and the creditor liable where the collection agency's activities were "limited to the furnishing of collection letters."[69] The collection agency did not receive the creditor's files on each debtor, its letters directed that any correspondence be sent to the creditor, it had no authority to negotiate settlements with

61 Rummel, FTC Informal Staff Letter (May 16, 1979); Davidson, FTC Informal Staff Letter (May 18, 1978); Gilbert, FTC Informal Staff Letter (Mar. 28, 1978); Mansfield, FTC Informal Staff Letter (Mar. 20, 1978). *But see* Arellano v. Etan Indus., 1998 WL 911729 (N.D. Ill. Dec. 23, 1998) (§§ 1692e and 1692j(a) are mutually exclusive, since former applies only to debt collector and latter only to those who "falsely pretend to be a debt collector"). *See generally* Ch. 7, *supra*.

62 FTC Official Staff Commentary § 812-3, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Lisanti, FTC Informal Staff Letter (Aug. 8, 1978).

63 *See* Trull v. Lason Sys., Inc., 982 F. Supp. 600 (N.D. Ill. 1997); Laubach v. Arrow Serv. Bur., Inc., 987 F. Supp. 625 (N.D. Ill. 1997). *See also* § 4.3.1, *supra*, Appx. E.2.4.5, *infra*. *Cf.* Romine v. Diversified Collection Serv., Inc., 155 F.3d 1142 (9th Cir. 1998).

64 12 C.F.R. § 1006.30(e) (eff. Nov. 30, 2021).

65 *See* 84 Fed. Reg. 23,274, 23,333 (Aug. 19, 2019).

66 *Id.*

67 307 F.3d 623 (7th Cir. 2002).

68 53 F. Supp. 2d 307 (E.D.N.Y. 1999).

69 *Id* at 313. *See also* Hartley v. Suburban Radiologic Consultants, Ltd., 295 F.R.D. 357 (D. Minn. 2013).

debtors, and it received only a flat rate based on the number of letters sent.[70]

Greater involvement by the collection agency, however, may prevent liability under FDCPA § 1692j. In *White v. Goodman*,[71] the court found that a creditor and collection agency had not violated FDCPA § 1692j where the creditor electronically transmitted information regarding delinquent accounts to the collection agency, the agency then prepared letters on its letterhead on forms prepared by it but approved by the creditor, the letters contained the phone number of the agency, and any uncollected debts remained with the agency.[72] Despite the debt collectors' lack of authority to engage in "hallmark activities" of collection, the Ninth Circuit, in *Echlin v. PeaceHealth*, found that the debt collector was not a flat-rater given the other actions the collector took, such as screening accounts, drafting and mailing letters, and inviting debtors to call the collector.[73]

In *Larson v. Evanston Northwestern Healthcare Corp.*,[74] the court listed the types of evidence indicating whether the collection agency's participation was so minimal that the creditor should be deemed liable as a debt collector, or whether the facts supported liability.[75] In applying these indicators, the court in *Larson* found that the collection agency performed more than "ministerial" tasks for the creditor, that it was engaged in traditional debt collection activities for the creditor, and that it was not a "mere mailing service" in sending out a "pre-collection" letter.[76]

In *Hartley v. Suburban Radiologic Consultants, Ltd.*,[77] a lower court considering the liability of a medical services provider and its collection agency noted that "[t]he analysis of whether a collection agency is acting as a flat-rater instead of as a true debt collector examines identical factors . . . for determining whether a creditor is acting as a debt collector."[78]

A series of informal FTC staff letters had dealt with this same issue some years ago. An FTC staff letter clarified that there is no set minimum level of sufficient participation in the collection of a debt to take a flat-rater or any other collector outside the proscription of FDCPA § 1692j.[79] The minimum level of participation necessary to ensure that the consumer was not deceived about the collector's involvement depends upon a comparison of the collector's representations of its involvement with its actual participation.[80] Thus, to avoid misrepresentations of its participation, a collector that threatened further action against the consumer must be more involved in the collection of the debt than merely sending letters on its own letterhead requesting payment to the creditor.[81]

10.4.3 Lawyers Must Review File Before Signing Collection Letter

By implication, a letter on a lawyer's letterhead would imply greater participation than a letter on a collection agency's letterhead because of the stronger remedies available to attorneys. The Third Circuit recognized this:

> Abuses by attorney debt collectors are more egregious than those of lay collectors because a consumer reacts with far more duress to an attorney's improper threat of legal action than a debt collection agency committing the same practice. A debt collection letter on an attorney's letterhead conveys authority and credibility.[82]

If an attorney, for example, supplied form letters to a creditor or collection agency and did not otherwise participate in the collection efforts in the manner implied by the letters, they violate FDCPA § 1692j.[83] However, the leading case on

70 *Id.*

71 41 F. Supp. 2d 794 (N.D. Ill. 1998), *aff'd*, 200 F.3d 1016 (7th Cir. 2000). *See also* § 2.5.5, *supra*.

72 *Id.* at 797. *See also* Larson v. Evanston Nw. Healthcare Corp., 1999 WL 518901 (N.D. Ill. July 19, 1999) (collection agency performed more than "ministerial" tasks for creditor and was not "mere mailing service" in sending out "pre-collection" letter); Epps v. Etan Indus., Inc., 1998 WL 851488 (N.D. Ill. Dec. 1, 1998) (collection agency performed traditional collection activities, charged percentage of recovery, and was not merely mailing service).

73 Echlin v. PeaceHealth, 887 F.3d 967, 972, 974 (9th Cir. 2018).

74 1999 WL 518901 (N.D. Ill. July 19, 1999). *See also* Hartley v. Suburban Radiologic Consultants, Ltd., 295 F.R.D. 357 (D. Minn. 2013).

75 Larson v. Evanston Nw. Healthcare Corp., 1999 WL 518901 at *4 (N.D. Ill. July 19, 1999); Erceg v. Concord Servicing Corp, 2019 WL 658828 (S.D. Fla. Feb. 13, 2019) (applying *Larson* factors in denying debt collector's motion to dismiss. *See also* Garner v. ClaimAssist, L.L.C., 2018 WL 3772166, at *10 (D. Md. Aug. 9, 2018) (granting summary judgment based on debtor's failure to provide evidence of flat-rating); Hartley v. Suburban Radiologic Consultants, Ltd., 295 F.R.D. 357 (D. Minn. 2013).

76 Larson v. Evanston Nw. Healthcare Corp., 1999 WL 518901 at *5 (N.D. Ill. July 19, 1999); Williams v. Danek Med., Inc., 1999 U.S. Dist. LEXIS 13031, at *6 (E.D. La. Aug. 23, 1999). *See also* Hartley v. Suburban Radiologic Consultants, Ltd., 295 F.R.D. 357 (D. Minn. 2013).

77 295 F.R.D. 357 (D. Minn. Sept. 30, 2013).

78 *Id.* at 372.

79 Smith, FTC Informal Staff Letter (July 5, 1984).

80 *Id.*

81 *See also* Knobel, FTC Informal Staff Letter (Oct. 5, 1987) (collector sending letters in creditor's name violated § 1692e(14), but not § 1692j since its participation was not misrepresented); Feldman, FTC Informal Staff Letter (Apr. 30, 1979).

82 Crossley v. Lieberman, 868 F.2d 566, 570 (3d Cir. 1989). *But cf.* Anthes v. Transworld Sys., Inc., 765 F. Supp. 162 (D. Del. 1991) (letter sent by outside attorney retained by debt collector was neither impersonation of attorney nor use of name other than its own; whether debt collector's routine request for outside attorney to send dunning letters would mislead consumer into believing collection activities had entered more serious stage raised questions not appropriate for summary judgment).

83 *See* Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232 (5th Cir. 1997); Littles v. Lieberman, 90 B.R. 700 (E.D. Pa. 1988); Smith, FTC Informal Staff Letter (Dec. 13, 1978). *See also* Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995) (lawyers collecting debts for check collection agency covered, and that coverage was not an unconstitutional interference with state judiciary's supervision of lawyers); Obidinski v. Interstate Serv., Inc., Civ. No. 81-0044 (M.D. Pa. 1981) (there was evidence that attorneys/defendants participated in collecting debts); *In re* Scheck, 574 N.Y.S.2d 372 (App. Div. 1991) (upholding four charges of professional misconduct against

this type of violation found that the violation was of FDCPA § 1692e(3), misrepresenting that a communication was from a lawyer when the lawyer had no significant involvement in the case.[84]

an attorney who allowed collection agency to use his name and letterhead without his supervision); FTC Official Staff Commentary § 812-3, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*; Michael, FTC Informal Staff Letter (Aug. 15, 1988); § 7.2.3.3, *supra*. *But see* Rumpler v. Phillips & Cohen Assoc., Ltd., 219 F. Supp. 2d 251 (E.D.N.Y. 2002) (use of title "Esq." did not create impression that collector was an attorney where he was collecting under title "Executive Vice President"). *But cf.* Wegmans Food Mkts., Inc. v. Scrimpsher, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) (grocery store which hired an agency to send series of computer printed letters demanding payment not covered by § 1692j).

84 Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993). *Accord* Martinez v. Albuquerque Collection Serv., 867 F. Supp. 1495 (D.N.M. 1994). *But see* Keele v. Wexler, 1995 WL 549048 (N.D. Ill. Sept. 12, 1995) (appearance of attorney's name in letterhead insufficient evidence to overcome affidavit that attorney was not partner and was not involved in sending of letter that allegedly violated FDCPA; dismissing attorney from lawsuit). *See generally* § 7.2.3.3, *supra*, Appx. E.2.4.4, *infra*.

Chapter 11 FDCPA Litigation and Remedies

11.1 Private Remedy Is Primary Enforcement Mechanism

A debt collector who violates the federal Fair Debt Collection Practices Act ("FDCPA" or "Act") while collecting a consumer debt is subject to suit by "any person"[1] adversely affected by the violation. The Act grants concurrent federal and state jurisdiction,[2] and the successful plaintiff may recover:

- Actual damages;[3]
- Additional statutory damages;[4]
- Attorney fees;[5] and
- Costs.[6]

The FDCPA is silent as to declaratory or injunctive relief,[7] and few courts have allowed such relief concerning FDCPA violations.[8] Punitive damages[9] are also not mentioned in the FDCPA, but they may be available under other federal statutes or similar state laws. A consumer may seek remedies either in an individual or in a class action.[10]

Congress intended private actions to be the main vehicle for enforcing the Act: "The committee views this legislation as primarily self-enforcing; consumers who have been subject to collection abuses will be enforcing compliance."[11] Thus, consumers enforcing compliance with the Act are acting as "private attorneys general."[12]

1 *See* § 4.10, *supra*.
2 *See* § 11.2.1, *infra*.
3 *See* § 11.8, *infra*.
4 *See* § 11.9, *infra*.
5 *See* § 11.13, *infra*.
6 *Id.*
7 *See* § 11.12.2, *infra*.
8 *See* § 11.12.1, *infra*.
9 *See* § 11.10, *infra*.
10 *See* § 11.11, *infra*.
11 S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and reproduced at* Appx. A.3, *infra*. *See also* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 603, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) (referring to "the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement").

Some of the bills leading to the Act contained enforcement provisions, such as criminal penalties and administrative rulemaking, that were subsequently omitted. Every bill, however, provided for private actions as a primary enforcement mechanism. Criminal sanctions were contained in all of the House bills and many of the Senate bills, but were deleted immediately prior to House passage of H.R. 5294. 95th Cong., 1st Sess. § 813 (1977). The early bills contained several remedial provisions that were not carried forward into subsequent bills. These provisions included enforcement by private consumer organizations, liability of corporate officers, and making a violation a complete defense to collection of the debt. *E.g.*, H.R. 10191, 94th Cong. §§ 811 to 813 (1975).

12 Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055, 1062 (9th Cir. 2011) ("Congress encouraged private enforcement by permitting aggrieved individuals to bring suit as private attorneys general."); Jacobson v. Healthcare Fin. Services, Inc., 516 F.3d 85, 91, 96 (2d Cir. 2008) ("FDCPA permits and encourages parties who have suffered no loss to bring civil actions for statutory violations").

11.2 Jurisdiction and Venue

11.2.1 State and Federal Courts Have Concurrent Jurisdiction

> (d) An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction . . .[13]

This provision establishes concurrent jurisdiction in United States district courts[14] and in competent state courts[15] over FDCPA actions, regardless of the amount of money in controversy.[16] Private FDCPA actions also fall within another federal jurisdictional statute allowing federal jurisdiction over Acts of Congress regulating commerce, without regard to the amount in controversy.[17] The pendency of a related state court proceeding is not necessarily a ground for the federal court to abstain from hearing FDCPA claims, but a federal court may stay an action where there is a parallel state court action

13 15 U.S.C. § 1692k(d).
14 Keep in mind, as discussed in detail in § 11.15, *infra*, a party invoking *federal* jurisdiction must prove they have Article III standing to remain in federal court.
15 *See* Levine v. Bayview Loan Servicing, L.L.C., 926 N.W.2d 49, 54 (Minn. Ct. App. 2019) (Minnesota district court is "court of competent jurisdiction" to adjudicate cases under FDCPA); Randall v. Paul, 897 N.W.2d 842, 845 (Minn. Ct. App. 2017) ("A plaintiff may sue a debt collector for FDCPA violations in federal or state court and recover actual damages, statutory damages, attorney fees, and costs."); Caputo v. Koenig, 46 N.Y.S.3d 880 (N.Y. App. Div. 2017) (reversing lower court's dismissal for lack of jurisdiction, since Supreme Court, New York County, was "court of competent jurisdiction" under § 1692k(d)).
16 *See* Itri v. Equibank, 464 A.2d 1336 (Pa. Super. Ct. 1983) (under 15 U.S.C. § 1692k(d), a Pennsylvania Court of Common Pleas had subject matter jurisdiction over an FDCPA claim). *See also* Biddle v. Santander Consumer USA, 2011 WL 1637989 (N.D. Tex. Apr. 29, 2011) (denying motion to dismiss for lack of subject matter jurisdiction based on defendant allegedly not being a "debt collector," but converting motion to one for summary judgment); Weiss v. Collection Ctr., Inc., 667 N.W.2d 567 (N.D. 2003); Nunez v. Etan Indus., Inc., 1999 WL 14483 (N.D. Ill. Jan. 6, 1998) (federal court had subject matter jurisdiction to determine whether defendant was a "debt collector"). *Cf.* Meehan v. Cable, 489 S.E.2d 440 (N.C. Ct. App. 1997) (N.C. Superior Court $10,000 minimum amount in controversy requirement precluded jurisdiction for FDCPA claim for $1000 statutory damages).
17 28 U.S.C. § 1337. *See also* Vantu v. Echo Recovery, L.L.C., 85 F. Supp. 3d 939 (N.D. Ohio 2015) (on Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, question of whether repossession company was debt collector went to merits of FDCPA claim and not court's power to adjudicate case).

pending.[18] A federal court may also have no jurisdiction over an FDCPA claim that challenges a state court judgment.[19]

FDCPA claims that exist upon filing of a bankruptcy become property of the bankruptcy estate.[20] The bankruptcy court has jurisdiction to "hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11" of the Bankruptcy Code.[21] The Third Circuit and a number of courts have determined that a proceeding is "related to" a bankruptcy case if the outcome of a proceeding could have any conceivable effect on the administration of the bankruptcy estate.[22] A claim against a collector which files bankruptcy may be stayed by the bankruptcy court, requiring litigation of the claim in the bankruptcy court or obtaining relief from the stay.[23]

Where the FDCPA violation occurs on a tribal reservation, the FDCPA claim is required to be initially litigated in the tribal court.[24] Where the forum-selection clause contained in the consumer's loan agreement required that litigation related to the loan must be heard only in the Cheyenne River Sioux Tribal courts, a federal district court rejected the doctrine of tribal jurisdiction as the basis for dismissal of the FDCPA complaint.[25]

State courts that are competent to hear claims analogous to FDCPA claims, such as tort claims, cannot refuse to hear an FDCPA claim simply because it is based on a federal statute.[26] Where a consumer brings a purely state claim for debt collection abuse in state court, without bringing an FDCPA count, the action may not be removed to federal court, even if state laws implicate the FDCPA.[27]

When the FDCPA claim is raised as a counterclaim in a state court collection action, a defendant cannot remove it to federal court on that basis, because a counterclaim cannot provide the basis for federal jurisdiction.[28] The majority view is that the same is true for third-party claims.[29] If the consumer

18 *See* § 12.6.3, *infra*.

19 *See* § 12.6.4.1, *infra*.

20 *See* § 13.2.5, *supra*.

21 28 U.S.C. § 157(b)(1); 28 U.S.C. § 1409(a); 28 U.S.C. § 1334(b). *See* § 2.3, *supra*, § 13.3, Appx. E.3.7.5, *infra*.

22 *See* Pacor v. Higgins, 743 F.2d 984 (3d Cir. 1984). See also *In re* Time Constr., Inc., 43 F.3d 1041 (6th Cir. 1995) (bankruptcy court has jurisdiction over proceeding if outcome could alter debtor's rights, options, or freedom of action); National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 14.2.2 (12th ed. 2020), *updated at* www.nclc.org/library. *See also In re* Williams, 612 B.R. 682, 696 (Bankr. M.D.N.C. 2020) (raising question of subject-matter jurisdiction; FDCPA claim of misapplication of mortgage payments was not "related to" bankruptcy case, and so court lacked subject matter jurisdiction over that count); Buckingham v. Baptist Mem. Hosp., Inc., 283 B.R. 691 (N.D. Miss. 2002) (denying motion to transfer FDCPA case to bankruptcy court because claims were not "related to" bankruptcy petition; all dealt with postpetition conduct and any recovery would go to plaintiff and would have no conceivable effect on estate); *In re* Garcia, 2013 WL 414177 (Bankr. W.D. Tex. Feb. 1, 2013) (majority of courts have concluded that bankruptcy courts do not have "related to" jurisdiction over chapter 7 debtor's postpetition claims for unfair debt collection practices); *In re* Csondor, 309 B.R. 124 (Bankr. E.D. Pa. 2004) (bankruptcy court has neither "core" nor "related to" jurisdiction over post-filing violations of FDCPA since bankruptcy estate is not affected).

23 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 18 (12th ed. 2020), *updated at* www.nclc.org/library.

24 Tiessen v. Capital, 2016 WL 6782776, at *2 (D. Minn. Oct. 20, 2016) (tribal exhaustion doctrine; "due to considerations of comity, federal court jurisdiction does not properly arise until available remedies in the tribal court system have been exhausted"), *adopted*, 2016 WL 6803076 (D. Minn. Nov. 15, 2016).

25 Gonnella v. Delbert Serv. Corp., 2015 WL 1299364 (N.D. Ill. Mar. 19, 2015).

26 *See* Testa v. Katt, 330 U.S. 386; 67 S. Ct. 810, 91 L. Ed. 967 (1947) (Rhode Island state court's refusal to enforce Federal Emergency Price Control Act); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 (1934) (Federal Employers' Liability Act); C. Wright, Law of Federal Courts § 45 (1970). *See also* Caputo v. Koenig, 46 N.Y.S.3d 880 (N.Y. App. Div. 2017) (reversing lower court's dismissal for lack of jurisdiction, since Supreme Court, New York County, was "court of competent jurisdiction" under § 1692k(d)). *But cf.* G.E. Capital Mortg. Serv., Inc. v. Baker, 1999 WL 511156, at *1, 4 (Conn. Super. Ct. July 2, 1999) (defenses based upon alleged violations of FDCPA were not available in foreclosure action because they did not "address the making, validity or enforcement of the mortgage and/or note" and "failed to assert any connection with the subject matter of the foreclosure action"; as such, "it did not arise out of the same transaction as the foreclosure action"); Missionary Sisters v. Dowling, 703 N.Y.S.2d 362 (N.Y. Civ. Ct. 1999) (FDCPA violations do not give rise to affirmative defense to eviction proceeding).

27 *See* Appx. E.3.7.1, *infra*.

28 *See* U.S. Bank v. Verity, 2015 WL 1469736 (D.N.J. Mar. 27, 2015); HSBC Bank v. Bryant, 2009 WL 3787195 (S.D. Cal. Nov. 10, 2009); First Horizon Home Loans v. Gardner, 2009 WL 1107818 (W.D. Pa. Apr. 23, 2009); Burbage v. Richburg, 417 F. Supp. 2d 746 (D.S.C. 2006) (debtor's purported defenses under FDCPA to state case did not create federal question jurisdiction); Greene Home Owners Ass'n v. Vogel, 1999 WL 292718 (N.D. Tex. Apr. 12, 1999). *See also* Perreault v. Model Fin. Co., 2019 WL 1493343, at *3 (S.D. Cal. 2019) ("That Plaintiffs assert a federal claim against Big Time does not give the Court federal question jurisdiction over Big Time's claims against MFC, all of which are based on state law. There is no independent basis for the Court's jurisdiction over the cross-complaint.").

29 Home Depot U.S.A., Inc. v. Jackson, ___ U.S. ___, 139 S. Ct. 1743, 204 L. Ed. 2d 34 (2019) (general removal statute does not permit removal by any counterclaim defendant, including parties brought into lawsuit for the first time by counterclaim, and Class Action Fairness Act's (CAFA) removal provision does not permit third-party defendant to remove); Palisades Collections, L.L.C. v. Shorts, 552 F.3d 327 (4th Cir. 2008) (in state collection action by debt collector, where consumer joined original creditor as additional counter-defendant for state consumer protection claims and moved for class action certification, third-party creditor could not remove action on basis of diversity and pursuant to Class Action Fairness Act); First Nat'l Bank of Pulaski v. Curry, 301 F.3d 456, 461 (6th Cir. 2002) ("Having carefully considered the issue, we conclude that neither § 1441(a) nor § 1441(c) provides third-party defendants with the right to remove a case to federal court."); Deutsche Bank Nat'l Tr. Co. v. Diamond, 2017 WL 587253, at *2–3 (M.D. Fla. Feb. 14, 2017); Rizwan v. Lender Services, Inc., 176 F. Supp. 3d 513 (D. Md. 2016) (mortgagee and mortgage servicer, added as third-party defendants in state court foreclosure action, could not remove third-party claims, even where those claims were properly severed); Fed. Nat'l Mortg. Ass'n v. Morris, 118 F. Supp. 3d 1288, 1291–1298 (N.D. Ala. 2015) (where defendant in foreclosure action asserted counterclaim against third-party mortgage servicer, removal was improper); Access Credit Mgmt., Inc. v. Lacy, 2013 WL 4012658, at *1 (E.D. Ark. Aug. 5, 2013) (in *dicta*, "the Eighth Circuit has held that, in almost

prefers to litigate the FDCPA claim in federal court, it should be brought as a separate suit and not as a counterclaim to the collection action. Whether such a separate FDCPA claim is barred by a judgment on the underlying debt is discussed at § 12.6, *infra*.

A defendant may, however, remove an FDCPA suit from state court to federal court, if the federal courts would have original jurisdiction over it.[30] When a claim is properly removed, the court may remand separable state law claims while retaining jurisdiction of the federal claims.[31] If the federal district court dismisses all federal claims within a complaint, and diversity jurisdiction does not exist over the remaining state statutory and/or common law claims, the court has discretion to retain, dismiss, or remand the remaining state law claims pursuant to 28 U.S.C. § 1367.[32]

The choice of federal or state forum usually depends on local factors: controlling case law, standing facts and laws,[33] the relative quality of the judiciary, the relative congestion of the court's dockets and the pace at which cases move, and differences in procedural rules (such as discovery, jury, and class action rules). The consumer can certainly file the FDCPA claim in federal court if that is the preferred forum. If the consumer prefers state court, then to avoid removal the consumer must consider not raising an FDCPA claim or doing so as a counterclaim in a state court collection case.

11.2.2 Personal Jurisdiction over Out-of-State Collectors

11.2.2.1 Generally

State long-arm statutes subject nonresident individuals or corporations to the *in personam* jurisdiction of local courts on the basis of their having performed some act affecting the state. The plaintiff has the burden of establishing jurisdiction.[34] Federal procedure uses the long-arm statute of the forum state,[35] which may allow fairly extensive service on nonresidents.

Long-arm statutes commonly allow jurisdiction over anyone who engages in "the transaction of any business within this State" or "the commission of a tortious act within this State" related to the cause of action.[36] Collecting debts from state residents may qualify as transacting business within the state.[37] Violating the FDCPA is analogous to committing a tort, because the Act is partly a codification of tort law and because a violation affecting a state resident within the state creates a cause of action within the meaning of such a statute.[38] Ironically, and unfortunately, a debt collector who sues the consumer in a distant state, thereby violating the FDCPA, may have to be sued in the distant state.[39]

11.2.2.2 "Transaction of Business" Test in Long-Arm Statutes

Courts usually interpret the statutory "transaction of business" test as broadly as possible within the minimum contacts standard required by the due process clause of the Fourteenth Amendment. The Supreme Court, in *International Shoe Co. v.*

all cases, a third-party defendant may not remove a case to federal court under 28 U.S.C. § 1441(c)," (citing Lewis v. Windsor Door Co., 926 F.2d 729, 733 (8th Cir. 1991)). *But see* Carl Heck Eng'rs, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133 (5th Cir. 1980) (permitting third-party removal); WGB, L.L.C. v. Bowling, 18 F. Supp. 3d 1288, 1294 (N.D. Ala. 2014) ("the Fifth Circuit's rationale for permitting a newly added defendant to remove a civil action to federal court under § 1441(c) remains valid and binding in the Eleventh Circuit").

30 28 U.S.C. § 1441; Currier v. First Magnus Fin. Corp., 2011 WL 4043423 (D. Nev. Sept. 8, 2011) (removal was proper where state statutory claim provided no private cause of action, but was premised entirely upon violations of standards that gave rise to independent federal claim based on FDCPA); Shock v. CDI Affiliated Serv., Inc., 2010 WL 672148 (D. Idaho Feb. 20, 2010); Simmons v. Countrywide Home Loans, 2010 WL 670032 (M.D. Tenn. Feb. 19, 2010). *See also* Knapp-Prasek v. California State Auto. Ass'n, 2011 WL 4368672 (N.D. Cal. Sept. 19, 2011) (given similarity of FDCPA and California Rosenthal Act, it was far from clear that plaintiff's cause of action arose under federal law or that right to relief depended on resolution of substantial question of federal law, and because federal jurisdiction must be rejected if there is any doubt as to right of removal, removal was improper).

31 *See, e.g.*, Wagner v. Bank of Am., 2012 WL 6586347 (S.D. Ill. Dec. 17, 2012) (state claims severed and remanded to state court).

32 *See* Valhalla Inv. Properties, L.L.C. v. 502, L.L.C., 832 Fed. Appx. 413 (6th Cir. 2020) (with FDCPA claim dismissed, court did not retain jurisdiction over supplemental state-law claims); Rogers v. J.P. Morgan Chase Bank, 466 F. Supp. 3d 791 (N.D. Ohio 2020) (where creditor was not debt collector under FDCPA, case dismissed and state law claims remanded); Perreault v. Model Fin. Co., 2019 WL 1493343, at *3 (S.D. Cal. Apr. 4, 2019); Dawson v. DovenMuehle Mortg., Inc., 2002 WL 501499 (E.D. Pa. Apr. 3, 2002); Jang v. A.M. Miller & Assoc., Inc., 1996 WL 435096, at *5 (N.D. Ill. 1996). *See also* Evans v. Better Homes & Gardens Real Estate, L.L.C., 2014 WL 11858176 (N.D. Ga. May 29, 2014) (court had discretion to maintain supplemental jurisdiction over state law claims); Roberts v. Chase Home Fin., L.L.C., 2014 WL 11930589 (N.D. Ga. Jan. 3, 2014) (denying consumer's motion to remand state law claims to state court from which they were removed, as court had jurisdiction of FDCPA claim and supplemental jurisdiction over state claims); Cable v. Prot. One, Inc., 2009 WL 2970111 (C.D. Cal. Sept. 9, 2009).

33 *See* § 11.15, *infra*.

34 *See* Carmona v. Leo Ship Mgmt., Inc., 924 F.3d 190 (5th Cir. 2019) (plaintiff bears burden of establishing prima facie case of personal jurisdiction); Knox v. MetalForming, Inc., 914 F.3d 685 (1st Cir. 2019) (same). *See also* Musso v. Seiders, 194 F.R.D. 43 (D. Conn. 1999) (if defendant raises lack of personal jurisdiction before discovery was conducted, plaintiff can defeat motion to dismiss by good faith allegation of jurisdiction; if defendant raises lack of personal jurisdiction by motion for summary judgment, plaintiff has the burden of establishing jurisdiction by preponderance of evidence).

35 Fed. R. Civ. P. 4(k).

36 *E.g.*, 735 Ill. Comp. Stat. §§ 5/2-209(a)(1), 5/2-209(a)(2). *See also* Appx. E.3.7.4, *infra*.

37 *See* § 11.2.2.2, *infra*.

38 *See* § 11.2.2.3, *infra*.

39 *See* Neal v. Buffaloe & Assoc., 2011 WL 6754056 (D. Neb. Dec. 23, 2011) (dismissing FDCPA case for lack of personal jurisdiction in Nebraska over Tennessee collection law firm that sued Nebraska consumer in Tennessee, where his mother lived). *See also* Fitzgerald v. Zakheim & LaVrar, P.A., 90 F. Supp. 3d 867 (D. Minn. 2015) (forum had no jurisdiction where Florida collection law firm garnished Minnesota account, instead of intended Florida account, at national bank).

State of Washington,[40] required that the nonresident defendant have minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[41] *McGee v. International Life Insurance Co.*[42] further broadened the extent of long-arm jurisdiction.

In *Hanson v. Denckla*,[43] the Supreme Court limited the broad rule of *International Shoe* and *McGee*. Minimum contacts, it held, require that the defendant "purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[44]

The current general requirements of the minimum contacts rule may be summarized as follows:[45]

- The nonresident defendant must act or must consummate a transaction purposefully in the forum state;
- The cause of action must have some connection with the act or transaction; and
- Jurisdiction in the forum state must not offend traditional notions of fair play and substantial justice.

The last requirement considers the quality, nature, and extent of the activity in the forum state, the relative convenience of the forum for the parties, the benefits and protections the parties receive from the laws of the state, and the basic equities of the situation.

The First Circuit has a similar three-part inquiry to determine whether a court can assert specific jurisdiction of an out-of-state defendant. First, the legal claims must relate to or arise out of the defendant's contacts in the forum. Second, the defendant's contacts must constitute "purposeful availment of the benefits and protections" of the forum's laws. Third, the exercise of jurisdiction must be reasonable, in light of the First Circuit's "gestalt factors."[46]

Courts typically find long-arm jurisdiction over an out-of-state debt collector who sends multiple collection letters and makes several phone calls to the consumer in the forum state.[47] Thus, the Ninth Circuit found long-arm jurisdiction over an out-of-state collector who contacted a company in the forum state to get the consumers' new address, sent one or two collection notices to the consumers in the forum state, and telephoned them once in the forum state.[48] The Second Circuit found that New York's long-arm statute applied to a Pennsylvania law firm that mailed a debt collection letter to the consumer, called the consumer, and mailed the summons and complaint to the consumer in New York.[49] Some state debt collection statutes may specifically describe debt collection contacts as "doing business within this state."[50] Courts have also found long-arm jurisdiction over individuals who direct the operations of an out-of-state collection agency, because of the individual's indirect efforts to collect a debt in the forum state.[51] On the other hand, courts will deny personal jurisdiction where there has

40 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (action by state to collect contributions for state unemployment compensation permitted when corporation employed salesmen in forum state).

41 *Id.*, 326 U.S. at 316.

42 335 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957) (sale of single insurance policy through mail subjected company to forum state's jurisdiction). *See also* Patterson v. Latimer Levay Jurasek L.L.C., 2009 WL 1862427 (S.D. Cal. June 29, 2009) (collection law firm sending letter into district constitutes minimum contacts for purposes of exercising personal jurisdiction over firm).

43 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

44 *Id.*, 357 U.S. at 253. *See also* Grice v. VIM Holdings Group, L.L.C., 280 F. Supp. 3d 258 (D. Mass. 2017) (Illinois payday lender purposefully availed itself of the benefits and protections of Massachusetts law, as required for Massachusetts district court to exercise specific jurisdiction over lender in Massachusetts debtor's action for alleged violations of Massachusetts law and FDCPA, where lender owned and operated website through which it voluntarily bid for loan to debtor and initiated interactive contact with her regarding the loan); Maloon v. Schwartz, Zweban & Slingbaum, L.L.P., 399 F. Supp. 2d 1108 (D. Haw. 2005) (defendant purposefully availed itself of forum by sending a debt collection letter, allegedly in violation of the FDCPA, to plaintiff in Hawaii). *See also* Palmer v. Idalia Llorens Collection Agency, Inc., 434 F. Supp. 3d 462, 469–470 (E.D. Tex. 2020) (mailing of one invoice by nonresident University to plaintiff's residence in Texas was too minimal a contact to establish jurisdiction via Texas long-arm statute); Mulato v. Wells Fargo Bank, 76 F. Supp. 3d 929, 948–949 (N.D. Cal. 2014) (court declined to exercise personal jurisdiction over Wells Fargo employees who showed they were communicating with plaintiff on behalf of Wells Fargo and not in their individual capacity).

45 *See* Michel v. Am. Capital Enter., Inc., 884 F.2d 582 (9th Cir. 1989) (unpublished); Casano v. WDSJ-TV, Inc., 313 F. Supp. 1130 (S.D. Miss. 1970), *aff'd*, 464 F.2d 3 (5th Cir. 1972). *See also* Nordess v. Faucheux, 170 So. 3d 454 (Miss. 2015) (provides history of progression of U.S. Supreme Court's evaluation of "minimum contacts.").

46 Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999).

47 *See* Grice v. VIM Holdings Group, L.L.C., 280 F. Supp. 3d 258, 272, 276 (D. Mass. 2017) ("Because the Loan was issued to a Massachusetts bank account, the Website was available in Massachusetts, and Grice's alleged harm occurred in Massachusetts as a result of the Loan, the relatedness prong is satisfied.").

48 Michel v. Am. Capital Enter., Inc., 884 F.2d 582 (9th Cir. 1989) (unpublished). *But see* Burry v. Cach L.L.C., 2015 WL 328182 (E.D. Pa. Jan. 22, 2015) (debt buyer's filing of hundreds of lawsuits in Pennsylvania did not subject it to general jurisdiction where consumer failed to offer evidence of nature of suits, and consumer, suing over debt buyer pulling his credit report, had not been contacted or sued; case was transferred to collector's home state).

49 Eades v. Kennedy, P.C. Law Office, 799 F.3d 161 (2d Cir. 2015).

50 *See* Fla. Stat. § 559.55(8); White v. Fed. Fin. Corp., 379 So. 2d 136 (Fla. Dist. Ct. App. 1980).

51 *See* Gallegos v. Tygart, 2017 WL 4872887 (D.N.M. July 20, 2017) (denying motion to dismiss owner of collection agency for lack of personal jurisdiction where claims were based on misconduct by her agents during calls to plaintiff in New Mexico, since evidence established owner "had considerable control over both the means and the results of her debt collectors' work," even though they were paid on commission basis); Appx. E.3.7.4, *infra*. *See also* Fabio v. Diversified Consultants, Inc., 2014 WL 713104 (W.D. Wis. Feb. 25, 2014) (Florida collector "selected Wisconsin as the staging ground for its collection calls to plaintiff, thereby purposefully availing itself of the privilege of conducting business in this state"). *But cf.* Grice v. VIM Holdings Group, L.L.C., 280 F. Supp. 3d 258, 278 (D. Mass. 2017) (no personal jurisdiction over owners and managers of debt collectors; mere participation in corporation's affairs is insufficient); Ernst v. Jesse L. Riddle, P.C., 964 F. Supp. 213 (M.D. La. 1997) (long-arm jurisdiction could not be exercised over collector's corporate officer without proof of officer contacting state as debt collector, rather than in his capacity as corporate officer).

been essentially no contact with the forum state,[52] unless the defendant is headquartered in the forum state.[53] The plaintiff must also establish personal jurisdiction over each defendant independently in a multi-party case. The contacts of one defendant may not be imputed to another defendant for jurisdictional purposes, unless the plaintiff can show that it would be appropriate to pierce the corporate veil.[54]

11.2.2.3 Tort Tests in Long-Arm Statutes

Courts broadly construe provisions of long-arm statutes, allowing jurisdiction over parties who commit torts in whole or in part within the state as providing a basis for jurisdiction over FDCPA defendants.[55] These cases follow similar holdings for claims under state tort and related state statutes.[56] Tort-based personal jurisdiction in libel, slander, and misrepresentation cases in particular can provide useful analogies for supporting jurisdiction in debt collection cases. Precedent in the forum state should be consulted in this regard.

11.2.3 Federal Court Venue

Federal suits may be brought in any judicial district in which the defendant "resides, if all defendants are residents of the State in which the district is located" or in which a substantial part of the events or omissions giving rise to the claim occurred.[57] The federal venue provisions should therefore be construed to permit suit to be brought in any competent federal court of a state that has long-arm jurisdiction over the defendant.[58] Unlike claims of improper jurisdiction, objections to venue are waived if not raised in a timely fashion.[59]

Federal court venue for an FDCPA action based upon where a claim arose is generally proper where the consumer received a dunning message alleged to violate the FDCPA,[60] and not where the underlying debt was consummated, where that is a different jurisdiction.[61] The Second Circuit has also found that the claim arose where the consumer received the dunning letter, even if it was mailed to a different state and forwarded to the consumer's new address.[62]

Even if venue is proper, however, the court has authority under 28 U.S.C. § 1404(a) to transfer the case "[f]or the convenience of parties and witnesses, in the interest of justice, . . . to any other district or division where it might have been brought."[63] Deference is given to a plaintiff's choice of forum,

52 *See* Bonilla v. Nelson & Kennard, 2020 WL 5763774 (E.D.N.Y. Sept. 28, 2020) ("None of the events took place in New York. The only connection to New York in this action is Plaintiff's residence in New York," so "the Court finds that the situs of injury is California, and not New York."); Sarracco v. Ocwen Loan Servicing, L.L.C. 220 F. Supp. 3d 346 (E.D.N.Y. 2016) (foreclosure law firm had no N.Y. contacts, although mortgagee did); Howell v. Clark County Collection Serv., L.L.C., 2015 WL 1210599 (S.D. Ind. Mar. 16, 2015) (merely filing credit report upon consumer who happened to live in Indiana did not invoke benefits and protections of its laws and court lacked personal jurisdiction); Kopp v. Hornung, 2015 WL 585746 (D. Colo. Feb. 11, 2015); Burry v. Cach L.L.C., 2015 WL 328182 (E.D. Pa. Jan. 22, 2015) (debt buyer's hard inquiry on consumer's TransUnion credit report did not operate to subject it to specific jurisdiction in Pennsylvania, even though TransUnion has a location in Pennsylvania); Appx. E.3.7.4, *infra*. *See also* Kangas v. Kieffer, 495 Fed. Appx. 749, 751 (8th Cir. 2012) ("These isolated contacts [serving notice of foreclosure in Wis. in N.D.] are insufficient to satisfy the due process clause."); Fitzgerald v. Zakheim & LaVrar, P.A., 90 F. Supp. 3d 867 (D. Minn. 2015).

53 *See* Daimler AG v. Bauman, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

54 *See* Carrington v. Experian Holdings, Inc., 469 F. Supp. 3d 891 (W.D. Wisc. 2020), *citing* KM Enterprises, Inc. v. Global Traffic Technologies, Inc., 725 F.3d 718, 733–734 (7th Cir. 2013).

55 *See* Grice v. VIM Holdings Group, L.L.C., 280 F. Supp. 3d 258, 273 (D. Mass. 2017) (where content of collection lawyer's communications with forum gives rise to intentional tort, this constitutes personal availment for purposes of personal jurisdiction); Johnson v. Critical Resolution Mediation L.L.C., 2017 WL 2590007 (M.D. Fla. Apr. 24, 2017) (because consumer's claims arose from unfair debt collection calls to telephones in Florida, court had specific jurisdiction over collection agency under Florida's long-arm statute's "tortious act" provision); Appx. E.3.7.4, *infra* ("tortious act").

56 First Act, Inc. v. Brook Mays Music Co., 311 F. Supp. 2d 258 (D. Mass. 2004); White v. Fed. Fin. Corp., 379 So. 2d 136 (Fla. Dist. Ct. App. 1980); Norton v. Local Loan, 251 N.W.2d 520 (Iowa 1977).

57 28 U.S.C. § 1391(b).

Note that the Federal Courts Jurisdiction and Venue Clarification Act of 2011 substantially revised this statute for cases filed on or after January 6, 2012. Cases arising under this statute, as amended, in contexts other than the FDCPA should also be consulted for their analysis of such issues as determining the residence of defendants and when a defendant is subject to the court's personal jurisdiction, as these may determine whether venue is proper under the statute.

58 *See* Dellget v. Wolpoff & Abramson, L.L.P., 2007 WL 4142769 (E.D. Pa. Nov. 21, 2007).

59 Fed. R. Civ. P. 12(h)(1); Comm. v. Dennis Reimer, Co., L.P.A., 150 F.R.D. 495 (D. Vt. 1993).

60 *See generally* Bates v. C & S Adjusters, Inc., 980 F.2d 865 (2d Cir. 1992); Michel v. Am. Capital Enters., Inc., 884 F.2d 582 (9th Cir. 1989); Appx. E.3.7.4, *infra*. *See also* Fabio v. Diversified Consultants, Inc., 2014 WL 713104 (W.D. Wis. Feb. 25, 2014) (ruling venue proper in Wisconsin where robo-calls to Minnesota resident's cell phone from Florida collector were made while plaintiff was in Wisconsin). Note that debt collectors bringing suit against consumers must follow the venue dictates of 11 U.S.C. § 1692*i*.

61 Howard v. Judge Law Firm, 2010 WL 2985686 (D. Minn. July 26, 2010). *See also* Bates v. C & S Adjusters, Inc., 980 F.2d 865 (2d Cir. 1992) (venue proper in New York when debt arose in Pennsylvania and collection letter sent to Pennsylvania, but forwarded to consumer's new address in New York).

62 Bates v. C & S Adjusters, Inc., 980 F.2d 865 (2d Cir. 1992).

63 *See* Appx. E.3.7.4, *infra See, e.g.*, Hampton-Muhamed v. James B. Nutter & Co., 687 Fed. Appx. 890 (11th Cir. 2017) (if claims had not been dismissed, transfer of case to Florida would be proper where Georgia court did not have jurisdiction over individual defendants and property, foreclosure proceedings, witnesses, and relevant documents were in Florida); Gentry v. Leading Edge Recovery Solutions, L.L.C., 2014 WL 131811 (D.N.J. Jan. 10, 2014) (granting transfer to N.Y. where consumer's lawyer received collection letter); Mobley v. ADP Screening & Selection Services, Inc., 2013 WL 396165, at *3 (D.N.J. Jan. 30, 2013) (granting transfer to Fort Collins, CO, where allegedly inaccurate reports were produced and defendant also maintained its records and computer server). *See also* Havanec v. EMC Mortg., L.L.C., 2012 WL 1646863 (N.D. Tex. May 10, 2012) (transferring FCRA case to a different federal district in Texas, where defendant's principal or main office was located); Kierstead v. Experian Info. Solutions, Inc., 2011 WL 1375361 (C.D. Cal. Apr. 11, 2011) (granting change of venue in individual case involving mixed files from location

unless the defendant makes a strong showing of inconvenience that warrants upsetting that choice.[64]

Courts sometimes allow a transfer of venue where all of the evidence is to be found in another jurisdiction.[65] Thus, a court transferred venue to Florida where all the operative facts occurred there and the consumer had only recently moved to another state.[66] Where a debt collection dispute involved property wrongfully seized in Tennessee, an Illinois federal court found that Tennessee was the proper venue—not Illinois, where the consumer resided.[67] On the other hand, even where the claims arise from a contract with a forum selection clause, transfer will be denied when enforcement of the clause would be unreasonable and unjust, would render the proceedings gravely difficult for the plaintiff and inconvenient to the point of practical impossibility, and would contravene a strong public policy of the forum in which suit is brought.[68]

11.2.4 Joining State Law Claims in Federal Court

Supplemental jurisdiction, defined in part by *United Mine Workers of America v. Gibbs*[69] and in part by 28 U.S.C. § 1367, allows a federal court considering a federal claim to hear a closely related state claim that lacks an independent basis for federal jurisdiction. The *Gibbs* court held that the jurisdictional power of federal courts hearing federal claims includes the power to decide all state claims that "derive from a common nucleus of operative fact" with the federal claim.[70] However, the court in *Gibbs* cautioned that this power to decide related state claims should be exercised with great care and should not be exercised when considerations of judicial economy, convenience, and fairness to the litigants are not served. The exercise of this power should be further influenced by considerations of comity and of the predominance in a particular case of either state or federal issues. Thus, a federal court considering a substantial federal claim should exercise its power to assume supplemental jurisdiction over a closely related state claim requiring little or no additional commitment of court resources and raising no novel issues of state law or policy.[71]

Later, Congress added the following jurisdictional statute for supplemental jurisdiction:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.[72]

This statute codifies the term supplemental jurisdiction, which replaced the concepts of pendent and ancillary jurisdiction over parties and claims in their broad forms. Subsequent federal decisions have extended supplemental jurisdiction.[73]

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of defendant's corporate headquarters to location of plaintiff's residence, over plaintiff's objection); Smith v. Hireright Solutions, Inc., 2010 WL 2270541 (E.D. Pa. June 7, 2010) (granting transfer of nationwide FCRA class action brought on behalf of employment applicants to venue of defendant's principal place of business). *Cf.* Saxerud v. T-H Prof'l & Med. Collections Ltd., 482 F. Supp. 3d 900, 901–902 (E.D. Mo. Aug. 27, 2020) (denying collection agency's motion for change of venue to location of its offices); Robey v. JPMorgan Chase Bank, 343 F. Supp. 3d 1304 (S.D. Fla. Dec. 4, 2018) (transfer of venue per 28 U.S.C. § 1406(a) from Florida to North Carolina warranted where wrongful foreclosure occurred in North Carolina and bulk of witnesses were in North Carolina); Ainsworth v. Experian Info. Solutions, Inc., 2011 WL 2135713 (C.D. Cal. May 12, 2011) (denying change of venue in individual case involving mixed files from location of defendant's corporate headquarters to location of plaintiff's residence).

64 *See* Lyons v. Michael & Assoc., 2013 WL 4680179 (S.D. Cal. Aug. 29, 2013); Ferri v. Del Medico, 2013 WL 12156114 (M.D. Fla. May 21, 2013); Tobey v. Nat'l Action Fin. Serv., Inc., 2009 WL 3734320 (E.D.N.Y. Nov. 4, 2009) (granting plaintiff's choice even though entitled to less deference in class action). *Cf.* Peatrowsky v. Persolve, L.L.C., 2012 WL 13012679, at *3 (C.D. Cal. May 22, 2012) (after weighing numerous factors, granting debt collector's motion to transfer case to Nevada federal court; for venue purposes, FDCPA claim should be brought in district in which plaintiff received debt collection communication; "receipt of a collection notice is a *substantial* part of the events giving rise to a claim under the FDCPA" (emphasis in original)).

65 *See* LeRoy v. Great W. United Corp., 443 U.S. 173, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979) (venue not proper where plaintiff was injured because bulk of evidence was more conveniently accessible in another district).

66 Sias v. Law Offices of Andreu, Palma, & Andreu, P.L., 2011 WL 345928 (D.N.J. Feb. 2, 2011).

67 Brooks v. Holmes, Rich & Sigler, P.C., 1998 WL 704023 (N.D. Ill. Oct. 1, 1998).

68 Grice v. VIM Holdings Grp., L.L.C., 280 F. Supp. 3d 258, 280–281 (D. Mass. 2017).

69 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) (referred to this aspect of supplemental jurisdiction as pendent jurisdiction).

70 *Id.*, 383 U.S. at 725.

71 *See* Lanton v. Ocwen Loan Servicing, L.L.C., 793 Fed. Appx. 398 (6th Cir. 2019) (where court overturned dismissal of RESPA claim, district court should consider whether to exercise supplemental jurisdiction over state claim (breach of contract)); Holzman v. Malcolm S. Gerald & Assoc., Inc., 920 F.3d 1264 (11th Cir. 2019) (same for overturned dismissal of FDCPA claim); McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 775 F.3d 109 (1st Cir. 2014); Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814 (8th Cir. 2012); Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055 (9th Cir. 2011); Robert J. Caluda, A.P.L.C. v. City of New Orleans, 403 F. Supp. 3d 522 (E.D. La. 2019) (district court severed claims against the city and remanded those claims to state court, while retaining jurisdiction over remaining claims including FDCPA against tax debt collectors); Appx. E.3.7.3, *infra*. *See also* Evans v. Better Homes & Gardens Real Estate, L.L.C., 2013 WL 12061906 (N.D. Ga. Nov. 7, 2013) (where homeowner's state law claims were based on same set of allegations as FDCPA claims concerning loan transaction, foreclosure sale, and dispossessory proceeding, jurisdiction over all claims was proper, since they all arose out of common nucleus of operative fact). *Cf.* PNC Bank v. Millaway, 1996 WL 684245 (E.D. Pa. Nov. 21, 1996) (granting bank's motion to remand to state court as there were no federal claims in complaint; homeowner had asserted FDCPA only as counterclaim).

72 28 U.S.C. § 1367.

73 *E.g.*, Jones v. Ford Motor Credit Co., 358 F.3d 205 (2d Cir. 2004) (finance company's counterclaims seeking amounts allegedly due on

District courts may decline to exercise supplemental jurisdiction if:

(1) The claims raise a novel or complex issue of State law;
(2) The claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
(3) The district court has dismissed all claims over which it has original jurisdiction; or
(4) In exceptional circumstances, there are other compelling reasons for declining jurisdiction.[74]

The statute of limitations for a claim raised pursuant to supplemental jurisdiction that is subsequently dismissed because the court declines to exercise supplemental jurisdiction is tolled for a period of thirty days, unless a longer tolling period is allowed by state law.[75]

The wide variety of FDCPA claims, and the even greater variety of state claims that might accompany an FDCPA suit, make it difficult to predict what state claims a court will allow under its supplemental jurisdiction. Courts will probably allow supplemental jurisdiction over claims arising under provisions of state law that parallel those of the FDCPA. For example, federal district courts considering FDCPA claims have exercised supplemental jurisdiction to consider state claims for a debt collector's torts[76] and violations of state consumer protection laws.[77]

A supplemental state claim may provide greater or simply additional relief to a consumer than an FDCPA claim. For example, punitive damages are more clearly available under state tort law than under the FDCPA.[78] Damages may sometimes be recovered simultaneously under both the FDCPA and the state law claim, but not invariably.[79] Where cumulative relief is not available, the consumer nevertheless should be able to proceed under both a federal and state law theory before they must choose the best remedy.[80]

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certain borrowers' vehicle finance loans satisfied "common nucleus of facts" standard for supplemental jurisdiction in borrowers' putative class action alleging race discrimination under Equal Credit Opportunity Act (ECOA)).

74 28 U.S.C. § 1367(c). *See* Lanton v. Ocwen Loan Servicing, L.L.C., 793 Fed. Appx. 398 (6th Cir. 2019) (where court overturned dismissal of RESPA claim, district court must consider whether to exercise supplemental jurisdiction over a state claim (breach of contract)); Holzman v. Malcolm S. Gerald & Assoc., Inc., 920 F.3d 1264 (11th Cir. 2019) (same for overturned dismissal of FDCPA claim); Khosroabadi v. N. Shore Agency, 439 F. Supp. 2d 1118 (S.D. Cal. 2006) (court declined to exercise supplemental jurisdiction over state law claim where claim asserting federal jurisdiction had been dismissed); Ferguson v. Credit Mgmt. Control, Inc., 140 F. Supp. 2d 1293 (M.D. Fla. 2001) (court may decline to exercise supplemental jurisdiction when all federal claims were dismissed or state law claims raised novel or complex issue of state law).

75 28 U.S.C. § 1367(d).

76 *See* Appx. E.3.7.3, *infra See, e.g.,* Garner v. Barton, 2015 WL 1120085 (E.D. Mo. Mar. 12, 2015) (because court had jurisdiction over consumer's FDCPA claims, it also had supplemental jurisdiction over her state law claims for abuse of process and conversion); Reid v. LVNV Funding L.L.C., 2015 WL 926146 (D. Utah Mar. 4, 2015) (recognizing identity theft victim's claim of invasion of privacy as state common law cause of action "which may be heard alongside the federal claims brought under the FDCPA"). *But see* Ferrell v. Midland Funding, L.L.C., 2015 WL 2450615 (N.D. Ala. May 22, 2015) (state litigation privilege based on filing of collection suit required dismissal of consumer's subsequent state invasion of privacy claim).

77 *See* Appx. E.3.7.3, *infra. See, e.g.,* Holzman v. Malcolm S. Gerald & Assoc., 920 F.3d 1264, 1274 (11th Cir. 2019) (court found supplemental jurisdiction over Florida Consumer Collection Practices Act as it related to FDCPA claims); Montoya v. Spinella & Assoc., P.C., 2013 WL 5203780 (D. Conn. Sept. 13, 2013) (overruling defendant's motion to dismiss where state law claims too were based on same collection procedures employed by defendants, and thus court had supplemental jurisdiction under 28 U.S.C. § 1367); Piper v. Portnoff Law Assoc., 216 F.R.D. 325 (E.D. Pa. 2003) (not forced to elect claims prior to damage determination); Kaplan v. Assetcare, Inc., 88 F. Supp. 2d 1355 (S.D. Fla. 2000) (plaintiff also stated cause of action under Florida Consumer Collection Practices Act, because knowledge could be imputed to defendants; declining to exercise supplemental jurisdiction over plaintiff's Florida Insurance Code claim because it raised novel or complex issue of state law). *But see* Alger v. Ganick, O'Brien & Sarin, 35 F. Supp. 2d 148 (D. Mass. 1999) (mag.; refusing to exercise jurisdiction over state tort, statutory debt collection, and UDAP claims, as state claims encompassed three years of collection activities not within FDCPA claim, state claim was made against creditor, and there were unanswered questions of state law under statute; tort claims raised evidentiary issues not presented by FDCPA claims).

78 *See* § 11.10.3, *infra*.

79 Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055 (9th Cir. 2011) (court found that state statute in question bolsters, not undermines, the protections afforded by FDCPA, and plaintiffs were therefore awarded damages under both state statute and FDCPA); Dean v. Compass Receivables Mgmt., Corp., 148 F. Supp. 2d 116 (D. Mass. 2001). *See also* Leto v. World Recovery Serv., L.L.C., 2015 WL 1897060 (W.D.N.C. Apr. 27, 2015) (awarding $1000 FDCPA damages and $1000 per violation in North Carolina Debt Collection Act damages for attempts to collect discharged debt); Gamboa v. Carruthers, 2010 WL 4823671 (M.D. Fla. Nov. 19, 2010) (awarding maximum statutory damages pursuant to FDCPA and Florida statute; $1000 per statute for deceptive and harassing collection letters); Silva v. Jason Head, P.L.C., 2010 WL 4593704 (N.D. Cal. Nov. 4, 2010) (where conduct violates both FDCPA and Rosenthal Act, consumer may recover one award of up to $1000 statutory damages under each act); Som v. Daniels Law Offices, P.C., 573 F. Supp. 2d 349 (D. Mass. 2008) (FDCPA does not preempt Mass. UDAP statute); Clark v. Universal Debt Solutions, Inc., 2007 WL 2386581 (D. Haw. Aug. 16, 2007) (statutory damages pursuant to both FDCPA and state statute, in addition to actual damages); *Cf.* Abby v. Paige, 2013 WL 141145, at *10 (S.D. Fla. Jan. 11, 2013) (declining to make second award of "additional damages" under state debt collection law), *aff'd*, 553 Fed. Appx. 970 (11th Cir. 2014); Hunter v. Oasis Fin. Solutions, L.L.C., 2010 WL 6210035 (S.D. Cal. Dec. 21, 2010) (award of maximum statutory damages under both FDCPA and Rosenthal Act not double recovery where collector violated provisions of Rosenthal Act not found in FDCPA), *adopted*, 2011 WL 997375 (S.D. Cal. Mar. 21, 2011).

80 Albanese v. Portnoff Law Assoc., 301 F. Supp. 2d 389, 392 (E.D. Pa. 2004) (Pennsylvania statute banning cumulative penalties for violations of both that state's Fair Credit Extension Uniformity Act and FDCPA did not prevent debtor from proceeding under both statutes simultaneously, so long as he chose one of the two statutory remedies under which to seek damages); Piper v. Portnoff Law Assoc., 216 F.R.D. 325 (E.D. Pa. 2003) (granting consumer's renewed motion to certify state law counts in addition to FDCPA claims in case involving collection of delinquent water and sewer bills; although consumer could not recover under both state and federal laws, law does not bar consumer from proceeding under both statutes before they choose state or federal remedy).

The likelihood that a federal court will exercise its power to hear a supplemental state claim is ultimately a function of two variables: the extent to which evidence of the state claim intertwines with evidence of the federal claim and the quantity of judicial resources required to handle the supplemental state claim. If these considerations are not adequately answered, supplemental state law claims may be dismissed.[81] Avoiding confusion of the jury is another reason cited to deny exercising supplemental jurisdiction over the consumer's state claims.[82]

When all federal claims are eliminated before trial, the court will generally decline to exercise jurisdiction over any remaining supplemental state law issues.[83] Supplemental claims to an FDCPA claim should be carefully screened so they do not invite or support a debt collection counterclaim by the collector.[84]

11.2.5 Federal Court Joinder of Creditors Subject to State Claims

The doctrine of supplemental jurisdiction over parties has given many federal courts a rationale for exercising supplemental jurisdiction over parties otherwise not subject to the federal claim in the case.[85] Supplemental party jurisdiction gives the court discretion to allow the consumer to join in federal court a creditor not covered by the FDCPA, under a state claim closely related to an FDCPA claim.[86] The most appropriate case for joinder is when the creditor and the debt collector are joint tortfeasors or when there are serious factual disputes over which party committed the violations (with each potential defendant blaming the other), creating the possibility of conflicting decisions if each defendant is tried separately.

Given that the FDCPA generally does not cover creditors collecting in their own name, creditors might claim that Congress intended to exclude them from federal jurisdiction.[87] The legislative history[88] indicates that creditors are generally excluded from the FDCPA only because of the lower incidence of collection abuses among creditors than among debt collectors; even so, creditors are covered under certain circumstances.[89] FDCPA coverage of creditors in some situations is inconsistent with an argument that Congress intended to preclude all federal suits against creditors.

11.3 Mandatory Arbitration of Consumers' Claims

11.3.1 Overview

Creditors, debt buyers, or those collecting on behalf of creditors or debt buyers often seek to thwart a consumer's FDCPA or state claims by attempting to enforce a mandatory arbitration clause found in the credit agreement between the original creditor and the consumer. These clauses require consumers to bring legal claims in private arbitration as opposed to litigation in court.

Consumers suing creditors, debt buyers, and debt collectors are almost always better off keeping an action in court. The arbitration clause often designates the arbitration provider, leaving the consumer with no say in selecting the arbitration forum or the rules to which the arbitration will be subject. Though consumers retain a narrow right to appeal, in general arbitrators need not follow the law, nor even reasonably judge the facts. Arbitrators familiar with commercial arbitration may not be attuned to differences that exist for consumer litigation.

Arbitration clauses—and the arbitration providers they designate—often provide consumer claimants with limited discovery. Arbitration clauses can also include various limits on a consumer's rights to pursue a claim and can also include a clause requiring issues as to a dispute's arbitrability to be determined by the arbitrator. While these limits may be unenforceable, it will require litigation to strike them. Perhaps most significantly for FDCPA claimants, arbitration clauses in consumer credit contracts typically require consumers to arbitrate their claims individually, prohibiting them from bringing class or collective actions in either court or arbitration, and the Supreme Court has ruled that these limits on class actions are enforceable.

This section surveys the arguments consumers can make to defeat a motion to compel arbitration of an FDCPA cause

81 *See* Appx. E.3.7.3, *infra;* Randall v. Nelson & Kennard, 2009 WL 2710141 (D. Ariz. Aug. 26, 2009) (court refused to exercise supplemental jurisdiction where it would increase complexity and length of time to resolve FDCPA claim); Wholesale Info. Network, Inc. v. Cash Flow Mgmt., Inc., 2007 WL 1893343 (W.D. Wash. June 29, 2007) (debt appeared to be FDCPA-exempt commercial debt, so litigating state claim would expend far greater resources than would FDCPA claim); Walker v. Lynn M. Olivier, P.C., 2006 WL 467912, at *2 (E.D. Mich. Feb. 23, 2006) (court refused to hear state claims because they would "substantially expand the scope of this case beyond that necessary and relevant to the federal claims under the FDCPA"). *Cf.* Malik v. Asset Acceptance, L.L.C., 2006 WL 13148 (E.D. Mich. Jan. 3, 2006) (unilaterally dismissing consumer's state law supplemental claims because of judicial inefficiency and comity).

82 *E.g.*, Shaffer v. ER Solutions, 2006 WL 1547755 (E.D. Mich. May 31, 2006).

83 *See* Lanton v. Ocwen Loan Servicing, L.L.C., 793 Fed. Appx. 398 (6th Cir. 2019) (originally, district court refused to exercise supplemental jurisdiction over state claim (breach of contract) after it dismissed federal claims); Holzman v. Malcolm S. Gerald & Assoc., Inc., 920 F.3d 1264 (11th Cir. 2019) (same). *See also* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 1130, 106 L. Ed. 2d 720 (1988); Taylor v. Luper, Sheriff, & Niedenthal, 74 F. Supp. 2d 761 (S.D. Ohio 1999); Johnson v. NCB Collection Services, 799 F. Supp. 1298 (D. Conn. 1992) (settled upon collector's payment of $4000 for consumer to withdraw appeal).

84 *See* § 12.8, *infra.*

85 *See, e.g.*, Cannon v. Kelly, 2009 WL 1158695 (W.D.N.Y. Apr. 28, 2009) (exercising supplemental jurisdiction over Internet payday lender); Jones v. Vill. of Villa Park, 784 F. Supp. 533 (N.D. Ill. 1992). *See also* ITT Commercial Fin. v. Unlimited Auto., Inc., 814 F. Supp. 664 (N.D. Ill. 1992).

86 *See* 28 U.S.C. § 1367(c).

87 *See* § 4.8.1, *supra.*

88 S. Rep. No. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 169 1696, *and at* Appx. A.3, *infra.*

89 *See* §§ 4.5, 10.4, *supra.*

of action or state law collection abuse claim. This section also considers strategies consumers ought to pursue if they are unable to resist a motion to compel arbitration—for example, the pursuit of class-wide relief or punitive damages through the arbitration proceeding.

Before discussing these issues in more depth, it is helpful to observe the unique character of consumer arbitration law as applied to debt collection claims. Although there is a federal policy favoring the enforcement of arbitration agreements, arbitration is a creature of private contract, and this purported policy favoring arbitration only applies if there is a binding agreement enforceable by the parties to the lawsuit. But where a debt buyer or debt collector is the defendant, that party will have to seek to enforce an agreement between the consumer and the original creditor, not between the consumer and the debt buyer or debt collector.

As a result, debt collectors and debt buyers face a double hurdle. They must prove their right to enforce the agreement between the original creditor and the consumer. Then they have to show that the arbitration requirement found in the creditor's agreement with the consumer is enforceable. Far more detail on all these subjects is found in NCLC's Consumer Arbitration Agreements,[90] which also contains sample briefs and other key documents.

11.3.2 Defendant Must Produce Arbitration Agreement Binding on the Consumer

Debt buyers and debt collectors wishing to take advantage of the arbitration agreement entered into between the consumer and the creditor have the burden of presenting to the court that actual arbitration agreement. The Federal Arbitration Act does not require arbitration of disputes, but only enforces arbitration agreements that have been validly created. Production of the actual agreement is also essential to determine what parties and disputes are covered by the agreement and whether any aspect of the agreement is unenforceable. A debt buyer or debt collector wishing to force the consumer's lawsuit into arbitration must produce both the arbitration agreement and evidence that the consumer has consented to that specific agreement.[91] At a minimum, this means that there will need to be a factual development of the record; a motion to dismiss should not be entertained, at least until evidence of a binding arbitration agreement is produced.[92]

In *Bazemore v. Jefferson Capital Systems, L.L.C.*,[93] the Eleventh Circuit concluded that a debt buyer could not compel arbitration of the consumer's FDCPA claims without producing the actual contract entered into by the consumer. It was not enough in that case to produce a declaration from a creditor employee attesting that the consumer had agreed to the credit agreement's terms and conditions, and that the terms and conditions that "would have been sent to" the consumer included an arbitration clause like the sample clause attached to the declaration.[94]

Similarly, it is not enough, for a debt collector to point to a standard form agreement drafted in 2020 when the consumer defaulted in 2018. The standard form agreement must be specifically linked to the consumer. In addition, the standard form agreement must not only be the contract that governs the creditor's transaction with the consumer, but there must also be evidence that the consumer signed the agreement or otherwise assented to it.[95] Furthermore, producing a credit card agreement is not enough to compel arbitration if the plaintiff was the victim of identity theft and did not, themself, assent to the credit agreement or its arbitration clause.[96] In some cases, however, it may be enough for a defendant to introduce testimony that the consumer must have received and assented to the arbitration clause at issue in order to access the underlying credit at a particular time period.[97]

Contracts allegedly formed on a website present particular challenges for a collector to show that there was a binding agreement and that the consumer had assented to particular language.[98] The binding effect of terms indicated on a website is examined in detail at NCLC's Consumer Arbitration Agreements § 4.3.4 (electronic assent) (7th ed. 2015), *updated at* www.nclc.org/library.

90 National Consumer Law Center, Consumer Arbitration Agreements (8th ed. 2020), *updated at* www.nclc.org/library.

91 *See, e.g.*, Shoe v. Cavalry SPV I, L.L.C., 2014 WL 12769220 (W.D. Ky. Apr. 4, 2014); Henggeler v. Brumbaugh & Quandahl, P.C., 894 F. Supp. 2d 1180 (D. Neb. 2012).

92 *See* Brown v. Dynamic Recovery Solutions, L.L.C., 2021 WL 2110795 (D.N.J. May 24, 2021); Kress v. Cavalry SPV, L.L.C., 2021 WL 1139875 (D.N.J. Mar. 24, 2021); Torres v. Rushmore Serv. Ctr., L.L.C., 2018 WL 5669175 (D.N.J. Oct. 31, 2018).

93 827 F.3d 1325 (11th Cir. 2016).

94 *Id.* at 1331. *See also* Midland Funding, L.L.C. v. Raney, 93 N.E.3d 724 (Ill. App. Ct. Jan. 4, 2018); Midland Funding L.L.C. v. Bordeaux, 147 A.3d 885 (N.J. Super. Ct. App. Div. Sept. 29, 2016). *But cf.* Danley v. Encore Capital Group, Inc., 680 Fed. Appx. 394 (6th Cir. 2017) (sufficient evidence introduced of arbitration agreement).

95 For examples of debt collectors' failures to produce valid arbitration agreements applicable to the consumer-plaintiffs, see Cox v. Midland Funding, L.L.C., 2015 WL 12862931 (N.D. Ga. June 11, 2015); Kulig v. Midland Funding, L.L.C., 2013 WL 6017444 (S.D.N.Y. Nov. 13, 2013); Hinten v. Midland Funding, L.L.C., 2013 WL 5739035 (E.D. Mo. Oct. 22, 2013); Midland Funding L.L.C. v. Bordeaux, 147 A.3d 885 (N.J. Super. Ct. App. Div. 2016). In each of these cases, the defendant-debt collector argued that, even though the form contract it produced was adopted by the creditor *after* the plaintiff had started using her credit card, the plaintiff had assented to the form contract by continuing to use her card. Both courts held that, without any evidence that the plaintiff had even received the form contract or that she should have reasonably understood that she would assent to it by using her card, the defendant could not prove that she had agreed to arbitrate. *But see* Hilton v. Midland Funding L.L.C., 2016 WL 1253273, at *6 (E.D. Mich. Mar. 31, 2016) (coming to opposite conclusion where plaintiff conceded that agreement to arbitrate existed between parties).

96 *See* Boran v. Columbia Credit Services, Inc., 2006 WL 3388400 (D. Conn. Nov. 21, 2006).

97 Krulee v. Receivables Performance Mgmt., L.L.C., 2015 WL 3638546, at *5 (N.D. Cal. June 11, 2015).

98 *See, e.g.*, Gilbert v. I.C. Sys., Inc., 2021 WL 292852 (N.D. Ill. Jan. 28, 2021).

The evidentiary burden of establishing a binding arbitration agreement lies with the defendant seeking to arbitrate. Experience suggests that debt buyers and debt collectors often cannot produce the agreement itself or sufficient evidence of contract formation, such as that the consumer ever received the credit agreement containing the arbitration requirement.[99] It may even be difficult for the originating creditor to do so. At the very least, even if a debt buyer is ultimately able to enforce an arbitration agreement through proof that the consumer assented to it, it will be very difficult to enforce the agreement without discovery into the underlying issue—in other words, courts should not grant a motion to compel arbitration without adequate factual development.[100] More detail on proof of an enforceable contract between a consumer and debt buyer or creditor is found in NCLC's Collection Actions.[101]

11.3.3 Debt Buyer's Right to Enforce the Creditor's Arbitration Agreement

When a debt buyer seeks to force a consumer's debt collection claim into arbitration, the debt buyer has initial hurdles to overcome. The debt buyer must produce the credit agreement binding on the consumer that contains an arbitration requirement, the debt buyer must prove that it has been assigned the credit agreement,[102] and it must prove it has rights to enforce the creditor's arbitration agreement.

These hurdles may be difficult for the debt buyer to overcome. Proof of the arbitration agreement is discussed at § 11.3.2, *supra*. Debt buyers may not receive the actual contract from the creditor and, after the consumer's action is filed, will have to go back to the creditor and request a copy of the relevant contract.

Debt buyers usually purchase blocks of thousands of accounts at a time, and may be able to produce a purchase agreement for that block of accounts, but not be able to prove that a particular consumer's account at issue is found in that block of accounts,[103] and thus cannot prove that the debt buyer has been assigned the consumer's contract. In addition, the debt buyer being sued may not be the debt buyer who purchased the account from the originating creditor, but instead someone who has purchased the account from another debt buyer, who in turn may have purchased the account from yet another debt buyer. As a result, for the defendant debt buyer to prove it is an assignee taking rights from the original creditor, it must prove an unbroken chain of assignments from the original creditor to the defendant debt buyer. Proof that a debt buyer has been assigned a particular account, and thus can enforce the arbitration agreement as an assignee, is examined in detail at NCLC's *Collection Actions*.[104]

Even if the debt buyer can prove there has been an assignment, the debt buyer must show that it has been assigned rights under the contract including the arbitration requirement, and not just that the debt buyer has been assigned the right to collect receivables.[105] The right to collect receivables does not provide rights under the contract, and thus no rights under the arbitration agreement.[106] Where the nature of the assignment to a debt buyer is defined in documents never submitted to the court, the debt buyer does not prove it has rights under the arbitration agreement.[107] But assignees may be able to enforce an arbitration agreement if assigned all rights in the credit agreement.[108]

After clearing these hurdles, the debt buyer still must show that it has rights to enforce an arbitration agreement between the consumer and the creditor. Arbitration agreements may specify that they apply to the creditor and to the creditor's assignees and successors, and courts generally find that a debt buyer, as an assignee, can then enforce the arbitration requirement.[109] Even without such language, courts

99 Proctor v. First Premier Corp., 2021 WL 131447 (D.D.C. Jan. 13, 2021).

100 Brown v. Dynamic Recovery Solutions, L.L.C., 2021 WL 2110795 (D.N.J. May 24, 2021); Kress v. Cavalry SPV, L.L.C., 2021 WL 1139875 (D.N.J. Mar. 24, 2021); Torres v. Rushmore Serv. Ctr., L.L.C., 2018 WL 5669175 (D.N.J. Oct. 31, 2018); Pearson v. United Debt Holdings, L.L.C., 123 F. Supp. 3d 1070, 1073 (N.D. Ill. 2015).

101 National Consumer Law Center, Collection Actions §§ 4.3, 4.5 (5th ed. 2020), *updated at* www.nclc.org/library.

102 *See, e.g.*, Brown v. Dynamic Recovery Solutions, L.L.C., 2021 WL 2110795 (D.N.J. May 24, 2021); Mark v. Portfolio Recovery Assoc., 2015 WL 1910527, at *3 (N.D. Ill. Apr. 27, 2015); Martin v. Cavalry SPV, 2014 WL 1338702 (E.D. Ky. Mar. 21, 2014); Thomas v. Asset Acceptance, L.L.C., 2013 WL 4538362 (N.D. Ill. Aug. 27, 2013) (finding insufficient proof of chain of title to plaintiff's debt); Henggeler v. Brumbaugh & Quandahl, P.C., 894 F. Supp. 2d 1180 (D. Neb. 2012); Starr v. Hameroff Law Firm, P.C., 2007 WL 3231988 (D. Ariz. Oct. 31, 2007), *adopted*, 2008 WL 906822 (D. Ariz. Mar. 31, 2008). *Cf.* Sweiger v. Calvary Portfolio Services, L.L.C., 2012 WL 1940678 (W.D. Pa. May 29, 2012) (debt buyer offered sufficient proof of assignment).

103 *See, e.g.*, Henggeler v. Brumbaugh & Quandahl, P.C., 894 F. Supp. 2d 1180 (D. Neb. 2012).

104 National Consumer Law Center, Collection Actions § 4.3.4 (5th ed. 2020), *updated at* www.nclc.org/library. *See* Haston v. Resurgent Capital Services, L.P., 2020 WL 7490231 (W.D. Pa June 7, 2021). *Cf.* Skinner v. Garry, 2021 WL 2315417 (D. Md. June 7, 2021) (collector failed initially to prove complete chain of ownership, but on submission of additional evidence sufficient proof was provided).

105 Smith v. Cavalry Portfolio Services L.L.C., 2020 WL 7682236 (N.D. Ill. Dec. 26, 2020) (failure to produce contract setting out terms of assignment prevents enforcement of arbitration agreement).

106 Lester v. Portfolio Recovery Assoc., 2018 WL 3374107 (N.D. Ala. July 11, 2018) (assignment of receivables does not provide rights under contract, such as right to enforce arbitration clause); Pounds v. Portfolio Recovery Assoc., 851 S.E.2d 423 (N.C. Ct. App. 2020); Spector v. Portfolio Recovery Assoc., 2020 WL 6438572 (N.C. Ct. App. Nov. 3, 2020).

107 Brown v. Dynamic Recovery Solutions, L.L.C., 2021 WL 2110795 (D.N.J. May 24, 2021); Kress v. Cavalry SPV I, L.L.C., 2021 WL 1139875 (D.N.J. Mar. 24, 2021); Lance v. Midland Credit Mgmt., Inc., 375 F. Supp. 3d 604 (E.D. Pa. 2019).

108 Peterson v Midland Funding L.L.C., 2020 WL 6719116 (N.D. Ill. Nov. 16, 2020).

109 *See* Barbosa v. Midland Credit Mgmt., Inc., 981 F.3d 82, 91 (1st Cir. 2020) ("[P]ursuant to the assignment provision and the express assignment of 'all' rights to Barbosa's account in the 'Bill of Sale,' Midland Funding does in fact stand in Barclays' shoes as its assignee and now has all the same rights regarding Barbosa's account as Barclays had when the Cardmember Agreement was formed."); Koch v. Compucredit Corp., 543 F.3d 460 (8th Cir. 2008); Russell v. Midland Credit Mgmt., Inc., 2021 WL 1192580 (N.D. Ill. Mar. 30, 2021); Cobb v. Resurgent Capital Services, L.P., 2021 WL 321408 (N.D. Ga. Feb. 1,

often find that assignees can generally enforce an arbitration agreement enforceable by the assignor where the assignee has been assigned all contract rights,[110] and the assignee's agents or affiliate may be able to do so as well.[111]

On the other hand, if an arbitration clause is narrowly drafted not to apply to assignees, then the debt buyer cannot enforce the agreement. For example, when the arbitration clause explicitly states it is between the consumer and "us" (meaning the creditor), courts may find it does not apply to the creditor's assignee.[112] Where the general definitions in a credit agreement apply "us" to the creditor and assignees, but where the arbitration agreement's definition of "us" does not, the more specific provision controls and assignees cannot enforce the arbitration agreement.[113]

11.3.4 Can a Collection Agency or Attorney Enforce the Creditor's Arbitration Agreement?

11.3.4.1 Generally

Third-party collectors and collection attorneys typically do not enter into contracts with the consumer, and thus there will be no arbitration agreement between these parties. Instead, the collector or attorney will seek to piggy-back onto an arbitration agreement between the creditor and consumer.

When the debt collector or attorney is hired by a debt buyer, the first step to prove the defendant's rights under the creditor's arbitration agreement is to show that the debt buyer has rights under that agreement. Whether the debt buyer has rights is examined in the prior subsection.[114] The next step is to determine if the collection agency or attorney has rights under the creditor's arbitration agreement, as examined in the rest of this subsection.

11.3.4.2 Primacy of the Arbitration Agreement's Language

Courts first look to the plain language of the contract and the relationship between the collection agency or attorney and the original creditor to see whether the arbitration agreement extends to cover parties with that relationship to the original creditor.[115] For example, one version of the GE Money Bank arbitration clause stated that it applied to disputes between the consumer and "us," defined as the creditor's parents, subsidiaries, predecessors, successors, assigns, employees, officers, and directors. Since a collection agency did not fall within any of these terms, it could not enforce the collection action.[116]

Another court similarly interpreted Citicorp's arbitration clause, based on South Dakota law (the law specified in Citicorp's credit card agreements). Because the Citicorp arbitration agreement did not explicitly provide for enforcement by agents, but only enforcement by Citicorp for claims relating to its agents, its agents could not enforce the arbitration requirement.[117] Similarly, the Discover Card arbitration provision at one time did not state that it applied to the creditor's agents, and a federal court concluded that this meant the clause did not apply to an action against a collection law firm collecting on a Discover debt.[118]

Other times, an arbitration agreement will state that it only applies to agents where the creditor is being sued at the same time as the agent, and thus does not provide a basis to

2021) (need not be immediate assignee, but can be further down chain of ownership); Hauptman v. Midland Credit Mgmt., Inc., 2019 WL 8436961 (N.D. Ill. Jan. 31, 2019); Zambrana v. Pressler & Pressler, L.L.P., 2016 WL 7046820 (S.D.N.Y. Dec. 2, 2016); Coleman v. LVNV Funding L.L.C., 2016 WL 3521939 (N.D. Ill. June 28, 2016); Harris v. Midland Credit Mgmt., Inc., 2016 WL 475349 (D.N.J. Feb. 8, 2016); Bolanos v. First Investors Servicing Corp., 2010 WL 4457347 (S.D. Fla. Oct. 29, 2010); Webb v. MBNA Am. Bank, 2006 WL 618186 (E.D. Ark. Mar. 10, 2006); Miller v. Northwest Tr. Services, Inc., 2005 WL 1711131 (E.D. Wash. July 20, 2005); Hoefs v. CACV of Colorado, L.L.C., 365 F. Supp. 2d 69 (D. Mass. Mar. 25, 2005).

110 Barbosa v. Midland Credit Mgmt., Inc., 981 F.3d 82 (1st Cir. 2020); Morrison v. Midland Funding, L.L.C., 2021 WL 2529618 (W.D.N.Y. June 21, 2021); Lebovits v. Cavalry Portfolio Services, L.L.C., 2021 WL 1198967 (S.D.N.Y. Mar. 29, 2021); Valentine v. LVNV Funding L.L.C., 2020 WL 5946975 (N.D. Ill. Oct. 7, 2020); Rosales v. Portfolio Recovery Assoc., 2020 WL 5891387 (N.D. Ill. Oct. 5, 2020); Bowker v Midland Funding L.L.C., 2020 WL 5743044 (D.N.J. Sept. 25, 2020); Peterson v. Midland Funding, L.L.C., 2020 WL 6719116 (N.D. Ill. Nov. 16, 2020). *But see* Williams v. Encore Capital Group, Inc., 2020 WL 7480404 (E.D. Pa. Dec. 18, 2020).

111 Barbosa v. Midland Credit Mgmt., Inc., 981 F.3d 82 (1st Cir. 2020); Morrison v. Midland Funding, L.L.C., 2021 WL 2529618 (W.D.N.Y. June 21, 2021); Valentine v. LVNV Funding L.L.C., 2020 WL 5946975 (N.D. Ill. Oct. 7, 2020); Bowker v Midland Funding L.L.C., 2020 WL 5743044 (D.N.J. Sept. 25, 2020).

112 Jenkins-Brown v. Liberty Acquisitions Servicing L.L.C., 2015 WL 1757220 (D. Or. Apr. 16, 2015); Buford v. Palisades Collection, L.L.C., 552 F. Supp. 2d 800 (N.D. Ill. 2008). *But see* Little v. Midland Credit Mgmt., Inc., 2021 WL 1382257 (S.D. Ohio Feb. 24, 2021); Evans v. Midland Funding, L.L.C., 2017 WL 1347694 (W.D. Ky. Apr. 10, 2017); Wood v. Portfolio Recovery Assoc., 2015 WL 12868067 (M.D. Fla. Apr. 1, 2015).

113 Williams v. Encore Capital Group, Inc., 2020 WL 7480404 (E.D. Pa. Dec. 18, 2020).

114 *See* § 11.3.3, *supra*.

115 *See* Landry v. Transworld Sys. Inc., 149 N.E.3d 781, 788 (Mass. 2020) (collection agency cannot enforce arbitration agreement as creditor's agent where not referenced in arbitration agreement, where consumer is not suing on contract). *But see* Vasquez. v. National Enter. Systems, Inc., 2021 WL 1399862 (D. N.J. Apr. 14, 2021) (agent could enforce arbitration requirement despite lack of contractual language).

116 Fox v. Nationwide Credit, Inc., 2010 WL 3420172 (N.D. Ill. Aug. 25, 2010). *See also* Neal v. Navient Solutions, L.L.C., 2019 WL 3779519 (W.D. Mo. Aug. 12, 2019). *Cf.* Hayes v. Delbert Services Corp., 2015 WL 269483, at *4 (E.D. Va. Jan. 21, 2015), *rev'd and remanded on other grounds*, 811 F.3d 666 (4th Cir. 2016) (allowing collector to compel arbitration based on language in agreement covering "collection representatives and agents," but not allowing collector to invoke forum selection clause that did not include that language).

117 Saroza v. Client Services, Inc., 2020 WL 948793 (D.N.J. Feb. 27, 2020).

118 Nazar v. Wolpoff & Abramson, L.L.P., 2007 WL 2875377 (D. Kan. Oct. 3, 2007). *See also* Butto v. Collecto Inc., 802 F. Supp. 2d 443 (E.D.N.Y. 2011) (denying arbitration request by non-signatory debt collector for AT&T/Verizon, since disavowal of both agency and control in collection agreements nullified collector's assertion that these agreements could form basis for finding that agency relationship existed). *But see* Liedtke v. Frank, 437 F. Supp. 2d 696 (N.D. Ohio 2006).

enforce the arbitration agreement when the creditor is not a co-defendant with the agent.[119] The MBNA arbitration agreement at one time explicitly applied to the creditor's "agents" and also applied to "collectors" when such collectors were named as co-defendants in claims against MBNA. While the arbitration clause clearly applied to collectors named as co-defendants,[120] it was ambiguous as to whether this clause applied to debt collectors sued alone, not in conjunction with MBNA, because of their status as MBNA's "agents." Courts resolved this ambiguity by finding that the more specific second condition controlled. Even if collectors were MBNA's agents, collection agencies and collection attorneys were not covered by the arbitration provision unless they were named as co-defendants with MBNA.[121]

A debt collection agency cannot enforce an arbitration agreement that applies only to assignees and not to agents, since the creditor's assignment of the account to the collection agency does not involve assignment of ownership of the account but is an assignment for collection purposes only.[122]

On the other hand, if the arbitration agreement explicitly refers to third parties, courts often find that those parties can enforce an agreement. An arbitration agreement referencing "agents" has been held to include debt collectors[123] and collection attorneys.[124] This may include agents of the creditor's assignee.[125] Similarly, a collector has been able to enforce an arbitration agreement that applies broadly to any other third party involved with servicing related to the credit account.[126] An arbitration clause applying to "anyone connected with us" has been found to apply to a debt collector hired by the creditor,[127] as has a clause applying to "related third parties."[128]

Other arbitration agreements explicitly apply to "affiliates." One federal court found that a clause applying to affiliates covers the creditor's debt collection agency."[129]

Similarly, another federal court has found that where the arbitration agreement applies to affiliates, and where Midland Funding can enforce an arbitration agreement, the same is the case with Midland Credit, because it is an affiliate of Midland Funding.[130] Some courts have even found collection attorneys can enforce an arbitration agreement that provides that arbitration is required as to "any disputes relating in any way to this loan agreement."[131]

11.3.4.3 Is the Collector an Agent

A collection agency or collection attorney can only enforce an arbitration agreement as the agent of the creditor or the creditor's assignee if there is an agency relationship. To shield themselves from liability for a debt collector's misconduct, creditors and debt buyers often state in their contracts with debt collectors that the debt collectors are independent contractors and not agents. In that case, a debt collector should not be able to take advantage of language that an agreement applies to the creditor's agents.[132]

Even without such contractual language in the creditor's agreements with the debt collector, it will be the debt collector's burden of proof to show an agency relationship.[133] Thus, in one case, a federal court has found that the creditor's attorney could not enforce the arbitration agreement, even though the agreement applied to the creditor's agents.[134] In another, a loan servicer could not enforce an agreement, since it was an independent contractor.[135]

To prove agency, the debt collector may have to show that the creditor or debt buyer exercises control over a collector's daily activities.[136] The creditor's right to review the collector's

119 Rizzo v. Kohn Law Firm S.C., 2018 WL 851386 (W.D. Wis. Feb. 12, 2018); Leibowitz v. Shindler, 2017 WL 3421530 (N.D. Ill. Aug. 9, 2017); Wood v. Portfolio Recovery Assoc., 2015 WL 616442, at *2 (M.D. Fla. Feb. 11, 2015) (regarding clause language covering collector only "if you assert a Claim against such other person or company at the same time you assert a Claim against any Bank Party").

120 Feil v. MBNA, 417 F. Supp. 2d 1214 (D. Kan. 2006).

121 Cohen v. Wolpoff & Abramson, L.L.P., 2008 WL 4513569 (D.N.J. Oct. 2, 2008); Bontempo v. Wolpoff & Abramson, L.L.P., 2006 WL 3040905 (W.D. Pa. Oct. 24, 2006); Karnette v. Wolpoff & Abramson, L.L.P., 444 F. Supp. 2d 640 (E.D. Va. 2006).

122 Koby v. ARS Nat'l Services, Inc., 2018 WL 707805 (S.D. Cal. Feb. 5, 2018).

123 Barbosa v. Midland Credit Mgmt., Inc., 981 F.3d 82 (1st Cir. 2020); Bailey v. Diversified Consultants Inc., 444 F. Supp. 3d 1330, 1335 (N.D. Ala. 2020).

124 Barbosa v. Midland Credit Mgmt., Inc., 981 F.3d 82 (1st Cir. 2020); Fedotov v. Peter. T. Roach & Assoc., 2006 WL 692002 (S.D.N.Y. Mar. 16, 2006).

125 Morrison v. Midland Funding, L.L.C., 2021 WL 2529618 (W.D.N.Y. June 21, 2021).

126 Hornicek v. Cardworks Servicing, L.L.C., 2011 WL 2623274 (E.D. Pa. June 29, 2011).

127 Lomell v. Midland Funding, L.L.C., 2019 WL 4695279 (N.D. Cal. Sept. 26, 2019).

128 Roberson v. Plaza Services, L.L.C., 2020 WL 5542080 (N.D. Ohio Sept. 16, 2020).

129 Bakon v. Rushmore Serv. Ctr., L.L.C., 2017 WL 2414639 (E.D.N.Y. June 2, 2017).

130 Mounts v. Midland Funding L.L.C., 257 F. Supp. 3d 930 (E.D. Tenn. June 28, 2017).

131 Nichelson v. Soeder, 2006 WL 3079109 (E.D. Mo. Oct. 27, 2006); Morrow v. Soeder, 2006 WL 2855024 (E.D. Mo. Oct. 3, 2006). *See also* Schiano v. Wolpoff & Abramson, L.L.P., 2005 U.S. Dist. LEXIS 35606 (D.N.J. Dec. 20. 2005) (collection attorney could enforce arbitration clause based upon broad scope of claims to which agreement covered).

132 Aliff v. Vervent, Inc., 2020 WL 5709197 (S.D. Cal. Sept. 24, 2020) (servicing agreement for private student loans explicitly states servicer is independent contractor); Smith v. GC Services L.P., 289 F. Supp. 3d 935 (S.D. Ind. 2018); Butto v. Collection Inc., 845 F. Supp. 2d 491 (E.D.N.Y. 2012), *denying motion for reconsideration of ruling in* 802 F. Supp. 2d 443 (E.D.N.Y. 2011); Lucy v. Bay Area Credit Services, L.L.C., 792 F. Supp. 2d 320 (D. Conn. 2011). *See also* Mims v. Global Credit & Collection Corp., 803 F. Supp. 2d 1349 (S.D. Fla. 2011).

133 Bultemeyer v. Sys. & Services Tech., Inc., 2012 WL 4458138 (D. Ariz. Sept. 26, 2012).

134 Kimble v. W. Ray Jamieson, P.C., 2018 WL 814225 (W.D. Tenn. Feb. 9, 2018).

135 Aliff v. Vervent, Inc., 2020 WL 5709197 (S.D. Cal. Sept. 24, 2020).

136 Aliff v. Vervent, Inc., 2020 WL 5709197 (S.D. Cal. Sept. 24, 2020); Butto v. Collection Inc., 845 F. Supp. 2d 491 (E.D.N.Y. 2012), *denying motion for reconsideration of ruling in* 802 F. Supp. 2d 443 (E.D.N.Y. 2011).

communications is not enough to create that control.[137] Nor is an agency relationship created because the collector also temporarily holds funds collected from consumers.[138] Of course, when the consumer admits that the collection agency and collection attorney are agents, and the arbitration clause applies to the creditor's agents or the assignee's agents, then the collection agency and attorney can enforce the arbitration requirement.[139]

11.3.4.4 Collateral Estoppel or Third-Party Beneficiary As Grounds to Enforce Arbitration Requirement

Where the language of an arbitration agreement does not allow debt collectors and collection attorneys to enforce the arbitration requirement, they may try to enforce the arbitration agreement under an equitable estoppel argument. However, courts find this doctrine generally applies only when the consumer has alleged interdependent and concerted misconduct between the creditor (who is a signatory to and can enforce the arbitration requirement) and the non-signatory collection agency.[140] Other courts only find equitable estoppel when the consumer's legal action against the collector in some manner takes advantage of the contract between the consumer and the creditor.[141]

Collectors' third-party beneficiary arguments should confront the same challenges.[142] Thus, a federal court has found no third-party beneficiary status for a collector hired by the creditor's assignee.[143] As a result, when the arbitration agreement lists parties who could enforce the arbitration agreement (including agents and assignees), there is a heavy burden for someone not listed to claim third-party beneficiary status.[144]

11.3.5 Defendant's Waiver of Right to Enforce Arbitration Agreement

11.3.5.1 Waiting Too Long to Enforce Arbitration Agreement

A defendant debt buyer, debt collector, or collection attorney can waive the right to enforce an arbitration agreement by waiting too long in the court litigation to raise the arbitration requirement. By acting inconsistently with a known right, to the consumer's prejudice, the defendant has waived the arbitration requirement.[145] Such may be the case when the defendant first raises the arbitration requirement after extensive discovery, motions to dismiss or summary judgment, or other litigation activity.

11.3.5.2 Refusing to Cooperate in the Arbitration Proceeding

The two major arbitration forums, the American Arbitration Association and JAMS (formerly known as Judicial Arbitration and Mediation Services, Inc.), require that the defendant business pay almost all of the arbitration fees and costs for consumer arbitrations (which can run into many thousands of dollars), with the consumer paying only $200 or $250. When the consumer proceeds to arbitration, the defendant may balk at the high arbitration fees and refuse to pay them or otherwise participate in the arbitration, which may result in AAA or JAMS refusing to proceed to arbitration. The defendant's conduct in thwarting the arbitration procedure may be viewed as a waiver of the arbitration requirement,[146] allowing the consumer to proceed in court.

11.3.5.3 Waiver Based on Prior Collection Lawsuit

Where a collector first avails itself of the court system by bringing a collection action in state court, this may act as a

137 Butto v. Collection Inc., 845 F. Supp. 2d 491 (E.D.N.Y. 2012), *denying motion for reconsideration of ruling in* 802 F. Supp. 2d 443 (E.D.N.Y. 2011).

138 *Id.*

139 Hoefs v. CACV of Colo., L.L.C., 365 F. Supp. 2d 69 (D. Mass. 2005).

140 National Consumer Law Center, Consumer Arbitration Agreements § 5.5.3 (8th ed. 2020), *updated at* www.nclc.org/library. *See also* Saroza v. Client Services, Inc., 2020 WL 948793 (D.N.J. Feb. 27, 2020); Neal v. Navient Solutions, L.L.C., 2019 WL 3779519 (W.D. Mo. Aug. 12, 2019); Leibowitz v. Shindler, 2017 WL 3421530 (N.D. Ill. Aug. 9, 2017); Adams v. Dell Computer Corp., 2006 WL 2670969 (S.D. Tex. Sept. 18, 2006). *Cf.* Mims v. Global Credit & Collection Corp., 803 F. Supp. 2d 1349 (S.D. Fla. 2011) (claims against collector not based on such conduct). *But see* Butto v. Collection Inc., 845 F. Supp. 2d 491 (E.D.N.Y. 2012), *denying motion for reconsideration of ruling in* 802 F. Supp. 2d 443 (E.D.N.Y. 2011) (no such relationship exists between collector and creditor).

141 National Consumer Law Center, Consumer Arbitration Agreements § 5.5.3 (8th ed. 2020), *updated at* www.nclc.org/library. *See* Ioane v. MRS BPO, L.L.C., 484 F. Supp. 3d 888 (D. Haw. Sept. 4, 2020); Butto v. Collection Inc., 845 F. Supp. 2d 491 (E.D.N.Y. 2012), *denying motion for reconsideration of ruling in* 802 F. Supp. 2d 443 (E.D.N.Y. 2011); Smith v. GC Services L.P., 289 F. Supp. 3d 935 (S.D. Ind. 2018) (no estoppel where no evidence that plaintiff's claims involved contract); Bultemeyer v. Sys. & Services Tech., Inc., 2012 WL 4458138 (D. Ariz. Sept. 26, 2012) (no equitable estoppel when consumer did not take advantage of contract); Mims v. Global Credit & Collection Corp., 803 F. Supp. 2d 1349 (S.D. Fla. 2011) (collecting on debt does not presume existence of contract between creditor and consumer, so equitable estoppel does not apply).

142 National Consumer Law Center, Consumer Arbitration Agreements § 5.5.4 (8th ed. 2020), *updated at* www.nclc.org/library. *See also* Bultemeyer v. Sys. & Services Technologies, Inc., 2012 WL 4458138 (D. Ariz. Sept. 26, 2012); Landry v. Transworld Sys. Inc., 149 N.E.3d 781, 788 (Mass. 2020).

143 Lucy v. Bay Area Credit SVC L.L.C., 792 F. Supp. 2d 320, 325 (D. Conn. 2011); Mims v. Global Credit & Collection Corp., 803 F. Supp. 2d 1349 (S.D. Fla. 2011).

144 Mims v. Global Credit & Collection Corp., 803 F. Supp. 2d 1349 (S.D Fla. 2011).

145 *See* National Consumer Law Center, Consumer Arbitration Agreement Ch. 6 (8th ed. 2020), *updated at* www.nclc.org/library. *See also* Davi v. White, 795 Fed. Appx. 764 (11th Cir. 2020); Howard v. LVN Funding, L.L.C., 2020 WL 7130562 (W.D. Pa. Dec. 4, 2020); Schafer Allied Interstate L.L.C., 2020 WL 4457922 (W.D. Mich. Aug. 2, 2020 Midland Funding L.L.C. v. Hilliker, 68 N.E.3d 542 (Ill. App. Ct. 2016

146 *See* National Consumer Law Center, Consumer Arbitration Agreemen (8th ed. 2020), *updated at* www.nclc.org/library.

waiver of the collector's right to enforce an arbitration requirement where the consumer later sues the collector. The consumer will have a difficult time arguing for waiver where the consumer's debt collection abuse claims are entirely distinct from the issues in the collector's lawsuit.[147]

However, where an FDCPA claim is directly tied to conduct within the collector's collection action, courts have found waiver of the arbitration requirement.[148] In that case, the creditor has chosen not to use the arbitration process in its collection action and cannot compel the consumer to do so in the consumer's related action. As the Nevada Supreme Court explained: "If the judgment the [debt collector] obtained was the product of fraud or criminal misconduct and is unenforceable for that reason, it would be unfairly prejudicial to the judgment debtor to require arbitration of claims seeking to set that judgment aside, to enjoin its enforcement, and otherwise to remediate its improper entry."[149]

Some courts hold to the contrary.[150] But much of this precedent seems to be grounded on the mistaken view that a party can only waive the right to arbitrate through litigation conduct that occurs within the same proceeding that it seeks to arbitrate. In fact, contractual waiver is also possible. Contractual waiver is different from judicial or litigation waiver. Litigation waiver occurs when a party waives an argument by failing to raise it during the course of that same litigation. Contractual waiver occurs when a party acts inconsistently with a known right; there is no requirement that such waiver occur within the same proceeding as the subsequent attempt to assert such a right. On the other hand, where the arbitration agreement explicitly stated that if the company sues in court, the company did not waive its right to demand arbitration of the consumer's claim, this has been enforced and no waiver was found by the collector's collection lawsuit.[151]

11.3.6 Does the Consumer and the Nature of Consumer's Claims Fall Under the Arbitration Agreement?

Because arbitration is a matter of contract, only disputes that the parties agree must go to arbitration must then go to arbitration. If a claim is outside the scope of disputes covered by the arbitration agreement, the consumer can bring that claim in court. In close cases, courts tend to favor finding that an arbitration agreement must be read carefully to determine what disputes it covers.

For example, some arbitration agreements cover only those disputes that "arise" out of the contract, while others govern disputes that "relate to" or are "connected with" the contract. The consumer's FDCPA claim will be within the scope of general arbitration language such as disputes "arising from or relating to the contract or the relationships which result from the contract" or "related in any way" to the services or agreement with the original creditor.[152] If a FDCPA claim is within the scope of an arbitration clause, then courts find there is no special status for FDCPA claims that allow for them to avoid the arbitration requirement.[153] Arbitration requirements, absent special statutory language, apply to federal statutory claims in the same way that they apply to any other claim.

But courts may find arbitration clauses not to apply to tort claims that are independent of the contract, such as those that arise from a breach of a duty created by law that is generally owed to others, and not just to the contracting parties.[154]

147 Izett v. Crown Asset Mgmt., L.L.C., 2019 WL 4845575, at *10 (N.D. Cal. Oct. 1, 2019); Davis v. CACH, L.L.C., 2015 WL 913392, at *7 (N.D. Cal. Mar. 2, 2015). *See also* Prasad v. Barclays Bank Delaware, 2020 WL 6083663, at *2 (C.D. Cal. July 29, 2020).

148 Castillo v. Duke Capital, L.L.C., 2021 WL 734951 (D. Utah Feb. 25, 2021); Novic v. Midland Funding, L.L.C., 271 F. Supp. 3d 778 (D. Md. 2017); Barbagallo v. Niagara Credit Solutions, Inc., 2012 WL 6478956, at *3 (D. Md. Dec. 4, 2012) (creditor's filing of collection suit contributed to conclusion that creditor waived arbitration of debtor's subsequent unfair debt collection practices suit); Cain v. Midland Funding, L.L.C., 156 A.3d 807 (Md. 2017); Principal Investments, Inc. v. Harrison, 366 P.3d 688 (Nev. 2016); Levonas v. Regency Heritage Nursing & Rehab. Ctr., L.L.C., 2013 WL 4554509 (N.J. Super. Ct. App. Div. Aug. 29, 2013) (nursing home's filing of suit on its arbitrable collection claims contributed to conclusion that nursing home waived arbitration of wrongful death suit subsequently filed against it); Am. Gen. Fin. v. Griffin, 2013 WL 3422900, at *7 (Ohio Ct. App. July 3, 2013) (lender's filing of suit on its arbitrable collection claims contributed to conclusion that lender waived arbitration of class counterclaims); Nelson v. Liberty Acquisitions Servicing, L.L.C., 374 P.3d 27 (Utah Ct. App. 2016).

149 Principal Investments v. Harrison, 366 P.3d 688, 697 (Nev. 2016).

150 Spencer v. Midland Funding L.L.C., 2016 WL 8677216 (D. Or. Oct. 21, 2016); Garcia v. Weltman, Weinberg & Reis Co. of Mich., 2014 WL 1746522, at *6 (E.D. Mich. Apr. 30, 2014) (collecting cases); Wiese v. Cach, L.L.C., 358 P.3d 1213, 1221 (Wash. Ct. App. 2015). *Cf.* Castellanos v. Mariner Fin., L.L.C., 2018 WL 488725 (D. Md. Jan. 19, 2018) (arbitration agreement did not apply to cases brought in small claims court, which is where collector had filed its collection case).

151 Reifenberger v. Autovest L.L.C., 2021 WL 212237 (D. Utah Jan. 21, 2021)

152 Russell v. Midland Credit Mgmt., Inc., 2021 WL 1192580 (N.D. Ill. Mar. 30, 2021); Lebovits v. Cavalry Portfolio Services, L.L.C., 2021 WL 1198967 (S.D.N.Y. Mar. 29, 2021); Nettles v. Midland Funding L.L.C., 2021 WL 1193165 (E.D. Mich. Mar. 3, 2021); Little v. Midland Credit Mgmt., Inc., 2021 WL 1382257 (S.D. Ohio Feb. 24, 2021); Bailey v. Diversified Consultants Inc., 444 F. Supp. 3d 1330, 1335 (N.D. Ala. 2020); Cabrales v. Midland Credit Mgmt., Inc., 2020 WL 6145110 (N.D. Tex. Oct. 7, 2020); Brown v. Midland Credit Mgmt., Inc., 2020 WL 5117975 (S.D.N.Y. Aug. 31, 2020); Fuller v. Rozlin Fin. Group, Inc., 2020 WL 5036215 (D.N.J. Aug. 26, 2020); Felix v. Richard D. London & Assoc., 2020 WL 4933632 (D. Md. Aug. 24, 2020); Bowles v. Receivables Performance Mgmt., L.L.C., 2016 WL 775786, at *3 (N.D. Ill. Feb. 24, 2016); Eaton v. AD Astra Recovery Services, Inc., 80 F. Supp. 3d 973, 979 (E.D. Mo. 2015); Hagy v. Demers & Adams, L.L.C., 2012 WL 359577 (S.D. Ohio Feb. 2, 2012). For a discussion of the issue and the cases on both sides, see *Delgado v. Progress Fin. Co.*, 2014 WL 1756282 (E.D. Cal. May 1, 2014).

153 *See* Snyder v. CACH, L.L.C., 2016 WL 6662675 (D. Haw. Nov. 10, 2016).

154 *See* National Consumer Law Center, Consumer Arbitration Agreements Ch. 5 (8th ed. 2020), *updated at* www.nclc.org/library. *See also* King Motor Co. v. Jones, 901 So. 2d 1017 (Fla. Dist. Ct. App. 2005) (invasion of privacy claim not covered by arbitration clause); Green Tree Servicing Corp. v. Fisher, 162 P.3d 944 (Okla. Civ. App. 2007); Chassereau v. Global-Sun Pools, Inc., 611 S.E.2d 305 (S.C. Ct. App. 2005). *Cf.* Jones v. Halliburton, Inc., 625 F. Supp. 2d 339 (S.D. Tex.

Similarly, a federal court has found that an arbitration agreement covering disputes concerning an account does not apply to debt collection practices.[155]

On the other hand, a court has found an arbitration clause to apply to a collection dispute when the clause applies to "collection of amounts" owed in connection with the account.[156]

An arbitration requirement may not apply to an individual's claim against a collector where the individual is not a party to the original credit agreement. For example, where only one spouse has signed a credit agreement, the other spouse is not subject to the credit agreement and not bound by the arbitration clause when subjected to debt harassment.[157] The defendant's estoppel and third-party beneficiary arguments to cover non-signatories generally will not be successful.[158]

11.3.7 Effect of Judgment in Prior Collection Action

The merger doctrine generally provides that, upon entry of a judgment, a plaintiff's claims against a defendant are merged into the judgment. This means that when there is a judgment in a breach of contract collection action, at least certain of the collector's rights under the contract cease. But courts generally find that the arbitration provision in the contract survives, even though other aspects of the contract (such as the obligation to pay money) is merged into the judgment.[159]

Whether the prior collection action in court waives the collector's right to enforce the arbitration agreement is examined in § 11.3.5.3, *supra*. Another question is whether the collector has admitted in a state court collection action that there is no binding agreement, so that it is judicially estopped later from arguing that there is a binding contract including an arbitration requirement. But the mere failure to prove a contract may not be enough to estop the collector, unless the court ruled there was no binding contract.[160]

11.3.8 Congress Overrides CFPB Rule Restricting Arbitration of Class Actions

The Consumer Financial Protection Bureau (CFPB) was granted authority to issue a rule limiting consumer arbitration agreements involving consumer financial products and services after it conducted a study of arbitration agreements.[161] The CFPB completed its study in 2015 and submitted a lengthy report to Congress.[162]

In July 2017, the CFPB issued its long-awaited final rule limiting the effect of mandatory arbitration agreements involving specified consumer financial products and services.[163] The rule prohibited financial services providers from using an arbitration agreement that prevents consumers from filing or participating in a class action.[164] It would have applied to arbitration agreements entered into on or after March 19, 2018.

However, the rule never went into effect because Congress, pursuant to the Congressional Review Act,[165] enacted a law signed by the President that repealed the rule.[166] Under the Congressional Review Act, not only is the rule repealed, but the CFPB is prohibited from reissuing the rule or a new rule in substantially the same form unless specifically authorized by Congress.[167]

11.3.9 Federal Law Prohibits Mandatory Arbitration in Mortgage Loans

The Truth in Lending Act (TILA) prohibits contract terms requiring the arbitration of disputes involving closed-end loans secured by a dwelling and open-end loans secured by a consumer's principal dwelling.[168] This TILA provision also provides that no other provision of such loans shall "bar a consumer from bringing an action" in court.[169] TILA's Regulation

2008) (various tort claims not arbitrable, including intentional infliction of emotional distress); Runion v. Am. Gen. Fin. Services, Inc., 2008 WL 2468573 (Ohio Ct. App. June 20, 2008) (tort claim for destruction of property after foreclosure unrelated to mortgage document); Coleman v. Am. Gen. Fin. Services, Inc., 2008 WL 8030039 (Ohio Ct. App. Mar. 27, 2008) (tort claim for failure to file termination statement unrelated to loan agreement). *But see* Koch v. Compucredit Corp., 543 F.3d 460 (8th Cir. 2008); Bolanos v. First Investors Servicing Corp., 2010 WL 4457347 (S.D. Fla. Oct. 29, 2010); Fedotov v. Peter. T. Roach & Assoc., 2006 WL 692002 (S.D.N.Y. Mar. 16, 2006); Webb v. MBNA Am. Bank, 2006 WL 618186 (E.D. Ark. Mar. 10, 2006); Pridgen v. Green Tree Fin. Servicing Corp., 88 F. Supp. 2d 655 (S.D. Miss. 2000); Hawkins v. O'Brien, 2009 WL 50616 (Ohio Ct. App. Jan. 9, 2009).

155 Jenkins-Brown v. Liberty Acquisitions Servicing L.L.C., 2015 WL 1757220 (D. Or. Apr. 16, 2015).

156 Hornicek v. Cardworks Servicing, L.L.C., 2011 WL 2623274 (E.D. Pa. June 29, 2011).

157 *See* National Consumer Law Center, Consumer Arbitration Agreements § 4.3.6 (8th ed. 2020), *updated at* www.nclc.org/library. *See also* Johnson v. Westlake Portfolio Mgmt., L.L.C., 2020 WL 5526386 (M.D. Fla. Sept. 15, 2020).

158 *See* National Consumer Law Center, Consumer Arbitration Agreements (8th ed. 2020), *updated at* www.nclc.org/library. *See also* Johnson v. Westlake Portfolio Mgmt., L.L.C., 2020 WL 5526386 (M.D. Fla. Sept. 15, 2020).

159 *See, e.g.*, Morrison v. Midland Funding, L.L.C., 2021 WL 2529618 (W.D.N.Y. June 21, 2021); Valentine v. LVNV Funding L.L.C., 2020 WL 5946975 (N.D. Ill. Oct, 7, 2020).

160 *See* Nettles v. Midland Funding L.L.C., 2021 WL 1193165 (E.D. Mich. Mar. 3, 2021) (no judicial estoppel where collector did not allege contract in prior action, but claimed an account stated); Valentine v. LVNV Funding L.L.C., 2020 WL 5946975 (N.D. Ill. Oct, 7, 2020) (no judicial estoppel where collector did not allege contract in prior action, but claimed account stated).

161 12 U.S.C. § 5518.

162 CFPB, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (Mar. 2015), *available at* www.consumerfinance.gov.

163 82 Fed. Reg. 33,210 (July 19, 2017).

164 12 C.F.R. § 1040.4(a).

165 5 U.S.C. § 801, *et seq.*

166 Pub. L. No. 115-74 (Nov. 1, 2017).

167 *See* 5 U.S.C. § 801(b)(2).

168 15 U.S.C. § 1639c(e)(1).

169 15 U.S.C. § 1639c(e)(3).

Z implements this provision, effective June 1, 2013.[170] Because federal law limits a creditor's ability to enforce arbitration concerning a mortgage loan, debt collectors, debt buyers, and collection attorneys cannot do so either where they are relying on the creditor's arbitration agreement found in a mortgage loan.

TILA contains two different prohibitions on mortgage loan arbitration clauses, and Regulation Z does as well. One provision, found at 15 U.S.C. § 1639c(e)(1),[171] provides that mortgages shall not "*include*" terms which require arbitration. A second provision, found at 15 U.S.C. § 1639c(e)(3),[172] provides that no mortgage provision shall be "*applied*" to prevent a consumer from bringing a federal cause of action.

Use of the term "applied" implies that arbitration clauses found in mortgages executed prior to the statute's effective date should not be applied to force arbitration of claims brought after the statute's effective date. The distinction between the two provisions is accentuated by the fact that section 1639c(e)(3) prohibits application of an arbitration requirement to federal, but not state claims, while section 1639c(e)(1) prohibits inclusion of a clause that requires arbitration of either federal or state claims.[173]

Importantly, 15 U.S.C. § 1639c(e)(3) also provides that "no other agreement between the consumer and the creditor relating to the residential mortgage loan . . . referred to in paragraph (1), shall be applied or interpreted so as to bar a consumer from bringing an action in an appropriate district court of the United States . . . for damages or other relief in connection with any alleged violation of this section, any other provision of this subchapter, or any other Federal law." As a result, an arbitration agreement found not only in the mortgage loan, but also in an agreement relating to the mortgage loan, is not binding on a consumer bringing a federal claim, such as an FDCPA claim. Even a third-party payment processor that processes the consumer's mortgage payments cannot enforce an arbitration requirement where the consumer brings an FDCPA claim against the processor or the processor's debt collector.[174]

11.3.10 No Mandatory Arbitration Where Debt Incurred by Active-Duty Military Personnel or Their Dependents

The Talent-Nelson Military Lending Act prohibits creditors from enforcing mandatory arbitration agreements in certain types of consumer credit contracts against those who, at the time the agreement is made, were active -duty military personnel or their dependents.[175] An arbitration requirement is unenforceable, even if the consumer is no longer a servicemember or a dependent of a servicemember, so long as the consumer was covered by the Act when the credit was originated.[176] As a result, debt collectors, debt buyers, and collection attorneys cannot rely on the creditor's arbitration requirement where it has been made unenforceable by the Talent-Nelson Military Lending Act.

The Act also provides that creditors cannot extend consumer credit which requires that the borrower submit to arbitration.[177] Thus, the Act both prohibits the inclusion of an arbitration requirement in the credit agreement and renders any included arbitration requirement unenforceable. Department of Defense interpretations of the Act provide that credit agreements are allowed to include an arbitration agreement so long as the agreement contains a savings clause that excludes the agreement's application to servicemembers or their dependents.[178]

The Talent-Nelson Military Lending Act does not apply to residential mortgages[179] or purchase money automobile loans, or other purchase money personal property loans.[180] The Act also delegates to the Department of Defense authority to define what consumer credit contracts are covered by the Act.[181] In 2015, the Department of Defense amended its regulations to broaden significantly the scope of "consumer credit" covered by the Act's prohibitions, including the prohibition on the enforcement of arbitration requirements.[182] The prohibition on arbitration now applies to almost all forms of credit within the scope of the Truth In Lending Act when offered to servicemembers or their dependents, except for residential mortgages

170 12 C.F.R. § 1026.36(h), *as amended by* 78 Fed. Reg. 11,279, 11,413 (Feb. 15, 2013).

171 *See also* 12 C.F.R. § 1026.36(h)(1).

172 *See also* 12 C.F.R. § 1026.36(h)(2).

173 *But see* Weller v. HSBC Mortg. Services, Inc., 2013 WL 4882758 (D. Colo. Sept. 11, 2013) (court fails to notice this difference in language). For a discussion of the retroactive date of the TILA provisions to mortgage loans prior to June 1, 2013, see generally National Consumer Law Center, Truth in Lending (10th ed. 2019), *updated at* www.nclc.org/library.

174 Thomas-Lawson v. Carrington Mortg. Services, L.L.C., 2021 WL 1253578, at *1 (C.D. Cal. Apr. 5, 2021); Attix v. Carrington Mortg. Services, L.L.C., 2020 WL 5757624, at *9 (S.D. Fla. Sept. 16, 2020).

175 *See* 10 U.S.C. § 987(f)(4) ("*Arbitration.* Notwithstanding section 2 of title 9 [9 U.S.C. § 2], or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.").

176 *See* 10 U.S.C. § 987(f)(4).

177 10 U.S.C. § 987(e)(3).

178 *See* 81 Fed. Reg. 58,840, 58,844 (Aug. 18, 2016).

179 10 U.S.C. § 987(*i*)(6)(A).

180 *See* 10 U.S.C. § 987(*i*)(6)(B); Goodwin v. H.M. Brown & Assoc., Inc., 2011 WL 820025, at *9 (D. Colo. Mar. 2, 2011). *See also* Beard v. Santander Consumer USA, Inc., 2012 WL 1292576 (E.D. Cal. Apr. 16, 2012) (Act does not prohibit enforcement of arbitration clause or class action ban provision in car loan modification agreement), *adopted*, 2012 WL 1576103 (E.D. Cal. May 3, 2012).

181 10 U.S.C. § 987(h)(2)(D), (*i*)(6).

182 80 Fed. Reg. 43,559 (July 22, 2015).

and purchase money loans. Notably the coverage now includes credit cards and other forms of open-end credit.

The changes to the regulation broadening the scope of covered credit were effective October 3, 2016, for closed-end credit and effective for credit cards and other open-end credit October 3, 2017.[183]

The Act now applies to most types of open and closed-end credit, including:

- All payday loans, automobile title loans, and refund anticipation loans, even those structured to avoid the former Department of Defense regulations;
- Installment loans (as opposed to retail installment loans);
- Any non-purchase money loan secured by the consumer's automobile;
- Private student loans;
- Loans on the consumer's future income stream;
- Credit cards;
- Certain overdraft loans;[184]
- Any form of tax-time credit;
- Purchase money loans when the amount of credit extended exceeds the amount needed to purchase the goods;[185] and
- Any other form of consumer credit besides home mortgages and purchase money loans.

11.3.11 Unavailability of the Sole Arbitration Provider?

Arbitration clauses in credit agreements typically specify one or two arbitration providers, such as the American Arbitration Association (AAA) or JAMS. Until a law enforcement action ended its ability to conduct consumer arbitrations in 2009, the National Arbitration Forum (NAF) was the preferred provider for many creditors.[186]

There are any number of other reasons why an arbitration provider may be unavailable to administer an arbitration. For example, AAA will not conduct arbitrations where the business has not registered its arbitration agreement with the AAA and the agreement meets certain consumer due process protocols. Both AAA and JAMS will not arbitrate disputes where the business does not pay upfront large filling and other fees.

A significant number of courts have ruled that, when an arbitration agreement designates an arbitration forum as the sole designated arbitration forum, then this is grounds to throw out the arbitration requirement if the selection of the forum is integral to the agreement and not ancillary.[187] If integral, the arbitration agreement cannot be fulfilled according to its terms. If a court were to rule otherwise, the court would have to select the arbitrator if the parties cannot agree on one, because the designated arbitration provider will not do so.[188]

11.3.12 Other Grounds to Challenge the Arbitration Clause's Enforceability

In addition to challenges to an arbitration requirement set out earlier in this section, there are a number of other grounds to attack an arbitration requirement. The Federal Arbitration Act (FAA) finds arbitration clauses to be enforceable "save upon such grounds as exist at law or equity for the revocation of any contract."[189] One such ground to revoke any contract is unconscionability, and hundreds of decisions have found arbitration clauses unenforceable on this ground.[190]

The unconscionability claim will typically rest on both procedural and substantive unconscionability. The procedural aspects may include a take-it-or-leave-it adhesion contract when most other competitors also require mandatory arbitration, or when the arbitration requirement is concealed from the consumer in some fashion. Substantive unconscionability may involve the arbitral forum not offering the same relief as available in court, such as limiting punitive, treble or consequential damages, restricting attorney fees for prevailing consumers, shortening the statute of limitations, or requiring excessive and unaffordable fees and costs. Other aspects of substantive unconscionability might be that the clause has the practical effect of requiring only the consumer and not the creditor to arbitrate claims, requiring an inconvenient venue, or requiring that the arbitration proceeding be kept secret.

In addition to state unconscionability law, the federal "effective vindication" doctrine is also a ground for striking down a clause that prevents the plaintiff from effectively vindicating their rights under federal law.[191] If the provisions of an arbitration agreement prevent effective vindication of an FDCPA claim, the provisions are open to challenge. The doctrine of effective vindication may be more forgiving than unconscionability challenges, because it does not require procedural unconscionability.

One provision that is not open to challenge under either an unconscionability or effective vindication theory is a provision banning class arbitration. The Supreme Court has ruled that individual, not class arbitration is fundamental to the nature of FAA arbitration, and that this trumps any challenge to the class arbitration ban.[192]

183 *Id.*

184 *See* 81 Fed. Reg. 58,840 (Aug. 18, 2016) (discussing which overdraft loans are covered).

185 *See* 81 Fed. Reg. 58,840, 58,841 (Aug. 18, 2016).

186 *See* National Consumer Law Center, Consumer Arbitration Agreements Ch. 9 (8th ed. 2020), *updated at* www.nclc.org/library.

187 National Consumer Law Center, Consumer Arbitration Agreements Ch. 8 (8th ed. 2020), *updated at* www.nclc.org/library.

188 National Consumer Law Center, Consumer Arbitration Agreements Ch. 8 (8th ed. 2020), *updated at* www.nclc.org/library.

189 9 U.S.C. § 2.

190 National Consumer Law Center, Consumer Arbitration Agreements § 8.5 (8th ed. 2020), *updated at* www.nclc.org/library. *See, e.g.*, Dunn v. Glob. Tr. Mgmt., L.L.C., 2020 WL 7260771 (M.D. Fla. Dec. 10, 2020).

191 Hayes v. Delbert Services Corp., 811 F.3d 666, 673 (4th Cir. 2016) ("This arbitration agreement fails for the fundamental reason that it purports to renounce wholesale the application of any federal law to the plaintiffs' federal claims.").

192 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013); AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

Another limitation to both the unconscionability and effective vindication doctrines is that a court, once it determines that an arbitration provision is improper, must then fashion an effective remedy. One option is to find the whole arbitration clause unenforceable, but another option is to strip the offending provision and enforce the rest of the arbitration clause.[193]

Misrepresentation as to the nature of the arbitration clause (not the contract as a whole) is also grounds to find an arbitration clause unenforceable.[194] Fraud in the factum, duress, and infancy in the creation of the contract as a whole are all grounds to revoke the arbitration agreement, as well.[195] These and additional bases for an arbitration clause to be unenforceable are detailed in National Consumer Law Center, Consumer Arbitration Agreements (8th ed. 2020), *updated at* www.nclc.org/library.

11.3.13 Does the Court or Arbitrator Decide the Challenge to the Arbitration Requirement?

In any challenge to an arbitration agreement, a preliminary issue is who decides the challenge, the court or the arbitrator. The Supreme Court has ruled that issues of enforceability are for the court unless there is a "delegation" clause giving the arbitrator authority to decide issues of enforceability of the arbitration agreement.[196] Even if there is such a delegation clause, the issue is still for the court if the consumer's challenge is whether an arbitration agreement was ever consummated.

Otherwise, if there is a delegation clause, the consumer cannot initially bring a court challenge to the arbitration agreement as a whole, but instead must first attack the delegation clause. After a court finds a delegation clause unenforceable, and only then, will the court hear a challenge to the arbitration requirement itself.[197]

For example, when there is a delegation clause, do not initially attack the arbitration requirement as being too costly. Instead, attack the delegation clause, arguing that the arbitrator, who is the beneficiary of the high cost, should not be deciding whether the cost is too high. Instead of initially arguing that the collector cannot enforce an arbitration requirement, first argue that the collector cannot enforce the delegation clause.

11.3.14 Bringing an Individual Case in Arbitration

While consumers typically are better off bringing a FDCPA or other debt collection harassment case before a court, rather than an arbitrator, sometimes there is no choice—either the arbitration clause is enforceable or it is impractical to draw out the litigation by challenging the requirement's enforceability. In that case, proper client representation may require that the case proceed in arbitration.

Practitioners report excellent results if the case if brought before the right arbitrator. A chapter offering advice on proceeding in individual arbitration is found at NCLC's *Consumer Arbitration Agreements* Chapter 9 (7th ed. 2015), *updated at* www.nclc.org/library. Advice is presented on selecting the arbitration forum and arbitrator, understanding arbitration forum rules and fees, options where the defendant does not pay its fees, the importance of the preliminary hearing, setting the scope of discovery, preliminary motions, putting on the case, post-hearing briefs, and confirming the arbitration award.

11.3.15 Punitive Damages in Arbitration

When a debt harassment case is forced into arbitration, and the facts are egregious, a consumer should not shy away from pursuing punitive damages. Typically, neither an arbitration agreement nor the rules of an arbitration service provider will limit the availability of punitive damages. (If there is such a limitation, this may be grounds to find the arbitration requirement unenforceable.[198])

There are many reasons why a consumer may wish to avoid arbitration,[199] and an arbitrator is far less likely than a jury to award punitive damages. Nevertheless, once an arbitrator has awarded punitive damages, there will be very limited court review of such an award, and the award is far more likely to remain intact than one issued by a jury.[200]

A good example is a case in which the Eighth Circuit upheld an arbitrator's $6 million punitive damages award against a collector found liable on various tort claims and FDCPA violations.[201] There is an extremely high standard to overrule an arbitration award, and the Eighth Circuit found no basis to do so. Moreover, most courts find that there is no due process review of an arbitrator's punitive damages award, because there is no state action. Having selected the private arbitration procedure, the defendant is in no position to claim the process is unconstitutional.[202]

193 *See* National Consumer Law Center, Consumer Arbitration Agreements § 8.8.2 (8th ed. 2020), *updated at* www.nclc.org/library. *See also* Hunter v. Kaiser Found. Health Plan, Inc., 434 F. Supp. 3d 764 (N.D. Cal. 2020) (severing unconscionable provisions and enforcing the agreement).

194 National Consumer Law Center, Consumer Arbitration Agreements § 4.3.7 (8th ed. 2020), *updated at* www.nclc.org/library.

195 National Consumer Law Center, Consumer Arbitration Agreements § 4.3.7 (8th ed. 2020), *updated at* www.nclc.org/library.

196 Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).

197 *See* Green v. G. Reynolds Sims & Assoc., 2013 WL 1212775 (E.D. Mich. Mar. 25, 2013).

198 National Consumer Law Center, Consumer Arbitration Agreements § 8.7.6.2.2 (8th ed. 2020), *updated at* www.nclc.org/library.

199 *See generally* § 11.3, *supra*.

200 National Consumer Law Center, Consumer Arbitration Agreements § 9.11 (8th ed. 2020), *updated at* www.nclc.org/library.

201 Stark v. Sandberg, Phoenix & Von Gontard, Prof'l Corp., 381 F.3d 793 (8th Cir. 2004).

202 National Consumer Law Center, Consumer Arbitration Agreements § 11.7.6 (8th ed. 2020), *updated at* www.nclc.org/library.

11.3.16 Class Arbitration

The 2011 Supreme Court decision in *Concepcion* has made class arbitration much less available to consumers, by allowing businesses to require consumers to give up their right to join in a class action either in court or in arbitration.[203] *Concepcion* holds that the Federal Arbitration Act preempts a state rule that an arbitration clause's ban on class arbitration is unconscionable. This problem was compounded by the Supreme Court's subsequent decision in *Italian Colors*, which holds that a ban on class arbitration (otherwise known as a class waiver) is enforceable even if it prevents claimants from effectively vindicating their federal statutory rights, such as because the costs of litigation far outweigh any recovery in an individual action.[204]

As a result, a large percentage of credit contracts include requirements that debtors arbitrate disputes *individually*, thereby foreclosing class litigation *and* class arbitration. Faced with an agreement that specifically prohibits class arbitration, no arbitrator will allow class arbitration to proceed. Thus, class arbitration will become virtually impossible in the majority of consumer contracts that explicitly prohibit class arbitration. Instead, the better approach will be to argue that the arbitration agreement is unenforceable on some other grounds, and then to bring the class action in court.

However, when debt buyers or collectors seek to enforce consumer contracts that do *not* expressly state whether class arbitration is allowed, consumers can seek a construction of the arbitration agreement that class arbitration was within the parties' original intent. In *Oxford Health Plans v. Sutter*, the Court clarified that, as with any contract, whether class arbitration is allowed depends on what the parties intended in their agreement.[205] *Oxford* holds that, when an arbitrator construes a contract as allowing class arbitration, a reviewing court should almost never vacate such a ruling. As a result, in a significant number of cases, arbitrators have construed otherwise silent arbitration clauses as allowing class arbitration.

The determination must be made as to the parties' intent; it cannot be based upon policy considerations.[206] In 2019, the Supreme Court further found that where a court finds the parties' intent to be ambiguous, it cannot rule in favor of class arbitration on the basis that contracts are to be construed against the drafter. Instead, there must be some affirmative contractual basis for concluding that the parties' intent is to allow class arbitration. Nevertheless, the Court leaves open the possibility that a contract can be interpreted that the parties' intent is to allow class arbitration.[207]

Courts, at the moment, reach different results as to who determines the parties' intent as to class arbitration—the court or the arbitrator. But where the arbitration agreement delegates to the arbitrator issues of the agreement's enforceability, it may be the arbitrator that determines the parties' intent.[208]

11.4 Evaluating Cases

11.4.1 Overview

The FDCPA's purpose is to protect consumers from collection misconduct and resulting injuries. If the Act is to continue to accomplish its purpose, counsel and consumers bringing FDCPA claims as private attorneys general should keep in mind the public interest embodied in the statute as well as their own claims. It may be important for counsel to discuss with clients the possible effect of an individual case on the development of the law construing the Act.

Collectors' protestations that some consumers' suits are based on technical claims should be met with explanations of the protective purpose of the FDCPA provisions involved in the case and illustrations of how the consumer was, in fact, harmed by the violation. Such injury should be used as a rejoinder to the claim that the violation was merely technical.[209]

Cases raising close issues of law or fact or coming before an unsympathetic judge should be settled, if possible, before there is an opportunity for an unfavorable construction of the Act, and adverse decisions in marginal cases should rarely, if ever, be appealed. Awards in FDCPA cases are noted at Appendix E, *infra*.[210]

11.4.2 Considerations Concerning Remedies

11.4.2.1 Increasing FDCPA Individual Awards

With the passage of time since the enactment of the FDCPA, it has become more important to explore the possibility of developing and recovering actual damages for harm suffered by a consumer as a result of an FDCPA violation. In addition to the requirement of concrete harm for Article III standing in federal court discussed at § 11.15, *infra*, the real value of statutory damages under the FDCPA has declined substantially since its enactment. The $1000 ceiling in individual actions and the $500,000 ceiling in class actions have remained unchanged since 1977.

One strategy to increase FDCPA awards in individual actions is to focus on cases that involve egregious debt

203 AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

204 Am. Express v. Italian Colors Rest., 570 U.S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). *See also* Shetiwy v. Midland Credit Mgmt., 959 F. Supp. 2d 469, 474 (S.D.N.Y. 2013) (arbitration agreements enforceable even if costs of individual arbitration relative to potential award prevent consumers from effectively vindicating their rights under FDCPA).

205 Oxford Health Plans, L.L.C. v. Sutter, 569 U.S. 564, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013).

206 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010).

207 Lamps Plus, Inc. v. Varela, ___ U.S. ___, 139 S. Ct. 1407, 203 L. Ed. 2d 636 (2019).

208 *See* National Consumer Law Center, Consumer Arbitration Agreements § 8.3 (8th ed. 2020), *updated at* www.nclc.org/library.

209 *See* § 11.15, *infra*, on the importance of concrete harm for Article III standing.

210 *See* Appx. E.3.1, E.3.2, E.3.3.3, *infra*.

collector abuse or harassment and the resulting significant consumer injury, including emotional distress.[211] An award of punitive damages in such cases pursuant to a state law claim will further enhance the consumer's recovery.[212]

Another strategy is to focus on cases with overcharges and seek those overcharges as actual damages[213] or disgorgement[214] in a class action. A payment made by a debtor as a result of an act that violated the FDCPA may be considered actual damages, without regard to whether the debt was in fact owed.[215] Another possibility to produce a sizeable actual damages award is bringing an FDCPA case alleging litigation misconduct by a debt buyer or other collector in bringing a prior collection action against the consumer or a class of consumers. The consumer's actual damages may include the attorney fees the consumer had to expend to prevail in the collection action or other costs to defend the suit.[216]

11.4.2.2 Class Actions Seeking FDCPA Damages

The FDCPA expressly provides for class-wide statutory damages "without regard to a minimum individual recovery"[217] and the number of class actions under the FDCPA for both actual and statutory has been growing.[218] The increasing numbers of very large interstate debt collection agencies and collection law firms has stimulated an increase in FDCPA class actions for damages, because such firms often have substantial net worth, leading to the possibility of increased recoveries. Class actions may benefit many debtors who otherwise would be unaware that their rights had been violated or unable to obtain representation. Courts which might view individual FDCPA cases as unimportant may view FDCPA class actions as more worthwhile. There is no limit on the amount of actual damages that can be recovered in FDCPA class actions, plus statutory damages may be awarded; however, statutory damages may not exceed the lesser of $500,000 or one percent of the collector's net worth.[219]

Class actions may be appropriate even when class members' recoveries are not large, and even where the class award is less than may feasibly be distributed to the class members. The primary relief may be a declaratory judgment[220] and the damages' recovery may be the basis for a *cy pres* distribution to a nonprofit organization dedicated to promoting justice for vulnerable consumers.[221] However, such a *cy pres* award must still provide benefits to class members, as the Ninth Circuit highlighted in *Koby v. ARS National Services, Inc.*,[222] when it concluded that the proposed injunctive relief and *cy pres* award in a class settlement failed to provide such benefits.

Class actions under the FDCPA are treated in depth at § 11.11, *infra*.

11.4.2.3 Bringing a Class Action Seeking Declaratory or Injunctive Relief

Limiting class relief to declaratory or injunctive relief, where available under either the FDCPA or state law,[223] may be the best choice in some cases, such as actions against undercapitalized, rogue debt collectors.[224] The proof needed to establish a class-wide declaratory judgment is likely to be much the same as the proof needed to obtain a monetary recovery for an individual plaintiff, thus requiring few additional resources.

Class equitable relief extends the FDCPA's remedial purposes to the entire community by providing a strong incentive for the collector to alter its practices to conform to the FDCPA. Courts have been more willing to award greater compensation for the consumer's attorney fees in cases in which there is class-wide relief.

Nevertheless, it may be difficult to obtain injunctive relief through an FDCPA class action, because the predominant view is that such relief is not available under the FDCPA.[225] While this view is subject to criticism, it may be easier to seek

211 *See* § 11.8.2, *infra*.

212 *See* § 11.10, Chs. 15, 16, *infra*.

213 *See* § 7.2.2, *supra*.

214 *See* National Consumer Law Center, Consumer Class Actions § 17.4.4 (10th ed. 2020), *updated at* www.nclc.org/library; National Consumer Law Center, Credit Discrimination § 11.8.5.2 (7th ed. 2018), *updated at* www.nclc.org/library.

215 *See, e.g.*, Hamid v. Stock & Grimes, L.L.P., 876 F. Supp. 2d 500, 503 (E.D. Pa. 2012) ("If her payment was not a proper element of actual damages under the FDCPA, a debt collector could harass a debtor in violation of the FDCPA, as a result of that harassment collect the debt, and thereafter retain what it collected. We do not believe that Congress intended this result."). *Accord* Alonso v. Blackstone Fin. Group L.L.C., 962 F. Supp. 2d 1188, 1198 (E.D. Cal. 2013). *See also* Villanueva v. Account Discovery Sys., L.L.C., 77 F. Supp. 3d 1058 (D. Colo. 2015) (default judgment awarded plaintiff $1000 for emotional distress, and $150 to compensate for out-of-pocket expenses: $115 that defendant withdrew from plaintiff's bank account and $35 overdraft fee that caused); *In re Lord*, 270 B.R. 787, 799 (Bankr. M.D. Ga. 1998).

216 *See, e.g.*, Moore v. Wells Fargo Bank, 908 F.3d 1050 (7th Cir. 2018) (attorney fees can be actual damages if caused by violation); Hinderliter v. Legal Recovery Law Offices, Inc., 2013 WL 3833982 (S.D. Cal. Apr. 24, 2013) (awarding actual damages of $1880 in attorney fees and costs for defending time-barred state court action plus $3540 for emotional distress).

217 15 U.S.C. §§ 1692k(a)(2)(B), 1692k(b)(2).

218 *See* Appx. E.3.2, E.3.4, *infra*.

219 *See* § 11.11.3.1, *infra*.

220 *See* § 11.12.1, *infra*.

221 *See also* Zimmerman v. Portfolio Recovery Assoc., 2013 WL 1245552, at *8 (S.D.N.Y. Mar. 27, 2013); O'Connor v. AR Res., Inc., 2012 WL 12743, at *1 (D. Conn. Jan. 4, 2012) (approving settlement including *cy pres* payments to the National Consumer Law Center and the National Association of Consumer Advocates); Garland v. Cohen & Krassner, 2011 WL 6010211, at *15 (E.D.N.Y. Nov. 29, 2011) (ordering that, after ninety days, uncashed settlement funds would be distributed as *cy pres* award to National Consumer Law Center). *See generally* National Consumer Law Center, Consumer Class Actions § 10.6.2.3 (10th ed. 2020), *updated at* www.nclc.org/library.

Author's disclaimer: NCLC has been a recipient of *cy pres* awards, which has enabled NCLC to continue providing services to those offering legal services for low-income individuals. For more on *cy pres* awards, see National Consumer Law Center, Consumer Class Actions § 14.7 (10th ed. 2020), *updated at* www.nclc.org/library.

222 846 F.3d 1071 (9th Cir. 2017).

223 *See* §§ 11.12, 16.7, *infra*.

224 *See* Gammon v. GC Services L.P., 162 F.R.D. 313 (N.D. Ill. 1995).

225 *See* § 11.12.2, *infra*.

declaratory relief,[226] or join state law claims that provide for equitable relief.[227] The procedural requirements for a class action seeking equitable relief are discussed at § 11.11.2.3.3, *infra*.

11.4.3 A Wide Range of Parties May Bring FDCPA Actions

A private right of action is available not only to the "consumer," that is, the putative debtor, but also, in some cases, to "any person" adversely affected by an FDCPA violation.[228] Moreover, most FDCPA provisions protect not just consumers, but any person affected by violations occurring during the collection of consumer debts. Therefore, friends, relatives, neighbors, or an employer, even though not obligated or alleged to be obligated on a debt, may bring an action under the Act.[229] An executor of a deceased party also has standing to bring an FDCPA claim that the deceased could have brought.[230]

11.4.4 A Wide Range of Defendants May Be Named Under the FDCPA

11.4.4.1 Employees and Officers

The FDCPA defines a debt collector to include "any person" who regularly collects debts owed to another,[231] and therefore coverage is not limited to collection agencies. Agency employees and officers are individually liable under the Act to the extent they are "debt collectors" under the Act and participate in the FDCPA violation.[232] Liability is based upon these individuals' participation in the violation, though, and not simply on their association with the collection agency.[233]

Corporate officers and members of law firms may be named as individual defendants where they are personally involved in establishing or carrying out the proscribed activities of the corporation or law firm. The Sixth Circuit and most district courts that have addressed the issue have held that shareholders, officers, or directors are not insulated from personal liability under the FDCPA by the corporate structure, and can be held personally liable without piercing the corporate veil if they are debt collectors under the FDCPA.[234] The plaintiff must show that the defendant materially participated in collecting the debt, exercised control over the business's affairs, was personally involved in the debt collection at issue, and regularly engaged in debt collection.[235]

Even if officers are not directly involved in the collection efforts, they can be liable if they exercise supervisory authority over the corporation, are intimately involved with the practices and procedures of the corporation or developed and implemented the particular collection practice challenged.[236] An attorney in a sole proprietorship should be individually liable in addition to the sole proprietorship's liability.[237]

The Seventh Circuit, however, has held that a shareholder or officer of a debt collecting corporation cannot be personally liable unless the plaintiff pierces the corporate veil, regardless of the person's involvement with the corporation's debt collection practices.[238]

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226 *See* Gammon v. GC Services L.P., 162 F.R.D. 313 (N.D. Ill. 1995). *See also* Labbate-D'Alauro v. GC Serv. L.P., 168 F.R.D. 451 (E.D.N.Y. 1996); § 11.12.1, *infra*.

227 *See* § 16.7, *infra*.

228 *See, e.g.*, Appx. E.1.4, *infra*. including Todd v. Collecto, Inc., 731 F.3d 734 (7th Cir. 2013); Sykes v. Mel S. Harris & Assoc., 780 F.3d 70 (2d Cir. 2015); Villarreal v. Snow, 1996 WL 28308 (N.D. Ill. Jan. 19, 1996) (individual who was not actually obligated, had signed as owner of the collateral for a loan, and was an addressee of the deceptive dunning letter). *See also* § 4.10, *supra*.

229 *See* § 4.10, *supra See, e.g.*, Heard v. Bonneville Billing & Collections, 216 F.3d 1087 (10th Cir. 2000) (mother of debtor); West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983) (consumer's mother); Whatley v. Universal Collection Bur., Inc., 525 F. Supp. 1204 (N.D. Ga. 1981) (parents). *See* Flowers v. Accelerated Bur. of Collections, Inc., 1997 WL 136313 (N.D. Ill. Mar. 19, 1997) (spouse); Appx. E.1.4, *infra*.

230 *See* Appx. E.1.4.2, *infra, including* Cruz v. Int'l Collection Corp., 673 F.3d 991 (9th Cir. 2012); Wright v. Fin. Serv. Inc., 996 F.2d 820 (6th Cir. 1993), *aff'd en banc*, 22 F.3d 647 (6th Cir. 1994); Finney v. MIG Capital Mgmt., Inc., 2014 WL 1276159 (S.D. W. Va. Mar. 27, 2014) (an FDCPA claim is remedial rather than penal, and thus claim survives consumer's death; estate is proper party for substitution); § 4.10, *supra*.

231 15 U.S.C. § 1692a(6).

232 *See* Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 438 (6th Cir. 2008); Wilson v. Aargon Agency Inc., 2015 WL 7185451 (D. Nev. Nov. 13, 2015); ValleCastro v. Tobin, Melien & Marohn, 2015 WL 6478412 (D. Conn. Oct. 27, 2015) (servicer's employee); Robinson v. Managed Accounts Receivables Corp., 654 F. Supp. 2d 1051 (C.D. Cal. 2009); FTC Official Staff Commentary §§ 803(6)-1; 813, *reproduced at* Appx. C.2, *infra, discussed at* § 3.4.4.4, *supra*; § 4.7, *supra*. *But see* Pettit v. Retrieval Masters Creditors Bur., Inc., 211 F.3d 1057 (7th Cir. 2000) (*dicta*; but not followed in circuit).

233 *See* Robinson v. Managed Accounts Receivables Corp., 654 F. Supp. 2d 1051 (C.D. Cal. 2009) (employees of a debt collection organization may be "debt collectors" under the FDCPA and held personally liable for acts committed during the scope of their employment).

234 *See* Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 438 (6th Cir. 2008); Gonzales v. Stillman Law Office, 2015 WL 4903344 (W.D. Mich. Aug. 17, 2015) (denying motion to dismiss as to individual lawyer's liability where he signed state court papers and individually participated in collection efforts on behalf of his firm); Smith v. Levine Leichtman Capital Partners, Inc., 723 F. Supp. 2d 1205 (N.D. Cal. 2010); Robinson v. Managed Accounts Receivables Corp., 654 F. Supp. 2d 1051, 1059 (C.D. Cal. 2009); Schwarm v. Craighead, 552 F. Supp. 2d 1056 (E.D. Cal. 2008); Albanese v. Portnoff Law Assoc., Ltd., 301 F. Supp. 2d 389 (E.D. Pa. 2004).

235 Smith v. Levine Leichtman Capital Partners, Inc., 723 F. Supp. 2d 1205, 1213 (N.D. Cal. 2010); Schwarm v. Craighead, 552 F. Supp. 2d 1056, 1073 (E.D. Cal. 2008).

236 *See* Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 438, 439 (6th Cir. 2008); Brumbelow v. Law Offices of Bennett & Deloney, P.C., 372 F. Supp. 2d 615 (D. Utah 2005); Musso v. Seiders, 194 F.R.D. 43 (D. Conn. 1999); Pope v. Vogel, 1998 WL 111576 (N.D. Ill. Mar. 5, 1998); Ditty v. CheckRite, Ltd., 973 F. Supp. 1320 (D. Utah 1997). *But see* Reese v. Arrow Fin. Services, L.L.C., 202 F.R.D. 83 (D. Conn. 2001) (dismissing case against officers of collection agency although they allegedly adopted, ratified, and approved violations).

237 Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 438 (6th Cir. 2008). *Contra* Bartlett v. Herbl, 128 F.3d 497 (7th Cir. 1997).

238 *See* § 11.4.4.2, *infra*; Pettit v. Retrieval Masters Creditor Bur., Inc., 211 F.3d 1057, 1059 (7th Cir. 2000); White v. Goodman, 200 F.3d 1016, 1019 (7th Cir. 2000). *See also* Carrington v. Experian Holdings, Inc.,

While most debt collection employees and officers are impecunious, others, such as a person who is both an officer and actively involved in the collection activities of a small company, may be wealthier than the company itself. Joining as a party an employee or officer involved in the debt collection also facilitates discovery, which is typically more expensive and cumbersome against a nonparty. Care should be taken that the employee is not one who may solicit undue sympathy from a jury.[239] Because collection employees often use fake names while collecting a debt, it may be necessary to sue them as "John Doe a.k.a. Robert Smith," and discovery may be needed to obtain the information necessary to serve them.

11.4.4.2 Owners, Partners, Franchisors, and Parent Companies

Apart from the possibility of direct liability discussed in the preceding section, the owner of a collection agency may be held vicariously liable for FDCPA violations committed by agency employees[240] if there is sufficient evidence to pierce the corporate veil.[241] The applicable state law to evaluate piercing the corporate veil is the state of incorporation of the entity whose veil is sought to be pierced.[242] Seeking to pierce the veil of an alleged parent corporation is a high burden, and courts generally look at whether "the entities are so interconnected in interest and ownership that the separate individual corporations no longer exist and that the recognition of the separate corporate entities would promote fraud or injustice."[243] In addition, even if owners are not directly involved in the collection efforts, they can still be liable if they exercise supervisory authority over the corporation, are intimately involved with the practices and procedures of the corporation, or developed and implemented the particular collection practice challenged.[244]

Under partnership law, the general partners of limited partnership debt collection agencies are vicariously liable for the limited partnership's violations.[245] A franchisor may be liable for those acts of its franchisee debt collector which it controls.[246] A parent company can be found liable for the FDCPA violations of its corporate subsidiary collection agency even where the subsidiary collects debts in the subsidiary's own name.[247] This liability can be established where the parent instigated the practices of its subsidiaries[248] or the subsidiary was merely an instrumentality for the parent and the entire group of corporations constituted a single economic enterprise.[249]

11.4.4.3 Collection Attorneys and Collectors Employing Attorneys

Collection attorneys, originally broadly excluded from FDCPA coverage, are now subject to the Act's provisions and to private FDCPA actions, as any other debt collector would be.[250] Suing a collection agency's attorney may provide deeper pockets than suing a collection agency. If a law partner is liable under the FDCPA, the partnership may also be liable under state partnership principles.[251] However, some judges may react badly to suits against collection attorneys. Consumer lawyers should obtain experienced co-counsel before bringing their first suit of this type.

Debt collectors employing attorneys[252] or other agents[253] to carry out debt collection practices that violate the FDCPA have been held vicariously or directly liable for their agents'

469 F. Supp. 3d 891 (W.D. Wis. 2020) (contacts of one defendant may not be imputed to another defendant for jurisdictional purposes, unless plaintiff can show that it would be appropriate to pierce corporate veil).

239 *See* Johnson v. Eaton, 873 F. Supp. 1019 (M.D. La. 1995) (jury found paralegal's violation should not result in award of statutory damages)

240 *See* § 4.7.3, *supra*.

241 *See* Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433, 438, 439 (6th Cir. 2008); White v. Goodman, 200 F.3d 1016 (7th Cir. 2000) (shareholders of debt collectors were not liable absent piercing of the corporate veil, and joining them was frivolous); Klco v. Elmhurst Dodge, 2002 WL 193461 (N.D. Ill. Feb. 6, 2002) (insufficient evidence). *See also* Pettit v. Retrieval Masters Creditors Bur., Inc., 211 F.3d 1057 (7th Cir. 2000) (an owner, officer of corporation, or shareholder may be held personally liable for corporation's violation of FDCPA only if they were involved in FDCPA violations); Semper v. JBC Legal Group, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005) (lawyer who owned law firm, but did not personally participate in activities at issue, was not personally liable).

242 *See, e.g.*, On Command Video Corp. v. Roti, 705 F.3d 267, 272 (7th Cir. 2013).

243 Hystro Prods., Inc. v. MNO Corp. 18 F.3d 1384, 1388–1389 (7th Cir. 1994); Klco v. Elmhurst Dodge, 2002 WL 193461 (N.D. Ill. Feb. 6, 2002). *See also* Backuswalcott v. Common Ground Cmty. HDFC, Inc., 104 F. Supp. 2d 363 (S.D.N.Y. 2000).

244 *See* § 11.4.4.1, *supra*.

245 *See* § 4.7.3, *supra*.

246 Taylor v. Checkrite, Ltd., 627 F. Supp. 415 (S.D. Ohio 1986).

247 *See* §§ 4.7.3, 4.7.5, *supra*. *See also* LeBlanc v. Unifund CCR Partners, 601 F.3d 1185 (11th Cir. 2010) (partners of debt collector limited partnership may be held jointly and severally liable for partnership's conduct regardless of whether they violated FDCPA and whether or not they are debt collectors); Peter v. G.C. Services, L.P., 310 F.3d 344 (5th Cir. 2002) (general partners are liable for all obligations of partnership, including FDCPA violations).

248 Fuller v. Midland Credit Mgmt. Inc., 2014 WL 883757, at *7 (N.D. Ill. Mar. 6, 2014).

249 *See* Appx E.1.2.4, *infra*; Janetos v. Fulton Friedman & Gullace, L.L.P., 825 F.3d 317 (7th Cir. 2016); Jenkins v. Union Corp., 999 F. Supp. 1120 (N.D. Ill. 1998) (parent corporation could be liable, but in this case insufficient evidence to create such liability). *Cf.* Litt v. Midland Credit Mgmt., Inc., 2014 WL 1977137 (E.D. Mich. May 15, 2014) (absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities).

250 *See* § 4.7.3.3, *supra*.

251 *See* Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000); Albanese v. Portnoff Law Assoc., Ltd., 301 F. Supp. 2d 389 (E.D. Pa. 2004); Cashman v. Ricigliano, 2004 WL 1920798 (D. Conn. Aug. 25, 2004).

252 *See* Janetos v. Fulton Friedman & Gullace, L.L.P., 825 F.3d 317, 325 (7th Cir. 2016) (Asset Acceptance can be held liable for letters drafted and sent by its collection attorney); Fox v. Citicorp Credit Serv., Inc., 15 F.3d 1507, 1516 (9th Cir. 1994).

253 *See* Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000) (debt buyer vicariously liable for FDCPA violation of its collection agency). *See also* McAdory v. M.N.S. & Assoc., 952 F.3d 1089 (9th Cir. 2020) (remanding to determine "whether and when a debt collector can be held vicariously liable for the actions of another debt collector" where debt buyer used debt collector for collection of debts).

conduct.[254] As the Third Circuit noted: "We believe this is a fair result because an entity that is itself a 'debt collector'—and hence subject to the FDCPA—should bear the burden of monitoring the activities of those it enlists to collect debts on its behalf."[255] Exceptions may apply to this general rule where the attorney is considered an independent contractor, and not the debt collector's agent,[256] or where the intentionally fraudulent conduct was outside of the agency relationship.[257]

The consumer has the option of suing the collection lawyer's debt collector client, either alone or together with the collection attorney, to redress the attorney's FDCPA violations. Where suing an attorney is met with hostility from the local bench, naming only the collection lawyer's debt collector client may be an attractive practical option, except in the rare jurisdiction that does not impose vicarious liability on a lawyer's client for the lawyer's FDCPA violations.

Consumers should proceed with caution when raising FDCPA claims against an attorney in the same collection case that the attorney is bringing against the consumer. Joining the creditor's lawyer in a third-party complaint or otherwise in the collection case in which the lawyer is appearing may not be permissible or advisable.[258] Collection attorneys, claiming ethical violations, have even sought sanctions (without success) against consumers' attorneys for doing so. The most prudent course may be to file a separate FDCPA suit against the creditor's attorney.

11.4.4.4 Forms Suppliers, Repossessors, and Insurers

It is an FDCPA violation to design, compile, and furnish any form while knowing that the form will be used to create the false impression that a person other than the creditor (such as an attorney or a collection agency) is participating in the collection of the debt.[259] An example of this conduct is someone who sends a default letter to a debtor portraying themselves as a debt collector when they actually have no involvement in the debt collection effort. They are just lending out their name to the creditor for its intimidation value, many times in exchange for a "flat rate" per notice.[260] The FDCPA section states "any person who violates this section [such as "flat raters"] shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k."[261] A repossession company may be liable under the Act and may work in conjunction with other debt collectors.[262]

Collecting a consumer's judgment against a usually thinly capitalized local collection agency may be problematic.[263] For this reason, a negotiated settlement that includes a certified check or a bank's letter of credit supporting an installment agreement is advisable regarding smaller collection agencies.[264] If the collection agency or attorney has a liability insurer, as many do, that may provide another avenue for recovery.[265] Although most states do not permit joinder of an insurer in an action to determine an insured's liability, statutes in most states authorize a direct action against a collector's insurer after judgment against the collector or upon the collector's bankruptcy.[266]

The ACA International (Association of Credit and Collection Professionals, formerly the American Collector's Association) markets, and other groups may also market, professional liability insurance to debt collection agencies, attorneys, and creditors. Such insurance has satisfied the claims of many consumers suing under the FDCPA. The existence and contents of such insurance agreements are expressly discoverable in federal courts.[267] Determination of insurance coverage assists the process of negotiating settlements, because it reveals the insurer's presence and interests in the action and decreases concern over the ability to recover a judgment from an impecunious collector. Also, many states provide by statute for direct actions by claimants against insurers after obtaining judgment against the insured.[268] In other states, such an

254 *See* Appx. E.1.2.4, *infra*. *See also* Barbato v. Greystone Alliance, L.L.C., 916 F.3d 260, 261 (3d Cir. 2019); Janetos v. Fulton Friedman & Gullace, L.L.P., 825 F.3d 317, 325–326 (7th Cir. 2016); Oei v. N. Star Capital Acquisitions, L.L.C., 486 F. Supp. 2d 1089 (C.D. Cal. 2006); Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507, 1516 (9th Cir. 1994). *Cf.* Wadlington v. Credit Acceptance Corp., 76 F.3d 103, 108 (6th Cir. 1996) (company that was not debt collector under FDCPA would not be held vicariously liable for acts of attorney). *But see* Reygadas v. DNF Assoc., 982 F.3d 1119 (8th Cir. 2020) (debt buyer not found vicariously liable for third party debt collector's contact while consumer was represented by counsel because, even though debt buyer knew of representations, third-party debt collector did not); Clark v. Main Street Acquisition Corp., 553 Fed. Appx. 510 (6th Cir. 2014) (debt buyer was not vicariously liable for attorney's alleged violations relating to admission requests, as consumer failed to offer any evidence that debt collector exercised control over, or even had knowledge of, requests for admissions at issue).

255 Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 404–406 (3d Cir. 2000).

256 Byrd v. Law Offices of John D. Clunk Co., L.P.A., 2010 WL 816932 (S.D. Ohio Mar. 8, 2010) (collection law firm not vicariously liable for acts of independent contractor who served process when law firm was unaware of process server's methods and did not have supervisory authority).

257 *In re* Humes, 496 B.R. 557 (Bankr. E.D. Ark. 2013).

258 *See* Yale New Haven Hosp. v. Orlins, 1992 WL 110707 (Conn. Super. Ct. May 11, 1992); Egan v. Williams, 709 A.2d 1057 (R.I. 1998). *But see* Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443 (D. Nev. 1994).

259 *See* 15 U.S.C. § 1692j(a); § 10.4, *supra*.

260 *See* Nielsen v. Dickerson, 307 F.3d 626 (7th Cir. 2002).

261 *Id.*; 15 U.S.C. § 1692j(b).

262 *See* §§ 4.7.5.1, *supra*.

263 *See* West v. Costen, 826 F.2d 1376 (4th Cir. 1987) (collection agency's chapter 11 bankruptcy discharged FDCPA judgment).

264 *See* Miller v. Prompt Recovery Services, Inc., 2014 WL 4230895 (N.D. Ohio Aug. 25, 2014) (ordering collection agency to tender $4000 provided in settlement agreement to consumer in ten days; exercising its inherent power to enforce the settlement agreement entered into by the parties).

265 *See, e.g.*, Columbia Cas. Co. v. HIAR Holding, L.L.C., 411 S.W.3d 258 (Mo. 2013) (TCPA $500-per-occurrence statutory damages awards are remedial and not penal in nature).

266 *See* § 2.8, *supra*.

267 Fed. R. Civ. P. 26(b)(2). However, evidence of insurance liability is not generally admissible against the insured. Fed. R. Evid. 411.

268 *See* 7A Couch on Insurance 3d ch. 104 (1985).

insurance agreement may be subject to attachment in aid of execution.

Insurance policies will contain a deductible of varying amounts, but a common deductible is $5000. The debt collector is responsible for the deductible amount and the insurance company would cover any amount higher, subject to the limits of the policy.

Under some state direct action statutes, the insurer may raise any defenses which it would have against the insured. One frequent defense, the insured's noncooperation with the insurer, may be avoided by a consumer's lawyer directly supplying the insurer with copies of demand letters, the complaint, and motions to the insurer to avoid the defense of noncooperation. Noncooperation should not be an issue when the insurer provides the lawyers for the collector's defense.

11.4.4.5 Creditors

Creditors who, in the process of collecting their own debts, use any name other than their own which would indicate a third party is collecting the debt are subject to the FDCPA.[269] Generally, however, creditors collecting under their own name are exempt from FDCPA coverage for their own debt collection activities, but a state claim usually is available to challenge a creditor's misconduct. Similarly, creditors not covered by the FDCPA are generally not responsible for the FDCPA violations of their debt collectors, including collection agencies and collection lawyers.[270] Creditors are typically liable, however, under state laws of agency, for the state law violations of collection agencies and collection attorneys who are found to be the creditor's agents. If the collector is an agent, the creditor is legally responsible for the agent's wrongful acts which are within the scope of the relationship.[271]

Creditors and others exempt from the FDCPA may be joined as co-defendants in a federal court FDCPA action against a collection agency if the court accepts supplemental jurisdiction over state law claims against these other parties. Particularly where the collection agency or collection attorney has limited assets, it may be prudent to sue the creditor, or at least join the creditor to other defendants. Creditors often have more capital against which recovery may be obtained. Joinder of the creditor should be considered in suits against collection agencies, repossession companies, attorneys, and the creditor's employees.

If the collector is an independent contractor, however, the creditor is generally not *per se* legally responsible for the collector's wrongful acts; the consumer must establish additional actions by the creditor to establish creditor liability, such as negligent selection of the agency or the creditor's ratification of the collector's conduct.[272] A key question, then, is whether the collection agency or collection attorney is the creditor's agent or is an independent contractor. The more control exercised by the creditor over the collector, the more likely the relationship is that of principal and agent. Some cases have found a collection agency[273] or attorney[274] to be an agent for which the creditor was responsible, while other courts have indicated that the issues of control and scope of employment are for the jury to decide.[275]

Even if the court determines a collection agency is an independent contractor, the creditor may be responsible for

269 15 U.S.C. § 1692a(6); § 4.8.9.1, *supra*.

270 *See* Wadlington v. Credit Acceptance Corp., 76 F.3d 103 (6th Cir. 1996); Faiella v. Green Tree Servicing L.L.C., 2017 WL 589096 (D.N.H. Feb. 14, 2017); Bywater v. Wells Fargo Bank, 2014 WL 1256103 (N.D. Ill. Mar. 24, 2014); London v. Gums, 2014 WL 546914 (S.D. Tex. Feb. 10, 2014); Cangelosi v. New Orleans Hurricane Shutter & Window, L.L.C., 2013 WL 395138 (E.D. La. Jan. 31, 2013); Garcia v. Solomon, Grindle, Silverman & Wintringer APC, 2012 WL 12846995 (S.D. Cal. Jan. 23, 2012); Frascogna v. Wells Fargo Bank, 2009 WL 2843284 (S.D. Miss. Aug. 31, 2009); Flamm v. Sarner & Assoc., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002); Caron v. Charles E. Maxwell, P.C., 48 F. Supp. 2d 932, 936 (D. Ariz. 1999).

271 3 Am. Jur. 2d *Agency* § 264 (2002). *See* Household Credit Services, Inc. v. Driscol, 989 S.W.2d 72 (Tex. App. 1998) (evidence supported jury finding that collection agency was agent of Household and that Household authorized or ratified its conduct). *See also* Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (employer not responsible for employee's unauthorized collection abuses under punitive damages statute).

272 41 Am. Jur. 2d *Independent Contractors* §§ 27, 32–37 (2005). *See also* Household Credit Services, Inc. v. Driscol, 989 S.W.2d 72 (Tex. App. 1998).

273 *See* Appx E.1.2.4, *infra*. *See also* Morante v. Am. Gen. Fin. Ctr., 157 F.3d 1006 (5th Cir. 1998) (when collection subsidiary of finance company had right of control over debt collection agency, subsidiary was liable for punitive damages resulting from agency's debtor harassment); Patzka v. Viterbo Coll., 917 F. Supp. 654 (W.D. Wis. 1996) (collection agency was agent of college, resulting in college's liability under state statute for collector's demands for illegal fees and interest); Taylor v. Checkrite, Ltd., 627 F. Supp. 415 (S.D. Ohio 1986) (collector on dishonored checks and credit reporting agency was responsible for FDCPA violations of its franchisee agents when it exercised control over activities of franchise which resulted in violations); Southwestern Bell Tel. Co. v. Wilson, 768 S.W.2d 755 (Tex. App. 1988) (creditor was held responsible under agency principles for torts committed by private attorneys retained for collection efforts; attorneys, in turn, were held responsible for torts committed by constable and deputy in course of execution and levy). *But see* Craig v. Andrew Aaron & Assoc., 947 F. Supp. 208 (D.S.C. 1996) (creditor was not liable for collector's actions when it did not know what collector was going to do and terminated its contract with collection agency as soon as it learned of misconduct).

274 Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1486 (M.D. Ala. 1987) (acts of attorney are regarded as acts of client); Southwestern Bell Tel. Co. v. Wilson, 768 S.W.2d 755 (Tex. App. 1988) (creditor was held responsible under agency principles for torts committed by private attorneys retained for collection efforts; attorneys, in turn, were held responsible for torts committed by constable and deputy in course of execution and levy).

275 Jacksonville State Bank v. Barnwell, 481 So. 2d 863 (Ala. 1985) (facts sufficient for jury to find repossessor to be agent of bank); Loughan v. Harger-Haldeman, 7 Cal. Rptr. 581 (Cal. Ct. App. 1960); Sherman v. Field Clinic & Collection Accounts Terminal, 392 N.E.2d 154 (Ill. App. Ct. 1979). *See also* Howe v. Reader's Digest Ass'n, Inc., 686 F. Supp. 461 (S.D.N.Y. 1988) (magazine retailer was not a debt collector since it never undertook collection activities; it would not be held responsible on agency grounds without consumer proving an agency relationship); Breuleux v. Pentagon Fed. Credit Union, 460 N.E.2d 306 (Ohio Ct. App. 1983) (collection agency found not to be agent of creditor).

negligently failing to terminate the collector's collection authority,[276] for negligent selection of the collector,[277] for failure to prevent or remedy unlawful conduct,[278] or for ratification of the wrongful conduct.[279] The creditor's control of the debt collector may lead to the creditor's liability for the acts of the collector if negligent supervision is shown.[280]

11.4.5 Jury Trials

11.4.5.1 Right to a Jury Trial

The Seventh Amendment to the United States Constitution guarantees the right to a jury trial in FDCPA private actions seeking actual or statutory damages.[281] Collectors have argued that the use of the word "court" in 15 U.S.C. §§ 1692k(a)(2)(A) and 1692k(b)(1) evidenced a congressional intent to limit FDCPA actions to bench trials. This argument has been consistently rejected.[282] The word "court" is not the equivalent of the word "judge" and is used in numerous federal statutes to include both the judge and jury in circumstances that merely beg the Seventh Amendment question.[283] As an FDCPA action is similar to types of actions recognized at common law, the Seventh Amendment guarantees the right to a jury trial to any party in an FDCPA action seeking damages.[284] A waiver of a jury trial in a mortgage may be unenforceable after foreclosure,[285] by a mortgage servicer not a party to the mortgage,[286] or where it was not knowingly and intentionally waived.[287]

11.4.5.2 Benefit of a Jury Trial

Generally, debtors should request jury trials at the beginning of a debt collection harassment cases. This is such a strong preference that differences among courts as to the makeup, procedures, and delay in obtaining a jury may dictate the debtor's choice of forum. There are sufficient appellate cases reversing debt collection harassment decisions that included sizable jury awards (as well as sufficient cases tried by a judge alone in which small damages were awarded) to suggest strongly that juries are more likely to award larger damages than judges.[288]

11.4.5.3 Preparing for a Jury Trial of an FDCPA Case

In federal court, where cases pursuant to the Fair Debt Collection Practices Act are usually brought, a demand for trial by jury must be made "not later than [ten] days after the service of the last pleading."[289] The better practice is to request a trial by jury in the consumer's complaint. The method of requesting a jury trial, for example, by doing so in the caption, is often governed by local rules. Once a trial by jury has been demanded, it may only be withdrawn upon the consent of all parties.[290]

Lawyers specializing in debt collection abuse cases find mock juries valuable for framing their jury presentation and valuing the case. In preparation for a jury trial, the consumer's attorney should provide the judge with proposed *voir dire* questions, jury instructions, and a special verdict sheet. Samples are available online as companion material to this

276 Loughan v. Harger-Haldeman, 7 Cal. Rptr. 581 (Cal. Ct. App. 1960) (jury could find creditor waived its acceleration and negligently failed to tell repossession company to terminate its efforts).

277 41 Am. Jur. 2d *Independent Contractors* § 36 (2005). *See* Colorado v. Owens, 227 F.R.D. 181 (E.D.N.Y. 2005). *See also* Sherman v. Field Clinic, 392 N.E.2d 154 (Ill. App. Ct. 1979).

278 41 Am. Jur. 2d *Independent Contractors* § 31 (2005).

279 41 Am. Jur. 2d *Independent Contractors* § 32 (2005). *See also* Flamm v. Sarner & Assoc., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (creditor and her collection attorney would be vicariously liable for harassing debt collection tactics of process server they hired if they authorized or ratified those tactics); Household Credit Services, Inc. v. Driscol, 989 S.W.2d 72 (Tex. App. 1998) (while agency's death threats and job contacts were beyond scope of its duties, Household could have ratified agency's abuses as found by jury). *But cf.* Breuleux v. Pentagon Fed. Credit Union, 460 N.E.2d 306 (Ohio Ct. App. 1983).

280 Freeman v. CAC Fin., Inc., 2006 WL 925609 (S.D. Miss. Mar. 31, 2006) (Miss. law).

281 Kobs v. Arrow Serv. Bur., Inc., 134 F.3d 893 (7th Cir. 1998); Sibley v. Fulton Dekalb Collection Serv., 677 F.2d 830 (11th Cir. 1982); Lassiter v. Integrity Solution Serv., Inc., 2014 WL 1040677 (D. Colo. Mar. 18, 2014). *But see* Lucas v. U.S. Bank, 953 N.E.2d 457 (Ind. 2011) (FDCPA, a legal claim, was subsumed in equitable foreclosure issues; no right to jury in essentially equitable proceeding).

282 Kobs v. Arrow Serv. Bur., Inc., 134 F.3d 893 (7th Cir. 1998); Sibley v. Fulton Dekalb Collection Serv., 677 F.2d 830 (11th Cir. 1982); Adams v. Schumacher, 2015 WL 1538788 (D. Or. Apr. 7, 2015); Lassiter v. Integrity Solution Serv., Inc., 2014 WL 1040677, at *6 (D. Colo. Mar. 18, 2014); Delalat v. Syndicated Office Sys., Inc., 2013 WL 8364853, at *5 (S.D. Cal. July 30, 2013); Martsolf v. JBC Legal Group, P.C., 2009 WL 275719, at *11 (M.D. Pa. Jan. 30, 2008); Trans-Continental Credit and Collection Corp., 1999 WL 292623, at *1 (S.D.N.Y. May 10, 1999) (recognizing potential right to jury; awarding $1000 statutory damages to consumer contingent on defendant not seeking jury trial on statutory damages; noting that avoiding a jury trial would avoid costs to jury and public). *But see* Padilla v. Payco Gen. Am. Credits, Inc., 161 F. Supp. 2d 264 (S.D.N.Y. 2001); Dewey v. Associated Collectors, Inc., 927 F. Supp. 1172 (W.D. Wis. 1996).

283 Kobs v. Arrow Serv. Bur., Inc., 134 F.3d 893 (7th Cir. 1998); Sibley v. Fulton Dekalb Collection Serv., 677 F.2d 830 (11th Cir. 1982).

284 *See also* § 2.5.12, *supra*.

285 *See* DeFrancesco v. Veripro Solutions Inc., 2015 WL 179376 (M.D. Fla. Jan. 14, 2015). *But see* Poynter v. Ocwen Loan Servicing, L.L.C., 2017 WL 2779489 (W.D. Ky. June 27, 2017) (jury trial waiver in loan modification agreement was enforced).

286 *See, e.g.*, Burdick v. Bank of Am., 2015 WL 11199690 (S.D. Fla. Aug. 4, 2015).

287 *See* Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832–833 (4th Cir. 1986); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755–756 (6th Cir. 1985); Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977); Levinson v. Green Tree Servicing, L.L.C., 2015 WL 1912276 (M.D. Fla. Apr. 27, 2015) (in FDCPA case arising from mortgage, consumers knowingly and voluntarily waived their right to jury trial upon signing mortgage).

288 *E.g.*, Smith v. Law Office of Mitchell N. Kay, 124 B.R. 182 (D. Del. 1991) (entering default judgment against debt collector and jury awarding $15,000 actual damages for emotional distress, plus $1000 statutory damages; debt collector's motion for new trial on damages was granted on ground that actual damages of $15,000 awarded by jury was excessive unless consumers filed remittitur to reduce actual damages to $3000). *See also* § 15.2, *infra*.

289 Fed. R. Civ. P. 38(b).

290 Fed. R. Civ. P. 38(d).

treatise. In some U.S. district courts the judge or the clerk conducts the questioning of potential jurors. In those jurisdictions, the consumer must submit proposed *voir dire* for those questions to be asked.

Most courts require the submission of proposed jury instructions and a special verdict sheet, as well as trial briefs. Check the local court rules to determine those requirements. The consumer's proposed jury instructions should address the issues which will be decided by the jury. Well-drafted jury instructions will not only enhance the likelihood of success, but will also protect the record on those issues that may be raised upon appeal. Properly drafted instructions supported by legal authority will enhance the consumer's case.

Special verdicts and jury interrogatories may be submitted to the jury pursuant to rule 49 of the Federal Rules of Civil Procedure. Often local rules will elaborate upon this process. The consumer's attorney should prepare and submit a proposed special verdict sheet for the submission to the jury. The jury may be asked to determine what violations of the Act the debt collector has committed and then specify the award of actual damages and statutory damages.[291] A well-drafted special verdict sheet will help the jury reach its determination of whether the debt collector violated the Fair Debt Collection Practices Act and also to reach its conclusion upon the amount of actual and statutory damages to be awarded.

Where a consumer's lawyer remarked in his closing statement to the jury about the unreliability of computer records in general, the jury had been instructed not to consider a closing argument as evidence, and there was sufficient evidence from the consumer for the jury to reject the collector's records being reliable.[292]

11.4.5.4 Jury Does Not Determine Attorney Fees

The determination of attorney fees is not a question for the jury. As the Ninth Circuit stated: "The award of attorneys' fees is a matter for the judge, not the jury."[293] The court explained:

> In a case where the plaintiff is entitled to compensatory damages, informing the jury of the plaintiff's potential right to receive attorneys' fees might lead the jury to offset the fees by reducing the damage award. Even more troubling, however, is the case where actual damages are small or nonexistent. When damages are nominal, there is a risk that the jury may believe that the "harm" does not justify the payment of a large fee award. The jury may thus decide to find for the defendant rather than allow the plaintiff's attorney to recover fees.[294]

Thus, the availability of attorney fees pursuant to the Fair Debt Collection Practices Act should not be brought to the attention of the jury. If this should happen, the court may direct the jury to disregard the matter,[295] or in more serious cases, grant a motion for mistrial.[296] A motion in limine precluding certain lines of questioning may be appropriate.[297]

11.5 Developing the Facts

11.5.1 First Steps

One important first step in developing a case for debtor harassment is preparing a chronology of the events involved in the harassment. Events seemingly insignificant to the claim may prove significant later, may aid a witness's memory, or may indicate discrepancies in evidence. It can also be helpful in establishing a client's credibility in front of a judge or jury.

291 *See* Dickens v. GC Services L.P., ___ Fed. Appx. ___, 2017 WL 3616345 (11th Cir. Aug. 23, 2017) (reversing lower court's *sua sponte* assessment of $1 in statutory damages, as consumer was entitled to jury trial on the issue). *Cf.* Clayson v. Rubin & Rothman, L.L.C., 2011 WL 13209935 (W.D.N.Y. Mar. 3, 2011) (outlining very limited testimony necessary to allow jury to award FDCPA statutory and actual damages where collection law firm's strict liability had been determined by a prior trial).

292 *See* Danow v. Borack, 346 Fed. Appx. 409, 411 (11th Cir. 2009) (consumer's lawyer's attempt to cast doubt in his closing remarks to jury on relevance and reliability of collection lawyer's computerized records were not grounds for overturning jury verdict).

293 Brooks v. Cook, 938 F.2d 1048, 1051 (9th Cir. 1991).

294 *Id.* at 1051.

295 Lanham v. Whitfield, 805 F.2d 970, 972 (11th Cir. 1986). *But cf.* Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996).

296 Brooks v. Cook, 938 F.2d 1048 (9th Cir. 1991).

297 *See* Hamburger v. Northland Group, Inc., 2015 WL 2341901 (M.D. Pa. May 13, 2015) (granting consumer's motion in limine precluding reference to possible award of attorney fees, as attorney fees are within province of court, not jury; denying as premature collector's motion in limine to preclude consumer from testifying as to consumer use of credit card as based on assumptions that are not developed in record); Tallman v. Freedman Anselmo Lindberg, L.L.C., 2013 WL 2631754 (C.D. Ill. June 12, 2013) (defendant ordered not to reference plaintiff's ability to recover attorney fees; plaintiff's counsel's area of practice; comments about "greedy lawyers," comments implying that consumer or his counsel were pursuing the claims for "nefarious or unwholesome reasons," or other derogatory comments about plaintiff's or his counsel's motivation for bringing this case); Nelson v. Santander Consumer USA, Inc., 2013 WL 12234542 (W.D. Wis. June 5, 2013) (granting consumer's motions *in limine* to exclude potential allegation that she was suing "for the money" and to exclude potential allegation that she was a "deadbeat" who brought suit "to avoid paying her debts"; as to any evidence about motives of any lawyers in the case: "Those motives have nothing to do with liability or damages."); Lee v. Robins Preston Beckett Taylor & Gugle Co., L.P.A., 1999 U.S. Dist. LEXIS 12969 (S.D. Ohio July 9, 1999) (granting motion in limine precluding defendant from raising consumer plaintiff's eleven prior FDCPA cases or mentioning her past relationship with her attorney or availability of attorney fees to successful plaintiff). *Cf.* Wright v. Best Recovery Services L.L.C., 2015 WL 6468135 (E.D. Mich. Oct. 27, 2015) (denying consumer's motion in limine to exclude testimony or evidence related to his state of mind; his purchase, payments, or default on vehicle sought to be repossessed; his payment arrangements with finance company; and his understanding of whether his vehicle was eligible for repossession; however, consumer's credit history was outside of his purchase, and payment history regarding the vehicle was irrelevant and prejudicial, and therefore excluded); Lee v. Phelan Hallinan, P.L.C., 303 F.R.D. 671 (S.D. Fla. 2014) (in FDCPA putative class action, law firm's failure to identify its expert witness on net worth denied consumers opportunity to provide rebuttal report or to depose expert; thus, expert's affidavit and supporting documents were stricken).

There are usually a substantial number of documents connected with a consumer transaction; these are particularly useful for pinpointing significant dates in a chronology.

It may be a long time between the consumer attorney's initial interview with the client and trial. It is good practice to obtain a statement of the client's story and have them sign it. The statement may be used at trial to refresh the client's memory.[298] The effect of this statement on the client-attorney privilege and the work product rule is beyond the scope of this subsection but should be considered by counsel.[299]

The next step is to get statements from sympathetic witnesses while events (and a sense of outrage) are still fresh in their minds. Family members, friends, fellow employees (or the client's employer) and the client's physician and/or counselor or clergy should be interviewed if they witnessed collection contacts or injuries the client suffered, such as emotional distress. If the case involves abusive phone calls, a request could be sent to the telephone or cellphone company requesting an investigation and retention of the records of the collector's telephone calls to and from the consumer and the third parties involved during the relevant period. Most cellphones will have records of all numbers dialed and income numbers. Recordings of the calls can be invaluable in developing a chronology of facts for the case, as discussed at § 11.5.2, *infra*. It is also helpful to obtain from the client statements of witnesses who may have been present when the abusive calls were made, or who may have overheard a message left by the collector.

In addition to the development of a chronology of facts, consider beginning a case with an Evidence/Proof Chart to determine the elements counsel will need to prove for each claim and the evidence needed to prove each element at trial or on summary judgment. An FDCPA claim can have several subclaims depending on which section the collector's behavior violated. A collector's call threatening to garnish wages before a court judgment, for example, may constitute harassment (§ 1692d), misleading representations (§ 1692e) and unfair practices (§ 1692f), as well as violate other provisions of the Act. Overall, the consumer will have to prove overarching elements such as that the caller was a "debt collector" under the FDCPA,[300] the subject transaction is covered by the Act[301], the plaintiff was harmed by the act, and the plaintiff is protected from such conduct under the Act.[302] As discussed at Chapters 5 through 10, *supra*, each FDCPA section has its own requirements and must be parsed carefully to ensure each element is addressed. Creating a chart that has columns for each claim, the elements of each claim, the evidence needed to prove each claim, and how to obtain each piece of evidence to be used at trial (i.e., interrogatories, deposition, affidavit, live witness, etc.) will aid in crafting the complaint and, also, discovery requests.

As another first step, before or upon filing a lawsuit, practitioners should send a letter to the defendant requesting preservation of specified categories of current and ongoing data that ultimately will be requested in discovery. Almost every important document used to prove the plaintiff's case against a defendant, particularly in a class action, is in the hands of the defendant, not the plaintiff; most of it is electronically stored.[303] Call logs, account notes, e-mails, loan transaction histories, and policies and procedures are all in the custody or control of the defendant. Each party has a duty to preserve unique, relevant evidence that might be useful to an adversary. In addition, as of November 30, 2021, debt collectors must retain evidence of compliance or noncompliance with the FDCPA and Regulation F starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt.[304] For phone recordings, the debt collector must retain the recordings for three years after the date of each telephone call.[305] However, debt collectors are not required to create additional records or even record phone calls if that is not already part of their regular business practice. A debt collector only must retain applicable records or recordings that are already created in the ordinary course of its business.[306] The preservation letter should include a reminder that, if the collector already maintains such records of compliance and noncompliance, they must retain such records in accordance with Regulation F.[307]

The preservation letter also supports a potential subsequent claim for spoliation, helping to establish bad faith and conscious disregard of the duty to preserve relevant evidence. The more effective the preservation letter, conveying specifically what must be retained including methodologies for preservation and consequences of failure, the greater the likelihood the defendant will be punished for failing to produce evidence they claim is no longer available.

11.5.2 Recording of Phone Calls

11.5.2.1 Generally

FDCPA cases often involve proof of the content of phone conversations with debt collectors. Recordings can be an invaluable way to develop the chronology of facts in a case and support a consumer's claims. This subsection examines:

- Whether it is legal for a consumer to record a phone call from a collector;
- Whether it is legal for the consumer's attorney to advise the consumer to do so, or to participate in the recording;
- Options if the consumer does not record the conversation;
- The fact that the collector can record the conversation as a means of substantiating its version of a conversation; and
- Basic evidentiary considerations for using recordings.

298 *See* Fed. R. Evid. 612, 803(5).
299 *See* Fed. R. Evid. 501.
300 15 U.S.C. § 1692a(6). *See* § 4.7, *supra*.
301 15 U.S.C. § 1692a. *See* § 4.4, *supra*.
302 *See* § 4.4, *supra*. *See also* § 11.15, *infra*, regarding Article III standing.
303 *See* National Consumer Law Center, Consumer Class Actions § 6.3 (10th ed. 2020), *updated at* www.nclc.org/library.
304 Reg. F § 1006.100. *See* § 11.5.4.2a, *infra*.
305 *Id.*
306 Reg. F Official Interpretations § 100(a)-2.
307 *Id.*

11.5.2.2 Is It Legal for a Consumer to Record the Collector's Call?

A number of jurisdictions require that both parties consent to the recording of a call: California,[308] Connecticut,[309] Florida,[310] Georgia,[311] Illinois,[312] Maryland[313], Massachusetts,[314] Michigan,[315] Montana,[316] Nevada,[317] New Hampshire,[318] Pennsylvania,[319] Puerto Rico,[320] and Washington.[321] Other states though require the consent of only one of the parties to the call.[322] This generally means in these other states that, if one is not a party to the conversation, one can record a conversation or phone call only if at least one party consents and has full knowledge that the communication will be recorded. What constitutes "consent" in a given state can vary in terms of whether it must be express or can be implied based on the circumstances.

Care should be taken as to the choice of law when the collector's call originates in another state.[323] The question becomes

308 Cal. Penal Code § 632 (preempted in part by Calif. constitutional provisions), § 637.2 (civil damages); Cal. Pub. Util. Code Gen. Order 107-B(II)(A); People v. Guzman, 217 Cal. Rptr. 3d 509 (Cal. Ct. App. 2017), *aff'd*, 453 P.3d 1130 (Cal. 2019). *See also* Kuschner v. Nationwide Credit, Inc., 2009 WL 1531574 (E.D. Cal. June 2, 2009) (counterclaim permitted against FDCPA plaintiff for secretly tape -recording phone conversation with debt collector); Flanagan v. Flanagan, 41 P.3d 575 (Cal. 2002).

309 Conn. Gen. Stat. § 53a-187 (definition), § 53a-189 (penalty), § 52-570d (civil definition & damages).

310 Fla. Stat. §§ 934.01 to 934.50 (definition and penalties) (§ 934.09[1 repealed).

311 Ga. Code Ann. §§ 16-11-62, 16-11-66 (definitions), § 16-11-69 (penalty).

312 Ind. Code § 35-31.5-2-176 (definition), § 35-33.5-5-5 (penalty), § 35-33.5-5-4 (civil damages).

313 Md. Code, Cts. & Jud. Proceedings § 10-402 (definition and penalty), § 10-410 (civil damages); Malpas v. State, 695 A.2d 588 (Md. Ct. Spec. App. 1997).

314 Mass. Gen. Laws ch. 272, § 99 (definition, penalty, civil damages); *See also* Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001) (no exception to criminal eavesdropping when one party to the conversation consents to taping). *But cf.* Martin v. Gross, 340 F. Supp. 3d 87, 109 (D. Mass. 2018), *aff'd in part, vacated in part, remanded sub nom.* Project Veritas Action Fund v. Rollins, 982 F.3d 813 (1st Cir. 2020) (declaring Section 99 unconstitutional insofar as it prohibits audio recording of government officials, including law enforcement officers, performing their duties in public spaces, subject to reasonable time, place, and manner restrictions; corresponding injunction against defendants); Commonwealth v. Douglas, 236 N.E.2d 865 (Mass. 1968) (consent of taped party unnecessary).

315 Mich. Comp. Laws § 750.539c (definition and penalty), § 750.539h (civil damages), Sullivan v. Gray, 324 N.W.2d 58 (Mich. Ct. App. 1982).

316 Mont. Code Ann. § 45-8-213 (definition and penalty).

317 Nev. Rev. Stat. § 200.620.

318 N.H. Rev. Stat. § 570-A:2 (definition and penalty), § 570-A:11 (civil damages); New Hampshire v. Locke, 761 A.2d 376 (N.H. 1999).

319 18 Pa. Con. Stat. Ann. §§ 5703, 5704 (preempted by federal wiretap act) (definition & penalty), §§ 5725, 5747 (civil damages).

320 P.R. Laws Ann. tit. 33 § 2160.

321 *See* Wash. Rev. Code § 9.73.030 (definition), § 9.73.080 (penalty), § 9.73.060 (civil damages).

322 *Alabama*: Ala. Code § 13A-11-30 (definition), § 13A-11-31 (penalty); *Alaska*: Alaska Stat. § 42 20.310 (definition), § 42.20.330 (penalty), Palmer v. State, 604 P.2d 1106 (Alaska 1979); *Arizona*: Ariz. Rev. Stat. §§ 13-3005, 13-3012 (definition and penalty), § 12-731 (civil damages); *Arkansas*: Ark. Code Ann. § 5-60-120 (definition and penalty); *Colorado*: Colo. Rev Stat § 18-9-303 (wiretapping definition and penalty), § 18-9-304 (eavesdropping definition and penalty); *Connecticut*: Conn. Gen. Stat. § 53a-187 (definition), § 53a-189 (penalty), § 52-570d (civil definition and damages); *Delaware*: Del. Code Ann. tit. 11, § 2402 (wiretapping definition and criminal penalty), § 2409 (wiretapping civil liability), § 1335 (privacy violation definition and penalty), U.S. v. Vespe, 389 F. Supp. 1359 (D. Del. 1975); *District of Columbia*: D.C. Code § 23-542 (definition and penalty), § 23-554 (civil damages); *Georgia*: Ga. Code Ann. §§ 16-11-62, 16-11-66 (definitions), § 16-11-69 (penalty); *Hawaii*: Haw. Rev. Stat. § 803-42 (definition and penalty), § 803-48 (civil damages); *Idaho*: Idaho Code § 18-6702 (definition and penalty), § 18-6709 (civil damages); *Indiana*: Ind. Code § 35-31.5-2-176 (definition), § 35-33.5-5-5 (penalty), § 35-33.5-5-4 (civil damages); *Iowa*: Iowa Code § 727.8 (eavesdropping definition), § 808B.1 (wiretapping definition), § 808B.2 (definition and penalty), § 808B.8 (civil damages); *Kansas*: Kan. Stat. Ann. § 21-6101 (definition & penalty), § 22-2518 (civil damages); *Kentucky*: Ky. Rev. Stat. § 526.010 (definition), § 526.020 (penalty); *Louisiana*: La. State. Ann. § 15:1303 (definition and penalties), § 15:1312 (civil damages); *Maine*: Me. Stat. tit. 15, § 709 (definition; §§ 1-B and 1-C amended 2021); § 710 (penalty), § 711 (civil damages); Griffin v. Griffin, 92 A.3d 1144 (Me. 2014); *Minnesota*: Minn. Stat. § 626A.02 (definition and penalty), § 626A.13 (civil damages); *Mississippi*: Miss. Code Ann. § 41-29-531 (definition), § 41-29-533 (penalty), § 41 29 529 (civil damages); *Missouri*: Mo. Rev. Stat. § 542.402 (definition and penalty), § 542.418 (civil damages); *Nebraska*: Neb. Rev. Stat. § 86-290 (definition and penalty), § 86-297 (civil damages); *New Jersey*: N.J. Stat. Ann. §§ 2A:156A-3, 2A:156A-4 (definition and penalty), § 2A:156A-24 (civil damages); *New Mexico*: N.M. Stat. Ann. § 30-12-1 (definition and penalty), § 30-12-11 (civil damages); *New York*: N.Y. Penal Law §§ 250.00, 250.05 (definition and penalty); *North Carolina*: N.C. Gen. Stat. § 15A-287 (definition and penalty), § 15A-296 (civil damages); *North Dakota*: N.D. Cent. Code § 12.1-15-02 (definition and penalty); *Ohio*: Ohio Rev. Code Ann. § 2933.51 (definition and penalty), § 2933.65 (civil liability); *Oklahoma*: Okla. Stat. tit. 13, §§ 13-176.3, 13-176.4 (definition and penalty); *Rhode Island*: R.I. Gen. Laws § 11-35-21 (definition and penalty), § 12-5.1-13 (civil damages); *South Carolina*: S.C. Code Ann. §§ 17-30-20, 17-30-30 (definition and penalty), § 17-30-135 (civil damages); *Tennessee*: Tenn. Code Ann. §§ 39-13-601, 39-13-604 (definitions), § 39-13-602 (penalty), § 39-13-603 (civil damages); *Texas*: Tex. Penal Code § 16.02 (definition and penalty), Tex. Civ. Prac. & Rem. Code § 123.004 (civil damages); *Utah*: Utah Code Ann. § 77-23a-4 (definition and penalty; civil damages), § 77-23b-8 (civil damages); *Vermont*: no specific statute to address consent for recording conversations; *Virginia*: Va. Code Ann. § 19.2-62 (definition and penalty), § 19.2-69 (civil damages); *West Virginia*: W. Va. Code § 62-1D-3 (definition and penalty), § 62-1D-12 (civil damages); *Wisconsin*: Wis. Stat. § 968.31 (definition, penalty, and civil damages); *Wyoming*: Wyo. Stat. Ann. § 7-3-702 (definition and penalty).

323 *See, e.g.*, MacNeill Eng'g Co. v. Trisport, Ltd., 59 F. Supp. 2d 199, 202 (D. Mass 1999) ("secretly recording a conversation outside Massachusetts does not give rise to liability under Mass. law prohibiting secret recording even if the call originated within Massachusetts"); Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914 (Cal. 2006) (California law requiring two-party consent to recording of phone call prohibited Georgia brokerage's secret recording, despite fact that only one-party consent is required under Georgia law); Locke v. Aston, 814 N.Y.S.2d 38 (N.Y. App. Div. 2006) (secret recording of phone call by Cal. resident with N.Y. resident admissible in N.Y. courts, though prohibited by Cal. law, but permitted in N.Y.); Ball v. Ehlig, 2005 WL 1023650 (Pa. Com. Pl. Jan. 31, 2005) (Call recorded in Texas with only consent of one party required application of Texas law, even though case brought in PA), *aff'd*, 889 A.2d 107 (Pa. Super. Ct. 2005); Larrison v. Larrison, 750 A.2d 895, 898 (Pa. Super. Ct. Apr. 12, 2000) (recording

whether the applicable law about recording calls is the state where the collector placed the call or the state where the consumer received the call. Muddying the legal issue is the common use by debt collectors of telephone services that provide a caller ID local to the consumer for all outgoing collection calls, with the result that consumers may falsely believe they received an in-state call when it was actually an out-of-state call.

11.5.2.3 Is It Ethical for the Consumer's Attorney to Suggest or Assist in the Recording?

While it may be legal in many states for a consumer to record a collector's call, a separate question is whether it is ethical for the consumer's attorney to participate in, assist, or even suggest that the call be recorded. ABA Opinion 337 (1974) initially held that recording without consent was conduct involving fraud, dishonesty, or misrepresentation, prohibited by ABA Ethical Rule 8.4,[324] but that rule was reversed in June, 2001, by ABA Formal Opinion 01-422. The 2001 opinion provides that the nonconsensual tape recording of a conversation to which the recording attorney is a party is not unethical if it is lawful in that state and the recording attorney does not falsely deny that the conversation is being recorded. If the recording is unlawful in the state, then the attorney's involvement is unethical.[325]

Nevertheless, state ethics rules may not follow the 2001 ABA model. Colorado and South Carolina have issued rules expressly rejecting ABA Formal Opinion 01-422, and Arizona, Idaho, Indiana,[326] Iowa, Kansas, and Kentucky[327] have not withdrawn their ethics opinions issued prior to ABA Formal Opinion 01-422. On the other hand, a number of states' ethics opinions explicitly find it ethical for a lawyer to tape record without the other party's consent when it was legal, including Hawaii,[328] Maine,[329] Mississippi,[330] Minnesota,[331] New York,[332] Oklahoma,[333] Oregon,[334] and Texas.[335] The New York City Bar has concluded that an attorney may not routinely tape record conversations, but may do so in pursuit of a societal good.[336] A good overview of attorney ethical considerations concerning recording of phone calls is found at a Congressional Reserve Service publication.[337]

Assuming it is unethical for a lawyer to record or assist in recording the calls, a separate issue is whether an attorney can advise the client about recording calls. In one state where it was legal, but previously unethical to surreptitiously record a conversation, the ethics authority opined that the lawyer may not request the client to surreptitiously record a conversation with an adverse party, but may tell that client that it is legal for the client to do so.[338] Other ethics opinions provide that an attorney cannot indirectly record a call,[339] so that advising the client to record a call could be seen as indirectly recording the call.

A lawyer may not advise a client to engage in criminal conduct. A lawyer who does so incurs criminal responsibility for the crime. If surreptitious tape recording is unethical for the lawyer, but legal for others, a lawyer advising a client on the subject must avoid even an appearance of impropriety.

Acknowledging the violation of ethical standards, some courts have nevertheless allowed at least the limited evidentiary use of a secretly obtained tape recording,[340] while others

of call in NY with only consent of sender or receiver allowed, even though used in PA court).

324 *See also* Nissan Motor Co., Ltd. v. Nissan Computer Corp., 180 F. Supp. 2d 1089 (C.D. Cal. 2002) (taping of opposing counsel without consent would be criminal and unethical and enjoined).

325 *See* State *ex. rel.* Neb. State Bar Ass'n v. Schleich, No. 5-97-1214 (Neb. 1998) (suspending repentant lawyer for six months for illegally taping wife's phone call prior to instituting divorce); Conn. Bar Ass'n Informal Op. 94-30 (Oct. 19, 1994); N.C. State Bar Ass'n Op. 192 (Jan. 13, 1995) (lawyer may not listen to client's illegal tape recording); Or. Ethics Op. 2005-156, 2005 WL 5679581 (Or. St. Bar Ass'n Aug. 2005).

326 Ind. State Bar Ass'n, Legal Ethics Subcommittee, Formal Op. No. 2, res gestae 234 (July 1975).

327 Ky. Bar Ass'n Ethics Op. KBA E-289 (1984).

328 Haw. Op. 30 (July 27, 1995) (not *per se* unethical when legal, but must be made and used in ethical way).

329 Me. Prof'l Ethics Comm'n Op. 168, 14 Me. Bar J. 132 (Mar. 9, 1999).

330 Attorney M v. Mississippi Bar, 621 So. 2d 220 (Miss. 1992) (attorney's call to treating physician was explicitly involving malpractice claim putting doctor on notice that his statement was for potential republication, therefore no deceit was involved in tape recording of conversation; action for unethical conduct was dismissed). *See Propriety of Attorney's Surreptitious Sound Recording of Statements by Others Who Are or May Become Involved in Litigation*, 32 A.L.R.5th 715 (1995).

331 *See, e.g.*, Edward J. Cleary, Privacy Rights and Ethical Provisions (Bench & Bar of Minnesota 1999), *available at* http://lprb.mncourts.gov.

332 N.Y. County Ethics Op. 696 (1993) (invalidating prior contrary opinion). *Compare* Ass'n of the Bar of the City of New York Formal Opinion 2003-02.

333 Okla. Bar Ass'n Op. 307 (Mar. 5, 1994) (lawyer must disclose recording if asked to avoid deceit).

334 Or. Ethics Op. 2005-156, 2005 WL 5679581 (Or. St. Bar. Ass'n Aug. 2005); Or. State Bar Op. 1991-74 (may record phone conversation if it is legal to do so; may not secretly tape record in-person conversation).

335 Tex. Ethics Op. 575, 2006 WL 4045664 (Nov. 1, 2006).

336 Ass'n of the Bar of the City of New York Formal Opinion 2003-02.

337 Charles Doyle, Wiretapping, Tape Recorders, and Legal Ethics: An Overview of Questions Posed by Attorney Involvement in Secretly Recording Conversation (Congressional Research Service Aug. 9, 2012), *available at* https://sgp.fas.org.

338 Tex. State Bar Prof'l Ethics Comm'n, Op. 514 (Dec. 27, 1995) (this opinion may have been overruled in Texas by Tex. Ethics Op. 575, 2006 WL 4045664 (Nov. 1, 2006)).

339 Ky. Bar Ass'n Ethics Op. KBA E-289 (1984).

340 *See* United States v. Ewald, 398 Fed. Appx. 657 (2d Cir. 2010) (while court precluded defendant from playing audiotape itself, it permitted him to use *transcript* of audiotape, without restriction, for purpose of refreshing witness's recollection); Miano v. A.C.R. Advertising, 148 F.R.D. 68 (S.D.N.Y. 1983); State v. Muhammad, 927 A.2d 769 (Vt. 2007). *See also* Koller *ex rel.* Koller v. Richardson-Merrell, 737 F.2d 1038 (D.C. Cir. 1984) (unethical secret tape recording of witness was not misconduct that would disqualify *pro hac vice* counsel as taping was motivated by desire to get at the truth), *rev'd on other grounds*, 472 U.S. 424 (1984); *In re* PRB, 989 A.2d 523 (Vt. 2009).

have refused to allow its use, even if their refusal may have helped perpetuate a fraud.[341]

11.5.2.4 Alternative Means to Substantiate a Call's Substance

In states where tape recording without consent or warning "beeps" is illegal, or where it is unethical for the attorney to suggest that collection calls be recorded, the consumer still can keep paper and pen by the telephone and take notes of future collection calls. Alternatively, the consumer can seek the collector's consent to the call being recorded. Debt collectors increasingly are recording their conversations with consumers, and these tapes can be sought in discovery.[342]

Debt collectors may leave messages on the consumer's voicemail, and this should be deemed the collector's consent to the recording. These recordings may be introduced in evidence at trial—the recordings are not being submitted to prove the truth of the language used, but that the language used in fact took place.[343] On such occasions, the client should be instructed to bring the tape containing the collector's message to the attorney, so that it may be preserved as evidence. Similarly, texts and emails should be preserved and provided to the consumer's attorney.

11.5.2.5 Can the Collector Record Its Own Call?

Larger debt collectors record many of their debt collection calls and are increasingly able to retrieve many of those calls when sued. A debt collector's tapes may be used to exonerate the debt collector.[344]

The same standards should apply to a collector recording the call as apply to the consumer, so that in some states, the collector will need the consumer's consent to record the call. Collectors may seek to obtain that consent by informing the consumer that the call will be recorded for quality assurance purposes. It is unclear whether the consumer's silence after that announcement is sufficient consent.

11.5.2.6 How to Use Recordings to Support a Case

Where allowed under state law, consumers sometimes tape record their telephone conversations with debt collectors without disclosing that the recording is taking place.[345] Tape recording reduces contests about the actual contents of abusive calls. Several courts have issued protective orders which prevent the disclosure of consumer's recordings until after the debt collector who was unknowingly recorded has been deposed.[346] These courts reason that the party in possession of the tape has a right to hear the unrefreshed and unpolished recollections of the person on tape, and that pre-deposition access to the tapes will give the recorded person an opportunity to tailor their testimony to fit the contents of the tape.[347]

One court has noted that problems associated with tailored testimony have been long recognized and practices such as witness sequestration have been developed to combat the effects.[348] These courts reason that post-deposition disclosure of the recording will allow the deponent to explain any inconsistencies at trial, thereby mitigating any prejudice.[349] Although the weight of authority suggests that recordings should be withheld until after the person recorded has been deposed, it is a matter of the trial court's discretion.[350]

Parties who have been unknowingly recorded argue that it is unfair to depose them without knowledge of a recording's contents while the other party is deposed after hearing the tapes.[351] Courts that have accepted this argument reason

341 *See* Iowa S. Ct. Bd. of Prof'l Ethics and Conduct v. Plumb, No. 91/95-1852 (Iowa 1996) (taping private conversation with magistrate was unethical, even if done to record threats of false accusation of drug dealing). *See also* Parrot v. Wilson, 707 F.2d 1262 (11th Cir. 1983) (any work product privilege that may have applied to taped conversation was lost because of unethical secret tape recording); Meacham v. Outdoor World Corp., 12 ABA/BNA Lawyers Manual on Prof'l Conduct 443 (N.Y. Sup. Ct. Nov. 27, 1996) (disqualifying class counsel for secretly taping adverse party's phone call).

342 *See* § 1.5.3, *supra;* § 11.5.4.2, *infra* (regarding debt collector's obligation under Reg. F § 1006.100(b) to retain call recording for three years after call is recorded).

343 Walker v. Asset Acceptance, L.L.C., 2012 WL 2839807 (D.N.J. July 10, 2012). *See* § 11.5.2.6, *infra* (introducing calls as evidence at trial).

344 *See* Ford v. Principal Recovery Group, Inc., 2012 WL 930334 (W.D.N.Y. Mar. 19, 2012) (tape transcript showed debt collector said debt had just come to "my office" rather than to collection agency's offices).

345 In some states, it is criminal for a party to tape record a call without disclosing that the call is being recorded. In those and additional states, it may be unethical for an attorney to advise tape recording without mutual consent. *See* §§ 11.5.2.2, 11.5.2.3, *supra.*

346 *See* McQueen v. Huddleston, 2015 WL 3746733 (W.D.N.Y. June 15, 2015); Poppo v. Aon Risk Services, Inc., 2000 WL 1800746, at *1 (S.D.N.Y. Dec. 6, 2000); Walls v. Int'l Paper Co., 192 F.R.D. 294, 298–300 (D. Kan. 2000); Ward v. CSX Transp., Inc., 161 F.R.D. 38, 41 (E.D.N.C. 1995); Torres-Paulett v. Tradition Mariner, Inc., 157 F.R.D. 487, 488 (S.D. Cal. 1994); Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 104 (E.D.N.C. 1993); Sherrell Perfumes, Inc. v. Revlon, Inc., 77 F.R.D. 705, 707 (S.D.N.Y. 1977). *See also* Hildebrand v. Wal-Mart Stores, Inc., 194 F.R.D. 432, 435 (D. Conn. 2000); Charles A. Wright, et al., 8 Federal Practice and Procedure Civ. 2d § 2015 n.26 (compiling authorities).

347 *See* Young v. BC Services, Inc., 2011 WL 2443765 (S.D. Ala. 2011); Poppo v. Aon Risk Services, Inc., 2000 WL 1800746, at *1 (S.D.N.Y. Dec. 6, 2000); Walls v. Int'l Paper Co., 192 F.R.D. 294, 298–300 (D. Kan. 2000); Torres-Paulett v. Tradition Mariner, Inc., 157 F.R.D. 487, 489 (S.D. Cal. 1994); Sherrell Perfumes, Inc. v. Revlon, Inc., 77 F.R.D. 705, 707 (S.D.N.Y. 1977).

348 Poppo v. Aon Risk Services, Inc., 2000 WL 1800746, at *1 (S.D.N.Y. Dec. 6, 2000).

349 Torres-Paulett v. Tradition Mariner, Inc., 157 F.R.D. 487, 489 (S.D. Cal. 1994). *See* Walls v. Int'l Paper Co., 192 F.R.D. 294, 299 (D. Kan. 2000). *See also* Sherrell Perfumes, Inc. v. Revlon, Inc., 77 F.R.D. 705, 707 (S.D.N.Y. 1977).

350 *See* Doebele v. Sprint Corp., 2001 WL 392513, at *2 (D. Kan. Apr. 10, 2001), *citing* Pro Billiards Tour Ass'n, Inc. v. R.J. Reynolds Tobacco, Co., 187 F.R.D. 229, 230 (M.D.N.C. 1999).

351 *See* Fausto v. Credigy Services Corp., 251 F.R.D. 436 (N.D. Cal. June 19, 2008) (denying protective order to produce tape recordings only after depositions were completed because it would be unfair not to

that withholding of certain recordings encourages trying to create inconsistencies in deposition testimony to be used as impeachment evidence during trial.[352] Another court decided that if "the real value of the recording is not in impeaching a witness, but in the facts and issues determined by the recording," then the recording must be disclosed prior to the deposition of the party who was unknowingly recorded.[353]

Defendants may try to avoid having to give a deposition before hearing the tapes by deposing the plaintiff first and asking to hear the tape and testimony about it at the deposition. In order to avoid this, plaintiffs should notice their depositions as soon as possible and urge the court to adhere to the customary practice of holding depositions in the order that they were noticed.[354]

If the recording was obtained through legal methods, keep in mind the evidentiary elements in using such recordings at trial.[355] This may include verification of the speakers, date of the recording, recording device used, and whether any changes or deletions were made.[356] The Eighth Circuit considered seven factors when determining the admissibility of tape-recorded conversations, including:

1. That the recording device was capable of taking the conversation now offered in evidence.
2. That the operator of the device was competent to operate the device.
3. That the recording is authentic and correct.
4. That changes, additions or deletions have not been made in the recording.
5. That the recording has been preserved in a manner that is shown to the court.
6. That the speakers are identified.
7. That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.[357]

Courts have since used the seven factors as a guide to review the totality of the circumstances regarding the reliability and the admissibility of the recordings.[358]

11.5.3 The Collector's Own Documents

The collector's records of collection contacts are often useful; obtaining them should be a priority at this stage. The database screens that contain the dates and amounts of payments should be requested in discovery from the creditor, collection agency, or attorney. These records, telephone logs, e-mails between collector and creditor, and recordings of telephone conversations may be central to the issue of liability on the purported debt. The documents in the creditor's and collector's account file (including, in some cases, references to tape recordings), may identify at least some of the dates and contents of collection contacts.

These documents are maintained by most collection agencies[359], as well as by creditors.[360] If these documents are not furnished voluntarily, they should be obtained through discovery.[361] If they are not available, their absence (or destruction) should be thoroughly explored to determine whether or not a basis for an adverse inference or presumption may exist.[362] In many cases, it can be informative to obtain communications between the collection law firm or collection agency and the creditor or debt buyer. These communications may be found in email or some other electronic system.

allow defendant to access recording); Stamps v. Encore Receivable Mgmt., Inc., 232 F.R.D. 419, 420, 424 (N.D. Ga. 2005) (plaintiff failed to articulate value of defendant's unrefreshed recollection of events giving rise to this litigation in seeking to delay production of recordings until after depositions); Smith v. WNA Carthage, L.L.C., 200 F.R.D. 576, 579 (E.D. Tex. 2001); Roberts v. Americable Int'l, Inc., 883 F. Supp. 499, 504 (E.D. Cal. 1995). *See also* Evan v. Estell, 203 F.R.D. 172, 175 (M.D. Pa. 2001); Frazier v. Southeastern Penn. Transp. Auth., 161 F.R.D. 309 (E.D. Pa. 1995).

352 *See* Fausto v. Credigy Services Corp., 251 F.R.D. 436 (N.D. Cal June 19, 2008) (denying protective order to produce tape recordings only after depositions were completed because it would be unfair not to allow the defendant to access the recording); Stamps v. Encore Receivable Mgmt., Inc., 232 F.R.D. 419, 420, 424 (N.D. Ga. 2005) (plaintiff failed to articulate the value of defendant's unrefreshed recollection of the events giving rise to this litigation in seeking to delay production of recordings until after depositions); Innovative Therapy Prods., Inc. v. Roe, 1998 WL 293995, at *2 (E.D. La. June 4, 1998); Roberts v. Americable Int'l, Inc., 883 F. Supp. 499, 505 (E.D. Cal. 1995).

353 Pro Billiards Tour Ass'n, Inc. v. R.J. Reynolds Tobacco Co., 187 F.R.D. 229, 231 (M.D.N.C. 1999). *See also* Innovative Therapy Prods. v. Roe, 1998 WL 293995, at *2 (E.D. La. June 4, 1998).

354 *See, e.g.*, Sprague Elec. Co. v. Cornell-Dubilier Elec., Corp., 4 F.R.D. 113, 114 (D. Del. 1944).

355 Fed. R. Evid. 901 ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."). *See* § 11.5.4.6, *infra*.

356 *See, e.g.*, Hochroth v. Ally Bank, 461 F. Supp. 3d 986, 999 (D. Haw. 2020); Asia Econ. Inst. v. Xcentric Ventures, L.L.C., 2010 WL 4977054, at *12 (C.D. Cal. July 19, 2010).

357 United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974).

358 United States v. Oslund, 453 F.3d 1048 (8th Cir. July 14, 2006); United States v. Matta-Ballesteros, 71 F.3d 754, 768 (9th Cir. 1995); United States v. Clark, 986 F.2d 65, 68 (4th Cir. 1993).

359 As of November 30, 2021, debt collectors must retain evidence of compliance or noncompliance with the FDCPA and Regulation F starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt. For phone recordings, the debt collector must retain the recordings for three years after the dates of the telephone calls. However, a debt collector is not required to create or maintain additional records to evidence compliance or record calls, but only must retain applicable records, including call recordings, that are already created in the ordinary course of its business. Reg. F Official Interpretations § 100(a)-2. *See* § 11.5.4.2, *infra*.

360 Collection agencies that do no more than send a series of letters to consumers are unlikely to keep records of contacts other than an identification of which series was sent to whom.

361 Sample discovery documents are available online as companion material to this treatise.

362 *See* Rogers v. Exxon Research & Eng'g Co., 550 F.2d 834, 843 (3d Cir. 1997); United States v. Roelof Constr. Co., 418 F.2d 1328, 1331 (9th Cir. 1969). *See also* Cooling Sys. & Flexibles v. Stuart Radiator, 777 F.2d 485 (9th Cir. 1985) (failure to produce evidence may result in negative inference). *Cf.* Wilson v. Aargon Agency Inc., 2015 WL 7185451 (D. Nev. Nov. 13, 2015) (collector must offer evidence regarding destroyed policy manuals outside of presence of jury).

A collector's notes regarding collection contacts present several difficulties. If handwritten, they may be barely legible. Often the notes are computer recorded and contain unfamiliar abbreviations, such as "PH" for "phoned," "POE" for "place of employment," and "S" for "spouse," and unfamiliar codes, such as a series of digits representing a series of letters, a referral to a collection agency, or a phone call. Appendix G, *infra*, sets out frequently used codes.[363]

The record and abbreviations can usually be deciphered, with some time and patience, using the following method. Duplicate what is written on the card or computer record from the beginning, writing out each word, abbreviation, or letter that is obvious, and leaving blanks and question marks when the writing or abbreviations are unclear. Patterns will develop to place abbreviations and illegible handwriting in sufficient context to make their meaning clear.

A friendly bank examiner, collection attorney, or former collection employee can be of great assistance, since many codes and abbreviations are used industry-wide. Employee training programs and operations manuals may also be helpful in deciphering the codes and abbreviations. In discovery, it is important to request a key to the abbreviations and codes used in the call logs and notes.

After obtaining and examining the relevant documents and information, the client should be interviewed again to verify dates, fill in gaps, solve discrepancies in developing a written chronology, and determine if any follow-up discovery is needed to prove each and every element of the claim.[364]

It is not unusual for the collector's records to be incomplete (for example, failing to record abusive collection contacts).

11.5.4 Discovery

11.5.4.1 Initial Focus

Interrogatories, admissions, and a request for production of documents should be served with the complaint or soon thereafter to maintain the momentum of the case and to obtain critical evidence while it is still fresh and available. Include a request for a key to the codes and abbreviations used in the collector's records. Sample discovery requests and depositions are included in this treatise's digital version under Companion Material>Pleadings and Discovery.[365]

In order to establish the contents of collection records as evidence, and ensure they can be admitted into evidence, plaintiff's counsel can depose a custodian of the records or another qualified witness to establish a hearsay exception under Federal Rule of Evidence 803(6). Identify the best adverse witnesses to depose for purposes of introducing and interpreting the collector's records. Employees that worked on the account, their supervisors, their job duties, their roles relative to the account, their last known address(es) and telephone numbers, and their current employers must be identified.

A deposition of a witness familiar with the codes and abbreviations used can provide information regarding any unsolved codes or abbreviations. A witness familiar with the collection attempts on the consumer's file can help determine if the defendant has any independent recollection of their phone calls to the consumer.

To the extent permissible under local ethics rules, recent former employees of the collector should be identified and located, since they may be less hostile to the client and more willing to provide complete information about the collector's business routines and record-keeping methods. Particularly if resources for depositions are limited, it may be worthwhile to interview any former employees prior to taking their deposition to determine if they are cooperative and able to help. However, some states may not permit *ex parte* communications with former employees as they may be considered represented by their former employer's legal counsel.[366]

If contact with former employees is permitted, local ethics rulings may require that disclosures be made by the consumer's attorney about the relationships involved.[367] If no former employee is available, it may be worthwhile deposing a lower-ranking collector employee before, or rather than, the manager, because they may have less loyalty to the debt collector and less of a financial stake in defending the collector's practices.

Debt collectors may argue that Federal Rule of Civil Procedure 26(b)(1) prevents discovery about collection letters, contacts, and other conduct that is not specifically pleaded in the consumer's complaint because such a request is not relevant or "proportional to the needs of the case." Federal Rule of Civil Procedure 26(b)(1) requires "proportionality" of the requested discovery to the needs of the case as a factor in determining allowable discovery.[368]

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363 *See also* Artese v. Academy Collection Serv., 1997 WL 509404, at *2 (D. Conn. July 28, 1997) (denying motion to compel production of "plain English transcript" of defendant debt collector's records, including meaning of codes and abbreviations, because specimen attached by defendant seemed entirely understandable and no "plain English transcript" was necessary).

364 *See, e.g.*, Burton v. Kohn Law Firm, S.C., 934 F.3d 572 (7th Cir. 2019) (affirming summary judgment for collection law firm and collection agency on §§ 1692d and 1692e claims where consumer, who denied that debt was his, failed to present sufficient evidence that alleged debt was consumer debt).

365 *See* § 1.1.1.3, *supra*.

366 *See, e.g.*, S. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 Neb. L. Rev. 868 (2003). *See also* Intergen N.V. v. Grina, 231 F. Supp. 2d 393 (D. Mass. 2002) (granting counsel permission to speak to opposing party's former employees); ABA Model Rule of Prof'l Conduct 4.2 cmt. 7 (lawyer may communicate with former employees without consent of former employer's counsel).

367 *See* S. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 Neb. L. Rev. 868 (2003). *See also* ABA Model Rule of Prof'l Conduct 4.3 (lawyer must disclose that they are not disinterested).

368 "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the

These arguments should fail, since one of the factors that the court must consider in setting the amount of statutory damages is the frequency and persistence of noncompliance by the debt collector.[369] Collection contacts other than the ones pleaded in the complaint are also relevant to show intent, another listed factor for setting statutory damages.[370]

Indeed, the Advisory Committee Notes of Rule 26(b)(1) list "other incidents of the same type, or involving the same product," as an example of information that may well be relevant and discoverable under the new standard. The revised rule also makes clear that information is discoverable even if inadmissible, as long as it is relevant to the subject matter involved in the action: "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available, so long as it is otherwise within the scope of discovery. Nonetheless, it is prudent to plead that the debt collector's violations "include, but are not limited to," the specific contacts set forth in the complaint.

A more serious problem may be the difficulty of conducting discovery to determine whether there are grounds for additional legal claims. For example, the consumer may want to plead a defamation claim in addition to the FDCPA claim but needs additional information about the extent to which the debt collector communicated with other people. Consider a discovery plan at the time of pleading and try to plead some facts or some claims on which discovery into missing elements can be based. In addition, a debt collector may first have to establish that the requested discovery is burdensome, before addressing the issue of proportionality.[371]

A debt collector may provide the court with its records, such as call logs or collector's notes, to show that a contact alleged by the consumer did not occur.[372] The consumer's call log or notes, or detailed memory, could create a triable issue in such a situation.

If the collector provides such evidence outside the pleadings in a motion to dismiss, if the court allows such submissions, it may convert the motion to a motion for summary judgment.[373] In either case, the consumer's attorney should oppose such motions, arguing that more time for discovery is necessary, and asserting the evidence sought that would create an issue of fact to defeat the collector's motion to dismiss[374] or summary judgment motion.[375]

An affidavit submitted by the plaintiff's attorney in opposition to a motion to dismiss, outlining the multiple items sought that are relevant to their claims, may be sufficient to establish that more time for discovery is needed, and may forestall conversion of any motion to dismiss to a motion for summary judgment.[376] The Second Circuit found an abuse of discretion when summary judgment was not postponed until the consumer had an opportunity to depose the defendant's affiants.[377]

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needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

369 15 U.S.C. § 1692k(b)(1); Shields v. Prof'l Bur. of Collection of Maryland, Inc., 2021 WL 1736862 (D. Kan. 2021) (allowing discovery beyond just letters defendant mailed to plaintiff, in part, because claims for damages includes "frequency and persistence of noncompliance" as factor); Kimbro v. I.C. Sys., Inc., 2002 WL 1816820 (D. Conn. July 22, 2002) (overruling collector's objections to routine FDCPA discovery requests—seeking, *inter alia*, itemization of debt, plain English translation of its collection/contact notes, details of collector's reporting to credit bureaus, later changes made to subject dun, copies of other complaints and judgments against collector, and arrangement and communication between collector and creditor—as each was found to meet standards for discovery in federal court; inviting consumer to request award of attorney fees for successfully prosecuting discovery motion). *Cf.* Navarro v. Eskanos & Adler, 2006 WL 3533039 (N.D. Cal. Dec. 7, 2006) (granting consumer leave to amend to assert collection lawyers who deceptively rubber -stamped collection letters without legal review, as consumer promptly requested leave to amend after learning of this deceptive practice in depositions). *But see* Lewis v. ACB Bus. Serv., Inc., 135 F.3d 389 (6th Cir. 1998) (debtor not entitled to discovery of contract between creditor and debt collector where debtor did not dispute existence of debt and debt collector did not dispute that it had sent letter at issue; thus questions of whether letter was sent pursuant to contract or whether debt collector acted outside terms of contract were not relevant).

370 15 U.S.C. § 1692k(b)(1). Fed. R. Evid. 404(b) provides that evidence of other acts is admissible to show intent.

371 *See* Halvorsen v. Credit Adjustments Inc., 2016 WL 1446219, at *2 (N.D. Ill. Apr. 11, 2016).

372 *See* Laabs v. ER Solutions, Inc., 2011 WL 1337100 (W.D. Pa. Apr. 7, 2011).

373 *See* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 721 F.3d 264, 281 (4th Cir. 2013).

374 Jackson v. Sagal, 370 F. Supp. 3d 592 (D. Md. 2019).

375 *See* Fed. R. Civ. P. 56(d); Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003); Copeland v. Healthcare Revenue Recovery Group, Inc., 2019 WL 3777630 (E.D. Mo. Aug. 12, 2019) (allowed collection agency discovery to ascertain the circumstances surrounding the challenged telephone call and the consumer's resulting "belief" and "understanding" before summary judgment); Jackson v. Sagal, 370 F. Supp. 3d 592, 599 (D. Md. Mar. 29, 2019) (court declined to convert motion to dismiss to motion for summary judgment because discovery was necessary); Black v. AFNI, Inc., 2016 WL 4249491 (D.N.J. Aug. 10, 2016); Miller v. Account Mgmt. Services, 2008 WL 596011 (N.D. Ind. Feb. 29, 2008). *But see* Raburn v. Community Mgmt., L.L.C., 761 Fed. Appx. 263, 268 (5th Cir. 2019) (Rule 56(d) relief denied where plaintiff did not comply with all elements of Rule); Argentieri v. Fisher Landscapes, Inc., 15 F. Supp. 2d 55 (D. Mass. 1998) (debtor not entitled to opportunity to discover evidence in support of debtor's claim that law firm collector was "debt collector" under FDCPA, given lack of any concrete basis in record for questioning firm's affidavit that no more than 0.4% of its practice was devoted to debt collection).

376 *See* Jackson v. Sagal, 370 F. Supp. 3d 592, 598 (D. Md. Mar. 29, 2019) (affidavit listed multiple items for which plaintiff sought additional discovery; court declined to convert motion to dismiss to motion for summary judgment because discovery was necessary).

377 Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003).

11.5.4.2 Areas of Inquiry Permitted

Courts have required debt collectors to provide a wide variety of types of information in discovery,[378] including information about the collector's internal procedures, business, and assets, such as:

- The collector's internal manuals;[379]
- The process by which a dunning letter was generated;[380]
- Written procedures and protocols the collector used or employed in complying with the FDCPA;[381]
- Internal procedures for accessing and/or reporting to the credit bureaus;[382]
- Codes used in the collector's collection records;[383]
- Liability insurance policies;[384]
- Tax returns,[385] financial documents,[386] and profit and loss statements[387] to determine net worth for class statutory damages;
- Where defendant's production of its balance sheets was incomplete as evidence of its net worth, production of a current audited financial statement with the underlying accountant's notes;[388] and
- Debt collection employees' personnel file,[389] job descriptions,[390] home addresses, and phone numbers.[391]

378 *See generally* Appx. E.3.9, *infra*.

379 Barnello v. Bayview Loan Servicing, L.L.C., 2015 WL 5782346 (M.D. Fla. Sept. 2, 2015); Swelnis v. Universal Fid. L.P., 2014 WL 1571323 (N.D. Ind. Apr. 17, 2014) (training materials); Arboleya v. Firstsource Advantage, L.L.C., 2010 WL 11570727 (N.D. Ala. Sept. 1, 2010); Evon v. Law Offices of Sidney Mickell, 2010 WL 455476 (E.D. Cal. Feb. 3, 2010) (debt collector was to not redact any discrete segments of its policy and procedure manuals that were relevant to complaint); Hastings v. Asset Acceptance, L.L.C., 2007 WL 461477 (S.D. Ohio Feb. 7, 2007); Boutvis v. Risk Mgmt. Alternatives, Inc., 2002 WL 971666 (D. Conn. May 3, 2002); Artese v. Academy Collection Serv., 1997 WL 509404 (D. Conn. July 28, 1997) (limiting request for policy or training manuals regarding collection practices to any manual containing provisions about dealing directly with debtors who had retained counsel).

380 McWatters v. Cherry Creek Strategic Advisory, L.L.C., 2014 WL 2957739 (W.D. Mich. July 1, 2014); Kimbro v. I.C. Sys., Inc., 2002 WL 1816820 (D. Conn. July 22, 2002); Yancey v. Hooten, 180 F.R.D. 203 (D. Conn. 1998).

381 *See* Barnello v. Bayview Loan Servicing, L.L.C., 2015 WL 5782346 (M.D. Fla. Sept. 2, 2015); Hallmark v. Cohen & Slamowitz, 304 F.R.D. 165 (W.D.N.Y. 2015), *aff'd*, 2015 WL 4483959 (W.D.N.Y. July 22, 2015); Godson v. Eltman, Eltman & Cooper, P.C., 2014 WL 4627216 (W.D.N.Y. Sept. 15, 2014); Drossin v. Nat'l Action Fin. Services, Inc., 2008 WL 5381815 (S.D. Fla. Dec. 19, 2008); Hastings v. Asset Acceptance, L.L.C., 2007 WL 461477 (S.D. Ohio Feb. 6, 2007); Boutvis v. Risk Mgmt. Alternatives, Inc., 2002 WL 971666 (D. Conn. May 3, 2002).

382 Kimbro v. I.C. Sys., Inc., 2002 WL 1816820 (D. Conn. July 22, 2002); Boutvis v. Risk Mgmt. Alternatives, Inc., 2002 WL 971666 (D. Conn. May 3, 2002).

383 McWatters v. Cherry Creek Strategic Advisory, L.L.C., 2014 WL 2957739 (W.D. Mich. July 1, 2014); Kimbro v. I.C. Sys., Inc., 2002 WL 1816820 (D. Conn. July 22, 2002); Yancey v. Hooten, 180 F.R.D. 203 (D. Conn. 1998). *But see* Artese v. Academy Collection Serv., 1997 WL 509404 (D. Conn. July 28, 1997) (denying motion to compel production of "plain English transcript" of defendant debt collector's records).

384 *E.g.*, Godson v. Eltman, Eltman & Cooper, P.C., 2014 WL 4627216 (W.D.N.Y. Sept. 15, 2014); Tzanetis v. Weinstein & Riley, P.S., 2009 WL 5128892 (D. Conn. Dec. 18, 2009) (all insurance documents); Yancey v. Hooten, 180 F.R.D. 203 (D. Conn. 1998). *See also* Hill v. Asset Acceptance, L.L.C., 2014 WL 3014945 (S.D. Cal. July 3, 2014).

385 Armamburu v. Healthcare Fin. Services, Inc., 2007 WL 2020181 (E.D.N.Y. July 6, 2007); Mailloux v. Arrow Fin. Services, L.L.C., 2002 WL 246771 (E.D.N.Y. Feb. 21, 2002) (entitled to discover defendant's tax returns and other financial information); Hanks v. Zenner, 2000 WL 1281321 (W.D. La. June 30, 2000), *rev'd without op.*, 244 F.3d 134 (5th Cir. 2000); Yancey v. Hooten, 180 F.R.D. 203 (D. Conn. 1998). *But see* Garcia v. Jefferson Capital Sys., L.L.C., 2006 U.S. Dist. LEXIS 56147 (M.D. Fla. Aug. 11, 2006) (mag.; allowing consumer to depose individuals who had some financial interest in debt collector, but was not entitled to obtain their personal financial documents at early stage of litigation).

386 *See* Matthias v. Tate & Kirlin Assoc., Inc., 465 F. Supp. 3d. 878 (W.D. Wis. 2020); Vinas v. Credit Bur. of Napa Cty., Inc., 2015 WL 5009981 (D. Md. Aug. 21, 2015); Hallmark v. Cohen & Slamowitz, 304 F.R.D. 165 (W.D.N.Y. 2015), *aff'd*, 2015 WL 4483959 (W.D.N.Y. July 22, 2015); Green v. Monarch Recovery Mgmt., Inc., 997 F. Supp. 2d 932 (S.D. Ind. 2014); Godson v. Eltman, Eltman & Cooper, P.C., 2014 WL 4627216 (W.D.N.Y. Sept. 15, 2014); Gold v. Midland Credit Mgmt., Inc., 2014 WL 3371012 (N.D. Cal. July 9, 2014); Powers v. Credit Mgmt. Services, Inc., 2013 WL 1156447 (D. Neb. Mar. 20, 2013). *Cf.* Swelnis v. Universal Fid. L.P., 2014 WL 1571323 (N.D. Ind. Apr. 17, 2014) (plaintiff's pre-class certification motion to compel production of net worth information taken under advisement pending court's ruling on summary judgment).

387 Wise v. Cavalry Portfolio Services, L.L.C., 2012 WL 1597450 (D. Conn. May 7, 2012) (financial documents sought could be relevant to issue of "net worth"); Evon v. Law Offices of Sidney Mickell, 2010 WL 455476 (E.D. Cal. Feb. 3, 2010) (compelling evidence on net worth prior to certification, in part because it was volunteered); Nicander v. Hecker, 2009 WL 5084087 (N.D. Cal. Dec. 21, 2009) (compelling debt collector to produce current tax return and prepared financial statements). *See also* Miller v. Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, L.L.P., 2011 WL 6105033 (E.D.N.Y. Dec. 7, 2011) (entitled to defendant attorney's net worth as well as that of defendant law firm); Del Campo v. Am. Corrective Counseling Serv., Inc., 2009 WL 3458298 (N.D. Cal. Oct. 23, 2009) (ordered discovery into the individual defendants' personal net worth relevant to 1% class damages calculation; rejected bifurcation of liability and damages); Trevino v. ACB Am., Inc., 232 F.R.D. 612 (N.D. Cal. Jan. 27, 2006); Hanks v. Zenner, 2000 WL 1281321 (W.D. La. June 30, 2000) (by agreement, documents ordered subject to a confidentiality order; tax returns were relevant to punitive damages), *rev'd without op.*, 244 F.3d 134 (5th Cir. 2000).

388 Matthias v. Tate & Kirlin Assoc., Inc., 465 F. Supp. 3d 878 (W.D. Wis. 2020).

389 *See* Arboleya v. Firstsource Advantage, L.L.C., 2010 WL 11570727 (N.D. Ala. Sept. 1, 2010). *But see* Mohr v. Sec. Credit Services, L.L.C., 141 F. Supp. 3d 179 (N.D.N.Y. 2015) (debt collector personnel files denied to consumer).

390 Davis v. Creditors Interchange Receivable Mgmt., L.L.C., 585 F. Supp. 2d 968 (N.D. Ohio 2008); Yancey v. Hooten, 180 F.R.D. 203 (D. Conn. 1998) (relevant to claim that attorney collector was in fact not acting as attorney, but as unlicensed collection agency). *See also* Hill v. Asset Acceptance, L.L.C., 2014 WL 3014945 (S.D. Cal. July 3, 2014) (ordered to produce all of its organizational charts).

391 CFPB v. Navient Corp., 2018 WL 3824367, at *3–4 (M.D. Pa. Aug. 10, 2018); Mohr v. Sec. Credit Services, L.L.C., 141 F. Supp. 3d 179

Consumers can also discover information about the collector's contacts with creditors, assignors, consumer reporting agencies, and other third parties, such as:

- The amount of money the debt collector paid to purchase the debt;[392]
- Billing records of the defendant's collection lawyer;[393]
- Business information conveyed to legal counsel;[394]
- Collection lawyer's retainer agreement and letter to client requesting information about the consumer's debt;[395]
- Information regarding the contractual relationship between the debt collector and a collection law firm,[396] the creditor,[397] or the entity it purchased the debt from;[398]
- All agreements the collector had with consumer reporting agencies;[399]
- All information provided by the collector to any credit reporting agencies;[400]
- Information conveyed between the debt collector and the creditor[401] or debt buyer, including emails;[402]
- Student loan contracts and loan payments from the collector's technical school client;[403] and
- Attorney collector's in-state client list and annual advertisements.[404]

Courts have allowed consumers to seek information about the consumer's account at the collector and the collector's contacts with the consumer, including:

- All collection records regarding the consumer's account;[405]
- An itemization of the debt;[406]
- Information about the ownership of the debt being collected;[407]
- Information about the telephone calls placed by the debt collector to the consumer;[408] and
- Information about any persons who drafted and/or approved the form and content of collection letter sent to the consumer.

(N.D.N.Y. 2015); Florida First Fin. Group, Inc. v. Castro, 815 So. 2d 789 (Fla. Dist. Ct. App. 2002) (neither privacy laws nor FDCPA prevented discovery of home addresses and phone numbers of debt collection employees). *See also* Hardesty v. Anthony A. Petrocchi, P.C., 2012 WL 1744991 (W.D. Wash. May 16, 2012); Davis v. Creditors Interchange Receivable Mgmt., L.L.C., 585 F. Supp. 2d 968, 978 (N.D. Ohio 2008) (collection agency ordered "to provide the plaintiffs with a list of current and former employees, their last known contact information, and the position these employees held during the time period relevant to this case").

392 Boutvis v. Risk Mgmt. Alternatives, Inc., 2002 WL 971666 (D. Conn. May 3, 2002).

393 *See* Leasure v. Willmark Communities, Inc., 2012 WL 4361555 (S.D. Cal. Sept. 21, 2012) (records not privileged and relevant to whether defendant collected debts through its lawyer).

394 *See* Harris v. D. Scott Carruthers & Assoc., 2010 WL 610978 (D. Neb. Feb. 18, 2010). *But see* Baylor v. Mitchell Rubenstein & Assoc., 857 F.3d 939 (D.C. Cir. May 30, 2017) (attorney-client privilege attached to communications between collection attorney defendant and collection agency, barring discovery of student loan documents obtained by collection attorney).

395 *See* Torres v. Toback, Bernstein & Reiss L.L.P., 278 F.R.D. 321 (E.D.N.Y. 2012).

396 *See* Gomez v. Niemann & Heyer, L.L.P., 2016 WL 8673847 (W.D. Tex. Aug. 5, 2016) (documents identifying its employees, partners, and contractors involved in collections and their agreements, compensation, and time sheets); Barnello v. Bayview Loan Servicing, L.L.C., 2015 WL 5782346 (M.D. Fla. Sept. 2, 2015); Avoletta v. Danforth, 2012 WL 3113151 (D. Conn. July 31, 2012) (rejecting collection lawyer's claims of attorney-client privilege, and ordered entire collection file be produced); Bianchi v. Bronson & Migliaccio, L.L.P., 2010 WL 940993 (S.D. Fla. Mar. 12, 2010).

397 *See* Hunsinger v. SKO Brenner Am., Inc., 2014 WL 114348 (N.D. Tex. Jan. 9, 2014); Torres v. Toback, Bernstein & Reiss L.L.P., 278 F.R.D. 321 (E.D.N.Y. 2012); Dickard v. Oklahoma Mgmt. Services for Physicians, L.L.C., 2007 WL 2460618 (W.D. Ark. Aug. 24, 2007). *But see* MacDermid v. Discover Fin. Services, 488 F.3d 721 (6th Cir. 2007) (consumer was not entitled to discovery on relationship between Discover and collection employees).

398 Barnello v. Bayview Loan Servicing, L.L.C., 2015 WL 5782346 (M.D. Fla. Sept. 2, 2015) (materials to be produced included agreement to buy debt); Gold v. Midland Credit Mgmt., Inc., 2014 WL 3371012 (N.D. Cal. July 9, 2014); Kimbro v. I.C. Sys., Inc., 2002 WL 1816820 (D. Conn. July 22, 2002); Boutvis v. Risk Mgmt. Alternatives, Inc., 2002 WL 971666 (D. Conn. May 3, 2002). *See also* Tzanetis v. Weinstein & Riley, P.S., 2009 WL 5128892 (D. Conn. Dec. 18, 2009) (compelling debt collection law firm to state relationships among defendant, its principals, and others); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 2009 WL 44551 (D. Mont. Jan. 6, 2009), *aff'd on other grounds*, 637 F.3d 939 (9th Cir. 2011) (compelling collection law firm to produce its retainer agreement with debt buyer it had represented, as agreement was not protected by attorney-client privilege, it is information preparatory to obtaining legal advice and not provided to obtain legal advice); Trevino v. ACB Am., Inc., 232 F.R.D. 612 (N.D. Cal. 2006) (providing redacted agreement between debt buyer and its collection agency was improper).

399 Boutvis v. Risk Mgmt. Alternatives, Inc., 2002 WL 971666 (D. Conn. May 3, 2002).

400 Witt v. GC Services L.P., 307 F.R.D. 554 (D. Colo. 2014); Miranda v. Integrity Solution Services, Inc., 2014 WL 519239 (D. Colo. Feb. 10, 2014).

401 Witt v. GC Services L.P., 307 F.R.D. 554 (D. Colo. 2014); McWatters v. Cherry Creek Strategic Advisory, L.L.C., 2014 WL 2957739 (W.D. Mich. July 1, 2014); Martin v. Client Services, Inc., 2010 WL 3702461 (M.D. Fla. Sept. 16, 2010).

402 *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011) (emails introduced to rebut bona fide error defense).

403 *See* Annunziato v. Collecto, Inc., 304 F.R.D. 360 (E.D.N.Y. 2015).

404 Yancey v. Hooten, 180 F.R.D. 203 (D. Conn. 1998).

405 *E.g.*, Barnello v. Bayview Loan Servicing, L.L.C., 2015 WL 5782346 (M.D. Fla. Sept. 2, 2015); McWatters v. Cherry Creek Strategic Advisory, L.L.C., 2014 WL 2957739 (W.D. Mich. July 1, 2014); Tzanetis v. Weinstein & Riley, P.S., 2009 WL 5128892 (D. Conn. Dec. 18, 2009) (date and nature of all documents and information defendant received about plaintiff's account, all documents reflecting purchase or ownership of plaintiff's account); Yancey v. Hooten, 180 F.R.D. 203 (D. Conn. 1998). *See also* Kimbro v. I.C. Sys., Inc., 2002 WL 1816820 (D. Conn. July 22, 2002). *But see* Matthias v. Tate & Kirlin Assoc., Inc., 465 F. Supp. 3d 878, 880-881 (W.D. Wis. 2020) (denying motion to compel production of the class members' full account histories, because Plaintiff was already provided identity and phone numbers of class members).

406 Kimbro v. I.C. Sys., Inc., 2002 WL 1816820 (D. Conn. July 22, 2002).

407 Hunsinger v. SKO Brenner Am., Inc., 2014 WL 114348 (N.D. Tex. Jan. 9, 2014); Padgett v. OneWest Bank, 2010 WL 3239350 (N.D. W. Va. Aug. 16, 2010) (ownership of underlying debt was relevant to whether defendant was FDCPA debt collector).

408 Martin v. Client Services, Inc., 2010 WL 3702461 (M.D. Fla. Sept. 16, 2010).

For class actions, additional discovery has been allowed, such as:

- A sample of consumer class members' credit card agreements;[409] and
- Discovery regarding the number of class members and the defendant's net worth.[410]

Consumers can also discover information about the collector's contacts with other consumers and information about past collection conduct, including:

- Information regarding lender's attorney fees and costs charged to consumers;[411]
- The number of cases in which the defendant had filed suit in the state,[412] or letters sent;[413] and
- Documents that the collectors had at the time of filing a state debt collection suit.[414]

Consumers can also discover information related directly to the defendant's defense to the FDCPA case, including:

- The defense counsel's time records in the case[415] and case notes;[416]
- The basis for the defendant's assertion of a bona fide error[417] and other defenses;[418]
- Information necessary to supplement debt buyer's responses found in collection files of debt buyer's debt collection counsel;[419]
- Information bearing on the FDCPA violations,[420] such as a witness who is competent to testify about the design, use, and efficacy of the collection letter and enclosed educational brochure; and
- Depositions of defendant's five fact witnesses where "reasonable and proportional in light of the issues at stake."[421]

On the other hand, a court found disproportionate the consumers' request in an individual action for information on complaints filed against a bank regarding its foreclosure practices in the last three years, since this would not help establish the bank's intent nearly as effectively as discovery related to the bank's specific treatment of the plaintiffs.[422] Another court found a consumer's request of "all written communication" was not proportional to the consumer's needs in obtaining evidence of frequency and persistence of noncompliance to determine statutory damages. The court instead allowed the

409 *See* Hallmark v. Cohen & Slamowitz, 304 F.R.D. 165 (W.D.N.Y. 2015).

410 *Id. But see* Tourgeman v. Nelson & Kennard, 900 F.3d 1105, 1108, 1113 (9th Cir. 2018) (consumer had burden at trial to produce evidence of debt collector's net worth to establish entitlement to class statutory damages under FDCPA and there was no showing that consumer could not obtain net worth evidence through discovery); Vandehey v. Client Services, Inc., 390 F. Supp. 3d 956, 964 (E.D. Wis. 2019) (defendant's net worth limitation on liability is affirmative defense on which defendant has burden of proof); Hill v. Asset Acceptance, L.L.C., 2014 WL 3014945 (S.D. Cal. July 3, 2014) (defendant's response that 1% of its net worth exceeds maximum recovery available to class is sufficient).

411 Holloway v. Pekay, 1996 WL 19580 (N.D. Ill. Jan. 18, 1996).

412 *See* Evon v. Law Offices of Sidney Mickell, 2010 WL 455476 (E.D. Cal. Feb. 3, 2010) (compelling defendant to state number of its collection accounts and number on which suit initiated); McCollough v. Johnson, Rodenburg & Lauinger, 645 F. Supp. 2d 917, 928 (D. Mont. 2009), *aff'd on other grounds*, 637 F.3d 939 (9th Cir. 2011); Yancey v. Hooten, 180 F.R.D. 203 (D. Conn. 1998) (relevant to whether threat of suit was intended). *See also* Davis v. Unifund CCR Partners, 2007 WL 3476523 (N.D. Cal. Nov. 15, 2007); Hastings v. Asset Acceptance, L.L.C., 2007 WL 461477 (S.D. Ohio Feb. 6, 2007) (compelled to provide files associated with collection suits in U.S. or a sample, or stipulated that more than fifty were filed after statute of limitations ran).

413 Gold v. Midland Credit Mgmt., Inc., 2014 WL 3371012 (N.D. Cal. July 9, 2014).

414 *See* Hallmark v. Cohen & Slamowitz, 304 F.R.D. 165 (W.D.N.Y. 2015) (cardholder agreements), *aff'd*, 2015 WL 4483959 (W.D.N.Y. July 22, 2015); Davis v. Unifund CCR Partners, 2007 WL 3476523 (N.D. Cal. Nov. 15, 2007). *See also* Hill v. Asset Acceptance, L.L.C., 2014 WL 3014945 (S.D. Cal. July 3, 2014) (debt buyer's spreadsheet did not adequately respond to RFPs, because it did not provide requested documents; consumer entitled to review documents that support information in spreadsheet).

415 *See* Mohr v. Sec. Credit Serv., L.L.C., 141 F. Supp. 3d 179 (N.D.N.Y. 2015); Agan v. Katzman & Korr, P.A., 328 F. Supp. 2d 1363 (S.D. Fla. 2004) (denying collector's motion to strike pre-billing worksheets attached to complaint). *See also* Evon v. Law Offices of Sidney Mickell, 2010 WL 455476 (E.D. Cal. Feb. 3, 2010) (compelling collection law firm to state compensation formula); Tzanetis v. Weinstein & Riley, P.S., 2009 WL 5128892 (D. Conn. Dec. 18, 2009) (compelling all retainer agreements); Heller v. Graf, 2004 WL 2057894 (N.D. Ill. Aug. 25, 2004) (compelling discovery related to the defendant attorney's practice of law; defendant denied that he qualified as "debt collector"); § 11.9.9, *infra*. *But see* Okyere v. Palisades Collection, L.L.C., 300 F.R.D. 149 (S.D.N.Y. 2014); Caputo v. Prof'l Recovery Services, Inc., 2004 WL 1503953 (D. Kan. June 9, 2004) (refusing to order defendant to disclose hourly rate and total paid to its out-of-state attorney).

416 *See* Mohr v. Sec. Credit Serv., L.L.C., 141 F. Supp. 3d 179 (N.D.N.Y. 2015).

417 *See* Barnello v. Bayview Loan Servicing, L.L.C., 2015 WL 5782346 (M.D. Fla. Sept. 2, 2015); Arboleya v. Firstsource Advantage, L.L.C., 2010 WL 11570727 (N.D. Ala. Sept. 1, 2010); Anchondo v. Anderson, Crenshaw & Assoc., 256 F.R.D. 661 (D.N.M. 2009).

418 *See* Gold v. Midland Credit Mgmt., Inc., 2014 WL 3371012 (N.D. Cal. July 9, 2014).

419 *See* Gold v. Midland Credit Mgmt., Inc., 2014 WL 3371012 (N.D. Cal. July 9, 2014).

420 *See* Hardesty v. Anthony A. Petrocchi, P.C., 2012 WL 1744991 (W.D. Wash. May 16, 2012) (allowing plaintiff to conduct relevant discovery concerning whether client was vicariously liable for attorney's unlawful debt collection activities, whether attorney had meaningfully reviewed account before sending attorney dun, and whether defendants intended to immediately take legal action as stated in dun).

421 *See* Shabazz v. Pinnacle Credit Services L.L.C., 2016 WL 6892948, at *3 (D. Colo. Nov. 23, 2016).

422 *See* Rose v. Bank of Am., 2017 WL 1197822, at *6 (E.D. Wash. Mar. 30, 2017). *See also* Witt v. GC Services L.P., 307 F.R.D. 554, 569 (D. Colo. 2014) (granting in part consumer's motion to compel, but also indicating that information might be more efficiently obtained in 30(b)(6) deposition, given "principles of proportionality, reasonableness, convenience, and common sense").

consumer to determine the number of similar collection letters sent to other consumers.[423]

11.5.4.3 Record Retention

Pursuant to Regulation F (effective November 30, 2021), a debt collector must follow specific rules for retaining certain records. Regulation F 1006.100 can be used to help with the development of discovery requests because it provides the requirements collectors must follow for the maintenance and retention of certain records and call recordings.

Regulation F § 1006.100 states:

> (a) *In general.* Except as provided in paragraph (b) of this section, a debt collector must retain records that are evidence of compliance or noncompliance with the FDCPA and this part starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt.
>
> (b) *Special rule for telephone call recordings.* If a debt collector records telephone calls made in connection with the collection of a debt, the debt collector must retain the recording of each such telephone call for three years after the date of the call.

Section 1006.100 requires debt collectors to retain evidence of compliance and noncompliance with Regulation F. This includes records that show both that a) the debt collector performed the actions and made the disclosures required by the FDCPA and Regulation F and b) refrained from conduct prohibited under the FCPA and Regulation F.[424] Examples of such documents include:

i. Telephone call logs as evidence of compliance or noncompliance with the prohibition against harassing telephone calls in § 1006.14(b)(1); and
ii. Copies of documents provided to consumers as evidence that the debt collector provided the information required by §§ 1006.34 and 1006.38 and met the delivery requirements of § 1006.42.[425]

Also, records substantiating a collector's claim that a consumer owes a debt are considered records that are evidence of compliance or noncompliance with the Act and should be retained pursuant to Regulation F.[426] Such records are necessary to avoid deceptive or unfair collection practices by a debt collector.[427]

Importantly, a debt collector is not required to create or maintain additional records to evidence compliance, but only has to retain applicable records that are already created in the ordinary course of its business.[428] For example, a debt collector does not need to create a call log solely for the purpose of evidencing compliance or noncompliance with the Act and Regulation F, but if the collector already keeps a call log as part of its regular business practice, it must retain that record for the period stated. Likewise, Regulation F does not require debt collectors to record calls with consumers, but if they do, they must retain the recording for each call for three years after the date of the call.[429]

A debt collector can retain records electronically or by any method that would allow the collector easy access to the records and ensures that they can be reproduced accurately, including having a legal right to access records possessed by another entity.[430]

The timeframe for retention of such records starts "on the date that the debt collector begins collection activity on a debt."[431] The term "collection activity" is not defined in the Act or Regulation F. Limited clarification in the discussion of Regulation F provides that the time period does *not* start at the time the debt collector obtains the debt, but rather "that a debt collector must begin to retain records on the date that collection activity begins on a debt."[432] With this broad directive, "collection activity" should include any action taken to prepare an account for collection, such as scrubbing portfolios for certain types of accounts as discussed in § 1.5.5, *supra*. It should also include any communication or attempt to communicate with the consumer as well as any attempts to obtain location information from third parties. It should include all credit reporting on the debt and all communications related to a debt, regardless of whether the collector seeks payment, perhaps even including limited content messages under 12 CFR § 1006.2(d) and (j).

Such records must be retained "until three years after the debt collector's last collection activity on a debt."[433] The regulation again provides minimal clarity. An example that would start the running of the three-year clock includes a debt collector transferring the debt for consideration to another party, as long as that transfer represents the last collection activity on the debt.[434] A discharge of a debt in bankruptcy, however, would not start the three-year record retention clock if the collector continues collection activity on the debt after that time, for example, on a secured debt that survives the bankruptcy or on a lien that remains after the discharge.[435]

A collector may maintain policies for retention of records for more than three years. Or a collector may decide to delete the account records three years after the final collection activity, as long as no further collection activity occurs.[436] If the collector

423 Klein v. Affiliated Group, Inc., 2019 WL 1307884 (D. Minn. Mar. 22, 2019).
424 Reg. F Official Interpretations § 100(a)-1.
425 Reg. F Official Interpretations § 100(a)-1.
426 85 Fed. Reg. 76,734, 76,857 (Nov. 30, 2020).
427 *Id.*
428 Reg. F Official Interpretations § 100(a)-2.
429 Reg. F § 1006.100(b); Reg. F Official Interpretations § 100(b)-1.
430 Reg. F Official Interpretations § 100(a)-3.
431 Reg. F § 1006.100(a).
432 85 Fed. Reg. 76,734, 76,855 (Nov. 30, 2020) (Part 1 of the debt collection rulemaking).
433 Reg. F § 1006.100(a).
434 Reg. F Official Interpretations § 100(a)-4.
435 *Id.*
436 85 Fed. Reg. 76,734, 76,857 (Nov. 30, 2020) (Part 1 of the debt collection rulemaking).

restarts collection activity on that same debt, however, having deleted the prior records would violate Regulation F.[437]

This is different for call recordings where the retention period is not dependent on when the "collection activity" begins or ends, but only requires retention of the recordings for three years after the date of the call.[438] A debt collector who deletes a call recording after three years and continues collection activity on the debt would not violate the retention requirements of Regulation F.

Regulation F applies to all debt collectors as defined under the Act, regardless of their size. If a debt collector is also a furnisher under the Fair Credit Reporting Act (FCRA), it must also comply with the recordkeeping requirements of the FCRA.[439]

Notably, because Regulation F § 1006.100 is finalized pursuant to title X of the Dodd-Frank Act that does not provide a private right of action, section 1006.100 does not provide a private right of action if a debt collector fails to comply.[440] The requirements of Reg. F § 1006.100 could be used in support of discovery requests, however, for a collector's policies and practices regarding the use and maintenance of certain records, including whether a collector keeps call logs, transaction histories, copies of communications to the consumer, call recordings, or other evidence of compliance or noncompliance with the Act and Reg. F.

11.5.4.4 Compelling Debt Collector to Respond to Discovery Requests

When the debt collector fails to answer or objects to an interrogatory or other discovery request, try to schedule a conference with the collector or its attorney to review in detail the items that are lacking. Before the conference, it is prudent to provide the collector a written list of the disputes. Federal Rule of Civil Procedure 37 requires the parties to confer or attempt to confer in good faith about the disputes before filing a motion to compel.[441] Many courts also have their own local rules and procedures for handling a discovery dispute.

If disputes remain after a good faith effort to confer, and all procedures have been followed per the court's local rules, counsel can file a motion to compel discovery pursuant to Rule 37.[442] In an extreme case, sanctions may be awarded for failure to respond to discovery appropriately.[443] The consumer may be entitled to attorney fees where the collector offered no legitimate excuse for its failure to timely respond to the plaintiff's discovery requests, nor did it adequately explain why it was unable to produce the call history reports requested by the consumer plaintiff.[444] Motions and briefs on compelling discovery accompany the digital version of this treatise at Companion Materials>Pleadings and Discovery.

11.5.4.5 Protective Orders

The parties may agree to a confidentiality or protective order at the beginning of discovery to eliminate objections based on confidentiality.[445] Some courts have a form confiden-

437 *Id.*

438 Reg. F § 1006.100(b).

439 85 Fed. Reg. 76,734, 76,857 (Nov. 30, 2020) (Part 1 of the debt collection rulemaking).

440 85 Fed. Reg. 76,734, 76,859 (Nov. 30, 2020) (Part 1 of the debt collection rulemaking).

441 *See, e.g.*, Stiffler v. Frontline Asset Strategies, L.L.C., 2019 WL 2612726 (M.D. Pa. June 26, 2019) (granting attorney fees where collection agency provided requested discovery the day after motion to compel was filed); *In re* Trevino, 564 B.R. 890, 904 (Bankr. S.D. Tex. 2017) (certification, which must accompany motion to compel discovery, of parties' good faith attempts to resolve discovery dispute should indicate names of parties who conferred or attempted to confer, manner by which they communicated, dispute at issue, as well as dates, times, and results of their discussions, if any).

442 *See also* Read v. Amana Collection Services, 1993 WL 286132 (W.D.N.Y. July 21, 1993) (imposing sanctions pursuant to Fed. R. Civ. R. 37(b) including reasonable expenses and attorney fees due to collector's failure to produce documents and refusal to answer questions at court-ordered postjudgment examination). *See generally* Appx. E.3.9, *infra*.

443 *See, e.g., In re* Trevino, 564 B.R. 890, 907 (Bankr. S.D. Tex. 2017) (sanction must be "just" and specifically related to particular claim at issue in order providing discovery (citing *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982); "The Court also has the ability to sanction a party when that party 'impedes, delays, or frustrates the fair examination of the deponent' or when an incompetent witness is put forth by a party."); Witt v. GC Services L.P., 307 F.R.D. 554, 569 (D. Colo. 2014) (defense counsel required to pay consumer's counsel $500 to defray expenses, including reasonable attorney fees, related to motion to compel discovery responses); Jasper v. Windsor Equity Grp., Inc., 2012 WL 12830001 (D.N.M. July 11, 2012) (as sanction for collection agency's abuse of discovery that was designed to ascertain its status as "debt collector," court declared that agency "is, and hereby will be considered" a "debt collector"); Jones v. Regent Asset Mgmt. Solutions, Inc., 2011 WL 2037626 (D. Conn. May 24, 2011) (entering order holding in abeyance arrest warrant for defendant collection agency's CEO, who had not paid previous sanctions for his failure to participate in court-ordered postjudgment discovery in aid of execution to collect default judgment entered against defendant, pending hearing on CEO's motions for emergency relief); Del Campo v. Am. Corrective Counseling Services, Inc., 2007 WL 3306496 (N.D. Cal. Nov. 6, 2007) (resolution of highly contested discovery issues and baseless confidentiality claims, ordering discovery and sanctioning defendants over $10,000); Kapeluschnik v. LeSchack & Grodensky, P.C., 1998 WL 35248047 (E.D.N.Y. June 4, 1998) (consumer's attorney sanctioned). *See also* McGahey v. FNMA and PHH Mortg. Corp., 2018 WL 3521175 (D. Me. 2018) (in UDAP and RESPA case, ordering reopening of deposition of corporate representative, enlargement of discovery deadline, and costs and attorney fees for bringing motion to compel where representative failed to provide adequate answers to questions regarding specific guidelines, policies, and procedures that PHH followed in evaluating and denying his HAMP applications). *Cf.* Davis v. Unifund CCR Partners, 2007 WL 3476523 (N.D. Cal. Nov. 15, 2007) (denying sanctions).

444 *See* Diegert v. Receivables Performance Mgmt., L.L.C., 2017 WL 370808, at *5 (W.D.N.Y. Jan. 26, 2017). *See also* Fulton v. Livingston Fin. L.L.C., 2016 WL 3976558 (W.D. Wash. July 25, 2016) (following parties' settlement of merits, awarding consumer $41,370 in attorney fees and imposing discovery sanctions on defense counsel).

445 Powers v. Credit Mgmt. Services, Inc., 2013 WL 1156447 (D. Neb. Mar. 20, 2013) (with protective order in place, debt collectors' objection

tiality order available on their website and specific guidelines about filing such orders.[446] A court may enter a protective order limiting the communication of the collector's trade secrets and proprietary data,[447] although there is a strong presumption of public access to litigation records and against protective orders.[448]

When the defendant is an attorney, certain evidence may not be discoverable based on the attorney-client privilege.[449] However, one court held that a collector who asserted the bona fide error of law defense (for its *Foti* violation)[450] waived the attorney-client privilege as to the relevant legal research and opinions that it had received and the identity of the attorneys who performed the work.[451] The court denied a collector's motion to strike, under Federal Rule of Evidence 408, pre-billing worksheets attached to the FDCPA complaint, since they showed that the law firm sought excessive fees in a state collection suit.[452] Recordings made upon the advice of counsel are not entitled to protection from discovery, according to a federal district court in New Jersey, even though the recording did not violate any applicable canons of ethics.[453]

Consumers may also seek protective orders from producing information sought by collectors that is not proportionate to the needs of the case.[454] Settlement agreements between the plaintiff and other defendants should not be discoverable. A remaining defendant may argue that a confidential settlement agreement is necessary to determine an offset of any amounts already paid to the plaintiff. However, under the Act, statutory damages are based on each defendant's liability, not on a lump sum recovery that would justify an offset.[455] Nor does the Act provide any provision for a right of contribution, indemnification, or equitable credit to justify an offset for causes of action under the Act.[456] Likewise, a settlement agreement is not necessary to determine any alleged double recovery of attorney fees, as the appropriate inquiry is the determination of reasonable attorney fees for work spent on pursuing claims against the remaining defendant.[457]

11.5.4.6 Additional Discovery Approaches and Issues

Counsel should be aware of impending discovery deadlines in the court's scheduling order. Most courts require that, absent some excusable circumstance, discovery initiatives must be undertaken so that the response of the opposing party is due prior to the discovery deadline. An extension of the discovery deadline may be necessary to properly follow up on discovery responses and deposition testimony,[458] or where the

that net worth information was confidential was not proper basis upon which to oppose disclosing net worth information to plaintiffs).

446 *See, e.g.*, U.S. District Courts of the Northern District of California, Hawaii, Kansas, Maine, the Northern District of Illinois, and the Eastern District of New York.

447 *See* Plascencia v. Collins Asset Group, L.L.C., 2019 WL 1163842 (W.D. Wash. Mar. 13, 2019) (consumer's motion to compel granted for production of certain documents provided that they be redacted or designated "Confidential"); Sokolski v. Trans Union Corp., 178 F.R.D. 393 (E.D.N.Y. 1998) (entering protective order limiting communication of trade secrets and proprietary data). *See also* Taylor v. United Collection Bur., Inc., 2009 WL 1708762 (S.D. Ill. June 17, 2009) (rejecting defendant's efforts to put its answer and counterclaim under seal lest it violate state privacy laws); Del Campo v. Am. Corrective Counseling Services, Inc., 2008 WL 4177916 (N.D. Cal. Sept. 8, 2008) (granting plaintiffs' motion challenging confidentiality designation of documents obtained through public records request); Del Campo v. Am. Corrective Counseling Services, Inc., 2007 WL 902568 (N.D. Cal. Mar. 22, 2007) (ordering removal of confidential designation regarding agreements between defendants revealing cost and scope of work performed and employment contracts with salary and benefits redacted, but denying removal of confidentiality with regard to weekly mailings reports); Navarro v. Eskanos & Adler, 2007 WL 4458306 (N.D. Cal. Mar. 22, 2007) (analyzing each section of collection law firm's employee manual for confidentiality or other protection from public disclosure).

448 *See* Miller v. Indiana Hosp., 16 F.3d 549 (3d Cir. 1994); Miller v. P.S.C., Inc., 2018 WL 6435708 (W.D. Wash. Dec. 7, 2018). *See also* www.publicjustice.net.

449 *See* Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999) (distinguishing general rule that attorney-client privilege did not apply to billing and expense records and holding that collection attorney's entries "reveal[ing] the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of the law, fall within the privilege"); Del Campo v. Am. Corrective Counseling Services, Inc., 2007 WL 4287335 (N.D. Cal. Dec. 5, 2007) (responses to discovery required of ACCS; did not have to provide correspondence with counsel, but did need to provide privilege logs if privilege limited its response about its collection law suits). *But see* Bolorin v. Borrino, 248 F.R.D. 93 (D. Conn. 2008) (privilege log insufficiently detailed to protect attorney-client communications in foreclosure).

450 Foti v. NCO Fin. Sys., 424 F. Supp. 2d 643 (S.D.N.Y. 2006) (name of entity, "NCO Financial Systems," did not indicate it was collection company, and therefore debt collector did not identify itself as such in all communications with consumer).

451 Anchondo v. Anderson, Crenshaw & Assoc., 256 F.R.D. 661 (D.N.M. 2009).

452 Agan v. Katzman & Korr, P.A. 328 F. Supp. 2d 1363, 1373 (S.D. Fla. 2004) (worksheets were prepared for settlement in state condominium assessment action, but contained otherwise discoverable evidence as to federal FDCPA claim; "[A]ny collection agency or collection lawyer must comply with the requirements of federal law in collecting on a debt. If that means the agency or attorney must scrutinize her attorney time records more carefully, that is a price that federal law requires").

453 Ward v. Maritz Inc., 156 F.R.D. 592, 597–598 (D.N.J. 1994).

454 Barnello v. Bayview Loan Servicing, L.L.C., 2016 WL 11565523, at *4 (M.D. Fla. Mar. 11, 2016) (granting consumers protective order against mortgage servicer's attempt to take discovery from their marriage counselor, because while consumers waived psychotherapist-patient privilege by putting their mental condition in controversy, as result of claiming significant emotional distress damages, proposed deposition and document production were "disproportional to the needs of the case"). *See* § 11.5.4.3, *supra*.

455 Close v. Account Resolution Services, ___ F. Supp. 3d ___, 2021 WL 3674066, at *2, 3 (D. Mass. 2021) (settlement agreements not relevant to offset or to determine attorney fees).

456 *Id.*

457 *Id.*

458 *See, e.g.*, Scannell v. Gunnoe & Assoc., 1997 WL 1764768 (S.D. Ohio Mar. 28, 1997) (eight months was sufficient time to conduct discovery necessary to establish defendants were "debt collectors"). *See also* Burdett v. Harrah's Kansas Casino Corp., 2003 WL 124665 (D. Kan. Jan. 12, 2003) (granting extension of time to conduct discovery to rebut debt collector's affidavit in support of summary judgment). *But see* Hochroth v. Ally Bank, 461 F. Supp. 3d 986, 1002 (D. Haw.

defendant's motion for summary judgment raises a new factual issue.[459]

If a deposition is scheduled less than thirty days before the expiration of the discovery deadline, counsel should consider seeking an extension in the event follow-up discovery is needed as a result of information gathered in the deposition. Additionally, if new information or evidence is discovered after the deadline has expired, it may be necessary to reopen discovery for a very focused inquiry.[460] A court allowed a consumer additional time to respond to the debt collector's requests for admissions where the debt collector's requests would have had the consumer deny the core factual elements of her case.[461]

When an attorney debt collector filed an affidavit indicating he did not regularly collect debts and questioned the jurisdiction of the court, the consumer was afforded limited discovery on the sole issue of whether defendant was a "debt collector."[462] Where consumers alleged inadequate service of an underlying state court action, the court compelled discovery as to the defendants concerning their allegedly improper service in the underlying state collection litigation and the regularity of their debt collection activities.[463]

A court may grant consumers' requests for a subpoena to telephone service providers so as to identify the collection caller, in order to facilitate identification of, and service of process upon, the proper corporate defendant.[464] A court may allow the consumer in an FDCPA class action to subpoena the credit card records of the class member to establish the consumer purpose of the transactions involved.[465]

Depositions of the collection employees involved in collecting the consumer's account, their supervisors, a corporate representative, and the defendant's computer specialist may be needed, depending on the type of claims involved and anticipated defenses. Some consumer attorneys seek to inspect the debt collector premises while engaged in depositions of employees.[466]

The court may limit discovery of information about the consumer or the consumer's motivation to sue[467] in order to protect the consumer's privacy or to protect against unreasonable requests, such as a consumer's criminal history or prior debts.[468] Discovery of a consumer's immigration status has been blocked in some non-FDCPA cases.[469]

But a court found reasonable a request for a consumer's records of loss of work time and medical bills.[470] Where a consumer claimed emotional distress, the court allowed the debt collector's discovery of any treatment or a diagnosis for any mental, emotional, and psychological issues from any medical provider in the past ten years.[471]

11.6 Pleading and Proof

11.6.1 Specificity of Pleading

Two Supreme Court decisions have heightened the standards for pleading claims in federal court: *Bell Atlantic Corp. v. Twombly*[472] in 2007 and then *Ashcroft v. Iqbal*[473] in 2009. *Twombly* diminished the fifty-year-old Supreme Court

2020) (extension of discovery denied where plaintiff was not diligent in bringing underlying discovery motion).

459 *See, e.g.*, Black v. AFNI, Inc., 2016 WL 4249491 (D.N.J. Aug. 10, 2016).

460 Rhodes v. Marix Servicing, L.L.C., 302 F. Supp. 3d 656, 666 (D.N.J. 2018) (plaintiff should have supplemented discovery responses to include additional FDCPA claims to be raised at trial; allowing reopening of discovery for brief period of time),

461 Pittman v. Wakefield & Assoc., Inc., 2017 WL 5593287 (D. Colo. Nov. 21, 2017).

462 *See* Mikesell v. Hafeli Staran Hallahan & Christ, P.C., 2011 WL 1812749 (E.D. Mich. May 12, 2011).

463 Sayeed v. Cheatham Farms Master Homeowners Ass'n, 2018 WL 8053857 (C.D. Cal. Dec. 19, 2018) (compelling consumers to provide discovery regarding their damages, residence, and whether residence was rented out during relevant times).

464 *See* Catlin v. Global, 2014 WL 3955220 (W.D.N.Y. Aug. 13, 2014).

465 *See* Jenkins v. Pech, 2015 WL 3872388 (D. Neb. June 23, 2015).

466 *See* Arboleya v. Firstsource Advantage, L.L.C., 2010 WL 11570727 (N.D. Ala. Sept. 1, 2010) (compelling Rule 34 inspection of physical layout of collection agency's various work areas). *But see* Bryant v. Allied Account Services, Inc., 2006 WL 2620376 (E.D.N.Y. Sept. 13, 2006) (denying consumer's motion to compel inspection of defendant collection agency's premises in order to better understand defendant debt collectors' operations because it would be too disruptive, and to produce collector's tax returns, explaining that information is readily available through deposition testimony and other discovery without intrusion of producing actual tax returns).

467 *See* Lee v. Kucker & Bruh, L.L.P., 2013 WL 680929 (S.D.N.Y. Feb. 25, 2013).

468 *See, e.g.*, Vagenos v. LDG Fin. Services, L.L.C., 2010 WL 1608877 (E.D.N.Y. Apr. 15, 2010); Wells v. GC Services L.P., 2007 WL 1068222, at *2 (N.D. Cal. Apr. 10, 2007) (quashing collector's subpoenas of consumer's creditors' records the collector claimed were material to show consumer's "credibility" and "motives," because credibility or motives were not relevant, since FDCPA "focus[es] on the conduct of debt collectors, not on the conduct or motives of the debtor"); Del Campo v. Am. Corrective Counseling Services, 2007 WL 470262 (N.D. Cal. Feb. 8, 2007) (denying check collection agency's request to produce ten years of consumer's bank records to determine criminality of her check writing).

469 *See, e.g.*, Cabrera v. Schafer, 178 F. Supp. 3d 69, 75 (E.D.N.Y. 2016) (denying permission to raise immigration status at trial involving a wage claim: "[A]lthough the evidence that the Plaintiff may have given . . . forged immigration documents may be relevant to the Plaintiff's credibility, the evidence would also be highly prejudicial to the Plaintiff because of the likelihood that it will lead the jury to be improperly biased against the Plaintiff because of his status as an illegal immigrant. Moreover, the Court is also cognizant of the 'chilling effect' that disclosure of his immigration status may have on his own decision to testify and the decision of other employees to enforce their rights under the FLSA in future cases.").

470 Wright v. Best Recovery Services L.L.C., 2015 WL 1849405 (E.D. Mich. Apr. 22, 2015).

471 Pomije v. CLX Sys./Westwood Mgmt., Inc., 2011 WL 13233764 (D. Minn. Feb. 22, 2011). *But see* Barnello v. Bayview Loan Servicing, L.L.C., 2016 WL 11565523, at *4 (M.D. Fla. Mar. 11, 2016) (granting consumers protective order against mortgage servicer's attempt to take discovery from their marriage counselor, because proposed deposition and document production were "disproportional to the needs of the case").

472 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). *See also* Appx. E.3.8, *infra*.

473 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

Rule 8 that "a complaint should not be dis-
to state a claim unless it appears beyond
ntiff can prove no set of facts in support
would entitle him to relief."[475] The *Iqbal*
the *Twombly* standards apply to "all civil
y to the antitrust and discrimination claims
the two cases.[476] The *Iqbal* decision summa-
standards:

tandard Rule 8 announces does not require
l allegations," but it demands more than an
-defendant-unlawfully-harmed-me accusa-
ng that offers "labels and conclusions" or "a
tion of the elements of a cause of action will
does a complaint suffice if it tenders "naked
void of "further factual enhancement. . . ."

notion to dismiss, a complaint must contain
al matter, accepted as true, to "state a claim
plausible on its face." . . . A claim has facial
nen the plaintiff pleads factual content that
rt to draw the reasonable inference that the
able for the misconduct alleged. . . . The plau-
rd is not akin to a "probability requirement,"
more than a sheer possibility that a defendant
awfully. . . . Where a complaint pleads facts
ely consistent with" a defendant's liability, it
f the line between possibility and plausibility
t to relief.'"

principles underlie our decision in *Twombly*.
et that a court must accept as true all of the
ontained in a complaint is inapplicable to legal
Threadbare recitals of the elements of a cause
pported by mere conclusory statements, do not
Rule 8 marks a notable and generous departure

complaint.[478] The consumer's problem with a pleading usually is in the failure to identify who, what, how, and where; sometimes plaintiffs are given an opportunity to amend the complaint to cure the deficiency.[479] In *Douglass v. Convergent Outsourcing*,[480] the Third Circuit gave the general outline of an FDCPA claim: "To prevail on an FDCPA claim, a plaintiff must prove that (1) she is a consumer, (2) the defendant is a debt collector, (3) the defendant's challenged practice involves an attempt to collect a 'debt' as the Act defines it, and (4) the defendant has violated a provision of the FDCPA in attempting to collect the debt."

Other courts have found varying degrees of specificity required:

- The complaint must set out the basic elements of an FDCPA violation;[481]

478 *See, e.g.*, Humphreys v. McCabe Weisberg & Conway, P.C., 686 Fed. Appx. 95 (3d Cir. 2017) (affirming dismissal of *pro se* complaint that did not adequately plead facts showing that foreclosing entities made any materially false statement about ownership of mortgage in foreclosure); Toone v. Wells Fargo Bank, 716 F.3d 516 (10th Cir. 2013) (complaint failed to state basis to question authenticity or authority of endorsements on note; statement that endorsements were "robosigned," without more, did not state claim under *Iqbal*); *In re* Bernadin, 610 B.R. 787, 795 (E.D. Pa. 2019) (debtor's allegation that Ocwen assisted in preparation of POC satisfies "facial plausibility" standard stated in *Iqbal* and *Twombly*); Norton v. LVNV Funding L.L.C., 396 F. Supp. 3d 901, 911 (N.D. Cal. 2019) ("Although Norton's allegations do not nail down the existence of a consumer debt, they create a plausible inference that the debt was incurred for personal, family, or household expenses, and therefore are sufficient to withstand a Rule 12 challenge;" citing *Iqbal* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.") and *Twombly* "Asking for plausible grounds [for relief] does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence [supporting the claim]."); Ruczek v. Setergus L.L.C., 2019 WL 4118649 (W.D.N.Y.

aint must allege *facts* that the FDCPA specifically he plaintiff and defendant, and was violated by nt;[482]

ust contain more than a mere allegation that a a debt collector,[483] particularly if the complaint

- The complaint must allege that a law firm regularly collects or attempts to collect debts owed, due, or asserted to be owed or due to another is sufficient to alleged that the law firm is a "debt collector";[485]
- The complaint must state the type of consumer debt involved[486] and the amount and date of the debt;[487]
- The complaint must state a date of the violation that was within the FDCPA one-year statute of limitations;[488]

or a public record referred to in the complaint indicates that the company was a creditor collecting a debt in its own name;[484]

arrison v. Caliber Home Loans, Inc., 233 F. Supp. 3d Fla. 2017) (dismissing with permission to amend FDCPA lid not present FDCPA claims discretely and succinctly); ltman, Wienberg & Reis, Co., L.P.A., 2010 WL 2803975 ly 15, 2010) (allegation that, over a two-and-a-half-month ty-six messages were left on consumer's cell phone was strella v. G L Recovery Group, L.L.C., 2010 WL 679067 eb. 22, 2010); Puttner v. Debt Consultants of Am., 2009) (S.D. Cal. June 4, 2009) (stated claim by alleging that collectors called consumer without providing meaningful f their identity); Hernandez v. Downey Sav. & Loan Ass'n, 57406 (N.D. Cal. Mar. 13, 2009) (failed to state claim for violation of § 1692g(b) since complaint did "not allege any strating that Defendants continued their efforts to collect lowing receipt of the [verification request]"); O'Chaney & Kreisman, L.L.C., 2004 WL 635060 (N.D. Ill. Mar. 29, ation that collector's statement to call collector for further , appearing at end of letter containing 15 U.S.C. § 1692g confusing and overshadowed requirement to disclose that request must be in writing, stated claim for relief for vio- 2g, but not § 1692f); Ononuju v. Virginia Hous. Dev. Auth., . 228 (Va. Cir. Ct. 2019) (complaint did not state how, or closing entities violated FDCPA).

umphreys v. McCabe Weisberg & Conway, P.C., 686 Fed. d Cir. 2017) (*pro se* complaint did not adequately plead facts t foreclosing entities made any materially false statement rship of mortgage in foreclosure); Barnhart v. Nationstar C., 2016 WL 11005038, at *2 (6th Cir. Oct. 28, 2016) ("The loes refer obliquely to purported 'misrepresentations,' but int to any specific statement or explain how it was false or Instead, the complaint simply recites conclusory allega- fers to various portions of the FDCPA."); Genova v. IC Sys., VL 2289289 (D.N.J. May 25, 2017) (alleged that collection tanded 17% collection fee that had not been incurred and horized by contract or law); Aurandt v. Brown, 2017 WL .D. Pa. Mar. 31, 2017) (alleged that debt collector pretended

(D.N.H. Nov. 9, 2011) (finding reasonable inference that individual was admitting to engaging in debt collection activities, so as to qualify as debt collector, when complaint included statement attributed to collector's attorney in abusive phone call that he was a debt collector). *But see* Nooruddin v. Comerica Inc., 2011 WL 5588806, at *3 (D. Kan. Nov. 16, 2011) (allegation that defendant bank was "debt collector" was sufficient to survive motion to dismiss; "Although Defendant categorizes itself as a creditor, and not as a 'debt collector,' on a motion to dismiss, the Court must consider only the allegations in the complaint itself.").

484 Garland v. Enter. Leasing Co., 1999 WL 1077075 (E.D. Pa. Nov. 24, 1999) (dismissing FDCPA complaint against car rental company); Scappaticci v. G.E. Capital Mortg. Services, Inc., 2000 WL 1868219 (Conn. Super. Ct. Nov. 27, 2000) (complaint omitting any allegation that defendant was acting to collect debt owed or due to another failed to state claim under FDCPA). *See also* Russell v. Standard Fed. Bank, 2002 WL 1480808 (E.D. Mich. June 19, 2002) (dismissing FDCPA claim when plaintiff failed to provide sufficient information as to whether defendant law firm collected debts regularly or how it violated the Act).

485 *See* Sheldon v. Clarfield, Okon, Salomone & Pincus, P.L., 2015 WL 4651320 (S.D. Fla. July 31, 2015). *See also* Ortega v. Collectors Training Inst. of Ill., Inc., 2010 WL 11505559 (S.D. Fla. Mar. 31, 2010)

486 *See, e.g.*, Calogero v. Shows, Cali & Walsh, L.L.P., 970 F.3d 576 (5th Cir. 2020) (alleged overpayment qualified as debt under § 1692a(5) where obligation of repayment was transaction in which consumer received funds for "personal, family, or household" purposes); Johns v. Northland Group, Inc., 76 F. Supp. 3d 590 (E.D. Pa. 2014); Vaquero v. Frederick J. Hanna & Assoc., 2013 WL 5947011 (D.N.J., Nov. 6, 2013); Dunham v. Lombardo, Davis & Gold[illegible]

- Each alleged violation must be pleaded as a separate count in the complaint;[489]
- The consumer must plead the subsections of the FDCPA violated;[490]
- The complaint must include "factual particularity" such as "the dates and contents" of the telephone calls that allegedly violated the FDCPA;[491] and
- Legal conclusions in the complaint without supporting factual allegations may require an amended complaint.[492]

Absent a claim of fraud or mistake, however, an FDCPA complaint is subject only to the general pleading requirements of Rule 8, and not the heightened pleading requirements of Rule 9.[493]

Specificity of the allegations of emotional distress damages may not be required in order to withstand a motion to dismiss.[494] However, a court may require some specificity in order for the consumer to obtain significant emotional distress damages in a default judgment.[495] The plaintiff also has the burden of providing a pleading that is reasonably specific to enable the opposing party to know the nature and degree of the allegations, including a claim for emotional distress.[496] It may be to the consumer's advantage to specify the cause, type, and duration of actual damages without stating an amount sought, as the case may be resolved by an offer to settle for those damages and the rest of the relief sought, taking away the opportunity for a greater amount in a verdict.[497]

There needs to be a balance between meeting the specificity pleading standards of *Twombly* and *Iqbal* and pleading broadly enough to allow flexibility to amend the complaint with further allegations or to restructure the theory of the case.[498] *Twombly* did leave room for discovery to pin down facts— such as the regularity of a lawyer acting as a debt collector—that could not be established from the events or through informal investigation. Pleading broadly when the facts support it also allows amending to add new parties or more violations that relate back to the original filing date.[499]

One experienced consumer lawyer suing debt collectors has the plaintiff verify the complaint. While it is not required, it can serve several purposes. It involves the client directly in the case, allowing more specificity in the allegations. Doing so impresses on the debt collector and judge that this is not a form complaint. This can be done only if the complaint is actively written and edited with the client so that it accurately reflects the client's experience.

Other attorneys may think that verifying the complaint suggests the consumer's lawyer distrusts the client's story, and

Bashore v. Resurgent Capital Services, L.P., 452 Fed. Appx. 522 (5th Cir. 2011) (consumer failed to plead timing and content of her claim that debt collector violated FDCPA when she disputed debt); McLean-Laprade v. HSBC, 2013 WL 3930565 (N.D.N.Y. July 30, 2013).

489 *See, e.g.*, Friends of St. Stephens Inc. v. Caliber Home Loans, Inc., 2015 WL 12516200 (S.D. Cal. Mar. 23, 2015). *Cf.* Serra v. Mary Jane Elliott, P.C., 2014 WL 1608665 (E.D. Mich. Apr. 22, 2014) (section 1692e(a)(2) violation not raised in complaint cannot be considered on motion for summary judgment); Valek v. Stellar Recovery, Inc., 2014 WL 1028916 (W.D. Mich. Mar. 17, 2014) (where facts alleged supported FDCPA violation, not necessary to cite specific provision violated).

490 *See* Friends of St. Stephens Inc. v. Caliber Home Loans, Inc., 2015 WL 12516200 (S.D. Cal. Mar. 23, 2015); Bernstein v. Noteworld, L.L.C., 2010 WL 3154518 (D. Nev. Aug. 9, 2010). *See also* Krasnor v. Spaulding Law Office, 675 F. Supp. 2d 208 (D. Mass. 2009) (tracking language of subsections sufficient).

491 *See, e.g.*, Napolitano v. Green Tree Serv., L.L.C., 2016 WL 447451 (D. Me. Feb. 4, 2016); Cutler *ex rel.* Jay v. Sallie Mae, Inc., 2014 WL 7745878 (C.D. Cal. Sept. 9, 2014); Lopez v. Prof'l Collection Consultants, 2011 WL 4964886 (C.D. Cal. Oct. 19, 2011); Blaxill v. Arrow Fin. Services, L.L.C., 2011 WL 1299350 (N.D. Cal. Apr. 4, 2011). *See also* Brown v. Account Control Tech., Inc., 2014 WL 11706429 (S.D. Fla. Mar. 28, 2014) (dismissing for failure to allege frequency or contents of alleged offending telephone calls). *But see* Huizar v. Mandarich Law Group, L.L.P., 2013 WL 4209050 (C.D. Cal. Aug. 14, 2013) (16-month time frame sufficed).

492 *See, e.g.*, Morgan v. LVNV Funding L.L.C., 2014 WL 4680694 (S.D. Ind. Sept. 19, 2014).

493 *See, e.g.*, CFPB v. Frederick J. Hanna & Assoc., 114 F. Supp. 3d 1342 (N.D. Ga. 2015); Cutler *ex rel.* Jay v. Sallie Mae, Inc., 2014 WL 7745878 (C.D. Cal. Sept. 9, 2014); Deeters v. Phelan Hallinan & Schmieg, L.L.P., 2013 WL 6524625 (W.D. Pa. Dec. 12, 2013); Allgood v. West Asset Mgmt., Inc., 2013 WL 6234691 (D. Nev. Dec. 2, 2013); Renteria v. Nationwide Credit, Inc., 2009 WL 2754988 (S.D. Cal. Aug. 27, 2009); Antoine v. U.S. Bank, 547 F. Supp. 2d 30 (D.D.C. 2008); Neild v. Wolpoff & Abramson, L.L.P., 453 F. Supp. 2d 918 (E.D. Va. 2006); Sullivan v. Equifax, Inc., 2002 WL 799856 (E.D. Pa. Apr. 19, 2002). *But see* Crittenden v. HomeQ Serv., 2009 WL 3162247 (E.D. Cal. Sept. 29, 2009) (erroneously applying "fraud" pleading standard to FDCPA claim). *But cf.* Townsend v. Chase Bank USA, 2009 WL 426393 (N.D. Cal. Feb. 15, 2009) (*pro se* case that included FDCPA and state claims applied Rule 9(b) requirements to allegations of fraud), *aff'd on other grounds*, 445 Fed. Appx. 920 (9th Cir. 2011).

494 *See* Ferrante v. Law Offices of Lewisohn & Lewisohn, 2016 WL 8711075 (E.D.N.Y. July 15, 2016) (consumer need not plead actual damages "in detail" at pleading stage); Smolinski v. Oppenheimer, 2012 WL 2885175 (N.D. Ill. July 11, 2012); § 11.8.2, *infra*.

495 *See* Sleeper v. Rent Recover, L.L.C., 2014 WL 4455044 (E.D. Wash. Sept. 10, 2014); Slater v. PRA Recovery, 2012 WL 5269400 (D. Haw. Sept. 21, 2012), *adopted*, 2012 WL 5269390 (D. Haw. Oct. 22, 2012); § 11.8.2, *infra*.

496 Carrier v. LJ Ross & Assoc., 2008 WL 544550 (E.D. Mich. Feb. 26, 2008).

497 *See* § 11.8, *infra*.

498 Littles v. Lieberman, 90 B.R. 700 (E.D. Pa. 1988) (when evidence showed defendant did not send dunning letter as alleged, but supplied form for letter, violating 15 U.S.C. § 1692j, complaint's claim under 15 U.S.C. §§ 1692 to 1692*o* was broad enough to cover 15 U.S.C. § 1692j claim). *See* Vitullo v. Mancini, 684 F. Supp. 2d 747 (E.D. Va. 2010) (claim of party added in amended complaint was timely, as it related back to date of filing of initial complain).

499 *See* Klemp v. Columbia Collection Serv., Inc., 2014 WL 5324318 (D. Or. Oct. 17, 2014); Shula v. Lawent, 2002 WL 31870157 (N.D. Ill. Dec. 23, 2002) (pursuant to Rule 15(c)(3), amendment changing party or name of party against whom claim was asserted related back to date of original pleading), *aff'd*, 359 F.3d 489 (7th Cir. 2004); Byes v. Telecheck Recovery Services, Inc., 1996 WL 22686 (E.D. La. Jan. 19, 1996) (leave to amend complaint was proper; defendant was sufficiently on notice of subject matter and size of litigation, and it knew what letters it had sent to plaintiff and who else had received letters). *See also* Krupski v. Costa Crociere, 560 U.S. 538, 130 S. Ct. 2485, 177 L. Ed. 2d 48 (2010) (amendment to complaint substituting proper party permitted to relate to date of filing); Tate v. Bennett Law, P.L.L.C., 2013 WL 1751289 (D. Or. Apr. 22, 2013) (consumer was allowed to add his wife as plaintiff more than a year after collection calls, as he did not discover that his wife was alleged debtor until depositions).

thus do not have complaints verified. It also binds the consumer to certain statements which could cause problematic later if the consumer remembers any of the details differently through the litigation.

11.6.2 Proving an FDCPA Violation

As discussed at § 3.2.1, *supra*, courts most often apply a "least sophisticated" or "unsophisticated" consumer standard to analyze whether a debt collector has violated the FDCPA.[500] This means that the standard "pays no attention to the circumstances of the particular debtor in question, and asks only whether the *hypothetical* least sophisticated consumer could reasonably interpret the representation in a way that is inaccurate."[501] To prove the debt collector's conduct violates the FDCPA, consumers can look beyond their own personal interpretation of a particular conduct or communication and present evidence that the conduct would have been harassing, misleading, deceptive, or unfair to the hypothetical least sophisticated or unsophisticated consumer.[502] Particularly where a case involves statements that are not misleading or deceptive on their face, but might possibly be misleading or deceptive to an unsophisticated consumer, evidence such as consumer surveys, focus groups, and expert testimony can be probative as to whether unsophisticated consumers would be deceived or misled.[503]

Similarly, pattern and practice evidence can be used to prove abusive or harassing conduct by showing that the debt collector engaged in similar conduct with other consumers in addition to the current plaintiff. The burden of proof may shift to a debt collector to show that it fits into an exception of the FDCPA and that its conduct did not violate the Act.[504]

The FTC has used surveys, focus groups, market research and principles, and the opinions of expert witnesses in determining implied meanings of representations in deceptive advertising:

> If our initial review of evidence from the advertisement itself does not allow us to conclude with confidence that it is reasonable to read an advertisement as containing a particular implied message, we will not find the ad to make the implied claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable. . . .
>
> The extrinsic evidence we prefer to use and to which we give great weight is direct evidence of what consumers actually thought upon reading the advertisement in question. Such evidence will be in the form of consumer survey research for widely distributed ads, such as those involved in this proceeding. . . . Where we use surveys in lieu of individual testimony, the surveys are methodologically sound; they draw valid samples from the appropriate population, ask appropriate questions in ways that minimize bias, and analyze results correctly.
>
> Another type of evidence we will look at is evidence . . . showing how consumers might ordinarily be expected to perceive or understand representations like those contained in the ads we are reviewing. For example, we might look at the dictionary definition of a word to identify the word's common usages. Or we might look at principles derived from market research, as expressed by marketing experts, which show that consumers generally respond in a certain manner to ads that are presented in a particular way, and presume that consumer reactions to a particular ad before us would be consistent with the general response pattern . . .
>
> A third type of evidence we will consider if offered is the opinion of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted . . . Whether we are looking at evidence from the ad itself, extrinsic evidence, or both, we look at the overall, net impression made by an ad to determine what messages it reasonably can be interpreted as conveying to consumers.[505]

Whether a communication is deceptive, misleading, or an implicit threat may also be considered a legal decision or mixed finding of fact and law. There are hundreds of decisions dealing with the implications of such representations that can help build an FDCPA case.[506]

11.6.3 Surveys

While comprehensive surveys can provide strong evidence that a particular conduct or communication is deceptive, such surveys are a form of expert testimony,[507] so one of the biggest impediments to using survey evidence in FDCPA cases is the high cost of the expert designing and conducting the survey.[508]

500 Hopkins v. Collecto, Inc., 994 F.3d 117, 121 (3d Cir. 2021) ("sophisticated" consumer standard functionally equivalent to "unsophisticated" consumer standard).

501 Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P., 875 F.3d 128, 135 (2d Cir. 2017) (emphasis added).

502 *See, e.g.*, Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012); DeKoven v. Plaza Assoc., 599 F.3d 578 (7th Cir. 2010).

503 *See* Johnson v. Enhanced Recovery Co., L.L.C., 961 F.3d 975 (7th Cir. 2020) (letter stating that "[t]his letter serves as notification that your delinquent account may be reported to the national credit bureaus" required "producing evidence of confusion (beyond her own) using an objective measure such as 'a carefully designed and conducted consumer survey'"); Lox v. CDA, Ltd., 689 F.3d 818, 827 (7th Cir. 2012); Klein v. Affiliated Group, Inc., 2019 WL 1307884 (D. Minn. Mar. 22, 2019); Hale v. AFNI, Inc., 2010 WL 380906 (N.D. Ill. Jan. 26, 2010); § 7.3.8, *supra*.

504 *See* 11 U.S.C. § 1692k(c); § 11.6.3, *infra*.

505 *In re* Thompson Med. Co., 104 F.T.C. 648, 788 (F.T.C. 1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

506 *See* Appx. E.2.4, *infra*.

507 Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 776 (7th Cir. 2007); Klein v. Affiliated Group, Inc., 2019 WL 1307884 (D. Minn. Mar. 22, 2019).

508 *See, e.g.*, Tonka Corp. v. Rose Art Industr., Inc., 836 F. Supp. 200, 210 n.10 (D.N.J. 1993) (stating cost of pilot study to be $7850; noting more extensive survey could increase cost of study by more than $29,000); Lon Tai Shing Co., Ltd. v. Koch & Lowy, 1991 WL 170734 (S.D.N.Y. June 20, 1991) (noting cost of conducting proper survey in trademark

It is not clear whether a consumer who conducts a survey to establish an FDCPA claim may recover the costs of the survey as part of the damages, the fee award, or costs.[509]

In addition to the hurdle created by the high cost of a survey, there is a risk that the expensive survey, once presented will not be accepted as meeting *Daubert* requirements[510] or, if accepted, will be considered of insufficient probative weight to sway the decision. For example, in a Seventh Circuit FDCPA case, Judge Posner threw out the consumer's survey as containing leading questions but suggested a formulation of the survey that would make it acceptable.[511] The court emphasized that the survey evidence must be of professional quality to be admissible finding:

> The respondents in the survey were shown a letter similar to the one the plaintiff had received. The key question they were asked was, "Let's say the person getting this letter does not accept the settlement offer by the deadline date. Do you think that person would feel it is a limited-time offer, or it is not a limited-time offer?" By referring to "deadline date," the questioner signaled that it was a limited-time offer. Leading questions in surveys are improper. *E.g., Scott Fetzer Co. v. House of Vacuums Inc., supra,* 381 F.3d at 488. And "limited-time offer" was not defined. Nor should the respondents have been asked what they thought some other recipient of the letter would "feel," especially since they were given no information about the hypothetical recipient. They should simply have been asked, "What do you think would happen if you didn't accept the offer? Do you think it would be renewed or extended? Or do you think this would be your last chance to get a discount off the amount owed?[512]

In *Muha v. Encore Receivable Management, Inc.*[513] Judge Posner affirmed the inadmissibility of a consumer's survey evidence, because the consumer's lawyer supplied the key question used in the survey, even though the lawyer had hired a "competent survey researcher to conduct it."[514] The question posed was also impermissibly leading and suggestive, and the multiple -choice answers supplied by the survey should have included the debt collector's interpretation of the statement but did not. Finally, there was no control group showing that the letter was not confusing when the challenged language was omitted.[515] Notably, however, the court reversed the court's summary judgment for the collection agency, holding that the debt collector had the burden of explaining the meaning and purpose of a confusing statement in its dunning letter and that consumer testimony about the deceptiveness of the debt collection letter could be sufficient without a survey.[516] This was a shift in the Seventh Circuit, which frequently had required expert evidence of deception in particular expert surveys.[517]

Another problem with consumer surveys in this area is that only about three percent of the population is a target of debt collectors at any point in time.[518] Many in the general population have no direct experience with debt collection. Debt collection experiences are likely to be quickly forgotten given their unpleasantness. This means that it is very difficult to locate a peer group to survey.

Pettit v. Retrieval Masters Creditors Bureau, Inc.[519] provides a good illustration of the difficulty of establishing a close case of deception. The collector was alleged to have used a name, Retrieval Masters Creditors Bureau, Inc., which violated the prohibition in 15 U.S.C. § 1692e(16) that the debt collector not falsely imply that it operated a consumer credit reporting agency. The words "credit bureau" at the time were synonymous with credit reporting agency.[520] The Fifth Circuit and the lower courts had found that the use of the words "credit

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and trade dress case could exceed $100,000). *See also* Irina D. Manta, *In Search of Validity: A New Model for The Content and Procedural Treatment of Trademark Infringement Surveys,* 24 Cardozo Arts & Ent. L.J. 1027 n.152 (2007) ("surveys can cost $30,000 to $150,000"); Robert H. Thornburg, *Trademark Survey Evidence: Review of Current Trends in the Ninth Circuit,* 21 Santa Clara Computer & High Tech. L.J. 715, 717 (2005) (the most basic trademark survey costs hundreds of thousands of dollars).

509 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.8.7.3 (9th ed. 2016), *updated at* www.nclc.org/library.

510 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993). For a detailed discussion on the *Daubert* elements, see National Consumer Law Center, Consumer Warranty Law § 13.8.4 (5th ed. 2015) *updated at* www.nclc.org/library. FDCPA cases addressing this issue include: Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623 (7th Cir. 2009) (consumer survey poorly designed and inadmissible under *Daubert* where questions were leading, drafted by lawyer, and there was no control group); Evory v. Nat'l Action Fin. Services, Inc., 505 F.3d 769 (7th Cir. 2007).

511 Evory v. Nat'l Action Fin. Services, Inc., 505 F.3d 769 (7th Cir. 2007). *See also* Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623 (7th Cir. 2009) (consumer survey inadequate when leading questions were drafted by lawyer and there was no control group).

512 Evory v. Nat'l Action Fin. Services, Inc., 505 F.3d 769, 778 (7th Cir. 2007). *See also* Jackon v. Nat'l Action Fin. Services, 441 F. Supp. 2d 877 (N.D. Ill 2006) (phrase "limited-time offer," as used in survey without definition or explanation, was too ambiguous to provide insight whether participants were confused as to meaning of offer allegedly presented in letters).

513 558 F.3d 623 (7th Cir. 2009).

514 *Id.* at 625.

515 *Id.* at 626.

516 *Id.*

517 *See* Pettit v. Retrieval Masters Creditors Bur., Inc., 211 F.3d 1057 (7th Cir. 2000); Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057 (7th Cir. 1999); Walker v. Nat'l Recovery, Inc., 200 F.3d 500 (7th Cir. 1999) (mentions evidence such as surveys to buttress case); Gammon v. GC Services L.P., 27 F.3d 1254, 1260 (7th Cir. 1994) (concurring opinion recommended survey evidence). *But see* Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996) (no evidence of actual consumer confusion necessary when statement was literally false).

518 *See* Hannah Hassani & Signe-Mary McKernan, Urban Institute, 71 Million US Adults Have Debt in Collections (July 19, 2018), *available at* https://www.urban.org.

519 211 F.3d 1057 (7th Cir. 2000).

520 The American Heritage Dictionary of the English Language, "credit bureau" (5th ed. 2018) ("[a]n organization to which business firms apply for credit information on prospective customers"). *See* National Consumer Law Center, Fair Credit Reporting § 1.2 (9th ed. 2018), *updated at* www.nclc.org/library (describing relation of local credit bureaus to large national credit reporting agencies).

bureau" in the name of a collection agency which was not a credit reporting agency violated the FDCPA.[521] The Seventh Circuit held that there was insufficient evidence to convince it that a careful,[522] unsophisticated consumer would infer that a company name including the words "creditors bureau" was a "credit bureau" providing consumer reports. The court suggested that survey evidence might have been useful to the consumer's case.

It is almost a certainty that the debt collector chose a name only three letters removed from the common words "credit bureau" because it believed that name would make it more effective in getting money from consumers. The collector was probably aware that most Americans are so bombarded with information in their everyday lives that they are not up to the standard of careful reading imposed by the *Pettit* court. Most Americans would look at the words "creditors bureau," which have no literal meaning, and not realize the company was not holding itself out as a "credit bureau." Survey evidence may have improved the odds of success before the *Pettit* court.

11.6.4 Experts

Experts can be used to show deception or confusion in a consumer case, short of a full survey of a sample of the collector's customers who received the same communication as the plaintiff.[523] For example, in the case discussed at § 11.6.3, *supra*, against a company using the name "Retrieval Masters Creditors Bureau, Inc.,"[524] an expert might have devised a number of simple tests to find out the extent to which consumers would believe the company was in the business of credit reporting. The test might be administered to a classroom of adult community education students, or several classrooms, to reduce its costs, if this would produce a sufficient sampling of "unsophisticated consumers."

An academic with a graduate degree in education, marketing, communications, sociology, or testing may be appropriate to design, administer, and interpret such a test. A linguist might provide expert insights using other techniques. Such experts may be willing to do such work on a pro bono basis for the court experience or because they may publish a scholarly article on the subject. The expert must be prepared to justify the validity of every aspect of their testimony.[525] Caution must be used because of the high costs of developing such evidence and the ability of courts to reject or discount an expert's evidence.

An expert may be used to establish other aspects of the case, for example, the reasonableness of the defendant's procedures to avoid mistake, intent, and industry practices compared to the defendant's noncompliance.[526] An expert may not generally provide legal opinions to the court.[527]

Evidence of emotional distress and suffering is best offered through the testimony of a physician,[528] mental health professional, or another third person—for example, a relative or adult child. If a physician treated the consumer for symptoms or injuries resulting from the collection abuse, they (or another physician) should be presented as an expert witness in order to avoid the inference by the trier of fact that the treating physician's testimony would not support the claim. An expert on the nature and willfulness of the debt collector's noncompliance may be useful.[529]

11.6.5 Pattern Evidence

While evidence of a pattern of noncompliance within a particular case may be used to determine whether that particular conduct is abusive or harassing,[530] evidence of similar wrongdoing by the defendant with *other* consumers, including other victims' testimony, may be introduced:

521 *See* McKenzie v. E.A. Uffman & Assoc., Inc., 119 F.3d 358, 361 (5th Cir. 1997) (use of name "Collections Department, Credit Bureau of Baton Rouge" misrepresented that collector operated credit reporting agency). *See also* § 7.2.16, *infra*.

522 A "careful" unsophisticated consumer standard is not the test usually used in the courts.

523 *See also* § 7.2.8, *supra*.

524 Pettit v. Retrieval Masters Creditors Bur., Inc., 211 F.3d 1057 (7th Cir. 2000).

525 *See New Federal Rules Limit Use of Expert Testimony*, 19 NCLC REPORTS, *Deceptive Practices and Warranties Ed.* 7 (Sept./Oct. 2000).

526 *E.g.*, McCabe v. Crawford & Co., 272 F. Supp. 2d 736 (N.D. Ill. 2003) (allowing Manuel H. Newburger to testify at trial regarding issue of practices and standards in debt collection industry, but excluding his expert report, finding it filled with legal conclusions and inappropriate opinions). *But see* Hamilton v. Am. Corrective Counseling Services, 2006 WL 2873622 (N.D. Ind. Oct. 4, 2006) (granting defendant's motion to exclude testimony of plaintiff's expert, Manuel Newburger, holding that his proffered testimony constituted inadmissible opinions of law presented on following three topics: whether defendants' conduct complies with industry standards of debt collection, nature and severity of alleged violations, and whether defendants are debt collectors within meaning of FDCPA).

527 *See, e.g.*, Jones v. Midland Funding, L.L.C., 616 F. Supp. 2d 224 (D. Conn. 2009).

528 *See, e.g.*, 2 Stein on Personal Injury Damages §§ 8.18, 10.14 (3d ed. 1997). *See also* Wood v. GC Services, L.P., 2012 WL 987761 (M.D. Fla. Jan. 26, 2012) (concluding that record fell short of establishing that plaintiff was entitled to actual damages when plaintiff failed to offer any competent evidence, other than his own self-serving statements, that he had distress and anxiety, as well as lack of medical or other evidence on issue as to whether defendant's conduct caused plaintiff any further problems than those he was already experiencing), *adopted*, 2012 WL 995207 (M.D. Fla. Mar. 23, 2012).

529 *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 645 F. Supp. 2d 917, 928 (D. Mont. 2009), *aff'd on other grounds*, 637 F.3d 939 (9th Cir. 2011); Tenuto v. Transworld Sys., Inc., 2000 U.S. Dist. LEXIS 17566 (E.D. Pa. Nov. 27, 2000) (Manuel H. Newburger not precluded from testifying). See also online companion material to this treatise, including Newburger's affidavit.

530 Merchant v. Nationwide Recovery Serv., Inc., 440 F. Supp. 3d 1396, 1374 (N.D. Ga. 2020); Kayyal v. Enhanced Recovery Co., 2019 WL 4601743 (N.D. Ill. Sept. 23, 2019); Hollis v. LVNV Funding, 2019 WL 1091336 (C.D. Cal. Jan. 2, 2019) (pattern of frequently calling for more than a year after consumer requested that it stop was itself abusive).

- To show a pattern or practice of abusive conduct;[531]
- To show the debt collector's knowledge or intent;
- To demonstrate the malice required for punitive damages for common law causes of action;
- To establish circumstantial evidence to authenticate an anonymous phone call;[532] or
- To prove that a particular entity is a "debt collector" under the FDCPA.[533]

Other victims who have suffered similar debt collector abuses may be appropriate witnesses.[534] Other victims' testimony may show the intent, frequency, and persistence of the behavior in support of the statutory damage award under the FDCPA.[535] Time-barred FDCPA claims may be relevant to establish the abusiveness of the FDCPA claims that were not time-barred.[536] Even if the testimony of other victims is not admitted in the trial, the other victims' information is useful to a consumer's attorney in understanding the collector's method of operating, so that discovery and cross-examination are more effective.

Introduction of testimony of similar abuses may be opposed as an attempt to introduce character evidence that is not relevant under Federal Rule of Evidence 404(a), or the state counterpart to that rule. However, evidence of prior similar abuses may be admitted under both Federal Rules of Evidence 404(b) and 406. Rule 404(b) provides that evidence of other wrongs may be introduced to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." Rule 406 allows evidence of the routine practice of an organization to establish its conduct in a case that conformed to that routine practice.

Intent is an element of a tort action against a debt collector for egregious misconduct.[537] Intent or knowledge may also be an element of a claim under a state debt collection[538] or UDAP statute.[539] The frequency, persistence, and nature of noncompliance, and the extent to which such noncompliance by the debt collector was intentional, are all factors the court considers under section 1692k(b) in determining statutory damages.[540] Intent is also relevant to the FDCPA bona fide error defense.[541]

For example, in *Burbach v. Investors Management Corp.*,[542] the court offered the following factors for consideration of trial court in admitting prior bad acts:

> (a) The length of time between each of the past incidents, and the incident under consideration;
> (b) The degree of similarity between the facts of the previous incidences and the incident under consideration;
> (c) The degree of similarity between the conduct of the defendant in each of the incidents;
> (d) The degree of similarity between the advantage foreseeably obtained under the facts of each prior incident by the unfair conduct in each case;
> (e) The degree of similarity of harm to others in each incident; and
> (f) The number of prior incidents as compared with the relative number of prior opportunities to conduct the unfair conduct.[543]

In *McCollough v. Johnson, Rodenburg & Lauinger*,[544] the trial court affirmed the admissibility of evidence that the defendant debt collection law firm had filed several thousand lawsuits in the state in the prior eighteen months. The evidence of the prior suits was admissible to establish malice for a malicious prosecution claim and for punitive damages.[545]

Complaint-receiving agencies—for example, the Better Business Bureau—may cooperate by identifying other victims. Other sources that may identify victims are the consumer protection office of the state attorney general's office, local consumer protection offices, and state licensing and examination

531 *See* Allen v. P & B Capital Group, L.L.C., 2009 WL 2940206, at *1 (D. Colo. Sept. 9, 2009) (denying defendant's Rule 12(f) motion to strike allegations in complaint that defendant "violates the FDCPA as part of its business practice" because, *inter alia*, allegations may be "relevant and admissible 'to show that the Defendant has a history or plan of aggressive debt collecting'"). *See also* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.8.1.2 (9th ed. 2016), *updated at* www.nclc.org/library; National Consumer Law Center, Automobile Fraud § 10.8.1 (6th ed. 2018), *updated at* www.nclc.org/library. *But cf.* Fisher v. Am. Gen. Fin. Co., 52 Fed. Appx. 601 (4th Cir. 2002) (dissimilarity between alleged prior acts and defendant's incorrect description of property securing loan demonstrates that evidence of prior acts was inadmissible).

532 Colton v. Ford Motor Credit Co., 1986 WL 8538 (Ohio Ct. App. July 30, 1986) (circumstantial evidence authenticated one anonymous call, but not another).

533 James v. Wadas, 724 F.3d 1312 (10th Cir. 2013); Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004) (court adapted five-factor test to determine whether person's debt collection activities met regularity threshold of FDCPA, including whether any patterns of collection activity were discernible); Nelkenbaum v. Caliber Home Loans, Inc., 2019 WL 3464507 (E.D.N.Y. July 31, 2019).

534 *See* McCollough v. Johnson, Rodenburg, & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011). *See also* Webster v. Nations Recovery Ctr., Inc., 2009 WL 2982649 (D. Colo. Sept. 15, 2009).

535 *See* § 11.9.3, *infra*. *See also* Miranda v. Integrity Solution Services, Inc., 2014 WL 519239, at *2 (D. Colo. Feb. 10, 2014) ("By virtue of the language of the FDCPA, the issue of the frequency and persistence of a defendant's noncompliance with the FDCPA is present in every FDCPA case."). *But see* Brownstein v. Shelton, 2014 WL 1057049 (D. Conn. Mar. 18, 2014) (overlooking "nature of the noncompliance" and intentionality prongs of § 1692k(b)).

536 *See* Pittman v. J.J. MacIntyre Co., 969 F. Supp. 609 (D. Nev. 1997).

537 *See* Ch. 15, *infra*.

538 *See* § 16.2, *infra*.

539 *See* § 16.3, *infra*.

540 *See* § 11.9, *infra*.

541 *See* §§ 12.2, 12.7.3, *infra*.

542 484 S.E.2d 119 (S.C. Ct. App. 1997).

543 *Id.* at 122. *See also* McCormick on Evidence § 197 (8th ed. 2020); National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.8.1.2 (9th ed. 2016), *updated at* www.nclc.org/library; National Consumer Law Center, Automobile Fraud § 10.8.1 (6th ed. 2018), *updated at* www.nclc.org/library.

544 645 F. Supp. 2d 917 (D. Mont. 2009), *aff'd*, 637 F.3d 939 (9th Cir. 2011) (jury awarded $250,000 in compensatory damages, $60,000 in punitive damages under state tort law).

545 *Id.* at 923–927.

agencies. Websites posting consumer complaints are another place to look. If government agencies are not cooperative, the identity of other victims may be available under the state freedom of information act. A search of the Internet may also locate consumers complaining about similar behavior by the debt collector.[546] The identity of other victims may also be obtained in discovery from such agencies and from the collector.

Another resource is the CFPB consumer complaint database.[547] While the names of the consumers submitting complaints are not revealed, the names of the debt collection companies are, and a search for a particular debt collector could turn up hundreds or thousands of complaints. The website allows advanced search options to narrow down the results to find complaints similar in nature to the consumer's experience. Additional information regarding the complaints can then be sought in discovery. When the debt collector challenges such requests, the same arguments regarding pattern and practice evidence can be used.

11.6.6 Burden of Proof As to FDCPA Exceptions

While the burden of proof is on the consumer asserting that a collector violated an FDCPA provision, the burden switches to the collector seeking to assert that the FDCPA provision does not apply to the collector. The FDCPA explicitly provides that the collector must prove the bona fide error defense "by a preponderance of the evidence."[548]

In other situations, the courts must determine where the burden of proof lies. The Third Circuit in an FDCPA case sets out five criteria for shifting the burden of proof to the collector:

> (1) Whether the defense is framed as an exception to a statute's general prohibition or an element of a prima facie case;[549]
> (2) Whether the statute's general structure and scheme indicate where the burden should fall;
> (3) Whether a plaintiff will be unfairly surprised by the assertion of a defense;
> (4) Whether a party is in particular control of information necessary to prove or disprove the defense; and
> (5) Other policy or fairness considerations.[550]

The Third Circuit cited for support Supreme Court rulings in *FTC v. Morton Salt Co.*[551] and *Meacham v. Knolls Atomic Power Lab.*,[552] and an earlier Third Circuit decision in *United States v. Taylor*.[553]

The Third Circuit case dealt with a collector's third-party contacts. Section 1692c(b) prohibits such contact, except as provided in section 1692b. The collector was found to have the burden of proving compliance with section 1692b.

Similarly, section 1692f(1) prohibits a collector from seeking an amount unless authorized by contract or permitted by law. The Ninth Circuit has held that the collector has the burden of proof of establishing that the amount it seeks is so authorized or permitted.[554] Section 1692f(8) limits language or symbols on an envelope mailed to the consumer, except that a collector may use its business name if such name does not indicate that it is in the debt collection business. The collector bears the burden of proving this exception.[555]

The Sixth Circuit has found that a loan servicer has the burden of proof that the FDCPA does not apply because the loan was not in default when it acquired servicing rights.[556] The Ninth Circuit similarly finds that the collector has the burden of proving the in-house collector defense under section 1692a(6)(B).[557] Where the collector seeks to minimize its statutory damages liability based on its low net worth, it has the burden of establishing that net worth.[558]

The collector has the burden to prove its statute of limitations defense.[559] Where a collector argues that an arbitration agreement prevents the case from being heard in court, the Eleventh Circuit has found it is the collector's burden to prove the existence of an arbitration agreement and that the agreement is binding on the consumer.[560]

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546 Searching for the debt collector's name in quotation marks using a search engine such as www.google.com may lead to consumer complaints posted on the web.

547 https://www.consumerfinance.gov.

548 15 U.S.C. § 1692k(c). *See* Urbina v. Nat'l Bus. Factors, Inc., 979 F.3d 758, 763 (9th Cir. 2020); Abdollahzadeh v. Mandarich Law Group, L.L.P., 922 F.3d 810 (7th Cir. 2019); Engelen v. Erin Capital Mgmt., L.L.C., 544 Fed. Appx. 707 (9th Cir. 2013); Odsather v. Fay Servicing, L.L.C., 2018 WL 6696688 (W.D. Wash. Dec. 20, 2018).

549 *See also* Flores v. Collection Consultants of Cal., 2015 WL 4254032, at *8 (C.D. Cal. Mar. 20, 2015) ("The burden of proving a statutory exception falls on the party seeking to reap the benefit of the exception." (quoting *Del Campo v. Am. Corrective Counseling Serv., Inc.*, 718 F. Supp. 2d 1116, 1133 (N.D. Cal. 2010)).

550 Evankavitch v. Green Tree Servicing, L.L.C., 793 F.3d 355, 361 (3d Cir. 2015).

551 334 U.S. 37, 44–45, 68 S. Ct. 822, 92 L. Ed. 1196 (1948).

552 554 U.S. 84, 91, 128 S. Ct. 2395, 171 L. Ed. 2d 283 (2008).

553 686 F.3d 182, 190 n.5 (3d Cir. 2012) (compiling numerous Supreme Court decisions for the proposition).

554 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 950 (9th Cir. 2011); *See also* Urbina v. Nat'l Bus. Factors, Inc., 979 F.3d 758, 763 (9th Cir. 2020) (collector who relied on contractually obligating creditors to provide accurate information could not avoid liability, because it did not prove that it maintained procedures reasonably adapted to avoid violation).

555 Davis v. Baron's Creditors Serv. Corp., 2001 WL 1491503 (N.D. Ill. Nov. 19, 2001).

556 Garner v. Select Portfolio Servicing, Inc., 2017 WL 8294293 (6th Cir. Oct. 27, 2017).

557 Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507, 1514–1515 (9th Cir. 1994).

558 Vandehey v. Client Services, Inc., 2019 WL 2403201 (E.D. Wis. June 7, 2019).

559 *See* Michalak v. LVNV Funding, L.L.C., 604 Fed. Appx. 492 (6th Cir. 2015).

560 Bazemore v. Jefferson Capital Sys., L.L.C., 827 F.3d 1325 (11th Cir. 2016). *See also* § 11.3.2, *supra*.

11.7 Offers of Judgment or Settlement

11.7.1 Offers of Judgment in General

Rule 68 of the Federal Rules of Civil Procedure provides that, at any time at least fourteen days before trial, the collector may make "an offer to allow judgment on specified terms, with the costs then accrued." An offer of judgment may be accepted within fourteen days by written notice. Then either party may file the offer and notice of acceptance together with proof of service, after which the clerk enters judgment.[561]

If the offer of judgment was not accepted and the judgment eventually obtained is less favorable than the offer, the plaintiff must pay the defendant's post-offer court costs.[562] These costs do not include the defendant's post-offer attorney fees, because the FDCPA considers "costs" as separate from attorney fees.[563] In addition, in this situation, a court may limit the consumer's award of attorney fees to fees earned before the offer of judgment.[564]

Offers of judgment are frequently used by debt collector defendants in FDCPA actions in an attempt to settle individual FDCPA suits, and often as an attempt to defeat FDCPA actual damage awards, consumer attorney fee awards, and class actions. The use of Rule 68 in class actions to settle the claim of the named FDCPA plaintiff and provide the foundation for the defendant to argue that the settlement moots the class action is addressed in § 11.11.4.2, *infra*.[565]

11.7.2 Offers of Incomplete Relief

Rule 68 may not apply where the collector's offer is not for a definite amount or where it does not address all of the consumer's sought relief. The Fourth Circuit held in *Warren v. Sessoms & Rogers, P.A.*,[566] that a Rule 68 offer of judgment did not moot an individual's FDCPA claim for damages when the defendant debt collector offered $250 in actual damages or "an amount determined by the Court upon Plaintiff's submission of affidavits or other evidence of actual damage." The court found it significant that the plaintiff did not plead or state in discovery the amount of her claim for actual damages, and that she had requested the amount of her damages to be determined by a jury. The court held that the Rule 68 offer did not moot the case as it was contingent or not unequivocal,[567] and it required the consumer to give up the right to a jury. Likewise, the Seventh Circuit found that the collection agency's settlement offer of $1500 did not moot the FDCPA claim where the offer did not specify if it was for actual or statutory damages and the settlement amount did not satisfy the consumer's demand for actual damages.[568]

In *Payne v. Progressive Financial Services, Inc.*,[569] the Fifth Circuit found an offer of judgment that did not offer to compensate the consumer's FDCPA actual damages would not moot the consumer's case, as the offer did not offer complete relief.[570] The lower court determined that complete relief was offered as it considered the consumer's allegations of actual damages to be insufficiently supported by facts in the complaint. Relying on Supreme Court precedent, the Fifth Circuit found that the failure to adequately plead entitlement

561 Fed. R. Civ. P. 68. *Cf.* Ardito v. Wolpoff & Abramson, L.L.P., 2009 WL 449159 (C.D. Cal. Feb. 23, 2009) (unreported) (granting lawyer defendant relief from mistakenly entered offer of judgment, but not dismissing from reopened action).

562 Danow v. Law Office of David E. Borack, P.A., 367 Fed. Appx. 22 (11th Cir. 2010) (attorney fees ($62,895) plus costs ($715.60) properly awarded where offer of judgment was not more favorable than judgment). *But see* Bolton v. Pentagroup Fin. Services, L.L.C., 2009 WL 734038 (E.D. Cal. Mar. 17, 2009) (even though plaintiff failed to accept offer of judgment that provided all relief available, case would not be deemed moot, since court's instant ruling adopting *Costa* standard of emotional distress that eliminated plaintiff's claim for actual damages could not have been anticipated).

563 *See* Crossman v. Marcoccio, 806 F.2d 329 (1st Cir. 1986); Abby v. Paige, 2013 WL 12246348, at *4 (S.D. Fla. Aug. 2, 2013) (consumer was entitled to award of reasonable attorney fees, even though she rejected early Rule 68 offer of judgment that offered larger recovery than that ultimately received; "Because the FDCPA does not include attorney's fees as part of awardable costs, Rule 68 does not limit Plaintiff's recovery of attorneys fees."), *adopted*, 2013 WL 12246349 (S.D. Fla. Oct. 1, 2013); Valencia v. Affiliated Group, Inc., 674 F. Supp. 2d 1300 (S.D. Fla. 2009); Pietrowski v. Merchants & Med. Credit Corp., 256 F.R.D. 544 (E.D. Mich. 2008). *See also* Peck v. IMC Credit Services, 960 F.3d 972 (7th Cir. June 5, 2020) (damages such as plaintiff's time and mailing expenses incurred in successfully pursuing his claim are not part of costs "properly awardable under" § 1692k(a)); Hopper v. Eulid Manor Nursing Home, Inc., 867 F.2d 291, 296 (6th Cir. 1989).

564 *See* Fallen v. GREP Southwest, L.L.C., 247 F. Supp. 3d 1165, 1207 (D.N.M. Mar. 30, 2017) (citing supporting cases). *See also* Paz v. Portfolio Recovery Assoc., 924 F.3d 949 (7th Cir. May 15, 2019) (considering plaintiff's rejection of Rule 68 offer and limited success at trial in limiting award of attorney fees); Lloyd v. Credit Services Int'l, Inc., 2019 WL 5311843 (N.D. Ill. Oct. 21, 2019); Deibert v. Kohn Law Firm, S.C., 2019 WL 4933154 (E.D. Wis. Oct. 7, 2019).

565 *See also* National Consumer Law Center, Consumer Class Actions § 7.3 (10th ed. 2020), updated at www.nclc.org/library.

566 676 F.3d 365 (4th Cir. 2012).

567 *See also* Smith v. Greystone Alliance, L.L.C., 772 F.3d 448 (7th Cir. 2014) (collection agency's settlement offer of $1500 did not moot FDCPA claim for unspecified amount of actual and statutory damages); Payne v. Progressive Fin. Services, Inc. 748 F.3d 605 (5th Cir. 2014) (unaccepted offer of judgment that omitted compensation for claimed actual damages did not offer complete relief, and therefore did not moot plaintiff's FDCPA claim); McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010, 1019 (7th Cir. 2014) (settlement proposal did not offer full resolution: "[I]t demanded that he refrain from appealing the denial of class certification; and, most importantly, it promised only to give any other "reasonable" relief that the court thought necessary. This indicated that [the debt buyer] LVNV was reserving the right to object to any additional relief that it deemed unreasonable."). *But see* Jackson v. Cavalry Portfolio Services, L.L.C., 2014 WL 517490 (E.D. Mo. Feb. 7, 2014) (granting the defendant summary judgment when the consumer failed to provide any evidence to support his alleged actual damages).

568 Smith v. Greystone Alliance L.L.C., 772 F.3d 448 (7th Cir. 2014).

569 748 F.3d 605 (5th Cir. 2014). *See also* Wynne v. I.C. Sys., Inc., 124 F. Supp. 3d 734 (E.D. Va. 2015).

570 *See also* Webster v. Receivables Performance Mgmt., L.L.C., 414 F. Supp. 3d 1198 (S.D. Ind. Oct. 21, 2019) (rejecting Rule 68 offer of judgment does not moot plaintiff's claims).

to actual damages would not go to the court's jurisdiction; the debt collector, at this stage of the case, could seek summary judgment.[571]

Similarly, in *Hrivnak v. NCO Portfolio Management, Inc.*,[572] the Sixth Circuit found that the debt collectors' Rule 68 offer of judgment did not moot the consumer's FDCPA and state claims when the offer did not offer to satisfy claims that the debt collectors deemed meritless. For example, the offer did not address the consumer's claims for declaratory and injunctive relief. Because the availability of those claims under the FDCPA had not been addressed by the Sixth Circuit or the Supreme Court, they should be determined by dispositive motion, rather than a motion to dismiss for lack of jurisdiction because of mootness.[573] In *Cabala v. Crowley*,[574] the Second Circuit held that an oral settlement offer that offered full monetary relief, but did not consent to entry of judgment, did not offer full relief mooting the case, affirming the district court's conclusion that the parties continued to litigate because of a substantive dispute over the "nature and form" of the settlement. The Eleventh Circuit also held that a debt collector's mere offer of settlement for the full amount of statutory damages, costs, and attorney fees, without entry of judgment, did not moot the plaintiffs' FDCPA claims.[575]

The question of whether a rejected offer of judgment offered full relief also arises as to whether the relief obtained is less than that offered, entitling a losing defendant to recovery of its court costs. The Eleventh Circuit found an offer of judgment was not as favorable where it was as to monetary relief, but also contained a confidentiality provision.[576] The lack of a confidentiality agreement had some value: "this is exactly the kind of consumer protection case where there is added value to public exposure to a defendant's violations."[577]

Where an offer of judgement is accepted, tender by the collector and acceptance of a payment by the consumer of less than the full judgment amount does not amount to an accord and satisfaction of such judgment, particularly where no genuine compromise is reached that the payment would be considered full satisfaction of the judgment.[578]

11.7.3 Ambiguity in Defendant's Offer of Reasonable Attorney Fees

Some debt collectors file offers of judgment which provide for damages and "costs," but do not specifically mention the payment of the consumer's attorney fees. The debt collector then asserts that acceptance of the offer of judgment waived the consumer's right to recover attorney fees. The debt collector's position is based on litigation under the Civil Rights Act, in which the term "costs" includes the plaintiff's attorney fees for the purpose of an offer of judgment. The United States Supreme Court has reasoned: "Thus, absent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purpose of Rule 68."[579]

However, many courts find the Civil Rights Act cases are not determinative in FDCPA cases because the FDCPA states that the successful litigant may obtain costs "together with a reasonable attorney's fee."[580] The Seventh, Eighth, and Ninth Circuits have approved awarding consumers attorney fees in FDCPA cases when the consumer accepts a Rule 68 offer of judgment that provides for damages and costs but is silent as to attorney fees.[581] The consumer is entitled under the FDCPA to an additional amount for fees, since the offer failed to exclude fees and since the defendant, if it had intended to exclude fees, should have done so explicitly.[582]

However, the Sixth Circuit admonished a consumer attorney for refusing to disclose to the debt collector the current consumer attorney fees accrued and rejecting an offer of judgment that included an offer for the consumer's previously disclosed fees, but not the current fees.[583] The Sixth Circuit

571 748 F.3d 605, 608 (5th Cir. 2014).

572 719 F.3d 564 (6th Cir. 2013).

573 *See also* Smith v. Specified Credit Ass'n, Inc., 2015 WL 468871 (N.D. Ill. Jan. 30, 2015) (where consumer proposed to amend class action complaint to seek injunctive and/or declaratory relief, collection agency's offer of solely monetary damages did not moot FDCPA claim).

574 736 F.3d 226 (2d Cir. 2013). *See also* Balthazor v. ARS Nat'l Services, Inc., 2011 WL 3627701, at *2 (S.D. Fla. Aug. 18, 2011) (when there was no offer of judgment, but a mere settlement offer of full damages, lower court found that offer did not moot case or warrant dismissal: "Defendant in this action is expressly not seeking relief under Rule 68. This Court does not find that the action is moot as Plaintiff has not been afforded the relief of an enforceable judgment.").

575 Zinni v. ER Solutions, Inc., 692 F.3d 1162 (11th Cir. 2012). *See also* Fernandez v. Peter J. Craig & Assoc., 985 F. Supp. 2d 363 (E.D.N.Y. 2013).

576 Danow v. Law Office of David E. Borack, P.A., 367 Fed. Appx. 22 (11th Cir. 2010).

577 Danow v. Law Office of David E. Borack, P.A., 367 Fed. Appx. 22, 24 (11th Cir. 2010).

578 Afewekri v. Anaya Law Group, 843 Fed. Appx 847 (9th Cir. 2021) (consumer was awarded attorney fees and costs following his acceptance of debt collector's second offer of judgment; debt collector tendered payment for less than judgment amount and consumer accepted such payment; denying debt collector's appeal of judgment under theory of accord and satisfaction).

579 Marek v. Chesny, 473 U.S. 1, 9, 105 S. Ct. 3012, 3016, 87 L. Ed. 2d 1 (1985) (split decision with strong dissent arguing that attorney fees have not been considered costs under Rule 68).

580 15 U.S.C. § 1692k(a)(3).

581 *See* Afewerki v. Anaya Law Grp., 779 Fed. Appx. 449 (9th Cir. 2019); Hennessy v. Daniels Law Office, 270 F.3d 551 (8th Cir. 2001); Burrell v. G.M.F., Inc., 225 F.3d 661 (9th Cir. 2000); Webb v. James, 147 F.3d 617 (7th Cir. 1998); Nusom v. Comh Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997); Van Echaute v. Law Office of Thomas Landis, Esq., 2011 WL 1302195 (N.D.N.Y. Mar. 31, 2011); Tye v. Brock & Scott, P.L.L.C., 2010 WL 428964 (M.D.N.C. Feb. 1, 2010) (ambiguity from not mentioning attorney fees in Rule 68 offer construed against debt collection law firm). *See also* Ash v. Malacko, 2014 WL 4384475, at *2 (D. Minn. Sept. 4, 2014) (awarding consumer fees based on it being successful action (citing *Fletcher v. City of Fort Wayne*, 162 F.3d 975, 976–977 (7th Cir. 1998)).

582 *See* Hennessy v. Daniels Law Office, 270 F.3d 551 (8th Cir. 2001).

583 Lee v. Thomas & Thomas, 109 F.3d 302 (6th Cir. 1997) (awarding fees of $1106.85 when $12,759 were sought). *See also* Baylor v. Mitchell

denied the consumer attorney fees that accrued after the offer of judgment.[584]

Unless the law in the applicable jurisdiction is clear that fees can be awarded, it is better to seek a revised offer that expressly permits the recovery of the consumer's attorney fees and specifies the procedure for determining those fees. A consumer who receives an offer of judgment should ask the defendant to clarify the offer's contents when it is unclear.[585]

When the debt collector makes an offer of judgment to resolve the matter of damages and costs, but agrees to leave the determination of attorney fees to the court, this should be spelled out in the offer of judgment.[586] When the offer of judgment includes an unspecified amount of attorney fees, the amount of fees or the method of calculations should be confirmed in writing.[587] If the offer consists only of "now accrued" attorney fees and provides for a determination by the court of the amount of fees, the consumer may not be able to obtain fees for the time spent preparing and arguing the fee petition.[588]

Clarifying the offer in the consumer's acceptance of the offer of judgment may be construed as a rejection of the offer[589] or as acceptance of the offer as originally stated.[590] It is advisable, before acceptance, to clarify what the offer of judgment includes and does not include.[591]

11.7.4 Other Issues in Settlements and Offers of Judgment

Parse the language in a proposed settlement agreement to prevent releasing claims against other parties or future claims. For example, when the consumer accepted an offer of judgment from the debt buyer's collection agency, a lower court dismissed his complaint against the debt buyer co-defendant as moot pursuant to agency principles, because the consumer's only claim against the debt buyer was based on its vicarious liability for the acts of its collection agency, which was satisfied by the offer of judgment.[592] The clear language of section 1692k provides that statutory damages are available from *each* defendant;[593] be leery of an offer of judgment by one of several defendants.

A prior settlement by a consumer of an FDCPA claim may attempt to bar a subsequent suit by that consumer against the debt collector.[594] One loan servicer argued that language in a prior settlement agreement that released the servicer from "any and all past and present claims up until the Effective Date

Rubenstein & Assoc., 857 F.3d 939 (D.C. Cir. 2017) (attorney fees significantly reduced in part because attorney spent more than 87 hours on opposition to motion dismiss after she should have known of offer of judgment that was eventually accepted); Miranda v. Receivables Performance Mgmt., L.L.C., 2014 WL 772959 (D. Colo. Jan. 30, 2014) (awarding attorney fees with 50% reduction for "unreasonable" time spent following plaintiff's rejection of offer of judgment, based on her belief that offer's wording would restrict her recovery of costs); Weber v. I.C. Sys., Inc., 2007 WL 2907306 (E.D.N.Y. Mar. 19, 2007) (awarding fees and costs under Rule 68 only for time expended to first $1000 offer of judgment, which plaintiff declined). *Cf.* Williams v. NCO Fin. Sys., Inc., 2011 WL 1791099 (E.D. Pa. May 11, 2011) (although party may be entitled to attorney fees accruing after date of service of offer of judgment for work done to prepare fee petition, offer is contract, and if party has agreed to earlier accrual date, agreed date will control); Mann v. Acclaim Fin. Services, Inc., 348 F. Supp. 2d 923 (S.D. Ohio 2004) (neither Rule 68 nor Sixth Circuit precedent precluded award of fees for time expended after inadequate offer of judgment was made; $2000 offer of judgment intended to compensate for $1200 in damages plus $800 in attorney fees and expenses fell well short when attorney fees expended at time of offer were $4600).

584 Lee v. Thomas & Thomas, 109 F.3d 302 (6th Cir. 1997).

585 *Cf.* Queen v. Nationwide Credit, Inc., 2010 WL 4006676 (N.D. Ill. Oct. 7, 2010) (debt collector's offer of judgment requiring "general release" rendered offer undefined, indefinite, and unenforceable).

586 *See* Rivera v. Corporate Receivables, Inc., 540 F. Supp. 2d 329 (D. Conn. 2008). *See also* Skaer v. Nat'l Action Fin. Services, Inc., 2009 WL 724054 (D. Colo. Mar. 18, 2009).

587 *See, e.g.*, Conway v. Specified Credit Ass'n I, Inc., 2014 WL 51024, at *3 (E.D. Mo. Jan. 7, 2014) ("Defendants' offer of judgment unambiguously included reasonable attorney's fees accrued in the federal court action. Plaintiff accepted that offer and cannot recover fees incurred in connection with the previous state court action."). *See also* Shaw v. Credit Collection Services, 2009 WL 4981620 (S.D. Cal. Dec. 14, 2009) (fees "incurred to date"); Tillman v. Calvary Portfolio Services, L.L.C., 2009 WL 510921 (D. Ariz. Feb. 27, 2009) (finding plaintiff's motion to strike offer of judgment that was ambiguous about payment of consumer's attorney fees to be procedurally improper).

588 *See* Watson v. NCO Fin. Sys., Inc., 2015 WL 1959163 (D. Nev. Apr. 29, 2015); Navarro v. Monarch Recovery Mgmt. Inc., 2014 WL 2805244, at *1 n.1 (E.D. Pa. June 20, 2014) (because offer of judgment is contract, if parties have specified accrual date within offer of judgment, that date will govern); Bilazzo v. Portfolio Recovery Assoc., 876 F. Supp. 2d 452 (D.N.J. 2012); Lindenbaum v. NCO Fin. Sys., Inc., 2011 WL 2848748, at *1 (E.D. Pa. July 19, 2011) (statement in accepted offer of judgment that allowed "an additional amount for plaintiff's reasonable costs and attorney fees accrued through the date of this Offer of Judgment" was an ambiguous term that must be construed against drafter of offer; "Accordingly . . . plaintiff may recover for work done through the date of filing of the acceptance of the Offer of Judgment" rather than date that offer was made); Pearson v. Nat'l Credit Sys., Inc., 2010 WL 5146805 (D. Ariz. Dec. 13, 2010).

589 *See* Boraci v. Law Offices of Michael R. Stillman, P.C., 2007 WL 485232 (E.D. Mich. Feb. 9, 2007). *See also* Henchen v. Renovo Services, L.L.C., 2013 WL 1152040 (W.D.N.Y. Mar. 19, 2013) (offer of judgment that was silent as to attorney fees was not accepted when consumer accepted offer intending to seek his attorney fees).

590 Gomez v. Allied Interstate, Inc., 2007 WL 2710390 (W.D. Mich. Sept. 13, 2007).

591 *See* Conway v. Specified Credit Ass'n I, Inc., 2014 WL 51024 (E.D. Mo. Jan. 7, 2014) (consumer cannot recover fees incurred in connection with previous state court action). *See also* Walker v. Rash Curtis & Assoc., 2010 WL 4157128 (E.D. Cal. Oct. 19, 2010) (awarding plaintiffs reasonable attorney fees of $4822.50 pursuant to terms of settlement agreement, but not costs, because nothing in settlement offer indicated that plaintiffs had in any way conducted "successful action to enforce" liability against defendant under FDCPA).

592 Nelson v. Cavalry Portfolio Services, L.L.C., 2010 WL 1258045 (D. Colo. Mar. 24, 2010); *See also* Deutsch v. Pressler, Felt & Warshaw, L.L.P., ___ F. Supp. 3d ___, 2021 WL 1619505 (S.D.N.Y. Apr. 26, 2021) (claims against LVNV released in settlement agreement because of affiliate relationship between LVNV and Resurgent).

593 *See* § 11.9.8.2, *infra*.

594 *See, e.g.*, Little v. Seterus, Inc., 2017 WL 606340 (S.D. Fla. Feb. 13, 2017) (homeowner's FDCPA claims against mortgage servicer were dismissed, because release by homeowner in his settlement of prior FDCPA suit against servicer had waived future claims against servicer).

of this Agreement . . . known or unknown or capable of being known" acted as a release and waiver of post-settlement claims of attempts to collect on inaccurate amounts due to the servicer's pre-settlement failure to properly calculate the escrow account.[595]

The Eleventh Circuit held that acceptance of the defendant's offer of judgment rendered the case moot despite the debt collector's reservation of its right to appeal. The reservation did not create a justiciable controversy in the absence of either party having a continuing financial stake in the litigation.[596]

Most debt collectors wish to avoid a public record of a judgment recorded against them and may make a higher offer than that extended by the offer of judgment when the consumer agrees that the offer and acceptance will not be filed. This higher offer will be appealing to the consumer, but, if the debt collector does not make a higher offer, the offer of judgment and acceptance should be recorded with the clerk of the court, thereby creating a permanent public record of judgment against the collector. That recorded judgment may provide a warning to other consumers and strengthen other consumers' claims for FDCPA statutory damages and punitive damages for other claims.

11.8 Actual Damages

11.8.1 Overview

11.8.1.1 Importance of Developing Actual Damages

A working knowledge of the law and practice of proving damages is crucial in both the negotiation and the trial stage of a debt collection abuse case. An attorney who has not developed the evidence of damages in a case has little idea of where to start and terminate negotiations.

As discussed in detail below, a case should always be assessed for actual damages resulting from emotional distress and even medical conditions, whether considering a statutory debt collection violation or a case sounding in tort. When a claim sounding in tort is added, punitive damages also may be appropriate.[597] All types of actual damages must be considered, including out-of-pocket expenses and "relational" injuries, in which the damage is to the debtor's relationships to family, employers, or the community, such as injury to reputation. Treatises exist that report amounts of court awards for "pain and suffering," "emotional distress," and other consumer injuries.[598]

Successful negotiation or trial of the damages issues in a debtor harassment case has important repercussions beyond the individual case: it sets a standard for future settlements in similar cases and educates opposing counsel and their client, mediators, and the judiciary of the harms consumers suffer in these cases. Favorable settlements or awards of damages that are publicized also may deter future misconduct by collectors throughout the affected community. Large settlements or awards increase the legal resources available to low-income consumers by increasing the financial incentive for more private lawyers to become involved in debtor harassment cases. A consumer attorney obtaining large awards will be sought by consumers seeking representation and by attorneys seeking co-counsel.

11.8.1.2 Actual Damages and Settlement of Consumer's Underlying Debt

A consumer's damages claim may be used to leverage a reduction of the collector's debt claim against the consumer. Canceling or reducing the underlying debt, if owed, can provide meaningful relief to the client, since the amount of the debt may well exceed the damages recoverable for debt collection abuse. Be mindful, however, as to whether a cancellation or reduction of a debt is taxable income to the consumer. Settlement of a disputed debt may not result in taxable income, while forgiveness of a debt may result in taxable income.[599] Consumer's counsel must also use some caution in exploring forgiveness of the debt in return for dismissal or reduction of the amount claimed in litigation of an FDCPA case, as some judges may disapprove of that strategy.

Since the consumer may be judgment proof or eligible for bankruptcy, this type of compensation may be appealing to the collector. However, a consumer who is filing bankruptcy or is judgment proof may have little interest in trading real dollars as damages for forgiveness of the debt in settlement negotiations. Retirement of the debt as settlement of FDCPA claims should be accepted only when it has real significance to the client.

Canceling the debt may later be claimed to be beyond the authority of a collection agency or attorney or not recorded in the creditor's records, so that it is imperative to confirm the agreement in writing. When the consumer settles and dismisses their suit, they should file the settlement with the court and request that it reserve jurisdiction to enforce the settlement agreement.[600]

The consumer's counsel should also rectify with the collector, to the extent possible, any harmful information in the consumer's credit reports.[601] This will make it easier for the

595 Bowen v. Ditech Fin. L.L.C., 2017 WL 4183081, at *14, 15 (D. Me. Sept. 20, 2017).

596 *See* Yunker v. Allianceone Receivables Mgmt., Inc., 701 F.3d 369 (11th Cir. 2012).

597 *See* § 11.10, *infra*.

598 *See, e.g.*, Jury Verdict Research Inc., Personal Injury Valuation Handbooks (1989) (available from Jury Research, Inc., Solon, Ohio). Lawyers specializing in personal injury cases may also be helpful.

599 *See* § 11.14.2, *infra*.

600 *See* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 380–382, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); Kelly v. Bird, 2006 WL 2193709 (E.D. Mich. Aug. 2, 2006).

601 *See* National Consumer Law Center, Fair Credit Reporting (9th ed. 2017), *updated at* www.nclc.org/library.

consumer to get credit or a mortgage in the future at a lower cost.[602]

A defendant may seek to require that settlement terms remain confidential. Confidentiality in this context may be contrary to the public interest when it allows the defendant to continue to perpetrate an abusive practice. Several factors should be evaluated when deciding whether a consumer should accept a confidentiality clause in a settlement agreement.[603] Some clients, however, may prefer to keep a settlement agreement confidential, particularly when it results in a large recovery.

11.8.1.3 General Standards for FDCPA Actual Damages

The standards for establishing actual damages vary by type of claim and for state claims by state. Chapter 15, *infra*, focuses on tort claims, and Chapter 16, *infra*, on state consumer protection claims.

For an FDCPA claim, the statute provides:

> (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure; . . .[604]

Neither the FDCPA, nor any other part of the Consumer Credit Protection Act,[605] defines "actual damage." *Black's Law Dictionary* defines actual damages as: "an amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses—Also termed *compensatory damages*."[606]

Congress left it to the courts to apply the term "actual damage" to particular cases in accordance with the purposes of the FDCPA and with developing principles of federal common law. Actual damages commonly include pecuniary losses such as lost wages, attorney fees to defend a state collection action brought in violation of the FDCPA,[607] or the cost of obtaining an unlisted telephone number,[608] and physical injuries such as heart attacks, ulcers, vomiting, and insomnia.[609] A payment made by a debtor in response to an act that violated the FDCPA may be considered actual damages, without regard to whether the debt was in fact owed.[610] The equitable remedy of disgorgement may be appropriate to return the debt collector's revenues obtained by violations of the FDCPA to a class of consumers targeted by the illegal conduct.[611] In addition, the courts commonly allow recovery of damages for emotional distress[612] and relational injuries under the FDCPA.[613]

11.8.2 Emotional Distress Damages

11.8.2.1 Importance of Emotional Distress Damages

Depending on the severity of the harm, damage awards for emotional distress can be substantial.[614] For example, in *McCollough v. Johnson, Rodenburg & Lauinger, L.L.C.*,[615] the Ninth Circuit held that the testimony of the plaintiff consumer and a clinical psychologist supported the jury's award of $250,000 for emotional distress. Generally, a consumer does not have to meet the higher tort standards of intentional or negligent infliction of emotional distress under the FDCPA,[616] and such claims can be supported by objective evidence, arguments of counsel, and the consumer's own experience.[617] Large damage awards for emotional distress may be easier to recover and retain on appeal than a large punitive damages award.[618]

602 *Id.*
603 *See* National Consumer Law Center, Mortgage Lending § 12.11.3 (3d ed. 2019), *updated at* www.nclc.org/library.
604 15 U.S.C. § 1692k(a)(1).
605 15 U.S.C. §§ 1601 to 1693.
606 Black's Law Dictionary (11th ed. 2019).
607 *See* § 11.8.4, *infra*.
608 *Id.*
609 *See* § 11.8.2.5, *infra*.
610 *See* § 118.4, *infra*.
611 *See* National Consumer Law Center, Consumer Class Actions § 17.4.4 (10th ed. 2020), *updated at* www.nclc.org/library; National Consumer Law Center, Credit Discrimination § 11.8.5.2 (7th ed. 2018), *updated at* www.nclc.org/library. *See also* Appx. E.3.1.1, *infra*.
612 *See* § 11.8.2, *infra*.
613 *See* § 11.8.5, *infra*.
614 *See, e.g.*, McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011) ($250,000); Goodin v. Bank of Am., 114 F. Supp. 3d 1197 (M.D. Fla. 2015) ($50,000 to each spouse); Burrows v. Hunt, 2012 WL 414295 (E.D. Mich. Feb. 9, 2012) (default judgment of $25,000); Hunter v. Oasis Fin. Solutions, L.L.C. 2010 WL 6210035 (S.D. Cal. Dec. 21, 2010) ($73,000 as default judgment), *adopted*, 2011 WL 997375 (S.D. Cal. Mar. 21, 2011).
615 637 F.3d 939 (9th Cir. 2011).
616 *Id.* Lee v. Javitch, Block & Rathbone, L.L.C., 2008 WL 1886178 (S.D. Ohio Apr. 25, 2008) (emotional distress damages for FDCPA violation do not require proof of elements of intentional infliction of emotional distress), *rev'd on other grounds*, 601 F.3d 654 (6th Cir. 2010). *But see* Costa v. Nat'l Action Fin. Serv., 634 F. Supp. 2d 1069 (E.D. Cal. 2007) (to recover emotional distress damages for violation of FDCPA or Rosenthal Fair Debt Collection Act, must prove elements of intentional infliction of emotional distress; severe distress not shown when consumer suffered anxiety and loss of sleep, but never consulted healthcare professional; disagreed with by *Alonso v. Blackstone Fin. Group L.L.C.*, 962 F. Supp. 2d 1188, 1200 (Aug. 2, 2013)).
617 *See* § 11.8.6.3, *infra*.
618 *See, e.g.*, Carlisle v. Nat'l Commercial Serv., Inc., 722 Fed. Appx. 864 (11th Cir. 2018) (affirming district court's award of $7000 for emotional distress without hearing where consumer's emotional distress damages affidavit was factually unopposed on summary judgment and collection agency did not request hearing); Lee v. Javitch, Block & Rathbone L.L.C., 2008 WL 1886178 (S.D. Ohio Apr. 25, 2008) (upholding jury' award of emotional distress damages; emotional distress damages fo FDCPA violation do not require proof of elements of intentional inflic tion of emotional distress), *rev'd on other grounds*, 601 F.3d 654 (6t Cir. 2010); Wenrich v. Robert E. Cole, P.C., 2001 WL 4994 (E.D. P Dec. 22, 2000).

11.8.2.2 Supreme Court Case Law on Recovery of Emotional Distress Damages

The development of the law supports that emotional distress damages can be recovered as actual damages. In *Gertz v. Robert Welch, Inc.*,[619] a defamation case predating the FDCPA raising First Amendment issues, the Supreme Court did not define actual injury, but held that it was not limited to out-of-pocket loss. The Court noted that the more common types of harm inflicted by defamatory falsehoods include loss of reputation and standing in the community, personal humiliation, and mental anguish and suffering.[620]

In *Carey v. Piphus*,[621] a procedural due process case brought under 42 U.S.C. § 1983, the Court stated that "[d]istress is a personal injury familiar to the law,"[622] and that "[w]e use the term 'distress' to include mental suffering or emotional anguish."[623] The Court thus defined actual injury to include a variety of psychological harms, as well as pecuniary loss and physical injury.

11.8.2.3 Older State Law Tort Standards for Recovery of Emotional Distress Damages

Courts in the past were reluctant to permit compensation for mental anguish or distress unless the mental distress resulted from a physical injury or impact, known as the "impact rule." Some courts restricted the availability of compensation for stress-related injuries to situations in which they are likely to exist (for example, when the defendant's conduct is "outrageous," "malicious," or "reckless").[624] Some courts wanted to see utterly despicable debt abuses and "blood" before they would compensate a tort victim.[625]

A change in judicial attitude toward awarding stress-related damages is reflected by the increased number of jurisdictions recognizing the tort of intentional infliction of mental distress and liberalizing that tort by expressly doing away with the "impact rule," or by ignoring contrary precedent and awarding damages for purely stress-related injuries.

When claims are based on state law, the stage of development of the state law for awarding damages related to emotional stress must be carefully determined. Federal cases, particularly Supreme Court decisions, may be persuasive to local courts in the process of expanding their laws of damages.[626]

11.8.2.4 The FDCPA Standard for Emotional Distress Damages

Courts now generally agree that emotional distress damages can be awarded under the FDCPA without having to meet state tort requirements for recovery of such damages when the plaintiff provides specific testimony to show mental pain and distress and not just generalized testimony or conclusory statements.[627]

Congress passed the FDCPA because of the inadequacy of state tort law. The FDCPA's Findings and Declaration of Purpose states: "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers."[628] Representative Annunzio, the primary House FDCPA sponsor, stated that "[p]assage of the Debt Collection Practices Act is important if consumers throughout this country are to be protected from the mental anguish and intimidation that are consequences of abusive debt collection practices."[629] As one lower court noted: "by their very nature, abusive, deceptive or unfair debt collection practices are those kinds of actions which may be expected to cause emotional distress and, therefore, the availability of damages for such distress is of paramount importance."[630] "[A] reading of § 1692k(a)(1), that looks to state tort law, would afford plaintiffs no protection from the very conduct the FDCPA is intended to curb. This would appear to be contrary to Congress' intentions."[631] "The imposition of actual damages should be interpreted as a message to all debt collectors that such conduct is inappropriate. To not award actual damages would encourage 'a race to the bottom'

619 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

620 *Id.*, 418 U.S. at 350.

621 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).

622 *Id.*, 435 U.S. at 263.

623 *Id.*, 435 U.S. at 263 n.20.

624 For example, the standard in Maine for intentional infliction of emotional distress includes that the conduct was so "extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community." Curtis v. Porter, 784 A.2d 18, 24 (Me. 2001).

625 *See* § 15.2.3, *infra*.

626 *See* § 11.8.2.2, *supra* (analysis of United States Supreme Court's position on the awarding of damages for stress-related injuries, and review of federal court decisions based on Supreme Court's guidance in this area).

627 *See* Lodge v. Kondaur Capital Corp., 750 F.3d 1263, 1272 (11th Cir. May 8, 2014); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011); Best v. Fed. Nat'l Mortg. Ass'n, 450 F. Supp. 3d 606 (D. Md. Mar. 30, 2020) (mortgagor testified in deposition that he suffered inability to sleep, vomiting, and headaches as result of receiving threatening letters from law firm and failure of law firm to respond to documents, and that he had not seen physician and mental health care provider but had taken over-the-counter medications for symptoms of his emotional distress); *In re* Trevino, 615 B.R. 108 (Bankr. S.D. Tex. Jan. 31, 2020); Young v. NPAS, Inc., 361 F. Supp. 3d 1171 (D. Utah Feb. 5, 2019); § 11.8.6.3, *infra*. *See also* Buchholz v. Meyer Njus Tanick, P.A., 946 F.3d 855, 864 (6th Cir. Jan. 3, 2020) (allegation of anxiety alone with no corroborating allegations not considered emotional distress or cognizable injury). *But see* Russell v. GC Services L.P., 476 F. Supp. 3d 1097 (E.D. Wash. Aug. 4, 2020) (consumer did not establish that debt collector's communications would cause reasonable person to suffer significant emotional harm). Whether emotional distress damages are considered concrete harm for Article III standing is discussed in § 11.15, *infra*.

628 15 U.S.C. § 1692(b).

629 123 Cong. Rec. H2923 (daily ed. Apr. 1, 1977).

630 Deeters v. Phelan Hallinan & Schmieg, L.L.P., 2013 WL 6524625, at *4 (W.D. Pa. Dec. 12, 2013).

631 Smith v. Law Offices of Mitchell N. Kay, 124 B.R. 182, 189 n.6 (D. Del. 1991) (looking at case law interpreting 15 U.S.C. §§ 1681 to 1681t). *Cf.* Greene v. Rash, Curtis & Assoc., 89 F.R.D. 314, 316 (E.D. Tenn. 1980).

as debt collectors could operate in an inappropriate manner with little consequence."[632]

At the time the FDCPA was enacted, case law under other titles of the Consumer Credit Protection Act (CCPA), such as the Fair Credit Reporting Act (FCRA)[633] and the Equal Credit Opportunity Act (ECOA),[634] had awarded damages for injury to the sensibilities or psyche, without proof of the state tort elements for emotional distress. When Congress enacted the term "actual damages" in the FDCPA, it was aware of how the term was used in other preexisting CCPA titles. "Where Congress borrows terms of art in which are accumulated . . . legal tradition and meaning . . . it presumably knows and adopts the cluster of ideas that were attached . . . and the meaning its use will convey to the judicial mind."[635] For example, the availability of FCRA emotional distress damages without reference to state tort law requirements indicates a Congressional intent to allow the same under the FDCPA.[636]

11.8.2.5 Injuries and Symptoms Related to Stress

The consumer's attorney should ask about the stress the consumer suffered and how long the distress continued. Actual damages from stress may involve several different injuries, such as nausea, sleeplessness, headaches, body pain, and loss of concentration. Multiple symptoms from stress can add credibility to the consumer's claim, as well as increase actual damages. It can be helpful to obtain medical or mental health treatment records if the consumer discussed the distress with a professional. Other support can come in the form of affidavits from partners, friends, clergy, or anyone close to the consumer with whom the consumer discussed the abuse. When the abuse is egregious and the resulting distress lasts many days, damages may be valued in five or even six figures, or more.[637]

The following injuries and symptoms are among those that courts have recognized are related to stress[638]:

- Anxiety, paranoia, difficulty relating to others, stress, anger, "down time," severe headaches, increased temper, adrenaline, conflict with a spouse;[639]
- Shock;[640]
- Crying;[641]
- Loss of sleep, insomnia, nightmares, night sweats;[642]
- Anxiety, nervousness, fear of foreclosure of their home,[643] worry, loss of happiness;[644]

632 Becker v. Montgomery, Lynch, 2003 WL 23335929, at *2 (N.D. Ohio Feb. 26, 2003).

633 Rasor v. Retail Credit Co., 554 P.2d 1041 (Wash. 1976). *See also* Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829 (8th Cir. 1976).

634 Shuman v. Standard Oil Co. of Cal., 453 F. Supp. 1150 (N.D. Cal. 1978).

635 Morissette v. United States, 342 U.S. 246, 263, 72 S. Ct. 240, 96 L. Ed. 288 (1952). *See also* United States v. Freed, 401 U.S. 601, 607–608, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971); United States v. Merriam, 263 U.S. 179, 187, 44 S. Ct. 69, 68 L. Ed. 240 (1923); United States v. Fid. Trust Co., 222 U.S. 158, 160, 32 S. Ct. 59, 56 L. Ed. 137 (1911).

636 Smith v. Law Offices of Mitchell N. Kay, 124 B.R. 182 (D. Del. 1991) (looking at case law interpreting 15 U.S.C. §§ 1681 to 1681t).

637 *See* Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (award of $5 million); Southwestern Bell Tel. Co. v. Wilson, 768 S.W.2d 755 (Tex. App. 1988) (upheld $2,457,789.24 award on appeal).

638 *See also* Appx. E.3.1.1, *infra*.

639 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011). *See also* Grimm v. GPG Processing, L.L.C., 2019 WL 4508921 (S.D. Ohio Sept. 19, 2019) (awarding $15,000 in emotional distress damages where plaintiff's constant anticipation of additional calls from debt collector caused, *inter alia*, stress in her relationship with her husband); Bentson v. Chyma, 2017 WL 7513317, at *3 (E.D. Tex. Dec. 11, 2017) (summary judgment for consumer, $2000 in actual damages for emotional distress; "Here, Plaintiff, a single mother with very limited financial resources, worried (and continues to worry) that she would be unable to provide for her children if her assets were frozen pending resolution of Defendant's debt collection efforts; this anxiety and stress manifested itself physically whereby Plaintiff experienced panic attacks, headaches, loss of appetite and sleep, and a rash that caused her to visit a dermatologist."), *adopted*, 2018 WL 780587 (E.D. Tex. Feb. 8, 2018); Green v. Monarch Recovery Mgmt., Inc., 2015 WL 4599480 (S.D. Ind. July 29, 2015) (consumer's testimony that she had suffered fatigue, argued with her husband, and experienced stomach pain following receipt of collection letter went beyond mere conclusory statements (though barely), entitling her to jury trial).

640 Moorehead v. J.C. Penney Co., 555 S.W.2d 713, 718 (Tenn. 1977).

641 *See* Bahena v. Jefferson Capital Sys., L.L.C., 363 F. Supp. 3d 914 (W.D. Wis. 2019); Young v. NPAS, Inc., 361 F. Supp. 3d 1171 (D. Utah 2019); Mendoza v. Allied Interstate L.L.C., 2019 WL 5616961, at *8 (C.D. Cal. Oct. 22, 2019) (consumer's statements that he suffered from lack of sleep and stress and was unable to answer calls from prospective clients on his cell phone were "more than conclusory and enough to establish emotional distress"); Grimm v. GPG Processing, L.L.C., 2019 WL 4508921 (S.D. Ohio Sept. 19, 2019); Latimore v. Gateway Retrieval, L.L.C., 2013 WL 791258 (N.D. Ga. Feb. 1, 2013); Baiocchetti v. Smith, Dean & Assoc., Inc., 2012 WL 3728146 (D. Conn. Jan. 25, 2012); Hartung v. J.D. Byrider, Inc., 2009 WL 1876690 (E.D. Cal. June 26, 2009); Cady v. Marcella, 729 N.E.2d 1125 (Mass. App. Ct. 2000).

642 *See* Blevins v. MSV Recovery L.L.C., 2020 WL 4365634, at *4–5 (S.D. Ohio July 30, 2020) (awarding $5000 for emotional distress consisting of panic, difficulty falling asleep, trouble focusing at work, and 'flashbacks' to past instances of verbal/physical abuse"); Best v. Fed. Nat'l Mortg. Ass'n, 450 F. Supp. 3d 606 (D. Md. Mar. 30, 2020); Bahena v. Jefferson Capital Sys., L.L.C., 363 F. Supp. 3d 914 (W.D. Wis. 2019); Reyelts v. Cross, 2013 WL 3870285 (N.D. Tex. July 26, 2013); Latimore v. Gateway Retrieval, L.L.C., 2013 WL 791258 (N.D. Ga. Feb. 1, 2013); Roots v. Am. Marine Liquidators, Inc., 2012 WL 3136462 (D.S.C. Aug. 1, 2012); Rankins v. Nat'l Credit Works II, L.L.C., 2011 WL 5222601 (E.D. Mo. Nov. 2, 2011); Hartung v. J.D. Byrider, Inc., 2009 WL 1876690 (E.D. Cal. June 26, 2009); Baruch v. Healthcare Receivable Mgmt., Inc., 2007 WL 3232090 (E.D.N.Y. Oct. 30, 2007); Crossley v. Lieberman, 90 B.R. 682 (E.D. Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (awarding compensatory damages of $5 million under Texas Debt Collection Act when plaintiff suffered very painful skin eruptions and numerous other symptoms, including sleeplessness, due to defendant's abusive collection tactics). But see Braden v. JH Portfolio Debt Equities, L.L.C., 2019 WL 6895544, at *2 (D. Md. Dec. 18, 2019) (testimony regarding lack of "restful" sleep did not warrant damages for emotional distress).

643 *See* Goodin v. Bank of Am., 114 F. Supp. 3d (M.D. Fla. 2015) (awarding $50,000 to each spouse, noting that their very real fear of losing their home created "a very stressful situation"). *But see* Aitken v. Debt Mgmt. Partners, L.L.C., 2015 WL 1810345 (C.D. Ill. Apr. 17, 2015) (fear of felony prosecution not credible after the consumer's lawyer advised consumer it was not possible).

644 *See* Selig v. Niagara Recovery Solutions Mgmt. Group, L.L.C., 2020 WL 4283926, at *6 (E.D. Va. July 27, 2020) (on default judgment, awarding emotional distress damages where consumer alleged that he

- Severe distress,[645] hypertension;[646]
- Loss of concentration, instability;[647]
- Hysteria,[648] trembling;[649]
- Irritability;[650]
- Embarrassment, humiliation, intimidation;[651]
- Loss of the tranquility of old age;[652]
- Indignation;[653]
- Future anxiety, pain, or suffering;[654]
- Emotional or mental distress.[655]

"worried that the defendants had taken legal action against him, and that the caller would call or come to his work, jeopardizing his current and future employment" and "also worried that the defendants would show up at his home"); Latimore v. Gateway Retrieval, L.L.C., 2013 WL 791258 (N.D. Ga. Feb. 1, 2013) (awarding $10,000 for emotional distress resulting from threats of arrest and jail); Baiocchetti v. Smith, Dean & Assoc., Inc., 2012 WL 3728146, at *3 (D. Conn. Jan. 25, 2012) (awarding $2500 in actual damages for emotional distress that plaintiff suffered as result of defendant's "egregious collection efforts"); Rankins v. Nat'l Credit Works II, L.L.C., 2011 WL 5222601 (E.D. Mo. Nov. 2, 2011) (felt panicked); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 645 F. Supp. 2d 917, 928 (D. Mont. 2009), *aff'd*, 637 F.3d 939 (9th Cir. 2011) ("[doctor] felt that the lawsuit caused stress which worsened [plaintiff's] symptoms, such as headaches, anxiety, paranoia, and difficulty relating to others"; jury awarded $250,000 in compensatory damages, $60,000 in punitive damages under state tort law); Hartung v. J.D. Byrider, Inc., 2009 WL 1876690 (E.D. Cal. June 26, 2009); Baruch v. Healthcare Receivable Mgmt., Inc., 2007 WL 3232090 (E.D.N.Y. Oct. 30, 2007) (consumer's allegation of anxiety and depression credible considering duration and persistence of harassment); Dowling v. Litton Loan Servicing, L.P., 2007 WL 7020413 (S.D. Ohio June 5, 2007) (awarding consumer $25,000 for mental anguish after bench trial for anxiety she suffered dealing with mistakes by mortgage servicing company and their repeated calls after being informed that she was represented). *But see* In re Trevino, 615 B.R. 108, 147 (Bankr. S.D. Tex. 2020) (while plaintiffs testified generally to damages, mental distress, anxiety, and worry, such generalized testimony was not specific or substantial enough to establish disruption in their daily routine).

645 Chavez v. Diverse Fin. Enterprises Inc., 2015 WL 13662798 (D.N.M. June 10, 2015) (default judgment on allegations of multiple FDCPA violations; damages of $15,000 for severe emotional distress to restore amount extorted from consumer); Reyelts v. Cross, 2013 WL 3870285 (N.D. Tex. July 26, 2013) (awarding damages for mental anguish of $30,000); Brablec v. Paul Coleman & Assoc., 2010 WL 235062 (E.D. Cal. Jan. 21, 2010) (awarding $25,000 FDCPA actual damages following debt collection law firm's default on consumer's claim alleging harassing telephone calls and threats of legal action resulting in severe emotional distress); Bullock v. Abbott & Ross Credit Serv., L.L.C., 2009 WL 4598330 (W.D. Tex. Dec. 3, 2009) (recommending default judgment award of $2000 actual FDCPA damages for mental anguish); Hartung v. J.D. Byrider, Inc., 2009 WL 1876690 (E.D. Cal. June 26, 2009); Rodriguez v. Florida First Fin. Group, Inc., 2009 WL 535980 (M.D. Fla. Mar. 3, 2009) (awarding $1000 FDCPA actual damages in default judgment for several panic attacks over several weeks as a result of debt collection abuses); Myers v. LHR, Inc., 543 F. Supp. 2d 1215 (S.D. Cal. 2008) (affirming $90,000 damages for emotional distress and damage to credit caused by outrageous harassment for debt not owed; consumer presented evidence of medical treatment for physical effects of stress). *See also* Leonard v. John Doe Corp., 2020 WL 3642562, at *2 (S.D. Ohio July 6, 2020) (on default judgment, awarding $5000 in actual damages for "extreme stress, depression, anxiety and sleeplessness" resulting from debt collector's degrading conduct).

646 *See* Decker v. Receivables Performance Mgmt., L.L.C., 2019 WL 1112256, at *6 (N.D. Ill. Mar. 11, 2019); Itri v. Equibank, 464 A.2d 1336, 1339 (Pa. Super. Ct. 1983).

647 Cady v. Marcella, 729 N.E.2d 1125 (Mass. App. Ct. 2000) (hysterical crying and inability to concentrate on work); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002). *See also* Hartung v. J.D. Byrider, Inc., 2009 WL 1876690 (E.D. Cal. June 26, 2009) (recommending entry of default judgment for consumer for $25,000 in FDCPA actual damages for tenseness, headaches, nervousness, fear, worry, unhappiness, loss of sleep, nightmares, crying jags, loss of appetite, loss of concentration, loss of enjoyment of life, shortness of breath, humiliation, and extreme emotional distress; also, debt collector's actions aggravated plaintiff's anxiety disorder, post-traumatic stress disorder, back injury, and asthma forcing her to obtain medication from her psychiatrist); Myers v. LHR, Inc., 543 F. Supp. 2d 1215 (S.D. Cal. 2008) (default judgment was entered against collector for $92,000 in damages; plaintiff did not owe debt, suffered repeated and abusive collection efforts, and suffered sleeplessness, upset, and embarrassment).

648 Urban v. Hartford Gas Co., 93 A.2d 292 (Conn. 1952) (repossession of buyer's home heater and attendant, apparently false assertion that buyer was in default, causing humiliation, hysteria, and flare-up of arrested diabetic condition, were cognizable basis for tort cause of action).

649 *See* Browne v. Portfolio Recovery Assoc., Inc., 2013 WL 871966 (S.D. Tex. Mar. 7, 2013).

650 *See* Browne v. Portfolio Recovery Assoc., Inc., 2013 WL 871966 (S.D. Tex. Mar. 7, 2013); Rankins v. Nat'l Credit Works II, L.L.C., 2011 WL 5222601 (E.D. Mo. Nov. 2, 2011); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002).

651 Rannels v. S.E. Nichols, Inc., 591 F.2d 242 (3d Cir. 1979) (allegations of loss of respect, pain and embarrassment, handicap in returning to profession, and loss of consortium were sufficient to plead special damages and to withstand motion to dismiss); Croft v. L.C. Maxwell & Assoc., Inc., 2019 WL 117334, at *3 (E.D. Mich. Jan. 5, 2019) (on default judgment, awarding $25,000 in actual damages under FDCPA and state law where collector's repeated calls and threats caused consumer to take "the undoubtedly embarrassing and stressful step of notifying his employer that a debt collector might be contacting them" and caused other consumer concern that "that if other employees overheard the calls, they might question her competence as a manager"), *aff'd*, 2019 WL 275933 (E.D. Mich. Jan. 22, 2019); Roots v. Am. Marine Liquidators, Inc., 2012 WL 3136462 (D.S.C. Aug. 1, 2012) (awarding actual damages of $16,660, representing $12,500 in emotional distress damages, including loss of sleep and personal humiliation in this default matter); Harding v. Check Processing, L.L.C., 2011 WL 1097642, at *3 (N.D. Ohio Mar. 22, 2011) (contacting adult plaintiff's mother and disclosing debt was in some small degree "inherently degrading" to plaintiff; $5000 in emotional distress damages).

652 Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (compensatory damage award of $5 million under Texas Debt Collection Act for seventy-three-year-old identity theft victim).

653 McCollough v. Johnson, Rodenburg & Lauinger, 645 F. Supp. 2d 917, 928 (D. Mont. 2009), *aff'd*, 637 F.3d 939 (9th Cir. 2011) (plaintiff thought that lawsuit was "frivolous" and "an insult," and he was "being shoved around;" lawsuit "was the straw that broke the camel's back. I got mad. I'm still mad"; jury awarded $250,000 in compensatory damages, $60,000 in punitive damages under state tort law); DeGeorge v. LTD Fin. Serv., L.P., 2008 WL 905913 (W.D.N.Y. Mar. 31, 2008) (consumer's testimony that he was "pretty aggravated" and embarrassed by revelation of debt, corroborated by family testimony that he was stressed, frustrated, depressed, and anxious is barely sufficient to raise fact issue of emotional distress damages).

654 *See* Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (compensatory damage award of $5 million; $2 million was for future suffering).

655 *See* § 11.8.6.3, *infra*; Lepski v. Bayside Capital Serv., L.L.C., 2020 WL 4192245, at *3 (W.D.N.Y. July 21, 2020) (awarding $2000 in emotional distress damages for "frustration, anxiety, and stress resulting from

Keep in mind that certain symptoms related to stress or distress may not be considered a concrete injury for purposes of Article III standing. As discussed in § 11.15, *infra*, advocates should rely on emotional distress to establish Article III standing only where the plaintiff's distress was significant, and the conduct was of a nature that would cause many people to feel distress.[656]

11.8.3 Medical Conditions Arising from Debt Collection Abuses

Debt collection abuse can result in medical conditions for the consumer, which can be recovered as actual damages. Examples include:

- Loss of appetite, nausea, vomiting, sensitive stomach, loss of weight;[657]
- Tooth pain where debt collector took funds saved for dental work;[658]
- Ulcers, diabetic flare-ups;[659]
- Miscarriage;[660]
- Heart attack, heart palpitations, angina, chest constrictions;[661]
- Becoming bedridden;[662]
- Pain and suffering;[663]
- Shortness of breath;[664]

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the calls both to [the plaintiff] and to his family members"); Mendes v. JH Portfolio Debt Equities, 2019 WL 4860660, at *3 (E.D. Mo. Oct. 2, 2019) (awarding $1000 in emotional distress damages where debt collector's provision of false information, failure to communicate, and continued misrepresentations affected consumer's "ability to secure future loans and enjoy an error-free credit report, thereby causing her to feel 'stuck' and unable to move forward in life"); Escobar v. Midland Credit Mgmt., 2019 WL 3751586, at *8 (D. Conn. Aug. 8, 2019) (denying motion to dismiss claim for actual damages where consumer alleged that he became frustrated and agitated and suffered mental anguish after learning that debt collector continued to represent his debt was still owing when it was not); Weinstein & Mandarich Law Group, L.L.P., 2019 WL 290578, at *1 (W.D. Wash. Jan. 23, 2019) (awarding $30,000 in emotional distress damages based on testimony of plaintiff and his wife that law firm's actions "repeatedly harmed Plaintiff by causing stress, anxiety, feelings of helplessness and hopelessness, and other forms of general emotional distress"), *aff'd in part, rev'd in part*, 798 Fed. Appx. 88 (9th Cir. 2019); Esget v. TCM Fin. Serv. L.L.C., 2014 WL 258837 (E.D. Cal. Jan. 23, 2014); Roots v. Am. Marine Liquidators, Inc., 2012 WL 3136462 (D.S.C. Aug. 1, 2012) (actual damages of $16,660 for mental anguish); Miller v. Midpoint Resolution Group, L.L.C., 608 F. Supp. 2d 389 (W.D.N.Y. Apr. 9, 2009) (bench trial resulted in $500 for emotional distress in FDCPA case); DeGeorge v. LTD Fin. Serv., L.P., 2008 WL 905913 (W.D.N.Y. Mar. 31, 2008) (consumer's testimony that he was aggravated and embarrassed by revelation of debt, corroborated by family testimony that he was stressed, frustrated, depressed, and anxious is barely sufficient to raise fact issue of emotional distress damages); Lee v. Javitch, Block & Rathbone, L.L.C., 2008 WL 1886178 (S.D. Ohio Apr. 25, 2008) (upholding jury's award of emotional distress damages for wrongful freezing of account containing only exempt SSI funds), *rev'd on other grounds*, 601 F.3d 654 (6th Cir. 2010); McNally v. Client Serv., Inc., 2008 WL 2397489 (W.D. Pa. June 11, 2008) (discussing standard of proof for emotional distress damages for FDCPA violation), *adopted*, 2008 WL 2987199 (W.D. Pa. July 31, 2008).

656 *See* §§ 11.15.3.4, 11.15.5.6, *infra*.

657 *See* Latimore v. Gateway Retrieval, L.L.C., 2013 WL 791258 (N.D. Ga. Feb. 1, 2013) (awarding $10,000 for emotional distress resulting from threats of arrest and jail); Rankins v. Nat'l Credit Works II, L.L.C., 2011 WL 5222601 (E.D. Mo. Nov. 2, 2011). *See also* Boerner v. LVNV Funding L.L.C., 358 F. Supp. 3d 767, 781 (E.D. Wis. 2019) (plaintiff met his burden of explaining the physical and mental effects of the LVNV lawsuit where he testified that he suffered "a loss of appetite that resulted in him shedding ten pounds from an already frail frame"). *But cf.* Baker v. Lincoln First Bank, 18 B.R. 243 (Bankr. W.D.N.Y. 1982) (100 phone calls, letters, personal intimidating visits at work, threats of calling police and suit not outrageous over two-year period when instability and diarrhea could have been the result of other troubles).

658 Christensen v. Fin. Credit Serv., Inc., 2016 WL 10538187, at *1 (D.N.M. Apr. 29, 2016) ("Here, the jury awarded plaintiff $200,000 for actual damages, including damages for loss of money; out-of-pocket expenses, pain and suffering, and personal humiliation, embarrassment, mental anguish, emotional distress, aggravation, or frustration. Plaintiff established that defendant withdrew $2,875.75—80% of plaintiff's net worth—from his bank account for a time barred debt.").

659 Latimore v. Gateway Retrieval, L.L.C., 2013 WL 791258 (N.D. Ga. Feb. 1, 2013) (awarding $10,000 for emotional distress resulting from threats of arrest and jail).

660 *See* Hearings on S. 656, S. 918, S. 1130, and H.R. 5294 (Bills to Amend the Consumer Credit Protection Act to Prohibit Abusive Practices by Debt Collectors) Before the Subcomm. on Consumer Affairs of the S. Comm. on Banking, Housing & Urban Affairs, 95th Congr. 183 (1977).

661 *See* Gilmore v. Account Mgmt., Inc., 2009 WL 2848278 (N.D. Ga. Apr. 27, 2009) (damages for mental distress of $10,000 as a result of stress caused by dunning for disputed debt when consumer was having heart problems, trebled to $30,000 under state statute); George v. Jordan Marsh Co., 268 N.E.2d 915 (Mass. 1971) (tort action stated for heart attacks allegedly caused by creditor's repeated dunning letters, etc., despite dispute about the debt and creditor's knowledge of consumer's illness). *But cf.* Francisco v. Midland Funding, L.L.C., 2019 WL 498936, at *7 (N.D. Ill. Feb. 8, 2019) (where consumer did not produced any medical records to support her claim that stress caused her heart attack, or even that she had a heart attack, jury could not award actual damages based on record); Greene v. Rash, Curtis & Assoc., 89 F.R.D. 314 (E.D. Tenn. 1980) (undisputed medical evidence showed no causal link between plaintiff's aggravated heart problems and defendant's conduct); Greene v. Rash, Curtis & Assoc., 89 F.R.D. 314 (E.D. Tenn. 1980) (undisputed medical evidence showed no causal link between plaintiff's aggravated heart problems and defendant's conduct).

662 *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 645 F. Supp. 2d 917, 928 (D. Mont. 2009) ("lawsuit caused him to spend more time 'down' in bed with severe headaches"; jury awarded $250,000 in compensatory damages, $60,000 in punitive damages under state tort law), *aff'd*, 637 F.3d 939 (9th Cir. 2011); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (compensatory damage award of $5 million under Texas Debt Collection Act when plaintiff suffered fear, embarrassment, very painful sores, panic attacks, and reclusiveness due to defendant's abusive collection tactics).

663 Christensen v. Fin. Credit Serv., Inc., 2016 WL 10538187, at *1 (D.N.M. Apr. 29, 2016) ("Here, the jury awarded plaintiff $200,000 for actual damages, including damages for loss of money; out-of-pocket expenses, pain and suffering, and personal humiliation, embarrassment, mental anguish, emotional distress, aggravation, or frustration."; loss of this money caused plaintiff pain and suffering for additional two years because he was unable to pay for required dental work); Rankins v. Nat'l Credit Works II, L.L.C., 2011 WL 5222601 (E.D. Mo. Nov. 2, 2011) (could not sleep at night and experienced headaches, nausea, and pain in neck, shoulder, and back; went to a doctor for physical pain and to psychiatrist for stress and anxiety).

664 Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002).

- Headaches;[665]
- Dizziness, fainting, blacking out;[666]
- Skin eruptions and great pain from shingles;[667]
- Aggravated existing illness;[668] and
- Extended illness.[669]

11.8.4 Out-of-Pocket Losses

Recoverable out-of-pocket losses in debt collection harassment cases include:

- Loss of job, income, work time, or leave from a job;[670]
- Impairment of job advancement;[671]
- Medical or counseling expenses;[672]
- Medication or special diet;
- Telephone toll charges;[673]
- Telephone charges for an unlisted number;[674]
- Payments on an invalid claim;[675]
- Payment of a debt barred by a statute of limitations;[676]
- Transportation expenses;[677]
- Conversion of consumer's property;
- The amount of a tax refund intercepted to pay a student loan that had been discharged in bankruptcy, and accountant fees for filing for the return of the intercepted funds;[678]
- Bank overdraft charges;[679]
- Reduced credit rating;[680]
- Attorney fees incurred defending a prior suit;[681]

665 McCollough v. Johnson, Rodenburg & Lauinger, 645 F. Supp. 2d 917, 928 (D. Mont. 2009), *aff'd*, 637 F.3d 939 (9th Cir. 2011) (jury awarded $250,000 in compensatory damages, $60,000 in punitive damages under state tort law).

666 Duty v. Gen. Fin. Co., 273 S.W.2d 64 (Tex. 1954) (fainting, blackouts, severe headaches, nausea, diminished housework capacity alleged); United Fin. & Thrift Corp. v. Bain, 393 S.W.2d 419 (Tex. App. 1965) (severe headaches, nausea, blackouts, fainting, numbness, diminished capacity to do housework alleged).

667 Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002). *See also* Stagikas v. Saxon Mortg. Serv., Inc., 2013 WL 5373275, at *7 (D. Mass. Sept. 24, 2013) (plaintiff suffered embarrassment, anger, and stress that had physical manifestations such as weight loss, racing heart, restlessness, muscle tensions, and shingles).

668 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011) (time-barred collection suit aggravated conditions from plaintiff's prior head injury; $250,000 for emotional distress and $60,000 in punitive damages); Alonso v. Blackstone Fin. Group, L.L.C., 2013 WL 6843597 (E.D. Cal. Dec. 20, 2013) (lupus flared). *But see* Baruch v. Healthcare Receivable Mgmt., Inc., 2007 WL 3232090 (E.D.N.Y. Oct. 30, 2007) (consumer's allegation that emotional distress caused or aggravated physical illness not sufficient; no evidence of doctor visits or prescriptions, nor expert testimony as to causation).

669 Bowden v. Spiegel, Inc., 26 P.2d 571 (Cal. Ct. App. 1950) (buyer's allegation that seller placed threatening phone call concerning disputed debt to house of buyer's neighbor at 11:00 p.m., resulting in buyer's being called to that house and humiliated before others and causing extended illness, stated cause of action).

670 Rannels v. S.E. Nichols, Inc., 591 F.2d 242 (3d Cir. 1979) (allegations of loss of respect, pain, and embarrassment, handicap in returning to profession, and loss of consortium were sufficient to plead special damages and to withstand motion to dismiss); Esget v. TCM Fin. Serv., L.L.C., 2014 WL 258837 (E.D. Cal. Jan. 23, 2014); Roots v. Am. Marine Liquidators, Inc., 2012 WL 3136462 (D.S.C. Aug. 1, 2012) (awarding $16,660 in actual damages, $4160 in lost wages in this default matter); *In re* Orman, 2006 WL 4470839 (Bankr. E.D. Okla. Sept. 18, 2006) (actual damages for violation of automatic stay included time off from work); *In re* Lisenby, 2006 WL 802392 (Bankr. M.D. Ala. Feb. 22, 2006) (actual damages for violation of automatic stay included bank's overdraft charges and consumer's lost wages to prevent further withdrawals from her checking account).

671 *See* Esget v. TCM Fin. Serv. L.L.C., 2014 WL 258837 (E.D. Cal. Jan. 23, 2014).

672 *See id.*

673 *See* Schubach v. Household Fin. Corp., 376 N.E.2d 140 (Mass. 1976).

674 *See* Moller v. New England Tel. & Tel. Co., 44 F.C.C.2d 614 (F.C.C. 1973).

675 *See* O'Brien v. Valley Forge Specialized Educ. Serv., 2004 WL 2580773 (E.D. Pa. Nov. 10, 2004) (considering in *dicta* restitution of wrongfully taken funds as FDCPA actual damages); Gervais v. O'Connell, Harris & Assoc., Inc., 297 F. Supp. 2d 435 (D. Conn. 2003) (awarding to consumer in a default judgment $2500 actual damages for the $2500 withdrawn by the collector from his bank account after the collector falsely stated that the debt was not time-barred debt and must be paid immediately; also awarding $1500 as emotional distress damages, $8000 punitive damages, and $5720 as costs and attorney fees for violations of the FDCPA and Connecticut Unfair Trade Practices Act); § 8.3, *supra*.

676 *See* Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987). *See also* Rawson v. Source Receivables Mgmt., L.L.C., 235 F. Supp. 3d 1014 (N.D. Ill. 2016) (including payments made on time-barred debts in the settlement that could have otherwise added huge amounts of actual damages to this recovery); §§ 7.4.9.3, 8.3, *supra*.

677 *In re* Orman, 2006 WL 4470839 (Bankr. E.D. Okla. Sept. 18, 2006) (actual damages for violation of automatic stay included mileage for travel to lawyer's office). *But cf.* Baker v. G.C. Serv. Corp., 677 F.2d 775 (9th Cir. 1982) ($1.25 in parking and gasoline expenses to visit attorney's office was not proper element of general damages).

678 Miele v. Sid Bailey, Inc., 192 B.R. 611 (S.D.N.Y. 1996).

679 Villanueva v. Account Discovery Sys., L.L.C., 77 F. Supp. 3d 1058, 1079 (D. Colo. 2015); *In re* Lisenby, 2006 WL 802392 (Bankr. M.D. Ala. Feb. 22, 2006).

680 Nelson v. Equifax Info. Serv., L.L.C., 522 F. Supp. 2d 1222 (C.D. Cal. 2007). *See* National Consumer Law Center, Fair Credit Reporting § 12.5.2.2 (9th ed. 2018), *updated at* www.nclc.org/library.

681 *See* Beard v. Ocwen Loan Servicing, L.L.C., 2016 WL 4271765 (M.D. Pa. Aug. 15, 2016) (attorney fees that consumer incurred in successfully defending foreclosure action were recoverable as FDCPA actual damages); Hancock v. Legal Recovery Law Offices, Inc., 2015 WL 12532470 (S.D. Cal. June 23, 2015) (attorney fees incurred in defending state collection suit are recoverable as actual damages in FDCPA action); Monroe v. Steinfeld, 2012 WL 1496204 (N.D. Cal. Mar. 22, 2012) (awarding consumer actual damages on his § 1692*i* claim of $2300, amount of attorney fees and costs paid to consumer's lawyer to have underlying state collection case that was filed in violation of § 1692*i* transferred to county of proper venue in this default matter), *adopted*, 2012 WL 1497519 (N.D. Cal. Apr. 27, 2012); Shepherd v. Law Offices of Cohen & Slamowitz, L.L.P., 668 F. Supp. 2d 579 (S.D.N.Y. 2009) (attorney fees incurred by consumer to vacate improperly obtained default judgment in underlying state collection action, "additional fees to right her credit rating," were among recited actual damages that Rule 68 offer would have to satisfy in order to moot case); Lowe v. Elite Recovery Solutions L.P., 2008 WL 324777 (E.D. Cal. Feb. 5, 2008) (awarding as actual damages ($2560) amount of attorney fees incurred by consumer in defending the underlying state collection action in which FDCPA violations at issue occurred (action was barred by statute of limitations and sought incorrect principal balance, unauthorized amount of interest, and unauthorized attorney fees)); Owens v. Howe, 365 F. Supp. 2d. 942, 948 (N.D. Ind. 2005) (attorney fees

- Bank fees;[682]
- Bankruptcy consultation fees;[683]
- A filing fee to answer a time-barred debt collection complaint against the consumer and the mailing fees for mailing that answer to the debt collector by certified mail;[684] and
- A payment made by a debtor in response to an act that violated the FDCPA may be considered actual damages, without regard to whether the debt was in fact owed.[685]

11.8.5 Injuries to Personal Relations

Debt collection abuse can lead to actual damages based on injury to the consumer's relationship with others, including:

- Injury to reputation;[686]
- Harm to credit rating, loss of access to credit and to employment;[687]
- Loss of privacy;[688]
- Loss of consortium;[689]
- Strain to marriage;[690]

defending state court action compensable as "actual damages" under FDCPA) See also McGahey v. Fed. Nat'l Mortg. Ass'n, 266 F. Supp. 3d 421 (D. Me. 2017) ($100 in attorney fees to pay for second QWR after inadequate response to first QWR was actual damage, and citing cases holding attorney fees are recoverable as actual damages under RESPA if they are not incurred in connection with bringing suit under statute). *But cf.* Moore v. Wells Fargo Bank, 908 F.3d 1050 (7th Cir. 2018) (attorney fees can be actual damages if caused by violation, but not when, as here, fees were incurred to investigate and pursue (RESPA) claim); Bratton v. Thomas Law Firm, P.C., 943 F. Supp. 2d 897 (N.D. Ind. 2013) (consumer could not recover as part of FDCPA attorney fee award for time spent defending underlying collection suit).

682 Shepherd v. Law Offices of Cohen & Slamowitz, L.L.P., 668 F. Supp. 2d 579 (S.D.N.Y. 2009) (charges plaintiff paid to her bank in connection with defendant's allegedly wrongful attachment of her bank account were among recited actual damages that Rule 68 offer would have to satisfy in order to moot case).

683 Blevins v. MSV Recovery L.L.C., 2020 WL 4365634, at *4 (S.D. Ohio July 30, 2020) ($100 bankruptcy consultation fee incurred as a direct result of defendants' unlawful collection practices deemed "just the type" of out-of-pocket expenses contemplated by FDCPA).

684 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 645 F. Supp. 2d 917, 926 (D. Mont. 2009), *aff'd on other grounds*, 637 F.3d 939 (9th Cir. 2011) (fees established loss of money for UDAP claim).

685 *See, e.g.*, Alonso v. Blackstone Fin. Grp. L.L.C., 2013 WL 6843597 (E.D. Cal. Dec. 20, 2013); Hamid v. Stock & Grimes, L.L.P., 876 F. Supp. 2d 500, 503 (E.D. Pa. 2012) ("If her payment was not a proper element of actual damages under the FDCPA, a debt collector could harass a debtor in violation of the FDCPA, as a result of that harassment collect the debt, and thereafter retain what it collected. We do not believe that Congress intended this result."). *Accord* Gustafson v. Recovery Serv., 2015 WL 5009108 (D.N.H. Aug. 21, 2015) (consumer's payment of $300 constituted actual damages where she was never advised of right to dispute validity of debt, and to take other measures to contest debt buyer's actions, prior to making any payments); Abby v. Paige, 553 Fed. Appx. 970 (S.D. Fla. 2013). *See also* Hammitt v. Northeast Collection Bur., Inc., 2014 WL 3577605 (D. Ariz. July 21, 2014) (court would consider payment to be actual damages where it was made by consumer's mother to debt collector to prevent son's threatened arrest, with reimbursement of mother by her son when better evidence of transactions was offered to court); *In re* Lord, 270 B.R. 787, 799 (Bankr. M.D. Ga. 1998); Jacobson v. Bayview Loan Servicing, L.L.C., 371 P.3d 397 (Mont. 2016) (trial court correctly found that homeowners suffered financial detriment because their loan liability was wrongfully increased in the amount of interest ($172,615.20) and late charges ($1,792.94) and defendant servicer would pay that amount to homeowner as damages).

686 Rannels v. S.E. Nichols, Inc., 591 F.2d 242 (3d Cir. 1979) (allegations of loss of respect, pain, embarrassment, handicap in returning to profession, and loss of consortium were sufficient to plead special damages and to withstand motion to dismiss); Holt v. Boyle Bros., 217 F.2d 16 (D.C. Cir. 1954) (cause of action found when single dunning letter, alleged to be false, had been placed in employee's personnel records); Escobar v. Midland Credit Mgmt., 2019 WL 3751486, at *8 (D. Conn. Aug. 8, 2019) (denying motion to dismiss actual damages where consumer alleged that Midland's continued reporting of delinquency caused his credit reputation to suffer); Walton v. Pereira, 995 F. Supp. 3d 437, 441 (W.D. Pa. 2014) (allegations of "harm to her reputation, emotional distress, mental anguish, and humiliation" that consumer suffered sufficiently and plausibly pleaded that she incurred actual damages under FDCPA); Hupp v. N. Hills Lincoln-Mercury, Inc., 610 S.W.2d 349 (Mo. Ct. App. 1980) ($25,000 actual and $50,000 punitive damages upheld for bad check charges when consumer had told dealer not to deposit check until myriad of defects had been corrected on new car purchased); Duty v. Gen. Fin. Co., 273 S.W.2d 64 (Tex. 1954) (headaches, loss of sleep, and loss of work, credit rating, and employment alleged). *But cf.* Palmer Ford, Inc. v. Wood, 471 A.2d 297 (Md. 1984) (summary judgment in malicious prosecution action was properly granted for defendant car repairer when there was evidence of probable cause for arrest; action for abuse of process properly permitted; reversing and remanding jury verdict of $100,000 compensatory and $400,000 punitive damages).

687 *In re* Humes, 496 B.R. 557 (Bankr. E.D. Ark. 2013) ($10,000 damages for emotional distress). *See also* Jiang v. Millennium Concepts Inc., 2016 WL 3682474, at *5 (N.D. Cal. July 11, 2016) (on default judgment, awarding $5000 in actual damages for distress stemming, in part, from allegations of damages to credit score due to reporting "fake debt").

688 *See* K-Mart Corp. v. Weston, 530 So. 2d 736 (Ala. 1988) (jury verdict of $5000 compensatory and $15,000 punitive damages upheld for invasion of privacy when employee of store communicated to customer in front of several other customers that his check would not be accepted because of prior bad check, when, in fact, store had already acknowledged that it was not fault of customer's wife that prior check had been dishonored); Summit Loans, Inc. v. Pecola, 288 A.2d 114 (Md. 1972) (award of $1500 compensatory and $7500 punitive damages for invasion of privacy involving 200 telephone calls and persistent, "vicious," and "vile" language). *See also* § 15.3, *infra*.

689 *See* Rannels v. S.E. Nichols, Inc., 591 F.2d 242 (3d Cir. 1979) (allegations of loss of respect, pain and embarrassment, handicap in returning to profession, and loss of consortium were sufficient to plead special damages and to withstand motion to dismiss); Bingham v. Collection Bur., Inc., 505 F. Supp. 864 (D.N.D. 1981) (awarding husband $100 actual damages for loss of consortium).

690 Grimm v. GPG Processing, L.L.C., 2019 WL 4508921 (S.D. Ohio Sept. 19, 2019) (awarding $15,000 in emotional distress damages where plaintiff's constant anticipation of additional calls from debt collector caused, *inter alia*, stress in her relationship with her husband); Reyelts v. Cross, 2013 WL 3870285 (N.D. Tex. July 26, 2013) (awarding damages for mental anguish of $30,000); Roots v. Am. Marine Liquidators, Inc., 2012 WL 3136462 (D.S.C. Aug. 1, 2012) (emotional distress damages of $12,500 for marital discord); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 645 F. Supp. 2d 917, 928 (D. Mont. 2009), *aff'd*, 637 F.3d 939 (9th Cir. 2011) ("[Plaintiff] thought that the lawsuit was 'frivolous' and 'an insult,' and he was 'being shoved around' . . . [doctor] felt that the lawsuit caused stress which worsened [plaintiff's] symptoms, such as headaches, anxiety, paranoia, and difficulty relating to others"; jury awarded $250,000 in compensatory damages, $60,000 in punitive damages under state tort law); Rogers v. Capital Credit Corp., 47 Wash. Fin. Rep. (BNA) 377 (M.D.N.C. 1986)

- Strain with family;[691]
- Demotion by employer;[692] and
- Humiliation.[693]

11.8.6 Proof of Actual Damages

11.8.6.1 When to Introduce Proof of Damages

Often in FDCPA cases, proof of actual damages is introduced into evidence only after the consumer has prevailed on a partial summary judgment motion on liability. By resolving liability issues first through a partial summary judgment motion, judicial and litigation resources are conserved because proof of actual damages can be focused on those claims on which the consumer prevailed at summary judgment and not on the consumer's other claims.[694]

11.8.6.2 Proof of Out-of-Pocket Damages

For most forms of out-of-pocket injury, documentation is often the best evidence. For example, medical expenses might be proved by billing statements or a receipt for medication. A pay check can show the victim's wages. An employer's personnel file can show the employer's view of a change in work habits. A court may even reject the consumer's testimony about such out-of-pocket expense without supporting documents.[695]

11.8.6.3 Proof of Existence and Extent of Emotional Distress Injury

Emotional distress damages will typically not rely on documents, but on testimony as to the nature of the distress. Nevertheless, emotional distress damages must be based on competent evidence.[696] It is not enough for the consumer to offer brief, conclusory testimony that they experienced emotional distress—there must be something more, such as a more detailed statement from the consumer as to the specifics, symptoms, and duration of the emotional stress, medical testimony, or corroborating witnesses.[697]

On the other hand, emotional distress injury can be proven by the consumer's own testimony, as long as it is specific and explains the nature of the stress, any symptoms, and the duration of the stress.[698] Rather than give opinions, the victim

(attempting to cause friction in consumers' marriage by driving wedge of destruction between spouses and undermining their confidence in each other).

691 *See* Rankins v. Nat'l Credit Works II, L.L.C., 2011 WL 5222601 (E.D. Mo. Nov. 2, 2011) (plaintiff became irritable and isolated herself from friends and family); *In re* Humes, 496 B.R. 557 (Bankr. E.D. Ark. 2013) ($10,000 damages for emotional distress). Cf. Croft v. L.C. Maxwell & Assoc., Inc., 2019 WL 117334, at *3 (E.D. Mich. Jan. 5, 2019) (on default judgment, awarding $25,000 in actual damages under FDCPA and state law where debt collector's repeated phone calls and threats to contact plaintiff's employer and garnish his wages caused him "clear concern for the financial welfare of his family").

692 *See* Wojtasik v. Nat'l Credit Adjusters, L.L.C., 2014 WL 6879312 (D. Kan. Dec. 4, 2014) (awarding $5000 in actual damages in default judgment where collection agency was both persistent and intentional, causing consumer anxiety and stress, and where its calls to her resulted in demotion at work).

693 Smith v. Law Office of Mitchell N. Kay, 124 B.R. 182 (D. Del. 1991) (after default judgment was entered, jury awarded $15,000 for emotional distress as FDCPA actual damages; granting debt collector's motion for new trial on damages unless consumers filed remittitur reducing actual damages to $3000); *In re* Humes, 496 B.R. 557 (Bankr. E.D. Ark. 2013) ($10,000 damages for emotional distress); Jordan v. Scala, 14 Clearinghouse Rev. 1096 (N.J. Super. Ct. 1980) (default judgment; awarding consumer $4000 for retailer's collection actions causing humiliation, emotional distress, injury to reputation and character, and extreme nervousness); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002). *See also* § 11.8.2.5, *supra*.

694 *See, e.g.*, Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989); Graziano v. Harrison, 763 F. Supp. 1269 (D.N.J. 1991), *aff'd in part and rev'd in part*, 950 F.2d 107 (3d Cir. 1991); Clayson v. Rubin & Rothman, L.L.C., 2011 WL 13209935 (W.D.N.Y. Mar. 3, 2011) (in case involving antagonism between parties, explaining very limited testimony necessary to allow jury to award FDCPA statutory and actual damages where collection law firm's strict liability had been determined by summary judgment).

695 *See* Fooks v. Heritage Payment Recovery, 2015 WL 4393903 (M.D. Pa. July 16, 2015), *citing* Blair v. Scott Specialty Gases, 283 F.3d 595, 608 (3d Cir. 2002).

696 *See* Beasley v. Red Rock Fin. Serv., L.L.C., 583 Fed. Appx. 138, 142 (4th Cir. 2014); Sloane v. Equifax Info. Serv., L.L.C., 510 F.3d 495, 503 (4th Cir. 2007); Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989); *In re* Trevino, 615 B.R. 108, 147 (Bankr. S.D. Tex. 2020); Bassett v. I.C. Sys., Inc., 715 F. Supp. 2d 803 (N.D. Ill. 2010); Crass v. Marval & Assoc. L.L.C., 2010 WL 2104174 (E.D. Wis. May 25, 2010); Molina v. Creditors Specialty Serv. Inc., 2010 WL 235042 (E.D. Cal. Jan. 21, 2010).

697 *See* Buchholz v. Meyer Njus Tanick, P.A., 946 F.3d 855, 864 (6th Cir. Jan. 3, 2020) (allegation of anxiety alone with no corroborating allegations not considered emotional distress or a cognizable injury); Gustafson v. Recovery Serv., 2015 WL 5009108 (D.N.H. Aug. 21, 2015); Cabral v. Capitol Mgmt. Serv., L.P., 2014 WL 257878 (D. Nev. Jan. 22, 2014); Guthrie v. JD Enter. & Fin. Serv., 2013 WL 2244337 (S.D. Cal. May 21, 2013); Slater v. PRA Recovery, 2012 WL 5269400 (D. Haw. Sept. 21, 2012), *adopted*, 2012 WL 5269390 (D. Haw. Oct. 22, 2012); Wood v. GC Serv., L.P., 2012 WL 987761 (M.D. Fla. Jan. 26, 2012), *adopted*, 2012 WL 995207 (M.D. Fla. Mar. 23, 2012); Thompson v. Gateway Fin. Servs., Inc., 2012 WL 5989240 (N.D. Ill. Nov. 29, 2012); Mayes v. Credit Solutions Corp., 2011 WL 855634 (D. Ariz. Mar. 9, 2011); Hett v. Bryant Lafayette & Assoc., 2011 WL 740460 (E.D. Mich. Feb. 24, 2011); Kittle v. Accredited Collection Agency Inc., 2010 WL 2650479 (D. Colo. June 30, 2010); Suszka v. Capital Collections, L.L.C., 2009 WL 959798 (E.D. Wis. Apr. 8, 2009); Read v. Amana Collection Serv., 1991 WL 165033 (W.D.N.Y. Jan. 15, 1991). *See also* Ruffin-Thompkins v. Experian Info. Solutions, Inc., 422 F.3d 603, 609 (7th Cir. 2005) (FCRA case); Crafton v. Law Firm of Jonathan B. Levine, 2014 WL 907423 (E.D. Wis. Mar. 7, 2014); §§ 11.8.2.5, 11.15.2.1, *infra* (reliance on emotional distress as concrete injury for Article III standing).

698 *See, e.g.*, Best v. Fed. National Mortg. Ass'n, 450 F. Supp. 3d 606 (D. Md. Mar. 30, 2020); Carlisle v. Nat'l Commercial Serv., Inc., 722 Fed. Appx. 864 (11th Cir. 2018) (affirming district court's award of $7000 on default judgment for emotional distress based on consumer's emotional distress damages affidavit); Sloane v. Equifax Info. Serv., L.L.C., 510 F.3d 495, 503 (4th Cir. 2007); Young v. NPAS, Inc., 361 F. Supp. 3d 1171(D. Utah 2019); Best v. Fed. National Mortg. Ass'n, 450 F. Supp. 3d 606 (D. Md. Mar. 30, 2020); Grimm v. GPG Processing, L.L.C., 2019 WL 3821788, at *5 (S.D. Ohio Sept. 5, 2019) (on default judgment, awarded $1,116.88 in out of pocket expenses plus $15,000 in damages for emotional distress where consumer alleged that "[f]or over two

should simply state the observable manifestations of the injury. The severity and duration of each symptom of each injury should be detailed in order to maximize the recovery.[699]

Corroborating testimony from other witnesses can be helpful[700] and some courts may even require it.[701] Perhaps the best corroboration is from the consumer's physician— either a physician who treated the victim or later became familiar with the victim's medical records.[702] This is particularly relevant if the consumer sought medical treatment for the emotional distress or had a preexisting medical condition that was aggravated by the distress. While it is always a good idea to obtain the corroboration of a physician, courts generally do not require medical testimony in cases in which the plaintiff did not receive medical treatment for the stress caused by the defendant.[703]

Corroboration can also be provided by family members, clergy, or friends.[704] Where two plaintiffs are complaining of the same debt collector, that can even corroborate each other's testimony.[705] Having these corroborating witnesses is particularly helpful because some jurors may view a consumer complaining about their own emotional injury as just being a chronic complainer.

Although it is the province of the jury to determine the causal link between the violation and the injury, evidence of causation should be introduced.[706]

11.8.6.4 No Proof Required for Dollar Value of Mental Suffering

While testimony regarding the value of some types of claimed injuries, such as lost wages, is essential, evidence of the value of pain or mental suffering is not required; the jury is guided in its determination by its own experience, testimony of witnesses on the existence, cause, and extent of the injury, the arguments of counsel, and the instruction of the judge.[707] Again, conclusory, general testimony is not sufficient to establish an amount of damages for claimed emotional distress.[708] A number of courts have held that expert testimony is not necessary to prove emotional distress damages.[709]

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years," she had "been beaten down by the fear caused by the constant threats" against her over her debts), *adopted*, 2019 WL 4220903 (S.D. Ohio Sept. 5, 2019); Browne v. Portfolio Recovery Assoc., Inc., 2013 WL 871966 (S.D. Tex. Mar. 7, 2013); Ploch v. FirstSource Advantage L.L.C., 2012 WL 5384876 (E.D. Mo. Nov. 1, 2012); Santacruz v. Standley & Assoc., 2011 WL 1043338 (D. Colo. Mar. 17, 2011); McIntosh v. Check Resolution Serv., Inc., 2011 WL 1595150 (E.D. Mich. Apr. 27, 2011); Bynum v. Cavalry Portfolio Serv., L.L.C., 2006 WL 1047035 (N.D. Okla. Apr. 13, 2006). *See also* Carlisle v. Nat'l Commercial Serv., Inc., 722 Fed. Appx. 864 (11th Cir. Jan. 2, 2018); Clayson v. Rubin & Rothman, L.L.C., 2010 WL 547476 (W.D.N.Y. Feb. 11, 2010).

699 *See, e.g., In re* Trevino, 615 B.R. 108, 147 (Bankr. S.D. Tex. 2020); Clanton v. Midland Funding, L.L.C., 2019 WL 4750015 (N.D. Ill. Sept. 30, 2019) (summary judgment for collection agency where consumer did not describe her emotional injuries in any significant detail); Elliott v. GC Serv., L.P., 2011 WL 5975671 (M.D. Fla. Nov. 28, 2015); Reyelts v. Cross, 968 F. Supp. 2d 835, 846 (N.D. Tex. 2013); Taylor v. Law Offices of Vincent Peter Cignarale, L.L.C., 2011 WL 6102020 (N.D. Ill. Dec. 5, 2011).

700 *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 957 (9th Cir. 2011). *See also* Guajardo v. GC Serv., L.P., 498 Fed. Appx. 379 (5th Cir. 2012); Jestes v. Saxon Mortg. Serv., Inc., 2014 WL 1847806 (M.D. Tenn. May 8, 2014); Obenauf v. Frontier Fin. Group, Inc., 785 F. Supp. 2d 1188 (D.N.M. 2011).

701 *See, e.g., In re* Steed, 2020 WL 1562526 (N.D. Ga. Apr. 1, 2020); Smith v. Greystone Alliance, Inc., 2014 WL 1097701 (N.D. Ill. Mar. 20, 2014), *rev. on other grounds*, 772 F.3d 448 (7th Cir. 2014); Montgomery v. Florida First Fin. Group, 2008 WL 3540374 (M.D. Fla. Aug. 12, 2008) (denying actual damages when consumer testified to fear and insomnia, but never sought medical help, took over-the-counter medications, or lost time from work); Lowe v. Elite Recovery Solutions L.P., 2008 WL 324777 (E.D. Cal. Feb. 5, 2008).

In the context of Fair Credit Reporting Act violations, some courts require only sufficient detail from the plaintiff, without corroboration, while others demand the latter. *See* National Consumer Law Center, Fair Credit Reporting § 12.5.2.3 (9th ed. 2018), *updated at* www.nclc.org/library.

702 *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 957 (9th Cir. 2011).

703 *See, e.g.*, Best v. Fed. National Mortg. Ass'n, 450 F. Supp. 3d 606 (D. Md. Mar. 30, 2020); Dorris v. Accounts Receivable Mgmt., Inc., 2013 WL 1209629, at *8 (D. Md. Mar. 22, 2013); Browne v. Portfolio Recovery Assoc., Inc., 2013 WL 871966 (S.D. Tex. Mar. 7, 2013); Ortega v. Collectors Training Inst. of Ill., Inc., 2011 WL 241948 (S.D. Fla. Jan. 24, 2011).

704 DeGeorge v. LTD Fin. Serv., L.P., 2008 WL 905913 (W.D.N.Y. Mar. 31, 2008).

705 *See* Basile v. I.C. Sys., Inc., 2011 WL 4368510 (W.D.N.Y. Sept. 19, 2011).

706 *See* § 11.8.7, *infra*.

707 *See* Braden v. JH Portfolio Debt Equities, L.L.C., 2019 WL 68995544) (D. Md. Dec. 18, 2019). *See also* Knussman v. Maryland, 272 F.3d 625, 640 (4th Cir. 2001) (civil rights claim with emotional distress damages). *Cf.* Smith v. Law Office of Mitchell N. Kay, 124 B.R. 182 (D. Del. 1991) (jury award was excessive). *See generally* Grassley v. Debt Collectors, Inc., 1992 U.S. Dist. LEXIS 22782 (D. Or. Dec. 14, 1992); Carrigan v. Cent. Adjustment Bur., Inc., 502 F. Supp. 468 (N.D. Ga. 1980); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979); 2 Stein on Personal Injury Damages §§ 1.5, 1.7, and Chs. 8 and 10 (3d ed. 1997, updated 2020); D. Dobbs, 1 The Law of Remedies §§ 3.1, 8.1(4) (2d ed. 1993); Fritz, *Action for Harassment of Debtor*, 16 Am. Jur. *Trials* 619, §§ 78, 99 (1969); § 11.8.2.1, *supra* (more detailed discussion of proving actual damages including emotional distress).

708 *See* § 11.8.6.3, *supra;* Dill v. City of Edmond, Okla., 155 F.3d 1193, 1209 (10th Cir. 1998) (plaintiff's statement that transfer was "very upsetting," that everything he worked for "was taken away," and some people would not associate with him because of transfer, not sufficient to prove emotional distress).

709 *See, e.g.*, Lodge v. Kondaur Capital Corp., 750 F.3d1263 (11th Cir. May 8, 2014) (non-expert testimony may be sufficient to satisfy one prong of emotional distress analysis); McNally v. Client Serv., Inc., 2008 WL 2397489 (W.D. Pa. June 11, 2008) (consumer's testimony sufficient), *adopted*, 2008 WL 2987199 (W.D. Pa. July 31, 2008); DeGeorge v. LTD Fin. Serv., L.P., 2008 WL 905913 (W.D.N.Y. Mar. 31, 2008) (family members' testimony sufficient); Nelson v. Equifax Info. Serv., L.L.C., 522 F. Supp. 2d 1222, 1235, 1239 (C.D. Cal. 2007) (medical testimony unnecessary); McCammon v. Bibler, Newman & Reynolds, P.A., 493 F. Supp. 2d 1166 (D. Kan. 2007). *Cf.* Baruch v. Healthcare Receivable Mgmt., Inc., 2007 WL 3232090 (E.D.N.Y. Oct. 30, 2007) (consumer testimony sufficient for emotional distress damages but more required as to physical injury damages).

For example, the Ninth Circuit quoted the following jury instruction approvingly:

> The law does not set a definite standard by which to calculate compensation for mental and emotional suffering and distress. Neither is there any requirement that any witness express an opinion about the amount of compensation that is appropriate for the kind of law.
>
> The law does require, however, that when making an award for mental and emotional suffering and distress you should exercise calm and reasonable judgment. The compensation must be just and reasonable.[710]

A jury's award of actual damages for mental distress injuries may be overruled only if the court can "say that the jury's emotional distress damages award is grossly excessive or monstrous, shocking to the conscience, clearly not supported by the evidence, or could only have been based on speculation or guesswork. When the jury's verdict is supported by substantial evidence, the Court 'may not weigh the evidence and impose a result [it] finds to be more preferable.'" "Substantial emotional distress damages need not be supported by 'objective' evidence; the plaintiff's subjective testimony, corroborated by others, may be sufficient."[711]

11.8.7 Standards of Causation

The FDCPA's language "sustained . . . as a result of" in § 1692k(a)(1) implies that causation in fact (a showing that the injury suffered was in fact caused by the violation proved) must be established by direct connection to the violation.[712] One issue is that families having difficulties paying their bills may be experiencing emotional stress related to other debt collectors, the inability to pay for needed goods or services, or for other unrelated causes such as illness, marital problems, or loss of employment.

Some clients also will be particularly susceptible to stress-related injuries and may benefit from the rule that a tortfeasor must take the victim as they are and must compensate the victim for their full measure of suffering.[713] A likely issue in a case involving such a client is whether the client's suffering was actually exacerbated or triggered by the collection contact or by the condition which made them particularly susceptible in the first place.[714]

To overcome all these problems, establish the proximity in time between a collection contact and any suffering.[715] For example, evidence of a high volume of repeated phone calls with repeated requests by the consumer that the calls stop and a recitation of loss of sleep, stress, and anxiety, for "months and months" was sufficient to show cause and effect.[716] If stress related to other collection contacts cannot be distinguished from the defendant's contacts, another approach is to join the collectors as joint tortfeasors.[717]

11.8.8 Relation Between FDCPA Actual Damages and Other Awards

Because actual damages are compensatory, the consumer cannot recover actual damages more than once for the same injury, even if there were multiple violations and recovery can be had under multiple causes of action.[718] Actual damages can, however, be awarded in addition to statutory damages under

710 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 957 (9th Cir. 2011).

711 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 645 F. Supp. 2d 917, 928–929 (D. Mont. 2009) (citations omitted), *aff'd*, 637 F.3d 939 (9th Cir. 2011).

712 *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 957 (9th Cir. 2011); Thomas v. Law Firm of Simpson & Cybak, 2007 WL 2126270 (7th Cir. July 25, 2007); Bartlett v. Herbl, 128 F.3d 497 (7th Cir. 1997); Sharm v. Rushmore Loan Mgmt. Serv., L.L.C., ___F. Supp. 3d ___, 2020 WL 1323007, at *16 (S.D. Md. Mar. 20, 2020); De Amaral v. Goldsmith & Hull, 2014 WL 572268 (N.D. Cal. Feb. 11, 2014) (attorney fees for defense in state court action were not considered damages where consumers hired a lawyer to defend collection suit, but not as result of FDCPA violation). *Cf.* Marchisio v. Carrington Mortg. Serv., L.L.C., 919 F.3d 1288 (11th Cir. Mar. 25, 2019) (causal connection necessary for FCRA); McNally v. Client Serv., Inc., 2008 WL 2397489 (W.D. Pa. June 11, 2008) (must show "reasonable probability" not just "mere possibility" that emotional distress damages incurred), *adopted*, 2008 WL 2987199 (W.D. Pa. July 31, 2008).

713 *See also* In re Vanamann, 561 B.R. 106, 127 (D. Nev. 2016) (in bankruptcy discharge injunction case, court found that fact that "Debtor had emotional challenges prior to obtaining her discharge did not make her fair game for her creditors after she obtained her discharge."). *See generally* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011).

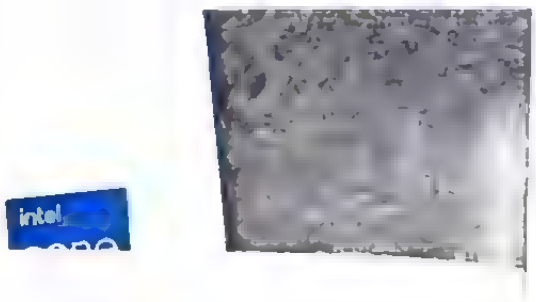
714 Dobbs, 1 The Law of Torts § 188, at 465 (2001).

715 Fritz, *Action for Harassment of Debtor*, Am Jur. *Trials* 619, § 4 (1969). *See* Evanauskas v. Strumpf, 2001 WL 777477 (D. Conn. June 27, 2001) (denying actual damages for emotional distress when consumer did not meet her burden to show that any distress she suffered was result of defendants' FDCPA violations as opposed to the stress of having judgment issued against her for debt she owed). *See also* Fouché v. Shapiro & Massey, L.L.P., 575 F. Supp. 2d 776 (S.D. Miss. 2008) (negligence; causation not shown when consumer had disabling injury, major financial problems, and hard-fought home foreclosure during relevant period); Campbell v. Triad Fin. Corp., 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007) (intentional infliction of emotional distress; depression shown, but not causation, when consumer had other problems, including home foreclosure, at time of dispute over car repossession).

716 *See* Ramsour v. JP Morgan Chase Bank, 2012 WL 6004230 (S.D. Cal. Nov. 30, 2012).

717 *See* Industr. Fin. Serv. Co. v. Riley, 302 S.W.2d 652 (Tex. App. 1957) (fifteen loan companies joined; where two or more wrongdoers join to produce indivisible injury, all jointly and severally liable to person wronged for entire damage suffered).

718 *See* Portalatin v. Blatt, Hasenmiller, Leibsker, & Moore, L.L.C., 900 F.3d 377, 385 (7th Cir. Aug. 13, 2018) (once a plaintiff settles with one defendant for full relief available for single, indivisible injury, plaintiff generally cannot pursue claim for same injury against different defendant; settlement renders such a claim moot; "Generally, a plaintiff is only entitled to a single recovery for a single injury, regardless of how many defendants could be liable for that single injury, or how many different theories of recovery could apply to that single injury."); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 957 (9th Cir. 2011); Grassley v. Debt Collectors, Inc., 1992 U.S. Dist. LEXIS 22782 (D. Or. Dec. 14, 1992).



n addition to statutory or punitive damages

ɒry Damages in Individual
ıS

'iew

herwise provided by this section, any debt 'ails to comply with any provision of this ı respect to any person is liable to such per- nt equal to the sum—

* * *

ıe case of any action by an individual, such tional damages as the court may allow, but :xceeding $1,000; . . .[721]

n permits courts to award statutory damages n addition to any actual damages to any per- noncompliance. It was modeled in part after :nding Act's statutory damages provision,[722] ıed under that Act may be helpful in construc- sions of the FDCPA that are parallel. However, ıl differences between a largely disclosure law, :h in Lending Act (TILA), and a statute regulat- conduct, such as the FDCPA, support construc- ı civil liability provisions more forcefully than _A provisions.

deral court that only allege statutory damages actual injury in fact will not pass Article III rements. Section 11.15, *infra* provides a detailed ticle III standing requirements.[723]

Two principles should guide courts in resolving statutory damages issues:

- Congress intended private actions to be the primary enforcement mechanism of the Act;[724] and
- Congress viewed existing remedies for debt collection abuses as inadequate.[725]

Courts should resolve any ambiguities or gaps in the FDCPA in favor of fostering private enforcement and in a manner calculated to avoid the remedial inadequacies of existing laws restricting debt collection abuse. Nearly a century ago, the Supreme Court considered and upheld the validity of statutory damages in a railroad ticket overcharge case.[726] The FDCPA is a strict liability statute.[727] "One purpose of statutory damages is to create an incentive to obey the law."[728] While recovery of actual damages is not a prerequisite to an award of statutory damages,[729] consumers must have suffered a concrete injury caused by the alleged violation when suing in federal court to meet Article III standing.[730] The determination of whether to award statutory damages and the amount of any such award is at the court's discretion.[731] A court may decide, however, that contested FDCPA statutory damages are a matter for a jury.[732]

11.9.2 Factors for Determining Amount of Statutory Damages Award in Individual Actions

Section 1692k(b)(1) sets out the factors to consider in the award of individual statutory damages as provided by § 1692k(a)(2)(A):

> (b) In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—
>
> (1) in any individual action under subsection (a)(2)(A)

requires courts to consider four factors in
ount of statutory damages in an individual

id
collector's noncompliance.

o permits the courts to consider "other rele-
he court need not base its award of FDCPA
on more than one of these factors.[738]
four required factors were borrowed from
tatutory damages provisions of the Truth in
LA)[739] and the punitive damages provisions
dit Opportunity Act (ECOA).[740] However, the
noncompliance"[741] is a factor unique to the

ave held that the "frequency and persistence
e" pertains only to the debt collector's non-
h respect to the plaintiff—activities relating
ers are not relevant in an individual action.[742]

Because the purpose of private FDCPA actions is to deter activities violating the Act, the better view adopted by a number of courts is that statutory damages should be higher where the activity is a common or regular part of the collector's policy or practices regarding other consumers.[743]

Three factors included in the TILA class action statutory damages provision and in the ECOA provision for punitive damage awards were *not* included in the FDCPA criteria for individual actions:

- The amount of actual damages;
- The resources of the defendant; and
- The number of persons adversely affected.

The latter two factors are included in the FDCPA only in connection with class actions. Because the amount of actual damages was omitted as a factor in the FDCPA provisions for determining the amount of statutory damages in an individual and also a class action, it is clear that Congress did not consider the existence or amount of an award of actual damages as relevant to the amount of statutory damages to be awarded. While an allegation of concrete harm is necessary for Article III standing,[744] recovery of actual damages is not necessary in order to obtain statutory damages.[745]

To the extent that the FDCPA factors a court considers in a particular case are the same as those of the TILA and the ECOA, cases decided under those acts will be helpful in construing the FDCPA's identical language. However, the distinctiveness of the FDCPA factors indicates that Congress carefully considered the factors to use in an FDCPA case and that courts should apply those factors. In interpreting the statutory damages provisions, courts should keep in mind that Congress found existing remedies inadequate and intended the FDCPA remedies to eliminate abusive debt collection practices.[746]

Appellate courts generally defer to trial courts' determination of the amount of statutory damages. In *Clomon v.*

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v. NFS, Inc., 781 F. Supp. 188 (W.D.N.Y. 1991); Clark's lumble, 823 P.2d 818 (Kan. Ct. App. 1991).

rcia v. Law Offices Howard Lee Schiff, P.C., 401 F. Supp. onn. 2019) (court awarded only $500 in statutory damages imer received only one non-threatening letter containing onal mistake); Carter v. Credit Bur. of Carbon Cty., 2015 8 (D. Colo. July 20, 2015) (following bench trial, awardim statutory damages for collection agency's violation of pon finding that agency's noncompliance had been "intena matter of policy" and both frequent and persistent); *In re* 5 B.R. 108, 147–148 (Bankr. S.D. Tex. Jan. 31, 2020) (court l $1000 in damages where collector acted in bad faith when withdraw, seek leave to withdraw, or modify 3002.1 notice me it serviced consumer's loan).

rgrast v. First Choice Assets, L.L.C., 317 F. Supp. 3d 1018, . Ill. May 14, 2018) (court awarded full $1000 where collector

court."[747] For example, lower courts are often given discretion in the Second Circuit when setting the amount of additional damages.[748]

11.9.3 Are Statutory Damages Mandatory?

The FDCPA's legislative history suggests Congress intended a statutory damages award to be mandatory in almost all cases. The majority of proposed bills consistently provided a nondiscretionary award of statutory damages of between $100 and $1000, depending on the extent of proof of the criteria currently set forth in § 1692k(b)(1) required.[749] The formula in these bills was a hybrid modeled after the provisions for individual and class statutory damages in the Truth in Lending Act.[750] While the Senate minority bill provided for actual damages and "such amounts of punitive damages as the court may allow"[751] for willful violations only, that provision was ultimately dropped in the Senate Banking Committee mark-up in favor of the present approach.[752]

The final bill removed the $100 minimum statutory damages award found in earlier bills to deal with "nuisance"[753] suits when none of the criteria for statutory damages was satisfied. The legislative history suggests that Congress did not intend statutory damages to be discretionary in other situations. If a violation is established and proof of at least one of the § 1692k(b)(1) criteria is met (e.g., frequency, persistence, nature of violation, and intent), the statutory damages award should be mandatory. Only where none of the statutory factors are demonstrated may statutory damages be denied.[754] Even in the rare case where no actual or statutory damages are awarded, attorney fees and costs are mandatory if the plaintiff has proven an FDCPA violation.[755]

11.9.4 Actual Damages Not a Prerequisite

FDCPA statutory damages are awarded in addition to actual damages, but an award of actual damages is not a prerequisite to the recovery of FDCPA statutory damages.[756] The FDCPA's civil liability provisions in individual cases were modeled on similar provisions in the Truth in Lending Act (TILA),[757] and courts at the time (and also since then) refused to make actual damages a precondition for statutory awards in TILA cases.[758] (Actual damages are a factor to consider when awarding TILA statutory damages in a class action only.)

"Where Congress borrows terms of art in which are accumulated . . . legal tradition and meaning . . . it presumably knows and adopts the cluster of ideas that were attached . . . and the meaning its use will convey to the judicial mind."[759] Thus Congress intended that the FDCPA provision would be interpreted the same way as the TILA provision.[760] While the civil liability provisions of other titles of the Consumer Credit Protection Act mention actual damages as a factor to be considered in computing statutory damages,[761] neither TILA (for individual statutory damages) nor the FDCPA do so. Similarly, numerous courts have held that actual damages are not a

747 Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993). *See* Carlisle v. Nat'l Commercial Serv., Inc., 722 Fed. Appx. 864 (11th Cir. 2018) (statutory damages of $1000 in default judgment upheld where consumer disputed debt multiple times, collector failed to report disputes to consumer reporting agencies, and credit reports could have significantly damaged consumer's credit); Savino v. Computer Credit, Inc., 164 F.3d 81, 85 (2d Cir. 1998); King v. Int'l Data Serv., 100 Fed. Appx. 681 (9th Cir. 2004) (district court did not abuse its discretion in awarding maximum statutory damages); Garcia v. Law Offices Howard Lee Schiff, P.C., 401 F. Supp. 3d 241, 256 (D. Conn. 2019). *Cf.* Crossley v. Lieberman, 90 B.R. 682 (E.D. Pa. 1988) (increasing bankruptcy court's $100 statutory damage award to $1000), *aff'd*, 868 F.2d 566 (3d Cir. 1989).

748 *See* Savino v. Computer Credit, Inc., 164 F.3d 81, 86 (2d Cir. 1998); Clomon v. Jackson, 988 F.2d 1314, 1322 (2d Cir. 1993); Pipiles v. Credit Bur. of Lockport, Inc., 886 F.2d 22, 25–26 (2d Cir. 1989); Emanuel v. Am. Credit Exch., 870 F.2d 805, 809 (2d Cir. 1989).

749 *See, e.g.*, H.R. 11969, 94th Cong. § 812(a)(2)(A) (1976); H.R. 29, 95th Cong. § 812(a)(2)(A) (1977); S. 918, 95th Cong. § 813(a)(2)(A) (1977).

However H.R. 10191, 94th Cong. § 811(2)(A) (1975), provided for statutory damages of no less than $100 and no more than $2500.

750 15 U.S.C. §§ 1640(a)(2)(A), 1640(a)(3); 122 Cong. Rec. H7789 (daily ed. July 27, 1976) (remarks of Rep. Wylie) ("a civil liability section similar to this one is standard for all titles of the Consumer Credit Protection Act").

751 S. 1130, 95th Cong. § 805(a)(1) (1977).

752 Washington Credit Letter 8 (Aug. 8, 1977). *Compare* Senate Comm. Print No. 1, 95th Cong. § 813(a)(2) (1977), *with* H.R. 5294, 95th Cong. § 813(a)(2) (1977) (Senate version).

753 *See* S. Rep. No. 95-382, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 *and at* Appx. A.3, *infra* (additional views of minority members).

754 *See* Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989); Emanuel v. Am. Credit Exch., 870 F.2d 805 (2d Cir. 1989); Monroe v. Steinfeld, 2012 WL 1496204 (N.D. Cal. Mar. 22, 2012), *adopted*, 2012 WL 1497519 (N.D. Cal. Apr. 27, 2012).

755 *See* § 11.13.2, *infra*.

756 Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076, 1083 (7th Cir. 2013) (proof of injury is not required when only damages sought are statutory); Gonzales v. Arrow Fin. Serv., L.L.C., 660 F.3d 1055, 1067 (9th Cir. 2011) ("Statutory damages under the FDCPA are intended to 'deter violations by imposing a cost on the defendant even if his misconduct imposed no cost on the plaintiff,'" (*quoting* Crabill v. Trans Union, L.L.C., 259 F.3d 662, 666 (7th Cir. 2001); Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 307 (2d Cir. 2003); Gambardella v. G. Fox & Co., 716 F.2d 104, 108 n.4 (2d Cir. 1983)). *See also* Robey v. Shapiro, Marianos & Cejda, L.L.C., 434 F.3d 1208 (10th Cir. 2006). *Cf.* Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016); § 11.15, *infra*. *But see* McNeill v. Graham, Bright & Smith, P.C., 2006 WL 1489502 (N.D. Tex. May 26, 2006).

757 *See* § 11.9.3, *supra*.

758 *See* Dzadaovsky v. Lyonds Ford Sales, Inc., 593 F.2d 538 (2d Cir. 1979); Redhouse v. Quality Ford Sales, Inc., 523 F.2d 1 (10th Cir. 1975).

759 Morissette v. United States, 342 U.S. 246, 263, 72 S. Ct. 240, 96 L. Ed. 288 (1952). *See also* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010); United States v. Freed, 401 U.S. 601, 607–608, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971); United States v. Merriam, 263 U.S. 179, 187, 44 S. Ct. 69, 68 L. Ed. 240 (1923); United States v. Fid. Trust Co., 222 U.S. 158, 160, 32 S. Ct. 59, 56 L. Ed. 137 (1911).

760 *See* Letter from Senator William Proxmire to Robert J. Hobbs (Aug. 17, 1978) (on file at National Consumer Law Center).

761 *See, e.g.*, 15 U.S.C. § 1691e(b).

prerequisite to the award of statutory damages under the Fair Credit Reporting Act.[762]

A distinct, but closely related issue is whether the consumer has alleged a sufficiently concrete "injury in fact" that is required for constitutional standing in federal courts. Section 11.15, *infra*, discusses *Spokeo, Inc. v. Robins*,[763] and *TransUnion L.L.C. v. Ramirez*,[764] the Supreme Court's decisions on this issue in the context of FCRA litigation, as well as numerous post-*Spokeo* and *Ramirez* lower court decisions in FDCPA litigation.[765]

11.9.5 Enhancing Statutory Damages

Courts in early FDCPA cases awarded higher amounts when they viewed the violation as aggravated or egregious[766] and lower amounts when the violation was considered less serious.[767] As the real value of the maximum $1000 statutory damage award has declined with inflation,[768] awards of $1000 have become the norm.[769] Thus, in those early cases statutory damages were often only $100 or $200 where the violation was the failure to provide statutorily required notices and no consumer injury was alleged.[770] However, as early as 1988, the collector's placement of a verification notice on the back of a dunning letter resulted in a $1000 statutory damages award.[771]

This increase in the size of statutory damages awards recognizes that the maximum award is not to be limited solely to egregious violations. The maximum award is particularly beneficial in cases involving less than egregious violations because such cases generally do not produce large awards of actual damages, and private enforcement of the FDCPA would otherwise be discouraged.

Factors which courts have mentioned, or which appear to play a role in larger statutory damages awards are:

- The collector's intent to do the act which violated the FDCPA[772] or to evade the FDCPA's protections;[773]
- The collector's intent that its illegal action injure the consumer;[774]
- The collector's sophistication, giving it reason to know the FDCPA's requirements;[775]
- The clarity of the requirements the collector violated;[776]
- The collector's persistent denial of its proscribed act;[777]
- Failure to timely correct violations;[778]

762 National Consumer Law Center, Fair Credit Reporting § 12.5.4.1.2 (9th ed. 2018), *updated at* www.nclc.org/library.

763 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016).

764 ___ U.S. ___, 141 S. Ct. 2190, 2207–2208, ___ L. Ed. 2d ___ (2021).

765 *See also* Appx. E.1.4.1, *infra*.

766 *See* Appx. E.3.1.2, *infra*.

767 *See* Appx. E.3.1.2, *infra*.

768 It would cost approximately $3427 in 2011 to buy what could be bought for $1000 in 1978, when the FDCPA was enacted. $1000 in 2011 dollars would only buy about $292 in 1978 dollars. *See* www.bls.gov (click on Data Tools, then CPI Inflation Calculator).

769 *See* Appx. E.3.1.2, *infra*.

770 *See, e.g.*, Siler v. Mgmt. Adjustment Bur., 1992 WL 32333 (W.D.N.Y. Feb. 18, 1992); Read v. Amana Collection Serv., 1991 WL 165033 (W.D.N.Y. Jan. 15, 1991); Zurcher v. Credit Bur., Inc., 1983 U.S. Dist. LEXIS 20366 (D. Or. Nov. 8, 1983); Griswold v. J&R Anderson Bus. Serv., Inc., 1983 U.S. Dist. LEXIS 20365 (D. Or. Oct. 21, 1983).

771 *See, e.g.*, Riveria v. MAB Collections, Inc., 682 F. Supp. 174 (W.D.N.Y. 1988). *See also* Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997); Sakuma v. First Nat'l Credit Bur., 1989 U.S. Dist. LEXIS 19120 (D. Haw. Nov. 15, 1989).

772 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011); *Selig v. Niagara Recovery Solutions Mgmt. Group, L.L.C., 2020 WL 4283926 (E.D. Va. July 27, 2020)* (defendants intentionally violated multiple FDCPA provisions by calling consumer three times over a period of six months and sending him two letters); Jara v. P.N. Fin., Inc., 2014 WL 4388515 (S.D.N.Y. Sept. 4, 2014), *adopted*, 2014 WL 5100222 (S.D.N.Y. Oct. 10, 2014); Mills v. Lieberman, Michaels & Kelly, L.L.C., 2011 WL 6012980 (M.D. Pa. Dec. 1, 2011); Appx. E.3.1.2, *infra*. *Cf.* Garcia v. Law Offices Howard Lee Schiff, P.C., 401 F. Supp. 3d 241 (D. Conn. 2019) (no evidence that violation was intentional); Kaschak v. Raritan Valley Collection Agency, 1989 WL 255498 (D.N.J. May 22, 1989) (collector's lack of intent factor favoring lower damages).

773 *See* Blick v. Shapiro & Brown, L.L.P., 748 Fed. Appx. 562 (4th Cir. 2019) (failure to verify debt); Campbell v. MBI Assoc., Inc., 98 F. Supp. 3d 568 (E.D.N.Y. 2015) (whether sending collection letter to represented consumer was unintentional was relevant to damages, not to liability); Hagen v. Messerli & Kramer, P.A., 85 F. Supp. 3d (D. Minn. 2015); Thomas v. Nat'l Bus. Assistants, Inc., 1984 U.S. Dist. LEXIS 24876 (D. Conn. Oct. 5, 1984).

774 *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011); Hollback v. Rothman Mediation Serv., L.L.C., 2014 WL 3547392 (S.D. Ohio July 17, 2014), *adopted*, 2014 WL 3889473 (S.D. Ohio Aug. 7, 2014); Thomas v. Nat'l Bus. Assistants, Inc., 1984 U.S. Dist. LEXIS 24876 (D. Conn. Oct. 5, 1984). *Cf.* Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989) (collector's lack of intent to deceive or harass a factor favoring lower damages); Zurcher v. Credit Bur., Inc., 1983 U.S. Dist. LEXIS 20366 (D. Or. Nov. 8, 1983) (only $200 where collector lacked intent to injure consumer); Carrigan v. Cent. Adjustment Bur., Inc., 502 F. Supp. 468 (N.D. Ga. 1980) (considering the absence of specific intent to injure).

775 *See* Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990).

776 *See* Chapman v. ACB Bus. Serv., 1997 U.S. Dist. LEXIS 23743 (S.D. W. Va. Feb. 13, 1997); Kaschak v. Raritan Valley Collection Agency, 1989 WL 255498 (D.N.J. May 22, 1989).

777 Walter v. HSM Receivables, 2015 WL 2019104 (D. Colo. Apr. 30, 2015) (defendant was dismissive of claim); Nelson v. Select Fin. Serv., Inc., 2006 WL 1672889 (E.D. Pa. June 9, 2006); Crossley v. Lieberman, 90 B.R. 682 (E.D. Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989); *In re* Belile, 209 B.R. 658 (Bankr. E.D. Pa. 1997).

778 *See* Carlisle v. Nat'l Commercial Serv., Inc., 722 Fed. Appx. 864 (11th Cir. 2018) (collector failed to report disputed debt to consumer reporting agencies despite multiple disputes by consumer); Gustafson v. Recovery Serv., 2015 WL 5009108 (D.N.H. Aug. 21, 2015); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990); Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890 (N.D. Ga. Dec. 7, 1984); *In re* Scrimpsher, 17 B.R. 999, 1017 (Bankr. N.D.N.Y. 1982). *Cf.* Carrigan v. Cent. Adjustment Bur., Inc., 502 F. Supp. 468 (N.D. Ga. 1980). *See also In re* Trevino, 615 B.R. 108, 147–148 (S.D. Tex. 2020) (awarding maximum amount of statutory damages where servicer's failure to diligently correct improper notice caused needless expense and amounted to bad faith).

- Prior violations and liability of the collector for the same illegal act;[779]
- Multiple violations;[780]
- Multiple consumers affected by the same type of violations;[781]
- Multiple debts whose collection involved the same violation;[782]
- Multiple debt collectors responsible for the violation;[783]
- Repetition of the illegal act;[784]
- The importance attached to deterrence by the court;[785]
- Publicity or potential publicity connected with the violation;[786]
- The consumer's injury;[787]
- The existence of collector's liability insurance; and
- Egregiousness of the violation.[788]

While the egregiousness of the violation is certainly a factor, the cases reflect a wide spectrum of judicial perception as to what is egregious, which is likely to depend on the judge's attitude toward abusive collection behavior. Any court is likely to view an abusive act that causes the consumer distress as more egregious than the failure to notify the consumer of FDCPA rights, for example. But some courts view any noncompliance as serious, while others view some violations as technical and not very serious.[789] In the latter instance, it is important to point out the policy underlying the prohibition or requirement that was violated.

Consumer attorneys sometimes feel that some judges award low statutory damages as a way of discouraging others from filing cases in their district, because they do not appreciate a federal court hearing small monetary value consumer cases. Of course, a court could take the opposite view, that substantial statutory damages awards will deter collectors from violating the FDCPA, which then reduces federal court FDCPA litigation in the long run.

779 *See* Jones v. Vest, 2000 WL 33907601 (E.D. Va. Dec. 27, 2000); Furth v. United Adjusters, Inc., 1983 U.S. Dist. LEXIS 20368 (D. Or. Nov. 17, 1983).

780 *See* Selig v. Niagara Recovery Solutions Mgmt. Group, L.L.C., 2020 WL 4283926 (E.D. Va. July 27, 2020) (defendants intentionally violated multiple FDCPA provisions by calling consumer three times over period of six months and sending him two letters); Magbanua v. Evans, 2020 WL 2332168, at *7 (C.D. Cal. Feb. 20, 2020) ("multiple, repeated FDCPA violations"); Waddell v. Capital Accounts, L.L.C., 2019 WL 5792865 (S.D. W. Va. Nov. 5, 2019); Georgopulous v. PPM Capital, Inc., 2019 WL 6065617 (D. Colo. Oct. 21, 2019) (defendant violated twelve provisions of FDCPA), *adopted*, 2019 WL 6053333 (D. Colo. Nov. 15, 2019); Hollback v. Rothman Mediation Serv., L.L.C., 2014 WL 3547392 (S.D. Ohio July 17, 2014), *adopted*, 2014 WL 3889473 (S.D. Ohio Aug. 7, 2014); Finney v. MIG Capital Mgmt., Inc., 2014 WL 1276159 (S.D. W. Va. Mar. 27, 2014); Hanks v. Reg'l Arbitration Serv., L.L.C., 2014 WL 717165 (D. Colo. Feb. 25, 2014); Woods v. Sieger, Ross & Aguire, L.L.C., 2012 WL 1811628 (S.D.N.Y. May 18, 2012); Frazier v. Absolute Collection Serv., Inc., 767 F. Supp. 2d 1354 (N.D. Ga. 2011); Mills v. Lieberman, Michaels & Kelly, L.L.C., 2011 WL 6012980 (M.D. Pa. Dec. 1, 2011); Bretana v. Int'l Collection Corp., 2010 WL 1221925 (N.D. Cal. Mar. 24, 2010); Shields v. Receivable Mgmt. Serv., 2009 WL 2497400 (D. Ariz. Aug. 14, 2009); *See also* Beeders v. Gulf Coast Collection Bur., 632 F. Supp. 2d 1125 (M.D. Fla. 2009).

781 *See* Berry v. Nat'l Fin. Sys., Inc., 2009 WL 2843260 (W.D.N.Y. Aug. 27, 2009); Morgan v. Credit Adjustment Bd., Inc., 999 F. Supp. 803 (E.D. Va. 1998); *In re* Belile, 209 B.R. 658 (Bankr. E.D. Pa. 1997); Venes v. Prof'l Serv. Bur., Inc., 353 N.W.2d 671 (Minn. Ct. App. 1984). *But see* Grubbs v. Andrews & Cox, P.C., 2015 WL 5613325 (S.D. Ind. Sept. 22, 2015) (frequency of noncompliance pertained only to consumer himself and not all consumers).

782 *See* Hollis v. Roberts, 1991 U.S. Dist. LEXIS 21813 (N.D. Ga. Sept. 13, 1991).

783 *See* Overcash v. United Abstract Group, Inc., 549 F. Supp. 2d 193 (N.D.N.Y. 2008).

784 Magbanua v. Evans, 2020 WL 2332168, at *7 (C.D. Cal. Feb. 20, 2020) ("multiple, repeated FDCPA violations"); Waddell v. Capital Accounts, L.L.C., 2019 WL 5792865 (S.D. W. Va. Nov. 5, 2019) (defendant threatened to tell plaintiff's employer about debt and repeatedly called plaintiff, even after he told them he was not allowed to take calls at work); Murphy v. Ability Recover Serv., L.L.C., 2019 WL 7708592 (W.D. Pa. Aug. 7, 2019); Miele v. Sid Bailey, Inc., 192 B.R. 611 (S.D.N.Y. 1996); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990); Thomas v. Nat'l Bus. Assistants, Inc., 1984 U.S. Dist. LEXIS 24876 (D. Conn. Oct. 5, 1984). *See also* Copper v. Global Check & Credit Serv., L.L.C., 2010 WL 5463338 (W.D.N.Y. Dec. 29, 2010) (not found to violate FDCPA persistently); Hartman v. Meridian Fin. Serv., Inc., 191 F. Supp. 2d 1031 (W.D. Wis. 2002) (the number of separate violations was factor in determining statutory damages). *But cf.* Byes v. Credit Bur. Enter., Inc., 1995 WL 540235 (E.D. La. Sept. 11, 1995) (discovery of debt collector's practices regarding persons other than plaintiff was not relevant to issue of statutory damages).

785 Gonzales v. Arrow Fin. Serv., L.L.C., 660 F.3d 1055 (9th Cir. 2011); Cobb v. A & S Collection Assoc., Inc., 2011 WL 4433579 (M.D. La. Sept. 21, 2011). *See also* Kaylor-Trent v. John C. Bonewicz, P.C., 910 F. Supp. 2d 1112, 1116 (C.D. Ill. 2012) (awarding $1000 because of the nature of the violations "and to encourage future compliance with the FDCPA"); Dunn v. Derrick E. McGavic, P.C., 653 F. Supp. 2d 1109 (D. Or. 2009); Withers v. Eveland, 988 F. Supp. 942 (E.D. Va. 1997); Strange v. Wexler, 796 F. Supp. 1117 (N.D. Ill. 1992); Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890 (N.D. Ga. Dec. 7, 1984); Thomas v. Nat'l Bus. Assistants, Inc., 1984 U.S. Dist. LEXIS 24876 (D. Conn. Oct. 5, 1984); Scott v. Universal Fid. Corp., 42 F. Supp. 2d 837 (N.D. Ill. 1999).

786 *See, e.g.*, Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890 (N.D. Ga. Dec. 7, 1984); Florence v. Nat'l Sys., 1983 U.S. Dist. LEXIS 20344 (N.D. Ga. Oct. 14, 1983).

787 *See* Brablec v. Paul Coleman & Assoc. P.C., 2010 WL 235062 (E.D. Cal. Jan. 21, 2010); McHugh v. Check Investors, Inc., 2003 WL 21283288 (W.D. Va. May 21, 2003); Venes v. Prof'l Serv. Bur., Inc., 353 N.W.2d 671 (Minn. Ct. App. 1984). *Cf.* Kaschak v. Raritan Valley Collection Agency, 1989 WL 255498 (D.N.J. May 22, 1989) (lack of actual injury factor favoring lower statutory damages).

788 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011); Becker v. Montgomery, Lynch, 2003 WL 23335929 (N.D. Ohio Feb. 26, 2003); Boyce v. Attorney's Dispatch Serv., 1999 WL 33495605 (W.D. Ohio Apr. 27, 1999); Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890 (N.D. Ga. Dec. 7, 1984); Thomas v. Nat'l Bus. Assistants, Inc., 1984 U.S. Dist. LEXIS 24876 (D. Conn. Oct. 5, 1984); Florence v. Nat'l Sys., 1983 U.S. Dist. LEXIS 20344 (N.D. Ga. Oct. 14, 1983). *See also* Copper v. Global Check & Credit Serv., L.L.C., 2010 WL 5463338 (W.D.N.Y. Dec. 29, 2010) (violation not egregious); Raimondi v. McAllister & Assoc., Inc., 50 F. Supp. 2d 825 (N.D. Ill. 1999); Zoeckler v. Credit Claims & Collections, Inc., 1983 U.S. Dist. LEXIS 20363 (N.D. Ga. Feb. 1, 1983); Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1981). *Cf.* Smart v. Emerald City Recovery, L.L.C., 2019 WL 366205, at *2 (W.D. Wash. Jan. 30, 2019) (act of wrongful possession itself was egregious, but defendant's conduct was not "anything more than an isolated unintentional violation of the statute").

789 *See* § 12.1, *infra*.

11.9.6 Factors Reducing Statutory Damages Awards

Factors mentioned by the courts as reducing the amount of statutory damages awards include:

- A single violation;[790]
- The technical[791] or nonabusive[792] nature of the violation, or that it involved a mistake of law;[793]
- Cessation of the violation when first brought to the collector's attention;[794]
- A collector's seeking to comply by obtaining legal advice;[795]
- Lack of persistent, frequent violations;[796]
- The lack of consumer injury;[797]
- The absence of intent to deceive or harass the consumer;[798]
- The recent passage of the statutory requirement or recent employment of the offending employee;[799] and
- Seeking less than maximum statutory damages.[800]

11.9.7 Relation Between FDCPA Statutory Damages and Other Awards

The FDCPA states explicitly that statutory damages are to be awarded in addition to FDCPA actual damages.[801] A

790 *See* Braden v. JH Portfolio Debt Equities, L.L.C., 2019 WL 6895544 (D. Md. Dec. 18, 2019) (where plaintiff alleged only one nonintentional violation and did not allege that defendant acted in aggressive or threatening manner, award of $50 in statutory damages was appropriate); Seeger v. Ross & Assoc., 2019 WL 5695944 (E.D.N.Y. Aug. 6, 2019); Datiz v. Int'l Recovery Assoc., 2019 WL 1900472, at *4 (E.D.N.Y. Apr. 29, 2019) (granting defendant's motion to reconsider, finding that court's award of maximum statutory damages was excessive: "The Court awarded summary judgment based on a singular technical violation of the FDCPA, not a pattern of egregious, intentional, or harmful misconduct. As a result, the Court views a $500 statutory award more appropriate for the claims at issue."); Razilova v. Halstead Fin. Serv. L.L.C., 2019 WL 1370695 (E.D.N.Y. Mar. 1, 2019); Garcia v. Creditors Specialty Serv., Inc., 2016 WL 6778681 (N.D. Cal. Nov. 16, 2016); Nicaisse v. Stephens & Michaels Assoc., Inc., 2015 WL 9462106 (E.D.N.Y. Dec. 28, 2015); Forkum v. Co-Operative Adjustment Bur., Inc., 2014 WL 3101784 (N.D. Cal. July 3, 2014); Richardson v. Check Sys. Recovery, L.L.C., 2012 WL 6049703 (N.D. Ind. Dec. 5, 2012) (single, overtly deceptive and non-technical violation; $750 award appropriate); Warren v. Specified Credit Ass'n Inc., 2012 WL 1067728 (D.N.J. Mar. 28, 2012); McCammon v. Bibler, Newman & Reynolds, P.A., 493 F. Supp. 2d 1166 (D. Kan. 2007; Griswold v. J&R Anderson Bus. Serv., Inc., 1983 U.S. Dist. LEXIS 20365 (D. Or. Oct. 21, 1983) ($200); Zoeckler v. Credit Claims & Collections, Inc., 1983 U.S. Dist. LEXIS 20363 (N.D. Ga. Feb. 1, 1983). *See also* Drolet v. Phillips Reinhard & Assoc., 2016 WL 638667 (W.D.N.Y. Feb. 18, 2016) (awarding $500 in statutory damages given relative infrequency of instances of noncompliance).

791 *See* Caldera v. RMA Recovery Group L.L.C., 2020 WL 3883257 (W.D. Tex. July 9, 2020) (technical FDCPA violation warranted $250 in statutory damages); Datiz v. Int'l Recovery Assoc., 2019 WL 1900472, at *4 (E.D.N.Y. Apr. 29, 2019) (granting defendant's motion to reconsider, award of maximum statutory damages was excessive: "The Court awarded summary judgment based on a singular technical violation of the FDCPA, not a pattern of egregious, intentional, or harmful misconduct. As a result, the Court views a $ 500 statutory award more appropriate for the claims at issue."); Razilova v. Halstead Fin. Serv. L.L.C., 2019 WL 1370695 (E.D.N.Y. Mar. 1, 2019); Crumel v. Kross, Lieberman & Stone, Inc., 2015 WL 1565432 (E.D.N.C. Apr. 8, 2015); Branco v. Credit Collection Serv. Inc., 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011); Fasten v. Zager, 49 F. Supp. 2d 144 (E.D.N.Y. 1999); O'Connor v. Check Rite, 973 F. Supp. 1010 (D. Colo. 1997); Young v. Credit Bur., Inc., 729 F. Supp. 1421 (W.D.N.Y. 1989). *Cf.* Sterling v. Am. Credit & Collections, L.L.C., 2012 WL 3553757 (D. Colo. Aug. 16, 2012) (violation was more than de minimis or technical, $250 awarded).

792 *See* Braden v. JH Portfolio Debt Equities, L.L.C., 2019 WL 6895544 (D. Md. Dec. 18, 2019) (where plaintiff alleged only one nonintentional violation and did not allege that defendant acted in aggressive or threatening manner, award of $50 in statutory damages was appropriate); Welther v. Schlottman & Wagner, P.C., 2017 WL 82975 (E.D. Mich. Jan. 10, 2017).

93 *See* Hooks v. Forman Holt Eliades & Ravin L.L.C., 2015 WL 5333513 (S.D.N.Y. Sept. 14, 2015); Collins v. Portfolio Recovery Assoc., L.L.C., 2013 WL 9805805 (E.D. Tenn. June 7, 2013).

794 *See* McCafferty v. Schwartzkopf Law Office, 2012 WL 1660819 (E.D. Mo. May 11, 2012); Simmons v. Miller & Steeno, P.C., 2002 WL 31898324 (E.D. Mo. Dec. 30, 2002) ($50), *vacated due to settlement*, 2003 WL 255238 (E.D. Mo. Feb. 4, 2003); Zoeckler v. Credit Claims & Collections, Inc., 1983 U.S. Dist. LEXIS 20363 (N.D. Ga. Feb. 1, 1983). *But cf.* Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890 (N.D. Ga. Dec. 7, 1984) ($1000 statutory damages to each of two plaintiffs not mitigated by collector's discontinuance).

795 *See* Lambert v. Nat'l Credit Bur., Inc., 16 Clearinghouse Rev. 442 (D. Or. 1981).

796 *See* Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989); Muldowney v. Merit Recovery Sys., Inc., 2019 WL 2024760, at *5 (N.D.N.Y. May 8, 2019) ("two confusing letters sent a little over three weeks apart with no other identified communications or conduct certainly do not demonstrate persistent or frequent noncompliance with the FDCPA"); Powers v. Am. Credit Resolution, Inc., 2014 WL 1572391 (W.D.N.Y. Apr. 18, 2014); Laster v. Cole, 2000 WL 306848 (E.D.N.Y. Mar. 20, 2000); Zoeckler v. Credit Claims & Collections, Inc., 1983 U.S. Dist. LEXIS 20363 (N.D. Ga. Feb. 1, 1983); Bingham v. Collection Bur., Inc., 505 F. Supp. 864 (D.N.D. 1981); Carrigan v. Cent. Adjustment Bur., Inc., 502 F. Supp. 468 (N.D. Ga. 1980).

797 *See* Campbell v. MBI Assoc., Inc., 98 F. Supp. 3d 568 (E.D.N.Y. 2015) (whether sending collection letter to represented consumer was de minimis was relevant to damages, not to liability); Kaschak v. Raritan Valley Collection Agency, 1989 WL 255498 (D.N.J. May 22, 1989); Furth v. United Adjusters, Inc., 1983 U.S. Dist. LEXIS 20368 (D. Or. Nov. 17, 1983); Griswold v. J&R Anderson Bus. Serv., Inc., 1983 U.S. Dist. LEXIS 20365 (D. Or. Oct. 21, 1983); Zoeckler v. Credit Claims & Collections, Inc., 1983 U.S. Dist. LEXIS 20363 (N.D. Ga. Feb. 1, 1983); Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1981). *See also* Simmons v. Miller & Steeno, P.C., 2002 WL 31898324 (E.D. Mo. Dec. 30, 2002), *vacated due to settlement*, 2003 WL 255238 (E.D. Mo. Feb. 4, 2003).

798 *See* Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989); Branco v. Credit Collection Serv. Inc., 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011); Weiss v. Zwicker & Assoc. P.C., 664 F. Supp. 2d 214 (E.D.N.Y 2009); Richard v. Oak Tree Group Inc., 2009 WL 3234159 (W.D. Mich. Sept. 30, 2009); Boyce v. Attorney's Dispatch Serv., 1999 U.S. Dist. LEXIS 1124 (S.D. Ohio Feb. 2, 1999); Altergott v. Modern Collection Techniques, 1994 WL 319229 (N.D. Ill. June 23, 1994); Kaschak v. Raritan Valley Collection Agency, 1989 WL 255498 (D.N.J. May 22, 1989). *See also* Page v. Checkrite, Ltd., 1984 WL 1052036 (D. Neb. Apr. 2, 1984) (no evidence of specific intent to injure consumers).

799 Carrigan v. Cent. Adjustment Bur., Inc., 502 F. Supp. 468 (N.D. Ga. 1980).

800 *See* Furth v. United Adjusters, Inc., 1983 U.S. Dist. LEXIS 20368 (D. Or. Nov. 17, 1983).

801 15 U.S.C. § 1692k(a)(2).

number of courts have also awarded state statutory damages[802] or punitive damages[803] on a parallel state claim in addition to FDCPA statutory damages. A consumer may also recover both treble damages on a UDAP claim and statutory damages under the FDCPA.[804]

11.9.8 Multiple Statutory Damages Awards

11.9.8.1 Where There Are Multiple Plaintiffs

The FDCPA provides that "any debt collector who fails to comply with any provision of this subchapter is liable to such person in an amount equal to . . . in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1000."[805] The $1000 cap is part of the liability "to such person . . . in the case of an action by an individual." Thus, the Act's plain language states that each plaintiff can recover $1000, and courts have awarded $1000 to each of multiple plaintiffs.[806]

Moreover, the FDCPA explicitly provides that the maximum $1000 statutory damages can be awarded to *each* named plaintiff in a class action.[807] It would be odd if named plaintiffs in a class action could each recover $1000, but several joined plaintiffs in an individual action could not.

11.9.8.2 Where There Are Multiple Defendants

The FDCPA provides that "any debt collector who fails to comply with any provision of this subchapter is liable to such person in an amount equal to . . . such additional damages as the court may allow, but not exceeding $1000."[808] As this applies to "any debt collector," where multiple debt collectors violate the FDCPA, *each* is liable for a maximum of $1000 statutory damages.[809] However, other courts hold that the maximum of $1000 applies "to any action."[810]

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802 *See, e.g.*, Gonzales v. Arrow Fin. Serv., L.L.C., 660 F.3d 1055 (9th Cir. 2011) (class plaintiffs could recover statutory damages under both FDCPA and parallel state law; FDCPA explicitly does not preempt state laws that provide greater protection; declining to decide if total statutory damages under FDCPA and state law may exceed FDCPA's $500,000 cap for class action damages); Anderson v. MFP, Inc., 2015 WL 509960 (M.D. Fla. Feb. 6, 2015); Alonso v. Blackstone Fin. Group, L.L.C., 2013 WL 6843597 (E.D. Cal. Dec. 20, 2013) (awarding $1000 in statutory damages under FDCPA, $1000 under Rosenthal Act, plus $100 actual damages and $2700 for pain and suffering); Barnett v. Creditors Specialty Serv., Inc., 2013 WL 1629090 (W.D.N.C. Apr. 16, 2013) (awarding statutory damages under both state and federal law given frequency of defendant's telephone calls, virulent nature of those calls, and clearly intentional noncompliance with FDCPA); Smith v. Royal Oak Fin. Serv., Inc., 2012 WL 3290153 (M.D. Fla. June 18, 2012), *adopted*, 2012 WL 3290151 (M.D. Fla. Aug. 13, 2012); Elmore v. Northeast Fla. Credit Bur., Inc., 2011 WL 4480419 (M.D. Fla. Sept. 27, 2011) (awarding $100 for FDCPA violation and $100 for parallel state violation); Burrell v. Imperial Recovery Partners, L.L.C., 2011 WL 2682694 (E.D. Mich. July 11, 2011) ($1000 in FDCPA statutory damages, as well as $150 in statutory damages under state law); Morisaki v. Davenport, Allen & Malone, Inc., 2010 WL 3341566 (E.D. Cal. Aug. 23, 2010); Francis v. J.C. Penney Corp., Inc., 2010 WL 715535 (W.D. Wash. Feb. 24, 2010) ($1000 FDCPA, $500 state, $1000 FCRA statutory damages, $1000 FCRA punitive damages as well as treble damages against both debt collectors); Jones v. Morgan Stone Assoc., 2010 WL 55884 (N.D. Cal. Jan. 4, 2010); Dabu v. Becks Creek Industr., 2009 WL 517826 (N.D. Cal. Dec. 22, 2009); Chapman v. ACB Bus. Serv., 1997 U.S. Dist. LEXIS 23743 (S.D. W. Va. Feb. 13, 1997); Appx. E.3.1.2, E.3.7.3, *infra*. *But cf.* Bentkowsky v. Benchmark Recovery, Inc., 2015 WL 502948 (N.D. Cal. Feb. 3, 2015) (refusing to stack state statutory damages onto award of $1000 FDCPA statutory damages against both defendants as $2000 award was sufficient); Carrero v. LVNV Funding, L.L.C., 2014 WL 6433214 (S.D. Fla. Oct. 27, 2014) (rejecting class restitution claim because there was no private remedy under state licensing law, and class members had adequate FDCPA statutory remedy).

803 *See* § 11.10, *infra*.

804 Baiocchetti v. Smith, Dean & Assoc., Inc., 2012 WL 3728146, at *2 (D. Conn. Jan. 25, 2012) (default judgment; awarding $2500 in actual damages for emotional distress under the FDCPA, as well as $25,000 in punitive damages under state UDAP law where plaintiff, who was "extremely tearful during the hearing," was afraid to answer her phone, was constantly looking over her shoulder, was afraid she was going to be arrested, was humiliated and embarrassed by multiple third-party contacts); Francis v. J.C. Penney Corp., Inc., 2010 WL 715535 (W.D. Wash. Feb. 24, 2010) ($1000 FDCPA, $500 state, $1000 FCRA statutory damages and $1000 FCRA punitive damages as well as treble damages against both debt collectors); Malone v. Hecker, 2007 WL 4200951 (D. Mass. Nov. 27, 2007).

805 15 U.S.C. § 1692k(a)(2)(A).

806 *See* Armbruster v. Hecker, 2010 WL 1643599 (M.D. Pa. Apr. 22, 2010); Robertson v. Horton Bros. Recovery, Inc., 2007 WL 2009703 (D. Del. July 3, 2007); Dowling v. Kucker Kraus & Bruh, L.L.P., 2005 WL 1337442 (S.D.N.Y. June 6, 2005); Yelvington v. Buckner, 1984 U.S. Dist. LEXIS 24890 (N.D. Ga. Dec. 7, 1984); Boyce v. Attorney's Dispatch Serv., 1999 WL 33495605 (S.D. Ohio Feb. 2, 1999); *In re* Cambron, 2007 WL 1076685 (Bankr. M.D. Ala. Apr. 5, 2007), *adopted*, 2007 WL 4287376 (M.D. Ala. Dec. 5, 2007). *See also* Crafton v. Law Firm of Jonathan B. Levine, 2014 WL 907423 (E.D. Wis. Mar. 7, 2014) (case not mooted by offer of $1000 statutory damages where each consumer sought statutory damages).

807 15 U.S.C. § 1692k(a)(2)(B).

808 15 U.S.C. § 1692k(a)(2)(A).

809 *See* Bentkowsky v. Benchmark Recovery, Inc., 2015 WL 502948 (N.D. Cal. Feb. 3, 2015); Hollback v. Rothman Mediation Serv., L.L.C., 2014 WL 3547392 (S.D. Ohio July 17, 2014), *adopted*, 2014 WL 3889477 (S.D. Ohio Aug. 7, 2014); Jones v. Inv. Retrievers, L.L.C., 2011 WL 1565851 (M.D. Pa. Apr. 25, 2011) (awarding a total of $2000 in statutory damages against two defendants); Mayes v. Credit Solutions Corp., 2011 WL 855634 (D. Ariz. Mar. 9, 2011); Overcash v. United Abstract Group, Inc., 549 F. Supp. 2d 193, 196 (N.D. NY Mar. 10, 2008); Gans v. Checkrite, Ltd., 1997 WL 33810208 (W.D. Wis. Jan. 6, 1997). *See also* Gomez v. Midland Funding, L.L.C., 77 F. Supp. 3d 750 (N.D. Ill. 2014) (Rule 68 offer of $1001 did not moot a case seeking only statutory damages where there were two defendants, debt buyer and collection agency, and each could be liable if each independently violated FDCPA). *But see* Martinez v. Scott, 2011 WL 3566970 (S.D. Tex. Aug. 12, 2011) (while individual plaintiffs can each recover $1000 statutory damages for FDCPA violations, they cannot recover more amount from each defendant).

810 *See, e.g.*, Goodman v. People's Bank, 209 Fed. Appx. 111, 114 (3d Cir. 2006) (plaintiff limited to $1000 per successful court action against multiple collectors, not $1000 per violation).

11.9.8.3 Where There Are Multiple Wrongful Acts

The vast majority of courts provide that each collector's liability to each consumer for statutory damages is capped at $1000, no matter how many violations are established in the FDCPA lawsuit.[811] If the debt collector violates the FDCPA again after an FDCPA suit was filed, there is precedent allowing a follow-up suit for a new statutory damage award without regard to the amount awarded in the prior suit.[812] However, one court held that a violation occurring before the first FDCPA suit could not be the basis for a second FDCPA suit.[813]

Where there are multiple violations, consideration should be given to stacking state statutory and tort damages and, for egregious or malicious violations, punitive damages. State claims and remedies are discussed at Chapters 15 and 16, *infra*. The possibility of punitive damages for an FDCPA claim is discussed § 11.10, *infra*.

While the policy of capping the $1000 dollar maximum statutory damages for each plaintiff against each defendant regardless of the number of violations committed by the collector is followed by nearly every recent decision, it ignores that the policy rewards a collector engaging in multiple violations and thwarts the purposes and goals of the FDCPA:

> [T]he majority's holding in the instant case invites an even greater harm. The majority's refusal to apply the $1000 limit to each violation illogically rewards unscrupulous collectors who, having engaged in an initial violation during attempts to collect on a particular debt, continue with their abusive practices. Applying a flat $1000 ceiling to any one proceeding, regardless of the number of violations involved, means that as the number of violations increases the cost per violation to the collector decreases. I cannot agree that this is a correct result; accordingly, I respectfully dissent."[814]

11.9.9 Prejudgment Interest on Statutory Damage Award

Some courts add prejudgment interest to an FDCPA statutory damage award,[815] calculated from the date of the FDCPA violation's first alleged injury to the plaintiff, as set forth in the complaint. In doing so, one court granted such interest although it "was unable to find a case or provision specifically addressing the award of prejudgment interest in an FDCPA or TCPA case." The court nevertheless concluded, based on the rule under other federal statutes, "that the prime rate, compounded annually, is reasonable in calculating the award of prejudgment interest in this case" and that "the prejudgment interest awarded herein should be compounded by the post-judgment interest rate."[816]

811 Goodmann v. People's Bank, 209 Fed. Appx. 111 (3d Cir. 2006); Wright v. Fin. Serv. Inc., 22 F.3d 647 (6th Cir. 1994); Harper v. Better Bus. Serv., Inc., 961 F.2d 1561 (11th Cir. 1992); Irvine v. I.C. Sys., Inc., 198 F. Supp. 3d 1232 (D. Colo. 2016); Martinez v. Scott, 2011 WL 3566970 (S.D. Tex. Aug. 12, 2011); Marseglia v. JP Morgan Chase Bank, 750 F. Supp. 2d 1171 (S.D. Cal. 2010) (Rosenthal Act); Armbruster v. Hecker, 2010 WL 1643599, at *3 (M.D. Pa. Apr. 22, 2010); Beeders v. Gulf Coast Collection Bur., 632 F. Supp. 2d 1125 (M.D. Fla. 2009); Sears v. Fed. Credit Corp., 2009 WL 2601378 (W.D. Va. Aug. 18, 2009); Robertson v. Horton Bros. Recovery, Inc., 2007 WL 2009703 (D. Del. July 3, 2007); Evanauskas v. Strumpf, 2001 WL 777477 (D. Conn. June 27, 2001); Boyce v. Attorney's Dispatch Serv., 1999 WL 33495605 (S.D. Ohio Feb. 2, 1999); Barber v. Nat'l Revenue Corp., 932 F. Supp. 1153 (W.D. Wis. 1996); Dewey v. Associated Collectors, Inc., 927 F. Supp. 1172 (W.D. Wis. 1996); McDaniel v. Asset Retrieval, Inc., 1996 WL 7001 (E.D. La. Jan. 5, 1996); Donahue v. NFS, Inc., 781 F. Supp. 188 (W.D.N.Y. 1991); Beattie v. D.M. Collections, Inc., 764 F. Supp. 925 (D. Del. 1991); Lauderback v. Master Collectors, Inc., 1991 U.S. Dist. LEXIS 21817 (D. Or. Oct. 22, 1991); Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1981). *But see* Trunzo v. Citi Mortg., 2018 WL 741422 (W.D. Pa. Feb. 7, 2018) (court could not resolve the per action vs. per defendant question); Younger v. Michael & Assoc., P.C., 2014 WL 1760827 (N.D. Cal. Apr. 30, 2014) (where collector sent same letter revealing debt through window envelope on two different debts, consumer brought separate FDCPA suit on each debt and both suits were settled with $1001 statutory damages). *See generally* Appx. E.3.1.2, *infra*.

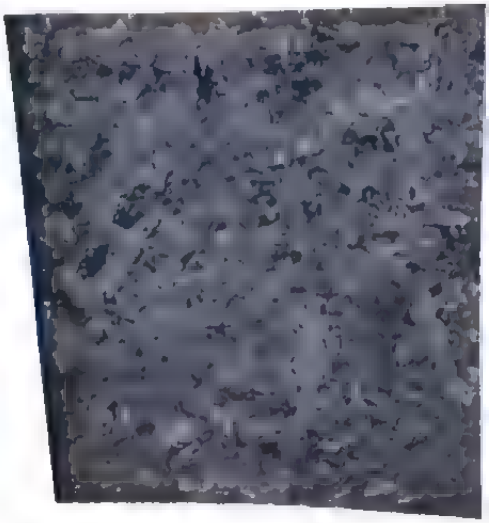
812 Goins v. JBC & Assoc., 352 F. Supp. 2d 262 (D. Conn. 2005). *See also* Synder v. CACH, L.L.C., 2016 WL 9461793 (D. Haw. June 29, 2016) (mag.; denying debt collector's motion to consolidate consumer's two FDCPA suits against it filed a few months apart; first FDCPA suit involved overstating amount owed and second involved claims of egregious state court collection litigation misconduct by two collector employees who were not defendants in first suit; noting that different arbitration clauses were involved in suits, and they were at different stages of development); Lassiter v. Integrity Solutions Serv., Inc., 2014 WL 1977216, at n.1 (D. Colo. May 15, 2014) (following *Goins*). *Cf.* Merrill v. Dyck-O'Neal, Inc., 2015 WL 4496101 (M.D. Fla. July 23, 2015). *But cf.* Beeders v. Gulf Coast Collection Bur., 632 F. Supp. 2d 1125, 1129 (M.D. Fla. 2009) (each of plaintiff's ten cases for calls (all of which occurred before first suit was filed) would bar the others under claim preclusion doctrine and are duplicative).

813 *See* Palmer v. Enhanced Recovery Co., 2017 WL 550054 (E.D. Pa. Feb. 9, 2017).

814 Wright v. Fin. Serv. of Norwalk, Inc., 22 F.3d 647, 653 (6th Cir. 1994) (J. Nathaniel R. Jones, dissenting).

815 *See* Ellis v. Alessi Tr. Corp., 2015 WL 3938436, at *2 (D. Nev. June 26, 2015) (awarding prevailing consumer prejudgment interest from date of service: "The purpose of an award of prejudgment interest is to fully compensate the plaintiff for an injury and is especially appropriate in actions under consumer protection statutes, like the FDCPA.").

816 *See* Jones v. Lockhart, Morris & Montgomery, Inc., 2012 WL 1580759 (E.D. Tex. Feb. 3, 2012), *adopted*, 2012 WL 1580636 (E.D. Tex. May 4, 2012); Reyelts v. Cross, 968 F. Supp. 2d 835, 851 (N.D. Tex. 2013). *See also* Gen. Motors, Corp. v. Devex Corp., 461 U.S. 648, 655–656, 103 S. Ct. 2058, 76 L. Ed. 2d 211 (1983) (prejudgment interest should be awarded in patent infringement cases); RK Co. v. See, 622 F.3d 846, 853–854 (7th Cir. 2010) ("prejudgment interest is presumptively available to victims of federal law violations"); Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp., 71 F.3d 198, 204 (5th Cir. 1995) ("in maritime cases the award of prejudgment interest is the rule, rather than the exception, and the trial court has discretion to deny prejudgment interest only where peculiar circumstances would much such an award inequitable"); Reeves v. Int'l Tel. & Tel. Corp., 705 F.2d 750, 752 (5th Cir. 1983) (discussing recovery of prejudgment interest in Fair Labor Standards Act cases); Michael S. Knoll, *A Primer on Prejudgment Interest*, Tex. L. Rev. (Dec. 1996).



mages

itive Damages May Be

eject the availability of punitive
,[817] and no reported decision has
The Act itself is silent about the
ages, although there is no evidence
of an intent to prohibit punitive

that the FDCPA does allow puni-
are in fact the FDCPA statutory
ped at $1000, and therefore puni-
amount are explicitly prohibited
can describe statutory damages as
do so—in two sister statutes, the
[8] and the Equal Credit Opportunity
y labeled the quantum of dam-
amages as "punitive damage." On
PA legislative history never refers
y provided damages as "punitive
istence of statutory damages up to
nitive damages, and is not a reason
arding punitive damages.
ence of specific federal statutory
nay determine that it is within their
ve damages in appropriate cases,[821]

although they may decide that punitive damages should not be awarded under certain statutes.[822] The congressional purpose in enacting the FDCPA would certainly be served by the availability of punitive damages. Congress expressly recognized that existing laws and procedures were "inadequate" to redress injuries suffered as a result of abusive collection methods.[823] In order to remedy this inadequacy, Congress, among other things, left intact state laws more protective than the Act.[824] Congress intended that the FDCPA eliminate abusive collection practices.[825] Awards of punitive damages in egregious cases further this purpose by making an example of violators, thus deterring emulation of their practices by other collectors.

Another reason for allowing punitive damages under the FDCPA is that the factors the FDCPA lists as supporting statutory damages awards do not include several of the factors that are commonly used when assessing punitive damages.[826] These common law prerequisites not adopted by the FDCPA[827] include:

- A showing of malice or recklessness on the wrongdoer's part;
- Receipt of an award of actual or nominal damages by the wrongdoer's victim; and
- Consideration of the wrongdoer's resources.[828]

As a result, FDCPA statutory damages, even if they were not capped, would not fully address the wrongfulness of the collector's conduct.

11.10.2 Fair Credit Reporting Act Punitive Damages Claims Against Debt Collectors

Simpson & Cybak, 244 Fed. Appx. 741 (7th
MRS, Inc., 368 F.3d 726, 728 (7th Cir. 2004);

reporting agency. A jury awarded $623,180 in punitive damages for the debt buyer's failure to meet its FCRA reinvestigation obligations.

For more on the application of the FCRA to debt collectors and debt buyers, see § 14.6, *infra*. For more detail on the award of punitive damages for willful FCRA violations and for practices that violate the FCRA, see NCLC's Fair Credit Reporting.[831]

11.10.3 Punitive Damages in Supplemental State Claims

In many states, punitive damages are available under a tort or state statutory claim that is brought supplemental to the FDCPA claim or in a separate action.[832] Some state statutory claims also permit recovery of multiples of actual damages.[833] State tort claims for debt collection abuses are discussed at Chapter 15, *infra*, and state statutory claims are discussed at Chapter 16, *infra*.

Punitive damages are not available at all in some jurisdictions and available only for certain causes of action in others, but they are generally available for tortious conduct once the defendant's actual malice or wanton or willful conduct is established.[834] Although not the general rule, some state deceptive practices statutes or other state statutes also allow for punitive damages.[835] Evidence of intent is seldom established by a direct admission by the defendant; usually it must be inferred from the nature and circumstances of the misconduct. To obtain punitive damages against a corporate principal for the acts of its agents, the consumer may have to show the corporation's involvement or ratification of the acts of its agent.[836] A detailed discussion of the availability of punitive damages for tort and related claims and constitutional and other limits on their award is found in NCLC's Automobile Fraud § 8.10 (6th ed. 2018), *updated at* www.nclc.org/library.

11.11 FDCPA Class Actions

11.11.1 Practical Considerations

Class actions are frequently the best method to enforce compliance with consumer protection laws because the awards in an individual case are usually too small to encourage an individual consumer to file suit.[837] Where the FDCPA action arises from the collector's standardized forms or practices, class action treatment may be appropriate.[838]

numerous memoranda of law and jury instructions from several similar cases for NCLC's Consumer Law Pleadings (online with index guide).

831 Punitive damages for willful violations are discussed in National Consumer Law Center, Fair Credit Reporting § 12.5.3.2 (9th ed. 2017), *updated at* www.nclc.org/library.

832 *See, e.g.*, Saccameno v. U.S. Bank, 943 F.3d 1071 (7th Cir. 2019) (finding sufficient evidence of loan servicer's conscious and deliberate disregard for borrower's rights to support jury award punitive of damages for deceptive debt collection practices under Illinois Consumer Fraud Act; reducing $3 million punitive damages award to $582,000); Johnson v. McCollough, 637 F.3d 939 (9th Cir. 2011) (upholding $60,000 in punitive damages); Stark v. Sandberg, Phoenix & von Gontard, P.C., 381 F.3d 793 (8th Cir. 2004) (upholding $6 million punitive damages awarded by arbitrator); Bahena v. Jefferson Capital Sys., L.L.C., 363 F. Supp. 3d 914 (W.D. Wis. 2019) (to recover punitive damages under Wisconsin Consumer Act, debtor need not show intent to cause injury; wanton, willful, or reckless disregard of rights of others suffices); Galle v. Nationstar Mortg., L.L.C., 2018 WL 3390235 (M.D. Fla. Jan. 5, 2018) (mortgage servicers repeated falsely representations of "character, amount, or legal status" of her debt sufficient to permit award of punitive damages); Christensen v. Fin. Credit Serv., Inc., 2016 WL 9819536 (D.N.M. Aug. 10, 2016) ($10 million in punitive damages); Goodin v. Bank of Am., 114 F. Supp. 3d 1197 (M.D. Fla. 2015) ($100,000 in punitive damages); Fausto v. Credigy Serv. Corp., No. C 07-05658 JW (N.D. Cal. Apr. 3, 2009), *available at* www.nclc.org/unreported ($400,000 in punitive damages) (intrusion-upon-seclusion claim); Adams v. A & S Collection Assoc., Inc., 2007 WL 2206936 (D. Conn. July 30, 2007); Boyce v. Attorney's Dispatch Serv., 1999 WL 33495605 (S.D. Ohio Apr. 27, 1999); Miele v. Sid Bailey, Inc., 192 B.R. 611 (S.D.N.Y. 1996); Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443 (D. Nev. 1994); Grassley v. Debt Collectors, Inc., 1992 U.S. Dist. LEXIS 22782 (D. Or. Dec. 14, 1992); Fennell v. G.A.C. Fin. Corp., 218 A.2d 492 (Md. 1966) ($35,000 punitive damages); Ellis County State Bank v. Keever, 1992 WL 379450 (Tex. App. Dec. 16, 1992) (upholding $1,535,000 punitive damages). *But see* Barefield v. HSBC Holdings P.L.C., 356 F. Supp. 3d 977 (E.D. Cal. 2018) (punitive damages unavailable under the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 et seq.).

833 *See, e.g.*, Carlisle v. Nat'l Commercial Serv., Inc., 722 Fed. Appx. 864 (11th Cir. 2018).

834 Conversion is one example of such tortious conduct. *See, e.g.*, Morales v. Kavulich & Assoc., 294 F. Supp. 3d 193 (S.D.N.Y. 2018) (where debt collection law firm attempted to collect on non-existent judgment against consumer by signing and later issuing restraining notice to consumer's bank, as well as execution with notice to garnishee, evidence presented genuine issues of material fact as to whether conduct qualified as wanton and reckless or malicious). *See* 2 Stein on Personal Injury Damages §§ 4.8 to 4.11 (3d ed. 1997, updated 2020).

835 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices Appx. A (9th ed. 2016), *updated at* www.nclc.org/library.

836 *Compare* Household Credit Serv., Inc. v. Driscol, 989 S.W.2d 72 (Tex. App. Nov. 8, 2001) ($1,250,000 punitive damages against corporate principal), *with* Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (reversing jury award of $10 million punitive damages where inadequate evidence of corporate involvement).

837 *See* National Consumer Law Center, Consumer Class Actions § 10.6.2.1 (10th ed. 2020), *updated at* www.nclc.org/library.

838 *See* Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076, 1080 (7th Cir. 2013) (filing time-barred collection suits); Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997); Cox v. Sherman Capital L.L.C., 295 F.R.D. 207, 215–216 (S.D. Ind. 2013) (implicit misrepresentation that debt collectors were licensed to collect debts in Indiana); Johnson v. Midland Credit Mgmt. Inc., 2012 WL 5996391 (N.D. Ohio Nov. 29, 2012) (dunning letters); Midland Funding, L.L.C. v. Brent, 2010 WL 4628593 (N.D. Ohio Nov. 4, 2010) (false affidavits of personal knowledge); Mund v. EMCC, Inc., 259 F.R.D. 180 (D. Minn. 2009); Gaalswijk-Knetzke v. Receivables Mgmt. Serv. Corp., 2008 WL 3850657 (M.D. Fla. Aug. 14, 2008); Kalish v. Karp & Kalamotousakis, L.L.P., 246 F.R.D. 461 (S.D.N.Y. 2007); Lau v. Arrow Fin. Serv., L.L.C., 245 F.R.D. 620 (N.D. Ill. 2007); Blarek v. Encore Receivable Mgmt., Inc., 244 F.R.D. 525 (E.D. Wis. 2007); Wahl v. Midland Credit Mgmt., Inc., 243 F.R.D. 291 (N.D. Ill. 2007); Day v. Check Brokerage Corp., 240 F.R.D. 414 (N.D. Ill. 2007); Drinkman v. Encore Receivable Mgmt., Inc., 2007 WL 4458307 (W.D. Wis. Dec. 7, 2007); Balogun v. Midland Credit Mgmt., Inc., 2007 WL 2934886 (S.D. Ind. Oct. 5, 2007); Tedrow v. Cowles, 2007 WL 2688276 (S.D. Ohio Sept. 12, 2007); Hunt

Class actions seeking damages often require a commitment of substantial resources by the attorney (unless the class is quite small).[839] The representative party in a class action for damages in a federal court usually bears the costs of notice to the class members that a class has been certified.[840] These costs may outweigh the benefits of bringing suit if a collection agency is lightly capitalized. Care should be taken to avoid committing substantial resources to a class action for damages that ultimately cannot be recovered,[841] or that would be *de minimis* due to the cap on class action statutory damages (the lower of $500,000 or one percent of net worth).[842]

Low net worth should not be an issue when the defendant is a large national or regional collection agency but is likely to be a problem with small debt collection agencies because they commonly have few assets. Low net worth results in a small class action statutory damages award with proportionately smaller sums to the individual class members. A few courts may view such small recoveries as fatal to a class action and deny class action certification for lack of "superiority," while others have disagreed.[843] Limiting class size by restricting the class definition, for example including only consumers in a particular locality, or those involved in a certain type of transaction, may enhance damages per class member, thus avoiding this issue. This is discussed further at § 11.11.3.3, *infra*.

FDCPA class actions for actual damages are far less frequent than ones seeking statutory damages but are sometimes certified.[844] These have the advantage of not being subject to any statutory cap on total damages for the class, although collectability may still be a concern. Class actions seeking declaratory or injunctive relief have been certified as well.[845]

In order to be found adequate to represent the class, counsel inexperienced in class action litigation often should co-counsel with an experienced attorney. Co-counseling is often advisable in any event to aggregate the legal and financial resources necessary for the prosecution of a class action.[846]

When filing an FDCPA class action, consideration should be given to including claims under state law, such as an unfair and deceptive practices act or state debt collection statute. When doing so, care should be taken to comply with any applicable state statutory prefiling requirements to such suits.[847]

The FDCPA encourages private attorneys to pursue consumers' claims, but consumer attorneys may be faced with a court that only sees an FDCPA class action as lawyer-driven. A Ninth Circuit decision provides a welcome response to this view. The court found that the trial court had abused its discretion in denying certification of a small class action and in greatly reducing the hours in the consumer's lodestar attorney fee calculation. Most helpful was the court's rejection of the lower court's dim view of the class action as "attorney-driven." The court stated:

> The FDCPA is a consumer protection statute and was intended to permit, even encourage, attorneys like Lemberg to act as private attorney generals to pursue FDCPA claims. Moreover, plaintiffs have already benefitted and will continue to benefit from this case. [Defendant] Mickell admits that he has ceased his practice of sending letters to debtor's workplaces, a benefit to all class members. Furthermore, certifying the class will serve a "deterrent" component to other debt collectors who are engaging, or consider engaging in this type of debt collection tactic.[848]

11.11.2 Rule 23 Requirements for Class Certification

11.11.2.1 Generally

Most FDCPA class litigation takes place in federal court and thus class certification will be governed by Federal Rule of Civil Procedure 23. Even if the consumer brings the FDCPA class action in state court, the defendant is likely to remove the case to federal court because the FDCPA claim provides a basis for federal court jurisdiction.[849] But if the consumer brings a class counterclaim to a state court collection case,

v. Check Recovery Sys., Inc., 2007 WL 2220972 (N.D. Cal. Aug. 1, 2007); Jancik v. Cavalry Portfolio Serv., L.L.C., 2007 WL 1994026 (D. Minn. July 3, 2007); Jones v. Risk Mgmt. Alternatives, Inc., 2003 WL 21654365 (N.D. Ill. July 11, 2003); *In re* Risk Mgmt. Alternatives, Inc., 208 F.R.D. 493 (S.D.N.Y. 2002); Ballard v. Equifax Check Serv., Inc., 186 F.R.D. 589 (E.D. Cal. 1999) (service charge); Harrison v. Great Springwaters of Am., Inc., 1997 WL 469996 (E.D.N.Y. June 18, 1997); Avila v. Van Ru Credit Corp., 1995 WL 55255 (N.D. Ill. Feb. 8, 1995), *aff'd on other grounds sub nom.* Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996). *See generally* § 11.11.2.2.4, Appx. E.3.2, *infra*.

839 *See* National Consumer Law Center, Consumer Class Actions § 1.3.1 (10th ed. 2020), *updated at* www.nclc.org/library.

840 *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). *Cf.* Hunt v. Imperial Merchant Serv., Inc., 560 F.3d 1137 (9th Cir. 2009) (shifting cost of notice in class action to defendant after consumer obtained summary judgment was not abuse of discretion). *See generally* National Consumer Law Center, Consumer Class Actions § 1.3.1 (10th ed. 2020), *updated at* www.nclc.org/library.

841 *See* National Consumer Law Center, Consumer Class Actions § 1.8 (10th ed. 2020).

For example, if survey evidence is required in the applicable jurisdiction, its high cost and the probability of success may counsel against pursuing the litigation. *See* Evory v. RJM Acquisitions Funding, L.L.C., 2008 WL 4890591 (S.D. Ind. Nov. 12, 2008).

842 *See* § 11.11.3.1, *infra*.

843 This subject is covered in depth at § 11.11.2.3.4, *infra*.

844 *See* § 11.11.2.3.5, *infra*.

845 *See* § 11.11.2.3.3, *infra*.

846 See the directory of attorneys at www.consumeradvocates.org for leads on potential co-counsel.

847 *See* Mace v. Van Ru Credit Corp., 1995 WL 549088 (N.D. Ill. Sept. 11, 1995) (failure to give defendant prefiling notice of proposed UDAP class action for damages barred class certification under the Wisconsin Consumer Act), *rev'd*, 109 F.3d 338 (7th Cir. 1997) (notice requirement of the Wisconsin Consumer Act was procedural, not substantive; therefore Federal Rule of Civil Procedure 23, which has no notice provision, applied to supplemental state class claim, which was allowed to proceed). *But see* Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010).

848 Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015 (9th Cir. 2012).

849 *See* § 11.2.1, *infra*.

the action cannot be removed to federal court.[850] In any event, state court class action rules typically are similar to the federal rules. A state by state analysis of such state rules can be found in NCLC's *Consumer Class Actions*.[851]

More detail on certification of consumer class actions generally is found in another treatise in this series.[852] Other excellent, detailed treatises on class certifications are also available.[853]

As in any class action, the definition of the class should be carefully considered so that the class is ascertainable, not broader than necessary, and not fail-safe. A fail-safe class is one where the definition of who is included in the class is based on a conclusion that defendant acted illegally as to such class member.[854]

Although not specifically mentioned in the text of Rule 23, the class must be ascertainable through a manageable process that does not require substantial individualized analysis.[855] For example, in *Johnson v. Midland Credit Management, Inc.*,[856] the class was defined as all persons whose section 1692g notices were returned as undeliverable by the post office, but to whom no new or other notices were sent, notwithstanding that the defendants had obtained a current address and knew that those consumers had not received the required disclosures initially. The court was initially concerned that there was not an ascertainable class if the debt buyer's database would not identify the class members. Upon conducting a hearing and receiving expert testimony, the court determined there was in fact a feasible method to identify class members by using the information in the defendants' database to ascertain the class members.[857] In general, courts are reluctant to allow a defendant's poor record keeping to prevent certification because doing so would "undoubtedly invite[] other debt collectors to adopt similarly lax procedures as an easy end run around class action lawsuits."[858]

Moreover, it may be that all those receiving a letter are properly within a class without further analysis of the defendant's records. In *Pollak v. Portfolio Recovery Associates, L.L.C.*,[859] for example, the court rejected the defendant's contention that the class was overbroad or unascertainable because "mini-trials" would supposedly be necessary to determine defendant's subjective intent to proceed with litigation, as threatened in its letters sent to class members. Discovery had revealed that at the time all the letters were sent, there had as yet been no determination by an attorney that any of the accounts was ready for litigation.[860]

The most frequent challenge to the ascertainability of a proposed FDCPA class is that determining whether the debt whose collection had been sought was a consumer debt, and not a business debt, would be impossible or impracticable. The vast majority of courts have rejected this contention.[861]

850 *See* National Consumer Law Center, Collection Actions § 5.7.3 (4th ed. 2017), *updated at* www.nclc.org/library.

851 *See* National Consumer Law Center, Consumer Class Actions Appx. C (10th ed. 2020), *updated at* www.nclc.org/library.

852 National Consumer Law Center, Consumer Class Actions (10th ed. 2020), *updated at* www.nclc.org/library.

853 *See, e.g.*, William Rubinstein, Alba Conte & Herbert B. Newberg, Newberg on Class Actions (5th ed. 2013).

854 *See, e.g.*, Richards v. NewRez L.L.C., 2021 WL 1060286 (D. Md. Mar. 18, 2021) (allegations that defendant did not provide legally required notice; striking classes but permitting amendment of complaint); Usry v. Equity Experts.org L.L.C., 2018 WL 934897, at *3 (S.D. Ga. Feb. 16, 2018) (rejecting class definition that depended upon legal conclusions that, for example, illegal interest was sought), *later opinion at* 2020 WL 1080394 (S.D. Ga. Mar. 5, 2020) (granting class certification).

855 *See generally* National Consumer Law Center, Consumer Class Actions § 4.3 (10th ed. 2020).

856 2012 WL 5996391 (N.D. Ohio Nov. 29, 2012).

857 *See also* Koepplinger v. Seterus, Inc., 2020 WL 2063416, at *29 (M.D.N.C. Apr. 29, 2020) (in suit against mortgage servicer, defendant can identify which loans remained defaulted as of time of Defendant's acquisition by querying its database).

858 Rhodes v. Nat'l Collection Sys., Inc., 317 F.R.D. 579, 583 (D. Colo. 2016) ("[I]t is clear defendant has made no real effort to ascertain whether it in fact can identify any potential class members. Its suggestion that doing so would be difficult or impossible therefore rings hollow."). *See also* Smith v. Greystone Alliance L.L.C., 2010 WL 2680147, at *3 (N.D. Ill. June 30, 2010) (class defined as all natural persons in Illinois with whom Greystone left messages that do not disclose that calls are made by debt collector was ascertainable, even though defendant did not record calls; its standard scripts did not specify inclusion of such information); Drossin v. Nat'l Action Fin. Serv., Inc., 255 F.R.D. 608, 614–615 (S.D. Fla. 2009) (defendant's inadequate record keeping is not ground to defeat class certification for lack of numerosity). *But see* Hatcher v. Collecto, Inc., 2021 WL 765759 (D. Del. Feb. 26, 2021) (in suit seeking certification of class of debtors who were dunned by defendant on time-barred debt, denying certification because plaintiff failed to provide mechanism to identify which debts, in the more than 1000 identified by defendant as possibly in the class, were in fact time-barred; noting that plaintiff did not claim that defendant had or should have relevant information in its records); Ferris v. Transworld Sys., Inc., 2018 WL 701285, at *5 (N.D. Ill. Jan. 31, 2018) (class of consumers receiving letters that were allegedly initial communications lacking notice required by § 1692g failed commonality, because testimony from each putative class member about their communication history with defendant would likely be required).

859 285 F. Supp. 3d 812 (D.N.J. 2018).

860 *Id.* at 842.

861 *See, e.g.*, Rodriguez v. Cascade Collections L.L.C., ___ F. Supp. 3d. ___, 2021 WL 1222147, at *16 (D. Utah, Mar. 31, 2021) (proving practicability of identifying members of class who had consumer debt and who therefore may share in any recovery is not required at class certification stage); Holzman v. Malcolm S. Gerald & Associates, Inc., 334 F.R.D. 326, 332–333 (S.D. Fla. 2020) (certifying class despite defendant's contention that it lacked records which would allow it to show that some class members' debts did not arise from consumer transactions); Ocampo v. GC Serv. L.P., 2018 WL 6198464, at *3 (N.D. Ill. Nov. 28, 2018) ("even though some inquiry will be necessary to determine whether a letter recipient's debt was a 'consumer debt' for the purposes of the FDCPA, this does not mean that the class is not clearly defined by objective criteria"); Qureshi v. OPS 9, L.L.C., 2016 WL 6434345 (D.N.J. Oct. 28, 2016) (ascertainability of consumer nature of debt was not bar to class certification where certain details (i.e., name of account holder, nature of check, and identity of entity receiving check) provided "objective criteria" from which class members could be ascertained, and created at least rebuttable presumption that each prospective class member's debt was consumer in nature); Luther v. Convergent Outsourcing, Inc., 2016 WL 7235509 (E.D. Mich. Apr. 28, 2016) (following *Butto*); Roundtree v. Bush Ross, P.A., 304 F.R.D. 644 (M.D. Fla. 2015) (whether condominium debt sought to be collected was incurred for "personal, family or household purposes" could be

If problems with the class definition are noted during the court's consideration of a motion for class certification, the court has authority to modify the definition to overcome them.[862]

The party seeking class certification also has the burden of demonstrating that all of the criteria of Rule 23(a), and also those of at least one subsection of Rule 23(b), are met, and most courts now routinely apply a "rigorous analysis" to the certification motion.[863] While subdivisions (1) and (2) of Rule 23(b) may sometimes be applicable, FDCPA class actions that predominantly seek damages must comply with Rule 23(b)(3). Sections 11.11.2.2.1 to 11.11.2.2.5, *infra*, discuss the Rule 23(a) requirements in detail and § 11.11.2.3.3, *infra*, summarizes the Rule 23(b) requirements.

11.11.2.2 Rule 23(a) Requirements

11.11.2.2.1 Introduction

No class may be certified unless it meets all four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. These are discussed in turn below in the context of FDCPA class actions.[864] Plaintiff has the burden of establishing these elements by a preponderance of the evidence,[865] as well as showing that one of the three criteria required under Rule 23(b) is also met.

11.11.2.2.2 Numerosity

Federal Rule of Civil Procedure 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Something over one hundred members is preferable, but there is no set minimum.[866] A "[c]ourt does not need evidence of exact class size or identity of class . . . and may make common sense assumptions without the need for precise quantification of the class."[867]

determined from "publicly-available homestead records, claims forms and affidavits of class members"); Gold v. Midland Credit Mgmt., Inc., 306 F.R.D. 623 (N.D. Cal. 2014) (class members may be required to submit "documentary proof of the nature of the financial obligation"; the fact that a few persons might inappropriately have been included in class does not affect how much defendant in case seeking only statutory damages must pay, so for purposes of class certification, there is no need to examine business/personal nature of each class member's debt, particularly because *res judicata* is not a concern with respect to individuals whose financial transactions were not incurred primarily for personal, family, or household purposes); Muzuco v. ReSubmitIt, L.L.C., 297 F.R.D. 504 (S.D. Fla. 2013) (whether transaction involved consumer item apparently could be determined by looking at face of returned check that had been dishonored, following which defendant collection agency had submitted electronic checks for bank's NSF fees, thereby allegedly violating § 1692f by imposing unlawful NSF fee and § 1692c(b) by conducting unauthorized communications with class members' banks); Butto v. Collecto Inc. 290 F.R.D. 372, 382–383 (E.D.N.Y. 2013) ("The Court does not find it particularly arduous to ask potential class members the simple question of whether the individual's debt at issue qualifies as a consumer debt . . . any disputes regarding whether a particular class member's debt is consumer or commercial can be remedied through proper drafting of the claim form, and at the damages phase of this case"); Kinder v. United Bancorp, Inc., 2012 WL 4490874, at *5 (E.D. Mich. Sept. 28, 2012) (finding that "this concern can easily be addressed when class members are identified by asking them to disclose the primary purpose of their account"); Tourgeman v. Collins Fin. Serv., Inc., 2012 WL 1327824, at *8 (S.D. Cal. Apr. 17, 2012) (loan agreements as to which collection was sought were titled "consumer credit contract"); Gradisher v. Check Enforcement Unit, Inc., 203 F.R.D. 271, 277 (W.D. Mich. 2001) ("While the determination of whether each check was written for personal or business purposes may take some effort, the Court does not believe that the task would be extraordinarily difficult because the nature of the check, i.e., personal or business, should indicate the type of debt."); Wilkerson v. Bowman, 200 F.R.D. 605 (N.D. Ill. 2001) ("the need to show that the transactions involved in a particular case are consumer transactions is inherent in every FDCPA class action. If that need alone precluded certification, there would be no class actions under the FDCPA"); Macarz v. Transworld Sys., Inc., 193 F.R.D. 46, 57 (D. Conn. 2000) (any disputes regarding whether particular class member's debt is commercial or consumer can be remedied through claims process). *See generally* National Consumer Law Center, Consumer Class Actions § 10.6.2.1 (10th ed. 2020), *updated at* www.nclc.org/library.

862 *See, e.g.*, Jammeh v. HNN Assoc., 2020 WL 5407864 *9 (W.D. Wash. Sept. 9, 2020) (permitting "modest modifications to the class definition so long as the proposed modifications are minor, require no additional discovery, and cause no prejudice to defendants," even though doing so somewhat enlarged scope of class pleaded in complaint); Schultz v. Midland Credit Mgt., Inc., 2020 WL 3026531 *4 (D.N.J. June 5, 2020) ("plaintiff may amend the proposed class definition at the class certification stage"); La Caria v. Northstar Location Services, L.L.C., 2020 WL 2771185 (D. Nev., May 28, 2020) (granting certification of class with somewhat different definition than in complaint, without requiring filing of amended complaint); Ocampo v. GC Serv. L.P., 2018 WL 6198464, at *3 (N.D. Ill. Nov. 28, 2018). *See generally* National Consumer Law Center, Consumer Class Actions Ch. 4 (10th ed. 2020), *updated at* www.nclc.org/library.

863 *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

864 *See generally* National Consumer Law Center, Consumer Class Actions § 10.3 (10th ed. 2020), *updated at* www.nclc.org/library.

865 *See, e.g.*, Reyes v. NetDeposit, L.L.C., 802 F.3d 469 (3d Cir. 2015); Levitt v. J.P. Morgan Securities, Inc., 710 F.3d 454, 465 (2d Cir. 2013).

866 *See* Muse v. Holloway Credit Solutions, L.L.C., 337 F.R.D. 80 (E.D. Pa. 2020) (32 members found sufficient, specifically referencing context of FDCPA action); Ocampo v. GC Serv. L.P., 2018 WL 6198464 *4 (N.D. Ill. Nov. 28, 2018) (40 is generally considered enough; good faith estimates may suffice); Lau v. Arrow Fin. Serv., L.L.C., 245 F.R.D. 620 (N.D. Ill. 2007) (26 members of subclass was sufficient); Binder v. Atl. Credit & Fin., Inc., 2007 U.S. Dist. LEXIS 11483 (S.D. Ind. Feb. 16, 2007) (50 similar letters); Robles v. Corporate Receivables, Inc., 220 F.R.D. 306 (N.D. Ill. 2004) (102 consumers who received two collection letters); Piper v. Portnoff Law Assoc., 216 F.R.D. 325 (E.D. Pa. 2003) (148 individuals who paid attorney fees to collector); Seidat v. Allied Interstate, Inc., 2003 WL 21468625 (N.D. Ill. June 19, 2003) (statistical estimate of 50 sufficient); Parker v. Risk Mgmt. Alternatives, Inc., 206 F.R.D. 211 (N.D. Ill. 2002) (between 39 and 97 members); Sanders v Osi Educ. Serv., 2001 WL 883608 (N.D. Ill. Aug. 3, 2001) (91 persons) Fuller v. Becker & Poliakoff, P.A., 197 F.R.D. 697 (M.D. Fla. 2000) (20 families); Savino v. Computer Credit, Inc., 173 F.R.D. 346 (E.D.N.Y 1997) (numerosity satisfied at 40 members); National Consumer Law Center, Consumer Class Actions § 10.3.1 (10th ed. 2020), *updated* www.nclc.org/library; William Rubinstein, Alba Conte & Herbert I Newberg, Newberg on Class Actions (5th ed. 2013). *But see* Cook v. Alessi & Koenig, L.L.C., 2012 WL 693036 (D. Nev. Feb. 29, 201 (denying class certification of claims based on a form collection let because no evidence of number of class members was provided).

867 Annunziato v. Collecto, Inc., 293 F.R.D. 329, (E.D.N.Y. 2013). *Acc* Zirogiannis v. Nat'l Recovery Agency, Inc., 2016 WL 7410 (E.D.N.Y. Dec. 22, 2016).

Where a debt collection form letter is involved it is likely that it will have been distributed sufficiently broadly to meet the numerosity requirement,[868] except in an unusual case where, for example, the out-of-state collector's efforts were not usually targeted at consumers in the plaintiff's state.[869] Although numerosity may be inferred from the defendant's large annual revenues and use of a bulk mailing indicating a minimum of 200 pieces mailed,[870] some courts may find this type of showing insufficient.[871]

For this reason, it is important to try to obtain evidence of numerosity through informal discovery, such as checking court files, and then, as soon as permissible, through discovery directed to defendant.[872] Defendants sometimes contend that numerosity (as well as ascertainability or commonality) is not established because a portion of the collection efforts may have involved business debt. This issue is discussed in the context of ascertainability at § 11.11.2.1, *supra*, and predominance at § 11.11.2.3.4, *infra*.

11.11.2.2.3 Commonality

Federal Rule of Civil Procedure 23(a)(2) requires that issues of law or fact be common to the class.[873] Defense challenges to commonality are often, in fact, arguments about whether the case has merit, and therefore are inappropriate.[874] However, the Supreme Court, in both *Wal-Mart Stores, Inc. v. Dukes*,[875] and *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*,[876] has now established that courts should not simply accept the plaintiffs' allegations as true for purposes of the class certification decision; they may inquire preliminarily into the merits of plaintiff's claims as they affect any of the criteria for class certification,[877] but only insofar as the merits affect the class certification analysis.[878]

Nevertheless, in some circumstances, the overlap between consideration of the merits for class certification purposes and the ultimate disposition of the case can be substantial. For example, in *Phillips v. Asset Acceptance, L.L.C.*,[879] plaintiff alleged that the defendant had filed time-barred suits in violation of the FDCPA. Plaintiff asserted the relevant limitations period was four years, while defendant contended it was five. The Seventh Circuit Court of Appeals held that the trial court properly could have decided the applicable period because doing so would have determined the composition of the class. This in turn might have affected its evaluation of the representative's adequacy and also whether the class was sufficiently numerous to make joinder impracticable.[880] An important corollary to the view that the merits may be considered insofar as they effect the trial court's rigorous analysis of whether class certification is appropriate is that plaintiff must be permitted an adequate opportunity to conduct relevant discovery.[881]

868 *See* Kalkstein v. Collecto, Inc., 304 F.R.D. 114 (E.D.N.Y. Jan. 5, 2015) (certifying statewide class where collection agency's letters were sent to 360 students, even though some of them might not have suffered alleged violations, because significant portion likely did so); Henderson v. Eaton, 2002 WL 10464 (E.D. La. Jan. 2, 2002); Bigalke v. Creditrust Corp., 2001 WL 1098047 (N.D. Ill. Sept. 14, 2001) (debt collector could not admit or deny request for admissions asking whether it sent 500 similar letters); Smith v. Short Term Loans, 2001 WL 127303 (N.D. Ill. Feb. 14, 2001); Swanson v. Mid Am, Inc., 186 F.R.D. 665 (M.D. Fla. 1999); Borcherding-Dittloff v. Transworld Sys., Inc., 185 F.R.D. 558 (W.D. Wis. 1999); Blair v. Equifax Check Serv., Inc., 1999 WL 116225 (N.D. Ill. Feb. 26, 1999), *aff'd on other grounds*, 181 F.3d 832 (7th Cir. 1999); Ditty v. Check Rite, Ltd., 182 F.R.D. 639 (D. Utah 1998); Sledge v. Sands, 182 F.R.D. 255 (N.D. Ill. 1998); Davis v. Suran, 1998 WL 474105 (N.D. Ill. Aug. 3, 1998); Stewart v. Slaughter, 165 F.R.D. 696 (M.D. Ga. 1996); Hall v. Nat'l Recovery Sys., 1996 WL 467512 (M.D. Fla. Aug. 9, 1996); Keele v. Wexler, 1996 WL 124452 (N.D. Ill. Mar. 19, 1996), *aff'd*, 149 F.3d 589 (7th Cir. 1998) (5000 form letters). *But see* Jones v. Roy, 202 F.R.D. 658 (M.D. Ala. 2001) (denying class certification because most potential class members received collection letter slightly different from one plaintiff received; only about twenty people received identical letter); Deflumer v. Overton, 176 F.R.D. 55 (N.D.N.Y. 1997) (consumers failed to obtain timely discovery); Narwick v. Wexler, 901 F. Supp. 1275 (N.D. Ill. 1995) (seven percent sampling of defendants' court filings to collect debt was inadequate).

869 *E.g.*, Kuehn v. Cadle Co., 245 F.R.D. 545 (M.D. Fla. 2007); Leyse v. Corporate Collection Serv., Inc., 2006 WL 2708451 (S.D.N.Y. Sept. 18, 2006) (class involving collector making 22,000 prerecorded calls to New York not certified for failure to show number involving RCN accounts in relevant time period); Case v. Whetstone, 1998 WL 276088 (W.D. Mich. May 7, 1998); Byes v. Accelerated Cash Flow, 1997 WL 285004 (E.D. La. May 27, 1997).

870 Chapman v. Worldwide Asset Mgmt., L.L.C., 2005 WL 2171168 (N.D. Ill. Aug. 30, 2005); Ingram v. Corporate Receivables, Inc., 2003 WL 21982152 (N.D. Ill. Aug. 19, 2003).

871 Huntley v. Law Office of Richard Clark, P.L.L.C., 262 F.R.D. 203 (E.D.N.Y. 2009) (speculation inadequate to show others received threatening calls); Fahey v. Encore Fin., 2005 WL 2739323 (N.D. Ohio Oct. 24, 2005) (general information about debt collector's volume of business was insufficient); Weiss v. Fein, Such, Kahn & Shepard, P.C., 2002 WL 449653 (S.D.N.Y. Mar. 22, 2002) (speculation not enough); Edge v. C. Tech Collections, Inc., 203 F.R.D. 85 (E.D.N.Y. 2001); Wilner v. OSI Collection Serv., 198 F.R.D. 393 (S.D.N.Y. 2001).

872 *See, e.g.*, Barnes v. Midland Credit Mgmt., 2020 WL 6778013 (N.D. Ohio Nov. 17, 2020) (granting plaintiff's motion to compel answers to interrogatories asking number of recipients of allegedly illegal letter and number broken down by state); Spuhler v. STTE Collection Serv., Inc., 2017 WL 3723603 (E.D. Wis. May 1, 2017) (where plaintiff sought to compel defendant to search 152,734 letters for ones sent on behalf of three of 50–100 creditors in order to show numerosity, motion granted even though the search might take many days; plaintiff had offered to share in costs, and was ordered to do so).

873 *See* National Consumer Law Center, Consumer Class Actions §§ 10.3.2 (10th ed. 2020), *updated at* www.nclc.org/library.

874 *Id.*

875 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

876 568 U.S. 455, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013).

877 568 U.S. 455, 133 S. Ct. 1184, 1194, 185 L. Ed. 2d 308 (2013). *Accord* Comcast v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013) (trial court is permitted to "probe behind the pleadings before coming to rest on the certification question").

878 568 U.S. 455, 133 S. Ct. 1184, 1194–1195, 185 L. Ed. 2d 308 (2013).

879 736 F.3d 1076 (7th Cir. 2013).

880 *Id.*, 736 F.3d at 1081 (7th Cir. 2013). *Accord* Rose v. Asset Acceptance, L.L.C., 2012 WL 603263 (Cal. Ct. App. 2012) (upholding denial of class certification, finding district court properly had determined the applicable statute of limitations for purposes of evaluating numerosity).

881 *See, e.g.*, Landsman & Funk PC v. Skinder-Strauss Assoc., 640 F.3d 72, 93–94 (3d Cir. 2011) (vacating district court's orders of dismissal of consolidated TCPA class actions because "it is difficult to resolve without discovery whether there are factual issues regarding class members' business relationships with defendants or whether they consented

The Supreme Court's decision in *Wal-Mart Stores Inc. v. Dukes*[882] also confirmed the existing standard for evaluating commonality, but honed the analysis in a way that practitioners must take into account. While holding that "for purposes of Rule 23(a)(2) even a single common question will do,"[883] the Court also cautioned that "any competently crafted class complaint literally raises common 'questions,'" but not necessarily of the type that satisfies the rule.[884] What the Court is seeking is "a common contention . . . of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[885]

In FDCPA cases, commonality may be shown by evidence that the named plaintiff's injury resulted from the collector's routine business policy, pattern, or practice. A collector with many employees may have training materials or instructions for new employees. A collector that has many branch offices may have an operations manual or instructions for its local managers.

The names of former employees should be sought. Former employees of the collector, having little reason to protect the collector from liability, may provide evidence of its business practices.[886] At least one current collection employee should be deposed to determine the collector's business policies.

Commonality has often been satisfied in FDCPA cases by virtue of all the class members receiving the same or similar debt collection form letter.[887] Defendants typically argue that each class member must prove that they actually received the offensive letter that was mailed to them, but most courts have not accepted this argument.[888] Similarly, the fact that the class members did, or did not, pay the unlawful fee or did, or did not, owe the debt sought in the form debt collection letter does not undermine the commonality of the claim.[889] Differences in the relief sought by plaintiff and other class members is rarely problematic.[890] Commonality may be found even if not every element of the violation can be shown by resolving the common issues.[891]

Courts likewise generally reject the defense argument that there must be a determination in each case of whether the transaction was for a consumer or business purpose.[892]

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to the receipt of faxes"; also noting that "Discovery is necessary for the district court to conduct the 'rigorous analysis' it is tasked with at this stage, and more than speculation and supposition is needed to say that any vehicle is really superior.'" *Id.* at 95).

882 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

883 *Id.*, 564 U.S. at 359 (internal quotations and brackets omitted).

884 *Id.* at 359 (internal quotations omitted).

885 *Id.*

886 Before any informal interviews of former employees are conducted, ethical restrictions on communications with unrepresented parties should be considered, as well as the implications of any confidentiality agreement the employee may have signed.

887 Ferris v. Transworld Sys., Inc., 2018 WL 701285 (N.D. Ill. Jan. 31, 2018) (certifying § 1692c class of individuals who were sent letter by debt collector seeking to collect student loan which disclosed wrong current creditor for claims, but denying for lack of commonality certification of subclass under § 1692g of individuals who received these letters as first communication, because this would require extensive analysis of individual account histories); Vincent v. Money Store, 304 F.R.D. 446 (S.D.N.Y. 2015) (certifying class of 88,937 borrowers of loans owned or serviced by Money Store defendants, who received one of five or six variations of letters from law firm, prepared pursuant to firm's breach letter program); Durham v. Cont'l Cent. Credit, 2010 WL 2776088 (S.D. Cal. July 14, 2010); Harris v. D. Scott Carruthers & Assoc., 270 F.R.D. 446 (D. Neb. 2010); Stair *ex rel.* Smith v. Thomas & Cook, 254 F.R.D. 191 (D.N.J. 2008); Santoro v. Aargon Agency, Inc., 252 F.R.D. 675 (D. Nev. 2008); Acik v. I.C. Sys., Inc., 251 F.R.D. 332 (N.D. Ill. 2008); Gaalswijk-Knetzke v. Receivables Mgmt. Serv. Corp., 2008 WL 3850657 (M.D. Fla. Aug. 14, 2008); Fainbrun v. Southwest Credit Sys., L.P., 246 F.R.D. 128 (E.D.N.Y. 2007), *decertified*, 2008 WL 750550 (E.D.N.Y. Mar. 18, 2008)); Vega v. Credit Bur. Enter., 2005 WL 711657 (E.D.N.Y. Mar. 29, 2005); Tyrell v. Robert Kaye & Assoc., P.A., 223 F.R.D. 686 (S.D. Fla. 2004); Mendez v. M.R.S. Assoc., 2004 WL 1745779 (N.D. Ill. Aug. 3, 2004); Pleasant v. Risk Mgmt. Alternatives, Inc., 2003 WL 22175390 (N.D. Ill. Sept. 19, 2003); Weiss v. Coldata, Inc., 2003 WL 22118936 (N.D. Ill. Sept. 11, 2003); Jones v. Risk Mgmt. Alternatives, Inc., 2003 WL 21654365 (N.D. Ill. July 11, 2003); Parks v. Portnoff Law Assoc., Ltd., 210 F.R.D. 146 (E.D. Pa. 2002); Oslan v. Collection Bur., 206 F.R.D. 109 (E.D. Pa. 2002); Swanson v. Mid Am, Inc., 186 F.R.D. 665 (M.D. Fla. 1999); Ballard v. Equifax Check Serv., Inc., 186 F.R.D. 589 (E.D. Cal. 1999); Borcherding-Dittloff v. Transworld Sys., Inc., 185 F.R.D. 558 (W.D. Wis. 1999); Ditty v. Check Rite, Ltd., 182 F.R.D. 639 (D. Utah 1998); Byes v. Telecheck Recovery Serv., Inc., 173 F.R.D. 421 (E.D. La. 1997); Savino v. Computer Credit, Inc., 173 F.R.D. 346 (E.D.N.Y. 1997); Harrison v. Great Springwaters of Am., Inc., 1997 WL 469996 (E.D.N.Y. June 18, 1997). *But cf.* Agostino v. Quest Diagnostics Inc., 2010 WL 5392688 (D.N.J. Dec. 22, 2010) (commonality defeated where letters not the same).

888 *See, e.g.*, Swanson v. Mid Am, Inc., 186 F.R.D. 665 (M.D. Fla. 1999); § 4.3.1, *supra*. *But see* Flecha v. Medicredit, Inc., 946 F.3d 762, 768 (5th Cir. 2020) (in *dicta*, noting concern that class members who received allegedly deceptive letter "but ignored it as junk mail or otherwise gave it no meaningful attention . . . lack a cognizable injury under Article III").

889 *See* Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998); Kalkstein v. Collecto, Inc., 304 F.R.D. 114, 120 (E.D.N.Y. Jan. 5, 2015) (even though some portion of 360-member statewide class may have entered into agreements that authorized allegedly illegal additional fees and costs sought by defendant, "somewhat time-consuming" individualized review of defendant's records was not bar to finding of commonality); Ditty v. Check Rite, Ltd., 182 F.R.D. 639 (D. Utah 1998). *But see* Tyrell v. Robert Kaye & Assoc., P.A., 223 F.R.D. 686 (S.D. Fla. 2004) (where claim was that defendant improperly charged attorney fees and expenses to these consumers but underlying condominium contracts differed among hundred-plus condominium associations involved, individual issues pertinent to terms of each association contract made class certification inappropriate).

890 *See, e.g.*, Madden v. Midland Funding, L.L.C., 237 F. Supp. 3d 130, 156 (S.D.N.Y. 2017).

891 Sykes v. Mel S. Harris & Assoc., 780 F.3d 70 (2d Cir. 2015) (allegation of fraudulently obtained state court judgments that uniformly depended on filing of false affidavits of merit satisfied commonality requirement, even though resolution of question of their falsity would not address each element of claimed violations of federal and state law; likewise for plaintiffs' allegations that defendants regularly engaged in sewer service).

892 *See, e.g.*, Johnson v. Enhanced Recovery Co., L.L.C., 325 F.R.D. 608, 614 (N.D. Ind. 2018) (rejecting defendant's contention that commonality was not met because it will be necessary to determine whether each allegedly improper dunning letter sent to 39,000 class members concerned consumer debt, noting that "the need to show that the transactions involved in a particular case are consumer transactions is inherent in every FDCPA class action" and "[i]f that alone precluded

Commonality is shown where all class members had collection fees improperly added to the amount owed.[893] Federal courts also will generally deny supplemental jurisdiction over any counterclaims based on the debt against each member of the class, thus short circuiting the potential defense argument that while there may be commonality, these counterclaims raise individual issues that predominate, thus defeating certification pursuant to Rule 23(b)(3).[894]

On the other hand, commonality may not be satisfied to the extent the claim of liability is based on individual, unscripted conversations[895] or depends on individual payment histories,[896] or where there are other individualized circumstances that affect liability.[897] For example, the use of telephone obscenity by a collector may be an isolated occurrence, the routine practice of one employee (with or without employer approval), or the general policy (secret or stated) of the collector. In such a case, the commonality and typicality of the telephone calls, as opposed to the isolated receipt of obscene calls, may be resolved only through discovery.

Where the plaintiff alleges that a debt collector threatened legal action it did not intend to take but fails to show that the collector had a policy of not suing, individualized determinations have been held to defeat commonality and typicality. In this situation, "the question . . . is not only whether a consumer would perceive a particular statement as threatening legal action, but also whether such a statement is in fact true—that is, whether the creditor does indeed intend to bring suit against the debtor."[898]

Affirmative defenses raised by the defendant may create individual issues for some class members, but these generally do not defeat commonality.[899] Depending on the extent of such issues, they may or may not defeat predominance.[900]

11.11.2.2.4 Typicality

Federal Rule of Civil Procedure 23(a)(3) requires that named plaintiffs' claims be typical of the claims of the class. Typicality is satisfied where the named plaintiff's claims arise from the same event or pattern or practices and are based on the same legal theory as the claims of the class, even if there are some differences in the claims.[901] In FDCPA class actions, the receipt of the same offensive form collection letter should

certification, there would be no class actions under the FDCPA," quoting *Wilkerson v. Bowman*, 200 F.R.D. 605, 609 (N.D. Ill. 2001)). *See also* § 11.11.2.1, *supra* (discussing ascertainability and consumer debt), § 11.11.2.3.4, *infra* (discussing superiority and predominance and consumer debt).

893 Mund v. EMCC, Inc., 259 F.R.D. 180 (D. Minn. 2009).

894 *See* Ballard v. Equifax Check Serv., Inc., 186 F.R.D. 589 (E.D. Cal. 1999); Berrios v. Sprint Corp., 1998 WL 199842 (E.D.N.Y. Mar. 16, 1998). *See generally* § 11.11.2.3.4, *infra* (discussing predominance).

895 *See* Wesley v. Cavalry Inv., L.L.C., 2006 WL 2794065 (E.D. Pa. Sept. 27, 2006) (refusing to certify class of consumers who had disputed their debt and debt buyer failed to inform credit reporting agencies of any disputes that did not involve fraud or true identity theft; individual issues of fact involving oral communications between debt buyer and credit reporting agencies also undermined commonality and typicality requirements).

896 Parkis v. Arrow Fin. Serv., L.L.C., 2008 WL 94798 (N.D. Ill. Jan. 8, 2008) (denying class certification based on lack of commonality, where plaintiff alleged that debt buyer's state court lawsuits were filed against consumers beyond statute of limitations for the underlying debt, question of fact as to whether, given each specific debtor's payment history, debt was, in fact, beyond statute of limitations).

897 Drossin v. Nat'l Action Fin. Serv., Inc., 255 F.R.D. 608, 619 (S.D. Fla. 2009) (individualized inquiries into whether collector knew debt was asserted that did not exist); Kondratick v. Beneficial Consumer Discount Co., 2006 WL 305399 (E.D. Pa. Feb. 8, 2006) (mini-trials may have been required to determine whether Beneficial failed to stop its foreclosure when it entered into mortgage reinstatement agreements with borrowers). *See also* Sadler v. Midland Credit Mgmt., Inc., 2009 WL 901479, at *2 (N.D. Ill. Mar. 31, 2009) (granting amended motion for class certification where potential manual review to weed out false positives "might prove administratively burdensome, but a review for such straightforward objective criteria nevertheless remains ministerial in nature"); Rosales v. Unifund CCR Partners, 2008 WL 4976223 (N.D. Ill. Nov. 19, 2008) (would require individual inquiries to establish each affidavit false); Jenkins v. Gen. Collection Co., 2008 WL 4104677 (D. Neb. Aug. 28, 2008) (would require individual inquiries to determine whether there was written contract); Sadler v. Midland Credit Mgmt., Inc., 2008 WL 2692274 (N.D. Ill. July 3, 2008) (putative class action challenging filing of time-barred collection actions; each of 12,000 accounts would have to be reviewed as to last payment date as defendant was unable to devise filters to determine this information from its records); Lee v. Javitch, Block & Rathbone, L.L.P., 522 F. Supp. 2d 945 (S.D. Ohio 2007) (whether funds in debtors' bank accounts were non-exempt is individualized question); Harrell v. Checkagain, L.L.C., 248 F.R.D. 199 (S.D. Miss. 2006) (bounced check fees involved individualized issues such as whether there was point of sale notice or an express agreement permitting such charges); Asset Acceptance, L.L.C. v. Hanson, 2009 WL 840047 (Cal. Ct. App. Apr. 1, 2009).

898 Flecha v. Medicredit, Inc., 946 F.3d 762, 766 (5th Cir. 2020).

899 *See, e.g.*, Rizzo v. Kohn Law Firm, S.C., 2018 WL 3466935 (W.D. Wis. July 18, 2018) (speculative possibility that some class members may be judicially estopped to pursue their FDCPA claim for failure to disclose it as asset of bankruptcy estate, and then getting discharge, not ground to deny certification); Roundtree v. Bush Ross, P.A., 304 F.R.D. 644 (M.D. Fla. 2015) (certifying three classes of condominium debtors despite defenses of bankruptcy, release, and estoppel); Kalkstein v. Collecto, Inc., 304 F.R.D. 114, 2015 WL 59246 (E.D.N.Y. Jan. 5, 2015). *See generally* National Consumer Law Center, Consumer Class Actions Section § 10.6.3.7 (10th ed. 2020), *updated at* www.nclc.org/library. *But see* Powers v. Credit Mgmt. Serv., Inc., 776 F.3d 567 (8th Cir. 2015) (commonality defeated by individualized issue of claim preclusion for class members who had litigated issue in state court).

900 *See* § 11.11.2.3.4, *infra*.

901 National Consumer Law Center, Consumer Class Actions § 10.3.3 (10th ed. 2020), *updated at* www.nclc.org/library. *See, e.g.*, Simpson v. Safeguard Props., L.L.C., 2014 WL 4652336 (N.D. Ill. Sept. 17, 2014) (despite possible minor differences in the plaintiff's status compared to other class members, certifying class with § 1692g notice and deception claims against mortgage field services company that inspects and maintains defaulted and foreclosed properties); Randolph v. Crown Asset Mgmt., L.L.C., 254 F.R.D. 513 (N.D. Ill. 2008) (business-related expense charged on credit card did not destroy typicality required to certify proposed classes); Evans v. Am. Credit Sys., Inc., 222 F.R.D. 388, 394 (D. Neb. 2004); Asch v. Teller, Levit & Silvertrust, P.C., 2001 U.S. Dist. LEXIS 13160 (N.D. Ill. Aug. 27, 2001); Sanders v. Osi Educ. Serv., 2001 WL 883608 (N.D. Ill. Aug. 3, 2001); Lang v. Winston & Winston, 2001 U.S. Dist. LEXIS 7480 (N.D. Ill. May 31, 2001). *See also* Palmer v. Stassinos, 233 F.R.D. 546 (N.D. Cal. 2006); Thomas v. NCO Fin. Sys., Inc., 2003 WL 22416169 (E.D. Pa. Oct. 21, 2003).

establish typicality.[902] That the named plaintiff did not read the letter[903] or did or did not pay the unlawful charge demanded in the letter[904] does not undermine typicality. By the same token, that some class members may not have intended to pay the underlying debt when they incurred it does not make the named plaintiff's claim atypical.[905] Nor does it matter if the named plaintiffs were not misled.[906]

Similarly, typicality is not defeated where the class representative lives in a different state from most of the class—federal rather than state law applies.[907] Nor is it defeated because plaintiff seeks to represent a class of people who may be entitled to actual damages but is himself not entitled to such damages.[908] Defenses that are unique to the class representative will not render them atypical so long as they "do not threaten to become the focus of the litigation."[909]

However, where a class action alleged the filing of time-barred debts, a class representative was found not typical where that representative's debt is not time-barred because of the tolling of the limitations period.[910] Similarly, where the plaintiff consented to the collector's written communication with his father, he may be found not typical of the class of people who did not consent to written communications.[911]

11.11.2.2.5 Adequacy of representation

Federal Rule of Civil Procedure 23(a)(4) requires that the class representative have no interests antagonistic to the other members of the class.[912] The named plaintiff must be both interested in the case and reasonably conscientious,[913] and the class attorney must be qualified, experienced, and generally able to conduct the litigation vigorously. To show antagonistic interests, the defendant must show actual antagonism

902 *See* Rawson v. Source Receivables Mgmt., L.L.C., 289 F.R.D. 267 (N.D. Ill. 2013); Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998); Oslan v. Collection Bur., 206 F.R.D. 109 (E.D. Pa. 2002); Vines v. Sands, 188 F.R.D. 302 (N.D. Ill. 1999); Kane v. Shapiro, 1999 U.S. Dist. LEXIS 12679 (N.D. Ill. Aug. 16, 1999); Blair v. Equifax Check Serv., Inc., 1999 WL 116225 (N.D. Ill. Feb. 26, 1999); Wilborn v. Dun & Bradstreet Corp., 180 F.R.D. 347 (N.D. Ill. 1998); Savino v. Computer Credit, Inc., 173 F.R.D. 346 (E.D.N.Y. 1997); Harrison v. Great Springwaters of Am., Inc., 1997 WL 469996 (E.D.N.Y. June 18, 1997); Stewart v. Slaughter, 165 F.R.D. 696 (M.D. Ga. 1996); Appx. E.3.2, *infra*. *But see* Richard v. Oak Tree Group, Inc., 2007 WL 1238899 (W.D. Mich. Apr. 27, 2007); Palmer v. Stassinos, 233 F.R.D 546 (N.D. Cal. 2006); Brider v. Nationwide Credit, Inc., 1998 WL 729747 (N.D. Ill. Oct. 14, 1998); Villari v. Performance Capital Mgmt., Inc., 1998 WL 414932 (S.D.N.Y. July 22, 1998); Case v. Whetstone, 1998 WL 276088 (W.D. Mich. May 7, 1998); Byes v. Telecheck Recovery Serv., Inc., 173 F.R.D. 421 (E.D. La. 1997); Byes v. Kelly & Kano, Inc., 1997 WL 276096 (E.D. La. May 22, 1997); Hall v. Nat'l Recovery Sys., 1996 WL 467512 (M.D. Fla. Aug. 9, 1996); Dalton v. FMA Enter., Inc., 1996 WL 379105 (M.D. Fla. July 1, 1996); Appx. E.3.2, *infra*.

903 *See* Solberg v. Victim Serv., Inc., 2018 WL 6567072 (N.D. Cal. Dec. 12, 2018) (noting that the FDCPA requires an objective inquiry into whether the least sophisticated consumer would be misled); Passeggio v. Cosmetique, Inc., 1999 U.S. Dist. LEXIS 7607 (E.D.N.Y. Apr. 30, 1999). *See also* Talbott v. GC Serv. L.P., 191 F.R.D. 99 (W.D. Va. 2000); Nielsen v. Dickerson, 1999 WL 350649 (N.D. Ill. May 20, 1999), *aff'd*, 307 F.3d 623 (7th Cir. 2002); Harrison v. Great Springwaters of Am., Inc., 1997 WL 469996 (E.D.N.Y. June 18, 1997).

904 *See* Kalkstein v. Collecto, Inc., 304 F.R.D. 114, 120–121 (E.D.N.Y. Jan. 5, 2015); Macarz v. Transworld Sys., Inc., 193 F.R.D. 46 (D. Conn. 2000); Irwin v. Mascott, 186 F.R.D. 567 (N.D. Cal. 1999); Clark v. Retrieval Masters Creditors Bur., Inc., 185 F.R.D. 247 (N.D. Ill. 1999); Ditty v. Check Rite, Ltd., 182 F.R.D. 639 (D. Utah 1998). *See also* Brink v. First Credit Res., 185 F.R.D. 567 (D. Ariz. 1999); Blair v. Equifax Check Serv., Inc., 1999 WL 116225 (N.D. Ill. Feb. 26, 1999); Wells v. McDonough, 1998 WL 160876 (N.D. Ill. Mar. 31, 1998). *But see* Whaley v. Shapiro & Kreisman, L.L.C., 2003 WL 22232911 (N.D. Ill. Sept. 16, 2003); Sandlin v. Shapiro & Fishman, 168 F.R.D. 662 (M.D. Fla. 1996) (failed to differentiate between class members who actually paid the payoff fees and those who did not).

905 *See* Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998); Miller v. Wexler & Wexler, 1998 WL 60798 (N.D. Ill. Feb. 6, 1998).

906 *See* Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998); Smith v. Short Term Loans, 2001 WL 127303 (N.D. Ill. Feb. 14, 2001).

907 *See* Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., 198 F.R.D. 503 (N.D. Ill. 2001).

908 Madden v. Midland Funding, L.L.C., 237 F. Supp. 3d 130, 156 (S.D.N.Y. 2017) (plaintiff who sought only statutory damages for himself adequate even though 1% of class would be entitled to actual damages); Kalkstein v. Collecto, Inc., 304 F.R.D. 114, 121 (E.D.N.Y. 2015) (plaintiff can adequately represent class members with claims for compensatory damages despite claiming only statutory damages for himself); Magee v. Portfolio Recovery Assoc., 2015 WL 535859, at *4 (N.D. Ill. Feb. 5, 2015) (rejecting argument that "Plaintiffs' claims are not typical for actual damages claims because Plaintiffs did not make any payments to PRA"); Herrera v. LCS Fin. Serv. Corp., 274 F.R.D. 666 (N.D. Cal. 2011) (plaintiff not entitled to seek actual damages may still represent class of individuals who might be entitled to receive them); Wyatt v. Creditcare, Inc., 2005 WL 2780684, at *4 (N.D. Cal. Oct. 25, 2005) (fact that class members, but not plaintiff, may be entitled to actual damages does not render his legal claims atypical of those of class); Irwin v. Mascott, 96 F. Supp. 2d 968 (N.D. Cal. 1999) (same). *See* Keele v. Wexler 149 F.3d 589, 593 (7th Cir. 1998) (noting that "damages recoverable for the class members' injuries may differ—some may be eligible for both actual and statutory damages, others actual damages only, and still others just statutory relief—but the fact remains that their injuries are the same.").

909 Vincent v. Money Store, 304 F.R.D. 446 (S.D.N.Y. 2015) (possible waiver or estoppel arguments).

910 Richburg v. Palisades Collection, L.L.C., 247 F.R.D. 457 (E.D. Pa. 2008).

911 Freid v. Nat'l Action Fin. Serv., Inc., 2011 WL 1547257 (D.N.J. Apr. 20, 2011).

912 *See* Consumer Law Center, Consumer Class Actions § 10.3.4 (10th ed. 2020). *See also* Diaz v. Residential Credit Solutions, Inc., 297 F.R.D. 42, 52 (E.D.N.Y. 2014); Acik v. I.C. Sys., Inc., 251 F.R.D. 332 (N.D. Ill. 2008) (adequate representative even where confused collection letter); Campion v. Credit Bur. Serv., Inc., 206 F.R.D. 663 (E.D. Wash. 2001); Nielsen v. Dickerson, 1999 WL 350649 (N.D. Ill. May 20, 1999) (adequate representative even though defects in named plaintiff's bankruptcy schedule), *aff'd*, 307 F.3d 623 (7th Cir. 2002). *But see* Richburg v. Palisades Collection L.L.C., 247 F.R.D. 457 (E.D. Pa. 2008) (in case alleging filing of time-barred debts, named plaintiff's debts were not time-barred); Perovich v. Humphrey, 1997 WL 674975 (N.D. Ill. Oct. 28, 1997) (named plaintiffs showed no monetary injury or desire to obtain monetary relief).

913 Ocampo v. GC Serv. L.P., 2018 WL 6198464, at *3 (N.D. Ill. Nov. 28, 2018) (finding class representative inadequate due to lack of interest and/or ability to prosecute the action on behalf of a class). *See also* Diaz v. Residential Credit Solutions, Inc., 297 F.R.D. 42 (E.D.N.Y. 2014) (class representative must submit evidence to show she has basic knowledge of lawsuit and is capable of making intelligent decisions based on her lawyer's advice).

between the name plaintiff's claims and those of the class or some other serious deficiency in the named plaintiff's ability to protect the class's interests.[914] To be an adequate representative, the named plaintiff need not: fully understand the details of the litigation,[915] have failed to bounce checks,[916] be able to pay a legal fee or advance costs,[917] have suffered actual damages from the violation even if some class members have such claims,[918] have no relationship with class

914 Grandalski v. Quest Diagnostics Inc., 767 F.3d 175 (3d Cir. 2014) (plaintiff whose rights under FDCPA have been violated by illegal dunning calls inadequate to represent class of individuals who received written demands that contained same impropriety); Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998) (representative inadequate where conflict between complaint and named plaintiff's deposition); Pawelczak v. Fin. Recovery Serv., Inc., 286 F.R.D. 381 (N.D. Ill. 2012) (debtor's failure to read debt collection letter is analogous to situation of debtor failing to listen to entirety of voice recording and will not bar certification of class action in FDCPA case); Dotson v. Portfolio Recovery Assoc., L.L.C., 2009 WL 1559813 (E.D. Pa. June 3, 2009) (representative inadequate where not credible witness and cognitive disabilities impaired comprehension of allegedly deceptive collection letter); Mccall v. Drive Fin. Serv., L.P., 236 F.R.D. 246 (E.D. Pa. 2006) (plaintiff's fifteen-year-old armed robbery conviction did not disqualify him as adequate representative); Wanty v. Messerli & Kramer, P.A., 2006 WL 2691076 (E.D. Wis. Sept. 19, 2006) (named plaintiff's bankruptcy had no effect on adequacy of representation); Buzoiu v. Risk Mgmt. Alternatives, Inc., 2004 WL 1505061 (E.D. Pa. June 14, 2004) (not adequate representative where not credible witness); Smith v. Short Term Loans, 2001 WL 127303 (N.D. Ill. Feb. 14, 2001) (representatives adequate despite defendant's allegation that they never intended to repay the debt); Kaczor v. TRSI, Inc., 1999 U.S. Dist. LEXIS 4251 (N.D. Ill. Mar. 22, 1999) (no evidence that representative not adequate). *See also* Evans v. Am. Credit Sys., Inc., 222 F.R.D. 388 (D. Neb. 2004) (representative adequate); Littledove v. JBC & Assoc., 2001 WL 42199 (E.D. Cal. Jan. 11, 2001) (refusal to accept offers of judgments for individual claims did not make the representatives inadequate); Goetsch v. Shell Oil Co., 197 F.R.D. 574 (W.D.N.C. 2000) (not adequate where repeatedly failed to properly move for class certification); Weber v. Goodman, 1998 U.S. Dist. LEXIS 22832 (E.D.N.Y. May 26, 1998) (representative adequate even where litigation strategy questioned); Hall v. Nat'l Recovery Sys., 1996 WL 467512 (M.D. Fla. Aug. 9, 1996) (representative inadequate because of low credibility). *But see* Wilner v. OSI Collection Serv., Inc., 201 F.R.D. 321 (S.D.N.Y. 2001) (denying class certification pending additional information about the representative's qualifications).

915 Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 366, 86 S. Ct. 845, 15 L. Ed. 2d 807 (1966); Rodriguez v. Cascade Collections L.L.C., ___ F. Supp. 3d. ___, 2021 WL 1222147 (D. Utah, Mar. 31, 2021) (ten chapter 13 bankruptcy filings in ten years did not render plaintiff inadequate); Schafer v. Allied Interstate L.L.C., 2020 WL 4457922 (W.D. Mich. Aug. 2, 2020) (plaintiff who suffers from disability that affects her ability to think, remember, learn, and make rational decisions, but who sufficiently articulated basic understanding of her claim and had no potential conflicts of interest, found adequate); Mack v. Resurgent Capital Services, L.P., 2020 WL 549635 *5 (N.D. Ill. Feb. 3, 2020) (proposed representative adequate, even though she had ceded much of control of litigation to her counsel and admitted that she (1) did not receive or review any documents produced in the case, (2) did not know potential damages class could recover or whether class members had similar claims, and (3) would leave decision of whether to accept settlement offer to her attorneys, where she testified that she has reviewed complaint, letters at issue, and discovery responses with counsel, with counsel keeping her informed about progression of case; noting that under Seventh Circuit precedent, role of class representative had been recognized as nominal); Alderman v. GC Serv. L.P., 2018 WL 542455 (S.D. Fla. Jan. 19, 2018); Pawelczak v. Fin. Recovery Serv., Inc., 286 F.R.D. 381 (N.D. Ill. 2012); *In re* Vivendi Universal, S.A., 242 F.R.D. 76, 88 (S.D.N.Y. 2007); Bigalke v. Creditrust Corp., 2001 WL 1098047 (N.D. Ill. Sept. 14, 2001) (general knowledge and participation in discovery are sufficient to meet representativeness standard); Woodard v. Online Info. Serv., 191 F.R.D. 502 (E.D.N.C. 2000) (named plaintiff's representation by guardian did not render him inadequate); Brink v. First Credit Res., 185 F.R.D. 567 (D. Ariz. 1999); Nielsen v. Dickerson, 1999 WL 350649 (N.D. Ill. May 20, 1999), *aff'd*, 307 F.3d 623 (7th Cir. 2002); Passeggio v. Cosmetique, Inc., 1999 U.S. Dist. LEXIS 7607 (E.D.N.Y. Apr. 30, 1999); Blair v. Equifax Check Serv., Inc., 1999 WL 116225 (N.D. Ill. Feb. 26, 1999); Ditty v. Check Rite, Ltd., 182 F.R.D. 639 (D. Utah 1998); Randle v. GC Serv. L.P., 181 F.R.D. 602 (N.D. Ill. 1998); Arellano v. Etan Industr., 1998 WL 417599 (N.D. Ill. July 20, 1998); Arango v. GC Serv., L.P., 1998 WL 325257 (N.D. Ill. June 11, 1998); Weber v. Goodman, 1998 WL 1807355 (E.D.N.Y. June 1, 1998); Wells v. McDonough, 1998 WL 160876 (N.D. Ill. Mar. 31, 1998); Harrison v. Great Springwaters of Am., Inc., 1997 WL 469996 (E.D.N.Y. June 18, 1997). *But see* Russell v. Forster & Garbus, L.L.P., 2020 WL 1244804, at *4–5 (E.D.N.Y. Mar. 16, 2020) (plaintiff who was litigating through his behind-the-scenes wife inadequate; plaintiff had virtually no familiarity with action and no understanding of his role as class representative); Dotson v. Portfolio Recovery Assoc., L.L.C., 2009 WL 1559813 (E.D. Pa. June 3, 2009) (representative inadequate where not credible witness and cognitive disabilities impaired comprehension of allegedly deceptive collection letter); Sonmore v. CheckRite Recovery Serv., 206 F.R.D. 257(D. Minn. 2001) (in a poorly reasoned decision, finding representatives inadequate where they had already received summary judgment on their individual claims and had allegedly passed bad checks for small amounts of money); Brider v. Nationwide Credit, Inc., 1998 WL 729747 (N.D. Ill. Oct. 14, 1998) (not adequate where contradictions in deposition testimony raised); Byes v. Telecheck Recovery Serv., Inc., 173 F.R.D. 421 (E.D. La. 1997) (not adequate due to conflicts in deposition and where unaware of duties as representative); Dalton v. FMA Enter., Inc., 1996 WL 379105 (M.D. Fla. July 1, 1996) (not adequate where did not understand what claims were filed).

916 Vincent v. Money Store, 304 F.R.D. 446 (S.D.N.Y. 2015).

917 *See* Transworld Sys., Inc., 185 F.R.D. 558 (W.D. Wis. 1999); Blair v. Equifax Check Serv., Inc., 1999 WL 116225 (N.D. Ill. Feb. 26, 1999); Weber v. Goodman, 1998 WL 1807355 (E.D.N.Y. June 1, 1998) (client must advance $1); National Consumer Law Center, Consumer Class Actions § 10.3.4.4 (10th ed. 2020), *updated at* www.nclc.org/library. *See also* Kupfer v. Goodman, 2000 U.S. Dist. LEXIS 7951 (E.D.N.Y. May 17, 2000) (retainer made representative responsible for pro rata share of costs); Berrios v. Sprint Corp., 1998 U.S. Dist. LEXIS 22833 (E.D.N.Y. Sept. 10, 1998) (contributed $1 toward litigation); Berrios v. Sprint Corp., 1998 WL 199842 (E.D.N.Y. Mar. 16, 1998) (not adequate where did not agree to bear pro rata share of expenses, estimated at $0.40); Sandlin v. Shapiro & Fishman, 168 F.R.D. 662 (M.D. Fla. 1996) (representative not adequate where lacked funds to finance class action); Dalton v. FMA Enter., Inc., 1996 WL 379105 (M.D. Fla. July 1, 1996) (not adequate where not able to pay for class notice).

918 *See, e.g.*, Dickens v. GC Serv. L.P., 706 Fed. Appx. 529 (11th Cir. 2017) (district court abused its discretion in concluding that proposed class representative who sought only statutory damages was inadequate; any conflict was especially minimal given that class members could opt out of class); Ferris v. Transworld Sys., Inc., 2018 WL 701285, at *4 (N.D. Ill. Jan. 31, 2018) (plaintiff who sought only statutory damages for class not inadequate); Alderman v. GC Serv. L.P., 2018 WL 542455, at *5 (S.D. Fla. Jan. 19, 2018) (granting class certification, requiring that class notice inform putative class members that plaintiff is seeking only statutory damages and of right to opt out and pursue actual damages on their own); Manno v. Healthcare Revenue Recovery Grp.,

counsel,[919] or have never have been a class representative in other litigation.[920] Agreeing to an individual settlement of other class claims in the case may possibly indicate inadequacy.[921]

A proposed class representative need not seek every remedy that *possibly*—as opposed to probably—would be sought by absent class members; minor conflicts alone are insufficient to deem a representative inadequate, particularly since "in the rare circumstance in which a class member suffered actual damages, the class member could simply opt out of the class and pursue litigation on his own."[922] They do, however, have to have standing to bring the claim.[923] On the other hand, so long as at least one named plaintiff has standing, the class may be certified regardless of whether it contains members who might themselves lack standing.[924]

To be adequate, class counsel should be competent and zealous, and have some prior class action experience[925] or associate experienced counsel on the case.[926] Rule 23(g) provides that in appointing class counsel, the court must "consider" certain criteria, including the work counsel has done in identifying or investigating potential claims in the action, their knowledge of the applicable law and the resources they can commit to representing the class. Although Rule 23(g) also permits a court to direct potential class counsel to provide information on such matters as "propose[d] terms for fees and costs,"[927] several courts have denied discovery regarding the class counsel's fee arrangement allegedly sought for evidence of the counsel's inadequacy.[928]

If a representative is found inadequate, courts usually permit substitution of another class representative.[929]

11.11.2.3 Rule 23(b) Requirements

11.11.2.3.1 Introduction

Rule 23(a) criteria for certification are prerequisites for all class actions. In addition, the class must satisfy at least one subsection of Federal Rule of Civil Procedure 23(b).

11.11.2.3.2 Rule 23(b)(1)

Consumer class actions of any kind are rarely certified under Rule 23(b)(1). Nevertheless, at least one FDCPA action has been certified under this subsection, where the court found that the prosecution of separate actions based upon the same conduct by the defendant could lead to inconsistent legal adjudications.[930]

11.11.2.3.3 Rule 23(b)(2)

Actions for declaratory or injunctive relief must meet the requirements of Rule 23(b)(2), including the requirement that any money damages must be merely incidental to the injunctive relief.[931]

Declaratory or injunctive remedies for class relief are desirable when the collector's violations are part of a pattern or practice affecting a large number of people. Requirements for certification of class actions seeking declaratory or injunctive relief are considerably less strict than those for actions primarily seeking damages. In a class action for statutory or actual damages, Federal Rule of Civil Procedure 23(c)(2) requires notice of pendency of the action to class members, with the class bearing that cost.[932] Notice to the class of the

L.L.C., 289 F.R.D. 674, 696 (S.D. Fla. 2013) (plaintiff who sought only statutory damages for the class not atypical or inadequate).

919 Foley v. Student Assistance Corp., 336 F.R.D. 445, 449–450 (E.D. Wis. 2020) (former roommate and longtime friend of proposed class counsel's wife was not so closely related to counsel as to render her unable to adequately represent class's interests).

920 Nichols v. Northland Groups, Inc., 2006 WL 897867 (N.D. Ill. Mar. 31, 2006); Murray v. Sunrise Chevrolet, Inc., 2006 WL 862886 (N.D. Ill. Mar. 30, 2006).

921 Trunzo v. Citi Mortg., 2018 WL 741422 (W.D. Pa. Feb. 7, 2018) (denying motion to dismiss FDCPA class claims, even though class representative had entered into individual settlements with two other defendants).

922 Dickens v. GC Serv. L.P., 706 Fed. Appx. 529, 536 (11th Cir. 2017) (reversing denial of class certification predicated on failure to meet adequacy and superiority requirements).

923 *See, e.g.*, Brunett v. Convergent Outsourcing, Inc., 982 F.3d 1067 (7th Cir. 2020) (consumer who did not have standing could not represent class members who might have standing); Wheeler v. Am. Profit Recovery, Inc., 2017 WL 44585 (E.D. Mo. Jan. 3, 2017) (denying certification of proposed class of persons who received collection letters falsely indicating that flat rate company was collecting debt for creditor; plaintiff lacked injury-in-fact Article III standing because, unlike some people who might be in class, he did not attempt to contact company or creditor or otherwise attempt to dispute or pay debt, nor allege that he was misled or deceived).

924 *See, e.g.*, Byrne v. Oregon One, Inc., 2017 WL 3568412 (D. Or. July 18, 2017), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017). Additional cases are collected in NCLC's Consumer Class Actions § 10.3.3.2.1 (10th ed. 2020), *updated at* www.nclc.org/library.

925 *Cf.* Pawelczak v. Fin. Recovery Serv., Inc., 286 F.R.D. 381 (N.D. Ill. 2012) (refusing to consider debt collector's argument that the named plaintiff's filing of eleven other lawsuits, and dismissal of class claims in seven of those suits was indicative of her inadequacy).

926 *See* National Consumer Law Center, Consumer Class Actions § 10.3.4.2 (10th ed. 2020), *updated at* www.nclc.org/library.

927 Fed. R. Civ. P. 23(g)(C)(iii).

928 *See* Piazza v. First Am. Title Ins. Co., 2007 WL 4287469, at *1 (D. Conn. Dec. 5, 2007); Abels v. JBC Legal Group, P.C., 233 F.R.D. 645 (N.D. Cal. 2006).

929 *See* National Consumer Law Center, Consumer Class Actions § 10.3.4.8 (10th ed. 2020), *updated at* www.nclc.org/library.

930 Klewinowski v. MFP, Inc., 2013 WL 5177865, at *4 (M.D. Fla. Sept. 12, 2013) (finding requirements of Rule 23(b)(1)(A) satisfied, noting that class certification allows issue of whether "YOUR CREDITORS" letter violates FDCPA to be fully and conclusively determined and will allow defendant to concretely determine course of future conduct). *See generally* National Consumer Law Center, Consumer Class Actions § 10.4 (10th ed. 2020), *updated at* www.nclc.org/library.

931 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). *See* Del Campo v. Am. Corrective Counseling Serv., Inc., 254 F.R.D. 585 (N.D. Cal. 2008) (certifying classes for injunctive and declaratory relief); Swanson v. Mid Am, Inc., 186 F.R.D. 665 (M.D. Fla. 1999) (granting certification where monetary damages incidental to injunctive relief requested); Borcherding-Dittloff v. Transworld Sys., Inc., 185 F.R.D. 558 (W.D. Wis. 1999) (certifying class pursuant to Rule 23(b)(2)). *Cf.* Gradisher v. Check Enforcement Unit, Inc., 203 F.R.D. 271 (W.D. Mich. 2001) (case not certified under Rule 23(b)(2) where certified under Rule 23(b)(3)).

932 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974).

pendency of a declaratory or injunctive action is not ordinarily required. The problems encountered in proving and distributing damages or identifying class members are not raised by class actions seeking declaratory or injunctive relief.[933]

The named plaintiff must be subject to the same substantial, immediate threat of irreparable injury as the class seeking the injunction. A collector's discontinuance of practices violating the FDCPA does not preclude the issuance of an injunction.[934]

The main impediment to an FDCPA class action under Rule 23(b)(2) is the uncertainty as to the availability of declaratory and, particularly, injunctive relief under the FDCPA.[935] This issue is examined at § 11.12.2, *infra*. Nevertheless, injunctive relief may be available under state law, particularly pursuant to state unfair and deceptive trade practices statutes.[936]

11.11.2.3.4 Rule 23(b)(3)

Rule 23(b)(3) sets out requirements for superiority, manageability, and predominance. While this section considers those requirements in the context of the FDCPA, much of the jurisprudence under other federal consumer protection statutes, such as the Fair Credit Reporting Act and the Truth in Lending Act, applies with equal force to FDCPA class actions.[937] In considering the analogous case law, care must be exercised to consider whether the variations in available statutory remedies among these several statutory schemes affects the applicability of the holding to the FDCPA context.

Superiority is not defeated because some members of the class may lack standing.[938] Where individual recoveries are too small to be pursued economically on an individual basis, an FDCPA class action will generally be superior to individual cases.[939] The absence of any other suits weighs in favor of a finding of superiority.[940] The potential for an attorney fee award in an individual action does not make individual actions superior.[941] Neither the FDCPA nor Federal Rule of Civil Procedure 23 requires that the recovery per class member be significant for the class suit to go forward, and the majority of courts hold that the defendant's low net worth (with resulting low cap on statutory damages) does not defeat superiority.[942]

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933 *See* Wilson v. Transworld Sys., Inc., 2002 WL 1379246 (M.D. Fla. Mar. 29, 2002) (while class seeking damages not practical, injunctive class certified).

934 Chavez v. Northwest Collectors, Inc., 1999 U.S. Dist. LEXIS 14979 (N.D. Ill. Sept. 10, 1985); Smith v. Mikell, 17 Clearinghouse Rev. 585 (N.D. Ill. 1982). *But see* Grassley v. Debt Collectors, Inc., 1992 U.S. Dist. LEXIS 22782 (D. Or. Dec. 14, 1992) (absent proof that collector poses ongoing threat of continued unlawful debt collection practices, denying injunctive relief pursuant to state statute).

935 *See, e.g.*, Harris v. D. Scott Carruthers & Assoc., 270 F.R.D. 446 (D. Neb. 2010) (injunctive relief not available to class under FDCPA); Appx. E.3.4, *infra*.

936 *See* §§ 16.2.5.2.5, 16.3.8, *infra*.

937 *See generally* National Consumer Law Center, Consumer Class Actions Ch. 10 (10th ed. 2020), *updated at* www.nclc.org/library.

938 Dickens v. GC Serv. L.P., 336 F. Supp. 3d 1369, 1379 (M.D. Fla. 2018) (where suit seeks statutory damages for allegedly improper debt dispute and validation letters, fact that some class members may not have opened letters was irrelevant; plaintiff's standing is sufficient).

939 Dickens v. GC Serv., L.P., 706 Fed. Appx. 529, 538 (11th Cir. 2017) ("the high likelihood of a low per-class-member recovery militates in favor of class adjudication"); Rhodes v. Enhanced Recovery Co., L.L.C., 328 F.R.D. 225, 231 (S.D. Ind. 2018) (finding superiority, noting that "given the relatively small recovery likely at issue for each consumer's claim, we are not persuaded that, even with the potential to recover attorney's fees in addition to damages, individual plaintiffs would be sufficiently incentivized to bring solo actions"); Simpson v. Safeguard Props., L.L.C., 2014 WL 4652336 (N.D. Ill. Sept. 17, 2014) (despite possible minor differences in plaintiff's status compared to other class members, certifying class with notice and deception claims against mortgage field services company that inspects and maintains defaulted and foreclosed properties); Selburg v. Virtuoso Sourcing Group, L.L.C., 2012 WL 4514152 (S.D. Ind. Sept. 29, 2012); Randolph v. Crown Asset Mgmt., L.L.C., 254 F.R.D. 513, 520 (N.D. Ill. 2008); Gaalswijk-Knetzke v. Receivables Mgmt. Serv. Corp., 2008 WL 3850657, at *4–5 (M.D. Fla. Aug. 14, 2008); *In re* Risk Mgmt. Alternatives, Inc., 208 F.R.D. 493 (S.D.N.Y. 2002). *See also* Aramburu v. Healthcare Fin. Serv., 361 F. Supp. 2d 21 (D. Conn. 2005). *But see* Thompson v. Spinelli, 2005 WL 2483376 (N.D. Ill. Oct. 5, 2005) (class not superior where court required to examine almost 5000 agreements to determine if $8 credit card processing fee was authorized).

940 *See, e.g.*, Al v. Van Ru Credit Corp., 2018 WL 4603284, at *5 (E.D. Wis. Sept. 25, 2018).

941 Stillmock v. Weis Mkts., Inc., 385 Fed. Appx. 267 (4th Cir. 2010) (FCRA claims); Brent v. Midland Funding, L.L.C., 2011 WL 3862363 (N.D. Ohio Sept. 1, 2011); *In re* Farmers Ins. Co., FCRA Litig., 2006 WL 1042450, at *11 (W.D. Okla. Apr. 13, 2006) (interpreting analogous provisions under FCRA).

942 *See* Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997); Quinn v. Specialized Loan Servicing, L.L.C., 331 F.R.D. 126, 134 (N.D. Ill. 2019) (FDCPA "explicitly contemplates class actions for statutory damages, 'without regard to a minimum individual recovery'"); O'Dell v. Nat'l Recovery Agency, 291 F. Supp. 3d 687, 704 (E.D. Pa. 2018) (weighing several factors to find superiority despite defendant's purported low net worth, noting that "[c]ourts facing this issue typically hold that unless the defendant's net worth is negative, superiority is not destroyed"); Spice v. Blatt, Hasenmiller, Liebsker & Moore L.L.C., 2018 WL 525723 (N.D. Ind. Jan. 24, 2018) (noting that "[t]he plain language of the FDCPA supports class certification even where individual class member recovery is likely de minimis. The statutory language provides that class damages are to be awarded 'without regard to a minimum individual recovery . . .' 15 U.S.C. § 1692k(a)(2)(B)(ii)," citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997); Marquez v. Weinstein, Pinson & Riley, P.S., 2017 WL 4164170 (N.D. Ill. Sept. 20, 2017) (proceeding as class would further FDCPA's purpose of curbing debt collection abuses and judicial efficiency, even if class members ended up with little recovery); Spiegel v. Ashwood Fin., Inc., 2017 WL 443168, at *3 (S.D. Ind. Feb. 2, 2017) ("Even where recovery is de minimis, there is value in certifying a class to address potentially unlawful behavior that would not otherwise be addressed because the barriers to bringing suit are too high."); Tripp v. Berman & Rabin, P.A., 310 F.R.D. 499, 507 (D. Kan. 2015) ("Defendants concede, as they must, that other federal courts have held that a FDCPA class action is a superior method for adjudication, even where class members stand to recover a de minimis amount"); Magee v. Portfolio Recovery Assoc., 2015 WL 535859 (N.D. Ill. Feb. 5, 2015); Brent v. Midland Funding, L.L.C., 2011 WL 3862363(N.D. Ohio Sept. 1, 2011); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, 271 F.R.D. 572 (N.D. Ohio 2010) (class action superior even where each class member could recover only $3.10); Nicholas v. CMRE Fin. Servs, Inc., 2010 WL 1049935 (D.N.J. Mar. 16, 2010); Hicks v. Client Serv., Inc., 257 F.R.D. 699 (S.D. Fla. 2009) (class superior even where recovery in the range of $1 to $5 per class member); Gaalswijk-Knetzke v. Receivables Mgmt. Serv. Corp., 2008 WL 3850657 (M.D. Fla. Aug. 14, 2008) (class superior where members would receive $3.20 each); Kalish v. Karp

Similarly, the fact that a class member might receive a larger recovery in an individual action is generally held to be an insufficient reason to deny class certification.[943] Courts recognize that few class members are likely to sue for a maximum of $1000 in statutory damages, and while a class member may receive less than if they had brought an individual action, the ability to opt out of the class action and pursue an individual claim protects the individual's rights.[944]

In some circumstances, however, other factors may, weigh against a finding of superiority when the defendant has low net worth (taking into account the class size). One factor is if significant state law remedies are available in individual actions.[945] A second is if summary judgment has already been granted in favor of the plaintiff as to liability on the claim. In this situation, "the difficulty for a class member to pursue a claim individually is significantly reduced."[946]

In opposing class certification on based on the small amount of statutory damages available to a class member pursuant to the cap, the burden is on the defendants to show their limited financial ability.[947] At trial, however, the plaintiff has the

& Kalamotousakis, L.L.P., 246 F.R.D. 461 (S.D.N.Y. 2007) (class superior even where members would receive $2.50 each); Jancik v. Cavalry Portfolio Serv., L.L.C., 2007 WL 1994026, at *11 (D. Minn. July 3, 2007) ("If it is ultimately determined that Defendant violated the FDCPA, Defendant should not be allowed to avoid paying damages simply because each individual plaintiff will receive only a small recovery."); Jordan v. Commonwealth Fin. Sys., Inc., 237 F.R.D. 132 (E.D. Pa. 2006); Abels v. JBC Legal Grp., P.C., 227 F.R.D. 541, 546–547 (N.D. Cal. 2005) (finding superiority prong met even though class members would likely receive only $0.25 per person); Macarz v. Transworld Sys., Inc., 193 F.R.D. 46, 55 (D. Conn. 2000) ("Although class members may recover smaller damages amounts than would have been the case in individual actions, the Court finds that the class action vehicle is nonetheless superior, given the remote likelihood that such individual actions actually would be brought."). *See also* Powers v. Credit Mgmt. Serv., Inc., 776 F.3d 567 (8th Cir. 2015) (noting low net worth and remanding for further proceedings); Scott v. Universal Fid. Corp., 1999 U.S. Dist. LEXIS 13425 (N.D. Ill. Aug. 30, 1999); Passeggio v. Cosmetique, Inc., 1999 U.S. Dist. LEXIS 7607 (E.D.N.Y. Apr. 30, 1999); Berrios v. Sprint Corp., 1998 WL 199842 (E.D.N.Y. Mar. 16, 1998); Duran v. Credit Bur., Inc., 93 F.R.D. 607 (D. Ariz. 1982). *Cf.* Campion v. Credit Bur. Serv., Inc., 206 F.R.D. 663 (E.D. Wash. 2001) (net-worth information was useful, but not determinative, in considering motion for class certification). *But see* Gallego v. Northland Group, Inc., 814 F.3d 123 (2d Cir. 2016) (upholding district court denial of class certification and proposed settlement on grounds of lack of superiority due to de minimis recovery—$17,500 for a class of 100,000; also noting questionable adequacy of representation where a general release of class members was agreed to even though they would recover little or no money); Gonzalez v. Dynamic Recovery Solutions, L.L.C., 2015 WL 738329 (S.D. Fla. Feb. 23, 2015) (granting final approval of national injunctive relief class action settlement of some 180,000 members, but declining to certify 23(b)(3) class, noting that statutory cap on damages would have resulted in de minimis recovery); Versteeg v. Bennett, Deloney & Noyes, P.C., 271 F.R.D. 668 (D. Wyo. 2011) (class action was not superior to other means of handling FDCPA claims, where defendant debt collector had limited financial ability to pay recovery, there was little chance for recovery by individual class members if class was certified, and individual litigants would be more likely to recover under individual actions); Sonmore v. CheckRite Recovery Serv., Inc., 206 F.R.D. 257 (D. Minn. 2001) (denying class certification because class members would be entitled to recover no more than $25 per member, and the total amount of recovery may have been as low as $0.15 per class member); Kohnlenberger v. Dickinson, 1996 WL 131736, at *2 (N.D. Ill. Mar. 15, 1996) (noting that class action is not superior where defendant's net worth is "zero or less").

943 See Dickens v. GC Serv., L.P., 706 Fed. Appx. 529, 537 (11th Cir. 2017) (reversing denial of class certification predicated on adequacy and superiority grounds); Rigney v. Livingston Fin., L.L.C., 2014 WL 12625790 (M.D. Fla. Mar. 6, 2014), *adopted*, 2014 WL 12633494 (M.D. Fla. Mar. 6, 2014); Brent v. Midland Funding, L.L.C., 2011 WL 3862363 (N.D. Ohio Sept. 1, 2011); Smith v. Greystone Alliance L.L.C., 2011 WL 2160886 (N.D. Ill. May 27, 2011); Randolph v. Crown Asset Mgmt., L.L.C., 254 F.R.D. 513 (N.D. Ill. 2008); Kalish v. Karp & Kalamotousakis, L.L.P., 246 F.R.D. 461, 464 (S.D.N.Y. 2007); Petrolito v. Arrow Fin. Serv., 221 F.R.D. 303 (D. Conn. 2004); Woolley v. Krisor & Assoc., 2000 U.S. Dist. LEXIS 7069 (S.D. Ind. May 15, 2000) ("include an explanation of the right to bring an individual action in the notice to the class . . . [m]oreover, class members were free to opt out of the class to pursue an individual action"); Gammon v. GC Serv. L.P., 162 F.R.D. 313, 322 (N.D. Ill. 1995) (noting "the practical reality that few individuals will pursue the filing of a federal lawsuit, with its attendant costs, when their statutory damage recovery is capped at $1,000"). *But see* Sonmore v. CheckRite Recovery Serv., 206 F.R.D. 257 (D. Minn. 2001) (class action was not superior, because class treatment would be detrimental to absent class members, as it would substantially limit their recovery from $1000 each in individual action to between 15 cents and $25 per class member, depending on defendant's net worth).

944 *See* Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997); Quinn v. Specialized Loan Servicing, L.L.C., 331 F.R.D. 126, 134 (N.D. Ill. 2019); Zimmerman v. Portfolio Recovery Assoc., 2013 WL 1245552, at *8 (S.D.N.Y. Mar. 27, 2013); O'Connor v. AR Res., Inc., 2012 WL 12743, at *1 (D. Conn. Jan. 4, 2012); Garland v. Cohen & Krassner, 2011 WL 6010211, at *15 (E.D.N.Y. Nov. 29, 2011); Brent v. Midland Funding, L.L.C., 2011 WL 3862363 (N.D. Ohio Sept. 1, 2011); Kalish v. Karp & Kalamotousakis, L.L.P., 246 F.R.D. 461 (S.D.N.Y. 2007); Woolley v. Krisor & Assoc., 2000 U.S. Dist. LEXIS 7069 (S.D. Ind. May 15, 2000); Wilborn v. Dun & Bradstreet Corp., 180 F.R.D. 347 (N.D. Ill. 1998); Avila v. Van Ru Credit Corp., 1995 WL 55255 (N.D. Ill. Feb. 8, 1995), *aff'd on other grounds sub nom.* Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996). *See generally* National Consumer Law Center, Consumer Class Actions § 10.6.2.3 (10th ed. 2020), *updated at* www.nclc.org/library.

945 Vassalle v. Midland Funding, L.L.C., 708 F.3d 747 (6th Cir. 2013). *But see* Vassalle v. Midland Funding, L.L.C., 2014 WL 5162380 (N.D. Ohio Oct. 14, 2014) (on remand; finding potential recoveries available to class members not so great as to render individual lawsuits superior), *aff'd sub nom.* Pelzer v. Vassalle, 655 Fed. Appx. 352 (6th Cir. 2016).

946 Boucher v. Fin. Sys. of Green Bay, Inc., 2019 WL 1543988, at *5 (E.D. Wis. Apr. 9, 2019) (also noting that, in these circumstances, granting class certification would likely increase number of individual lawsuits, thus multiplying proceedings and defeating superiority).

947 Vandehey v. Client Serv., Inc., 390 F. Supp. 3d 956, 964 (E.D. Wis. 2019) (finding superiority where defendant did not submit any evidence in support of its claim of low net worth, observing that "[i]t makes sense to hold that a defendant's net worth limitation on liability in an FDCPA action is an affirmative defense on which the defendant has the burden of proof, not only because such a limitation is a matter of avoidance, but also because the defendant is in the best position to present evidence of its own net worth"); Lemire v. Wolpoff & Abramson, L.L.P., 256 F.R.D. 321, 331 (D. Conn. 2009) (even if Wolpoff's net worth turned out to be negative, class action was still superior to individual litigation); Harris v. D. Scott Carruthers & Assoc., 270 F.R.D. 446, 454 (D. Neb. 2010) (certifying class, finding unpersuasive defendant's evidence of negative net worth). *See also* Prindle v. Carrington

burden of producing evidence of the debt collector's net worth to establish entitlement to class statutory damages.[948]

Courts have held that a *cy pres* distribution[949] could be used to make the class adjudication superior to individual cases but should be reserved for those unusual situations where victims are not identifiable, or where disbursement would be impossible or inappropriate.[950] Superiority has been found even in the context of a *cy pres*–only settlement, where class members will not receive any direct compensation, so long as individual litigation would otherwise be economically infeasible.[951]

The allocation of the class recovery as a *cy pres* award has been approved where the costs of distribution to class members would exceed the statutory damages.[952] However, in *Koby v. ARS National Services, Inc.*,[953] the Ninth Circuit overturned the approval of a nationwide class settlement, in part because it did not appear that the designated *cy pres* recipient—a San Diego veterans organization—would provide any relevant benefit to absent class members.

For the benefit of the class and because some courts express concern when the size of the recovery per class member is very small,[954] consider ways to increase the per class member statutory damages recovery—thus decreasing the likelihood that a court will find a class action inferior to individual actions. Some of these approaches are discussed at § 11.11.3.3, *infra*.

For a Rule 23(b)(3) class to be certified, the class action must not only be superior and manageable,[955] but common issues must predominate.[956] Prior to the Supreme Courts' 2016 and 2021 decisions restricting standing,[957] when the class claim was that the debt collector's uniform communication was misleading, predominance was usually easily established, because the same objective test—the least sophisticated consumer or an unsophisticated consumer, depending on the circuit—applied to all class members.[958] These recent Supreme Court decisions

Mortg. Serv., L.L.C., 2016 WL 4466838 M.D. Fla. Aug. 24, 2016) (finding superiority, declining to speculate as to defendant's net worth).

948 Tourgeman v. Nelson & Kennard, 900 F.3d 1105 (9th Cir. 2018) (observing that defendant had been ordered to produce, and had produced, its financial information pursuant to protective order).

949 *See* National Consumer Law Center, Consumer Class Actions § 14.9 (10th ed. 2020), *updated at* www.nclc.org/library.

See also the pleadings from an FDCPA class action involving a *cy pres* remedy, available online as companion material to this treatise.

950 *See* Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997).

951 *In re* Google Referrer Header Privacy Litig., 869 F.3d 737, 742–743 (9th Cir. 2017), *vacated on other grounds and remanded by* Frank v. Gaos, ___ U.S. ___, 139 S. Ct. 1041, 203 L. Ed. 2d 404 (2019).

952 Drennan v. Van Ru Credit Corp., 1997 WL 305298 (N.D. Ill. June 2, 1997).

953 Koby v. ARS Nat'l Serv., Inc., 846 F.3d 1071 (9th Cir. 2017).

954 *See In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974); Mund v. EMCC, Inc., 259 F.R.D. 180 (D. Minn. 2009); Fainbrun v. Southwest Credit Sys., L.P., 2008 WL 750550 (E.D.N.Y. Mar. 18, 2008); Barnett v. Experian Info. Solutions, Inc., 236 F.R.D. 307 (E.D. Tex. 2006); Gradisher v. Check Enforcement Unit, Inc., 209 F.R.D. 392 (W.D. Mich. 2002); Sonmore v. CheckRite Recovery Serv., 206 F.R.D. 257(D. Minn. 2001).

955 The concern that the class be manageable is largely obviated when a class settlement is proposed. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed 2d 689 (1997).

956 Herrera v. LCS Fin. Serv. Corp., 274 F.R.D. 666 (N.D. Cal. 2011) (common questions regarding mailing of letters to debtors with allegedly misleading information predominated); Kimball v. Frederick J. Hanna & Assoc., 2011 WL 3610129 (D. Minn. Aug. 15, 2011) (finding predominant issue of whether defendant's voicemail messages violated §§ 1692e(11) and 1692d(6)); Garo v. Global Credit & Collection Corp., 2011 WL 251450 (D. Ariz. Jan. 26, 2011) (common questions predominant); Bogner v. Masari Inv., L.L.C., 257 F.R.D. 529 (D. Ariz. 2009) (finding common issues predominant where collector's section 1692g(a) notice stated that any dispute must be made in writing); Castro v. Collecto, Inc., 256 F.R.D. 534 (W.D. Tex. 2009) (finding common issues predominant where dunning after limitations period had expired); Drossin v. Nat'l Action Fin. Serv., Inc., 255 F.R.D. 608, 617 (S.D. Fla. 2009) (finding common issues predominant due to telephone messages left by collector); Sadler v. Midland Credit Mgmt., Inc., 2009 WL 901479, at *3 (N.D. Ill. Mar. 31, 2009) (finding common issues predominant in part because "individuals whose debts arose from the same creditor are likely to be subject to substantially similar, if not identical, agreements"); del Campo v. Am. Corrective Counseling Serv., Inc., 254 F.R.D. 585 (N.D. Cal. 2008) (finding superiority and common issues predominant for class of hundreds of thousands, defined as those who were mailed at least one demand letter falsely purporting to be from district attorney's office, and due to small amounts of actual damages and desirability of consistent judgments); Wahl v. Midland Credit Mgmt., Inc., 243 F.R.D. 291 (N.D. Ill. 2007) (class certified as to misrepresentations in collector's form correspondence, but subclass of those cases where collector continued to try to collect after receiving written disputes not certified, because the individual circumstances of the consumers' individual disputes would predominate). *But see* O'Donovan v. CashCall, Inc., 278 F.R.D. 479 (N.D. Cal. 2011) (individual issues predominated where § 1692d claim was predicated on defendant's auto dialer call volume that varied among class members); Freid v. Nat'l Action Fin. Serv., Inc., 2011 WL 1547257 (D.N.J. Apr. 20, 2011) (finding lack of predominance for false sense of urgency claim where NAFS gave its employees six similar scripts to use when leaving messages, but finding question of what was actually communicated was a highly individualized matter); Lee v. Javitch, Block & Rathbone, L.L.P., 522 F. Supp. 2d 945 (S.D. Ohio 2007) (common issues not predominant where must determine if collector's attorney had reasonable basis for belief that non-exempt funds existed in debtor's bank account); Foreman v. PRA III, L.L.C., 2007 WL 704478 (N.D. Ill. Mar. 5, 2007) (common issues not predominant where plaintiff would have to prove debt buyer's practice of filing collection actions without the means to prove a particular debtor's indebtedness). *See generally* National Consumer Law Center, Consumer Class Actions § 10.6.3 (10th ed. 2020), *updated at* www.nclc.org/library.

957 TransUnion v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021); Spokeo v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

958 *See, e.g.*, Bordeaux v. LTD Fin. Serv., L.P., 2017 WL 6619226 (D.N.J. Dec. 28, 2017) (certifying class of recipients of letter from debt collector stating that "[w]henever $600.00 or more of a debt is forgiven as a result of settling a debt for less than the balance owing, the creditor may be required to report the amount of the debt forgiven to the Internal Revenue Service on a 1099C form"); Long v. Fenton & McGarvey Law Firm, 2016 WL 7235509 (S.D. Ind. Dec. 14, 2016); Lewis v. ARS Nat'l Serv., Inc., 2011 WL 3903092 (M.D. Ala. Sept. 6, 2011) (where defendant's routine collection letters contained privacy notice that allegedly violated FDCPA, predominance requirement was clearly satisfied as least sophisticated consumer test was uniformly applicable). *But see* Landeros v. Pinnacle Recovery, Inc., 692 Fed. Appx. 608, 612 (11th Cir. 2017) (affirming denial of class certification of FDCPA claim that debt collector's letters misrepresented potential tax consequences of debt forgiveness; whether content was misleading as to a particular recipient depended on individual's indebtedness and intention of collector).

have, however, upended existing jurisprudence regarding letter violations, because courts now generally hold that, regardless of whether there was a violation, class members lack standing to seek redress unless they relied to their detriment on the inadequate, misleading, or false representation.[959] As one court has noted, "while some class members may be able to testify that they relied to their detriment on the contents of letters falsely threatening suit, which may be adequate to establish standing, others will not."[960] Even in those jurisdictions where consumer confusion or anxiety caused by such letters is recognized as sufficient to support standing, the same problem with individualized issues for class members would be presented.

The existence of some individual issues does not necessarily defeat predominance.[961] For example, the question of whether the debt whose collection had been sought was a consumer debt and not a business debt generally has not prevented a finding of predominance.[962] Similarly, that affirmative defenses may exist as to some class members does not necessarily defeat certification.[963] Where collection letters containing allegedly confusing language about leased equipment were sent to over 4000 Dish Network subscribers, the fact that some consumers may not have leased equipment did not prevent certification because "letter recipients simply could be asked whether they leased Dish Network equipment."[964]

In *McMahon v. LVNV Funding, L.L.C.*,[965] the Seventh Circuit reversed the district court's refusal to certify an FDCPA class alleging that a debt buyer's letters offering settlements on time-barred debts violated the FDCPA because of individualized issues of causation and damages. The court found the lower court's reasoning on predominance of common issues was internally inconsistent[966] and that it failed to consider bifurcation to deal with any individual causation and damages issues. Similarly, in *Wheeler v. Midland Funding L.L.C.*,[967] the court denied defendants' motion for summary judgment on damages for the class of consumers to whom defendants conveyed offers to settle debts without informing them that the debts were time-barred. Although consumers could have paid their debts for any number of reasons other than lack of knowledge of the statute of limitations, causation was an issue for the jury. In other putative class actions arising

959 Article III standing for FDCPA violations is discussed in § 11.15, *infra*.

960 Kwasniewski v. Medicredit, Inc., 2021 WL 248442 (W.D. Wis. Jan. 25, 2021) (decertifying class for lack of predominance).

961 Sykes v. Mel S. Harris & Assoc., 780 F.3d 70 (2d Cir. 2015) (no abuse of discretion in determination that at least five common issues predominated over concern that some damages would have to be determined on an individual basis); Dickens v. GC Serv. L.P., 336 F. Supp. 3d 1369, 1379 (M.D. Fla. 2018) (in case seeking statutory damages for allegedly improper debt dispute and validation letters, finding possibility of individualized damages not enough to defeat predominance); Madden v. Midland Funding, L.L.C., 237 F. Supp. 3d 130 (S.D.N.Y. 2017) (predominance found in action claiming debt collector that purchased defaulted debts charged and attempted to collect interest higher than permitted under New York law, where most, if not all, class members' credit card agreements pointed to state with no usury cap, statutory damages under New York law were capped at $50 per person, generally applicable formula applied to class action damages under FDCPA, and only about 1% of class (485 members) would seek actual damages based on paying usurious interest, as would require individualized review); Mayfield v. Asta Funding, Inc., 95 F. Supp. 3d 685 (S.D.N.Y. 2015); Simpson v. Safeguard Props., L.L.C., 2014 WL 4652336 (N.D. Ill. Sept. 17, 2014); Muzuco v. ReSubmitIt, L.L.C., 297 F.R.D. 504 (S.D. Fla. 2013) (certifying class of consumers whose checks had been dishonored and then defendant collection agency had submitted electronic checks for bank's NSF fees, thereby allegedly violating § 1692f by imposing an unlawful NSF fee and § 1692c(b) by conducting unauthorized communications with class members' banks: "The Court does not believe that it will need to engage in significant individual inquiries about the Notice received by each class member. And, while there may be individualized evidence concerning whether Defendants in fact contacted each class members' bank, the Court does not believe that this defeats predominance. As the Court has already explained, there are numerous common questions of law, and the resolution of these questions will have a direct impact on every class member's effort to establish liability"). *But see* Landeros v. Pinnacle Recovery, Inc., 692 Fed. Appx. 608, 612 (11th Cir. 2017) (affirming denial of class certification of FDCPA claim that debt collector's letters misrepresented potential tax consequences of debt forgiveness; whether content was misleading as to particular recipient depended on individual's indebtedness and intention of collector); Gaisser v. Portfolio Recovery Assoc., 2009 WL 10666810 (S.D. Fla. Mar. 2, 2009) (denying motion for class certification for filing suit on time-barred credit card debt on numerosity and variety of predominance grounds).

962 *See, e.g.*, Viernes vs. DNF Assoc., 2020 WL 6938010 *10 (D. Haw. Nov. 23, 2020) (eventual need to determine nature of debts sought to be collected by debt buyer did not prevent finding of predominance), *adopted*, 2021 WL 225327 (D. Haw. Jan. 22, 2021); Norton v. LVNV Funding, L.L.C., 2020 WL 5910077 (N.D. Cal. Oct. 6, 2020) (same); Usry v. Equity Experts.org L.L.C., 2020 WL 1080394 (S.D. Ga. Mar. 5, 2020) (same); Rhodes v. Enhanced Recovery Co., 328 F.R.D. 225, 230 (S.D. Ind. 2018) (rejecting contention that determining whether debts of each of 509 putative class members arose from transactions primarily for personal, family, or household purposes would defeat predominance, noting that, "in general, commercial purchases will "frequently be readily identified by the listing of the name of the business as the purchaser," *citing* Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1165 n.4 (7th Cir. 1974)). *See also* DeNicolo vs. Hertz Corp., 2021 WL 1176534, at *5 (N.D. Cal. Mar. 29, 2021) (referring to question of consumer versus business debt as more question of manageability than predominance); § 11.11.2.1, *supra*, discussing in the context of ascertainability ways of determining whether class members' debts arose from consumer transactions.

963 *See, e.g.*, Vincent v. Money Store, 304 F.R.D. 446 (S.D.N.Y. 2015) (affirmative defenses of waiver and estoppel); Kalkstein v. Collecto, Inc., 304 F.R.D. 114 (E.D.N.Y. 2015) (certifying 360-member statewide class where collection agency attempted to collect tuition debt that included allegedly unauthorized additional fees, even though some members may have agreed to such fees); Roundtree v. Bush Ross, P.A., 304 F.R.D. 644 (M.D. Fla. 2015) (certifying three classes of condominium debtors despite defenses of bankruptcy, release, and estoppel). *See generally* National Consumer Law Center, Consumer Class Actions § 10.6.3.7 (10th ed. 2020), *updated at* www.nclc.org/library.

964 Ocampo v. GC Serv. L.P., 2018 WL 6198464, at *7 (N.D. Ill. Nov. 28, 2018).

965 807 F.3d 872 (7th Cir. 2015).

966 *Id.* at 876 ("If, as the district court indicated, actual damages in this case are capable of ministerial determination, causation must likewise be capable of ministerial determination" since members had to prove causation to establish actual damages).

967 2020 WL 1469449 (N.D. Ill. Mar. 26, 2020).

from collection letters seeking to collect on time-barred debt, courts have split on whether determining which debts were in fact time-barred would precluded predominance.[968]

Concerns about the predominance of common issues and manageability may lead a court to deny certification of a nationwide class under some circumstances. For example, in *Johnson v. Riddle*, the court denied certification of a nationwide class action because certification would require the court and/or the trier of fact to examine whether the challenged conduct in imposing excessive fees on dishonored checks was permitted by the various statutory schemes of the thirty to forty states in which class members resided.[969] Moreover, where the prerequisites of predominance and superiority for Rule 23(b)(3) certification have been satisfied, the court may nevertheless deny certification unless adequate notice, as required by Rule 23(c)(2)(B), can be given.[970]

11.11.2.3.5 Special Rule 23(b)(3) considerations where class action seeks actual damages

Predominance and manageability issues may be particularly challenging when the goal is an award of actual damages, where there may need to be individual proof of actual damages to class members caused by a common violation. Many FDCPA violations produce different kinds and amounts of actual damages, depending upon the circumstances and susceptibility of each victim. Nevertheless, often the nature of the class's actual damages may be common to the class and the amounts readily determined from the collector's records, for example, where there is an illegal collection fee, or an overcharge, or legal fees incurred to defend against a time-barred action.[971]

If individual damages need be proven, the associated administrative difficulties do not necessarily preclude a class action for actual damages.[972] Solutions to such difficulties include:

- Reference to a special master or magistrate judge;[973]
- Submission of uncontested cases by affidavits to the class administrator;

968 *Compare* Holzman v. Malcolm S. Gerald & Assoc., Inc., 334 F.R.D. 326, 332–333 (S.D. Fla. 2020) (certifying class; noting that evidence indicated that defendants knew, or, at minimum, believed, debts were time-barred and were treating them as time-barred); Baez v. LTD Fin. Services, L.P., 2016 WL 3189133, at *5 (M.D. Fla. 2016) (granting class certification where dunning letter explicitly acknowledged that debt was time-barred, although not in legal terms, at time letter was mailed), *with* Riffle v. Convergent Outsourcing, Inc., 311 F.R.D. 677, 682-84 (M.D. Fla. 2015) (plaintiff could not satisfy predominance because determining whether each class member's debt was time-barred was individualized inquiry, which would involve reviewing applicable cardholder agreements to determine when limitations period began to accrue and when it expired). *See also*, Hatcher v. Collecto, Inc., 2021 WL 765759 (D. Del. Feb. 26, 2021) (in suit seeking certification of class of debtors who were dunned by defendant on time-barred debt, denying certification for lack of ascertainability because plaintiff failed to provide mechanism to identify which debts in more than 1000 identified by defendant as possibly in class were in fact time-barred; noting that plaintiff did not claim that defendant had or should have relevant information in its records).

969 Johnson v. Riddle, 2007 WL 528719 (D. Utah Feb. 15, 2007).

970 Thomas v. NCO Fin. Sys., Inc., 2004 WL 727071 (E.D. Pa. Mar. 31, 2004) (approving, on resubmission following its earlier rejection, settlement class a debt buyer reporting obsolete debts to credit reporting agencies, finding that notice to class through publication including *USA Today* was superior method of notice than individualized mailings, recognizing that median time living at a particular residence by adults was only 4.7 years). *See also* Thomas v. NCO Fin. Sys., Inc., 2003 WL 22416169 (E.D. Pa. Oct. 21, 2003).

971 *See* Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998) (illegal collection fee); Solberg v. Victim Serv., Inc., 2018 WL 6567072 (N.D. Cal. Dec. 12, 2018) (certifying FDCPA statutory damages class of California residents to whom defendants sent collection demands in connection with returned check and UCL restitution subclass for members who paid fees to defendants after receiving demands); McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513 (E.D. Mich. 2013) (granting class certification in § 1692e(2)(A) and § 1692f(1) challenge to defendant debt buyer's practice of unlawfully adding to its purchased accounts interest that original creditors had waived); Hamilton v. Am. Corrective Counseling Serv., 2007 WL 541817 (N.D. Ind. Feb. 14, 2007) (improper fees could be determined from collector's own records); Hansen v. Ticket Track, Inc., 213 F.R.D. 412 (W.D. Wash. 2003) (parking lot collection fee). *See also* Lowe v. Elite Recovery Solutions L.P., 2008 WL 324777 (E.D. Cal. Feb. 5, 2008) (individual action where attorney fees were incurred by consumer in defending underlying state collection action).

972 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) ("individualized monetary claims belong in Rule 23(b)(3)"). *See, e.g.*, Herrera v. JFK Med. Ctr. L.P., 648 Fed. Appx. 930 (11th Cir. 2016); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013) ("damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses"); *In re* Whirlpool Corp. Front-Loading Washer Products Liab. Litig., 678 F.3d 409, 421 (6th Cir. 2012), *judgment vacated, sub nom.* Whirlpool Corp. v. Glazer, 569 U.S. 901, 133 S. Ct. 1722, 185 L. Ed. 2d 782 (2013), *on remand*, 722 F.3d 838 (6th Cir. 2013) (reaffirming earlier holding); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802 (7th Cir. 2012) (collecting cases); Stillmock v. Weis Markets, Inc., 385 Fed. Appx. 267 (4th Cir. 2010) (finding common issues predominated even though statutory damages available to each class member for violations of FACTA truncation requirement would vary from $100 to $1000); Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998) (illegal $12.50 collection fee); Roundtree v. Bush Ross, P.A., 304 F.R.D. 644 (M.D. Fla. 2015) (granting class certification of three classes of condominium debtors); Magee v. Portfolio Recovery Assoc., 2015 WL 535859 (N.D. Ill. Feb. 5, 2015); Herrera v. LCS Fin. Serv. Corp., 274 F.R.D. 666, 680–681 (N.D. Cal. 2011) (granting class certification); Mund v. EMCC, Inc., 259 F.R.D. 180, 186 (D. Minn. 2009) (differences in damages suffered by individual class members did not defeat predominance); Hazelwood v. Bruck Law Offices S.C., 244 F.R.D. 523, 525 (E.D. Wis. 2007); Hunt v. Check Recovery Sys., Inc., 241 F.R.D. 505 (N.D. Cal. 2007) (Rule 23(b)(2) and (b)(3) class of all persons to whom the defendant mailed collection demand for both interest and statutory service charge on dishonored check); Brink v. First Credit Res., 185 F.R.D. 567 (D. Ariz. 1999) (statewide class approved); Peoples v. Wendover Funding, Inc., 179 F.R.D. 492 (D. Md. 1998).

973 *See, e.g.*, Vaquero v. Ashley Furniture Industr., Inc., 824 F.3d 1150, 1155 (9th Cir. 2016) (noting that with class of about 600 members in wage and hour claim, district court could appoint special master who could hear defendant's defenses to individual claims); Beattie v. Century Tel, Inc., 511 F.3d 554 (6th Cir. 2007) (if necessary, court can bifurcate liability and damages or appoint magistrate judge or special master to preside over individual damage proceedings).

- Use of statistical estimation formulas;
- Devising subclasses; and
- Limiting the class proceeding to liability issues.[974]

Nearly all these management tools require the commitment of substantial resources by the class attorney. If the court believes that it, not counsel, is expected to shoulder the class action management burdens, it is unlikely to permit the action to proceed on behalf of a class. If there are manageability or resource problems with a class action for actual damages, counsel might consider a class action limited to statutory damages[975] or one for equitable relief, possibly with incidental monetary relief as well.[976]

11.11.3 FDCPA Class Actions for Statutory Damages

11.11.3.1 Generally

The FDCPA provides for statutory damages in class actions, *in addition to actual damages*, as follows:

> (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
>
> * * *
>
> (2)(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector;
>
> * * *
>
> (b) In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—
>
> * * *
>
> (2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.[977]

The maximum recovery *for the class* as a whole is thus the *lesser* of $500,000 or one percent of the net worth of the debt collector.[978] However, this limitation does not affect or include the consumer's right to also recover their attorney's out-of-pocket expenses or attorney fees.

The named FDCPA plaintiffs (the parties initiating the class action and any intervening plaintiffs) are entitled to a statutory damages award equal to the amount they would have received as individuals in an FDCPA action.[979] The individual award is not included in calculating the maximum award for the other members of the class.

The $500,000 or one percent of net worth is a maximum statutory damages award for the class. If the class consists of fewer than 500 members, the recovery per class member could exceed $1000,[980] although the court may consider the number of affected persons in deciding the appropriate size of the award.

Indeed, the court must consider various factors, quoted above from section 1692k(b)(2), in determining the exact amount of statutory damages. These factors also are patterned after TILA, but the listing of FDCPA factors omits one of the factors found in TILA: "the amount of any actual damages awarded."[981] Reference to actual damages may have been dropped because it was foreseeable that plaintiffs in many

974 Fed. R. Civ. P. 23(c)(4).

975 *See* § 11.11.3, *infra*.

976 *See* § 11.12, *infra*.

977 15 U.S.C. § 1692k.

978 *See* Blandina v. Midland Funding, L.L.C., 2015 WL 456704 (E.D. Pa. Feb. 2, 2015) (statutory recovery in class action limited to $500,000 per action, not per defendant); Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., 198 F.R.D. 503 (N.D. Ill. 2001) (awarding maximum allowable statutory damages of $1000 for plaintiff and either $500,000 or 1% of collector's net worth, whichever was less, for absent class members). *See also* Cope v. Duggins, 203 F. Supp. 2d 650 (E.D. La. 2002) (approving class settlement requiring payment to class members of 60% of maximum net worth calculation that he defendant could be assessed).

The limitation on the amount of statutory damages the class may recover is modeled after the class action provisions of the Truth in Lending Act (TILA), although the cap in TILA actions has been increased substantially; 15 U.S.C. §§ 1640(a)(1)(B), 1640(a)(3) (TILA) (as of January 13, 2013, TILA has a $1,000,000 cap on class action statutory damage awards).

979 15 U.S.C. § 1692k(a)(1)(B)(i).

In addition to this statutory damages award, most courts allow class representatives to receive an "incentive" payment. *See, e.g.*, Barenbaum v. Hayt, Hayt & Landau, L.L.C., 2021 WL 120925, at *7 (E.D. Pa. Jan. 13, 2021) (approving $7800 incentive award to named plaintiff who was deposed, lost hours from work when he provided substantial assistance to counsel, and "endured the reputational risks of publicly pursuing this action about his experience with debt collection—a personal financial matter that most would prefer to keep private"); Kopchak v. United Res. Sys., 2016 WL 4138633 (E.D. Pa. Aug. 4, 2016) (in statutory damages class settlement where class members received $10.44 each, awarding named plaintiff $1000 in statutory damages plus incentive award of $1500); Alexander v. Coast Prof'l Inc., 2016 WL 972793 (E.D. Pa. Mar. 7, 2016) (awarding named plaintiff $1000 in statutory damages plus $1000 for service as class representative where class received just $9000, maximum available in light of statutory cap); Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 237 F.R.D. 26 (E.D.N.Y. 2006) ($1000 incentive award); Gross v. Washington Mut. Bank, 2006 WL 318814 (E.D.N.Y. Feb. 9, 2006) (approving $5000 incentive award). *See generally* National Consumer Law Center, Consumer Class Actions § 14.7.7 (10th ed. 2020), *updated at* www.nclc.org/library.

980 McCall v. Drive Fin. Serv., L.P., 440 F. Supp. 2d 388, 391 (E.D. Pa. 2006) ("§ 1692k(a) does not limit the share of the class award that any class member, including [plaintiff] McCall, may receive").

981 15 U.S.C. § 1640(a).

FDCPA class actions would not pursue actual damages for the class.

Yet another distinction between the TILA and the FDCPA is that TILA applies its class action statutory damages cap across a series of actions for the same violation against the same creditor.[982] That is, if three TILA class actions are brought against the same creditor for the same violation, then the statutorily capped recovery must be shared across the three class actions. The FDCPA has no such provision—the statutory damages cap applies to each separate class action.[983]

11.11.3.2 Computing One Percent of Net Worth

The FDCPA does not define "net worth" so there is some uncertainty in computing one percent of the debt collector's net worth as a cap on statutory damages.[984] Nevertheless, it is important to determine a defendant's net worth as soon as possible. Failure to obtain information regarding the defendant's net worth may eventually result in dismissal of the class claims.[985]

If the debt collector's company is publicly traded, some indication of the collector's net worth may be gleaned from financial reports prepared for investors[986] and from Edgar on the Internet.[987] In some states, financial information on a particular debt collector may be available from a state regulator or licensing agency.

If the collector is a local debt collection agency, it is likely to be either a business too small to be publicly traded or a corporate subsidiary without any publicly traded stock. In either case, the net worth may be determinable only through discovery. Discovery regarding net worth is permissible even before a class is certified as it affects the superiority factor under Rule 23(b)(3).[988]

Audited financial statements are generally the best evidence of net worth, but in their absence, profit and loss statements, income statements, balance sheet, asset valuations, and tax returns should be requested.[989] In seeking financial information about a defendant, also seek out financial reports in which the collector is likely to have stated its net worth or profits maximally (for example, reports of financial condition to a lender or investor) rather than reports tending to minimize worth and profits (for example, tax filings).[990] If the defendant seeks to settle because of allegedly low net worth, counsel should insist on confirmatory discovery, including at least documentary evidence and preferably the deposition of a corporate representative.[991]

The Seventh Circuit in *Sanders v. Jackson* held that "net worth," as used in the FDCPA, means the difference between assets and liabilities as determined in accordance with generally accepted accounting principles, rather than the debt collector's fair market value.[992] This unfortunate decision

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982 15 U.S.C. § 1640(a)(2)(B).

983 Mace v. Van Ru Credit Corp., 109 F.3d 338, 342 (7th Cir. 1997). *See also* Hubbard v. M.R.S. Assoc., Inc., 2008 WL 5384294 (S.D. Ind. Dec. 19, 2008); Nichols v. Northland Groups, Inc., 2006 WL 897867 (N.D. Ill. Mar. 31, 2006); Liles v. Am. Corrective Counseling Serv., Inc., 231 F.R.D. 565 (S.D. Iowa 2005); Avila v. Van Ru Credit Corp., 1995 WL 55255 (N.D. Ill. Feb. 8, 1995), *aff'd on other grounds sub nom.* Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996).

984 *See* Black's Law Dictionary (11th ed. 2019) ("measure of one's wealth is calculated as the excess of total assets over total liabilities"). *Cf.* Scott v. Universal Fid. Corp., 42 F. Supp. 2d 837 (N.D. Ill. 1999) (defendant's argument that appropriate measure of defendant's net worth was its book value was rejected because book value results in low estimations of businesses; proper measure of defendant's value was its fair market value).

985 Tourgeman v. Collins Fin. Serv., Inc., 197 F. Supp. 3d 1222, 1226 (S.D. Cal. 2016) (upon hearing on motion in limine, dismissing class claims prior to trial because "Plaintiff is now without competent evidence of the Defendant's net worth and can only speculate as to this element of his claim for class statutory damages"), *aff'd*, Tourgeman v. Nelson & Kennard, 900 F.3d 1105 (9th Cir. 2018) (observing that defendant had been ordered to produce its financial information pursuant to protective order).

986 *E.g.*, Standard & Poor's Corp., Standard Corp. Descriptions; Standard & Poor's Corp., Stock Reports; Moody, Bank & Finance Manual.

987 https://www.sec.gov/edgar.

988 *See, e.g., Perez v.* McCreary, Veselka, Bragg & Allen, P.C., 2021 WL 352433 (W.D. Tex. Feb. 2, 2021) (granting motion to compel answer to interrogatory seeking information on defendant's net worth and how it was calculated); Smith v. GC Serv., L.P., 295 F. Supp. 3d 908 (S.D. Ind. 2017) (granting motion to compel production of current audited financial statement, or, in absence of current audited statement, current profit and loss statements, income statements, balance sheet, asset valuations, and tax returns); Pavlovich v. Account Discovery Sys., L.L.C., 2017 WL 5903354 (S.D. Cal. Nov. 28, 2017) (compelling defendant to respond to discovery regarding three years of financial net worth information); Green v. Monarch Recovery Mgmt., Inc., 997 F. Supp. 2d 932 (S.D. Ind. 2014) (also noting that discovery of net worth information is necessary for meaningful settlement discussions of a putative statutory damages class action); Godson v. Eltman, Eltman & Cooper, P.C., 2013 WL 4832715, at *2 (W.D.N.Y. Sept. 11, 2013) (compelling production of tax returns and audited financial statements but not underlying materials, credit applications, etc.). *See* § 11.11.2.3.4, *supra*, regarding net worth as it affects superiority.

989 Smith v. GC Serv., L.P., 295 F. Supp. 3d 908 (S.D. Ind. 2017) (granting motion to compel production of current audited financial statement, or, in absence of current audited statement, current profit and loss statements, income statements, balance sheet, asset valuations, and tax returns). *Accord* Matthias v. Tate & Kirlin Associates, Inc., 465 F. Supp. 3d 878, 880 (W.D. Wis. 2020) (same, finding production of balance sheets insufficient, noting that audited financial statements are incomplete without the underlying account notes, but denying request for three years' worth of financial information).

990 *See* Wise v. Cavalry Portfolio Serv., L.L.C., 2012 WL 1597450 (D. Conn. May 7, 2012) (granting motion to compel Consolidated Financial Statements of entities related to defendant); Mailloux v. Arrow Fin. Serv., L.L.C., 2002 WL 246771 (E.D.N.Y. Feb. 21, 2002) (plaintiff in class action was entitled to discover defendant's tax returns and other financial information relevant to statutory damage determination of defendant's net worth, notwithstanding defendant's offer to provide an affidavit of net worth, because plaintiff was entitled to examine underlying data to test defendant's calculations; granting motion to compel). *See also* Muha v. Encore Receivable Mgmt., Inc., 236 F.R.D. 429 (E.D. Wis. 2006) (granting motion to compel); Scott v. Universal Fid. Corp., 42 F. Supp. 2d 837 (N.D. Ill. 1999) (defendants ordered to answer discovery requests related to their net worth). *But see* Marshall v. Bonded Adjustment Co., 2011 WL 3882284 (E.D. Wash. Sept. 2, 2011) (granting protective order precluding discovery of information regarding collector's net worth unless and until class is certified).

991 *See, e.g.*, Beneli v. BCA Fin. Serv., Inc., 324 F.R.D. 89 (D.N.J. 2018).

992 Sanders v. Jackson, 209 F.3d 998 (7th Cir. 2000) (goodwill is not asset to be listed on balance sheets, is not available to pay debts, and

overruled a prior lower court's cogent reasoning that the sounder policy was to measure net worth based on fair market value. The book value may be meaningless and manipulated, while the fair market value is more likely to accurately value the collector's worth and result in a sufficient award to deter abusive collection activities, as intended by Congress.[993] Apart from the issue of goodwill, however, it is important to note that the Seventh Circuit in *Sanders* referred to "generally accepted accounting principles." For this reason, lower courts have required that underlying account notes be included in the production of audited financial statements.[994] In *Annunziato v. Collecto, Inc.*,[995] a district court distinguished the Seventh Circuit's decision on the ground that the defendant debt buyer in *Annunziato* reported "goodwill" on its balance sheet as an asset, and admitted that the "goodwill" was the result of a "series of business combinations," and therefore was properly reported as an "asset" in accordance with the principles of GAAP. Another court has stated: "I do not believe that Congress intended to allow a company to avoid a class action litigation arising under the FDCPA by presenting a balance sheet which shows that assets equal liabilities; such a demonstration is the nature of a balance sheet. I would include equity, capital stock, and goodwill into the calculation of a company's net worth for these purposes."[996]

The statute also does not specify whether the defendant's net worth is to be evaluated at the time of the violation, at the time there is a finding of liability, or at some intermediate point. In the absence of a siphoning of assets or fraudulent transfers, the evaluation may take place at the time liability is established.[997]

11.11.3.3 Increasing Each Class Member's Recovery of Statutory Damages

The consequences of the class action statutory damages cap on each class member's recovery can be diminished by limiting the size of the class, for example by defining it to include only those residing in a particular state. The FDCPA does not require the widest possible class by virtue of its cap on class statutory damages, and denial of a request to certify a statewide FDCPA class action on the ground that the class should have been nationwide has been found to be in error.[998] Defining the class as including only those residing in a particular zip code has passed muster,[999] as has limiting the class to certain telephone area codes,[1000]

therefore is not factor in calculating net worth). *Accord* Stolicker v. Muller, Muller, Richmond, Harms, Myers & Sgroi, P.C., 2006 WL 1547274 (W.D. Mich. June 2, 2006) (following *Sanders*; "net worth" is limited to book value or balance sheet net worth and does not include goodwill). *See also* Roe v. Publishers Clearing House, Inc., 1999 U.S. Dist. LEXIS 16249 (N.D. Ill. Oct. 4, 1999).

993 Scott v. Universal Fid. Corp., 42 F. Supp. 2d 837 (N.D. Ill. 1999) (assessing class statutory damages using debt collection agency's fair market value ($1,800,000), rather than its book value ($101,353), to determine net worth was more consistent with FDCPA's purpose of deterring abusive debt collection practices without harming ethical debt collectors).

994 Matthias v. Tate & Kirlin Assoc., Inc., 465 F. Supp. 3d 878, 880 (W.D. Wis. 2020) (citing cases).

995 207 F. Supp. 3d 249, 267 (E.D.N.Y. 2016).

996 Wisneski v. Nationwide Collections, Inc., 227 F.R.D. 259, 261 (E.D. Pa. 2004) (certifying FDCPA class; rejecting debt collector's argument that superiority requirement of Rule 23(b)(3) had not been satisfied because it had net worth of zero).

997 *See* Tourgeman v. Collins Fin. Serv., Inc., 2015 WL 11613279, at *4 (S.D. Cal. May 12, 2015) (holding that defendant's net worth is calculated at resolution of case, not at time of violation); Seawell v. Universal Fid. Corp., 2007 WL 1030544, at *3 (E.D. Pa. Apr. 2, 2007) (same, citing as its only authority for this proposition *Bonett v. Educ. Debt Serv.*, 2003 WL 21658267, at *7 n.4 (E.D. Pa. 2003), where time at which net worth is determined was not contested issue).

998 Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997). *See* Diaz v. Residential Credit Solutions, Inc., 297 F.R.D. 42 (E.D.N.Y. 2014) (nationwide certification not required); LaRocque *ex rel.* Spang v. TRS Recovery Serv., Inc., 2013 WL 30055 (D. Me. Jan. 2, 2013) (denying defendants' motion to expand Maine class to national class); Nichols v. Northland Groups, Inc., 2006 WL 897867 (N.D. Ill. Mar. 31, 2006) (neither FDCPA nor Rule 23 require larger class than plaintiff proposed to certify, which consisted of Illinois residents who received collection letter during three-month period after collector was previously sued for deceptive letter and when it stopped using letter); Liles v. Am. Corrective Counseling Serv., Inc., 231 F.R.D. 565 (S.D. Iowa 2005) (certifying class consisting of persons in ten states; case alleges violations of FDCPA by check collection agency); Pleasant v. Risk Mgmt. Alternatives, Inc., 2003 WL 22175390 (N.D. Ill. Sept. 19, 2003); Talbott v. GC Serv. L.P., 191 F.R.D. 99 (W.D. Va. 2000) (Rule 23(b)(3) class action limited to Virginia consumers was certified in an overshadowing case); Randle v. GC Serv. L.P., 181 F.R.D. 602 (N.D. Ill. 1998) (Rule 23(b)(3) class was limited to Illinois residents); Harrison v. Great Springwaters of Am., Inc., 1997 WL 469996 (E.D.N.Y. June 18, 1997) (classes composed of New York residents); Drennan v. Van Ru Credit Corp., 1997 WL 305298 (N.D. Ill. June 2, 1997) (limited to Minnesota); Avila v. Van Ru Credit Corp., 1995 WL 41425 (N.D. Ill. Jan. 31, 1995) (FDCPA class consisted of certain consumers in Connecticut), *aff'd on other grounds sub nom.* Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996); Carr v. Trans Union Corp., 1995 WL 20865 (E.D. Pa. Jan. 12, 1995) (FDCPA class of certain Pennsylvania consumers); Colbert v. Trans Union Corp., 1995 WL 20821 (E.D. Pa. Jan. 12, 1995) (FDCPA class of certain Pennsylvania residents). *See also* Dinaples v. MRS BPO, L.L.C., 2017 WL 5593471, at *4 (W.D. Pa. Nov. 21, 2017) (granting certification of countywide class of 264 consumers, rejecting collection agency's contention that class had been drawn to include only residents of one county, as opposed to state, was bar to class certification; "Counsel's motive to enhance the chance of some noticeable recovery by the actual injured parties is laudable, and the court will leave the proposed class definition as it stands," but noting that because statute of limitations had already expired, "Defendant's risk of being pummeled by class actions drawn from each of Pennsylvania's sixty-seven counties is nonexistent"); Beattie v. Capital One, 2006 WL 1519087 (E.D. Wis. May 30, 2006) (certifying Rule 23(b)(3) statewide class on alleged sections 1692e and 1692g letter violations); Keele v. Wexler, 1996 WL 124452 (N.D. Ill. Mar. 19, 1996) (granting motion for class certification of Colorado class).

999 O'Dell v. Nat'l Recovery Agency, 291 F. Supp. 3d 687, 705 (E.D. Pa. 2018) (FDCPA "does not cabin the number of class actions that can be pursued or prohibit the use of geographical limitations in the definition of the class").

1000 Pawelczak v. Fin. Recovery Serv., Inc., 286 F.R.D. 381 (N.D. Ill. 2012) (certifying class defined as all persons with telephone numbers in two specified area codes to whom company placed prerecorded telephone messages).

a particular municipality,[1001] or the jurisdiction of a particular Circuit Court.[1002] However, a truly artificial geographic division may cause the court to deny class certification.[1003]

FDCPA classes have also been limited in size by using other than geographic factors. For example, two separate actions were pursued against the same debt collector based on the same allegedly improper form collection letter in the same geographic area, but one class was defined as cases in which the debt collector was acting to collect on debts allegedly owed to "Creditor A," while the other class was defined as cases in which the collector was acting to collect on debts allegedly.[1004]

Another factor that can be used is the nature of the underlying debt. For example, the class can be limited just to those where the debt only involved an automobile deficiency claim or where the debt related to an automobile lease.[1005]

Time is another possible factor, such as limiting the class to those victimized during certain months of a given year as opposed to the whole year or multiple years.[1006] Similarly, it may be advisable to define the class cutoff date as sometime soon after filing of the lawsuit. This reduces the potential class size and also provides defendant a reasonable opportunity "to correct its practices while, at the same time, preventing the Defendant from paying one-percent of its net worth and obtaining a legal license to continue its allegedly unlawful conduct."[1007]

Where the defendant's net worth limits the amount of the statutory damages award to less than $500,000, the effect of this limitation sometimes can be alleviated by increasing the number of defendants.[1008] Adding defendants increases the total net worth of the defendants and thus the statutory damages recovery. Even if other defendants are only vicariously liable, the principal may be required to pay more than its agent is required to pay.[1009] Individual owner-operators are likely to be the collection employees with the most net worth and may be liable under a theory of joint venture, conspiracy, or ratification even if they did not commit the violation themselves and are shielded from respondeat superior by a corporate veil.[1010] In some instances, the corporate veil may be pierced.[1011] The parent corporation of a subsidiary collector might be joined to increase the net worth available for class recovery.[1012]

Supplemental state claims for class statutory damages under a state debt collection act or a state consumer protection act generally are not be subject to a net worth limitation. Such claims thus may provide a method for expanding the monetary relief to the consumer class.[1013]

1001 Hassine v. Simon's Agency, Inc., 2021 WL 2646990 (D.N.J. Apr. 29, 2021) (collecting cases).

1002 Bitzko v. Weltman, Weinberg & Reis Co., 2020 WL 8620130 (N.D.N.Y. Nov. 4, 2020) (granting joint motion to modify previously certified nationwide class to just members within Second Circuit Court of Appeals, in light of likelihood that individual payments for nationwide class would not be practical due to size of class and defendant's net worth).

1003 Wenig v. Messerli & Kramer P.A., 2013 WL 1176062 (D. Minn. Mar. 21, 2013) (proposed FDCPA class limited to one county where small fraction of alleged violations occurred deemed inefficient and not superior, and therefore certification denied); Campos v. W. Dental Serv., Inc., 404 F. Supp. 2d 1164 (N.D. Cal. 2005) (denying class certification without prejudice, countywide class was not "superior").

1004 Guevarra v. Progressive Fin. Serv., Inc., 497 F. Supp. 2d 1090, 1092 (N.D. Cal. 2007) (noting that FDCPA class action liability provision creates "mis-incentives" to class counsel to file multiple sub-class actions to skirt one percent of net worth recovery cap applicable per action, but concluding that "any remedy to this situation lies with Congress," and therefore declining to refer class counsel's "ethically questionable behavior" to state bar or court standing committee on professional conduct). *But see* Abels v. JBC Legal Group, P.C., 2005 WL 3839309 (N.D. Cal. Nov. 30, 2005) (refusing consumer's request to further limit certified class of California consumers to consumers who had written check to two particular merchants in order to greatly reduce size of class making it more manageable); Nance v. Lawrence Friedman, P.C., 2000 U.S. Dist. LEXIS 2721 (N.D. Ill. Feb. 22, 2000) (denying consumer's motion to redefine class more narrowly to encompass only the members which had originally dealt with two of the creditors for which collection firm collected, so that class members would number fewer than 2500 rather than 25,000; difference between a $1 recovery and a $10 recovery was not too little to be material; individual class members could opt out after reading class notice if they preferred to pursue their individual claim).

1005 *E.g.*, Vaughn v. CSC Credit Serv., Inc., 1995 WL 51402 (N.D. Ill. Feb. 3, 1995) (limited class to consumers who received collection letter concerning deficiency claims on automobile contracts); Beasley v. Blatt, 1994 WL 362185 (N.D. Ill. July 11, 1994) (persons who received form documents in connection with automobile leases).

1006 McCurdy v. Prof'l Credit Serv., 2016 WL 5853721 (D. Or. Oct. 3, 2016) (approving class limited to one month where one-year class would have included 234,000 individuals).

1007 Diaz v. Residential Credit Solutions, Inc., 297 F.R.D. 42, 53 (E.D.N.Y. 2014) (denying certification due to insufficient showing of proposed class representative's adequacy).

1008 *See* § 11.4.4, *supra*. *See, e.g.*, Janetos v. Fulton Friedman & Gullace, L.L.P., 2016 WL 7240750, at *2 (N.D. Ill. Dec. 15, 2016) (in class action against debt buyer and its attorneys based on actions of attorney, FDCPA applies to "any" debt collector, so net worth of multiple collectors is properly considered notwithstanding "the nature of their respective roles in the offense"; "if Asset Acceptance were permitted to hide behind Fulton's insolvency, it would be encouraged to outsource unethical debt collection practices to judgment-proof debt collectors like Fulton"). *See also* Palmer v. Dynamic Recovery Solutions, L.L.C., 2016 WL 2348704, at *8 (M.D. Fla. May 4, 2016) (denying preliminary approval of proposed class settlement in part because settlement allowed debt buyer to avoid liability equal to that of collection agency: "Allowing [the debt buyer] to not pay anything despite its equal exposure would be patently unfair to the class, who should benefit from [the debt buyer's] substantially higher net worth.").

1009 Green v. Monarch Recovery Mgmt., Inc. 997 F. Supp. 2d 932, 937 (S.D. Ind. 2014) (compelling class action defendants, including those whose exposure might be based only upon vicarious liability, to respond to discovery establishing their net worth, noting that it is "appropriate to apply the FDCPA's damages cap individually to each relevant Defendant").

1010 *See also* Brujis v. Shaw, 876 F. Supp. 975 (N.D. Ill. 1995) (fiduciary shield doctrine did not apply where employee had power to decide what was to be done and chose to commit acts that subjected him to long-arm jurisdiction).

1011 *See* § 11.4.4.2, *supra*.

1012 *See* § 11.4.4.2, *supra*.

1013 *See* Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997) (supplementary state class claim allowed to proceed); § 11.2.4, *supra*; §§ 16.2, 16.3, *infra*.

11.11.3.4 Factors Affecting Amount of Class Statutory Damages Award

Once a court considers the debt collector's net worth and determines the maximum amount of class statutory damages, it must consider the six factors listed in the FDCPA to decide whether the maximum recovery or some lesser amount is appropriate. The statutory factors are:

- The frequency of the debt collector's noncompliance;[1014]
- The persistence of its noncompliance;
- The nature of its noncompliance;
- The debt collector's resources;
- The number of persons adversely affected; and
- The extent to which the debt collector's noncompliance was intentional.[1015]

The trier of fact determining these issues may be either a judge or a jury, and may also consider other factors in arriving at a suitable award, but is not required to do so.

11.11.4 Defense Tactics in Class Actions

11.11.4.1 Generally

While new defense tactics continually arise, two long-standing and frequent strategies to attempt to derail class actions are: (1) to make offers of settlement or judgment to the class representatives individually prior to certification of the class in the hope of mooting their claim and (2) to file counterclaims. These topics, as well as the less frequent maneuver of seeking a ruling on the merits prior to class certification, are discussed immediately below. Offers of judgment or settlement in the context of individual actions are discussed at § 11.7, *supra*.

11.11.4.2 Offers of Judgment or Settlement

Prior to a 2016 Supreme Court decision, debt collectors used to make what is known as a "pickoff" attempt by submitting an offer of judgment to the named individual plaintiff pursuant to Federal Rule of Civil Procedure 68, or by making an offer of settlement, and then move to dismiss the individual and class action as moot even if the offer was not accepted.[1016] At least when the offer is not accepted, this tactic was completely undermined by *Campbell-Ewald Co. v. Gomez*, a Telephone Consumer Protection Act case where the Supreme Court held that "an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists."[1017]

There remains uncertainty as to how *Campbell-Ewald Co. v. Gomez* will affect class action mootness doctrine. On the one hand, the Court seems to have left a door open to a possible defense strategy to avoid class action remedies:

> We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical.[1018]

In *Conway v. Portfolio Recovery Assoc.*,[1019] the Sixth Circuit came close to addressing this hypothetical when it concluded that the defendant's unaccepted offer of judgment—unaccompanied by payment—does not moot the case, despite the fact that the lower court erroneously entered judgment for the plaintiff who rejected the offer.

On the other hand, while the Supreme Court in *Campbell-Ewald* did not explicitly invoke the purposes of Rule 23 or the idea of "relation back" and claims evading review, it did express similar concerns about the power that allowing the pick-off strategy would give defendants to cut off class wide liability, referring to the offer of individual relief to proposed class representatives as a "strategy" and a "gambit" and observing that "Campbell sought to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept."[1020] The majority decried such efforts as an effort to "place the defendant in the driver's seat."[1021]

In the aftermath of *Campbell-Ewald*, several district courts have looked to the majority's statement—that "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted"[1022]—to reject the contention that unaccepted tenders

1014 A single mass mailing of a letter that violated § 1692g falls within the scope of "frequency"; repetition of the conduct is not required. Hernandez v. Guglielmo, 977 F. Supp. 2d 1054 (D. Nev. 2013).

1015 15 U.S.C. § 1692k(b)(2).

As to the last factor, *see, e.g.*, Zimmerman v. Portfolio Recovery Assoc., 2013 WL 1245552 (S.D.N.Y. Mar. 27, 2013) ($350,000 in statutory damages for class awarded and deemed to be sufficient to deter large debt collection company from future abusive practices; amount also reflected egregious nature of what court concluded was intentional misconduct).

1016 *See* Mavris v. RSI Enter. Inc., 303 F.R.D. 561 (D. Ariz. 2014) (granting motion to declare offer of judgment ineffective, noting that "picking off" class representatives with paltry sums, thereby leaving other putative class members in the lurch, is abuse of Federal Rules that is designed to do nothing more than frustrate class actions).

1017 577 U.S. 153, 156, 136 S. Ct. 663 193 L. Ed. 2d 571 (2016).

1018 *Id.*, 577 U.S. at 165.

1019 840 F.3d 333 (6th Cir. 2016). *See* Thompson v. Midland Funding, L.L.C., 2017 WL 11612284 (E.D. Ky. May 22, 2017) (declining to dismiss as moot FDCPA claims based on offer to deposit in court complete amount of individual relief where plaintiff did not yet have fair opportunity to pursue class certification).

1020 Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 165, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

1021 *Id.* 577 U.S. at 165. *See also* Macy v. GC Serv. L.P., 2016 WL 5661525 (W.D. Ky. Sept. 29, 2016) (where picking off named plaintiff is suspected, court may declare offer of judgment ineffective; plaintiffs should not be forced to choose between accepting offer of judgment and abandoning interests of class on the one hand, and rejecting offer and bearing risk of substantial litigation costs on the other).

1022 Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 165, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

of payment or judgment prevent the plaintiff from proceeding to class certification.[1023] This subject is addressed in National Consumer Law Center, Consumer Class Actions § 7.3.2.3 (10th ed. 2020), *updated at* library.nclc.org.

Where an offer of judgment is accepted by a putative class representative, the case does not become moot prior to entry of judgment.[1024] The plaintiff should therefore have an opportunity to move to substitute a new plaintiff with the same claim.[1025] However, if the individual settlement allows judgment to be entered in the plaintiff's favor as to all counts of his complaint, and plaintiff does not reserve any right to pursue class claims on appeal, plaintiff has waived any further interest in the class claims and they are moot.[1026]

11.11.4.3 Counterclaims by Defendants

Another defense tactic is to file counterclaims for the balance of the underlying debt against the named plaintiffs and the other members of the class.[1027] This tactic generally fails to defeat class certification as it conflicts with the purposes of the FDCPA.[1028] The court may also reject supplementary jurisdiction over the state law cause of action.[1029]

11.11.4.4 Defense Requests to Consider Merits First

It is generally accepted that the best practice is for the court to decide class certification before considering the merits.[1030] Nevertheless, defendants have sometimes convinced courts to exercise their discretion to consider the merits of the case prior to determining whether to certify a class. These courts have stayed a ruling on the class certification until resolution of liability, despite plaintiffs' pleas that bifurcation would cause some inefficiencies in discovery and require them to develop expensive expert testimony earlier than planned.[1031]

However, by requesting such sequencing, the defendant has voluntarily assumed the risk of what is known as "one way intervention." If it loses on the merits, that ruling will be binding when the class is certified. But if the defendant wins on the merits prior to class certification, this ruling will be binding only on the class representative, and not on others who might wish to bring a similar action.

11.11.5 Discovery

Defendant may be required to spend an extensive amount of time responding to a request for documents, so long as the burden of doing so does not exceed the benefit of production of the data.[1032] Pre-certification discovery seeking evidence necessary to meet the prerequisites of Rule 23, such as numerosity, is generally permissible.[1033] If defendant would have to review an extensive set of documents to comply with the production request, sampling may be ordered.[1034]

11.11.6 Class Settlements

If a class has not yet been certified on contested motion, but a class wide settlement is presented to the court for approval, the court must first determine whether the prerequisites for certification have been met, even though defendant has agreed that certification will not be contested. The requirements of Federal Rule of Civil Procedure 23 are discussed at § 11.11.2, *supra*; the only Rule 23 requirement not applicable in the settlement context is manageability, for the proposal is that there be no trial.

The procedures to gain court approval of proposed settlements are set forth in Federal Rule of Civil Procedure 23(e).[1035] An injunction may be issued against other FDCPA and similar actions relating to the same claims against the same debt

1023 *See, e.g.*, Ung v. Universal Acceptance Corp., 190 F. Supp. 3d 855 (D. Minn. 2016). *See also* Webster v. Receivables Performance Mgmt., L.L.C., 414 F. Supp. 3d 1198 (S.D. IN Oct. 21, 2019) (rejecting Rule 68 Offer of Judgment does not moot plaintiff's claims).

1024 Sanders v. Houslanger & Assoc., 2018 WL 6444922 (S.D.N.Y. Nov. 5, 2018) (denying certification for interlocutory appeal of order granting leave to amend complaint to add party after original plaintiffs accepted offer of judgment).

1025 *See, e.g.*, Timlick v. Nat'l Enter. Sys., Inc., 247 Cal. Rptr. 3d 575 (Cal. Ct. App. 2019) (after involuntary receipt of relief by named plaintiff in putative class action that cured Rosenthal Act violation, trial court should have allowed opportunity to amend complaint to redefine class or to add additional representatives, and if these failed, should not dismiss without giving notice to members of the putative class), *as modified* (June 21, 2019).

1026 McClain v. Hanna, 949 F.3d 266 (6th Cir. 2020).

1027 *See* Jones v. Ford Motor Credit Corp., 358 F.3d 205 (2d Cir. 2004). *See also* § 12.8, *infra*.

1028 *See* § 12.8, *infra*.

1029 *See* § 11.2.4, *supra*.

1030 *See, e.g.*, Al v. Van Ru Credit Corp., 2018 WL 4603284, at *5 (E.D. Wis. Sept. 25, 2018).

1031 Stavroff v. Midland Credit Mgmt., 2005 WL 6329149 (N.D. Ind. June 8, 2005); Sheets v. Nat'l Action Fin. Serv., 2005 U.S. Dist. LEXIS 8439 (N.D. Ind. May 9, 2005). *See* National Consumer Law Center, Consumer Class Actions § 11.1.5 (10th ed. 2020), *updated at* www.nclc.org/library (sequencing liability motions and class certification).

1032 Spuhler v. STTE Collection Serv., Inc., 2017 WL 3723603 (E.D. Wis. May 1, 2017) (where plaintiff sought to compel defendant to search 152,734 letters for ones sent on behalf of three of 50–100 creditors in order to show numerosity, motion granted even though the search might take many days; plaintiff had offered to share in costs, and was ordered to do so).

1033 *See, e.g.*, Dupres v. Houslanger & Assoc., 2021 WL 2373737, at *2 (E.D.N.Y. June 9, 2021) (citing cases).

1034 *See, e.g.*, Dupres v. Houslanger & Assoc., 2021 WL 2373737, at *3 (E.D.N.Y. June 9, 2021) (ordering 10% sample of one set of documents and 5% sample of another, because defendant would be required to engage in time-consuming privilege review).

1035 *See generally* National Consumer Law Center, Consumer Class Actions Ch. 14 (10th ed. 2020), *updated at* www.nclc.org/library.

If certification of the class has been denied, Rule 23(e) is inapplicable and the case may be dismissed or settled without court approval. However, acceptance of a settlement offer following denial of certification may negate the named plaintiffs' ability to appeal that denial, while acceptance of a Rule 68 offer of judgment following such denial will not. *See also* National Consumer Law Center, Consumer Class Actions § 12.4 (10th ed. 2020), *updated at* www.nclc.org/library.

collector to ensure the adequacy and enforceability of the proposed class action settlement.[1036]

The touchstone for approval of a class action settlement is a determination that it is fair, adequate, and reasonable. In evaluating a class action settlement for approval, the court determines whether the proposed settlement discloses grounds to doubt its fairness or other deficiencies, such as unduly preferential treatment of the class representatives or segments of the class, or excessive compensation of attorneys, and whether the class recovery appears to fall within the range of reasonableness, given the merits of the claim and potential damages.[1037]

This range of reasonableness though can be quite wide. On the one hand, relief could include forgiving all of the class members' debts which were the subject of an allegedly offensive collection letter and clearing their credit reports.[1038] On the other hand, the recovery may be modest; settlement distributions of less than $10 per class member have been approved.[1039]

One hallmark of a settlement that is unfair to class members is a release that goes beyond the issues certified or releases class damages or rights without payment of adequate compensation.[1040] For example, in *Vassalle v. Midland Funding L.L.C.*,[1041] the Sixth Circuit reversed as inadequate the district court's approval of a nationwide FDCPA settlement affecting 1.44 million victims of Midland's "predatory practices" in using robo-signed affidavits to obtain state court collection judgments. The court did so for four reasons, each of which was an independent ground to overturn the settlement.[1042]

The first was unfairness, that the named plaintiffs received "preferential treatment," while the relief provided to the unnamed class members was "perfunctory at best." The named plaintiffs were exonerated of debts owed to Midland. In contrast, the settlement prevented the unnamed class members from invoking Midland's use of false affidavits against Midland in any other lawsuit, "virtually assuring that Midland will be able to collect on these debts" which are generally for hundreds to thousands of dollars, yet class members who

1036 *See* Liles v. Del Campo v. Am. Corrective Counseling Serv., Inc., 350 F.3d 742 (8th Cir. 2003) (injunction stopping all related proceedings in other federal courts was upheld on appeal brought pursuant to 28 U.S.C. § 1292 to prevent further draining of the limited settlement fund); Midland Funding, L.L.C. v. Brent, 2011 WL 1882507, at *2 (N.D. Ohio May 17, 2011) (denying motion to dissolve preliminary injunction).

1037 *See, e.g.*, Godson v. Eltman, Eltman, & Cooper, P.C., 328 F.R.D. 35 (W.D.N.Y. 2018) (final approval granted to settlement of $688 to each of 247 class members who were sent allegedly unlawful letter, with remaining funds to *cy pres* recipient, and award of $350,000 in attorney fees, including 1.58 multiplier); Rhodes v. Nat'l Collection Sys., Inc., 2018 WL 2214649 (D. Colo. May 11, 2018) (in case alleging improper voicemail messages, granting final approval to claims-made class settlement providing fund of $8000 for approximately 4000 class members; rejecting defendant's contention that recovery of otherwise reasonable and proper attorney fees is prohibited simply because billing attorney did not appear of record); Babcock v. C. Tech Collections, Inc., 2017 WL 1155767 (E.D.N.Y. Mar. 27, 2017) (granting final approval to $90,726 settlement of claims-made actual and statutory damages classes alleging violations predicated on defendant's imposition of unauthorized fee for credit card payments; separately negotiated attorney fees and costs also awarded); Palmer v. Dynamic Recovery Solutions, L.L.C., 2016 WL 2348704 (M.D. Fla. May 4, 2016) (denying preliminary approval of proposed class settlement in FDCPA case as unfair for two reasons: (1) parties severely discounted consumer's likelihood of success on merits and (2) settlement allowed debt buyer to avoid liability equal to that of collection agency); Rawson v. Source Receivables Mgmt., L.L.C., 235 F. Supp. 3d 1014, 1021, 1022 (N.D. Ill. 2016) (denying proposed class settlement of three separate, unconsolidated cases due to number of ways in which "class members seem to get the short end of the stick in this proposed settlement," such as drastically reduced potential statutory damage award to smallest of three classes, also noting that while proposed class release did not cover actual damages, this was "Pyrrhic victory"); Aramburu v. Healthcare Fin. Serv., Inc., 2009 WL 1086938 (E.D.N.Y. Apr. 22, 2009); Ayzelman v. Statewide Credit Serv. Corp., 242 F.R.D. 23 (E.D.N.Y. 2007); Beattie v. The Westmoreland Agency, 2007 WL 2436817 (E.D. Wis. Aug. 22, 2007) (granting final approval of FDCPA class action settlement with class receiving $140,000, $110,000 for attorney fees and expenses, and any undistributed monies to go to Milwaukee Legal Aid Soc'y as *cy pres* remedy); Orloff v. Syndicated Office Sys., Inc., 2004 WL 870691 (E.D. Pa. Apr. 22, 2004); Parks v. Portnoff Law Assoc., 243 F. Supp. 2d 244 (E.D. Pa. 2003) ($75,000 settlement fund was fair and reasonable; $1000 was distributed to each of the named plaintiffs, at least $250 to each of fifty-two class claimants, and $13,500 to consumer's counsel); Purdie v. Ace Cash Express, Inc., 2003 WL 22976611 (N.D. Tex. Dec. 11, 2003) (approving settlement including $2.1 million in attorney fees); Tenuto v. Transworld Sys., Inc., 2002 188569 (E.D. Pa. Jan. 31, 2002); Tenuto v. Transworld Sys., Inc., 2001 WL 1347235 (E.D. Pa. Oct. 31, 2001); Fry v. Hayt, Hayt, & Landau, 198 F.R.D. 461 (E.D. Pa. 2000) ($500,000 and injunctive relief, including $150,000 for attorney fees and $80,000 for notice, was fair and reasonable). *Cf.* Ybarrondo v. NCO Fin. Sys., Inc., 2008 WL 183714 (S.D. Cal. Jan. 18, 2008); Greer v. Shapiro & Kreisman, 152 F. Supp. 2d 679 (E.D. Pa. 2001).

1038 Fabiani v. Oreck Corp., 2006 WL 1390458 (N.D. Cal. May 19, 2006). *See also* Ybarrondo v. NCO Fin. Sys. Inc., 2009 WL 3612864 (S.D. Cal. Oct. 28, 2009) (cash payment to class members, stipulation that each class member's debt forgiven, and no 1099 forms would be sent to Internal Revenue Service).

1039 *See, e.g.*, Beneli v. BCA Fin. Serv., Inc., 324 F.R.D. 89 (D.N.J. 2018) ($3.82 per class member); Berther v. TSYS Total Debt Mgmt., Inc., 2007 WL 1795472 (E.D. Wis. June 19, 2007). *See also* Hicks v. Client Serv., Inc., 257 F.R.D. 699, 700–701 (S.D. Fla. 2009) (collecting cases and certifying class, even though statutory damages per class member would be between $1 and $5); Gaalswijk-Knetzke v. Receivables Mgmt. Serv. Corp., 2008 WL 3850657 (M.D. Fla. Aug. 14, 2008) (rejecting argument that class should not be certified because class members would receive only $3.20 each).

1040 *See* Nat'l Ass'n of Consumer Advocates, Standards and Guidelines for Litigating and Settling Consumer Class Actions (2d ed. 2006), *reproduced in* National Consumer Law Center, Consumer Class Actions Appx. D (10th ed. 2020), *updated at* www.nclc.org/library. *See also* Koby v. ARS Nat'l Serv., Inc., 846 F.3d 1071 (9th Cir. 2017) (disapproving FDCPA settlement which included class members' waiver of right to participate in any class action, where class members got essentially nothing in return); Gallego v. Northland Group, Inc., 814 F.3d 123 (2d Cir. 2016) (upholding denial of proposed settlement class, in part due to disparity between broad release required in return for trivial payment). *But see* Mirfasihi v. Fleet Mortg. Corp., 551 F.3d 682 (7th Cir. 2008); Zimmerman v. Zwicker & Assoc., P.C., 2011 WL 65912 (D.N.J. Jan. 10, 2011) (overly broad release factor in rejection of class settlement).

1041 708 F.3d 747 (6th Cir. 2013). *See also* Gallego v. Northland Group, Inc., 814 F.3d 123 (2d Cir. 2016) (noting questionable adequacy of representation where class members would be bound by broad general release in return for little or no money).

1042 A revised settlement was later approved over objection. Pelzer v. Vassalle, 655 Fed. Appx. 352 (6th Cir. 2016).

responded to the notice by filing a claim would receive merely a "de minimis" payment of $17.38.[1043]

Second, the Sixth Circuit found the class representatives were inadequate because, since their debts would be forgiven under the settlement, they themselves had no incentive to vigorously prosecute the unnamed class members' most important interest—the ability to use the false affidavits against Midland to contest their debts in state court. Third, superiority was found lacking because unnamed class members had a significant interest in individually controlling the defense of Midland's state court judgments against them, and because the class members could have collected damages under state law claims that would exceed the value of monetary relief in this settlement.[1044]

Fourth, the notice of the settlement to class members was held to violate due process because, as to the principal ground a consumer might object, it was "insufficient to notify a non-attorney class member that by not objecting, he or she loses the right to use Midland's false affidavits against Midland in their debt-collection actions."[1045] A settlement may be found unfair and unreasonable when it requires submission of a claim form even though the identity of all class members is known and where the amount available for each class member is so low that it would be economically unreasonable for any class member to submit a claim.[1046]

Class counsel has a fiduciary duty to the class to ensure not just adequacy of the settlement, but adequate notice as well.[1047] Defendants too may have an incentive to ensure adequacy because inadequate notice can result in the settlement not being accorded *res judicata* effect in a subsequent case. Thus where the one legal notice published in *USA Today* did not provide adequate notice to absent class members or the opportunity to opt out that comported with due process, the Second Circuit held that *res judicata* did not bar a later action against the same defendant by the plaintiff, an absent class member.[1048]

11.12 Declaratory or Injunctive Relief

11.12.1 Declaratory Relief

The FDCPA is silent as to the availability of declaratory relief. While the Third Circuit and a number of federal district courts find that declaratory relief is not available under the FDCPA,[1049] other federal courts permit declaratory relief.[1050] Finding declaratory relief available is consistent with the general power of federal courts under the Declaratory Judgment Act.[1051] Some courts have certified FDCPA classes based on a request for declaratory relief or ordered such relief without directly addressing its availability under the FDCPA.[1052]

Federal Rule of Civil Procedure 23(b)(2) provides for class certification where injunctive or "corresponding" declaratory relief is available. An FDCPA class action for declaratory relief must seek relief that "corresponds to" injunctive relief. Courts have said that "corresponds to an injunction" means having the practical effect of an injunction, and at least one case has found that declaratory relief in an FDCPA case would not have the same practical effect as an injunction.[1053] On the other hand, injunctive and corresponding declaratory relief may be appropriate for class members from whom a debt collector has sought illegal interest in the past when they also are at risk of continuing collection attempts.[1054]

1043 The Sixth Circuit also noted that the unnamed class members were probably not benefitted by a prospective injunction requiring Midland to improve its policies on affidavit creation, which, in any event, lasted only a year. 708 F.3d 747, 756 (6th Cir. 2013).

1044 *Id.* at 757.

1045 *Id.* at 760.

1046 Brown v. Jonathan Neil & Assoc., Inc., 2018 WL 2734866, at *4 (E.D. Cal. June 5, 2018) (denying preliminary approval, noting that: "The agreement extinguishes the rights of all individuals who do not opt out regardless of whether they received compensation or filed a claim form for any alleged violation . . . given that each class member could potentially only receive $0.25, the cost of postage is more than the class member would receive in the settlement.").

1047 In cases where class members may be difficult to locate, professional "skip" tracing techniques or a "skip" tracer to find current addresses for class members may be invaluable. It is important to try and negotiate the settlement so that the skip tracing fees are paid by the defendant. However, some defendants may not be convinced to bear that cost. In a class where the recovery for class members is substantial, another possibility is convinced to bear that cost. In a class where the recovery for class members is substantial, another possibility is to provide that the skip tracing fee be deducted from the award of each class member who is found using that technique. Because most skip tracers will take their work on a contingent fee basis, the only deductions would be from the recovery of persons who are found and not from the class fund or any other class member's recovery.

1048 Hecht v. United Collection Bur., Inc., 691 F.3d 218 (2d Cir. 2012). *See also* Appx. E.3.4.3, *infra*.

1049 Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004); Altenburg v. Caliber Home Loans, Inc., 2017 WL 2733803 (D. Md. June 26, 2017); Appx. E.3.4, *infra*. *Cf.* Johnson v. Midland Credit Mgmt. Inc., 2006 WL 2473004 (N.D. Ohio Aug. 24, 2006) (finding declaratory relief unavailable to individual plaintiffs, but reserving possibility that it is available on a class-wide basis).

1050 *See* Mann v. Acclaim Fin. Serv., Inc., 232 F.R.D. 278 (S.D. Ohio 2003); Woodard v. Online Info. Serv., 191 F.R.D. 502 (E.D.N.C. 2000); Gammon v. GC Serv. L.P., 162 F.R.D. 313 (N.D. Ill. 1995); Appx. E.3.4, *infra*. *See also* Carter v. Am. Note Servicing, 2014 WL 2002829 (W.D. Va. May 15, 2014) (in FDCPA suit, consumer stated claim under Federal Declaratory Judgment Act, 22 U.S.C. § 2201(a), by alleging that collector initiated foreclosure proceedings on voided home equity line of credit that it cancelled only when sued).

1051 28 U.S.C. §§ 2201, 2202.

1052 Smith v. Specified Credit Ass'n, Inc., 2015 WL 468871 (N.D. Ill. Jan. 30, 2015); Seawell v. Universal Fid. Corp., 235 F.R.D. 64 (E.D. Pa. 2006); Ballard v. Equifax Check Serv., Inc., 158 F. Supp. 2d 1163 (E.D. Cal. 2001); Woodard v. Online Info. Serv., 191 F.R.D. 502 (E.D.N.C. 2000); Borcherding-Dittloff v. Transworld Sys., Inc. 185 F.R.D. 558 (W.D. Wis. 1999); Young v. Meyer & Njus, P.A., 183 F.R.D. 231 (N.D. Ill. 1998).

1053 Petrolito v. Arrow Fin. Serv., L.L.C., 221 F.R.D. 303 (D. Conn. 2004).

1054 Madden v. Midland Funding, L.L.C., 237 F. Supp. 3d 130, 159–160 (S.D.N.Y. 2017) (claim under N.Y. Gen. Bus. Law § 349).

11.12.2 Injunctive Relief

The FDCPA is silent as to the availability of injunctive relief. Courts discussing the availability of FDCPA private injunctive relief generally find it to be unavailable.[1055] The Eleventh and Third Circuits have held so directly,[1056] and the Second and Seventh Circuits have assumed the correctness of this approach, in *dicta*.[1057] Numerous district courts have also held that the silence of Congress regarding private FDCPA injunctive relief is fatal to an action seeking such relief.[1058]

The holding that injunctions are not available in FDCPA private actions is contrary to the general rule that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."[1059] Courts not allowing FDCPA injunctive relief reject arguments that federal courts have inherent and statutory jurisdiction to award injunctive relief where they have subject matter jurisdiction,[1060] and find that private damage actions are to be the primary FDCPA enforcement vehicle.[1061]

The Sixth Circuit declined to foreclose the possibility of declaratory and injunctive relief under the FDCPA.[1062] Similarly, in holding that the trial court had abused its discretion in approving a class action settlement that included worthless injunctive relief, the Ninth Circuit did not foreclose the availability of injunctive relief in a suit under the FDCPA.[1063]

A number of federal district courts have granted injunctive relief in FDCPA cases, but usually under a state law authorizing injunctions or pursuant to settlement of a class action.[1064] Other courts have granted or assumed the availability of injunctive relief without directly addressing the issue.[1065]

1055 *See* Appx. E.3.4.2, *infra*.

1056 McWeay v. Citibank, 521 Fed. Appx. 784 (11th Cir. 2013); Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004). *Accord* Franklin v. GMAC Mortg., 523 Fed. Appx. 172 (3d Cir. 2013); Sibley v. Fulton DeKalb Collection Serv., 677 F.2d 830, 834 (11th Cir. 1982).

1057 Hecht v. United Collection Bur., Inc., 691 F.3d 218 (2d Cir. 2012) (declining to rule on this issue, but noting "every federal appeals court to have considered the question has held that it does not"); Crawford v. Equifax Payment Serv., Inc., 201 F.3d 877, 882 (7th Cir. 2000) (*dicta*, citing *Sibley* for proposition that "all private actions under the [FDCPA] are for damages").

1058 *See* Rodriguez v. Cascade Collections L.L.C., ___ F. Supp. 3d ___, 2021 WL 1222147 (D. Utah 2021); House v. Wilmington Sav. Fund Soc'y, 2019 WL 2743792, at *1 (D.N.J. 2019); Merriam v. GC Serv., 2018 WL 3068857 (N.D. Ind. June 21, 2018); Hines v. HSBC Bank, 2016 WL 5716749 (E.D.N.Y. Sept. 30, 2016); Castellanos v. Countrywide Bank, 2015 WL 1906074 (N.D. Cal. Apr. 27, 2015); Reyes v. Julia Place Condo. Homeowners Ass'n, Inc., 2014 WL 7330602 (E.D. La. Dec. 18, 2014); Terrazas v. Wells Fargo Bank, 2013 WL 5774120 (S.D. Cal. Oct. 24, 2013); Ajib v. Fin. Assistance, Inc., 2013 WL 5553249 (E.D. Cal. Oct. 8, 2013), *adopted*, 2013 WL 5797105 (E.D. Cal. Oct. 28, 2013); Young v. LVNV Funding, L.L.C., 2012 WL 5508407 (E.D. Mo. Nov. 14, 2012); Waitkus v. Pressler & Pressler, L.L.P., 2012 WL 686025 (D.N.J. Mar. 2, 2012);; Martinez v. Scott, 2011 WL 3566970 (S.D. Tex. Aug. 12, 2011); Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358 (D. Md. 2010); Harris v. D. Scott Carruthers & Assoc., 270 F.R.D. 446 (D. Neb. 2010); Hampton v. Countrywide Home Loans, 2009 WL 1813648 (D. Neb. June 24, 2009); Taylor v. Quall, 471 F. Supp. 2d 1053 (C.D. Cal. 2007); Tomes v. Gordon & Berger, P.C., 2004 WL 614525 (E.D. Pa. Mar. 10, 2004); *In re* Risk Mgmt. Alternatives, Inc., 208 F.R.D. 493 (S.D.N.Y. 2002); Liles v. Am. Corrective Counseling Serv., 131 F. Supp. 2d 1114 (S.D. Iowa 2001); Zsamba v. Cmty. Bank, 56 F. Supp. 2d 1207 (D. Kan. 1999); Sokolski v. Trans Union Corp., 178 F.R.D. 393 (E.D.N.Y. 1998); Ditty v. CheckRite, Ltd., 973 F. Supp. 1320 (D. Utah 1997); Strong v. Nat'l Mgmt. Co., 600 F. Supp. 46 (E.D. Ark. 1984); Duran v. Credit Bur. of Yuma, Inc., 93 F.R.D. 607 (D. Ariz. 1982).

1059 Sierra Club, Lone Star Chapter v. Fed. Deposit Ins. Corp., 992 F.2d 545, 548 (5th Cir. 1993) (alteration in original, quoting *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)). *See* Loigman v. Kings Landing Condo. Ass'n, Inc., 734 A.2d 367 (N.J. Super. Ct. Ch. Div. 1999) (permitting injunctive relief, which is not prohibited by FDCPA).

1060 28 U.S.C. § 1651 ("All Writs" Act); Fed. Trade Comm'n v. Dean Foods Co., 384 U.S. 597, 86 S. Ct. 1738, 16 L. Ed. 2d 802 (1966). *See also* Piper v. Portnoff Law Assoc., 262 F. Supp. 2d 520 (E.D. Pa. 2003) (enjoining collector from proceeding with sale of consumer's residence).

1061 *See* S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and at* Appx. A.3, *infra*.

1062 Hrivnak v. NCO Portfolio Mgmt., Inc., 719 F.3d 564 (6th Cir. 2013) (debt collectors' Rule 68 offer of judgment did not moot consumer's FDCPA and state claims where the offer did not satisfy claims that debt collectors deemed meritless, such as claims for declaratory and injunctive relief; finding that because availability of those claims under FDCPA has not been addressed by Sixth Circuit or Supreme Court, they should be determined by dispositive motion rather than motion to dismiss for lack of jurisdiction due to mootness). *See also* Henggeler v. Brumbaugh & Quandahl, P.C., 2014 WL 793544 (D. Neb. Feb. 26, 2014) (in determining the degree of success of plaintiffs in a FDCPA class action settlement for purposes of determining plaintiffs' attorney fees, noted that settlement included injunction against debt collector repeating its violations).

1063 Koby v. ARS Nat'l Serv., Inc., 846 F.3d 1071 (9th Cir. 2017).

1064 *See* Gravina v. Client Serv., Inc., 2009 U.S. Dist. LEXIS 78204 (E.D.N.Y. Aug. 25, 2009); Anderson v. Nationwide Credit Inc., 2009 U.S. Dist. LEXIS 57157 (E.D.N.Y. June 25, 2009); Lopez v. GMAC Mortg. Corp., 2007 WL 4357628 (N.D. Cal. Dec. 11, 2007); Piper v. Portnoff Law Assoc., 262 F. Supp. 2d 520 (E.D. Pa. 2003); Wilson v. Transworld Sys., Inc., 2002 WL 1379246 (M.D. Fla. Mar. 29, 2002); Klewer v. Cavalry Inv., L.L.C., 2002 U.S. Dist. LEXIS 3378 (W.D. Wis. Feb. 21, 2002); Ballard v. Equifax Check Serv., 27 F. Supp. 2d 1201 (E.D. Cal. 1998); Valderrama v. Nat'l Revenue Corp., 1981 U.S. Dist. LEXIS 18627 (D. Neb. Sept. 28, 1981). *See also* Liles v. Del Campo, 350 F.3d 742 (8th Cir. 2003); Narvaez v. Law Offices of Antonio Duarte, III, P.A., 2015 WL 4605756 (M.D. Fla. July 30, 2015) (low net worth debt collector for home owner's association that agreed to cease its violations of FDCPA); Lambeth v. Advantage Fin. Serv., L.L.C., 2015 WL 4624008 (D. Idaho Aug. 3, 2015) (in class action settlement against apparently low net worth collector, collector agreed to cease its FDCPA violation); Gonzalez v. Dynamic Recovery Solutions, L.L.C., 2015 WL 738329 (S.D. Fla. Feb. 23, 2015) (granting final approval of national injunctive relief class action settlement of some 180,000 members for whom collection agency failed to state that they were debt collector); Smith v. Specified Credit Ass'n, Inc., 2015 WL 468871 (N.D. Ill. Jan. 30, 2015) (because consumer proposed to amend her class action complaint to seek injunctive and/or declaratory relief, collection agency's offer of solely monetary damages did not moot her FDCPA claim).

1065 *See* Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 977 n.39 (5th Cir. 2000) (assuming FDCPA injunctive relief available but noting contrary authority); Gravina v. Client Serv., Inc., 2009 U.S. Dist. LEXIS 78204 (E.D.N.Y. Aug. 25, 2009); Anderson v. Nationwide Credit Inc., 2009 U.S. Dist. LEXIS 57157 (E.D.N.Y. June 25, 2009); Lopez v. GMAC Mortg. Corp., 2007 WL 4357628 (N.D. Cal. Dec. 11, 2007); Piper v. Portnoff Law Assoc., 262 F. Supp. 2d 520 (E.D. Pa. 2003); Wilson v.

More than a dozen, often unreported, decisions have approved consent judgments or settlements including FDCPA injunctive relief,[1066] and several courts have certified FDCPA class actions seeking injunctive relief.[1067]

11.12.3 Injunctive Relief Under Supplementary State Law Claims

Instead of seeking injunctive relief under the FDCPA, consumers may be able to bring state law claims supplementary to the FDCPA cause of action seeking damages or declaratory relief, and then seek injunctive relief under the state law claim.[1068] The Ninth Circuit affirmed a judgment of contempt against a check collection agency for violating an injunction entered under a state statute.[1069]

11.13 Attorney Fees and Costs for Prevailing Consumers

11.13.1 Overview

Consumer attorneys should, and in most states must, in the written retainer agreement with the client, provide for the specific manner of determination of their fee.[1070] In FDCPA cases, the fee is usually related to the Act's fee-shifting provision, 15 U.S.C. § 1692k:

> Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
>
> * * *
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.[1071]

This provision establishes an entitlement to awards of costs and reasonable attorney fees to successful plaintiffs.[1072] An award of attorney fees is critical to enforcement of the FDCPA's requirements and fulfillment of the congressional intent.[1073] Awards must be sufficient to encourage attorneys to bring FDCPA actions.[1074] "[A]n award of attorney's fees under the FDCPA is designed not only for plaintiff's benefit but also to serve as a deterrent to defendants and others similarly situated."[1075]

The FDCPA attorney fees provision is identical to that found in the Truth in Lending Act (TILA) and the Fair Credit Reporting Act (FCRA), so the numerous TILA and FCRA fees cases should be useful in interpreting the attorney fees provision of the FDCPA. Those TILA and FCRA fee cases are analyzed in other NCLC treatises.[1076]

Transworld Sys., Inc., 2002 WL 1379246 (M.D. Fla. Mar. 29, 2002); Klewer v. Cavalry Inv., L.L.C., 2002 U.S. Dist. LEXIS 3378 (W.D. Wis. Feb. 21, 2002); Ballard v. Equifax Check Serv., 27 F. Supp. 2d 1201 (E.D. Cal. 1998); Valderrama v. Nat'l Revenue Corp., 1981 U.S. Dist. LEXIS 18627 (D. Neb. Sept. 28, 1981). *See also* Liles v. Del Campo, 350 F.3d 742 (8th Cir. 2003).

1066 *See, e.g.*, Gonzalez v. Dynamic Recovery Solutions, L.L.C., 2015 WL 738329 (S.D. Fla. Feb. 23, 2015) (approving class action settlement for injunctive relief where Rule 23(b)(3) class for damages might not have met superiority test); Morency v. Evanston Northwestern Healthcare Corp., 1999 WL 521155 (N.D. Ill. July 14, 1999). *But cf.* Gammon v. GC Serv. L.P., 162 F.R.D. 313 (N.D. Ill. 1995); Strong v. Nat'l Mgmt. Co., 600 F. Supp. 46 (E.D. Ark. 1984); Duran v. Credit Bur. of Yuma, Inc., 93 F.R.D. 607 (D. Ariz. 1982). *But cf.* Koby v. ARS Nat'l Serv., Inc., 846 F.3d 1071 (9th Cir. 2017) (overturning class settlement which included worthless injunctive relief).

1067 *See* Schwarm v. Craighead, 233 F.R.D. 655 (E.D. Cal. Mar. 7, 2006) (certifying class action for both injunctive relief and damages based on alleged violations of FDCPA, 42 U.S.C. § 1983, and state law in collection of dishonored checks by defendant private debt collector acting under contract and in cooperation with local government law enforcement entities); Piper v. Portnoff Law Assoc., 262 F. Supp. 2d 520 (E.D. Pa. 2003); Wilson v. Transworld Sys., Inc., 2002 WL 1379246 (M.D. Fla. Mar. 29, 2002); Klewer v. Cavalry Inv., L.L.C., 2002 U.S. Dist. LEXIS 3378 (W.D. Wis. Feb. 21, 2002); Swanson v. Mid Am, Inc., 186 F.R.D. 665 (M.D. Fla. 1999) (certifying class action for injunctive relief).

1068 *See, e.g.*, Elmore v. Northeast Florida Credit Bur., Inc., 2011 WL 4480419 (M.D. Fla. Sept. 27, 2011) (enjoining defendant from stating an intent "to begin what may be a costly and long asset search on you," followed by "to prevent that action, you must pay"); Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961 (N.D. Ohio 2009) (granting injunctive relief under Ohio Consumer Sales Protection Act in putative Ohio class action against use of affidavits falsely claiming to be made on personal knowledge; this injunction was later supplanted by agreed-upon nationwide injunction requiring Midland to establish procedures to prevent use of affidavits not made on personal knowledge), *later op. at* Brent v. Midland Funding, L.L.C., 2011 WL 3862363(N.D. Ohio Sept. 1, 2011); Asch v. Teller, Levit & Silvertrust, P.C., 2004 WL 2967441 (N.D. Ill. Nov. 24, 2004); Klewer v. Cavalry Inv., L.L.C., 2002 WL 1058763 (W.D. Wis. May 17, 2002); Ballard v. Equifax Check Serv., 158 F. Supp. 2d 1163 (E.D. Cal. 2001) (granting injunctive relief under state statute for FDCPA violations); Irwin v. Mascott, 112 F. Supp. 2d 937 (N.D. Cal. Aug. 31, 2000), *appeal from later decision at* 370 F.3d 924 (9th Cir. 2004) (holding defendant in contempt for violating injunction but declining to review propriety of injunction); People *ex rel.* Spitzer v. Boyajian Law Offices, P.C., 851 N.Y.S.2d 72 (N.Y. Sup. Ct. 2007). *See generally* Ch. 16, *infra*.

1069 Irwin v. Mascott, 370 F.3d 924 (9th Cir. 2004), *aff'g* 2001 U.S. Dist. LEXIS 3285 (N.D. Cal. Feb. 27, 2001).

1070 *See* Venegas v. Mitchell, 495 U.S. 82, 110 S. Ct. 1679, 109 L. Ed. 2d 74 (1990) (plaintiff bound by contingent fee agreement with attorney that produced fee in excess of court-awarded fee).

An example of a retainer agreement is available online as companion material to National Consumer Law Center, Consumer Class Actions Appx. E.1 (10th ed. 2020), *updated at* www.nclc.org/library.

1071 15 U.S.C. § 1692k(a)(3).

1072 *See* S. Rep. No. 95-382, at 5, 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and at* Appx. A.3, *infra*. *See also* Appx. E.3.3, *infra*.

1073 *See* § 11.13.8.2, *infra*.

1074 *See* Appx. E.3.3.3, *infra*.

1075 *See* Goins v. JBC & Assoc., 2005 WL 3536147, at *3 (D. Conn. Nov. 28, 2005) (noting other FDCPA cases against debt collector in declining to reduce lodestar).

1076 *See* National Consumer Law Center, Truth in Lending § 11.9 (10th ed. 2019), *updated at* www.nclc.org/library; National Consumer Law

In addition, federal court decisions interpreting the Civil Rights Act's attorney fees provision[1077] and other federal laws providing attorney fees for prevailing plaintiffs are frequently relevant.[1078] The Supreme Court has stated that the standards it set out for section 1988 "are generally applicable in all cases in which Congress has authorized an award of attorney fees to a 'prevailing party.'"[1079] Although the FDCPA and other federal consumer statutes refer to awarding fees to a plaintiff in a "successful action," this phrase is viewed as the equivalent of a "prevailing party."[1080] Attorney fees may be available to consumer attorneys in FDCPA cases under other statutory provisions[1081] or Rule 11.

11.13.2 Is a Fee Award Mandatory?

According to the Third Circuit: "Given the structure of the section, . . . the Act mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general."[1082] The Seventh Circuit explained: "The reason for mandatory fees is that congress chose a 'private attorney general' approach to assume enforcement of the FDCPA."[1083] The Truth in Lending Act (TILA) has identical attorney fee language, and courts have interpreted it as requiring the award of attorney fees even in cases of minor violations.[1084]

Attorney fees in a successful FDCPA suits thus should be mandatory once more than nominal statutory damages have been awarded.[1085] As the Third Circuit stated in reversing and remanding for reconsideration a district court's denial of attorney fees: "Only in unusual circumstances, however, may the court decline to award a fee."[1086] The factors enumerated in the FDCPA to determine the amount of statutory damages are not applicable to an attorney fees award, and fees are not contingent on those criteria being met.

However, the consumer's attorney fees award may be reduced or even denied where there is little success[1087] or no award of FDCPA damages.[1088] Nevertheless, the Seventh Circuit has found that attorney fees awards are mandatory in an FDCPA case even when the recovery is only $100.[1089] An award of statutory damages should lead to attorney fees even where no actual damages are awarded.

Competing considerations as to attorney fees where recovery is minimal were examined in a United States Supreme Court decision denying the award of attorney fees in a Civil Rights Act case under 28 U.S.C. § 1983, although the plaintiff was found to be the prevailing party.[1090] In that case, nominal damages of one dollar were awarded where the plaintiff sought $17 million in compensatory damages. The main decision stated: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim

Center, Fair Credit Reporting § 12.7.1.3 (9th ed. 2018), *updated at* www.nclc.org/library.

1077 42 U.S.C. § 1988. *See e.g.* Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992).

1078 *See, e.g.*, Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010); City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) (33 U.S.C. § 1365(d)); Ruckelshaus v. Sierra Club, 463 U.S. 680, 691, 103 S. Ct. 3274, 77 L. Ed. 2d 938 (1983) (Clean Air Act); Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

1079 Hensley v. Eckerhart, 461 U.S. 424, 446 n.7, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). *See also* Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (to be prevailing party there must be some judicial alteration of the parties' legal relationship); Rayna P. v. Campus Cmty. Sch., 300 F. Supp. 3d 556, 561 (D. Del. 2019); City Consumer Serv., Inc. v. Horne, 631 F. Supp. 1050 (D. Utah 1986).

1080 *See, e.g.*, Fallen v. GREP Southwest, L.L.C., 247 F. Supp. 3d 1165, 1204 (D.N.M. 2017); Rousseau v. Morris, 2014 WL 941476 (D. Conn. Mar. 11, 2014); Merrick v. Scott, 2011 WL 1938188, at *10 (N.D. Tex. May 20, 2011). *See also* Crabill v. Trans Union, 259 F.3d 662 (7th Cir. 2001) (FCRA).

1081 *See, e.g.*, Means v. Intelligent Bus. Solutions, Ltd., 2015 WL 1470757 (D. Nev. Mar. 31, 2015) (inviting consumer "to move for fees incurred in defending the present motion under 28 U.S.C. § 1927).

1082 Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991) (citation omitted). *See also* Gonzales v. Arrow Fin. Serv., L.L.C., 660 F.3d 1055, 1061 (9th Cir. 2011); Tolentino v. Freedman, 46 F.3d 645 (7th Cir. 1995); Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85 (2d Cir. 2008); Valencia v. Affiliated Group, Inc., 674 F. Supp. 2d 1300 (S.D. Fla. 2009); Riter v. Moss & Bloomberg, Ltd., 2000 WL 1433867 (N.D. Ill. Sept. 26, 2000).

1083 Tolentino v. Friedman, 46 F.3d 645, 651 (7th Cir. 1995).

1084 National Consumer Law Center, Truth in Lending § 11.9.2.1 (10th ed. 2019), *updated at* www.nclc.org/library.

1085 *See* Zagorski v. Midwest Billing Serv., Inc., 128 F.3d 1164 (7th Cir. 1997); Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989); Emanuel v. Am. Credit Exch., 870 F.2d 805 (2d Cir. 1989). *But see* Davis v. Credit Bur. of the South, 908 F.3d 972 (5th Cir. 2018) (despite an award of statutory damages, the court declined to award attorney fees due to the conduct of plaintiff and counsel).

1086 Graziano v. Harrison, 950 F.2d 107, 113–114 (3d Cir. 1991). *See also* Larsen v. AR Res., 453 F. Supp. 3d 849 (E.D. Va. 2020).

1087 *See* Richard v. Caliber Home Loans, Inc. 832 Fed. Appx. 940 (6th Cir. 2020) (reducing total attorney award due to limited success in action and other factors); Paz v. Portfolio Recovery Assoc., 924 F.3d 949 (7th Cir. 2019) (reduction of attorney fees where jury awarded $1000 in statutory damage and no actual damages); Larsen v. AR Res., 453 F. Supp. 3d 849 (E.D. Va. 2020) (substantial reduction in attorney fees where Plaintiff sought $80,000 in FDCPA damages and only received $1000 from jury); Baylor v. Mitchell Rubenstein & Assoc., 735 Fed. Appx. 733, at *1 (D.C. Cir. 2018); Carroll v. Wolpoff & Abramson, 53 F.3d 626 (4th Cir. 1995); Appx. E.3.3.3, *infra*.

1088 Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996); Pietrowski v. Merchants & Med. Credit Corp., 256 F.R.D. 544 (E.D. Mich. 2008). *See also* Nagle v. Experian Info. Solutions, Inc., 297 F.3d 1305 (11th Cir. 2002) (where no damages awarded in an FCRA case, no attorney fees could be awarded); Crabill v. Trans Union, L.L.C., 259 F.3d 662 (7th Cir. 2001) (suggesting that, under recent Supreme Court decisions, a consumer may have no standing to pursue FDCPA attorney fees without recovering damages). *But see* Pipiles v. Credit Bur., Inc., 886 F.2d 22, 28 (2d Cir. 1989); Emanuel v. Am. Credit Exch., 870 F.2d 805, 809 (2d Cir. 1989).

1089 Zagorski v. Midwest Billing Serv., Inc., 128 F.3d 1164 (7th Cir. 1997). *See also* Holzhauer v. Hayt, Hayt & Landau, L.L.C., 2012 WL 3286059 (D.N.J. Aug. 10, 2012); Pineda v. P & B Capital Group, L.L.C., 2011 WL 6356866 (W.D. Mo. Dec. 19, 2011); Kim v. Barro, 2009 WL 1616271 (N.D. Ga. June 9, 2009) (plaintiff who accepted $250 offer of judgment was prevailing party and obtained more than the "nominal" damages awarded to civil rights plaintiff in *Farrar*).

1090 Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992).

for monetary relief, . . . the only reasonable fee is *usually* no fee at all."[1091]

Nevertheless, Justice O'Connor, in her concurring opinion, stated that such disparities should not be the only factor considered in deciding on a fee award.[1092] Other factors, such as the significance of the legal issue involved, must be considered. Indeed, fees may be appropriate even when only nominal damages are awarded.[1093]

Almost all courts award attorney fees in federal statutory actions even when the individual is represented on a no-fee basis by a legal services program[1094] or a prepaid legal services plan;[1095] the same rule has been applied in FDCPA suits.[1096] Similarly, the absence of any obligation to pay counsel attorney fees not recovered from the defendant does not mean the fees are not "incurred" and is not a bar to a fee-shifting award.[1097] However, courts award no fees for work done by *pro se* litigants, irrespective of whether that litigant is an attorney.[1098]

11.13.3 Attorney Fees Where Claim Is Settled

11.13.3.1 Right to Attorney Fees

Many settlements set aside a specified amount for attorney fees or state that the settlement amount includes attorney fees, and the consumer will not seek such fees from the court. But where the settlement does not fully resolve the question of attorney fees, the consumer's attorney must consider the Supreme Court decision in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Services*.[1099] Although *Buckhannon* dealt with the fee-shifting provisions of the fair housing laws and the Americans with Disabilities Act, the Supreme Court made clear that it was announcing a general rule that applied to most, if not all, federal fee-shifting statutes.[1100] The Seventh Circuit has held that *Buckhannon* applies even to consumer protection statutes that, like the FDCPA,[1101] use the term "successful action" rather than the "prevailing party" language found in the statutes *Buckhannon* was interpreting.[1102]

Buckhannon holds that a "material alteration of the legal relationship of the parties" is necessary for a plaintiff to be found the prevailing party.[1103] This standard can be met by "enforceable judgments on the merits and court-ordered consent decrees,"[1104] because both have "the necessary judicial imprimatur."[1105] The court, however, rejected the "catalyst" theory, under which courts had held that a plaintiff was a prevailing party even if a favorable order was never entered, as long as the suit achieved the desired result by bringing about a voluntary change in the defendant's behavior. Further, it suggested that a "private settlement" that the court has not adopted as an enforceable order is insufficient to trigger the consumer's right to attorney fees, because it "do[es] not entail the judicial approval and oversight involved in consent decrees."[1106] While

1091 *Id.*, 506 U.S. at 115 (emphasis added).

1092 *Id.*, 506 U.S. at 121 (O'Connor, J., concurring).

1093 Thornton v. Wolpoff & Abramson, L.L.P., 312 Fed. Appx. 161, 164 (11th Cir. 2008) ("*Farrar* does not preclude the district court from awarding attorney's fees when a jury awards a nominal amount of statutory damages.").

1094 *See* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9, 100 S. Ct. 2024, 64 L. Ed. 2d 723 (1980); Martinez v. Roscoe, 100 F.3d 121, 124 (10th Cir. 1996) Gallegos v. Stokes, 593 F.2d 372 (10th Cir. 1979); Rodriguez v. Taylor, 569 F.2d 1231, 1244 (3d Cir. 1977) (Civil Rights Act case); Manning v. Princeton Consumer Discount Co., 533 F.2d 102 (3d Cir. 1976); Rios v. Enter. Ass'n Steamfitters (UAW) Local 638, 400 F. Supp. 993, 995 (S.D.N.Y. 1975), *aff'd*, 542 F.2d 579 (2d Cir. 1976) (Equal Employment Opportunity Act case). *See also* National Consumer Law Center, Truth in Lending § 11.9.3.2 (10th ed. 2019), *updated at* www.nclc.org/library.

1095 *See* Appx. E.3.3, *infra*.

1096 *See* Appx. E.3.3.2, *infra*.

In *Hish v. Chiquoine & Molberg, S.C.*, 2014 WL 31498 (W.D. Wis. Jan. 3, 2014), for example, the court awarded reasonable attorney fees to the prevailing plaintiff notwithstanding the facts that she was represented by a non-profit legal aid program that itself was barred from recovering fees and thus she incurred no fee obligation to pay her attorneys.

1097 Long v. Nationwide Legal File & Serve, Inc., 2014 WL 3809401, at *10 (N.D. Cal. July 23, 2014).

1098 *See* Kay v. Ehrler, 499 U.S. 432, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991) (civil rights claim); Damarest v. Manspeaker, 948 F.2d 655 (10th Cir. 1991) (Equal Access to Justice Act case); White v. Arlen Realty & Dev. Corp., 540 F.2d 645 (4th Cir. 1975); Adams v. Green Tree Servicing, L.L.C., 2015 WL 685791 (M.D. Fla. Feb. 18, 2015); Milton v. Rosicki, Rosicki & Assoc., P.C., 2007 WL 2262893 (E.D.N.Y. Aug. 3, 2007) (FDCPA case); Kurz v. Chase Manhattan Bank, 324 F. Supp. 2d 444, 447 (S.D.N.Y. 2004); Padilla v. Payco Gen. Am. Credits, Inc., 161 F. Supp. 2d 264 (S.D.N.Y. 2001); Ray v. Immigration & Naturalization Serv., 856 F. Supp. 1576 (S.D. Fla. 1994); Strange v. Wexler, 796 F. Supp. 1117 (N.D. Ill. 1992) (FDCPA case); *In re* Vasquez, 221 B.R. 222 (Bankr. N.D. Ill. 1998).

1099 Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

Buckhannon is examined in more detail in NCLC's Consumer Class Actions § 19.2.2.1 (10th ed. 2020), *updated at* www.nclc.org/library.

1100 Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

1101 *See* Dechert v. Cadle Co., 441 F.3d 474 (7th Cir. 2006) (plaintiff, who abandoned his FDCPA claim, was not prevailing party merely because of discovery sanctions award; award of fees to plaintiff reversed).

1102 15 U.S.C. § 1692k(a)(3). *See* Crabill v. Trans Union, 259 F.3d 662 (7th Cir. 2001) (applying *Buckhannon* to the Fair Credit Reporting Act and concluding that attorney fees are not available unless the plaintiff wins "formal judicial relief").

1103 *Buckhannon*, 532 U.S. at 604.

1104 *Id. See also* Johnson v. City of Tulsa, Oklahoma Lodge 93, 489 F.3d 1089 (10th Cir. 2007) (*Buckhannon* does not preclude an award of attorney fees for counsel's efforts to protect the fruits of a consent decree).

1105 Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). *See* Dechert v. Cadle Co., 441 F.3d 474 (7th Cir. 2006) (plaintiff, who abandoned his FDCPA claim was not prevailing party merely because of discovery sanctions award; award of fees to plaintiff reversed).

1106 *Buckhannon*, 532 U.S. at 604 n.7.

the Ninth Circuit has characterized this language as *dictum*,[1107] most courts have concluded that a "private settlement," by itself, cannot be a basis to ask a court for a fee award.[1108]

What is a court-ordered decree or judgment and what is a "private settlement"? The key distinction is likely to be that, to qualify as a decree, a final order has been entered in the case which permits the court, under the standards set forth in the Supreme Court decision in *Kokkonen v. Guardian Life Insurance Co.*,[1109] to retain jurisdiction for enforcement purposes.[1110] An order need not include an admission of liability by the defendant to qualify as a consent decree,[1111] and it is immaterial whether it repeats the terms of the parties' agreement or incorporates them by referring to a separate document.[1112]

Thus, an order that recites or incorporates a stipulation that sets forth steps that the defendant agrees to take, thereby subjecting the parties' agreement to judicial oversight and enforcement, qualifies as a court-ordered decree.[1113] Such steps may include paying damages or clearing a tradeline from a credit report. Even an order of dismissal can meet these standards if the court retains jurisdiction to enforce compliance with the parties' agreement.[1114] But a stipulation of dismissal that does not permit the court to retain jurisdiction to enforce the agreement[1115] probably will not suffice to qualify the plaintiff as a prevailing party.

The right to seek attorney fees should be preserved where there is a *judgment* for damages, because a money judgment is a "material alteration of the legal relationship of the parties,"[1116] as it creates an obligation of one party to the other that is enforceable by judicial process. The ability to enforce a money judgment by judicial process should be considered the functional equivalent of the judicial oversight that was the hallmark of a court-ordered consent decree for the *Buckhannon* court.[1117] This type of agreement should also be acceptable to a defendant that sincerely wishes to settle because it leaves the determination of the reasonableness of the fees to the court. The debt collector's concern about settling without knowing its total exposure may possibly be overcome by revealing the number of hours the consumer's attorney has devoted to the case to date, and the hourly rate that will be sought.

A mere stipulation that the issue of attorney fees will be considered by the court may not be sufficient to satisfy *Buckhannon*.[1118] Some courts have awarded fees when the

1107 Barrios v. California Interscholastic Fed'n, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002).

1108 *See, e.g.*, Tejero v. Portfolio Recovery Assoc., 993 F.3d 393 (5th Cir. 2021) (where settlement that did not include attorney fees, court held no "successful action to enforce the foregoing liability" under § 1692k(a)(3) where lawsuit did not reach any end result); Harris v. Jacobs Marsh, L.L.C., 2016 WL 1584018, at *3 n.3 (W.D.N.Y. Mar. 21, 2016) (finding court had no authority to award fees under FDCPA based on settlement agreement, even though "the parties may have agreed, as Plaintiff argues, that Plaintiff would be a 'prevailing party' in this case"); Nat'l Coalition for Students with Disabilities v. Bush, 173 F. Supp. 2d 1272 (N.D. Fla. 2001) (construing *Buckhannon* to disallow fees for "private settlements").

1109 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).

1110 Toms v. Taft, 338 F.3d 519 (6th Cir. 2003) (section 1988 case; settlement reached during judicially supervised settlement conference, after which claim was dismissed as moot, not basis for fees even though agreement was read into the record); Richard S. v. Dep't of Developmental Serv., 317 F.3d 1080 (9th Cir. 2003); Truesdell v. Philadelphia Hous. Auth., 290 F.3d 159 (3d Cir. 2002) (district court's order incorporating plaintiff's settlement in mandatory terms is sufficient); Am. Disability Ass'n v. Chmielarz, 289 F.3d 1315 (11th Cir. 2002); Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002) (consent decree on which fees can be based is one that is enforceable as a judicial decree by the court that entered it); Vasquez v. County of Lake, 2002 WL 31256166 (N.D. Ill. Oct. 7, 2002).

1111 Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

1112 Am. Disability Ass'n v. Chmielarz, 289 F.3d 1315 (11th Cir. 2002); Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002); Nat'l Coalition for Students with Disabilities v. Bush, 173 F. Supp. 2d 1272, 1278–1279 (N.D. Fla. 2001) ("the appropriateness of an award of fees surely ought not turn on whether the court does or does not retype the provisions of a settlement agreement as part of an order compelling compliance").

1113 *See* Hutchinson *ex rel.* Julien v. Patrick, 636 F.3d 1, 10–11 (1st Cir. 2011) (three-prong inquiry to determine whether an order contains judicial involvement and actions inherent in a conventional consent decree); Roberson v. Giuliani, 346 F.3d 75 (2d Cir. 2003) (district court's retention of enforcement jurisdiction over parties' private settlement agreement provided sufficient judicial sanction to convey "prevailing party" status on plaintiffs, for purposes of fee-shifting provision of civil rights statute); Independence Project, Inc. v. Ventresca Bros. Constr. Co., 397 F. Supp. 3d 482 (S.D.N.Y. 2019).

1114 Am. Disability Ass'n v. Chmielarz, 289 F.3d 1315 (11th Cir. 2002).

1115 Sole v. Wyner, 551 U.S. 74, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007); Xlear, Inc. v. Focus Nutrition, L.L.C., 893 F.3d 1227, 1238 (10th Cir. 2018) (a clerk of court terminating a case after a settlement by the parties does not constitute sufficient judicial imprimatur for the prevailing party analysis); Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy, 288 F.3d 452 (D.C. Cir. 2002) (stipulation of dismissal insufficient even though signed by judge); Perez-Arellano v. Smith, 279 F.3d 791 (9th Cir. 2002); Malibu Media, L.L.C. v. Baiazid, 152 F. Supp. 3d 496, 501 (E.D. Va. 2015) ("a defendant dismissed pursuant to a stipulation of dismissal [under Rule 41(a)(1)(A)(ii)] is not a 'prevailing party'") Dorfsman v. Law Sch. Admission Council, 2001 WL 1754726 (E.D. Pa. Nov. 28, 2001) (stipulation followed by dismissal). *See also* J.C. v. Reg'l Sch. Dist. 10, 278 F.3d 119 (2d Cir. 2002) (order dismissing hearing as moot after school board adopted individualized educational plan granting all relief sought was insufficient for fee award). *But cf.* Former Employees of Motorola Ceramic Prods. v. United States, 336 F.3d 1360 (Fed. Cir. 2003) (plaintiffs were prevailing parties where defendant agreed to remand order, and they then won claim before agency on remand).

1116 Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). *See also* Cabala v. Crowley, 736 F.3d 226 (2d Cir. 2013).

1117 Buckhannon, 532 U.S. at 603 (defining "prevailing party" as one in whose favor a judgment is rendered); Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., Inc., 298 F.3d 1238 (11th Cir. 2002) (entry of Rule 68 judgment is basis for attorney fees if *Marek v. Chesny*, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985), does not bar them); Dennis v. Columbia Collection Med. Ctr., Inc., 290 F.3d 639 (4th Cir. 2002) (party who obtains a judgment prevails); Pitchford v. Oakwood Mobile Homes, Inc., 212 F. Supp. 2d 613 (W.D. Va. 2002) (implying that settlement would have been basis for fees if it had been incorporated into court order). *See also* Walker v. City of Mesquite, 313 F.3d 246 (5th Cir. 2002) (adopting functional equivalence as standard).

1118 Harris v. Jacobs Marsh, L.L.C., 2016 WL 1584018 (W.D.N.Y. Mar. 21, 2016) (settlement agreement which merely permitted plaintiff to make application for reasonable attorney fees was insufficient basis for

settlement specifically states that the consumer has prevailed or been successful, that the consumer is entitled to an award of reasonable attorney fees—or at least that the defendant does not contest the right to such fees—and that the reasonableness of the fees will be determined by the court. However, this approach is not without risk.[1119] Counsel should not agree to a simple entry of dismissal, even if the case is dismissed pursuant to an agreement signed by the parties under which the defendant agrees to the relief the plaintiff sought, unless the order embodies the settlement agreement or the court retains jurisdiction to enforce it.[1120]

11.13.3.2 Negotiating a Settlement Containing Attorney Fees

Difficult problems arise when defendants seek to negotiate settlement of the substantive claims and attorney fees simultaneously.[1121] While simultaneous negotiation enables the defendant to know its total liability, it may place the consumer's attorney in an untenable ethical position. Defendants may attempt to divide the award between fees and damages in a way which disfavors either the consumer or the consumer's attorney. The attorney may be tempted to accept a generous fee offer in return for a less than optimal settlement for the client, or, conversely, may feel obligated to negotiate the best settlement for the client, even if this means no attorney fees.

Thus, it is generally viewed as a violation of the Rules of Professional Conduct to negotiate *separate amounts* for the client and for fees at the same time, while it is not unethical to simultaneously negotiate fees and merits relief as a lump sum, or for the defendant to condition a settlement on waiver of fees.[1122] Attorneys should be familiar with their state bar association's ethical opinions and other rulings on the topic. A few states have ethical rules or judicial decisions prohibiting waiver of fees or simultaneous negotiation of fees and the merits, but a number of others have concluded that there is no ethical violation.

Attorneys can reduce the conflict of interest created by lump-sum settlement offers and offers conditioned upon waiver of fees by drafting their retainers with this issue in mind. A retainer that obliges the client to pay fees at an hourly rate or as a percentage of a settlement if the client accepts an offer that does not include sufficient attorney fees means that the attorney and the client both have an economic interest in an adequate fee award.[1123] Such an agreement is generally enforceable, even where there is statutory fee shifting as in the FDCPA.[1124] Frequently, attorneys provide that the fees shall be a certain percentage of the recovery, but in any event not less than what their lodestar amount would be. However, any such agreement must take into account that most state Rules of Professional Conduct require fees to be reasonable, and may require a different approach, depending on the particular circumstances.

An assignment of a claim for money such as for attorney fees may be sufficient to provide standing for a plaintiff's attorney to seek fees.[1125] Plaintiff's attorney may be in the best position to negotiate for attorney fees if the attorney's original fee agreement with the client contains a provision stating that the statutorily authorized fees belong to and are assigned to counsel.[1126] If the fee agreement provides that the right to the fees and expenses is assigned to the attorney, and the defendant is notified that the attorney holds the right to recover fees,

court to award fees); Pitchford v. Oakwood Mobile Homes, Inc., 212 F. Supp. 2d 613 (W.D. Va. 2002) (settlement that merely reserved fee issue for court insufficient to establish consumer as prevailing party, but it would have sufficed if parties had stipulated that plaintiff was entitled to fees and that court would decide amount); Dorfsman v. Law Sch. Admission Council, 2001 WL 1754726 (E.D. Pa. Nov. 28, 2001). *See also* Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy, 288 F.3d 452 (D.C. Cir. 2002) (no fees despite stipulation that dismissal is "without prejudice to the right of plaintiff to obtain . . . an award of attorney's fees"; no discussion of whether this provision amounted to a stipulation that plaintiff was the prevailing party).

1119 *See* Pitchford v. Oakwood Mobile Homes, Inc., 212 F. Supp. 2d 613 (W.D. Va. 2002) (settlement that merely reserved fee issue for court insufficient to establish consumer as prevailing party, but it would have sufficed if parties had stipulated that plaintiff was entitled to fees and that court would decide amount).

1120 *See* Toms v. Taft, 338 F.3d 519 (6th Cir. 2003) (section 1988 fee application; settlement reached during judicially supervised settlement conference, after which claim was dismissed as moot, not basis for fees even though agreement was read into the record); Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002) (dismissal order that merely acknowledges, refers to, or approves settlement agreement is insufficient). *See also* Pitchford v. Oakwood Mobile Homes, Inc., 212 F. Supp. 2d 613 (W.D. Va. 2002) (noting in *dicta* that an order that meets *Kokkonen* standards would be sufficient to preserve fee claim).

1121 *See also* National Consumer Law Center, Consumer Class Actions §§ 14.10, 19.4.1 (10th ed. 2020), *updated at* www.nclc.org/library.

1122 Evans v. Jeff D., 475 U.S. 717, 728 n.14, 108 S. Ct. 1531, 89 L. Ed. 2d 747 (1986).

1123 A sample retainer with a clause along these lines may be found in National Consumer Law Center, Consumer Class Actions, Appx. E.1 (10th ed. 2020), *updated at* www.nclc.org/library.

1124 *See* Venegas v. Mitchell, 495 U.S. 82, 110 S. Ct. 1679, 109 L. Ed. 2d 74 (1990).

1125 Sprint Commc'ns. Co., L.P. v. APCC Serv., 554 U.S. 269, 271–272, 285–286, 128 S. Ct. 2531 (2008) (assignee of statutory claim under 47 U.S.C. § 226 satisfied Article III standing). However, note that the Anti-Assignment Act, 31 U.S.C. § 3727 ("AAA") generally prohibits the assignment of claims against the government unless the government has waived an objection to the assignment.

1126 *See* Evans v. Jeff D., 475 U.S. 717, 108 S. Ct. 1531, 89 L. Ed. 2d 747 (1986) (section 1988 case; suggesting that the lawyer obtain an assignment of rights to attorney fees from the client); Zeisler v. Neese, 24 F.3d 1000, 1002 (7th Cir. 1994) (TILA fees belong to plaintiff, not to attorney, but plaintiff can assign this right to attorney; if attorney notifies defense of assignment, then plaintiff's settlement will not be waiver of fees); Samuels v. Am. Motor Sales, Inc., 969 F.2d 573, 576–579 (7th Cir. 1992) (Magnuson-Moss Warranty Act case; attorney has standing to pursue fee petition after winning judgment for client). *See also* California Formal Ethics Op. 1994-136 (1994) (retainer agreements in which client assigns right to statutory attorney fees under 42 U.S.C. § 1988 to attorney are not unethical so long as there is appropriate disclosure and consent). *But see* Pony v. County of Los Angeles, 433 F.3d 1138 (9th Cir. 2006) (assignment of attorney fees under 42 U.S.C. § 1988 invalid under California tort law and, by analogy, actions under 42 U.S.C. § 1988).

through a notice of attorney's lien or notice of assignment, then: (1) the defendant cannot settle directly with the plaintiff without incurring liability to counsel,[1127] (2) a purported waiver of the right to fees without the attorney's consent is ineffective,[1128] and (3) the lawyer can enforce the right to fees by petition or appeal without the participation or approval of the client.[1129]

Nevertheless, it is not clear that an assignment has any effect on the ethical issues. Moreover, regardless of an assignment of the fee claim, the client has the right to decide to accept a settlement offer, and the attorney cannot allow their own interests to impair the client's decision.

Where the settlement agreement is not determinative of fees, the best approach is to try to settle the substantive claims with an explicit provision recognizing plaintiff's right to an award of such fees and stating that the issue of the consumer's attorney fees will be specifically reserved for the court if subsequent negotiation between the parties does not resolve the issue. This topic is discussed more fully at § 11.13.3.1, *supra*.

11.13.4 To Whom Does the Fee Award Belong?

The FDCPA provides that any debt collector who fails to comply with the Act "with respect to any person is liable to such person" for reasonable attorney fees.[1130] This language suggests that the attorney fee in a successful FDCPA case belongs to the consumer, and is payable directly to them and not the attorney.[1131] Thus, the FDCPA falls within the general rule that unless the statute specifically provides for payment to the attorney, and in the absence of an alternative contractual arrangement, the right to attorney fees is that of the litigant.[1132] Indeed, courts have followed this general rule in cases involving a number of federal statutes.[1133]

Whether a formal assignment of the client's rights to attorney fees is valid and enforceable may depend on state law claims.[1134]

The issue of who is entitled to the fee award becomes especially significant where there is at least a theoretical potential for such a fee award to be offset against a preexisting debt of the debtor or a judgment against the debtor. Offset of the fee award, however, has been denied in consideration of the

1127 Zeisler v. Neese, 24 F.3d 1000, 1002 (7th Cir. 1994).

1128 *Id.*

1129 *See* Harden v. Autovest, L.L.C., 2016 WL 6997905 (W.D. Mich. Nov. 30, 2016) (motion to dismiss plaintiff's claim for fees denied because provision in fee agreement assigning plaintiff's right to attorney fees and costs that are "obtainable" did not assign his right to recovery of those fees and costs). *See also* § 11.13.4, *infra*. *Cf.* Shealey v. Wilkie, 946 F.3d 1294 (Fed. Cir. 2020) (client's dismissal of his counsel part way through action constituted revocation of counsel's authority and standing to seek fees for work performed).

1130 15 U.S.C. § 1692k(a)(3).

1131 *See, e.g.*, Hester v. Graham, Bright & Smith, P.C., 289 Fed. Appx. 35, 44 (8th Cir. 2008) (vacating lower court's award of attorney fees to counsel and remanding to award fees directly to consumer); Shula v. Lawent, 359 F.3d 489, 492 (7th Cir. 2004) (under FDCPA, attorney fees should be awarded to client instead of the attorney, "especially since it is standard for fee-shifting statutes to award attorneys' fees as part of the costs normally awarded a prevailing party"); Szijjarto v. McCarrell, 2014 WL 555122 (S.D. Tex. Feb. 12, 2014); Bauer v. Midland Credit Mgmt., Inc., 2012 WL 6733649 (M.D. Fla. Dec. 4, 2012) (attorney fees are awarded directly to successful plaintiff under FDCPA), *adopted*, 2012 WL 6733021 (M.D. Fla. Dec. 28, 2012); Myrick v. Distribution & Acquisition Network, 2010 WL 2179112, at *5 (M.D. Fla. Apr. 28, 2010) ("The FDCPA provides that the person who recovers damages for a statutory violation, not that person's attorney, should recover a reasonable attorney's fee."); Sanders v. Wash. Mut. Home Loans, Inc., 2009 WL 365683, at *6 n.3 (E.D. La. Feb. 10, 2009) ("Although plaintiffs' *attorneys* purported to file the motion for determination of attorney's fees and costs on their own behalf, it would be error to award such fees and costs directly to plaintiffs' attorneys."). *Cf.* Eades v. Kennedy, PC. Law Offices, 343 F. Supp. 3d 104, 108 (W.D.N.Y. 2018) (plaintiff awarded attorney fees, but order stated award was to be made payable to plaintiff's counsel).

1132 *See, e.g.*, United States v. $186,416.00 in U.S. Currency, 642 F.3d 753, 756 (9th Cir. 2011) ("Direct payment to the attorney is the exception, not the rule."); Image Technical Serv., Inc. v. Eastman Kodak Co., 136 F.3d 1354, 1357 (9th Cir. 1998) ("Any fee award in an antitrust case goes to the successful plaintiff, not to plaintiff's counsel.").

1133 *See, e.g.*, Astrue v. Ratliff, 560 U.S. 586, 130 S. Ct. 2521, 177 L. Ed. 2d 91 (2010) (Equal Access to Justice Act); United States v. $186,416.00 in U.S. Currency, 642 F.3d 753 (9th Cir. 2011) (Civil Asset Forfeiture Reform Act); Long v. Morton Plant Hosp. Ass'n, 2008 WL 383808 (11th Cir. Feb. 14, 2008) (Americans with Disabilities Act); Willis v. Gov't Accountability Office, 448 F.3d 1341 (Fed. Cir. 2006) (Civil Service Reform Act); Gilbrook v. City of Westminster, 177 F.3d 839, 875 (9th Cir. 1999) ("In the absence of a contractual assignment to counsel, § 1988 requires that attorney fee awards be made directly to the prevailing party"); Image Technical Serv., Inc. v. Eastman Kodak Co., 136 F.3d 1354, 1357 (9th Cir. 1998) (Clayton Act; "Any fee award in an antitrust case goes to the successful plaintiff, not to plaintiff's counsel."); Zeisler v. Neese, 24 F.3d 1000, 1001 (7th Cir. 1994) (TILA; "the entitlement to attorney's fees belongs to the plaintiff, not to his (in this case her) lawyer"); Freeman v. B & B Assoc., 790 F.2d 145 (D.C. Cir. 1986) (TILA); Moore v. Nat'l Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1099 n.10 (D.C. Cir. 1985) (Title VII); United States ex. Rel. Rafter H. Constr., L.L.C. v. Big-D Constr. Corp., 350 F. Supp. 3d 938 (D. Idaho 2018) (attorney fees awarded directly to relators in qui tam action pursuant to False Claims Act). *But see* Flannery v. Prentice, 28 P.3d 860, 871 (Cal. 2001) (concluding that attorney fees awarded pursuant to state's Fair Employment and Housing Act (exceeding fees already paid) "belong, absent an enforceable agreement to the contrary, to the attorneys who labored to earn them"); Henry M. Lee Law Corp. v. Super. Ct., 139 Cal. Rptr. 3d 712, 723 (Cal. Ct. App. 2012) (construing state wage and hour laws authorizing award of fees to an "employee" and holding that, absent a contract determining a different disposition of an award, attorney fees in excess of those already paid to the attorneys by the client should be made payable directly to the attorney who provided the legal services).

1134 *See* Pony v. County of Los Angeles, 433 F.3d 1138 (9th Cir. 2006) (right to fees under 42 U.S.C. § 1988 not assignable under California law); Zeisler v. Neese, 24 F.3d 1000 (7th Cir. 1994). *See also* Evans v. Jeff D., 475 U.S. 717, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986). *Cf.* Igbanugo Partners Int'l Law Firm, P.L.L.C. v. Sabhari, 2013 WL 4711190 (Minn. Ct. App. Sept. 3, 2013) (concluding that unambiguous language in contracts and riders did not show manifest intent on the part of clients to assign their right to Equal Access to Justice Act (EAJA) fees to law firm; rather, contract language clearly reflected parties' agreement that, in the event of an EAJA award, any attorney fees owed to law firm would be offset by EAJA award).

public policy behind the attorney fee provision, among other things.[1135]

Cases under other federal consumer protection statutes also have held that it would further a particular act's congressional purpose for the attorney to be granted an independent right to the fees against the offending party. The reasoning underlying such cases, which is equally applicable to the FDCPA, is that courts should decline to award a setoff of attorney fees where the underlying statute pursuant to which the opposing party received a judgment is remedial in nature.[1136] To allow a setoff would in effect relieve the collectors who violated the Act of the attorney fee expense in the case of an insolvent debtor. Such a result would thwart the statute's individual enforcement scheme and its remedial objectives and has been rejected in several cases involving Truth in Lending Act claims where attorney fees were not allowed to be set off by the creditor's counterclaim or claim of recoupment,[1137] and in certain cases were paid directly to the attorney.[1138]

Where the client is represented by a legal services program or other nonprofit organization, some courts order attorney fees to be paid directly to the attorneys because the client does not pay a fee to their attorney and giving the full amount to the consumer would therefore be an unwarranted windfall.[1139]

Although the fee award usually belongs in the first instance to the client, where an appeal solely concerns attorney fees,

1135 Lundsted v. JRV Holdings, L.L.C., 2016 WL 1665154 (E.D. Mich. Apr. 27, 2016) (while state court judgment held by debt buyer could be set off against FDCPA judgment, setoff against consumer's reasonable attorney fees was rejected due to considerations of public policy, priority in time of competing claims, separateness of two actions seeking to be offset, and nature of attorney-client contract).

1136 *See, e.g.*, James v. Home Constr. Co. of Mobile, 689 F.2d 1357, 1359 (11th Cir. 1982) (TILA creates a right of action for attorneys to seek fee awards after settlement of the plaintiff's claim; "If settlement of a TILA case precluded the plaintiff's attorney from seeking a fee award, nothing would prevent indigent clients, who have no financial interest in statutory fee awards, from freely bargaining them away without personal detriment. Such a result would enable creditors who have violated the Act to escape liability for attorney's fees; such a practice would thwart both the statute's private enforcement scheme and its remedial objectives."); Plant v. Blazer Fin. Serv., Inc., 598 F.2d 1359, 1366 (5th Cir. 1979) (TILA case; "Allowance of attorney's fees in a successful action makes legal representation available in a manner analogous to the contingent fee system. Were the attorney's fee award subject to setoff, the expectation of fees from a successful action might well be limited to the resources of the debtor in any case where the outstanding debt, being in default and subject to counterclaim, exceeded the recovery. To allow a setoff would in effect relieve the creditors in violation of the Act of the attorney's fee expense in the case of an insolvent debtor. Such a result would thwart the statute's individual enforcement scheme and its remedial objectives."); Schmidt v. Citibank, 677 F. Supp. 687, 691 (D. Conn. 1987) (TILA case; "Attorney fees recovered are distinct from the consumer's recovery, which is preserved intact. The consumer did not receive the fee nor is he entitled to it, though the claim is made in his name."). *See also* Joseph A. Fischetti, *Ratliff v. Astrue: The Collision of the Equal Access to Justice Act and the Debt Collection Improvement Act*, 40 Seton Hall L. Rev. 723, 759 (2010) (written prior to the issuance of Supreme Court decision in *Astrue v. Ratliff*; arguing that circuit court decisions allowing offset "could have far-reaching consequences, potentially affecting civil-rights, environmental, consumer-protection, employment, and government-transparency laws that are central to our values as a society," even though the fee offsets only apply when the federal government is the creditor). *But see* Astrue v. Ratcliff, 560 U.S. 586, 588, 130 S. Ct. 2521, 177 L. Ed. 2d 91 (2010) (attorney fee awarded in an Equal Access to Justice Act case "is payable to the litigant and is therefore subject to a Government offset to satisfy a preexisting debt that the litigant owes the United States"; stressing that 31 U.S.C. §§ 3711 and 3716 give the federal government statutory authority to use administrative offsets to recover debts owed to it, and do not list fee awards among the items exempted—a possible basis for distinguishing FDCPA fee awards against non-governmental creditors); Harrington v. Berryhill, 906 F.3d 561 (7th Cir. 2018) (a reduction of a litigant's prior debts to the government by administrative offset constitutes payment to the prevailing party under EAJA, including attorney fees).

1137 *See, e.g.*, Plant v. Blazer Fin. Serv., Inc., 598 F.2d 1359 (5th Cir. 1979), Carr v. Blazer Fin. Serv., Inc., 598 F.2d 1368 (5th Cir. 1979); Schmidt v. Citibank, 677 F. Supp. 687, 691 (D. Conn. 1987); Graham v. Bank of Damascus, 528 F. Supp. 596, 597 (W.D. Va. 1981) ("To allow such a setoff would effectively make Truth in Lending claims unavailable to insolvent debtors."); *In re* DiCianno, 58 B.R. 810, 814 (Bankr. E.D. Pa. 1986) ("The debtor has also sought attorneys' fees under § 1640(a)(3) for successful prosecution of the action. He asserts that attorneys' fees are properly payable to him presently, and are not subject to setoff against his debt. . . . We agree, since under the TILA, Congress envisioned that the debtor would be paid the fees in hand to disburse to counsel. A contrary conclusion would not aid debtors in attracting competent counsel to represent them."); Mortg. Elec. Registration Sys., Inc. v. Lambert, 2011 WL 345970 (Ohio Ct. App. Feb. 3, 2011) (attorney fee award belongs to the attorney and cannot be applied to reduce debtor's tender obligation).

1138 Carr v. Blazer Fin. Serv., Inc., 598 F.2d 1368 (5th Cir. 1979). *See also* Graham v. Graham, 2012 WL 1099886 (S.D. Ga. Mar. 30, 2012).

1139 *See* Burnett v. Ala Moana Pawn Shop, 3 F.3d 1261, 1262 (9th Cir. 1993) (consumer not charged for attorney services); Kessler v. Associates Fin. Serv., 639 F.2d 498 (9th Cir. 1981); Dennis v. Chang, 611 F.2d 1302, 1309 (9th Cir. 1980) (section 1983 claim) (court can order fees paid directly to attorney where representation is provided pro bono and retainer entitles the organization to any fees); Harris v. Tower Loan, 609 F.2d 120 (5th Cir. 1980); Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3d Cir. 1977) (age discrimination case) (to avoid windfall, court can order fee paid directly to legal services program); Hairston v. R. & R. Apts., 510 F.2d 1090, 1093 (7th Cir. 1975) (housing discrimination case) (to avoid windfall, court can order fee paid directly to legal services organization). *See also* Saldivar v. Rodela, 894 F. Supp. 2d 916 (W.D. Tex. 2012); Benavides v. Benavides, 526 A.2d 536 (Conn. App. Ct. 1987); Fonsworth v. Hous. Auth. of Town of Windsor, 2002 WL 1980483, at *5 (Conn. Super. Ct. Aug. 22, 2002) (directing that payment of attorney fees be made directly to the legal services organization so that plaintiff did not reap a windfall); Pinnacle Props. v. Saulka, 693 N.E.2d 101, 105 (Ind. Ct. App. 1998) (recognizing that "any award made directly to the Tenants would result in a windfall to the Tenants and, thus, the award must be made to Student Legal Services"); Henriquez v. Henriquez, 992 A.2d 446 (Md. 2010) (attorney fees could be awarded directly to nonprofit organization that provided wife, the prevailing party, with pro bono legal representation during child custody and support proceeding even though fee-shifting statute did not contain language providing for payment of fees directly to an attorney); Black v. Brooks, 827 N.W.2d 256 (Neb. 2013) (in matter of first impression, award of attorney fees to which tenant was entitled due to landlord's willful noncompliance with lease agreements was paid directly to pro bono attorneys who represented tenant); Chanel v. Breton Builder Co., Ltd., 720 N.E.2d 941, 945 (Ohio Civ. App. 1998) (ordering fees in landlord tenant action to be paid directly to Student Legal Services organization).

the consumer's attorney has standing to pursue that action.[1140] Similarly, a prevailing plaintiff's former attorney can intervene to enforce their contingent fee agreement that legitimately exceeds the court's award of statutory attorney fees.[1141] However, an attorney has no right to seek fees if the client has waived the right to those fees, absent a prior assignment of rights[1142] or a contingent fee agreement.

11.13.5 Tax Consequences of Attorney Fee Awards

An attorney fee award may have consequences for the consumer, even if the consumer hands over the full attorney fee award to the attorney. The general rule is that the fee award is taxable income to the consumer even in that case, although there are several exceptions that often apply. These exceptions are examined at § 11.14, *infra*, including that the FDCPA damages award is not taxable, that the consumer is not obligated to pay for their attorney, for civil rights and related statutes (which possibly may include the FDCPA), and for class actions.

11.13.6 Record-Keeping for Attorney Fee Awards

To establish and maximize attorney fee awards, counsel for a consumer should keep accurate records of time spent on a debt collection case. Counsel should indicate the purpose or activity to which the time was devoted—for example, research, discovery, motion appearance, trial—since federal courts may review the time for reasonableness or assign a different rate of compensation for different types of work. Attorneys should also avoid "block billing" where several unrelated tasks are combined into one entry.[1143] Itemization of each task and describing each entry with sufficient specificity will provide adequate documentation of an attorney's time expenditures. Contemporaneously recorded time sheets are the preferred practice.[1144]

The federal courts have developed rigorous criteria and formulas for determining the rate and amount of awards of attorney fees,[1145] and counsel should be prepared to deal with such formulas. In federal courts, awards of attorney fees are generally based upon the affidavits of counsel. Hearings to determine the reasonableness of the amount of time, function, or rate of compensation usually take place only when awards are contested.

Consumer counsel in debtor abuse cases may also need to fashion their retainer agreement with consumers to provide for their fees on an hourly basis or as a percentage of the recovery if the case is settled. Some consumer counsel find that they must recover a portion of the damage award as attorney fees as well as obtain an award of attorney fees to maintain a practice in this area of law. Fee agreements are subject to local ethics rules, usually requiring the agreements to be written and reasonable.[1146]

11.13.7 Common Fund Attorney Fee Awards in Class Actions

While the lodestar method of computing attorney fees is used in individual FDCPA cases,[1147] a common fund approach to awarding attorney fees is sometimes used in FDCPA class actions.[1148] The common fund method awards the attorney a

1140 *See* § 11.13.11, *infra*.

1141 Venegas v. Mitchell, 495 U.S. 82, 110 S. Ct. 1679, 109 L. Ed. 2d 74 (1990) (40% contingent fee of $406,000 recoverable deducting $117,000 lodestar award).

1142 Zeisler v. Neese, 24 F.3d 1000 (7th Cir. 1994); Freeman v. B&B Assoc., 790 F.2d 145 (D.C. Cir. 1986). *See also* Evans v. Jeff D., 475 U.S. 717, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986). *Cf.* Pony v. County of Los Angeles, 433 F.3d 1138 (9th Cir. 2006) (in 42 U.S.C. § 1983 case, assignment invalid under California law); Panola Land Buying Ass'n v. Clark, 844 F.2d 1506 (11th Cir. 1988) (attorney does not have standing to challenge settlement waiving fees under Equal Access to Justice Act); Smith v. S. Side Loan Co., 567 F.2d 306 (5th Cir. 1978) (attorney has no right to pursue case in chief after client's settlement); Bonfiglio v. EMC Mortg. Corp., 935 So. 2d 561 (Fla. Dist. Ct. App. 2006) (TILA case; where settlement documents waived right to attorney fees, attorney lacked standing to pursue an award of fees). *But see* United States v. $186,416.00 in U.S. Currency, 722 F.3d 1173 (9th Cir. 2013) (where parties had not entered into settlement that waived any claim to fee award, attorney had valid contractual right to collect fee award and standing to protect his right); James v. Home Constr. Co. of Mobile, 689 F.2d 1357, 1359 (11th Cir. 1982) (plaintiff has no right to waive attorney fees in settlement agreement because that "practice would thwart both the statute's private enforcement scheme and its remedial objectives").

1143 Larsen v. AR Res., Inc., 453 F. Supp. 3d 849 (E.D. Va. 2020).

1144 *See* § 11.13.10.2, *infra*.

1145 *See* Tolentino v. Friedman, 46 F.3d 645, 653 (7th Cir. 1995) ("Paying counsel in FDCPA cases at rates lower than those they can obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law."). *But cf.* Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). In *Farrar*, the plaintiff, who was granted only nominal damages in this civil rights case when compensatory damages of $17 million were sought, was not entitled to an award of attorney fees. In her concurring opinion, Justice O'Connor wrote: "When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded." *Id.* at 576. "That is not to say that *all* nominal damages awards are *de minimis*. Nominal relief does not necessarily a nominal victory make." *Id.*, 506 U.S. at 578. Justice O'Connor stated that the difference between the amount sought and the amount recovered was not the only inquiry; other factors, such as the significance of the legal issue, must be considered. *See also* § 11.13.2, *supra*.

1146 An example of a retainer agreement is available online as companion material to National Consumer Law Center, Consumer Class Actions Appx. E.1 (10th ed. 2020) *updated at* www.nclc.org/library; § 11.13.1, *supra*.

1147 *See* § 11.13.8, *infra*.

1148 *See* National Consumer Law Center, Consumer Class Actions § 19.3.4 (10th ed. 2020), *updated at* www.nclc.org/library (detailed circuit-by-circuit analysis of courts using the common fund approach). *See, e.g., In re* TRS Recovery Serv., Inc. & Telecheck Serv., Inc., Fair Debt Collection Practices Act (FDCPA) Litig., 2016 WL 543137 (D. Me. Feb. 10, 2016) (in class action settlement, approving requested attorney fees and costs in total amount of $1,050,000, with $1,864,000 earmarked for consumers, of whom about 40,000 had made claims). *Cf.* Lambeth v. Advantage Fin. Serv., L.L.C., 2015 WL 4624008 (D. Idaho

percentage of the total recovery owed to the class—the common fund. The range normally approved by courts is twenty to thirty percent, with forty to fifty percent being the upper limit.[1149] Many courts will compute a rough lodestar value (allowable hours times reasonable hourly rates) as a cross-check against the common fund award, but the common fund calculation can exceed the lodestar calculation.[1150] Common fund attorney fees jurisprudence is examined in more detail in NCLC's *Consumer Class Actions*.[1151]

11.13.8 The Lodestar Approach to Calculating Attorney Fees

11.13.8.1 Generally

The lodestar approach is universally used to determine FDCPA attorney fees in individual actions. The lodestar is the number of allowable hours times a reasonable hourly rate or rates. There is a strong presumption that the lodestar amount represents an adequate and proper fee award.[1152]

Determination of both the reasonable hourly rate(s) and the allowable hours is in the trial court's discretion, and an appellate court will review the amount only for an abuse of discretion or a misapplication of the law.[1153] The United States Supreme Court and the circuit courts have developed standards for calculating these awards.[1154] A trial court's failure to follow these standards, or even failure to show clearly that these standards were followed, may be an abuse of discretion.[1155]

At one time, courts commonly adjusted this lodestar figure up or down, based on a number of factors reflective of the quality of representation, results obtained, the responsibilities and risks undertaken, availability of counsel and similar considerations. However recent Supreme Court decisions have severely constricted the availability of upward adjustments to the lodestar, so that, with the exception of delay in receiving award proceeds, upward adjustments to the lodestar are largely unavailable outside the context of common fund recoveries.[1156] In contrast, the lodestar may still be adjusted downward under certain circumstances.[1157] However, most courts have refused to reduce fee awards based on the defense argument that the attorney fees should be proportional to the amount the client recovers.[1158] As these decisions and others show, in most FDCPA cases the attorney fees award exceeds the damages award.[1159]

11.13.8.2 Determining the Allowable Hours

11.13.8.2.1 General standards

The Supreme Court has noted that the FDCPA is a "a comprehensive and complex federal statute."[1160] The complexity

Aug. 3, 2015) (consumer counsel sought lodestar fee, $17,122.50, where debt collector apparently had low net worth and agreed to cease its FDCPA violation).

1149 *See* National Consumer Law Center, Consumer Class Actions § 19.3.5.1 (10th ed. 2020), *updated at* www.nclc.org/library.

1150 National Consumer Law Center, Consumer Class Actions § 19.3.6 (10th ed. 2020), *updated at* www.nclc.org/library. *See also* Stumpf v. Pyod, L.L.C., 2013 WL 5753829 (N.D. Ill. Oct. 23, 2013).

1151 National Consumer Law Center, Consumer Class Actions § 19.3 (10th ed. 2020), *updated at* www.nclc.org/library.

1152 Hensley v. Eckerhart, 461 U.S. 424, 533, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); Davis v. City & County of San Francisco, 976 F.2d 1536, 1544 (9th Cir. 1992). *See, e.g.*, Tenuto v. Transworld Sys., Inc., 2002 U.S. Dist. LEXIS 1764 (E.D. Pa. Jan. 31, 2002) (attorney fee of $140,950 or 35% of total settlement fund minus administrative costs was reasonable where lodestar was between $131,000 and $146,518). *Cf.* Cooper v. Retrieval-Masters Creditors Bur., Inc. 338 F. Supp. 3d 729 (N.D. Ill 2018) (while there is strong presumption that lodestar is reasonable, presumption can be overcome in rare circumstance where it does not adequately take into account certain factors; court reduced lodestar figure where consumer had obtained only $500 in statutory damages in FDCPA matter and no actual damages).

1153 *See* Paz v. Portfolio Recovery Assoc., 924 F.3d 949, 954 (7th Cir. 2019); Hepsen v. J.C. Christensen & Assoc., Inc., 394 Fed. Appx. 597 (11th Cir. 2010); Schlacher v. Law Offices of Phillip J. Rotche & Assoc., 574 F.3d 852 (7th Cir. 2009); Dowling v. Litton Loan Servicing L.P., 320 Fed. Appx. 442 (6th Cir. 2009). *See also* Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996); Carroll v. Wolpoff & Abramson, 53 F.3d 626 (4th Cir. 1995); Harper v. Better Bus. Serv., Inc., 961 F.2d 1561, 1564 (11th Cir. 1992); Mares v. Credit Bur., 801 F.2d 1197 (10th Cir. 1986); Martinez v. Idaho First Nat'l Bank, 755 F.2d 1376 (9th Cir. 1985).

1154 *See, e.g.*, Farrar v. Hobby, 506 U.S. 103, 114, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992); Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, ___ L. Ed. 2d ___ (1983) ("'[T]he most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'").

1155 *See* § 11.13.11, *infra*.

1156 Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 727–728, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987) (Delaware II); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 564–566, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986) (Delaware I); Blum v. Stenson, 465 U.S. 886, 897–902, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

1157 *See* § 11.13.8.2.4, *infra*. *See also* Larsen v. AR Res., 453 F. Supp. 3d 849 (E.D. Va. 2020) (lodestar reduced by $50,000 to account for travel time, non-legal tasks, and the low degree of success).

1158 *See* Appx E.3.3.1, *infra*. *See also* Cent. Pension Fund of the Int'l Union of Operating Eng'rs & Participating Emp'rs v. Ray Haluch Gravel Co., 745 F.3d 1, 6 (1st Cir. 2014); Archambault v. GC Serv. L.P., 2016 WL 6208395 (D. Me. 2016) (recognizing there are fixed litigation costs and a rigid proportionality test would allow defendants to "inflict[ ] with impunity small losses on the people whom they wrong"), *quoting* Orth v. Wis. State Employees. Union, Council 24, 546 F.3d 868, 875 (7th Cir. 2008). *But see* Cooper v. Retrieval-Masters Creditors Bur., Inc. 338 F. Supp. 3d 729 (N.D. Ill 2018); Barrows v. Tri-Fin., 2009 WL 3672069 (W.D.N.Y. Oct. 30, 2009) (fees for default judgment reduced to make proportionate to damages earned).

1159 *See* Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996); Cope v. Duggins, 203 F. Supp. 2d 650 (E.D. La. 2002); Silva v. Nat'l Telewire Corp., 2001 WL 1609387 (D.N.H. Dec. 12, 2001) (awarding $59,288.50 attorney fees and $5338.45 costs and expenses); Norton v. Wilshire Credit Corp., 36 F. Supp. 2d 216 (D.N.J. 1999); Appx. E.3.3, *infra*.

1160 *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 587, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) ("a comprehensive and complex federal statute such as the FDCPA that imposes

of the FDCPA may justify more time for preparation of an FDCPA case. Thus, a court has upheld a fee award, including hours spent by a prominent national co-counsel, over the defendant's objections that a co-counsel was not necessary and that the co-counsel's hours should not be included in the award.[1161] Time conferring with co-counsel in such cases is also compensable.[1162] The attorney fees award can include work performed before commencement of the litigation.[1163]

The allowable hours in the lodestar calculation are those hours claimed and documented by the attorney that were reasonably expended.[1164] In determining the number of hours that are reasonable to pursue a case, the relevant inquiry is "whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures."[1165] Excessive, non-productive, or duplicative time will not be allowed.[1166]

Courts often reduce or discount hours which are deemed duplicative of other compensated work,[1167] not sufficiently

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open-ended prohibitions on, *inter alia*, 'false, deceptive,' § 1692e, or 'unfair' practices, § 1692f").

1161 Anchondo v. Anderson, Crenshaw & Assoc., L.L.C., 616 F.3d 1098 (10th Cir. 2010); Archambault v. GC Serv. L.P., 2016 WL 6208395, at *6 (D. Me. 2016) ("the practice of joining with more experienced counsel can increase efficiency"); Douyon v. N.Y. Med. Health Care, P.C., 49 F. Supp. 3d 328 (E.D.N.Y. 2014) (multiple attorneys can be compensated if their work reflects distinct contributions); Long v. Nationwide Legal File & Serve, Inc., 2014 WL 3809401 (N.D. Cal. July 23, 2014) (rejecting effort to reduce claimed hours, noting that is not uncommon for multiple attorneys to appear at depositions and participate in deposition preparation); Arlozynski v. Rubin & Debski, P.A., 2011 WL 6319190 (M.D. Fla. Nov. 21, 2011) (noting in an FDCPA case that "[i]t is routine practice in federal litigation for multiple attorneys to be involved in the representation of each party"), *adopted*, 2011 WL 6318970 (M.D. Fla. Dec. 16, 2011); Johnson v. Weinstein & Riley, P.S., 2011 WL 1261578 (E.D.N.C. Mar. 30, 2011) (finding that staffing of case with two attorneys was not inherently excessive or resulting in needless duplication of effort). *See also* Hutchinson *ex rel.* Julien v. Patrick, 636 F.3d 1 (1st Cir. 2011) (disability rights suit); Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 297 (1st Cir. 2001) ("Given the complexity of modern litigation, the deployment of multiple attorneys is sometimes an eminently reasonable tactic."); Garcia v. Resurgent Capital Serv., L.P., 2012 WL 3778852 (N.D. Cal. Aug. 30, 2012) (finding it is not unusual for two attorneys to work together on such activities as conducting legal research, drafting motions, and preparing for trial; deducting some hours for fact that second attorney familiarized himself with case while "getting up to speed"); Cooper v. Sunshine Recoveries, Inc., 2001 WL 740765 (S.D.N.Y. June 27, 2001).

1162 Anchondo v. Anderson, Crenshaw & Assoc., 616 F.3d 1098, 1105 (10th Cir. 2010) (upholding award for time conferencing with co-counsel where supporting billing records "were neither facially excessive . . . nor conclusory"). *See, e.g.*, Jacobson v. Persolve, L.L.C., 2016 WL 7230873 (N.D. Cal. Dec. 14, 2016) (observing that "collaboration and brainstorming are an important aspect of legal practice"); Alvarado v. Hovg, L.L.C., 2016 WL 5462429, at *2 (N.D. Cal. Sept. 29, 2016) ("[i]t is reasonable for the members of the legal team to meet regularly to develop strategy, update one another on developments, and give and receive instructions regarding assignments"); Castro v. Lloyd & McDaniel, 2016 WL 5110046, at *8 (S.D. Ind. Sept. 19, 2016) (consultations among counsel is "often a necessary practice when it benefits the client").

1163 Hutchinson *ex rel.* Julien v. Patrick, 636 F.3d 1 (1st Cir. 2011).

1164 Hensley v. Eckerhart, 461 U.S. 424, 433 n.7, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (stating in civil rights case that the standards "are generally applicable in all cases in which Congress has authorized an award of attorney fees to a 'prevailing party'"); Gastineau v. Wright, 592 F.3d 747, 748 (7th Cir. 2010); Hepsen v. J.C. Christensen & Assoc., Inc., 394 Fed. Appx. 597 (11th Cir. 2010) (affirming reduction of hours to reasonable amount); Hallmark v. Cohen & Slamowitz, L.L.P., 378 F. Supp. 3d 222 (W.D.N.Y. 2019); Cooper v. Retrieval-Masters Creditors Bur., Inc. 338 F. Supp. 3d 729 (N.D. Ill 2018); *In re* Arbitration Between Okyere & Houslanger & Assoc., 2015 WL 4366865 (S.D.N.Y. May 28, 2015) (inconsistency in consumer counsel's time records reduced fee award); Harper v. Phillips & Cohen Assoc., Ltd., 2009 WL 3059113 (D. Colo. Sept. 21, 2009) (hours expended were reasonable); Brown v. Sterling & King, Inc., 2009 U.S. Dist. LEXIS 15599 (S.D. Tex. Feb. 27, 2009) (hours spent for default judgment were reasonable); Cooper v. Sunshine Recoveries, Inc., 2001 WL 740765 (S.D.N.Y. June 27, 2001); Hagan v. MRS Assoc., 2001 WL 531119 (E.D. La. May 15, 2001) (detailed analysis as to reasonable hours in case: 10 hours as reasonable for settlement efforts, 25 hours for discovery, 14.25 hours for legal research, and 5 hours for opening matter and preparing complaint). *See also* Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

1165 Grant v. Martinez, 973 F.2d 96 (2d Cir. 1992); Eades v. Kennedy, P.C. Law Offices, 343 F. Supp. 3d 104 (W.D.N.Y. 2018).

1166 Paz v. Portfolio Recovery Assoc., 924 F.3d 949, 956 (7th Cir. 2019) (affirming district court's reduction of fees because majority of attorneys' time was spent "pursuing an unsuccessful and ill-advised effort to win a much bigger payoff than was even remotely possible in the circumstances giving rise to [the plaintiff's] claims"); Ferrari v. U.S. Equities Corp., 661 Fed. Appx. 47 (2d Cir. 2016) (affirming lower court's reduction of compensable hours for time spent on initially deficient complaint and motion practice related thereto, but reversing double deduction for these hours, as there was no finding of misconduct by consumer's attorney); Giovannoni v. Bidna & Keys, 255 Fed. Appx. 124 (9th Cir. 2007) (affirming reduction of the claimed lodestar hours by half because, *inter alia*, attorney unreasonably prolonged settlement discussions and was inefficient in work performed); Davis v. City & County of San Francisco, 976 F.2d 1536, 1544 (9th Cir. 1992); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); Larsen v. AR Res., 453 F. Supp. 3d 849 (E.D. Va. 2020); Gray v. Midland Funding, L.L.C., 447 F. Supp. 3d 724 (N.D. Ill. 2019); *In re* Arbitration Between Okyere & Houslanger & Assoc., P.L.L.C., 2015 WL 4366865 (S.D.N.Y. May 28, 2015); Danow v. Law Office of David E. Borback, P.A., 634 F. Supp. 2d 1337 (S.D. Fla. 2009) (awarding fees for two attorneys; third attorney was "second chair" at trial and his services were superfluous), *aff'd on other grounds*, 367 Fed. Appx. 22 (11th Cir. 2010); Zhang v. GC Serv., L.P., 537 F. Supp. 2d 805 (E.D. Va. 2008) (fee application reduced based on duplication of efforts, billing attorney time for clerical or paralegal work, and unexplained time entries; court found forty-six hours reasonably expended by lead counsel in this uncomplicated case settled fairly early after filing).

1167 Fair Hous. Council v. Landow, 999 F.2d 92 (4th Cir. 1993); Davis v. City & County of San Francisco, 976 F.2d 1536, 1544 (9th Cir. 1992) (hours claimed must reflect distinct contribution of each lawyer); Dechert *ex rel.* Estate of Oyler v. The Cadle Co., 2004 WL 2999112, at *5 (S.D. Ind. Nov. 10, 2004) (reducing fees for duplication, "given that this was a matter arising under a strict liability statute and given that there are an ample number of local practitioners well versed and experienced in the FDCPA"); Cooper v. Sunshine Recoveries, Inc., 2001 WL 740765 (S.D.N.Y. June 27, 2001).

itemized,[1168] unnecessary, or inefficient.[1169] Indeed, a few courts view reducing the award below what would otherwise be a reasonable fee as an appropriate sanction for a grossly excessive fee request.[1170] Courts may also devalue work which is perceived as not requiring a lawyer of the expertise, experience, and reputation of the lawyer who claims the time,[1171] although most courts will not require an attorney to so parse time expenditures.[1172]

Practical considerations in regard to fee applications may be found at § 11.13.8.1, *infra*. The issue of whether reductions in fees will be imposed when the consumer prevails on some, but not all claims is discussed at § 11.13.6.2.3, *infra*.

An expert's affidavit on the reasonableness of the hours expended may be useful to the court's determination of this issue.[1173] Courts are far more likely to disallow hours claimed if there are no contemporaneous time records, or if those records fail to specify the nature of the task, the time expended, and the general subject matter involved.[1174]

A defendant who litigates a case vigorously cannot later complain about the resulting hours that consumer's counsel needed to respond.[1175] In evaluating the reasonableness of the hours devoted to the case, some courts consider the amount of time spent by defense counsel on the case, while others discount the relevance of such a comparison.[1176]

Although some courts have held that consumer attorney fees should not be awarded for hours accruing after the consumer inappropriately rejected an offer of judgment,[1177] absent a showing of bad faith, the lodestar should not be adjusted downward for refusing a settlement offer that was lower than the judgment the consumer obtained.[1178] In one case, for

1168 *E.g.*, Lyon v. Chase Bank USA, 656 F.3d 877 (9th Cir. 2011) (court may reduce fee requested if it is only supported by block-billing statements of relevant activities); Larsen v. AR Res., Inc., 453 F. Supp. 3d 849 (E.D. Va. 2020); O Centro Espirita Beneficente União Do Vegetal in U.S. v. Duke, 343 F. Supp. 3d 1050 (D.N.M. 2018) (block billing does not call for disallowing entire sum sought); Mayer v. RSB Equity Group, L.L.C., 2011 WL 2650185, at *2 (C.D. Cal. July 5, 2011) (reducing fees by 30% where plaintiff's counsel used "block-billing" that "makes it impossible for the Court to determine whether specific entries are excessive or duplicative"); Clark v. Universal Debt Solutions, Inc., 2007 WL 2386581 (D. Haw. Aug. 16, 2007) (hours reduced because some time was billed in quarter-hour increments); Francis v. Snyder, 2006 WL 1236052 (N.D. Ill. May 4, 2006) (reducing attorney fees for block billing, grouping together time for different tasks, and vague entries); Sparkman v. Zwicker & Assoc., P.C., 2006 WL 463939 (E.D.N.Y. Feb. 27, 2006) (lack of acceptable time records). *But see* Douyon v. N.Y. Med. Health Care, P.C., 49 F. Supp. 3d 328 (E.D.N.Y. 2014) (rejecting defense argument that time records referring to such activities as "continue to revise [summary judgment] Memorandum of Law" were too vague, although then applying a 10% reduction across the board for block billing); Gradisher v. Check Enforcement Unit, Inc., 2003 WL 187416 (W.D. Mich. Jan. 22, 2003) (even though there was some duplication of attendance by local and out-of-state counsel, the duplication would not be the basis for reducing the award when joint attendance was necessary for them to confer on the case and the use of local counsel reduced the total hours spent). *See also* Samms v. Abrams, 198 F. Supp. 3d 311, 321 (S.D.N.Y. 2016) ("stating that a certain amount of time was spent working on a particular pleading or motion is sufficient for the Court to evaluate the merit of the entry").

1169 Envtl. Defense Fund v. Reilly, 1 F.3d 1254, 1258 (D.C. Cir. 1994); Fair Hous. Council v. Landlow, 999 F.2d 92 (4th Cir. 1993); Keenan v. City of Philadelphia, 983 F.2d 459 (3d Cir. 1992); Mares v. Credit Bur. of Raton, 801 F.2d 1197, 1205 (5th Cir. 1986) (TILA case); Varner v. Century Fin. Co., 738 F.2d 1143 (11th Cir. 1984) (TILA case); Valencia v. Affiliated Group, Inc., 674 F. Supp. 2d 1300 (S.D. Fla. 2009) (plaintiffs should not be rewarded for holding out for additional attorney fees after refusing settlement demand offering maximum amount of statutory damages awardable, as well as attorney fees and costs). *But see* Terry v. C&D Complete Bus. Solutions 2011 WL 2144614, at *1 (W.D. Mo. May 31, 2011) ("While it might be easy to second-guess or "Monday morning quarterback" an attorneys' fee request, the issue is reasonableness, not whether the work was perfect or even perfectly efficient.").

1170 Davis v. Credit Bur. of the South, 908 F.3d 972, 977 (5th Cir. Nov. 16, 2018) (denial of all attorney fees where quality of pleadings and brief on appeal along with limited success on simple claim did not warrant extraordinary $450 hourly rate, 156.55 hours, and request for $130,410 in attorney fees); Baylor v. Mitchell Rubenstein & Assoc., 857 F.3d 939 (D.C. Cir. 2017) (Henderson, J., concurring) ($221,155 attorney fee request in connection with accepted offer of judgment was excessive due to attorney's billing for unnecessary or excessive work and seeking hourly rate $125 above that charged to client); Eades v. Kennedy, PC. Law Offices, 343 F. Supp. 3d 104, 106 (W.D.N.Y. 2018) (counsel's hours more extensive than necessary allowing for "an across-the-board reduction in the amount of hours for which compensation is sought").

1171 Envtl. Defense Fund v. Reilly, 1 F.3d 1254 (D.C. Cir. 1994); Fair Hous. Council v. Landlow, 999 F.2d 92 (4th Cir. 1993); Varner v. Century Fin. Co., 738 F.2d 1143 (11th Cir. 1984); Aslam v. Malen & Assoc., 669 F. Supp. 2d 275 (E.D.N.Y. 2009) (finding that jury instructions had been lifted from this treatise).

1172 Davis v. City & County of San Francisco, 976 F.2d 1536, 1548 (9th Cir. 1992).

1173 *See* § 11.13.10.2, *infra* (preparation of the fee application). *See* Larsen v. AR Res., Inc., 453 F. Supp. 3d 849, 852 (E.D. Va. 2020) (affidavit verifying prevailing markets rates would have been helpful to support request for alternative rate).

1174 *See* § 11.13.10.2, *infra*.

1175 *See id.*

1176 Tikan v. Asset Acceptance, L.L.C., 2016 WL 1212641, at *2 (E.D. Mich. Feb. 12, 2016) (purpose of fee shifting statutes such as FDCPA is to ensure that plaintiffs whose damages may be relatively small may nevertheless obtain counsel to vindicate their federal rights), *adopted*, 2016 WL 1182771 (E.D. Mich. Mar. 28, 2016).

1177 Lee v. Thomas & Thomas, 109 F.3d 302 (6th Cir. 1997). *See also* Cooper v. Retrieval-Masters Creditors Bur., Inc., 338 F. Supp. 3d 729 (N.D. Ill 2018); Paz v. Portfolio Recovery Assoc., 2017 WL 6523151 (N.D. Ill. Sept. 29, 2017) (where plaintiff rejected offer of judgment for $2500 more than maximum statutory damages and attorney fees through date of acceptance, and jury awarded no actual damages, but only maximum $1000 in statutory damages, court awarded just $10,875 of the $187,410 requested), *aff'd*, 924 F.3d 949 (7th Cir. 2019); Guerrero v. Hudson & Keyse, L.L.C., 2009 U.S. Dist. LEXIS 4921 (W.D. Tex. Jan. 20, 2009) (reduction for attorney time spent after offer of judgment); § 11.7, *supra*.

1178 *See* Dowling v. Litton Loan Servicing L.P., 320 Fed. Appx. 442 (6th Cir. 2009); Armstrong v. Receivables Performance Mgmt., L.L.C., 2012 WL 404893, at *1 (S.D. Ohio Feb. 8, 2012) (rejecting argument that fees should be limited to those accrued at time of pre-litigation settlement offer: "pre-suit settlement negotiations became irrelevant when Plaintiff filed her complaint"; also noting that defendant had rejected amount of fees requested pre-suit); Terry v. C&D Complete Bus. Solutions 2011 WL 2144614, at *2 (W.D. Mo. May 31, 2011) ("While the Court encourages parties to settle their disputes, it is ultimately not relevant to the determination of reasonable attorneys' fees. The question is the reasonableness of the requested fees—not whether

example, the court rejected the defendant's argument that the plaintiff's attorney exhibited bad faith in declining his offers of settlement: "Defendant could have made a formal offer of judgment at the inception of this lawsuit thereby avoiding any liability for costs, including attorney's fee, incurred after the offer was made. Instead, Defendant made the decision to continue to try to negotiate a settlement without admission of liability which had the effect of prolonging the litigation and increasing Plaintiff's attorney's fees."[1179] The court found that the defendant's "insistence on settling the matter without any admission of liability significantly contributed to the delay in the resolution of this case and the accrual of additional attorney's fees."[1180]

Allowable hours include not only attorney time, but also time spent by paralegals and law clerks who work on the case (although reimbursed at a lower hourly rate than attorneys).[1181] An attorney's travel time should be compensable, sometimes at a reduced hourly rate.[1182]

there was some possibility at some point in time to reduce the fees by settling. Requiring plaintiffs to accept a settlement offer or face a reduction in their attorneys' fees would disregard the fee-shifting policy enacted by Congress."); Bell v. Midland Credit Mgmt., Inc., 2011 WL 673919 (W.D. Okla. Feb. 17, 2011) (questioning and distinguishing *Lee v. Thomas and Thomas*, where plaintiff rejected defendant's pre-litigation settlement offer of maximum statutory damages and attorney fees to date, but plaintiff, through litigation, recovered an award of damages in excess of statutory amount); Danow v. Law Office of David E. Borback, P.A., 634 F. Supp. 2d 1337 (S.D. Fla. 2009) (ignoring $1000 offer of judgment as basis to reduce fees because it was not "less favorable" than $1000 jury award), *aff'd*, 367 Fed. Appx. 22 (11th Cir. 2010).

1179 Cabala v. Morris, 2012 WL 3656364, at *4 (D. Conn. Aug. 24, 2012), *aff'd on other grounds*, 2013 WL 6066412 (2d Cir. Nov. 19, 2013).

1180 *Id. See also* Garcia v. Resurgent Capital Serv., L.P., 2012 WL 3778852 (N.D. Cal. Aug. 30, 2012) (rejecting the contention that plaintiff's fee award should be reduced based on settlement negotiations considering conflicting perspectives of settlement proceedings on both sides, and lack of evidence on record of bad faith).

1181 Missouri v. Jenkins *ex rel.* Agyei, 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989). *See, e.g.*, Castro v. Lloyd & McDaniel, 2016 WL 5110046 (S.D. Ind. Sept. 19, 2016) ($200/hour for paralegal time); Langhorne v. Takhar Grp. Collection Serv., Ltd., No. 13-CV-231C, 2016 WL 1177980, at *2 (W.D.N.Y. Mar. 28, 2016) ("The court finds the number of hours and the hourly rates ($ 300 per hour for experienced attorney and $ 50 per hour for paralegal) to be reasonable, given the prevailing market rates in this district for FDCPA cases in the recent past."); Zoeckler v. Credit Claims & Collections, Inc., 1983 U.S. Dist. LEXIS 20363 (N.D. Ga. Feb. 1, 1983) (FDCPA case; only paralegal work for tasks traditionally done by attorney); Postow v. Oriental Bldg. Ass'n, 455 F. Supp. 781 (D.D.C. 1978), *aff'd sub nom.* Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370 (D.C. Cir. 1980) (TILA case). *See, e.g.*, Douyon v. N.Y. Med. Health Care, P.C., 49 F. Supp. 3d 328 (E.D.N.Y. 2014) (awarding $95 per hour for paralegal in FDCPA litigation); Ward v. G. Reynolds Sims & Assoc., P.C., 2014 WL 4798935 (E.D. Mich. Sept. 26, 2014) (awarding $140 per hour for paralegals, noting that such work saves plaintiff fees).

1182 Hutchinson *ex rel.* Julien v. Patrick, 636 F.3d 1 (1st Cir. 2011); Johnson v. Credit Int'l, Inc., 257 Fed. Appx. 8 (9th Cir. 2007); Davis v. City & County of San Francisco, 976 F.2d 1536, 1544 (9th Cir. 1992); *In re* Pine, 705 F.2d 936 (7th Cir. 1983); Larsen v. AR Res., Inc., 453 F. Supp. 3d 849, 853 (E.D. Va. 2020) (reduced by 50%); Alvarado v. Hovg, L.L.C., 2016 WL 5462429 (N.D. Cal. Sept. 29, 2016) (not reducing rate);

11.13.8.2.2 Examples of allowable hours

Courts have found expending the following number of hours to be allowable:[1183]

- 28.7 hours in travel time to conduct in-person depositions;[1184]
- 8 hours for deposition, 9 hours for preparing jury instructions, and 37 hours of trial prep for 3-day trial;[1185]
- 7 hours in case where settlement was $1001—1.0 hour to meet with client, 1.25 hours to obtain and review the relevant documents, 2.25 hours to draft the complaint and update the governing case law, 1.0 hour to review the offer of judgment and discuss it with client, and 1.5 hours for myriad ministerial tasks;[1186]
- 1204.8 total hours for a multiple-year complex consumer class action including contentious discovery, motion practice, and numerous conferences and correspondence over about seven years;[1187]
- 11.5 hours for opening the file, researching potential claims, and drafting the complaint;[1188]
- 25 hours to draft an FDCPA complaint that involved mortgage and foreclosures issues;[1189]
- 13.4 hours for case settled in shortly after the amended complaint;[1190]

Douyon v. N.Y. Med. Health Care, P.C., 49 F. Supp. 3d 328 (E.D.N.Y. 2014) (50% of time spent traveling); Santiago v. Equable Ascent Fin., 2013 WL 3498079 (N.D. Cal. July 12, 2013) (FDCPA action; awarding hourly rate of $475 to plaintiff's out-of-state attorney, including for travel time); *In re* Mattera, 128 B.R. 107 (Bankr. E.D. Pa. 1991) (travel time allowed but deduction made), *aff'd*, 144 B.R. 687 (E.D. Pa. 1992). *Cf.* Silva v. Nat'l Telewire Corp., 2001 WL 1609387 (D.N.H. Dec. 12, 2001) (generally, travel time was not compensated at full professional rate; 50% of professional rate was reasonable).

1183 *See* Appx. E.3.3.3, *infra*.

1184 Larsen v. AR Res., Inc., 453 F. Supp. 3d 849, 853 (E.D. Va. 2020) (reduced from 57.4 hours).

1185 Larsen v. AR Res., Inc., 453 F. Supp. 3d 849, 854 (E.D. Va. 2020).

1186 Gray v. Midland Funding, L.L.C., 447 F. Supp. 3d 724, 726 (N.D. Ill. 2019).

1187 Hallmark v. Cohen & Slamowitz, L.L.P., 378 F. Supp. 3d 222, 231 (W.D.N.Y. 2019).

1188 *See* Campista v. Creditors Fin. Group L.L.C., 2014 WL 127083 (D. Or. Jan. 13, 2014). *See also* Reith v. Allied Interstate, Inc., 2012 WL 5458007 (S.D.N.Y. Nov. 8, 2012) (7.5 hours for all timekeepers); Castro v. First Nat'l Collection Bur., Inc., 2012 WL 4468318 (D. Colo. Sept. 27, 2012) (12 hours); Bosket v. NCO Fin. Sys., Inc., 2012 WL 4093023 (N.D.N.Y. Sept. 17, 2012) (7.5 hours of attorney time to prepare case and complaint and accept offer of judgment made at time of answer); Pinkham v. Prof'l Claims Bur., Inc., 367 F. Supp. 2d 338 (E.D.N.Y. May 2, 2005) (7.3 hours of work prior to accepting offer of judgment); Riter v. Moss & Bloomberg, Ltd., 2000 WL 1433867 (N.D. Ill. Sept. 26, 2000) (5 hours to draft five-page complaint that was similar to one filed before).

1189 Marshall v. Reisman, 2013 WL 1563335 (E.D.N.Y. Mar. 25, 2013), *adopted*, 2013 WL 1561478 (E.D.N.Y. Apr. 12, 2013).

1190 *See* Cotner v. Buffaloe & Assoc., 2012 WL 1670552 (E.D. Tenn. May 14, 2012) (13.4 hours to file complaint and amended complaint in case that was settled shortly after scheduling conference). *See also* Flora v. Plotkin & Plotkin, P.C., 2012 WL 6019311 (D. Colo. Dec. 4, 2012) (14 hours); Nuanes v. NCC Bus. Serv., Inc., 2012 WL 5464598 (D. Colo. Nov. 9, 2012) (10 hours); Howard v. Midland Credit Mgmt., Inc., 2012 WL 4359361 (D. Colo. Sept. 24, 2012) (10.1 hours); Ellis v. Midland

- 36 hours and more to obtain a default judgment;[1191]
- 27 hours for prevailing in arbitration;[1192]
- 46 hours for an individual case settled during discovery;[1193]
- 229 hours for a class action settled during discovery;[1194]
- 205.4 hours in case determined by summary judgment;[1195]
- 155 hours after accepting an offer of judgment just before trial involving taped collection calls and a vigorous defense;[1196]
- 172 hours where an offer of judgment was accepted;[1197]
- 189 hours in a settled case;[1198]
- 730 hours for obtaining a jury verdict;[1199]

Credit Mgmt., Inc., 2012 WL 4356251 (D. Colo. Sept. 24, 2012) (8.4 hours).

1191 French v. Corporate Receivables, Inc., 489 F.3d 402 (1st Cir. 2007). *See also* Penning v. Intrinsictel L.L.C., 2017 WL 3172853, at *2 (W.D. Mich. June 7, 2017) (on default, awarded $46,160 in attorney fees, based on 115 hours of work, requested hourly rate of $400, and $2,240.25 in costs where "the admitted scheme was a complicated one involving many actors"), *adopted*, 2017 WL 3151231 (July 25, 2017); Buskirk v. Premium Recovery Group, Inc., 2016 WL 796889 (D.N.J. Feb. 29, 2016) ($7,267.50 attorney fees at hourly rate of $450); Crider v. Pac. Acquisitions & Assoc., 2015 WL 6689391 (N.D. Cal. Nov. 3, 2015) (25 hours); Middlesworth v. Oaktree Collections, Inc., 2009 WL 3720884 (E.D. Cal. Nov. 3, 2009) (13 hours); Basinger-Lopez v. Tracy Paul & Assoc., 2009 WL 1948832 (N.D. Cal. July 6, 2009) (16 hours); Hartung v. J.D. Byrider, Inc., 2009 WL 1876690 (E.D. Cal. June 26, 2009) (23 hours); Clark v. Universal Debt Solutions, Inc., 2007 WL 2386581 (D. Haw. Aug. 16, 2007) (30 hours); Knight v. Integrity Resolution Group, L.L.C., 2007 WL 2345249 (N.D. Ga. Aug. 14, 2007) (25 hours); Gervais v. O'Connell, Harris & Assoc., Inc., 297 F. Supp. 2d 435 (D. Conn. 2003) (27 hours).

1192 Moyer v. Turnbrook Assoc., Inc., 2005 WL 2660353 (E.D. Pa. Oct. 17, 2005) (awarding $6461.87 in attorney fees for 27 hours spent on client intake, research, pleadings, and arbitration after entry of arbitration award of $1000 for violation of FDCPA). *See also* Nicaisse v. Mel S. Harris & Assoc., 2015 WL 5561296 (E.D.N.Y. Sept. 19, 2015) (awarding consumer $13,700 in attorney fees based on 63.5 hours and $2316 in costs as case was strongly litigated by both sides and generated substantial motion practice, depositions, a court appearance before the magistrate judge, and an arbitration hearing).

1193 *See* Rubenstein v. Nat'l Recovery Agency, Inc., 2012 WL 1425144 (C.D. Cal. Apr. 25, 2012). *See also* Stockman v. Global Credit & Collection Corp., 2015 WL 4999851 (N.D. Ill. Aug. 21, 2015) (upon settlement of this FDCPA/TCPA case, consumer was awarded attorney fees of $14,366.25 for 63.85 hours of compensable work and costs of $445); Ochoa v. Mistovich, 2012 WL 6720682 (N.D. Ill. Dec. 27, 2012) ($2794 in attorney fees); Holzhauer v. Hayt, Hayt & Landau, L.L.C., 2012 WL 3286059 (D.N.J. Aug. 10, 2012) (34.6 hours).

1194 De La Paz v. Rubin & Rothman, L.L.C., 2013 WL 6184425 (S.D.N.Y. Nov. 25, 2013).

1195 Hagen v. Messerli & Kramer, P.A., 2015 WL 1963057 (D. Minn. Apr. 30, 2015) (205.4 hours of work of consumer's counsel, a University of Minnesota's Legal Clinic professor and four student attorneys assigned to case). *See also* Pape v. Law Offices of Frank N. Peluso, P.C., 2016 WL 755602 (D. Conn. Feb. 25, 2016) (awarding consumer attorney fees of $34,100 based on 85.25 hours at hourly rate of $400 (based on consumer counsel's 45 years of arcane FDCPA litigation), after $1000 statutory damage award pursuant to summary judgment in his favor); Christopher v. RJM Acquisitions L.L.C., 2015 WL 3960163 (D. Ariz. June 30, 2015) (about 60 hours of work; $15,333); Johnson v. CFS II, Inc., 2013 WL 6700394 (N.D. Cal. Dec. 19, 2013) (147 hours); Lamberson v. Bank of Am. Corp., 2012 WL 4129807 (D. Minn. Sept. 19, 2012) ($17,458 in fees); Cabala v. Morris, 2012 WL 3656364 (D. Conn. Aug. 24, 2012) ($32,489.29 in fees), *aff'd*, 2013 WL 6066412 (2d Cir. Nov. 19, 2013); Rodriguez v. Florida First Fin. Group, Inc., 2009 WL 535980 (M.D. Fla. Mar. 3, 2009) (109 hours); Nelson v. Select Fin. Serv., Inc., 2006 WL 1672889 (E.D. Pa. June 9, 2006) (68 hours); Owens v. Howe, 365 F. Supp. 2d 942 (N.D. Ind. 2005) (53.5 hours); Goins v. JBC & Assoc., P.C., 2005 WL 3536147 (D. Conn. Nov. 28, 2005) (55 hours); Dowling v. Kucker Kraus & Bruh, L.L.P., 2005 WL 1337442 (S.D.N.Y. June 6, 2005) (95 hours; 11 hours for investigation and discovery, 15 hours for discovery, 56 hours for summary judgment, and 13 hours for the costs and fees; reduced fee application to just over half); Jones v. Vest, 2000 WL 33797103 (E.D. Va. Nov. 7, 2000) (87 hours).

1196 Blalock v. Maximum Sec. Alarm, Inc., 2012 WL 5467531 (D. Or. Nov. 9, 2012) (155 hours (reduced from 182), including 11.7 hours for the fee petition). *See also* Garcia v. Resurgent Capital Serv., L.P., 2012 WL 3778852 (N.D. Cal. Aug. 30, 2012) ($187,292.25 in attorney fees reflecting 565 hours of attorney time plus $16,470 for postjudgment work on fee application); Stair *ex rel.* Smith v. Thomas & Cook, 2009 WL 1635346 (D.N.J. June 10, 2009) (93 hours); Cancio v. Fin. Credit Network, Inc., 2005 WL 1629809 (N.D. Cal. July 6, 2005) ($10,000 in fees reducing compensable hours to eight for complaint, seven for case management, eight for discovery, one for acceptance of Rule 68 offer, and 7.8 for attorney fee petition); Caputo v. Prof'l Recovery Serv., Inc., 2004 WL 1503953 (D. Kan. June 9, 2004) (awarding over $87,000 in fees).

1197 Thorpe v. Collection Info. Bur., Inc., 1996 WL 806149 (S.D. Fla. Mar. 8, 1996). *See also* Howard v. Midland Credit Mgmt., Inc., 2012 WL 4359361 (D. Colo. Sept. 24, 2012) (awarding $2525); Livingston v. Midland Credit Mgmt., Inc., 2012 WL 4328367 (D. Colo. Sept. 20, 2012) (following plaintiff's acceptance of offer of judgment, awarding attorney fees in the amount of $1900 at rate of $250 per hour); Giovannoni v. Bidna & Keys, a Prof'l Law Corp., 2006 WL 279345 (N.D. Cal. Feb. 3, 2006) (about twelve attorney and three law clerk hours were reasonably expended where consumer rejected first, but accepted second offer of judgment for $1001); Smith v. Perimeter Credit, L.L.C., 2004 WL 1987231 (N.D. Ga. Aug. 27, 2004) (27 hours).

1198 Rodriguez v. Pressler & Pressler, L.L.P., 2009 WL 689056 (E.D.N.Y. Mar. 16, 2009). *See also* Bauer v. Midland Credit Mgmt., Inc., 2012 WL 6733649 (M.D. Fla. Dec. 4, 2012) (55 hours in three cases settled before discovery), *adopted*, 2012 WL 6733021 (M.D. Fla. Dec. 28, 2012); Bishop-Melvin v. First Am. Acceptance Co., L.L.C., 2012 WL 3578173 (D.N.J. Aug. 20, 2012) (23 hours in case settled shortly after complaint was filed); Gupta v. Arrow Fin. Serv., L.L.C., 2012 WL 1060054 (D. Minn. Mar. 29, 2012) (105 attorney hours in obtaining settlement after discovery was compelled); Silver v. Law Offices Howard Lee Schiff, P.C., 2010 WL 5140851 (D. Conn. Dec. 16, 2010) (73.65 hours); Dennis v. Syndicated Office Sys., Inc., 2010 WL 3632478 (S.D. Fla. Sept. 14, 2010) (22.5 hours); Morris v. I.C. Sys., Inc., 2009 WL 1362594 (E.D. Pa. May 15, 2009) (approximately 200 hours); Sakaria v. FMS Inv. Corp., 2009 WL 1322356 (D. Haw. May 12, 2009) (26 hours); Bernard v. Int'l Portfolio Mgmt., Inc., 2005 WL 1840157 (S.D. Fla. July 25, 2005) (83 hours).

1199 Delalat v. Syndicated Office Sys., Inc., 2014 WL 930162 (S.D. Cal. Jan. 28, 2014) (730 hours). *See also* Sherwood v. BRT Corp., 2015 WL 6437850 (D. Colo. Oct. 23, 2015) (awarding consumer $31 in actual damages, $1000 in statutory damages, and $26,647 in attorney fees for 140.3 hours in this case that went to trial); Rockwell v. Talbott, Adams & Moore, Inc., 2006 WL 436041 (D. Neb. Feb. 21, 2006) (200 hours of legal work, substantial reduction from amount sought due to plaintiff's limited success following two-day jury trial); Dowling v. Litton Loan Servicing L.P., 320 Fed. Appx. 442 (6th Cir. 2009) (165.2 hours after three-day bench trial); Clark v. Quick Collect, Inc., 2006 WL 572157 (D. Or. Mar. 6, 2006) (reducing hours by one-third; 98 hours to prepare case).

- 565 hours in case settled after preparing for a trial;[1200]
- 63 hours to defend an appeal;[1201]
- 2.5 hours to enforce a settlement agreement;[1202]
- 27.1 hours for postjudgment collection activities;[1203]
- 4 hours for preparing motion for attorney fees.[1204]

11.13.8.2.3 Computing allowable hours where consumer does not prevail on all claims

The total number of hours spent on the case will be reduced where the consumer failed to prevail on claims that were unrelated to the successful FDCPA claim and these claims are based on different facts and legal theories, so that work on one claim does not help the attorney prepare for the other.[1205] Conversely, where there is a common core of facts or where the legal theories are related, it is impractical to separate the attorney's time for each claim.[1206] At least when a case is settled, a court need not "scrutinize" every pleading and paper "to determine which involved only successful legal work."[1207]

A fee award should not be reduced based on unsuccessful motion practice. "It is entirely reasonable if not part and parcel of attorney's obligation to zealously advocate to research and pursue strategies that an advocate may ultimately conclude is advantageous to abandon or withdraw. Where the strategy or work was not frivolous in the first instance, an attorney should be entitled to those fees as time reasonably spent pursuing the matter."[1208]

Where attorneys have obtained excellent results, they should recover a fully compensatory fee for work on all the claims, FDCPA and non-FDCPA, even though many of these claims were not successful or would not independently result in attorney fees for prevailing consumers.[1209] The result is what matters,[1210] and the consumer's attorney should not be penalized for raising alternative legal grounds that the court dismisses or does not reach.[1211] On the other hand, a reduced

1200 Garcia v. Resurgent Capital Serv., L.P., 2012 WL 3778852 (N.D. Cal. Aug. 30, 2012) (awarding $187,292.25 in attorney fees reflecting 565 hours of attorney time and $9844.40 in costs, plus $16,470 for postjudgment work on the fee application in a case that was settled by cocounsel after preparing for five-day trial after parties' stipulation to damages of $50,000). *See also* Dunaway v. JBC & Assoc., Inc., 2005 WL 3465665 (E.D. Mich. Dec. 19, 2005) (262.8 hours in winning summary judgment, preparing for trial on damages, and settling case before trial).

1201 *See* Hooper v. Capital Credit & Collection Serv., Inc., 2005 WL 1899380 (D. Or. Aug. 8, 2005) (78.1 hours); Shula v. Lawent, 2004 WL 2044279 (N.D. Ill. Sept. 2, 2004).

1202 Kelly v. Jormandy, Inc., 2005 WL 3177730 (W.D. Va. Nov. 29, 2005) (experienced consumer attorney was entitled to fees for 2.5 hours at $300 per hour for enforcing settlement agreement).

1203 *See* Collins v. Bowman, Heintz, Boscia & Vician P.C., 2012 WL 1142442 (S.D. Ind. Mar. 8, 2012) (repeated failures to pay offer of judgment), *adopted*, 2012 WL 1142560 (S.D. Ind. Apr. 4, 2012).

1204 Midwest Disability Initiative v. Nelmatt, L.L.C., 344 F. Supp. 3d 1047 (D. Minn. 2018) (ADA-compliance action where court compared analysis to FDCPA cases; reduced from 6.5 hours requested).

1205 *See* Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); Eades v. Kentucky, PC. Law Offices, 343 F. Supp. 3d 104, 107 (W.D.N.Y. 2018); *In re* Arbitration Between Okyere & Houslanger & Assoc., P.L.L.C., 2015 WL 4366865 (S.D.N.Y. May 28, 2015). *See also* Cooper v. Retrieval-Masters Creditors Bur., Inc., 338 F. Supp. 3d 729, 738 (N.D. Ill 2018) (where plaintiff was denied actual damages and provided only limited statutory damages, court reduced fee by 20%).

1206 *See* Larsen v. AR Res., Inc., 453 F. Supp. 3d 849, 853 (E.D. Va. 2020) (no reduction in attorney fees where the TCPA claim (abandoned) and FDCPA claim arose from a common nucleus of facts and required overlapping work); West v. Americas Processing Ctr., Inc., 2018 WL 4610662 (W.D. Va. July 25, 2018); Daley v. A & S Collection Assoc., Inc., 2010 WL 5137834 (D. Or. Dec. 10, 2010). *See also* Karr v. Med-I Solutions, L.L.C., 2014 WL 5392098, at *4 (S.D. Ind. Oct. 22, 2014) (rejecting collection agency's request for wholesale percentage reduction for work performed on unsuccessful claim, since both claims were interrelated and much of legal work performed would have been performed regardless of whether unsuccessful claim existed); Long v. Nationwide Legal File & Serve, Inc., 2014 WL 3809401 (N.D. Cal. July 23, 2014) (no reduction for unsuccessful claims which arose out of same alleged course of conduct and were based on related legal theories); Rousseau v. Morris, 2014 WL 941476 (D. Conn. Mar. 11, 2014) (awarding fees for time spent on unsuccessful, but related state law claim); Garcia v. Resurgent Capital Serv., L.P., 2012 WL 3778852 (N.D. Cal. Aug. 30, 2012) (time expended on discovery regarding incidents outside statute of limitations was not deducted, since these incidents were admissible as related to plaintiff's claims to show background and establish foundation for other evidence, as well as to show plaintiff's vulnerable state of mind and establish extent of general damages); Bryant v. Cab Asset Mgmt., L.L.C., 2011 WL 1331267 (S.D. Fla. Apr. 6, 2011) (holding that 50% reduction of attorney fees was not warranted just because plaintiff was entitled to fees on just one of two claims and facts and legal theories with respect to plaintiff's Florida CCPA and FDCPA claims were interrelated, *citing* Hensley v. Eckerhart, 461 U.S. 424, 434–435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)), *adopted*, 2011 WL 1598732 (S.D. Fla. Apr. 27, 2011).

1207 Hatfield v. AIH Receivable Mgmt. Serv., Inc., 2013 WL 4761047 (W.D. Mo. Mar. 28, 2013) (noting that AIH's argument—that an attorney cannot recover for "unsuccessful legal work"—is not supported by any case law).

1208 Cabala v. Morris, 2012 WL 3656364, at *8 (D. Conn. Aug. 24, 2012), *aff'd*, 2013 WL 6066412 (2d Cir. Nov. 19, 2013). *See also* M.T. *ex rel.* Todd v. Accounts Recovery Bur., Inc., 2012 WL 3764039 (S.D. Ind. Aug. 8, 2012) (no reduction was made for preparing discovery that was not served), *adopted*, 2012 WL 3764036 (S.D. Ind. Aug. 28, 2012); A.M. *ex rel.* Mundy v. Accounts Recovery Bur., Inc., 2012 WL 3764034 (S.D. Ind. Aug. 8, 2012) (award included time for preparing discovery where the case settled before discovery was served), *adopted*, 2012 WL 3764028 (S.D. Ind. Aug. 28, 2012).

1209 *See* Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."); Dowling v. Litton Loan Servicing L.P., 320 Fed. Appx. 442 (6th Cir. 2009); Harris v. Marhoefer, 24 F.3d 16 (9th Cir. 1994); Rousseau v. Morris, 2014 WL 941476 (D. Conn. Mar. 11, 2014) (awarding fees for time spent on unsuccessful, but related state law claim); Hatfield v. AIH Receivable Mgmt. Serv., Inc., 2013 WL 4761047 (W.D. Mo. Mar. 28, 2013) (rejecting argument that attorney fees could be awarded only for successful claims); Cooper v. Sunshine Recoveries, Inc., 2001 WL 740765 (S.D.N.Y. June 27, 2001) (elimination of time spent on unsuccessful class claims was warranted).

1210 Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

1211 *See* Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989); Hensley v. Eckerhart, 461

fee may be appropriate if the relief is limited in comparison to the scope of the litigation as a whole.[1212] For example, one court reduced the hours reasonably expended to obtain a favorable FDCPA and TCPA settlement, but included an excessive number of hours for obtaining the TCPA settlement which did not involve factual or legal issues in common with the FDCPA claim.[1213] In an unpublished decision, where the plaintiff succeeded in part at summary judgment, but was unsuccessful at trial, the Ninth Circuit found "[t]he award of fees for hours spent pursuing an unsuccessful result cannot be sustained."[1214]

Where a plaintiff prevails against just one of several defendants, time spent litigating against the other defendants may nevertheless be included in an award of fees to the extent such time would likely have been spent litigating the same issues with the defendant against whom the consumer prevailed, had they not already been raised by the other defendants.[1215]

11.13.8.2.4 Fees for work on fee petition, appeal, collection of the award, and related proceedings

Attorney fees are generally awarded for time spent recovering fees through a fee application and related proceedings.[1216] An estimated amount of time for work on a fee hearing should be included in the application or this portion of the request may be rejected for that reason.[1217] The consumer should also

U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); Gates v. Deukmejian, 987 F.2d 1392 (9th Cir. 1992); City Consumer Serv., Inc. v. Horne, 631 F. Supp. 1050 (D. Utah 1986).

1212 Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); Paz v. Portfolio Recovery Assoc., 924 F.3d 949, 954 (7th Cir. 2019) (reduction in fees from $187,410 to $10,875 where majority of time "spent pursuing an unsuccessful and ill-advised effort to win a much bigger payoff than was even remotely possible in the circumstances giving rise to his claims"); Baylor v. Mitchell Rubenstein & Assoc., P.C., 735 Fed. Appx. 733 (D.C. Cir. 2018) (60% reduction in fee where consumer prevailed on only one of her three claims); Larsen v. AR Res., Inc., 453 F. Supp. 3d 849, 856 (E.D. Va. 2020) (reduced by 50% based on low degree of success "as reflected in the low ratio of damages achieved to damages sought"); Cooper v. Retrieval-Masters Creditors Bur., Inc., 338 F. Supp. 3d 729, 736 (N.D. Ill 2018); Kottle v. Unifund CCR, L.L.C., 992 F. Supp. 2d 982 (C.D. Cal. 2014) (reducing attorney fees by 50% to reflect the "partial" success of the plaintiff who prevailed on only one of three claims asserted); Mann v. Acclaim Fin. Serv., Inc., 348 F. Supp. 2d 923 (S.D. Ohio 2004) (reducing fees by one-third where only partial success); Cooper v. Sunshine Recoveries, Inc., 2001 WL 740765 (S.D.N.Y. June 27, 2001) (elimination of time spent on unsuccessful class claims); Cook v. VFS, Inc., 2000 WL 33727940 (S.D. Ohio Sept. 27, 2000) (50% reduction to time distinctly spent on losing issue); Norton v. Wilshire Credit Corp., 36 F. Supp. 2d 216 (D.N.J. 1999). *See also* Martinez v. Idaho First Nat'l Bank, 755 F.2d 1376 (9th Cir. 1985) (fees limited where recovery had on only one of eighteen counts); Kramer v. Marine Midland Bank, 577 F. Supp. 999 (S.D.N.Y. 1984) (not full compensation for work on frivolous claims). *But see* Danow v. Law Office of David E. Borback, P.A., 634 F. Supp. 2d 1337 (S.D. Fla. 2009) (rejecting "limited success" as basis to reduce fees just because related claims were dismissed), *aff'd on other grounds*, 367 Fed. Appx. 22 (11th Cir. 2010).

1213 *See* Stockman v. Global Credit & Collection Corp., 2015 WL 4999851 (N.D. Ill. Aug. 21, 2015) (TCPA is not fee-shifting statute; adopting 25% reduction in fees; rejecting consumer attorneys' reduction of 7.96%).

1214 Gonzalez v. Allied Collection Services, Inc., 852 Fed. Appx. 264, 268 (9th Cir. Mar. 29, 2021).

1215 Robinson v. Sherman Fin. Group, L.L.C., 2016 WL 1313082, at *4–5 (E.D. Tenn. Apr. 4, 2016).

1216 *See* Embree v. Medicredit, Inc., 752 Fed. Appx. 697 (11th Cir. 2018); Comm'r v. Jean, 496 U.S. 154, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990); King v. Int'l Data Serv. (IDS), 100 Fed. Appx. 681 (9th Cir. 2004); DeJesus v. Banco Popular de Puerto Rico, 918 F.2d 232 (1st Cir. 1990); O Centro Espirita Beneficente União Do Vegetal in U.S. v. Duke, 343 F. Supp. 3d 1050, 1080 (D.N.M. 2018) ("Time spent preparing the fees application 'must be included in calculating a reasonable fee because uncompensated time spent on petitioning for a fee automatically diminishes the value of the fee eventually received."); Alvarado v. Hovg, L.L.C., 2016 WL 5462429, at *3 (N.D. Cal. Sept. 29, 2016) ("Filing a fee request requires checking local case law as to rates for comparable counsel; reviewing the hours spent and making billing judgment decisions; and collecting information on and explaining the professional background of the various billing lawyers and paralegals."); Johnson v. Cheek Law Offices, L.L.C., 2015 WL 542189 (S.D. Ohio Feb. 10, 2015) (fees for fee petition following settlement of FDCPA class action, *inter alia* (citing *Auto Alliance Int'l, Inc. v. United States Customs Serv.*, 155 Fed. Appx. 226, 229 (6th Cir. 2005))); Garcia v. Resurgent Capital Serv., L.P., 2012 WL 3778852 (N.D. Cal. Aug. 30, 2012) ($187,292.25 in attorney fees reflecting 565 hours of attorney time plus $16,470 for postjudgment work on fee application); Arlozynski v. Rubin & Debski, P.A., 2011 WL 6319190 (M.D. Fla. Nov. 21, 2011) (time spent litigating attorney fees is compensable), *adopted*, 2011 WL 6318970 (M.D. Fla. Dec. 16, 2011); Hernandez v. Erin Capital Mgmt., L.L.C., 2011 WL 4595802 (C.D. Cal. Oct. 3, 2011) (awarding $4500 for fee motion following settlement of FDCPA claim for $6500 plus reasonable attorney fees and costs); Bryant v. Cab Asset Mgmt., L.L.C., 2011 WL 1331267 (S.D. Fla. Apr. 6, 2011) (time spent litigating attorney fees following settlement of plaintiff's claims is compensable), *adopted*, 2011 WL 1598732 (S.D. Fla. Apr. 27, 2011); Perez v. Perkiss, 742 F. Supp. 883 (D. Del. 1990); § 11.13.10, Appx. E.3.3.1, *infra*. *See also* Blalock v. Maximum Sec. Alarm, Inc., 2012 WL 5467531 (D. Or. Nov. 9, 2012) (awarding 11.7 hours for fee petition); Anastasion v. Credit Serv. of Logan, Inc., 2012 WL 1455219 (D. Utah Apr. 26, 2012) (awarding 29 hours for postjudgment fee application). Savino v. Computer Credit, Inc., 71 F. Supp. 2d 173 (E.D.N.Y. 1999) (attorney was entitled to fees for time incurred in making second application for attorney fees to lower court, but fees reduced for excessive hours billed). *Cf.* Cotner v. Buffaloe & Assoc., P.L.C., 2012 WL 1670552 (E.D. Tenn. May 14, 2012) (awarding "fees on fees," but limited them to 3% of amount awarded on main fee application). *But see* Howard v. Midland Credit Mgmt., Inc., 2012 WL 4359361 (D. Colo. Sept. 24, 2012) (denying all time for establishing fee award because that endeavor was "largely unsuccessful").

1217 *See* Gash v. Client Serv., Inc., 548 Fed. Appx. 547 (10th Cir. 2013); Johnson v. Leading Edge Recovery Solutions, L.L.C., 2013 WL 5313255 (D. Colo. Sept. 23, 2013); King v. Midland Credit Mgmt., 549 Fed. Appx. 791 (10th Cir. 2013) (prevailing FDCPA consumer who wishes to recover compensation for litigating attorney fees should include a request for, and "fair estimate" of, such fees in her initial motion; because consumer did not do so here and otherwise failed to file timely supplemental motion for fees, motion was untimely under Rule 54); Livingston v. Midland Credit Mgmt., Inc., 2012 WL 4328367, at *1 n.2 (D. Colo. Sept. 20, 2012) (denying time spent on establishing fee award because request was "untimely and will not be considered"

recover attorney fees for attorney time spent collecting the FDCPA judgment, if necessary.[1218] Similarly, courts sometimes grant attorney fees for postjudgment time expended by an attorney toward efforts to collect the fees awarded in the original action.[1219]

A consumer who is successful in the appeal of an FDCPA action is entitled to an award of attorney fees and costs for work on the appeal.[1220] The consumer's attorney will be compensated not only for work at the trial court level, but also for appellate work.[1221] On the other hand, where the court determined that the consumer's success on appeal was not great, the court awarded considerably less than the lodestar amount, even though the consumer was successful on appeal.[1222] In setting fees in such circumstances, the court should bear in mind, however, that apart from any monetary recovery, "the best measure of success in an FDCPA case is the greater service to the public."[1223]

If a consumer's appellate victory leads only to a remand to the trial court to determine whether there is a valid claim, attorney fees for the appellate case will be reserved until it is determined whether the action is successful at the trial level.[1224] If the consumer eventually prevails, attorney fees should be awarded for both rounds of the case at the trial level and for the work involved in the appeal. Where a successful consumer appeals the amount of the trial court's attorney fees award and prevails, the consumer's attorney should be awarded for time spent on that appeal as well.[1225]

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as "an issue or argument may not be properly raised in the first instance in a reply brief").

1218 *See, e.g.*, Green v. Nationwide Arbitration Serv., L.L.C., 2017 WL 7211136, at *4 (E.D. Mich. Dec. 22, 2017), *adopted*, 2018 WL 647445 (E.D. Mich. Jan. 31, 2018); Kersten v. Quick Collect, Inc., 152 F. Supp. 3d 1301 (D. Or. 2016); Collins v. Bowman, 2012 WL 1142442 (S.D. Ind. Mar. 8, 2012); Jones v. Regent Asset Mgmt. Solutions, Inc., 2011 WL 2037626, at *5 (D. Conn. May 24, 2011) (debt collector liable for additional fees expended by plaintiff's attorney in collecting the judgment awarded in FDCPA default matter); Queen v. Nationwide Credit, Inc., 2010 WL 4006676, at *3 n.1 (N.D. Ill. Oct. 7, 2010) (fees expended to collect FDCPA judgment are also recoverable); Dichiara v. Pelsinger, 2010 WL 3613798, at *6 (D. Conn. Aug. 30, 2010) (ordering plaintiff recover in full reasonable attorney fees and costs incurred since entry of judgment in attempting to enforce FDCPA judgment awarded on default); *See also* Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331 (1st Cir. 2008) (prevailing parties are entitled to recover reasonable fees with respect to litigating fee petition, attempting to collect underlying judgments, and seeking statutory interest); Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 538, 544–545 (10th Cir. 2000) (allowing award of fees for time spent toward postjudgment collection activities); Free v. Briody, 793 F.2d 807 (7th Cir. 1986) (affirming award of fees for efforts made to collect judgment awarded in ERISA case); Balark v. Curtin, 655 F.2d 798, 803 (7th Cir. 1981) (plaintiff was entitled to attorney fees incurred in collecting section 1988 civil rights judgment). *Cf.* Bianchi v. Bronson & Migliaccio, L.L.P., 2011 WL 379115 (S.D. Fla. Feb. 2, 2011) (fees may be awarded for postjudgment efforts in enforcing FDCPA awards, but some postjudgment work in this case was unnecessary and avoidable).

1219 *See* Dotson v. Chester, 937 F.2d 920, 932 (4th Cir. 1991) (attorney fees and costs were properly awarded for amounts expended in attempt to recover portion of original attorney fees allocated to county sheriff); Spain v. Mountanos, 690 F.2d 742, 747 (9th Cir. 1982) ("an award for fees on collection is proper under section 1988"); Means v. Dist. of Columbia, 999 F. Supp. 2d 128 (D.D.C. 2013) (prevailing plaintiffs entitled to fees for work done on motion to recover unpaid attorney fees); Garvin v. Gov't of D.C., 910 F. Supp. 2d 135, 138–139 (D.D.C. 2012) (awarding fees expended in collecting unpaid attorney fees incurred in bringing underlying IDEA action). *Cf.* Rickabaugh v. Enochs, 2003 WL 22294090, at *6 (Cal. Ct. App. Oct. 7, 2003) (interpreting state enforcement of judgment statute; "a prevailing party who has been authorized by contract *or statute* to recover attorney fees may recover such fees incurred to enforce a judgment"); Robbins v. Krock, 896 N.E.2d 633 (Mass. App. Ct. 2008) (in case involving contract between attorney and client relating to unpaid legal fees, "attorney's fees incurred in collection of the judgment" were within fee provision of contract).

1220 *See, e.g.*, Dowling v. Litton Loan Servicing L.P., 320 Fed. Appx. 442 (6th Cir. 2009); Joe v. Payco-General Am. Credits, Inc., 34 F.3d 1072 (9th Cir. 1994). *See also* Easley v. Collection Serv. of Nev., 910 F.3d 1286 (9th Cir. 2018) (attorney fees incurred on appeal in successful challenge of initial fees awarded are authorized under 11 U.S.C. § 362(k) of Bankruptcy Code). *But see* Alhassid v. Nation Star Mortg., L.L.C., 767 Fed. Appx. 865 (11th Cir. 2019) (plaintiff not entitled to appellate attorney fees under FDUTPA because, under contingency fee agreement, fees would inure to benefit of plaintiff's attorneys and not plaintiff).

1221 *See* Anchondo v. Anderson, Crenshaw & Assoc., 616 F.3d 1098, 1107 (10th Cir. 2010) (FDCPA case; awarding fees incurred defending, on appeal, earlier award for fees); Dowling v. Litton Loan Servicing L.P., 320 Fed. Appx. 442, 450 (6th Cir. 2009) (FDCPA case; plaintiff entitled to attorney fees incurred defending fee award on appeal); DeJesus v. Banco Popular, 918 F.2d 232, 236 (1st Cir. 1990) (remanding for determination of a reasonable fee and directing the district court to "include in its fee award a reasonable attorney's fee for services rendered in connection with this appeal"); Martinez v. Idaho First Nat'l Bank, 755 F.2d 1376 (9th Cir. 1985); Varner v. Century Fin. Co., 738 F.2d 1143 (11th Cir. 1984); *In re* Pine, 705 F.2d 936 (7th Cir. 1983); McGowan v. King, Inc., 661 F.2d 48 (5th Cir. 1981) (awarding attorney fees for services rendered on appeal where only issue was amount of fees awarded in underlying Truth in Lending Act case); Northcross v. Bd. of Educ. of Memphis City Schools, 611 F.2d 624, 632 (6th Cir. 1979) (section 1988 case; plaintiffs should recover attorney fees "for the spent litigating the fees issue itself"); Weisenberger v. Huecker, 593 F.2d 49, 54 (6th Cir. 1979) (concluding that implementation of congressional policy as to § 1988 required awarding fees spent pursuing attorney fees in cases under review and stating that fees should also include amounts spent "defending and prosecuting the instant appeals"); Prandini v. Nat'l Tea Co., 585 F.2d 47, 54 (3d Cir. 1978) (holding that attorneys were entitled to be compensated for time spent successfully appealing first fee award in underlying Title VII case to the extent that time was necessary to obtain a reasonable fee award); Preston v. Thompson, 565 F. Supp. 310 (N.D. Ill. 1983); Citibank Fed. Sav. Bank v. Sandel, 766 So. 2d 302 (Fla. Dist. Ct. App. 2000) (attorney fees may be awarded for services rendered in appeal where only issue was amount of fees awarded in underlying TILA case).

1222 Carroll v. Wolpoff & Abramson, 53 F.3d 626 (4th Cir. 1995) (where consumer abandoned her claim to actual damages on remand from appellate court and received only $50 in statutory damages for a technical violation of FDCPA, district court did not abuse its discretion in limiting award of attorney fees to $500).

1223 Hernandez v. Erin Capital Mgmt., L.L.C., 2011 WL 4595802, at *4 (C.D. Cal. Oct. 3, 2011).

1224 Blair v. Nat'l Constr. Co., 611 F.2d 80 (5th Cir. 1980).

1225 Easley v. Collection Serv. of Nev., 910 F.3d 1286 (9th Cir. Dec. 20, 2018) (attorney fees incurred on appeal in successful challenge of initial fees awarded are authorized under 11 U.S.C. 362(k)); *In re* Pine, 705 F.2d 936 (7th Cir. 1983); Stokes v. Fid. Acceptance Corp., 644 F.2d 355 (5th Cir. 1981). *Cf.* Middlesworth v. Oaktree Collections, Inc.,

When handling an FDCPA appeal, the consumer's attorney should carefully scrutinize all applicable rules of appellate procedure. For example, some rules require that the fee request be filed within a specified number of days after the appellate decision.[1226]

11.13.8.3 Establishing the Hourly Rate

In *Tolentino v. Friedman*,[1227] the Seventh Circuit observed:

> In order to encourage able counsel to undertake FDCPA cases, as Congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases. . . . Paying counsel in FDCPA cases at rates lower than those they can obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law.

The hourly attorney rate is based on the prevailing market rate in the community for that individual's level of legal skill and experience.[1228] With that in mind, counsel should submit declarations with information about their skill, experience, and reputation, as well as declarations regarding rates in the community.[1229] In rare instances, out-of-state or "big city" attorneys may be paid at a higher rate.[1230] A few courts deny fees to out-of-state attorneys who work on the case but do not appear *pro hac vice* if local rules prohibit more than a consulting role without *pro hac vice* admission.[1231] However, as one court has reasoned, such work, in general, should be compensable since "the legal work of a person unable to enter an appearance in court, such as a paralegal or law clerk, is compensable."[1232]

While the attorney's customary rate, the rate billed to the consumer or other clients, a contingent fee agreement, or the cost of the attorney's time, may all be considered as evidence, none of these is dispositive.[1233] Instead, the rate is based upon the prevailing rate in the community. An "attorney's status as a solo practitioner is not grounds for a reduction in the reasonable hourly rate."[1234] The same is true for a nonprofit legal aid office[1235] and a prepaid legal services plan lawyer.[1236] They should receive the same hourly rate as attorneys with comparable levels of experience in private practice. How to establish the prevailing rate in the community is discussed later in this subsection.

Substantial hourly rates have been found reasonable for lawyers handling FDCPA cases, depending on their level of experience, local community rates, and the dates of services rendered.[1237] The difficulty of the case, for example because

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2009 WL 3720884 (E.D. Cal. Nov. 3, 2009) (denying request for award of anticipated costs of collection where consumer failed to cite any authority to support such award).

1226 *See, e.g.*, Fed. R. App. P. 39.

1227 46 F.3d 645, 652–653 (7th Cir. 1995). *Accord* Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 981 (9th Cir. 2008).

1228 Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); Gonzalez v. City of Maywood, 729 F.3d 1196 (9th Cir. 2013); Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 979 (9th Cir. 2008); Hollis v. Roberts, 984 F.2d 1159 (11th Cir. 1993). *See also* Breidenbach v. Experian, 2013 WL 2631368 (S.D. Cal. June 11, 2013) (attorney's attendance at FDCPA seminar cited by court in assessing his experience).

1229 *See, e.g.*, Larsen v. AR Res., Inc., 453 F. Supp. 3d 849, 852 (E.D. Va. 2020); Hallmark v. Cohen & Slamowitz, L.L.P., 378 F. Supp. 3d 222 (W.D.N.Y. 2019); Eades v. Kennedy, P.C., 343 F. Supp. 3d 104 (W.D.N.Y. 2018); Miller v. Asset Acceptance, L.L.C., 2017 WL 4111446 (N.D. Ohio Sept. 18, 2017) (where requested rate was within range upheld in district, accepting declarations of plaintiff's attorneys, while noting that other evidence would be preferable); Forkum v. Co-Operative Adjustment Bur., Inc., 2014 WL 3101784 (N.D. Cal. July 3, 2014) (denying fee application without prejudice).

1230 Mathur v. Bd. of Trs. of S. Ill. Univ., 317 F.3d 738 (7th Cir. 2003) (reversing reduction of hourly rate for out-of-town attorneys as plaintiff had been unable to obtain local counsel); McDonald v. Armaontrovit, 860 F.2d 1456 (8th Cir. 1988); Polk v. New York State Dep't of Correctional Serv., 722 F.2d 23 (2d Cir. 1983). *See also* Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 183–184 (2d Cir. 2008) (court may adjust hourly rate to account for reasonable decision to retain out-of-district counsel); Gates v. Deukmejian, 987 F.2d 1392 (9th Cir. 1992) (collecting cases); Silva v. Nat'l Telewire Corp., 2001 WL 1609387 (D.N.H. Dec. 12, 2001) (attorney fees may be based on non-local rate if it was reasonable for plaintiff to hire non-local specialist because there are no attorneys available in local area with required skill to handle case). *But see* Waite v. Clark County Collection Serv., L.L.C., 606 Fed. Appx. 864 (9th Cir. 2015) (consumer entitled to award of fees for attorney who did not physically appear in court, seek *pro hac vice*, sign pleadings, or serve as exclusive contact with client or opposing counsel).

1231 Gsell v. Rubin and Yates, L.L.C., 41 F. Supp. 3d 443 (E.D. Pa. 2014) (declining to award attorney fees for prevailing plaintiff's "consulting" attorney, associate in national law firm, who performed majority of legal work for plaintiff). *But see* Santiago v. Equable Ascent Fin., 2013 WL 3498079 (N.D. Cal. July 12, 2013) (plaintiff's out-of-state lawyer was permitted to recover fees for work performed prior to admission where attorney (1) was eligible to be admitted *pro hac vice* as matter of course and (2) had not appeared before court prior to admission); Navarro v. Monarch Recovery Mgmt. Inc., 2014 WL 2805244 (E.D. Pa. June 20, 2014) (rejecting defendant's argument that fees should be reduced for out-of-state consulting attorney not admitted to practice in state and not admitted *pro hac vice*; distinguishing cases so holding because consulting attorney here acted at all times in secondary role supervised by lead local counsel).

1232 Garza v. Mitchell Ruhenstein & Assoc., 2016 WL 7468039, at *3 (D. Md. Dec. 27, 2016).

1233 Blanchard v. Bergeron, 489 U.S. 87, 97, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989); Keenan v. City of Philadelphia, 983 F.2d 459, 475 (3d Cir. 1992); Covington v. Dist. of Columbia, 839 F. Supp. 894 (D.D.C. 1993), *aff'd*, 57 F.3d 1101 (D.C. Cir. 1995). *See also* Alhassid v. Nation Star Mortg., L.L.C., 767 Fed. Appx 865 (11th Cir. 2019) (plaintiff not entitled to appellate attorney fees under FDUTPA because, under contingency fee agreement, fees would inure to benefit of plaintiff's attorneys and not plaintiff); Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011) (noting failure to submit affidavits of other attorneys regarding prevailing rates in community as factor in upholding district court's reliance on its own knowledge of local market rates and reasonable fees).

1234 Macolor v. Libiran, 2016 WL 1488121, at *7 (S.D.N.Y. Mar. 25, 2016), *adopted*, 2016 WL 1453039 (S.D.N.Y. Apr. 13, 2016).

1235 Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). *See* Appx. E.3.3.2, *infra*.

1236 Hollis v. Roberts, 984 F.2d 1159 (11th Cir. 1993) (distinguishing Harper v. Better Bus. Serv., Inc., 961 F.2d 1561 (11th Cir. 1992). *Accord* Siler v. Mgmt. Adjustment Bur., 1992 WL 170699 (W.D.N.Y. July 6, 1992).

1237 *See, e.g.*, Hallmark v. Cohen & Slamowitz, L.L.P., 378 F. Supp. 3d 222, 229 (W.D.N.Y. 2019) (attorneys granted fees at $375 and $300 per hour depending on experience due to "the complex nature of this case, the

it may be difficult to collect from the defendant, is one factor that may be considered in setting a reasonable hourly rate.[1238]

A contingent fee arrangement between the consumer and their attorney does not operate as a maximum cap for an attorney fee recovery.[1239] In other words, there should not be a downward adjustment because the attorney would have received less under a contingent fee arrangement. While there is no upward adjustment for taking a case on contingency,[1240] doing so places all the risk on the attorney and, when successful, the attorney should not be expected to accept as little as they would charge a client who agreed to pay for services, regardless of success.[1241]

The hourly rate is not affected by the amount of damages sought in the litigation or reasonably recoverable. Thus, the Seventh Circuit reversed a reduction of the market rate that had been incorrectly granted where the lower court had argued that a consumer would not pay the established rate in the community to recover only a maximum of $1000.[1242] The rates should be current rates at the time the work was done or at the time of the award;[1243] the rates paid for older cases should not be the basis of comparison.

The Civil Division of the United States Department of Justice maintains a widely respected matrix of reasonable rates in the Washington, D.C. area, at different experience levels adjusted annually for inflation.[1244] However, most courts outside the Washington, D.C. area have declined to follow it as not relevant to their local market rate.[1245]

The US Consumer Law Attorney Fee Survey Report, a survey conducted by Ronald Burdge, an Ohio consumer attorney, of rates charged by consumer attorneys in different regions of the country is found at www.nclc.org, under "litigation." Some courts have relied upon the survey as evidence of reasonable hourly rates.[1246]

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fact that Defendants . . . vigorously opposed Plaintiff's action, and the tremendous skill brought to bear by all attorneys involved"); Cooper v. Retrieval-Masters Creditors Bur., Inc., 338 F. Supp. 3d 729 (E.D. Ill. 2018) ($327 hourly rate, not $372 hourly rate requested by consumer, was reasonable rate for attorney; case had been simple, involving single FDCPA-violative sentence in single letter from debt collector, and prior decisions in district had awarded attorney $300, $327, and $352 hourly rates in FDCPA cases); West v. Credit Control Serv., Inc., 2017 WL 4938405 (N.D. Ill. Oct. 30, 2017) (awarding requested rates of $595/hour and $585/hour for partners, $295/hour for associate, and $210/hour for paralegals); Samms v. Abrams, 198 F. Supp. 3d 311, 321 (S.D.N.Y. 2016) (approving $400/hour in individual case for attorney with significant experience in litigating FDCPA cases); Jacobson v. Persolve, L.L.C., 2016 WL 7230873 (N.D. Cal. Dec. 14, 2016) (following class action settlement, awarding $151,995 in contested attorney fees based on hourly rates of $500 and $600 for experienced attorneys); Castro v. Lloyd & McDaniel, P.L.C., 2016 WL 5110046 (S.D. Ind. Sept. 19, 2016) (in Indianapolis market, approving $575/hour for 25+-year attorney with extensive experience with FDCPA class actions, $275/hour for associate, and $200/hour for paralegal; also noting that even if rates were high for Indianapolis market, premium would be appropriate); Romeo v. Simm Assoc., Inc., 170 F. Supp. 3d 750, 2016 WL 1070827 (M.D. Pa. Mar. 16, 2016) (awarding $375/hour for attorney with 16 years of experience, specializing in consumer protection law, as consistent with market rates in the Middle and Eastern Districts of Pennsylvania); Harlan v. Transworld Sys., Inc., 2015 WL 505400 (E.D. Pa. Feb. 6, 2015) ($620 an hour for experienced partner and $305 an hour for associate); Douyon v. N.Y. Med. Health Care, P.C., 49 F. Supp. 3d 328 (E.D.N.Y. 2014) (only $400 per hour for attorney with 45 years' experience, but $325 for 2004 law graduate); Serna v. Law Office of Joseph Onwuteaka, PC, 2014 WL 3749652 (S.D. Tex. July 29, 2014) ($300 an hour for a Texas Legal Services attorney with 21 years of experience); Long v. Nationwide Legal File & Serve, Inc., 2014 WL 3809401 (N.D. Cal. July 23, 2014) (awarding fees at requested rates, including $450/hour for lead counsel); Johnson v. CFS II, Inc., 2013 WL 6841964 (N.D. Cal. Dec. 27, 2013) (hourly rates of $400 for lead counsel and $300 for co-counsel); Harlan v. NRA Group, L.L.C., 2011 WL 813961, at *1 n.1 ($555 per hour to supervising senior attorney, "a partner in the firm with a national reputation in consumer law"); Appx. E.3.3.3, *infra*.

1238 Lietz v. Oxford Law, L.L.C., 2016 WL 2897469 (M.D. Fla. Apr. 22, 2016) (FDCPA case citing *Maner v. Linkan L.L.C.*, 602 Fed. Appx. 489, 493 (11th Cir. 2015) and *Morgado v. Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184, 1191, n.2 (11th Cir. 1983)).

1239 Blanchard v. Bergeron, 489 U.S. 87, 97, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989).

1240 *See* § 11.13.8.5, *infra*; City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992).

1241 Hallmark v. Cohen & Slamowitz, L.L.P., 378 F. Supp. 3d 222, 232 (W.D.N.Y. 2019).

1242 Tolentino v. Friedman, 46 F.3d 645, 651 (7th Cir. 1995). *See also* Norton v. Wilshire Credit Corp., 36 F. Supp. 2d 216 (D.N.J. 1999) (in FDCPA jury trial, plaintiff won $5800 on § 1692g claim, and defendant won $1651.63 on counterclaim for debt; plaintiff's counsel sought fees and costs of $67,697.56, and was awarded $57,206.34 at his current rate of $215 per hour; rejecting argument that there must be proportionality between damages and fee).

1243 *See* Mares v. Credit Bur. of Raton, 801 F.2d 1197 (10th Cir. 1986); Varner v. Century Fin. Co., 738 F.2d 1143 (11th Cir. 1984); Norton v. Wilshire Credit Corp., 36 F. Supp. 2d 216 (D.N.J. 1999) ($215 per hour; counsel's rate was $200 at beginning of case, but entire award was based on current rate to compensate for delay in payment). *See also* City Consumer Serv., Inc. v. Horne, 631 F. Supp. 1050 (D. Utah 1986).

1244 Known as the Laffey Matrix, after a case name, it is available at www.justice.gov. "[B]ecause the original *Laffey* Matrix is now more than thirty years old, it must be updated to account for inflation. . . . Competing updated *Laffey* Matrices have developed." Eley v. D.C., 793 F.3d 97, 101 (D.C. Cir. 2015) (discussing benefits and limitations of U.S. Attorney's Office Laffey Matrix, which accounts for inflation in general, and Legal Services Index Laffey Matrix, which adjusts for increases in costs of legal services nationally; applying the "Laffey Matrix" blindly, without regard to examining other factors in determining a proper fee award, is improper).

1245 *See, e.g.*, Forkum v. Co-Operative Adjustment Bur., Inc., 2014 WL 3101784 (N.D. Cal. July 3, 2014); Behrens v. Smith & Greaves, L.L.P., 2012 WL 590845 (D. Or. Feb. 22, 2012); Freid v. Nat'l Action Fin. Serv., Inc., 2011 WL 6934845 (D.N.J. Dec. 29, 2011); Harlan v. NRA Group, L.L.C., 2011 WL 813961, at *1 n.1 (but awarding $555 per hour to supervising senior attorney, "a partner in the firm with a national reputation in consumer law").

1246 This Report is also found at http://www.attorneyfeestudy.com. *See* Beneli v. BCA Fin. Serv., Inc., 324 F.R.D. 89 (Feb. 6, 2018); Fricano v. LVNV Funding, L.L.C., 2015 WL 5331711 (N.D. Ill. Sept. 8, 2015); Gregg v. N.A.R., Inc., 2014 WL 959412 (D. Colo. Mar. 12, 2014); Delalat v. Syndicated Office Sys., Inc., 2014 WL 930162, at *2 (S.D. Cal. Jan. 28, 2014) (finding survey supportive of hourly rate of $325); Pineda v. P & B Capital Group, L.L.C., 2011 WL 6356866 (W.D. Mo. Dec. 19, 2011) (relying on Burdge survey); Lindenbaum v. NCO Fin. Sys. Inc., 2011 WL 2848748 (E.D. Pa. July 19, 2011) (using survey); Livingson v. Cavalry Portfolio Serv., Inc., 2009 WL 4724268 (N.D. Ohio Dec. 2, 2009) (relying in part on Burdge survey in FDCPA case).

Evidence that the claimed rates are justified may also be drawn from affidavits from attorneys of similar experience and expertise in private practice,[1247] from the fee charged by opposing counsel,[1248] and from published opinions. Attorneys testifying solely on the topic of attorney fees are generally not required to provide expert reports.[1249] Fees of opposing counsel should be discoverable, and also may possibly be obtained from records of bankruptcy courts in which the firm practices, but these are sometimes lower than other prevailing rates in the community, perhaps due to volume discounts or competitive forces.

11.13.8.4 Downward Adjustments to the Lodestar

The lodestar figure is presumed reasonable unless the defendant carries the burden of showing why the figure should be adjusted downward.[1250] The plaintiff though should first provide specific evidence that the hourly rate and costs were reasonable.[1251] Reductions for excessive hours or inflated hourly rates is discussed at §§ 11.9.6.2 and 11.13.6.3, *supra*. A judge may also reduce counsel's hourly rate *sua sponte*, based on "first-hand experience with the deficient quality of representation."[1252]

To preempt criticisms of overbilling, in some instances attorneys incorporate a modest across-the-board reduction, in the exercise of "billing judgment," to take into account possible inefficiencies or duplications.[1253]

11.13.8.5 Upward Adjustments to the Lodestar

The Supreme Court ruled in *City of Burlington v. Dague*[1254] that the lodestar under a federal fee-shifting statute may not be adjusted upwards to compensate for the riskiness of a case or the contingent nature of litigating fee-shifting claims. And in 2010, the Supreme Court elaborated in *Perdue v. Kenny A. ex rel. Winn*[1255] that enhancements are only permissible in "rare and exceptional circumstances."

The burden is on the consumer,[1256] and the consumer must produce specific evidence that supports the award.[1257] Examples include when the method to compute the hourly rate does not measure the attorney's true market value, when the representation requires an extraordinary outlay of expenses, or where the litigation is exceptionally protracted and there is exceptional delay in the payment of fees.

That last basis was examined in an earlier Supreme Court case, *Missouri v. Jenkins ex rel. Agyei*,[1258] where the Court expressly approved of either upwardly adjusting the lodestar by a multiplier, prejudgment interest, or an award using current

See also Malick v. NCO Fin. Serv., Inc., 2015 WL 4078037 (S.D. Tex. July 6, 2015) (relying in part on state bar survey of hourly rates for that state's attorneys); Litt v. Portfolio Recovery Assoc., L.L.C., 2015 WL 1849267 (E.D. Mich. Apr. 22, 2015) (same). *But see* Forkum v. Co-Operative Adjustment Bur., Inc., 2014 WL 3101784 (N.D. Cal. July 3, 2014) (survey does not provide data on prevailing rates in local market); Behrens v. Smith & Greaves, L.L.P., 2012 WL 590845 (D. Or. Feb. 22, 2012) (2008 Consumer Law Attorney Fee Survey does not support higher requested hourly rate as it does not pertain to local market); Freid v. Nat'l Action Fin. Serv., Inc., 2011 WL 6934845 (D.N.J. Dec. 29, 2011) (declining to accord any weight to 2007 Burdge survey).

1247 *See, e.g.*, O Centro Espirita Beneficiente Uniao Do Vegetal in U.S. v. Duke, 343 F. Supp. 3d 1050, 1083 (D.N.M. 2018); Castro v. Lloyd & McDaniel, P.L.C., 2016 WL 5110046 (S.D. Ind. Sept. 19, 2016).

1248 *See, e.g.*, Dreher v. Experian Info. Solutions, Inc., 2016 WL 4055638 (E.D. Va. July 26, 2016); Real v. Cont'l Group Inc., 116 F.R.D. 211, 213 (N.D. Cal 1986); N.C. Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 517 (M.D.N.C. 1986); Schacher v. Am. Academy of Opthamology Inc., 106 F.R.D. 187, 192 (N.D. Ill. 1985); Blowers v. Lawyers Coop. Publ'g Co., 526 F. Supp. 1324, 1325 (W.D.N.Y. 1981); Stastny v. S. Bell Tel., 77 F.R.D. 662, 663–664 (W.D.N.C. 1978).

1249 *See, e.g.*, Infante v. Samara Portfolio, Mgmt., L.L.C., 2018 WL 911853 (E.D. Tex. Feb. 14, 2018).

1250 City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992). *See also* Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); Hutchinson *ex rel.* Julien v. Patrick, 636 F.3d 1 (1st Cir. 2011) (disability rights suit); Robinson v. City of Harvey, 489 F.3d 864, 872 (7th Cir. 2007) (section 1988 claims); Evans v. Port Auth., 273 F.3d 346 (3d Cir. 2001) (section 1988 case; accepting plaintiff's affidavits as to reasonable hourly rate as conclusive where defendant filed nothing in opposition by deadline); People Who Care v. Rockford Bd. of Educ., 90 F.3d 1307 (7th Cir. 1996) (section 1988 case); Gates v. Deukmejian, 987 F.2d 1392 (9th Cir. 1992) (section 1988 case); Varner v. Century Fin. Co., 738 F.2d 1143 (11th Cir. 1984) (TILA case); Goins v. JBC & Assoc., P.C., 2005 WL 3536147, at *3–4 (D. Conn. Nov. 28, 2005) (defendant failed to satisfy its burden to justify reduction of lodestar, rejecting arguments that lodestar figure should be reduced based on lack of complexity of legal issues in case, fact that plaintiff's counsel pursued this "simple case" in a "particularly aggressive manner," and nature of defendants' violation of FDCPA).

1251 Robinson v. Equifax Info. Serv., L.L.C., 560 F.3d 235 (4th Cir. 2009); Larsen v. AR Res., Inc., 453 F. Supp. 3d 849, 852 (E.D. Va. 2020) (declaration by experienced local attorney regarding prevailing market rates satisfied plaintiff's burden of production on the issue); Cooper v. Retrieval-Masters Creditors Bur., Inc., 338 F. Supp. 3d 729 (N.D. Ill. May 21, 2018) (plaintiff met burden of "specific evidence" showing that cost of deposition transcript was reasonable).

1252 Ferrari v. U.S. Equities Corp., 661 Fed. Appx. 47, 50 (2d Cir. 2016) (affirming lower court's determination that reasonable rate for consumer attorney's quality of representation was $250, not $400 per hour, even though defendant had argued for only $350 per hour).

1253 Hensley v. Eckerhard, 461 U.S. 424, 434, 103 S. Ct. 1933, 1490 (1983) (section 1988 case); Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 552 (7th Cir. 1999) (FLSA); Cooper v. Retrieval-Masters Creditors Bur., Inc., 338 F. Supp. 3d 729 (N.D. Ill. May 21, 2018); Douyon v. N.Y. Med. Health Care, P.C., 49 F. Supp. 3d 328 (E.D.N.Y. 2014) (removing duplicative time indicating inefficiency and reducing rate for attorneys performing administrative tasks). *See* Serna v. Law Office of Joseph Onwuteaka, PC, 2014 WL 3749652, at *7 (S.D. Tex. July 29, 2014) (imposing 10% reduction of hours for lack of evidence of billing judgment).

1254 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 446 (1992).

1255 559 U.S. 542, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010).

1256 Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010); City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 446 (1992).

1257 Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010).

1258 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989).

rates[1259] to compensate for delay in payment in protracted litigation. An award of postjudgment interest on the fees is appropriate to compensate for delay occasioned by appeal.[1260]

Given the hurdles to upward adjustment to the lodestar established in *Perdue*, in most cases the consumer attorney will be better off seeking other approaches to maximizing the attorney fees award. Rather than adjust the "lodestar" upwards for issues such as complexity or novelty of a case, courts rely on these factors as justification for the large number of hours expended in the case, or will find that the attorney handled the case with such skill as to justify the higher end of legal rates for that community.

In a class action, the consumer can also seek fees under a common fund approach.[1261] Even if the court computes a rough lodestar as a check against the common fund award, that lodestar can be adjusted upwards for various factors that could not be used to compute a fee-shifting award.[1262] In addition, the Supreme Court cases limiting upward lodestar adjustments under federal fee shifting statutes do not bind state courts when they interpret state fee shifting statutes, and state courts may award upward adjustments for example for state deceptive practices act or state debt collection statute claims.[1263]

11.13.9 Costs

The FDCPA provides that a collector is liable to the consumer for costs in the case of any successful action.[1264] The use of the words "is liable" in section 1692k(a)(3) strongly suggests the inapplicability of the Federal Rule of Civil Procedure 54(d) standard that gives the court broad discretion as to the awarding costs. Instead, section 1692k(a)(3) makes the award mandatory.[1265]

In seeking reimbursement for costs, the consumer attorney should submit sufficient evidence of the bills and invoices,[1266] and also establish that it is customary in the local legal community to bill separately for such items, as opposed to absorbing them in firm overhead and reflecting them in the hourly rate charged. For example, photocopies, telephone calls, postage, express mail, court imposed filing fees, process servers, and transcripts have all been found recoverable.[1267] Indeed, ACA International, the trade association of debt collection companies, argued in a brief before the U.S. Supreme Court[1268] that this was a proper interpretation of section 1692k(a)(3).[1269] Proof of local billing custom regarding costs may be evidenced by affidavits of local attorneys, possibly telephone surveys of local attorneys, the opponent's billing procedures, or publications of general circulation.[1270] Alternatively, nontaxable costs may possibly be recovered as attorney fees in an FDCPA case,[1271] as under any federal fee-shifting statute that provides for recovery of a reasonable attorney fee as well as costs of the action.[1272] "Even though not normally taxable as costs, out-of-pocket expenses incurred by an attorney which

1259 That is, by awarding the lawyer her billing rate as of the time of the fee petition rather than the lower, "historical rate," which was, or could have been, charged on the date the service was rendered.

1260 Corder v. Brown, 25 F.3d 833, 838 (9th Cir. 1994).

1261 *See* § 11.13.7, *supra*.

1262 *See* National Consumer Law Center, Consumer Class Actions § 19.3.6.1 (10th ed. 2020), *updated at* www.nclc.org/library.

1263 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.8.11.3 (9th ed. 2016), *updated at* www.nclc.org/library.

1264 15 U.S.C. § 1692k(a)(3).

1265 *See generally* Marx v. Gen. Revenue Corp., 568 U.S. 371, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013) (district court may award costs to prevailing defendants in FDCPA cases; no finding that plaintiff brought case in bad faith and for purpose of harassment). *But see* Peck v. IMC Credit Services, 960 F.3d 972 (7th Cir. 2020) (affirming district court's denial of *pro se* consumer's petition for costs; "costs" in § 1692k(a)(3) refers to "costs" awardable under Federal Rules of Civil Procedure 54(d) and does not include damages or compensation for *pro se* consumer's time or mailing expenses).

1266 *See* Cooper v. Retrieval-Masters Creditors Bur., Inc., 338 F. Supp. 3d 729 (N.D. Ill. 2018) (plaintiff showed that cost of preparing deposition was necessarily incurred and reasonable as it was used in summary judgment briefing); Douyon v. N.Y. Med. Health Care, P.C., 49 F. Supp. 3d 328 (E.D.N.Y. 2014) (denying most costs for failure of proof, but allowing fourteen days for submission).

1267 *See* Hallmark v. Cohen & Slamowitz, L.L.P., 378 F. Supp. 3d 222, 235–236 (W.D.N.Y. 2019); Larsen v. JBC Legal Group, 588 F. Supp. 2d 360, 365 (E.D.N.Y. 2008). *See also* LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763 (2d Cir. 1998).

1268 Marx v. Gen. Revenue Corp., 568 U.S. 371, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013).

1269 Amicus Brief of ACA Int'l, Marx v. Gen. Revenue Corp., No. 11-1175, at 6 (U.S. Sept. 2012).

1270 Davis v. City & County of San Francisco, 976 F.2d 1536, 1544 (9th Cir. 1992); Report of the Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237, 260–261 (F.R.D. 1985). *Cf.* Kim v. Barro, 2009 WL 1616271 (N.D. Ga. June 9, 2009) (denying $60 for service costs because plaintiff did not show request for waiver of service).

1271 Giovannoni v. Bidna & Keys, 255 Fed. Appx. 124, 126 (9th Cir. 2007); Bryant v. City of Chicago, 200 F.3d 1092, 1100 n. 3 (7th Cir. 2000) (*citing* Missouri v. Jenkins, 491 U.S. 274, 285–289, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989)); Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 54 (D.C. Cir. 1987) ("We believe that it would be unduly restrictive to find that neither the general term 'costs of litigation' nor the term 'attorney's fees' includes incidental expenses of attorneys that are routine to all litigation and routinely billed to private clients."); Henry v. Webermeier, 738 F.2d 188, 194 (7th Cir. 1984) (travel expenses). *See also* Hallmark v. Cohen & Slamowitz, L.L.P., 378 F. Supp. 3d 222, 235–236 (W.D.N.Y. 2019) (travel and lodging); Long v. Nationwide Legal File & Serve, Inc., 2014 WL 3809401 (N.D. Cal. July 23, 2014) (awarding travel expenses for depositions and also copying costs); Davis v. Hollins Law, 2014 WL 2875778 (E.D. Cal. June 24, 2014) (noting that fee-shifting statutes which provide for the recovery of costs by prevailing plaintiffs provide a sufficient basis for the recovery of travel expenses and that denying such expenses would deter them from taking meritorious cases within the district); McNall v. Credit Bur., Inc., 2011 WL 711095 (D. Or. Feb. 22, 2011) (allowing non-taxable expenses: photocopy charges, fax charges, and postage); Larsen v. JBC Legal Group, 588 F. Supp. 2d 360, 365 (E.D.N.Y. 2008) (permitting as part of attorney fee award $808.92 in transportation expenses).

1272 *See, e.g.*, Evans v. Books-A-Million, 762 F.3d 1288, 1299 (11th Cir. 2014) ("the definition of costs under [28 U.S.C.] § 1920 is not controlling and . . . Evans' ($2460.67) expenses for mediation, legal research, postage and travel may be awarded as attorneys' fees if the district court determines they were reasonably incurred in the course of case preparation, settlement, or litigation").

would normally be charged to a fee paying client are recoverable as attorney's fees."[1273]

There are some exceptions to the general rule that costs are to be awarded to the successful plaintiff. One is that courts deny a request to be reimbursed for the estimated future cost of collecting the consumer's judgment from the defendant.[1274] A more significant exception to the general rule is that the cost of an expert's testimony at trial may not be reimbursed beyond the general witness fee allowed under federal law for all fact witnesses under 28 U.S.C. §§ 1920(3) and 1821(b).[1275]

The Supreme Court, in *West Virginia University Hospitals v. Casey*,[1276] read the express inclusion of reimbursement for expert witness fees under certain federal statutes, such as Equal Access to Justice Act, to mean that the absence of such language in the fee-shifting statute at issue in that case, 42 U.S.C. § 1988, precluded an award of expert fees as costs. Congress later amended section 1988 to provide for expert witness fees,[1277] but the reasoning of *Casey* might justify the disallowance of expert witness fees under statutes, such as the FDCPA, which do not expressly provide for expert witness fees.[1278]

Nevertheless, there is an argument that the cost of consulting experts who assist the attorney in *preparation* for the trial, as opposed to testifying, should be recoverable.[1279] Another approach toward ultimately forcing the defendant to pay for at least some of plaintiff's expert's fee is to first submit requests for admissions reciting the essential factual points that the expert's testimony will prove. Then, under Federal Rule of Civil Procedure 36, the collector must either admit or deny the request for admissions. If admitted, the points are then established and the cost issue is moot; if not admitted, the expert witness fees may then be available as "reasonable expenses" owing pursuant to Federal Rule of Civil Procedure 37(c)(2) when a request for admission that was denied is proven at trial.[1280]

11.13.10 Fee Applications

11.13.10.1 Requirements

The Federal Rules of Civil Procedure require motions for attorney fees and expenses to be filed and served no later than fourteen days after judgment.[1281] What is required in this time period is only notice to the court and to the opponent that fees will be sought and a fair estimate of the total fees and expenses claimed.[1282] A detailed record of hours and rates, affidavits, time records, fee surveys, and other supporting evidence and briefs may be submitted following the motion for fees, "in due course."[1283]

The burden of justifying the amount of attorney fees falls on the consumer's attorney, who should substantiate in detail the number of hours claimed and the hourly rates, and, if applicable and permissible under *Perdue v. Kenny A.*, discussed at § 11.13.6.5, *supra*, any factors claimed to adjust the lodestar upward. The fee claimant's burden is to provide the court with enough documentary evidence to justify the rates claimed[1284] and the efficacy of the hours expended. Documentary insufficiencies will result in a reduction of the award.

Not all courts require a hearing on the fee application.[1285] The Federal Rules of Civil Procedure allow courts to adopt local rules that establish special procedures for resolving fee issues without extensive evidentiary hearings and also facilitates referral of fee issues to special masters or magistrate judges.[1286]

1273 Chalmers v. City of Los Angeles, 796 F.2d 1205, 1216 n.7 (9th Cir. 1986). *See also* Larsen v. AR Res., 453 F. Supp. 3d 849 (E.D. Va. 2020).

1274 *See* Selby v. Christian Nicholas & Assoc., Inc., 2010 WL 745748 (M.D. Fla. Feb. 26, 2010); Jamal v. Thompson & Assoc., P.C., 2010 WL 678925 (N.D. Cal. Feb. 25, 2010); Middlesworth v. Oaktree Collections, Inc., 2009 WL 3720884, at *2 (E.D. Cal. Nov. 3, 2009); Molinar v. Coleman, 2009 WL 435274, at *3 (N.D. Tex. Feb. 20, 2009).

Note, however, that attorney fees may be awarded for postjudgment collection activities when these become necessary due to the defendant's failure to pay. *See* § 11.13.8.2.4, *supra*.

1275 The maximum fee allowed is $40 per day.

1276 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991).

1277 *See* 42 U.S.C. §§ 1988, 2000e-5(k).

1278 *See* O Centro Espirita Beneficente União Do Vegetal in U.S. v. Duke, 343 F. Supp. 3d 1050 (D.N.M. 2018) (declining expert witness costs; the prevailing party is not entitled to any fees for services rendered by experts in a nontestimonial capacity). *Cf.* Cruz v. Int'l Bhd. of Elec. Workers Local No. 3, 150 F.R.D. 29, 36 (E.D.N.Y. 1993) (*Casey* still requires denial of expert fees under Labor Management Relations Act of 1947 as Civil Rights Act of 1991 did not amend this statute).

1279 *See In re* Air Crash Disaster at John F. Kennedy Int'l Airport, 687 F.2d 626 (2d Cir. 1982) (statistical consulting costs incurred in preparing trial exhibit may be recovered under 28 U.S.C. § 1920(4)). *See also* Denny v. Westfield State Coll., 880 F.2d 1465 (1st Cir. 1989) (finding appearance at trial not recoverable but reserving question of expert preparing attorney for trial).

1280 *See* House v. Giant of Md. L.L.C., 232 F.R.D. 257 (E.D. Va. 2005) (reasonableness of medical bills and their causal connection to accident giving rise to action should have been admitted).

1281 Fed. R. Civ. P. 54(d)(2)(B). *See also* Miller v. Credit Collection Serv., 200 F.R.D. 379 (S.D. Ohio 2000).

1282 *See* Gash v. Client Serv., Inc., 548 Fed. Appx. 547 (10th Cir. 2013) (estimated fees in motion should include fees for time to present and defend the fee petition).

1283 Fed. R. Civ. P. 54(d)(2)(B). *See also* Miller v. Credit Collection Serv., 200 F.R.D. 379 (S.D. Ohio 2000); Fed. R. Civ. P. 54 advisory committee's note (1993); Diller, *The Impact of the 1993 Amendments to the Federal Rules of Civil Procedure on Legal Services Practice in the Federal Courts*, 28 Clearinghouse Rev. 134, 140 (June 1994).

1284 *See* § 11.13.8.3, *supra*.

1285 *Compare* Planned Parenthood v. Attorney Gen., 297 F.3d 253 (3d Cir. 2002) (section 1988 case; when reasonable hourly rate is disputed, hearing is required), *and* Henson v. Columbus Bank & Tr. Co., 651 F.2d 320 (5th Cir. 1980) (TILA case; hearing required), *with* Thompson v. Pharmacy Corp., 334 F.3d 1242 (11th Cir. 2003) (section 1988 case; hearing not required), *and* Watkins v. Fordice, 7 F.3d 453 (5th Cir. 1993) (section 1988 case), *and* Love v. Deal, 5 F.3d 1406, 1409 (11th Cir. 1993) (Voting Rights Act case; hearing required only where there is some dispute of material historical fact), *and* DeJesus v. Banco Popular de Puerto Rico, 951 F.2d 3, 14 (1st Cir. 1991) (TILA case; hearing not required), *and* Sablan v. Dep't of Fin., 856 F.2d 1317 (9th Cir. 1988) (section 1988 case), *and* Mirabal v. Gen. Motors Acceptance Corp., 576 F.2d 729 (7th Cir. 1978) (TILA case).

1286 Fed. R. Civ. P. 54(d)(2)(D).

If the action is certified as a class action, then fairness to the class and the Federal Rules of Civil Procedure require that, even where the parties agree on a fee award, the court must still review that award.[1287] Notice of class counsel's motion for fees must be directed to the class in a reasonable manner.[1288] Any class member may object, as may any person from whom payment is sought.[1289]

11.13.10.2 Preparation of the Fee Application

The first step in a successful fee application is preparing a detailed accounting of time spent and work performed on the case.[1290] While the Supreme Court has not described the standards for record-keeping in detail, and some courts may accept reconstructed records,[1291] contemporaneous time records are by far the preferred practice.[1292] Courts may disallow hours claimed if there are no contemporaneous time records, or if those records fail to specify the nature of the task, the time expended, and the subject matter involved.[1293]

A sample petition for attorney fees is available with this treatise's digital version as companion material>Pleadings and Discovery. The petition should include definite information as to the following:

- The hours devoted to various types of activities, identifying the task and the general subject matter of the task; "stating that a certain amount of time was spent working on a particular pleading or motion is sufficient for the Court to evaluate the merit of the entry."[1294]
- The hours spent by various classes of advocates—partners, associates, paralegals.[1295]
- If the case involves unrelated claims, a breakdown of the time spent on each claim. Records should indicate the claim for which the work was done. If the work relates to several claims—or if the work cannot be effectively separated—the records should indicate these facts as well.[1296]
- An explanation of the fee arrangement with the client.
- The attorney's relevant experience and expertise in the type of litigation.
- Documentation of customary fees in the area for the level of experience and skill of the attorney, such as affidavits from other attorneys in the area or a fee survey[1297].
- The attorney's customary fee for the type of litigation.
- The attorney's rate as previously approved by other courts.
- Calculation of the amount of fees requested.

Affidavits regarding customary fees for attorneys of similar skill and experience in the area should be drafted with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1298] in mind. *Daubert* requires federal courts to determine whether an expert's opinion is based on reliable principles and methods before it can be admitted in evidence. This requirement has also been incorporated into the Federal Rules of Evidence.[1299]

Affidavits submitted in support of hourly rates should be careful to spell out the basis for the affiant's knowledge and expertise.[1300] The Seventh Circuit rejected an hourly rate where

1287 Fed. R. Civ. P. 23(h).

1288 Fed. R. Civ. P. 23(h)(1).

Thus, the Ninth Circuit has held in a common fund case that the fee motion must be filed before the deadline for objections to the settlement. *In re* Mercury Interactive Corp., 618 F.3d 988 (9th Cir. 2010). The class must have notice of the approximate amount of the fees. *See also* McCoy v. Nationstar Mortg., L.L.C., 2020 WL 1530859 (S.D. Cal. Mar. 31, 2020) (only notice of motion for attorney fees must be served on class, not actual motion).

1289 Fed. R. Civ. P. 23(h)(2).

1290 A sample schedule of attorney hours with the judge's marginal comments is appended to *In re* Mattera, 128 B.R. 107 (Bankr. E.D. Pa. 1991) (TILA case), *aff'd*, 144 B.R. 687 (E.D. Pa. 1992).

1291 *See* Sussman v. Patterson, 108 F.3d 1206 (10th Cir. 1997) (section 1988 case); Davis v. City & County of San Francisco, 976 F.2d 1536 (9th Cir. 1992) (Title VII case), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993) (vacating affirmance of award of expert fees in light of parties' settlement of that issue); Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988), *aff'd other grounds*, 496 U.S. 154 (1990) (Equal Access to Justice Act case); MacDissi v. Valmont Industr., 856 F.2d 1054 (8th Cir. 1988) (Age Discrimination in Employment Act case); Yohay v. Alexandria Employees Credit Union, 827 F.2d 967 (4th Cir. 1987) (Fair Credit Reporting Act case).

1292 Webb v. Bd. of Educ., 471 U.S. 234, 238 n.6, 105 S. Ct. 1223, 85 L. Ed. 2d 233 (1985); Walker v. United States Dep't of Hous. & Urban Dev., 99 F.3d 761 (5th Cir. 1996) (section 1988 case) (non-contemporaneous records rejected); Phetosomphone v. Allison Reed Group, 984 F.2d 4, 8 (1st Cir. 1993) (Title VII case) (absence of contemporaneous time records calls for disallowance of the fee award); Keenan v. City of Philadelphia, 983 F.2d 459, 472 (3d Cir. 1992) (section 1988 case), *citing* Webb v. Bd. of Educ., 471 U.S. 234, 238 n.6, 105 S. Ct. 1923, 85 L. Ed. 2d 233 (1985); Hallmark v. Cohen & Slamowitz, L.L.P., 378 F. Supp. 3d 222, 230 (W.D.N.Y. 2019); Godson v. Eltman, Eltman, & Cooper, P.C., 328 F.R.D. 35, 63 (W.D.N.Y. Oct. 23, 2018).

1293 *See* Hensley v. Eckerhart, 461 U.S. 424, 437 n.12, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (civil rights case); Washington v. Philadelphia County Ct. of Common Pleas, 89 F.3d 1031 (3d Cir. 1996) (section 1988 case); Keenan v. City of Philadelphia, 983 F.2d 459 (3d Cir. 1992) (section 1988 case); Bostic v. Am. Gen. Fin., Inc., 87 F. Supp. 2d 611 (S.D. W. Va. 2000) (15% reduction because of inadequate documentation in TILA case). *See also* Envtl. Defense Fund v. Reilly, 1 F.3d 1254, 1259–1260 (D.C. Cir. 1994) (Resource Conservation and Recovery Act case); Fair Hous. Council v. Landlow, 999 F.2d 92 (4th Cir. 1993) (section 1988 case); Soler v. G. & U. Inc., 801 F. Supp. 1056 (S.D.N.Y. 1992) (Fair Labor Standards Act case) (rejecting thirty-three individual time entries for being insufficiently described).

1294 Samms v. Abrams, 198 F. Supp. 3d 311, 321 (S.D.N.Y. 2016).

1295 Washington v. Philadelphia County Ct. of Common Pleas, 89 F.3d 1031 (3d Cir. 1996) (section 1988 case); Keenan v. City of Philadelphia, 983 F.2d 459, 473 (3d Cir. 1992) (section 1988 case). *Cf.* Gill v. Mid-Penn Consumer Disc. Co., 1988 WL 107560 (E.D. Pa. Oct. 14, 1988), *aff'd*, 853 F.2d 917 (3d Cir. 1988) (TILA case; no fees for time spent by substitute attorney where application failed to specify hourly rate of that particular attorney).

1296 *See* § 11.13.8.2.3, *supra*. *See also* Cruz v. Int'l Bhd. of Elec. Workers Local No. 3, 150 F.R.D. 29, 35 (E.D.N.Y. 1993) (Labor Management Relations Act case), *aff'd in part, vacated in part on other grounds*, 34 F.3d 1148 (2d Cir. 1994).

1297 *See, e.g.*, Bentson v. Chyma, 2017 WL 7513317, at *4 n.2 (E.D. Tex. Dec. 11, 2017) (citing State Bar of Texas website), *adopted*, 2018 WL 780587 (E.D. Tex. Feb. 8, 2018).

1298 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

1299 Fed. R. Evid. 702.

1300 *Cf.* O Centro Espirita Beneficente União Do Vegetal in U.S. v. Duke, 343 F. Supp. 3d 1050 (D.N.M. 2018) (plaintiff submitted affidavit of "one of the most prominent civil rights attorneys in New Mexico" to support hourly rate); Douyon v. N.Y. Med. Health Care, P.C., 49 F

the support for it was an affidavit by an attorney who did not live or practice law in the jurisdiction, had not practiced law at all in ten years, and had not made a study of prevailing rates in the community.[1301] If an affidavit from a fee expert is submitted, it should address not just the hourly rate but also other questions that are likely to arise, such as whether the number of hours spent on the case was reasonable and whether it is customary in the community to bill separately for paralegal time.[1302]

Courts may disallow or reduce fees for purely clerical tasks undertaken by attorneys;[1303] some challenged tasks, however, such as filing motions, are not "inappropriate for an attorney to perform, particularly in a situation of a very small firm that lacks the support services of a large firm."[1304] As courts often further penalize fee applicants who submit such claims by a punitive denial or reduction in fees,[1305] many attorneys excise questionable, borderline, or insufficiently documented time entries, and then volunteer a small reduction in the overall claim to compensate for duplication of efforts, inefficiency and billing errors which are inevitable—at least in any large-scale litigation.[1306]

In justifying hours claimed as having been reasonably expended, it may be useful to consider the hours charged by the defense attorneys in opposing the consumer's claim, especially where large time expenditures are necessitated by the defendant having taken an intransigent position or having vigorously opposed the consumer on many issues.[1307] If opposing counsel does not agree to provide information about their own bills for fees, many courts will require their production in postjudgment discovery.[1308] While the number of

Supp. 3d 328 (E.D.N.Y. 2014) (in this FDCPA fee application, finding unhelpful declaration of experienced landlord-tenant attorney).

1301 Fogle v. William Chevrolet/Geo, Inc., 275 F.3d 613 (7th Cir. 2001).

1302 *See, e.g.*, Dunaway v. JBC & Assoc., Inc., 2005 WL 3465665 (E.D. Mich. Dec. 19, 2005).

1303 Envtl. Defense Fund v. Reilly, 1 F.3d 1254, 1258 (D.C. Cir. 1994) (Resource Conservation and Recovery Act case); Davis v. City & County of San Francisco, 976 F.2d 1536, 1543 (9th Cir. 1992) (Title VII case), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993) (vacating affirmance of award of expert fees in light of parties' settlement of that issue). *Cf.* Walker v. United States Dep't of Hous. & Urban Dev., 99 F.3d 761 (5th Cir. 1996) (section 1988 case; clerical work done by attorneys should be compensated at a different rate from legal work). *But see* Douyon v. N.Y. Med. Health Care, P.C., 49 F. Supp. 3d 328 (E.D.N.Y. 2014); Ward v. G. Reynolds Sims & Assoc., P.C., 2014 WL 4798935 (E.D. Mich. Sept. 26, 2014) (tasks such as updating calendars and receiving document transmissions are not purely clerical or administrative and are therefore compensable).

1304 Samms v. Abrams, 198 F. Supp. 3d 311, 321 (S.D.N.Y. 2016).

1305 DeJesus v. Banco Popular de Puerto Rico, 951 F.2d 3, 5 (1st Cir. 1991) (TILA case). *See also* Oviedo v. Ozierey, 304 N.W.2d 596 (Mich. Ct. App. 1981) (state law); Stern v. Stern, 415 N.Y.S.2d 225 (App. Div. 1979) (state law).

Attorneys may also want to refer to standardized publications regarding approximate hours appropriately billed for routine services.

1306 Jaffee v. Redmond, 142 F.3d 409 (7th Cir. 1998) (section 1988 case); Louisville Black Police Officers v. City of Louisville, 700 F.2d 268, 278 (6th Cir. 1983) (section 1988 case). *See* § 11.13.8.2.1, *supra*.

1307 *See* Gates v. Deukmejian, 987 F.2d 1392, 1395, n.4 (9th Cir. 1992) (section 1988 case); DeJesus v. Banco Popular de Puerto Rico, 951 F.2d 3, 5 (1st Cir. 1991) (TILA case); Douyon v. N.Y. Med. Health Care, P.C., 49 F. Supp. 3d 328, 341 (E.D.N.Y. 2014) (defendant's vigorous defense provides "further justification for the amount of fees and costs incurred," dwarfing statutory damages recovery); Karr v. Med-I Solutions, L.L.C., 2014 WL 5392098, at *5 (S.D. Ind. Oct. 22, 2014) (disparity between $1000 statutory fee award and $26,000 attorney fee due to defendant's choice to "aggressively litigate its position"); Serna v. Law Office of Joseph Onwuteaka, P.C., 2014 WL 3749652, at *7 (S.D. Tex. July 29, 2014); Hagy v. Demers & Adams, L.L.C., 2013 WL 5728345 (S.D. Ohio Oct. 22, 2013) (awarding attorney fees of $74,195, amount of time expended was, in part, product of defendant's vigorous defense); Gradisher v. Check Enforcement Unit, Inc., 2003 WL 187416 (W.D. Mich. Jan. 22, 2003); Armstrong v. Rose Law Firm, P.A., 2002 WL 31050583 (D. Minn. Sept. 5, 2002) (full lodestar fee request of over $43,000 at $250 per hour awarded where consumer was unsuccessful on her state collection law claim, but prevailed on related FDCPA claim and received maximum statutory damages of $1000, attributing necessity of consumer's attorney's efforts entirely to defendant's defense posture). *See also* Davis v. City & County of San Francisco, 976 F.2d 1536 (9th Cir. 1992) (Title VII case), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993); Shula v. Lawent, 2004 WL 1244030 (N.D. Ill. June 7, 2004) (noting defendant's refusal to settle early on, in face of blatant violations, which prolonged case); McPherson v. Sch. Dist. No. 186, 465 F. Supp. 749, 758–759 (S.D. Ill. 1978) (section 1988 case). *But see* Caputo v. Prof'l Recovery Serv., Inc., 2004 WL 1503953 (D. Kan. June 9, 2004) (refusing to order defendant to disclose hourly rate and total paid to its out-of-state attorney in its unsuccessful defense on merits after determining that information would not be significant to determine rate or total fees to be awarded prevailing plaintiff for reasonable attorney fees).

1308 Gaines v. Dougherty County Bd. of Ed., 775 F.2d 1565, 1571 n.12 (11th Cir. 1985) (abuse of discretion; section 1988 case); Henson v. Columbus Bank & Tr. Co., 770 F.2d 1566, 1575 (11th Cir. 1985) (Truth in Lending Act case; "Because there was a particular need for evidence in this case and because the defendant here has contested the reasonableness of the plaintiff's petition, we find that the district court abused its discretion in refusing to allow Henson discovery of CB & T's records concerning hours expended and fees paid."). *See also* Bouaphakeo v. Tyson Foods, Inc., 2013 WL 364789 (N.D. Iowa Jan. 30, 2013) (Fair Labor Standards Act case); Mendez v. Radec Corp., 818 F. Supp. 2d 667 (W.D.N.Y. 2011) (Fair Labor Standards Act case; where employer put reasonableness of hours and rates charged by employee's attorneys at issue, billing records of employer's counsel were relevant and discoverable); Cohen v. Brown Univ., 1999 WL 696235, at *3 (D.R.I. May 19, 1999); Murray v. Stuckey's, Inc., 153 F.R.D. 151 (D. Iowa 1993) (Fair Labor Standards Act case); Real v. Cont'l Group Inc., 116 F.R.D. 211, 213 (N.D. Cal 1986) (Age Discrimination in Employment Act (ADEA) case); Mitroff v. Xomox Corp., 631 F. Supp. 25 (S.D. Ohio 1985) (ADEA case); Schachar v. Am. Academy of Opthamology Inc., 106 F.R.D. 187, 192 (N.D. Ill. 1985) (antitrust); Blowers v. Lawyers Coop. Publ'g Co., 526 F. Supp. 1324, 1325 (W.D.N.Y. 1981) (Title VII case); Naismith v. Prof'l Golfers Ass'n, 85 F.R.D. 552, 563–564 (N.D. Ga. 1979) (Title VII case; number of hours and hourly rate discoverable); Stastny v. S. Bell Tel. & Tel. Co., 77 F.R.D. 662 (W.D.N.C. 1978) (Title VII case). *See also* Black v. Lojac Enters., Inc., 117 F.3d 1420 (6th Cir. 1997) (table) (where issue of reasonableness of time expended is fully joined, amount of time spent by defense is relevant, but plaintiff here had not met initial burden of submitting enough information). *Cf. In re* Fine Paper Antitrust Litig., 751 F.2d 562, 587 (3d Cir. 1984) (information about opponent's hours and hourly rates "certainly was relevant," but trial court's discretion to deny discovery upheld). *But see* Rodriguez v. Wet Ink., L.L.C., 2014 WL 287339 (D. Colo. Jan. 27, 2014) (Title VII case); Marks Constr. Co. v. Huntington Nat'l Bank, 2010 WL 1836785, at *2–3, 7 (N.D. W. Va. May 5, 2010) (ERISA case, denying discovery); Zhang v. GC Serv., L.P., 537 F. Supp. 2d 805, 809 (E.D. Va. 2008) (denying

defense hours expended may support the plaintiff's attorney's claimed hours, caution should be exercised, because defense rates may be below market rate.

11.13.11 Appealing Attorney Fee Awards

If the action is successful, but the consumer's attorney believes the fee award is inadequate, this issue alone may be appealed.[1309] The lower court's fee decision though is only reversible in cases involving an abuse of discretion, which may be a difficult burden to shoulder.[1310] If the lower court failed to state valid legal reasons for the reduction from the lodestar, however, the decision should be remanded for an explanation.[1311]

The appeal may be filed by the client[1312] or, in many circumstances, by the attorney, such as where the client consents or where the attorney fees have been assigned to the attorney.[1313] Pendency of a motion for an award of attorney fees does not toll the time to appeal from the judgment on the merits of the case.[1314]

11.14 Tax Consequences of Consumer's Recovery and Attorney Fee Award

11.14.1 Overview

This section will discuss tax considerations in fair debt collection actions. While it cannot replace a consultation with a knowledgeable tax advisor, it will raise several issues regarding the tax implications of an award or settlement.[1315] These considerations may help shape the exact structure of the engagement and settlement to ensure that your client receives an adequate award after tax considerations are taken into account.

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postjudgment request for defendants' time records: "Such production would be of marginal assistance to the Court, at best, while placing an undue burden on the defense."); Samuel v. Univ. of Pittsburg, 80 F.R.D. 293 (W.D. Pa. 1978) (section 1988 case) (disallowing such discovery).

1309 *See, e.g.*, Paz v. Portfolio Recovery Assoc., 924 F.3d 949 (7th Cir. 2019); Davis v. Credit Bur. of the South, 908 F.3d 972 (5th Cir. 2018); Hunt v. City of Los Angeles, 638 F.3d 703, 719 (9th Cir. 2011) (order of attorney fees is collateral to, and separately appealable from, judgment); RMA Ventures California v. SunAmerica Life Ins. Co., 576 F.3d 1070 (10th Cir. 2009) (decision on merits and decision on attorney fees are considered separate, final, appealable decisions); Carroll v. Wolpoff & Abramson, 53 F.3d 626 (4th Cir. 1995); Price v. Franklin Inv. Co., 574 F.2d 594 (D.C. Cir. 1978); Herbert v. Fed. Nat'l Mortg. Ass'n, 102 B.R. 407, 409 (E.D. Pa 1989) (appeal of case on merits is separate from appeal of attorney fees award, *citing* White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 452–453, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)).

1310 *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); French v. Corporate Receivables, Inc., 489 F.3d 402 (1st Cir. 2007); Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998); Martinez v. Idaho First Nat'l Bank, 755 F.2d 1376 (9th Cir. 1985); Reneau v. Mossy Motors, 622 F.2d 192 (5th Cir. 1980); McGowan v. King, Inc., 616 F.2d 745 (5th Cir. 1980). *See also* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986) (guidelines for attorney fees).

1311 Carter v. Caleb Brett L.L.C., 757 F.3d 866 (9th Cir. 2014) (district court erred as matter of law by reducing fee award without sufficiently explaining its rationale for reduction); Gonzalez v. City of Maywood, 729 F.3d 1196, 1206 (9th Cir. 2013) (section 1988 case; district court must explain percentage cut to either lodestar or number of hours required unless reduction is no greater than 10%); Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015, 1034 (9th Cir. 2012) (FDCPA case; remanding because district court reduced requested fees of more than $90,000 to award of $2301.95 but "provided no meaningful explanation for the final number of hours it allowed"); Camacho v. Bridgeport Fin., Inc., 523 F.3d 973 (9th Cir. 2008) (FDCPA case; vacating and remanding fees award where district court made numerous reductions without explaining its decisions); Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1149, 1151 (9th Cir. 2001); Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998).

1312 *Cf.* Evans v. Jeff D., 475 U.S. 717, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986) (section 1988 case; client may waive fee); Turner v. Sec'y of the Air Force, 944 F.2d 804, 807 (11th Cir. 1991) (Title VII case); Benitez v. Collazo-Collazo, 888 F.2d 930 (1st Cir. 1989) (only client had standing to contest fee distribution among co-counsel).

1313 *See, e.g.*, Gonter v. Hunt Valve Co., 510 F.3d 610 (6th Cir. 2007) (False Claims Act case; attorneys had represented client at earlier stage of litigation); Mathur v. Bd. of Trs. of S. Ill. Univ., 317 F.3d 738, 741–742 (7th Cir. 2003) (title VII case; because client's obligations to attorneys were completely satisfied and client did not dispute fee award amount, any additional fees that would be awarded on appeal would not benefit him, but rather his attorneys, and therefore attorneys were deemed actual parties in interest); Samuels v. Am. Motors Sales Corp., 969 F.2d 573 (7th Cir. 1992); Venegas v. Skaggs, 867 F.2d 527 (9th Cir. 1989); Mayberry v. Walters, 862 F.2d 1040 (3d Cir. 1988) (holding attorney had right to appeal as surrogate for client with client's consent); Panola Land Buying Ass'n v. Clark, 844 F.2d 1506 (11th Cir. 1988); Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981) (civil rights case); Dietrich Corp. v. King Res. Co., 596 F.2d 422 (10th Cir. 1979); Preston v. United States, 284 F.2d 514, 515 n.1 (9th Cir. 1960). *But see* Willis v. Gov't Accountability Office, 448 F.3d 1341 (Fed. Cir. 2006) (Civil Service Reform Act case; attorney lacks Article III standing on appeal to assert claim for full amount of attorney fees where former client declined to appeal); Benitez v. Collazo-Collazo, 888 F.2d 930 (1st Cir. 1989).

1314 *See, e.g.*, Yost v. Stout, 607 F.3d 1239 (10th Cir. 2010); Moody Nat'l Bank of Galveston v. GE Life and Annuity Assurance Co., 383 F.3d 249, 250 (5th Cir. 2004); Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec., 811 F. Supp. 2d 216, 224 (D.D.C. 2011); Arrington v. La Rabida Children's Hosp., 2009 WL 928922 (N.D. Ill. Apr. 3, 2009). *Cf.* Movie Gallery, US, L.L.C. v. Greenshields, 2009 WL 3063311 (M.D. Ala. Sept. 22, 2009) (unfair trade practices action; exercising its discretion to toll time for appeal while rule 54(d)(2) motion was pending where plaintiff requested that court, while considering defendants' motion for fees, toll plaintiff's time for appeal pursuant to Fed. R. Civ. P. 58(e)).

1315 An important caveat: NCLC is not staffed by tax lawyers, tax laws often change, and each individual's tax situation is different. The particulars of an individual's taxes and tax planning must be based on a knowledgeable tax professional's analysis of the facts specific to that individual. Note that these issues are complex and some tax return preparers will not have adequate training or knowledge to properly consider them.

11.14.2 Tax Considerations for Prevailing Consumers

11.14.2.1 Generally

This section focuses on whether court awards and settlements,[1316] including cash awards, cancelled debt, and attorney fees, are taxable income to your client. Generally, all income is subject to tax unless specifically excluded by statute.[1317] Most pecuniary awards in the consumer area are taxable, for example, statutory damages, lost wages, penalties, interest, and punitive damages. Cancelled debt is considered taxable income to your client unless excluded by statute[1318] or common law.

In general, most cash awards to a consumer *are* considered taxable income to the extent the recovery includes the following:

- Recovery of lost wages or income;
- Prejudgment and postjudgment interest;[1319]
- Punitive damages;[1320]
- Statutory, minimum, or multiple damages, except to the extent that they can be treated as non-taxable compensatory damages;
- Emotional distress damages, unless they are linked to a physical injury or result in actual medical expenses; and
- Cancelled debts and forgiven loans, with several important exceptions discussed below.

In consumer rights litigation, however, the following types of recoveries are generally *not* taxable:

- Return of capital or recovery of a non-deductible expenditure—for example amounts improperly taken from a consumer or unwarranted overcharges;
- Damages from physical injury; and
- Cancellation of a debt (rather than an affirmative award of damages) because, for example, a statutory exemption applies, or the debt is disputed.

These principles are examined in more detail below.

11.14.2.2 Statutory, Minimum, and Multiple Damages

In general, statutory, minimum, and multiple damages are taxable. There may be an exception if they can be viewed under state law as a proxy for non-taxable compensatory damages. Some state laws treat them as a proxy for a compensatory award when public policy requires the consumer to be fully compensated, but problems of proof exist. Also, consider the situation in which the statute awards minimum or actual damages, whichever is greater. At least a portion of a minimum-damages award should be non-taxable if the non-taxable actual damages existed but were not awarded because the minimum damages were greater.

In the context of a multiple-damage award, separate out actual damages from the rest of the award. For example, when treble damages are awarded, only two-thirds of the award should be automatically considered taxable, while the other third should be examined to determine the exact nature of the harm being compensated to see if that portion of the award is non-taxable.

11.14.2.3 Return of Capital; Reduction of Purchase Price

While certain actual damages in a debt collection harassment case may be taxable, such as lost wages or emotional distress, an exception applies for damages that represent the return of money improperly taken. For example, recovery of wrongfully garnished wages is not taxable income, because the wrongdoer is returning money that has already been subject to tax. Such awards are non-taxable, because they are a recovery of capital.[1321] In many consumer cases, actual damages are unrelated to lost wages or income or emotional distress, but instead simply represent the return of amounts improperly taken from the consumer. Generally, awards returning amounts improperly taken from the consumers (i.e. overcharges) are not taxable because the money replaced has already been subject to tax.

11.14.2.4 Physical Injury Damages

In either a court recovery or a settlement, gross taxable income does not include damages (other than punitive damages) "on account of" personal physical injuries or physical sickness.[1322] To exclude these damages from gross income a taxpayer must demonstrate that the underlying cause of action giving rise to the recovery was based on tort or tort-type

1316 Generally, the tax consequences of a settlement or court award are the same. They will be referred to collectively as "award" throughout this section.

1317 I.R.C. § 61 (2017).

1318 26 U.S.C.A. § 108 (West 2018).

1319 Brabson v. United States, 73 F.3d 1040 (10th Cir. 1996).

1320 Punitive damages are not defined in either the Internal Revenue Code or the Treasury Regulations. They have been defined by the courts, however, as damages that are non-compensatory and are designed to punish the offender and serve as an example to others. *See* Bagley v. Comm'r, 105 T.C. 396 (1995). In some states, part of the punitive damages goes to a state fund or other governmental recipient. This portion of the punitive damages should not be taxable to the consumer because the consumer does not receive it and has no control over its disposition.

1321 They are not "accessions to wealth." Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431, 75 S. Ct. 473, 99 L. Ed. 483 (1955). *See* I.R.C. § 108(e)(5).

While they may result in a decrease in the tax basis of the item purchased, this will rarely have any consequences for consumer goods since they generally are not depreciable and not sold at a profit.

1322 I.R.C. § 104(a)(2). *See also* O'Gilvie v. United States, 519 U.S. 79, 117 S. Ct. 452, 136 L. Ed. 2d 454 (1996) (punitive damages are taxable).

rights.[1323] State law decides whether a tort-type injury is involved.[1324]

If an action has its origin in a physical injury or physical sickness, then all damages (other than punitive damages) that flow from the physical event are treated as damages received on account of personal physical injuries or physical sickness, whether or not the recipient of the damages is the injured party.[1325] If the tortious act causes physical injuries, which in turn cause other damages such as lost wages or pain and suffering, then all of the damages are "on account of" physical injury and are thus excluded from income.[1326]

Pain and suffering damages accompanying physical injury are also excluded from income, but stand-alone emotional distress damages are taxable.[1327] Moreover, any damages awarded to compensate for physical symptoms which flow from the emotional distress, such as insomnia, headaches, and stomach disorders, are taxable because they will likely be treated as damages for emotional distress and not physical injuries.[1328]

Nevertheless, even when no physical injury is present, emotional distress damages are not taxable up to the amount paid for medical expenses attributed to the treatment of that distress.[1329] Because the Internal Revenue Code refers to the amount "paid" as opposed to the amount "paid by the consumer," expenses paid by insurers should count toward this non-taxable amount.

1323 Comm'r v. Schleier, 515 U.S. 323, 115 S. Ct. 2159, 132 L. Ed. 2d 294 (1995).

1324 Brabson v. United States, 73 F.3d 1040, 1044 (10th Cir. 1996).

1325 I.R.C. § 104(a)(2). *See* H.R. CONF. REP. 104-737, 301 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 1474, 1589. *But see* Amos v. Comm'r, 86 T.C.M. (CCH) 663 (T.C. 2003), 2003 WL 22839795 (T.C. Dec. 1, 2003) (although dominant reason Dennis Rodman agreed to settlement amount was to compensate courtside cameraman for his claimed physical injuries; 40% of award was not received on account of personal physical injury or sickness, and thus was includable in taxpayer's income, when settlement agreement expressly provided that portion of settlement amount was paid in return for cameraman's agreement not to defame payor, disclose existence or terms of settlement agreement, publicize facts relating to injury incident, or assist in any criminal prosecution against Rodman with respect to incident).

1326 *See* Banaitis v. Comm'r, 340 F.3d 1074, 1080 (9th Cir. 2003).

1327 I.R.C. § 104(a). *See* Murphy v. I.R.S., 493 F.3d 170 (D.C. Cir. 2007) (when taxpayer sued to recover federal income tax paid on compensatory damages she had been awarded in administrative action against her former employer under whistleblower environmental statutes for "mental pain and anguish" and "injury to professional reputation," damages were outside Internal Revenue Code's "personal physical injuries or physical sickness" damages exclusion from personal income, even though taxpayer no doubt had suffered from certain physical manifestations of emotional distress on which award was based).

1328 "It is intended that the term emotional distress includes symptoms (e.g., insomnia, headaches, stomach disorders) which may result from such distress." H.R. Conf. Rep. No. 104-737, at 301.2 n.56 (1996).

1329 I.R.C. § 104(a).

11.14.2.5 Cancelled Debt

11.14.2.5.1 The general rule

Cancelled debts are taxable income unless a statutory exemption or other exclusion applies. Income from cancelled debts[1330] is taxable because the debtor realizes an accession to wealth.[1331] Receipt of loan proceeds is not taxable because of the corresponding obligation to repay. When that obligation is cancelled, the debtor has an increase in wealth which is subject to tax.[1332]

Unless a statutory exemption or common law exclusion exists, the debtor must report the cancelled debt as income. The logic that treats forgiveness of most debt obligations as income applies only to the principal amount of the debt. Interest and fees that are forgiven or refunded to the borrower are not considered income.

If a consumer has taken a deduction for interest payments in previous years, and that interest is subsequently refunded to the consumer, the consumer has received a tax benefit. According to one court, the amount previously taken as a deduction becomes income in the current year under the "tax benefit" rule.[1333]

11.14.2.5.2 Statutory exemptions

There is no taxable income to the debtor for a cancelled debt when a statutory exemption applies.[1334] These exemptions include when the debt is cancelled in a bankruptcy case; when the debtor is insolvent; for cancelled student loans in certain circumstances; when the loan relates to a primary residence and was cancelled (or an agreement to cancel existed) before January 1, 2021;[1335] and when the cancellation relates to a purchase price reduction between a buyer and seller.[1336]

1330 Cancelled debt (COD) is also referred to as discharge of indebtedness (DOI).

1331 The concept of discharge-of-indebtedness income, first articulated in *United States v. Kirby Lumber Co.*, 284 U.S. 1, 52 S. Ct. 4, 76 L. Ed. 2d 131 (1931), and later codified at I.R.C. § 61(a)(12), requires taxpayers who have incurred a financial obligation that is later discharged in whole or in part to recognize as taxable income the extent of the reduction in the obligation. Two rationales have been identified for this rule: (1) the taxpayer has an increase in wealth due to the reduction in valid claims against the taxpayer's assets or (2) the consideration received by a taxpayer in exchange for the indebtedness is excluded from income when received because of the obligation to repay, and the cancellation of that obligation removes the reason for the original exclusion.

1332 I.R.C. § 61(a)(12) (2017).

1333 "The tax benefit rule" applies whenever an individual recovers a previously deducted amount that reduced income subject to tax. For example, if an individual wins a recovery for reimbursement of overcharged interest on a home mortgage, and that individual had deducted the mortgage interest they paid on a previous year's tax return, the recovery or reimbursement of that interest is taxable. *See* I.R.C. § 111; Hillsboro Nat'l Bank v. CIR, 460 U.S. 370, 383, 103 S. Ct. 1134, 75 L. Ed. 2d 130 (1983); Schlifke v. Comm'r, 61 T.C.M. (CCH) 1697 (1991).

1334 *See* I.R.C. § 108.

1335 There are several other statutory exceptions outside the scope of this discussion. *See* I.R.C. § 108(a).

1336 I.R.C. § 108(e)(5).

The Internal Revenue Code specifically excludes from gross income any cancelled debt resulting from the cancellation of consumer debt in a bankruptcy case.[1337] The timing of the bankruptcy filing is crucial. If the debt is discharged in bankruptcy, the cancelled debt is entirely excludable from gross income.[1338] The bankruptcy exception does not apply if the debt is forgiven before or after the bankruptcy action.

Insolvency for purposes of the insolvency exception is defined as excess of liabilities over the fair market value of assets, as determined immediately prior to the discharge or cancellation of the debt.[1339] Total liabilities include the debt about to be cancelled. Contingent liabilities are counted as liabilities if it is "more likely than not" that the taxpayer will be called upon to pay the obligation in the amount claimed.[1340] Any amount cancelled that exceeds the insolvency is not excluded from income. IRS Publication 4681 is a helpful resource for determining whether a debtor is insolvent.

Student loans that are cancelled due to the debtor's work in certain professions for a certain period of time,[1341] or due to the death or disability of the student[1342] are not taxable. Another example of debt cancellation that is not taxable is gratuitous debt forgiveness, for example, when a family member or friend cancels a loan.[1343]

11.14.2.5.3 Non-statutory exclusions

In many consumer cases, the amount of a debt or even the existence of a debt that arose in connection to a consumer transaction is disputed, for example, when the debtor does not owe the debt, is the victim of identity theft, or when credit card charges were unauthorized. When there is a reasonable dispute as to the validity of the debt, its cancellation is not income.[1344] This doctrine usually applies to unliquidated, disputed debts.[1345]

A related doctrine involves the purchase price reduction. A purchase price reduction is not taxable income if a legitimate argument exists for contesting the purchase price.[1346] For example, consider a consumer claim against the creditor (under the FTC Holder Rule) that a seller's deception resulted in the consumer paying too much for a motor vehicle, causing the consumer to finance an excessive amount. Reduction or cancellation of that loan is not taxable because it falls under the purchase-price-reduction exception.[1347]

In addition, contingent liabilities are not income when they are cancelled.[1348] For example, there is no taxable income when a sale, which is contingent on financing, falls through.

11.14.2.5.4 Exception for operation of law; TILA rescission

Truth in Lending Act rescission of a home mortgage is an important example of when cancelled debt is not taxable income. Since the statute rescinds the mortgage debt, it is legally wiped out and not considered income when it is cancelled. However, the consumer has to recognize as income any deductions previously claimed for the interest paid on the mortgage.[1349]

One can also argue that in a Truth in Lending rescission, all that is cancelled is interest and fees. The rescission does not forgive any principal, but just erases any liability for interest and fees. Past payments made toward interest and fees are returned or applied to reduce the principal, and the consumer tenders the net amount financed. The refunded fees and the amount saved in future interest do not increase the taxpayer's pre-loan wealth and should not be treated as income.

11.14.2.6 Form 1099-C evidencing debt cancellation

Creditors are required to report to the IRS on Form 1099-C cancelled debt which exceeds $600.[1350] The creditor must also issue a copy of the Form 1099-C to the taxpayer on or before January 31 of the year following the year of the discharge.[1351]

Debt that is cancelled due to operation of law generally does not have to be reported by the lender on a Form 1099-C.[1352] Foreclosures and the running of statutes of limitations are important exceptions and are circumstances under which the IRS requires the lender to report the cancelled debt on a Form 1099-C.[1353]

1337 I.R.C. § 108(a)(1)(A).

1338 I.R.C. § 108(d)(2). If the bankruptcy exclusion applies, the taxpayer should not include any of the DOI in gross income on the taxpayer's tax return but must attach a Form 982 to his or her return. In lieu of a Form 982, the taxpayer can include a statement on his or her return, such as this: "The 1099-C DOI income reported by XYZ Bank is based on a discharge of indebtedness in bankruptcy under Title 11 United States Code. Therefore, it is excluded from gross income pursuant to I.R.C. § 108(a)(1)(A)."

1339 I.R.C. § 108(d)(3).

1340 Merkel v. Comm'r, 109 T.C. 463, 483 (1997), *aff'd*, 192 F.3d 844 (9th Cir. 1999).

1341 I.R.C. § 108(f)(1).

1342 I.R.C. § 108(f)(5).

1343 I.R.C. § 102 (gifts and bequests are not taxable to the recipient).

1344 Zarin v. Comm'r, 916 F.2d 110 (3d Cir. 1990). *See also* Estate of Smith v. C.I.R., 198 F.3d 515, 530 (5th Cir. 1999). *Cf.* Preslar v. Comm'r, 167 F.3d 1323, 1329 (10th Cir. 1999) (noting that, if debt is unenforceable as result of infirmity at time of its creation—for example, fraud or misrepresentation—tax liability may be avoided through purchase price reduction under I.R.C. § 108(e)(5) or an "infirmity exception"). *But see* Payne v. Comm'r, 357 Fed. Appx. 734 (8th Cir. 2009) (payment to bank was in settlement of undisputed credit card balance).

1345 *See* Preslar v. Comm'r, 167 F.3d 1323 (10th Cir. 1999).

1346 Rev. Rul. 92-99, 1992-2 C.B. 35 (1992); I.R.C. § 108(e)(5).

1347 I.R.C. § 108(e)(5).

1348 *See* I.R.S. P.L.R. 9642041 (Oct. 18, 1996).

1349 *See* Schlifke v. Comm'r, T.C. Memo. 1991-19, 61 T.C.M. (CCH) 1697 (1991).

1350 *See* Treas. Reg. §§ 1.6050P-1(a), 1.6050P-1T(b)(2)(B), 1.6050P-1(b)(2)(F).

1351 *See* Treas. Reg. § 1.6050P-1(f)(2).

1352 61 Fed. Reg. 262 (1996) ("A discharge of indebtedness occurring by operation of law not enumerated above is not required to be reported under the final regulations.").

1353 Treas. Reg. § 1.6050P-1(b)(2).

Creditors are not required to report consumer debts discharged in bankruptcy.[1354] However, if the lender mistakenly issues Form 1099-C for debt discharged in bankruptcy, it is still *not* taxable income.[1355] The taxpayer should simply file a Form 982 with their income tax return reporting the amount as discharged in bankruptcy.[1356]

The filing of a Form 1099-C does not prove that there has been a taxable event under the Internal Revenue Code. The lender is likely to file Form 1099-C without regard to whether one of the several exclusions from gross income, discussed above, applies. In addition, some Forms 1099-C are filed in error by creditors. A settlement agreement involving debt forgiveness can cover this issue by addressing whether the creditor will issue a Form 1099-C and in what amount.

When consumers receive a Form 1099-C, they or their tax professional must make an independent analysis, distinct from that performed by the creditor, about whether the cancelled debt is taxable income or whether one of the exclusions applies. If the taxpayer claims the amount is excluded, the taxpayer must attach—depending on the circumstances of the exclusion—a Form 982, a statement, or a Form 8275 to the tax return for the year in which the debt was cancelled.[1357]

A creditor or debt collector is unlikely to be liable to the consumer simply for issuing an inaccurate Form 1099-C. However, an improper motive for submitting a 1099-C form may give rise to an unfair and deceptive act or practice claim or a FDCPA violation.[1358]

11.14.2.7 Allocation Between Taxable and Non-Taxable Portions

Sometimes a settlement agreement will allocate the recovery to non-taxable and taxable portions. If this allocation is challenged, the Internal Revenue Service (IRS) and courts will consider all facts, including the allegations contained in the complaint, the evidence presented, the arguments made in the court proceeding, and the intent of the payor to determine the proper allocation.[1359]

The language of the settlement agreement, judgment, and any disbursement order is paramount. The U.S. Tax Court has held that the allocation in a settlement is generally binding for tax purposes to the extent that the agreement is entered into by the parties in an adversarial context, at arm's length, and in good faith.[1360] However, the IRS is not necessarily bound by the allocations contained in settlement agreements to which it was not a party.[1361] The allocation among the various claims of the settlement can be challenged when the facts and circumstances indicate that the allocation does not reflect the economic substance of the settlement.[1362]

11.14.3 Tax Consequences of Attorney Fee Awards

11.14.3.1 Generally

An important caveat: this section seeks to place attorney fee tax issues in a coherent context. Tax laws often change, some issues discussed here are unresolved, and each client's tax situation is different. The particulars of an individual's taxes and tax planning must be based on a knowledgeable tax professional's analysis of the facts specific to that individual.

Except when the law is clear, professional advice may be needed. Even then, these issues are complex; some tax return preparers will not have adequate training or knowledge to properly consider them. Failing to report the attorney fees as income could increase the likelihood of the IRS imposing an accuracy-related penalty if the fees are later found to be includable in the client's income.[1363]

In general, income is taxed to the person who earns it. As the FDCPA and other consumer statutes award attorney fees to a prevailing consumer, courts often have found that attorney fees (whether awarded by a court or determined as part of a settlement) belong to the client and are income to the client. The Supreme Court in *Astrue v. Ratliff*[1364] held that fee awards under the Equal Access to Justice Act, which specifies that payment of attorney fees are to made to the "prevailing party," are to be paid directly to the prevailing litigant, not to that litigant's attorney. The FDCPA and many other fee-shifting statutes contain similar language.[1365]

At issue then is whether that fee award, or some portion of it, is income to the client even when the client does not retain the award. When received by the consumer's attorney, the fees are income to the attorney. But the question is whether the attorney fee award is also income to the client.

That the client does not receive the fee award does not end the inquiry, because tax law may consider the payment of attorney fees to be income to the client either as satisfaction of

1354 Treas. Reg. § 1.6050P-1(d)(1).

1355 *See, e.g.*, Treas. Reg. § 1.6050P-1(a)(3) (discharged indebtedness must be reported whether or not it is taxable income).

1356 *See* IRS Publication 4681, at 5, *available at* https://www.irs.gov.

1357 *See* I.R.C. § 108(d)(2).

1358 § 7.2.5.4, *supra*.

1359 Threlkeld v. Comm'r, 87 T.C. 1294, 1306 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988); Bent v. Comm'r, 87 T.C. 236, 245 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987).

1360 Robinson v. Comm'r, 102 T.C. 116, 127 (1994) (citing Threlkeld v. Comm'r, 87 T.C. 1294, 1306–1307 (1986), Fono v. Comm'r, 79 T.C. at 680, 694 (1982), *aff'd without pub. op.*, 749 F.2d 37 (9th Cir. 1984), and Mitchell v. Comm'r, T.C. Memo. 1990-617, *aff'd*, 992 F.2d 1219 (9th Cir. 1993)), *rev'd in part on other grounds*, 70 F.3d 34 (5th Cir. 1995).

1361 *See* Robinson v. Comm'r, 102 T.C. 116, 127–134 (1994), *rev'd in part on other grounds*, 70 F.3d 34 (5th Cir. 1995).

1362 *See* Phoenix Coal Co. v. Comm'r, 231 F.2d 420, 423 (2d Cir. 1956); Bagley v. Comm'r, 105 T.C. 396, 406 (1995), *aff'd*, 121 F.3d 393 (8th Cir. 1997). *See also* Hemelt v. United States, 122 F.3d 204, 208 (characterization of settlement proceeds cannot depend entirely on the intent of the parties).

1363 *See, e.g.*, Green v. Comm'r, 312 Fed. Appx. 929 (9th Cir. 2009); Sanford v. Comm'r, 2008 WL 2491676 (U.S. Tax Ct. June 23, 2008).

1364 560 U.S. 586, 130 S. Ct. 2521, 177 L. Ed. 2d 91 (2010).

1365 For example, under the FDCPA, 15 U.S.C. § 1692k(a)(3), the debt collector is liable to "such person" (that is, the consumer) for costs of the action and attorney fees.

the client's debt[1366] or as anticipatory assignment of income.[1367] The United States Supreme Court case *Commissioner of Internal Revenue v. Banks*[1368] held that the contingent attorney fee portion of a client's recovery is an anticipatory assignment of income attributable to the client:

> In the context of anticipatory assignments, however, the assignor often does not have dominion over the income at the moment of receipt. In that instance the question becomes whether the assignor retains dominion over the income-generating asset, because the taxpayer "who owns or controls the source of the income, also controls the disposition of that which he could have received himself and diverts the payment from himself to others as the means of procuring the satisfaction of his wants." Looking to control over the income-generating asset, then, preserves the principle that income should be taxed to the party who earns the income and enjoys the consequent benefits.

In the case of a litigation recovery, the income-generating asset is the cause of action that derives from the plaintiff's legal injury. The plaintiff retains dominion over this asset throughout the litigation.[1369]

The general rule then is that, if a third party pays an obligation owed by a taxpayer (such as where the defendant is required to pay for attorney services rendered to the consumer), then the taxpayer realizes income in the amount of the payment.[1370] However, the Court in *Banks* went on to note that it was faced with a fairly narrow issue:

> After Banks settled his case, the fee paid to his attorney was calculated solely on the basis of the private contingent-fee contract. There was no court-ordered fee award, nor was there any indication in Banks' contract with his attorney, or in the settlement agreement with the defendant, that the contingent fee paid to Banks' attorney was in lieu of statutory fees Banks might otherwise have been entitled to recover.[1371]

A close reading of *Banks* indicates that the Supreme Court might treat statutory attorney fees paid to the attorney differently from fees pursuant to the contingent fee agreement at issue therein. One goal of statutory fees is to allow consumers to pursue litigation even when a corporation utilizes a scorched earth strategy. This defense strategy would succeed, and fair settlements discouraged if, because of the inclusion of attorney fees, a client is in a worse financial position having filed and won the case than if the client had not succeeded in vindicating their rights. Imagine an arduously fought case in which the consumer's attorney fees ballooned from matching the hours spent by the corporation's lawyers.

The *Banks* court discussed this issue but declined to address it. The opinion does indicate that the Court may find such fees not taxable to the consumer—it stated that the "plaintiff usually has little control over the amount awarded." Additionally, it noted that, when statutory fees are greater than the damage award, "[t]reating the fee award as income to the plaintiff in such cases, it is argued, can lead to the perverse result that the plaintiff loses money by winning the suit. Furthermore, it is urged that treating statutory fee awards as income to plaintiffs would undermine the effectiveness of fee-shifting statutes in deputizing plaintiffs and their lawyers to act as private attorneys general."[1372]

In addition, as described in the subsections following, there are several clear exceptions to the rule that an attorney fee award is taxable income to the consumer. If the underlying recovery is not taxable income (as discussed at § 11.14.2, *supra*), then the attorney fee award is not taxable to the client either.[1373] Another exception relates to where the consumer is not obligated to pay the consumer's attorney.[1374] There is also a statutory exception related to civil rights cases that may extend to certain consumer litigation.[1375] Other exceptions apply to class actions.[1376]

If the attorney fee award is taxable to the consumer, this can have harsh consequences for the consumer, significantly increasing the consumer's tax obligation and elimination of the child tax credit, earned income tax, other credits and tax benefits. This issue is examined at § 11.14.3.6, *infra*.

11.14.3.2 Attorney Fees Not Taxable to Client Where Damages Recovery Not Taxable

Generally, when the underlying award or settlement to the client is not taxable, then the attorney fees are also not taxable to the client. Whether all or part of a settlement or court award is non-taxable is examined at § 11.14.2, *supra*.

When the recovery involves taxable *and* non-taxable amounts, such as for personal injury and back wages, the attorney fees are normally apportioned accordingly,[1377] often in the same proportion to the award. Thus, the percentage of the contingent fee that is included in the taxpayer's gross income and also taken as an itemized deduction is the same

1366 *See* Old Colony Tr. Co. v. Comm'r, 279 U.S. 716, 49 S. Ct. 499, 73 L. Ed. 2d 918 (1929).

1367 *See* Commissioner v. Banks, 543 U.S. 426, 125 S. Ct. 826, 160 L. Ed. 2d 859 (2005); Commissioner v. Sunnen, 333 U.S. 591, 604, 68 S. Ct. 715, 92 L. Ed. 2d 898 (1948).

1368 543 U.S. 426, 125 S. Ct. 826, 160 L. Ed. 2d 859 (2005).

1369 Commissioner v. Banks, 543 U.S. 426, 434–435, 125 S. Ct. 826, 160 L. Ed. 2d 859 (2005) (citations omitted).

1370 Old Colony Tr. Co. v. Comm'r, 279 U.S. 716, 49 S. Ct. 499, 73 L. Ed. 918 (1929).

1371 *Id.*, 543 U.S. at 439.

1372 Comm'r v. Banks, 543 U.S. 426, 125 S. Ct. 826, 160 L. Ed. 2d 859 (2005). *But see* Sinyard v. Comm'r, 268 F.3d 756 (9th Cir. 2001) (pre-*Banks* case, with one judge dissenting; noting that taxing statutory attorney fees may have perverse results, but stating that remedy was with Congress).

1373 *See* § 11.14.3.2, *infra*.

1374 *See* § 11.14.3.3, *infra*.

1375 *See* § 11.14.3.4, *infra*.

1376 *See* § 11.14.3.5, *infra*.

1377 *See, e.g.*, Sinyard v. Comm'r, 268 F.3d 756 (9th Cir. 2001).

as the percentage of the full award which is included in gross income.[1378]

11.14.3.3 Where the Consumer Is Not Obligated to Pay the Consumer's Attorney

Whether a fee award is taxable to the client may depend on whether the client has an obligation to pay for the attorney's services. When the client is responsible for paying for the attorney's services, they will generally have income equal to the fee award, even if paid by another person. The satisfaction of another's obligation is income to the person who owed the debt.[1379] If a retainer or other agreement provides that the attorney will not charge the client for legal services, *i.e.*, when the client has no obligation to pay fees, any fees paid to the attorney may not be income to the client.[1380]

The strongest case for excluding the attorney fee award from the client's income is when the attorney's retainer agreement does not require the client to pay an attorney fee. An IRS Private Letter Ruling to a legal services organization indicates that a fee recovery from the defendant is not taxable to the legal services client. The fees awarded directly to a legal services organization and a private firm that had co-counseled the case with it[1381] were not taxable to the client even though the client's recovery of damages was taxable.[1382]

The legal services organization's retainer agreement expressly provided that the client would not be charged any fees for legal services, and there was no retainer agreement between the client and the private law firm. The IRS reasoned that, because the litigant had no obligation, express or implied, to pay attorney fees, the award of attorney fees was not includable in the litigant's income. If the fee arrangement specifically states that the client is not liable for the fee, then attorney fees should not be not includable in the client's income because the client is under no contractual obligation to pay fees.[1383]

Another strategy considered by some attorneys is to ask the client to agree in the retainer to irrevocably assign to the attorney any right to attorney fees and any control over the attorney fee claim. However, such an agreement may be considered as an anticipatory assignment of income, leading to an attribution of attorney fees.[1384] Nevertheless, the United States Solicitor General, representing the Internal Revenue Service before the Supreme Court, gave qualified endorsement to this strategy: "If such an assignment [of statutory attorney fees to the attorney] is viewed as a transfer of the entirety of the attorney fee claim to the lawyer, such that the prevailing party retains no meaningful interest in or control over the claim, then it may be possible to view any recovery on that claim as income only of the lawyer."[1385] Some cases state that the client does not own statutory attorney fees.[1386]

11.14.3.4 No Tax Is Owed on Fees in "Civil Rights" Cases

In certain "civil rights" cases, including some consumer claims, clients may deduct attorney fees and costs "above the line," which means that the client reports only their net income—that is, the amount of the award the client keeps.[1387] This eliminates the harsh result where the consumer's tax liability may increase, even though the fee award is received by the consumer's attorney.

The "above-the-line" deduction is available if the attorney fees relate to causes of action delineated in Internal Revenue Code § 62(a)(20): fee awards paid by or on behalf of the taxpayer "in connection with any action involving a claim of unlawful discrimination,"[1388] regardless of whether the fees and costs result from a contingent fee, statutory fee-shifting award, or a class action common fund award.

"Unlawful discrimination" is a defined term in the Internal Revenue Code to include claims under 42 U.S.C. §§ 1981, 1983, or 1985, the Fair Housing Act, and the Americans with Disabilities Act. The rule also applies to certain employment claims, such as those under the Age Discrimination in Employment Act and the Family Medical Leave Act.

1378 *See* Sinyard v. Comm'r, 268 F.3d 756 (9th Cir. 2001).

1379 Old Colony Tr. Co. v. Comm'r, 279 U.S. 716 (1929) (when payment is made to satisfy the obligation of a taxpayer to a third party, the amount of the payment is generally includible in the taxpayer's gross income).

1380 *See* IRS Private Letter Ruling, PLR 201015016, 2010 WL 1511524 (Apr. 16, 2010); IRA Private Letter Ruling PLR 201552001, 2015 WL 9474657 (Dec. 24 2015).

1381 IRS Private Letter Ruling, P.L.R. 201015016, 2010 WL 1511524 (Jan. 5, 2010) (released on April 16, 2010).

1382 IRS Private Letter Ruling, P.L.R. 201015016, 2010 WL 1511524 (Jan. 5, 2010) (released on April 16, 2010).

1383 IRS Private Letter Ruling, P.L.R. 200748010 (Nov. 30, 2007). Note, however, that *Astrue v. Ratliff*, 560 U.S. 586,130 S. Ct. 2521, 177 L. Ed. 91 (2010) could arguably leave counsel unpaid absent an attorney's lien.

1384 The strategy is more likely to succeed if there is no express contractual liability for a fee between the client and litigating counsel.

1385 Reply Brief of Petitioner, Comm'r v. Banks, 2004 WL 2190372 (U.S. Sept. 22, 2004).

However, note that, in *Banks*, the payment of attorney fees from a contingent-fee litigation recovery was viewed as the satisfaction of the beneficiary's legal obligation to the attorney from a prior assignment.

1386 *See, e.g.*, Citizens Legal Envtl. Action Network v. Premium Standard Farms, Inc., 397 F.3d 592 (8th Cir. 2005) (plaintiff not entitled to keep statutory attorney fees).

1387 The American Jobs Creation Act of 2004, which included the Civil Rights Tax Fairness Act, was enacted on October 22, 2004. The Act allows an above-the-line deduction (that is, a deduction taken from gross income in arriving at adjusted gross income) for any deductible attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with an action involving, among others, a claim of unlawful discrimination (including employment discrimination, civil rights, and other cases regarding employment relationships).

1388 IRC § 62(a)(20). The act defines "unlawful discrimination" to include a number of specific federal statutes (sections 62(e)(1) through (16)), any federal whistle-blower statute (section 62(e)(17)), and any federal, state, or local law "providing for the enforcement of civil rights" or "regulating any aspect of the employment relationship . . . or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law." *IRC* § 62(e)(18).

In addition, Internal Revenue Code § 62(a)(20) applies to "[a]ny provision of Federal, State, or local law, or common law claims permitted under Federal, State, or local law . . . providing for the enforcement of civil rights."[1389] Mortgage discrimination cases alleging fair housing violations are clearly within the ambit of this provision. It would seem to include Equal Credit Opportunity Act discrimination claims and claims under state credit discrimination statutes as well.

Since claims under 42 U.S.C. § 1983 are specifically covered, the provision should apply to consumer due process claims, such as may be alleged in many repossession, foreclosure, and garnishment cases involving governmental action.[1390] One could also argue that the IRS exception might apply to consumer fee-shifting statutes such as the FDCPA, but there is little authority directly on point. See the discussion of the *Banks* case at § 11.14.3.1, *supra*.

11.14.3.5 Taxability of Fees in Class Actions

In class action suits, the fee award is not income to the class representatives or class members when they are paid directly to the class counsel, are part of an opt-out class action lawsuit, and the class representatives and members do not have a separate contingency fee or retainer agreement with counsel.[1391] This rule may not apply to "opt-in" class action lawsuits.[1392]

11.14.3.6 Implications to Consumers if a Fee Award is Taxable to the Consumer

A large attorney fee award being taxable to the client can result in a sizeable tax liability for the client. This liability can adversely affect the client's ability to claim important credits, such as education credits, the child tax credit, and the Earned Income Credit.[1393] The alternative minimum tax (AMT) also may be implicated. The "below-the-line" deduction for attorney fees is not permitted in tax years 2019 through 2028.[1394] These adverse results are avoided when attorney fees are deductible "above-the line," which means that the client reports only their net income—that is, the amount of the award the client keeps,[1395] such as in civil rights and employment cases.

For low-income clients, the loss of the child tax credit, Earned Income Credit, and other credits can be catastrophic. For other clients, the application of the AMT is generally of greatest concern. Attorneys should carefully consider the tax implications of any Award before advising their clients.

11.15 Article III Constitutional Standing Under *Spokeo* As Applied to the FDCPA

11.15.1 Introduction; Basic Elements of Standing in Federal Court

Standing is a basic element of any civil action. A plaintiff who fails this basic test will be barred from all relief.

For federal courts, standing has a constitutional foundation. Article III of the United States Constitution limits a federal court to jurisdiction over "cases" or "controversies" between parties.[1396]

Article III standing consists of three elements: "The plaintiff must have (1) suffered an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[1397] To establish the first element, an injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[1398] The Supreme Court has made it clear that a small harm is sufficient to create standing: even "an identifiable trifle is enough for standing."[1399]

1389 IRC § 62(e).

1390 IRC § 62(e)(13).

1391 *See* IRS Private Letter Ruling PLR200518017, 2005 WL 1060971 (May 6, 2005); IRS Private Letter Ruling 200316040, 2003 WL 1901404 (Apr. 18, 2003); IRS Private Letter Ruling PLR 20022200, 2002 WL 1155028 (Feb. 28,2002); IRS Rev. Rul. 80-364 (IRS RRU), 1980-52 I.R.B. 15, 1980-2 C.B. 294, 1980 WL 130164 (Dec. 29, 1980). *See also* National Consumer Law Center, Consumer Class Actions § 19.6 (10th ed. 2020), *updated at* www.nclc.org/library.

1392 IRS Private Letter Ruling, PLR 200222001, 2002 WL 1155028 (May 31, 2002) (because class members have not personally agreed to compensate class counsel). *See also* IRS Private Letter Ruling PLR200518017, 2005 WL 1060971(May 6, 2005); IRS Private Letter Ruling 200316040, 2003 WL 1901404 (Apr. 18, 2003); Rev. Rul. 80-364, 1980-2 C.B. 294, Rev. Rul. 80-364, 1980-2 C.B. 294; Sinyard v. Comm'r, 268 F.3d 756 (9th Cir. 2001) (attorney fees awarded in opt-in class action suit under fee-shifting provision of ADEA included in plaintiff's gross income; injured party, not attorney, is eligible to receive court awarded fees).

1393 For example, the child tax credit begins to phase out at $150,000 if married and filing a joint return or if filing as a qualifying widow or widower; at $112,500 if filing as head of household; or at $75,000 if you are a single filer or are married and filing a separate return.

1394 IRC § 67(g).

1395 The American Jobs Creation Act of 2004, which included the Civil Rights Tax Fairness Act, was enacted on October 22, 2004. The Act allows an above-the-line deduction (that is, a deduction taken from gross income in arriving at adjusted gross income) for any deductible attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with an action involving, among others, a claim of unlawful discrimination (including employment discrimination, civil rights, and other cases regarding employment relationships).

1396 U.S. Const. art. III, § 2.

1397 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (citation omitted). *See also* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2203, ___ L. Ed. 2d ___ (2021) ("a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief").

1398 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016).

1399 United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 690 n.14, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973). *See also* Craftwood II, Inc. v. Generac Power Sys., Inc., 920 F.3d 479, 481 (7th Cir. 2019) (injuries from junk fax may be slight, but identifiable trifle is sufficient); Robbins v. Resident Verify, L.L.C., 2021 WL 3292652 (D. Utah Aug. 2, 2021) (post-*Ramirez* decision; temporary denial of lease renewal is concrete); Foley v. Mary Washington Healthcare Servs., Inc., 2021 WL 3193177 (E.D. Va. July 28, 2021) (post-*Ramirez*

Article III standing is required only in the federal system. It has no application in state courts,[1400] although some state courts have incorporated Article III principles into their own state standing doctrines. However, since federal courts have original jurisdiction over FDCPA claims, most FDCPA claims will probably be litigated there, and every FDCPA plaintiff must be prepared to address Article III standing.

Article III standing goes to subject matter jurisdiction, so it can be raised at any time.[1401] For example, it can be raised *sua sponte* by an appellate court, even when it was not raised below.[1402] Whether a claim is sufficient on the merits is a separate question from Article III standing, and courts should not mix merits questions in with Article III questions.[1403] The party invoking federal jurisdiction must establish standing for each claim and each form of relief.[1404]

This section begins by analyzing the Supreme Court's two key decisions on Article III standing for claims under federal consumer protection statutes—its 2016 decision in *Spokeo, Inc. v. Robins*[1405] and its 2021 decision in *TransUnion L.L.C. v. Ramirez*.[1406] Section 11.15.3, *infra*, then provides a broad overview of the developing law on the application of these decisions to FDCPA cases. It includes a Circuit-by-Circuit analysis of Court of Appeals decisions in FDCPA cases that apply *Ramirez* or are cited favorably by it, a summary of strategic considerations, a discussion of the difference between procedural and substantive violations, and a catalog of decisions recognizing types of harm that FDCPA violations may cause as concrete.

The section then turns to the application of *Spokeo* to specific FDCPA violations:

- Violations of specific FDCPA provisions regarding deception and nondisclosure (§ 11.15.4, *infra*);
- Violations of section 1692g's disclosure requirements and dispute right (§ 11.15.5, *infra*);
- Contacts at inconvenient times or places (§ 11.15.6, *infra*);
- Third-party contacts or public disclosure of facts about the debt (§ 11.15.7, *infra*);
- Contacts with a represented debtor (§ 11.15.8, *infra*);
- Conduct serving to harass, oppress, or abuse (§ 11.15.9, *infra*);
- Unfair or unconscionable collection methods (§ 11.15.10, *infra*); and
- Lawsuits in distant forums (§ 11.15.11, *infra*).

The section concludes with subsections regarding the burden of proof (§ 11.15.12, *infra*) and removal and the benefits of filing FDCPA cases initially in state court (§ 11.15.13, *infra*).

In analyzing Article III standing for FDCPA claims, practitioners should also consult Chapter 15, *infra*, which analyzes the common law torts that are most often applied to debt collection abuses and can serve as common law analogs to FDCPA claims. Standing questions under the Fair Credit Reporting Act, the Truth in Lending Act, and the Telephone Consumer Protection Act often raise similar issues and are discussed in other books in this series.[1407]

Whether a plaintiff has statutory standing is a separate question from Article III standing and focuses on the question of which persons are authorized by the statute to bring suit. Statutory standing is discussed in § 4.4, *supra*. *Ramirez* states that, as several circuit decisions have held, "[e]very class member must have Article III standing in order to recover individual damages." However, the court specifically did not "address the distinct question whether every class member must demonstrate standing before a court certifies a class."[1408] Most courts have held that such a showing is not necessary to grant certification because a class action is a representative

decision; purchase of postage stamp in order to dispute debt in writing, because of collector's failure to disclose that dispute could be oral, is concrete harm); Liotta v. Wolford Boutiques, L.L.C., 2017 WL 1178083, at *4 n.4 (N.D. Ga. Mar. 30, 2017) (citing this language and rejecting argument that injuries from TCPA violations are *de minimis*). *But see In re* FDCPA Mailing Vendor Cases, ___ F. Supp. 3d ___, 2021 WL 3160794, at *6 (E.D.N.Y. July 23, 2021) (post-*Ramirez* decision; amount of debt wrongfully disclosed to third party was too small to be concrete injury; failing to acknowledge Supreme Court precedent).

1400 ASARCO Inc. v. Kadish, 490 U.S. 605, 617, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989). *See generally* § 11.15.14, *infra* (Art. III standing when case is removed from state court).

1401 *See, e.g.*, Central States SE & SW Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005).

1402 Summers v. Earth Island Institute, 555 U.S. 488, 499, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) (court has independent duty to assure that standing exists, even if no party challenges it). *See, e.g.*, Frank v. Autovest, L.L.C., 961 F.3d 1185, 1187 (D.C. Cir. 2020) (vacating district court's judgment in FDCPA case because plaintiff lacked standing, even though district court did not evaluate or rule on standing); Gunn v. Thrasher, Buschmann & Voelkel, P.C., 982 F.3d 1069 (7th Cir. 2020) (raising standing *sua sponte*; ordering dismissal of FDCPA case for lack of jurisdiction).

1403 *See, e.g.*, Macy v. GC Services L.P., 897 F.3d 747, 758–759 (6th Cir. 2018) (refusing to mix merits questions—here, whether creditor's internal policy of honoring verbal disputes foreclosed a claim that it violated § 1641g by failing to specify that a dispute must be in writing—in with Article III analysis); Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75, 82 n.6 (2d Cir. 2018) (whether collector's incorrect identification of creditor was material goes to merits and is not relevant to Art. III analysis); Lewis v. Experian Info. Solutions, Inc., 2018 WL 1989449 (C.D. Cal. Mar. 20, 2018) (finding standing, but denying claim on merits; accuracy of collector's reports to credit bureaus is grounds for judgment on the merits but does not affect claimant's standing to bring claim).

1404 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2208, ___ L. Ed. 2d ___ (2021).

1405 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). *See also* Frank v. Gaos, ___ U.S. ___, 139 S. Ct. 104, 203 L. Ed. 2d 404 (2019) (per curiam) (stating that *Spokeo* abrogated ruling a 2010 Ninth Circuit decision that violation of statutory right automatically satisfies injury-in-fact requirement whenever statute authorizes person to sue to vindicate that right; remanding case to allow courts below to addres standing).

1406 ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021).

1407 National Consumer Law Center, Fair Credit Reporting § 11.2.1.3 (9t ed. 2017), *updated at* www.nclc.org/library; National Consumer La Center, Truth in Lending § 11.2.4 (10th ed. 2019), *updated at* www.nc .org/library; National Consumer Law Center, Federal Deception La § 6.10 (3d ed. 2017), *updated at* www.nclc.org/library.

1408 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 1108 n ___ L. Ed. 2d ___ (2021).

juridical entity, and the standing inquiry (like the personal jurisdiction inquiry) keys on the class representative.[1409] This analysis should survive the *Ramirez* decision.

11.15.2 The Supreme Court's Interpretation of Article III's Requirements in Spokeo *and* Ramirez

11.15.2.1 Article III Standing As Interpreted by *Spokeo*

In its 2016 decision *Spokeo, Inc. v. Robins*,[1410] the Supreme Court for the first time addressed the issue of constitutional standing in a case under a chapter of the federal Consumer Credit Protection Act, the Act that includes the FDCPA. The primary claim at issue was a violation of a requirement of the Fair Credit Reporting Act (FCRA) that consumer reporting agencies (CRAs) "follow reasonable procedures to assure maximum possible accuracy of" consumers' reports.[1411]

The *Spokeo* decision focused on the injury-in-fact element of standing.[1412] It held that, although the Ninth Circuit Court of Appeals correctly held that the particularity requirement[1413] for an injury-in-fact was met, it overlooked the concreteness requirement.[1414] As a result, the Court remanded the case to the Ninth Circuit for completion of the standing analysis.

The Supreme Court did not disagree with the Ninth Circuit's analysis of the particularity requirement. It noted that Robins' allegations "that Spokeo violated *his* statutory rights, not just the statutory rights of other people" and that "Robins's personal interests in the handling of his credit information are *individualized rather than collective*,"[1415] both concern particularity, not concreteness.[1416] Since the Court did not remand for further analysis of particularity, it apparently concluded that these allegations of particularity were sufficient.[1417]

In its analysis of the concreteness requirement, the Supreme Court reaffirmed its longstanding position that intangible injuries can be concrete.[1418] A harm can be actionable even if it is "difficult to prove or measure."[1419] The Court held that history and congressional judgment both play important roles in determining which intangible harms constitute injury in fact.[1420] With respect to history, the Court noted that "[b]ecause the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[1421] An example mentioned by the Court is slander,[1422] which is actionable because it is inherently damaging without showing actual damage to reputation, an intangible interest.

Spokeo also holds that Congress "may elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." The Court held that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements, [and] its judgment is also instructive and important."[1423] Nevertheless, the Court stated that "Article III standing requires a concrete injury even in the context of a statutory violation."[1424] Analogizing to tort law, the Court also held that a "risk of real harm" is sufficient to satisfy concreteness.[1425]

The Court added that deprivation of a "bare procedural right, divorced from any concrete harm" would not establish standing.[1426] Nonetheless, the Supreme Court noted that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute an injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."[1427] The Court gave as examples the right to information that Congress had decided should be made public.[1428]

1409 *See* National Consumer Law Center, Consumer Class Actions § 10.3.3.2.1 (10th ed. 2020), *updated at* www.nclc.org/library.

1410 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

1411 15 U.S.C. § 1681e(b).

1412 *See* § 11.15.1, *supra*.

1413 For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016).

1414 *Id.*

1415 *Id.* at 1548 (emphasis in original).

1416 *Id.*

1417 *Id.* at 1554 (Ginsburg dissenting).

1418 *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (noneconomic injuries); Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 1366, 31 L. Ed. 2d 636 (1972) (aesthetic and environmental well-being and enjoyment of park's scenery, natural and historic objects, and wildlife).

1419 *Id.* at 1549.

1420 *Id.* at 1549.

1421 *Id.*

1422 *Id.*

1423 *Id.*

1424 *Id.* (internal citations and quotations omitted). *See also* Thole v. U.S. Bank, ___ U.S. ___, 140 S. Ct. 1615, 1621–1622, 207 L. Ed. 2d 85 (2020) (reiterating this point); Frank v. Gaos, ___ U.S. ___, 139 S. Ct. 1041, 203 L. Ed. 2d 404 (2019) (per curiam) (reiterating that *Spokeo* rejects the view that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right).

1425 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016). *But see* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021) (risk of harm can support standing only for prospective relief unless risk causes some other harm). *See generally* § 11.15.2.2.6, *infra*.

1426 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016). *See* § 11.15.3.3, *infra* (discussion of distinction between procedural and substantive rights for purposes of Article III standing).

1427 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (emphasis in original).

1428 *Id.* at 1549–1550 (citing *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (confirming that group of voters' "inability to obtain information" that Congress had decided to make public is sufficient injury in fact to satisfy Article III) and *Public Citizen v. Department of Justice*, 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (two advocacy organizations' failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes sufficiently distinct injury to provide

Finally, the Supreme Court gave two examples of cases where statutory violations might not result in concrete harms: (1) a consumer reporting agency's failure to provide a required notice to a user of a credit report and (2) incorrectly reporting a consumer's zip code. The Court characterized these violations as examples of procedural violations that may not satisfy the concreteness requirements.[1429]

11.15.2.2 Article III Standing As Interpreted by *Ramirez*

11.15.2.2.1 The holding in Ramirez

The Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*[1430] is its second major decision about the application of Article III to claims under federal consumer protection laws. The case arose when TransUnion, one of the "Big Three" nationwide consumer reporting agencies (CRAs or credit bureaus), issued a report identifying a car buyer, Sergio Ramirez, as a potential terrorist. TransUnion had done so based solely on the fact that Ramirez had the same first and last name as a person on the federal government's terrorist watch list. TransUnion did not check any other identifying features, such as Ramirez's middle initial, date of birth, or address.

Since federal law prohibits transacting any business with a person who is on this list, Ramirez was denied a car loan. Ramirez filed suit on his own behalf and on behalf of thousands of other individuals who had been wrongly labeled as terrorists due to TransUnion's appallingly sloppy matching criteria.

The Supreme Court agreed with Ramirez that TransUnion had failed to use reasonable procedures to ensure the accuracy of class members' credit reports. The Court held, however, that while Ramirez had suffered a concrete injury, the other class members who were tagged as terrorists had standing only if their erroneous information in TransUnion's files was sent to third parties. Over a stinging dissent written by Justice Thomas, the Court held 5-4 that class members whose false information had *not* been published to a third party did not suffer concrete harm, and they had no standing to bring an FCRA action in federal court.

The Ninth Circuit had found that TransUnion also violated the FCRA by, in response to Ramirez's request for a copy of his credit file, sending him an incomplete version of his file that summarized his FCRA rights, but did not mention the terrorist alert. A day later, it sent him a second mailing that informed him of the terrorist match, but did not include the required summary of his FCRA rights. The Supreme Court characterized these disclosure violations as mere format violations, and the majority held that the class members—other than Ramirez himself—did not have standing to raise these claims because they did not identify any "downstream consequences" that they suffered from failing to receive the required information.

11.15.2.2.2 Physical harm, monetary injury, defamation, privacy, constitutional rights

Most of *Ramirez*'s holdings increase the difficulty of supporting standing in federal court consumer actions. However, *Ramirez* also solidifies the view that three types of injury should be sufficient for constitutional standing in federal court:

First, *Ramirez* states that "[i]f a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III."[1431] This fairly obvious point is only implicit in *Spokeo*. *Ramirez* highlights the importance of placing a monetary value on the denial of a consumer right whenever possible. As discussed in § 11.15.3.4, *infra*, there are many possible ways that plaintiffs may have suffered monetary harm due to an FDCPA violation, and these should be investigated and alleged in every case.

Second, *Ramirez* lists several types of intangible harms that are concrete because they were actionable under common law for analogous wrongs: reputational harms, disclosure of private information, and intrusion upon seclusion.[1432] This holding is of great importance for cases involving unwanted debt collection contacts, false reports to credit reporting agencies, and contacts with or disclosures about the debt to third parties, and is discussed in more detail in §§ 11.15.2.2.3, 11.15.5.4, 11.15.7, and 11.15.8, *infra*.

Third, *Ramirez* identifies infringement of rights afforded by the Constitution as injuries that may be concrete.[1433] While the Court mentions only free speech and free exercise as examples, the decision should remove any doubt that a consumer has standing to litigate other constitutional rights as well. Since the Supreme Court has held that the Constitution protects privacy, pointing to *Ramirez*'s language might buttress the argument that consumers have standing to bring claims under FDCPA provisions that protect their privacy.[1434] As another example, FDCPA claims involving debts that are being collected by or for government agencies or involving distant forum abuse may raise due process concerns that may bolster the argument for standing.[1435]

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standing to sue")). *See generally* § 11.15.4.4.3, *infra* (standing to assert informational injuries).

1429 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1550, 194 L. Ed. 2d 635 (2016). *But cf.* Daniel Solove, When Is a Person Harmed by a Privacy Violation? Thoughts on Spokeo v. Robins (May 17, 2016), *available at* https://www.teachprivacy.com (discussing potential harms from incorrect zip code).

1430 ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021).

1431 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

1432 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021). ("Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. *Id.*, at 340–341, 136 S. Ct. 1540. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion.").

1433 *Id.*

1434 *See* § 11.15.2.2.3, *infra*.

1435 *See* § 11.15.12 (Art. III standing for claims involving distant forum abuse), § 14.11 (Constitutional torts), *infra*.

11.15.2.2.3 When does harm have a close relationship to harm traditionally recognized as a basis for a lawsuit?

Ramirez provides more detail about one of the two alternative tests for Article III standing articulated in *Spokeo*—that the harms the plaintiff suffered have a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts.[1436] *Ramirez* states that Article III "does not require an exact duplicate in American history and tradition."[1437]

Accordingly, the Court agreed that the harm caused by disclosure to a third party that a consumer was a "*potential* terrorist" (emphasis added) was closely related to the harm made actionable by the tort of defamation, even though this statement was only misleading, rather than being literally false, as required for a defamation claim. However, the Court also held that, because at common law publication of the false information was "a fundamental requirement of an ordinary defamation claim,"[1438] mere retention in a consumer's credit file of a false identification as a terrorist had an insufficiently close relationship to a harm traditionally actionable at common law to give the plaintiff Article III standing.[1439]

In determining whether a statutory claim is sufficiently related to a common law cause of action to allow standing, the Court's refusal to distinguish between a misleading statement and a false statement is helpful in arguing that a statute and common law claim are sufficiently related. For example, in some jurisdictions an invasion of privacy is actionable as a common law tort only if the invasion is "highly offensive."[1440] *Ramirez* supports the argument that a statutory claim is sufficiently related to this common law tort, even if the statutory claim does not require such a high degree of offensiveness. This, like the difference between a misleading statement and a false statement, is essentially only a difference in *degree*. In a decision she wrote when she was on the Seventh Circuit,[1441] Justice Barrett explicitly adopted the view that a difference in degree does not defeat Article III standing, as long as the kind of harm is the same.

While common law torts are the most obvious analogs for FDCPA violations, *Ramirez* and the Supreme Court's other decisions do not limit the analogs to common law torts. Any type of claim that is rooted in "American history and tradition"[1442] can support Article III standing.[1443]

11.15.2.2.4 The role of Congress's judgment

Spokeo very clearly holds that "the judgment of Congress" plays an "important role[]" in determining whether an intangible injury is concrete.[1444] The decision holds that, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."[1445] It quotes with approval two of its earlier decisions, holding that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," and that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[1446]

Spokeo made this point clear even with respect to procedural protections: "[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute an injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."[1447]

The majority opinion in *Ramirez* can be interpreted to rob this principle of meaning. *Ramirez* states that "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III."[1448] It goes on to hold:

> For standing purposes, . . . an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court. As then-Judge Barrett succinctly summarized, "Article III grants federal

1436 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016). *See* § 11.15.2.2.1, *supra*.

1437 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

1438 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2210 n.6, ___ L. Ed. 2d ___ (2021).

1439 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2210, ___ L. Ed. 2d ___ (2021).

1440 *See* § 15.3.1, *infra*.

1441 Gadelhak v. AT&T Serv., Inc., 950 F.3d 458 (7th Cir. 2020) (Barrett, J.). *Accord* Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1024–1025 (11th Cir. 2021) (citing *Gadelhak* for this proposition), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021); Lupia v. Medicredit, Inc., 8 F.4th 1184 (10th Cir. 2021) (post-*Ramirez* decision; citing Gadelhak for this proposition); Thome v. Sayer Law Group, 2021 WL 4690829 (N.D. Iowa Oct. 7, 2021) (post-*Ramirez* decision; citing Gadelhak and similar decisions; question is kind, not degree of harm).

1442 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

1443 *See, e.g.*, Farrell v. Blinken, 4 F.4th 124 (D.C. Cir. July 13, 2021) (post-*Ramirez* decision; finding historical basis for right to sue to require U.S. government to recognize one's renunciation of U.S. citizenship).

1444 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

1445 *Id.*

1446 *Id.*

1447 *Id.*

1448 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2205, ___ L. Ed. 2d ___ (2021).

courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions."[1449]

This passage appears to confine Congress's role to creation of substantive rights, with no role in defining whether a harm is concrete—a flat contradiction of *Spokeo* and the cases it relied on. Justice Thomas's strong dissent points out how far this conclusion strays from logic and history.[1450]

Where, then, does *Ramirez* leave the role of the judgment of Congress? The decision holds that Congress's creation of a statutory right with a private cause of action is not in itself enough to establish that a violation creates a concrete injury. However, in order to give continuing meaning to *Spokeo*, Congress must have *some* role in determining whether an injury is concrete. Perhaps there is an argument that the rule that courts must give "due respect" to Congress's judgment[1451] means that there is a presumption that a harm is concrete if Congress identified it as actionable. At the very least, in borderline cases, courts should side with Congress's judgment.

It is important to note that *Ramirez* cites with approval a robocall decision by Justice Barrett when she was on the Seventh Circuit. Her harmonization of the role of Congress and the analogy to common law claims may carry great weight:

> Now, for Congress's judgment. In passing the Act, Congress decided that automated telemarketing can pose this same type of harm to privacy interests. Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394 (1991) (explaining in the findings that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy" and characterizing telemarketing as a "nuisance"). While Congress cannot transform a non-injury into an injury on its say-so, that is hardly what it did here. Instead, Congress identified a modern relative of a harm with long common law roots. And Gadelhak claims to have suffered the very harm that the Act is designed to prevent. *Cf. Melito*, 923 F.3d at 92–93 (reaching the same conclusion).
>
> The Eleventh Circuit treated the injury in its case [Salcedo v. Hanna, 936 F.3d 1162, 1172 (11th Cir. 2019)] as abstract partly because common law courts generally require a much more substantial imposition—typically, many calls—to support liability for intrusion upon seclusion. *See, e.g., Sofka v. Thal*, 662 S.W.2d 502, 511 (Mo. 1983). But when *Spokeo* instructs us to analogize to harms recognized by the common law, we are meant to look for a "close relationship" in kind, not degree. *See* 136 S. Ct. at 1549. In other words, while the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy. Congress's power is greater than that: it may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such texts nevertheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable. *Van Patten*, 847 F.3d at 1043.[1452]

As discussed in the next section, it is also possible to interpret *Ramirez* as addressing only violations of procedural rights created by Congress, not substantive rights. Perhaps, when Congress creates a new substantive right and creates a remedy for its violation, courts will defer to its judgment that a violation is a concrete injury. Post-*Spokeo* decisions from federal Courts of Appeal have often analyzed the "judgment of Congress" by asking "is this a harm that the Congress enacted the statute to prevent?"[1453] These decisions may still hold weight after *Ramirez*.

There is a danger that some courts will interpret *Ramirez*, with its downplay of Congress's role and its stress on the relationship not just between the harm the plaintiff claims and a harm made actionable at common law but also between the "fundamental requirements" of the two claims, as leaving Congress only with the authority to codify common-law torts that were recognized in the Eighteenth Century. This conclusion would be a profound assault on our representative democracy and would stretch the *Ramirez* decision beyond all reason.

11.15.2.2.5 Procedural vs. substantive requirements—does it make a difference?

The *Spokeo* decision dwelt on a characterization of the case's FCRA violations as merely "procedural." Although the *Spokeo* Court did not clearly indicate the role of the distinction between procedural and substantive violations, many decisions have given meaning to this distinction, often by giving greater weight or conclusive weight to Congress's judgment in enacting a statute that creates substantive protections and grants a private remedy for violations.[1454]

The majority opinion in *Ramirez* appears to give no weight to this distinction. It uses the term "procedural" only once, in a quote from *Spokeo* by which it characterizes the plaintiff's "format" claim as a "bare procedural violation."[1455] And it applies the same standards to the plaintiffs' claim that they

1449 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2205, ___ L. Ed. 2d ___ (2021), *quoting* Casillas v. Madison Ave. Assoc., Inc., 926 F.3d 329, 332 (7th Cir. 2019) (Barrett, J.).

1450 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2220–2221, ___ L. Ed. 2d ___ (2021).

1451 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

1452 Gadelhak v. AT&T Serv., Inc., 950 F.3d 458, 462–463 (7th Cir. 2020) (Barrett, J.) (finding standing for TCPA claim involving five unwanted text messages). *See also* Ward v. Nat'l Patient Account Services Solutions, Inc., ___ F.4th ___, 2021 WL 3616067, at *6 (6th Cir. Aug. 16, 2021) (Moore, J., dissenting) (interpreting *Ramirez* in this way).

1453 *See* § 11.15.4.4.1, *infra*.

1454 *See* § 11.15.3.3, *infra*.

1455 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2213, ___ L. Ed. 2d ___ (2021).

were wrongfully tagged as potential terrorists as it applies to the "format" claim. It is hard to imagine a violation that is more "substantive" than being tagged and reported as a potential terrorist, so the Court's application of the same standards to this claim suggests that it makes no difference whether a violation is procedural or substantive.

However, remember that the claim that the *Ramirez* plaintiffs were wrongfully tagged as terrorists was based on the FCRA requirement that credit reporting agencies "follow reasonable procedures to assure maximum possible accuracy" in consumer reports.[1456] One of the claims in *Spokeo* was also based on this requirement, and the *Spokeo* Court characterized it, and all of the plaintiff's other claims, as procedural. As a result, perhaps there is still an opening to argue that Congress's views should be given more weight when the claim is a violation of a substantive statutory protection.

Accordingly, since *Ramirez* deals only with rights that the Court has characterized as procedural, it would still be reasonable to argue that, when Congress has created a substantive right and made violations privately actionable, deprivation of that right is a concrete injury in and of itself. At least one post-*Ramirez* decision recognizes this distinction in an FDCPA case, holding that section 1692e, which prohibits deception, creates substantive rights, violation of which establishes a *de facto* injury.[1457] However, this approach is much more likely to be successful if the right that Congress created is not only substantive but also one that would be readily recognized as important, and it is far safer to file suit only where it is possible to allege some harm besides the violation of the right itself or there is a clear analogy to a common law claim. Distinguishing between procedural and substantive rights is discussed in § 11.15.3.3, *infra*.

11.15.2.2.6 Is the risk of harm a concrete injury?

Ramirez appears to cut back on the principle that *Spokeo* seemed to adopt, that "the risk of real harm" can be a concrete injury in a suit seeking money damages.[1458] Where there is only a risk of harm, the majority opinion in *Ramirez* states that standing is confined to suits seeking prospective relief, such as an injunction.[1459] This statement appears to be *dicta*, since the Court concluded on the facts that the plaintiffs had not established a risk of harm,[1460] but some courts have treated it as a holding.[1461]

Of course, a risk of harm can independently create concrete injury. *Ramirez* acknowledges that there might be standing if "the exposure to the risk of harm itself causes a *separate* concrete harm."[1462] As an example, the Court noted that "a plaintiff's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm."[1463] While the Court cautioned that it was not taking a position on whether emotional distress might suffice as a concrete injury,[1464] it has approved of the award of emotional distress damages in the past,[1465] and many lower courts have held that emotional distress is a concrete injury for purposes of Article III standing.[1466] A plaintiff might also spend money on precautionary measures upon learning of a risk of harm, and many courts have held that a loss of time is also a concrete injury.[1467]

One concern is how great and how clear the risk of harm must be in order to meet Article III standards. A second basis for the *Ramirez* majority's rejection of the risk-of-harm argument was that "the plaintiffs did not factually establish a sufficient risk of future harm to support Article III standing,"[1468] because the risk of future harm was too speculative. The dissents by both Justice Thomas and Justice Kagan appropriately lambast this mischaracterization of the record.[1469]

The fact that this part of the majority opinion is based on its characterization of the factual record means that it can be

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1456 15 U.S.C. § 1681e(b) (emphasis added).

1457 Garrett v. Fin. Bus. & Consumer Solutions, Inc., 2021 WL 3726199, at *2–3 (D. Colo. Aug. 23, 2021) (mag.; finding standing for § 1692e claim, but not for § 1692g claim, because that section confers only procedural rights). But see Kola v. Forster & Garbus L.L.P., 2021 WL 4135153, at *7–8 (S.D.N.Y. Sept. 10, 2021) (post-*Ramirez* decision; whether right is substantive or procedural, Congress's judgment is insufficient to establish standing).

1458 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

1459 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2210–2211, ___ L. Ed. 2d ___ (2021). *See* Ward v. Nat'l Patient Account Services Solutions, Inc., ___ F.4th ___, 2021 WL 3616067, at *2–3 (6th Cir. Aug. 16, 2021) (concluding that *Ramirez* abrogates prior 6th Cir. decision that found material risk of harm to be concrete injury in suit for damages); Cheatham v. Adams, 2021 WL 4313961 (E.D. Ark. Sept. 22, 2021) (risk of harm that never materialized is not concrete; dismissing claims involving failure to give section 1692e(11) and 1692g disclosures).

1460 Tolliver v. Nat'l Credit Sys., Inc., 2021 WL 4306056 (W.D. Wis. Sept. 22, 2021) (interpreting *Ramirez* to have questioned, but not decided, whether standing for suit for damages can be based on risk of harm).

1461 *See, e.g.*, Ward v. Nat'l Patient Account Services Solutions, Inc., ___ F.4th ___, 2021 WL 3616067, at *2–3 (6th Cir. Aug. 16, 2021) (concluding that *Ramirez* abrogates a prior 6th Cir. decision that found material risk of harm to be concrete injury in suit for damages); Kola v. Forster & Garbus L.L.P., 2021 WL 4135153, at *5 (S.D.N.Y. Sept. 10, 2021) (characterizing this statement as a holding).

1462 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2210–2211, ___ L. Ed. 2d ___ (2021) (emphasis in original).

1463 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2211 n.7, ___ L. Ed. 2d ___ (2021).

1464 *Id.*

1465 Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). *See also* § 11.8.2 (recovery of emotional distress damages for FDCPA violations), § 15.2 (the torts of intentional or negligent infliction of emotional distress, and recovery of emotional distress damages for other torts), *infra*; National Consumer Law Center, Fair Credit Reporting § 12.5.2 (9th ed. 2018), *updated at* www.nclc.org/library (emotional distress as a basis for an award of actual damages in FCRA cases).

1466 *See* § 11.15.3.4, *infra*.

1467 *See* National Consumer Law Center, Federal Deception Law §§ 6.10.3.4, 6.10.5 (3d ed. 2017), *updated at* www.nclc.org/library.

1468 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2212, ___ L. Ed. 2d ___ (2021).

1469 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2222, ___ L. Ed. 2d ___ (2021) (Thomas, J., dissenting); *id.* at 2225–2226 (Kagan, J., dissenting).

overcome with stronger proof. The high court's reluctance to draw the obvious conclusions from the facts in the record highlights the importance of nailing down the risk of harm with positive proof, leaving as little as possible to inferences.

Rejecting risk of harm as a basis for Article III standing for a suit seeking damages also implies that there must be a showing that the individual plaintiff was harmed. Harm to a hypothetical least sophisticated consumer is unlikely to be sufficient. In *Casillas v. Madison Avenue Assoc., Inc.*,[1470] a decision written by Justice Barrett when she was on the Seventh Circuit, that *Ramirez* cites with approval, states:

> Casillas insists that the "unsophisticated consumer" standard, which we have applied elsewhere in our precedent, means that standing exists whenever a debt-collection letter might have misled a naive consumer. But the "unsophisticated consumer" standard is a rule for interpreting a debt-collection letter to determine whether it is misleading. It is not a rule permitting those who have not been injured to vindicate the rights of those who have.

In *Trichell v. Midland Credit Management, Inc.*,[1471] another decision that *Ramirez* cites with approval, the Eleventh Circuit held that "a statutory violation that imposes a risk of concrete harm to consumers in general, but not to the individual plaintiff, cannot fairly be described as causing a particularized injury to the plaintiff."

Many district court and circuit decisions prior to *Ramirez* held that a risk of some particular type of harm created standing. *Ramirez* undercuts their conclusion that a risk of harm is sufficient to satisfy Article III for a suit seeking damages. Nonetheless, these decisions can still be cited as support for the argument that the harms they identify would have been concrete if they had materialized.

11.15.2.2.7 "Downstream consequences" must be shown for disclosure format violations; informational injuries

The *Ramirez* Court addressed several additional issues with respect to the plaintiff's claims that were based on TransUnion's failure to comply with the FCRA's file disclosure requirement and its duty to include a summary of consumer rights with a file disclosure. The Court characterized these claims as based on incorrect formatting of the notices Ramirez received,[1472] a characterization disputed by the dissent.[1473] It held that the plaintiffs, other than Ramirez himself, lacked standing because they did not present evidence of harm caused by the format of the mailings.[1474] Quoting *Spokeo*, the Court said that, without such proof, these were "bare procedural violation[s], divorced from any concrete harm."[1475]

An amicus had raised an additional ground for Article III standing for these violations: that they were concrete because they were informational injuries. The Court rejected this argument on three grounds:[1476]

- The Court held that the violations only involved formatting, not a denial of information.
- The Court distinguished its prior cases recognizing informational injuries as concrete on the ground that they involved public disclosure or sunshine laws that entitle all members of the public to certain information, and cited two Circuit decisions that make the same distinction.[1477] The Court did not, however, suggest any reason why a plaintiff would be more concretely injured by denial of information mandated by a sunshine law than by a law that mandates a disclosure to that particular individual, and it did not explicitly hold that denial of information is concrete only when it violates a sunshine-type law.
- The Court stated that the plaintiffs had not identified any "downstream consequences" from failing to receive the required information, and stated broadly that an "asserted informational injury that causes no adverse effects cannot satisfy Article III."[1478] The Court suggested that consumers might have had standing if they had established that they would have tried to correct their files, and thereby prevent dissemination of a misleading report, if they had been sent the information in the proper format.[1479]

The Court's treatment of informational injuries creates particular problems for litigation alleging statutory disclosure violations. For example, several important FDCPA provisions impose disclosure requirements on debt collectors, and the core protections of the Truth in Lending Act are disclosure requirements. In these cases, case selection will be of utmost importance. Cases that focus on technical requirements or format will likely be dismissed for lack of standing unless the plaintiff can allege and prove some "downstream consequences."

It is important to stress, however, that the *Ramirez* Court characterized the plaintiff's claims as involving the format of disclosures, not the failure to give disclosures or the provision of misleading disclosures. Cases that involve non-disclosure or misleading disclosure of substantive information may receive a more favorable reception in the courts. For example, *Casillas v. Madison Avenue Assoc., Inc.*, a decision written by Justice Barrett when she was on the Seventh Circuit that the Supreme Court cites with approval in *Ramirez*, distinguishes between a defendant's failure to give notice of statutory rights, which

1470 926 F.3d 329, 336 n.6 (7th Cir. 2019) (citation omitted).
1471 964 F.3d 990, 1002 (11th Cir. 2020).
1472 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2213, ___ L. Ed. 2d ___ (2021).
1473 *Id.* at 2221–2222.
1474 *Id.* at 2213–2214.
1475 *Id.* at 2213.
1476 *Id.* 2213–2214.
1477 Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990 (11th Cir. 2020); Casillas v. Madison Ave. Assoc., Inc., 926 F.3d 329 (7th Cir. 2019) (Barrett, J.).
1478 *Id.* at 2214 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F. 3d 990, 1004 (11th Cir. 2020)).
1479 *Id.* at 2213.

the decision holds is not a concrete injury, and a defendant's failure to provide substantive information.[1480]

Even for these cases, however, courts are much more likely to find standing if it can be truthfully alleged and proven that the consumer was actually misled, or that the consumer took or failed to take some action because of the violation. The Seventh Circuit has held that an allegation that the consumer was confused by the misleading disclosure is insufficient.[1481] However, other courts have held that confusion is a concrete injury.[1482] *Ramirez* adds some weight to this view, in that it cites the fact that the plaintiffs, other than Ramirez, did not present any evidence "that they were confused, distressed, or relied on the information in any way" as support for its conclusion that the plaintiffs had not alleged a concrete harm.[1483]

11.15.2.2.8 Private rights vs. public rights

In *Spokeo*, Justice Thomas, while concurring in the majority opinion, had proposed a somewhat different conceptual framework, founded on a distinction between "private rights" and "public rights." Quoting Blackstone, he defined private rights as those "belonging to individuals, considered as individuals," including rights of personal security, property rights, and contract rights. In Justice Thomas' view, "historically a plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded."[1484] By contrast, a public right—one that involves "duties owed to the whole community, considered as a community, in its social aggregate capacity"—was privately actionable only if the plaintiff could allege some special, individualized damage. Justice Thomas and the three other dissenters reiterated their support for this view in *Ramirez*.[1485]

In a 2020 decision, *Thole v. U.S. Bank*, a decision that held that a retirement plan participant lacked standing to sue a bank for mismanagement of the plan, Justice Gorsuch joined Justice Thomas in a concurring opinion that was based on this framework.[1486] In *Ramirez*, however, Justice Gorsuch joined Justice Kavanaugh's opinion, which explicitly rejected this approach.[1487] Given the fact that five Justices have agreed with the private rights/public rights framework in at least one decision, it is possible that in another case there might be a majority that would find standing based on Justice Thomas's framework, so it might be worthwhile to preserve this argument in cases that might reach the Supreme Court.

1480 926 F.3d 329, 335 (7th Cir. 2019). *See* § 11.15.3.1, *infra* (discussing this decision).

1481 Smith v. GC Services L.P., 986 F.3d 708 (7th Cir. 2021).

1482 *See* § 11.15.3.4, *infra*.

1483 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2213, ___ L. Ed. 2d ___ (2021).

1484 Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 1551–1553, 194 L. Ed. 2d 635 (2016) (Thomas, J., concurring).

1485 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2214, ___ L. Ed. 2d ___ (2021).

1486 Thole v. U.S. Bank, ___ U.S. ___, 140 S. Ct. 1615, 1622–1623, 207 L. Ed. 2d 85 (2020).

1487 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2207 n.3, ___ L. Ed. 2d ___ (2021).

11.15.3 The Lay of the Land Since Spokeo *and* Ramirez*: Overview and Strategy Considerations*

11.15.3.1 Circuit-by-Circuit Overview of Decisions Applying *Ramirez* to FDCPA Claims

The Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*,[1488] deals only with claims under the Fair Credit Reporting Act, but has profound implications for FDCPA litigation. How the Circuits apply *Ramirez* to FDCPA decisions will be of critical importance.

This subsection will analyze Circuit decisions applying *Ramirez* to FDCPA claims as those decisions are issued. It also summarizes four pre-*Ramirez* Circuit decisions that the *Ramirez* Court cited with approval—three in FDCPA cases and one in a TCPA case. Other pre-*Ramirez* Circuit decisions are addressed in §§ 11.15.5 to 11.15.12, *infra*, in connection with the specific FDCPA violations they address.

Sixth Circuit: In *Hagy v. Demers & Adams*,[1489] a pre-*Ramirez* decision, a law firm sent a letter to the consumers' lawyer, informing him that a creditor was waiving a claim that the consumers owed a deficiency. The consumers claimed that the letter violated the FDCPA because it did not identify the law firm as a collector. The Sixth Circuit held that the letter did nothing other than help the consumers. Since they did not allege that the letter caused them any harm or caused any risk of harm, the court concluded that they lacked standing. The decision deals only with the question whether Congress's creation of a private cause of action for non-disclosure of the debt collection purpose of a collection letter is sufficient in and of itself to establish standing, and does not explore whether there might be a close relationship between the harm the plaintiff was seeking to redress and a harm traditionally providing the basis for a lawsuit in English and United States Courts. *Ramirez* cites the decision for its statement that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."[1490]

In *Ward v. National Patient Account Services Solutions, Inc.*,[1491] a post-*Ramirez* decision, the Sixth Circuit held that a consumer did not have Article III standing to assert a FDCPA § 1692e(14) claim based on the caller's identification of itself as NPAS, rather than as NPAS, Inc. As a result of the collector's failure to give its full name, the consumer sent a cease-contact letter to the wrong entity, and then received another call from the defendant because the defendant had not received the letter. The majority held, over a persuasive dissent, that the harm of receiving the unwanted call had not been clearly enough

1488 *Id.* at 2190 (2021).

1489 882 F.3d 616 (6th Cir. 2018).

1490 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2205, ___ L. Ed. 2d ___ (2021) (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

1491 ___ F.4th ___, 2021 WL 3616067 (6th Cir. Aug. 16, 2021).

pleaded in the consumer's complaint, so it did not consider the argument that the unwanted call was an invasion of privacy and a concrete harm. The court held that the consumer's confusion about the identity of the caller was not a concrete injury in itself. It also held that the consumer's decision to retain counsel to prevent further calls was not a concrete harm because it was voluntary, a conclusion that runs counter to well-accepted views of causation. For example, standard damages for a breach of the implied warranty of title include the legal costs of defending title against a third-party claimant, even though the buyer could have given up and simply suffered the loss of title.[1492]

Seventh Circuit: In *Casillas v. Madison Avenue Assoc., Inc.*,[1493] a pre-*Ramirez* decision written by Justice Barrett when she was on the Seventh Circuit and cited favorably by the Supreme Court in *Ramirez*, the Seventh Circuit rejected the view that a collector's failure to inform a consumer of FDCPA § 1692g's requirement that a dispute letter be in writing creates a risk of harm that gives the consumer Article III standing. The court relied heavily on its decision in a non-FDCPA case,[1494] in which it held that a plaintiff cannot satisfy the injury-in-fact element of standing simply by alleging that the defendant violated a disclosure provision of a consumer protection statute. However, it distinguished disclosures that are required at the beginning of a credit arrangement and that address how to deal with problems that may arise in the future, on the ground that these are arguably of use to all consumers.[1495] It also distinguished the case of non-disclosure of substantive information, which deprives a consumer of the opportunity to challenge it, from the failure to give the consumer a notice of statutory rights.[1496] The court also took a very narrow view of the types of informational injuries that create Article III standing, essentially limiting the Supreme Court decisions on this question to sunshine laws, a view that the Supreme Court echoed in *Ramirez*.[1497]

Since it held that the violation did not create standing in and of itself, the court examined the particular plaintiff's allegations. She did not allege that she tried to dispute or verify the debt orally, that she had ever considered contacting the creditor, that she had any doubt that she owed the debt, or that she had read the notice. The court concluded that the violation amounted to the omission of information that she never would have used, so did not create a risk of harm for her.

Ramirez cites *Casillas* favorably three times: once for the general proposition that there is no case or controversy if the plaintiff does not allege an injury that the defendant caused and the court can remedy, once for its statement that federal courts do not have "freewheeling power to hold defendants accountable for legal infractions," and once for the view that the *Ramirez* defendant's failure to give the plaintiff information in the format required by the FCRA was not a concrete harm, because the FCRA is not a sunshine or public disclosure law.[1498]

Gadelhak v. AT&T Services, Inc.[1499] is a Seventh Circuit decision that *Ramirez* cites with approval. Written by Justice Barrett when she was on the Seventh Circuit, the decision holds that five unwanted text messages, sent in violation of the Telephone Consumer Protection Act (TCPA) amounted to a concrete injury. *Ramirez* cites the decision favorably for its conclusion that intrusion upon seclusion is a concrete injury.[1500] The fact that the Supreme Court cited a case involving harassing text messages for this conclusion should be very helpful when arguing that unwanted debt collection contacts create concrete harm in and of themselves.[1501]

Justice Barrett's harmonization of the role of Congress and the analogy to common law claims is of particular note and may carry great weight. As discussed in more detail in § 11.15.2.2.4, *supra*, in her view, Congress has the authority to identify "a modern relative of a harm with long common law roots," and a consumer who suffers that harm has Article III standing. The decision states: "While the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy."[1502] In Justice Barrett's view, when Congress chooses to make a harm legally cognizable that is the same kind of harm that common law courts recognize, a consumer who suffers that harm has standing, even if the harm might be too minor to be actionable at common law.

In *Wadsworth v. Kross, Lieberman & Stone, Inc.*,[1503] a post-*Ramirez* decision, the Seventh Circuit held that a consumer did not have standing to bring suit regarding a collector's failure to identify herself as a collector or to state that she was attempting to collect a debt. The decision does not interpret *Ramirez*, but applies the Seventh Circuit's earlier Article III decisions that a debt collector's failure to inform a debtor of the debtor's statutory rights causes a concrete injury only if impairs the debtor's ability to use that information for a substantive purpose that the statute envisions. The decision also follows the court's earlier decisions holding that emotional harms are not concrete injuries.[1504]

Tenth Circuit: In *Lupia v. Medicredit, Inc.*,[1505] a post-*Ramirez* decision, the Tenth Circuit held that, because of the

1492 *See, e.g.*, Jefferson v. Jones, 408 A.2d 1036 (Md. 1979); Colton v. Decker, 540 N.W.2d 172 (S.D. 1995). *See generally* National Consumer Law Center, Automobile Fraud § 9.2.2.4.1 (6th ed. 2021), *updated at* www.nclc.org/library.

1493 926 F.3d 329 (7th Cir. 2019).

1494 Grosbek v. Time Warner Cable, Inc., 865 F.3d 884 (7th Cir. 2017).

1495 *Id.* at 336.

1496 *Id.* at 335.

1497 *See* § 11.15.2.2.4, *supra*.

1498 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2205, 2214, ___ L. Ed. 2d ___ (2021).

1499 950 F.3d 458 (7th Cir. 2020).

1500 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

1501 *See* § 11.15.7, *infra*.

1502 Gadelhak v. AT&T Services, Inc., 950 F.3d 458, 462–463 (7th Cir. 2020).

1503 ___ F.4th ___, 2021 WL 3877930 (7th Cir. Aug. 31, 2021).

1504 *See* § 11.15.3.4, *supra*.

1505 ___ F.4th ___, 2021 WL 3627103 (10th Cir. Aug. 17, 2021) (finding standing for claims under §§ 1692g and 1692c(c)).

close relationship to the common law tort of intrusion upon seclusion, a consumer had Article III standing to litigate a claim that a collector violated FDCPA § 1692g by leaving her a voicemail message after she had disputed the debt and asked that collection contacts cease. The court stressed that, whether or not this contact intruded to the degree required by common law, it was the same kind of harm recognized at common law—intrusion into a plaintiff's peace and quiet. As additional support for its conclusion that the plaintiff's claim satisfied Article III, the court cited Congress's judgment that unwanted debt collection contacts were abusive and that it enacted the FDCPA to protect against them. The court affirmed summary judgment for the debtor on claims under FDCPA §§ 1692c(c) and 1692g(b).

Eleventh Circuit: In *Trichell v. Midland Credit Management, Inc.*,[1506] a pre-*Ramirez* decision, the Eleventh Circuit held that consumers did not have standing to sue a collector that sent them notices saying that they were pre-approved for options, including one involving very low monthly payments, that were designed to save them money. The letters did not disclose that making a payment would revive the debts, which were past the statute of limitations. The court held that, since the plaintiffs had not made payments in response to the letter or wasted time or money to determine whether to do so, they lacked standing.[1507]

The court rejected the argument that the deception that the plaintiff suffered satisfied Article III because it has a close relationship to the harm made actionable by the common law tort of fraudulent or negligent misrepresentation. In doing so it focused on the elements of the common law torts, rather than on the nature of the harm.[1508] However, *Ramirez* holds that the federal law claim need not be an "exact duplicate" of a claim traditionally actionable in English and United States courts,[1509] but need only share its "fundamental requirements."[1510]

The court also characterized Congress's role in the question as "limited."[1511] Ignoring the fact that a substantial part of the FDCPA directly addresses deception and creates a cause of action for it, the court held that the brevity of Congress's statutory findings and what it characterized as the narrowness of the FDCPA's cause of action disfavored standing.[1512]

Ramirez cites *Trichell* for the proposition that courts cannot treat an injury as concrete for Article III purposes "based only on Congress's say-so."[1513] It also cites the decision for its view that an informational injury under a statute other than a sunshine law is not a concrete harm.[1514]

In a post-*Ramirez* decision, *Hunstein v. Preferred Collection and Management Services, Inc.*,[1515] the Eleventh Circuit held that a collector's disclosure of personal information—the consumer's name, the fact that he owed a balance, his minor son's name, and the fact that the debt was for his son's medical treatment—to a mailing vendor was a concrete injury. The court noted that invasions of personal privacy have been traditionally actionable in American courts, and that in *Ramirez* the Supreme Court cited "reputational harms, disclosure of private facts, and intrusion upon seclusion" as examples of harms that can be concrete.[1516] The Eleventh Circuit stressed *Ramirez*'s holding that Article III does not require an exact match between a statutory claim and a common-law cause of action,[1517] and agreed with the many courts that have held that the alleged injury must be similar only in kind, not in degree, to a harm that is traditionally actionable.[1518] The court also held that the fact that the personal information had been revealed only to the mailing vendor's employees, rather than to a wider swath of the public, was only a difference of degree, so did not preclude standing. This decision has, however, been vacated and scheduled for rehearing *en banc*.[1519]

11.15.3.2 Strategic Considerations

Before filing an FDCPA claim, the consumer's attorney must carefully evaluate whether the claim meets the case or controversy requirements of Article III—in particular, whether the consumer has suffered a concrete injury. The attorney should consider not only the intricacies of *Spokeo* and *Ramirez*, but also whether the complaint smacks of something serious or something trivial. Evaluating claims through the materiality standard that some courts have adopted[1520] may be helpful as a starting point, but the materiality of a violation is not necessarily equivalent to the concreteness of the harm

6 964 F.3d 990 (11th Cir. 2020).

7 *Id.* at 996.

8 *See* § 11.15.4.3, *infra*.

9 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

Id. at 2210 n.6.

Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 999 (11th Cir. 2020).

Id. at 1000 (reading section 1692k(a) to require FDCPA plaintiffs to have suffered actual damages, and treating this as evidence that Congress did not intend to make violations actionable without a showing of actual damages). *But see* Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1033 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021) (declining to read *Trichell* or section 1692k to categorically limit class of FDCPA plaintiffs to those with actual damages).

1513 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2205, ___ L. Ed. 2d ___ (2021) (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 n.2 (11th Cir. 2020)).

1514 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2214, ___ L. Ed. 2d ___ (2021).

1515 17 F.4th 1016, 1033 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021).

1516 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

1517 Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1033 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021) (noting that "if Article III required a perfect match between an alleged harm and a common-law tort, Congress could only replicate and codify existing common-law causes of action—it would have no power to create enforceable rights. That is not, and couldn't be, the law.")

1518 *Id.* at *5–6.

1519 Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1103 (11th Cir. 2021).

1520 *See* §§ 7.3.9, 8.1.5, *supra*.

it causes. Advocates should expect to have to defend against a motion to dismiss on Article III grounds in every FDCPA case filed in federal court.

Since *Spokeo* requires that an injury in fact be evident from the pleadings, advocates should take care to explain the harm caused by the alleged FDCPA violation in the complaint. Choosing cases in which the plaintiff's facts demonstrate some harm beyond the violation itself is important, and will likely be essential in many cases involving disclosure violations and other informational injuries. Even when there is a strong analogy to a common law claim, the case will be greatly strengthened by pleading and proving some downstream harm. Federal courts are likely to be emboldened by *Ramirez* to dismiss FDCPA claims of all types on standing grounds where the pleading does not allege downstream consequences resulting from the violation.

For these reasons, advocates should explore carefully whether the consumer suffered some additional harm beyond experiencing the violation.[1521] Any response to the collector's wrongful act, including a phone call, an Internet search, a request for advice, or anxiety, should be developed, and the advocate should strongly consider pleading that harm. The advocate should also ask the potential plaintiff the questions that the defendant is likely to ask in deposition. For example, in a deception case the advocate should ask:

- Did the consumer receive and open the letter that was deceptive? Did the consumer read it?[1522]
- Did the consumer notice the allegedly deceptive part of the letter? Did the consumer understand that part? How did the consumer interpret it?
- Did the deceptive part of the letter cause the consumer any concerns or cause the consumer to take or forgo, or consider taking or forgoing, any steps?
- Was there anything in the letter that the consumer did not understand, and did the consumer take any steps to get clarification?
- Does the consumer have, or did the consumer have, any disputes, doubts, or questions about the debt?
- If the violation involves non-disclosure, what impact, if any, would the information have had on the consumer if it had been disclosed?
- Did the collector's violations cause the consumer embarrassment, distress, worry, or fear?
- Did the violations cause the consumer to waste time?

Negative answers to these questions may make it clear that the case has too many weaknesses that the defense may exploit.

A common theme in favorable opinions prior to *Ramirez* is that courts will find concrete harm where the alleged injury is the type of harm that Congress was seeking to protect against in passing the statute. As discussed in § 11.15.2.2.4, *supra*, *Ramirez* throws the deference to be given to Congress into confusion. Nevertheless, pointing out, whenever possible, that Congress specifically intended to curb the type of harm in question when it enacted the FDCPA[1523] can only strengthen the case for standing. If the injury alleged does not appear to be within the purposes of the statute or appears to be tangential to those purposes, courts will be more likely to find that there is no concrete harm.

In a class action, there is some danger that tying the debtor's claim too closely to some particular harm the debtor has suffered will lead the court to conclude that the class representative's claim is not typical of those of the class, or that there are too many individual issues to allow class certification. If the named plaintiff's particular injuries can be presented in a way that merely illustrates the concreteness of the harm caused to that individual, and not as an integral part of the claim that is asserted on behalf of the class, there will be less danger that they will interfere with class certification.

Evaluating Article III standing issues is particularly important before deciding to appeal a case. Article III standing can be raised *sua sponte* by an appellate court,[1524] so is likely to arise in every appeal of an FDCPA decision. Advocates should pay especially close attention to the *Spokeo* and *Ramirez* decisions their circuit has issued, both in FDCPA and other cases.[1525] Advocates should appeal only strong cases that present easily recognizable substantive wrongs, and should obtain at least one second opinion—from a tough judge—about whether the case presents the Article III issues in a favorable light.

Some states have more expansive standing rules than Article III as interpreted by *Spokeo* and *Ramirez*. An important strategy to consider is to file an FDCPA case in state court in one of these states, rather than in federal court. The defendant will have the right to remove the case to federal court, but then if the court finds that Article III standing is lacking it will remand the case to state court rather than dismissing it. The potential benefits of filing the case initially in state court are discussed in more detail in § 11.15.13, *infra*. However, this strategy should be reserved for strong cases that will appeal to a state court judge, particularly since it may be the judge's first introduction to the FDCPA.

Even if the suit is filed initially in federal court, if it is dismissed for lack of Article III standing the dismissal should be

1521 *See* § 11.15.3.4, *infra* (cataloging types of harm that courts have found concrete).

1522 *See, e.g.*, Casillas v. Madison Ave. Assoc., Inc., 926 F.3d 329, 335 (7th Cir. 2019) (Barrett, J.) (noting that consumer did not allege that she read disclosure about which she sued; affirming dismissal for lack of standing); Seung Eun Oh v. Collecto, Inc., 2021 WL 3732881 (D.N.H. Aug. 23, 2021) (post-*Ramirez* decision; no standing where consumer did not read letter).

1523 *See, e.g.*, Macy v. GC Services L.P., 897 F.3d 747, 760 (6th Cir. 2018) (contrasting collector's failure to specify that § 1692g dispute must be in writing, which was enacted to prevent "precisely the type of harm—abusive debt collection practices—the FDCPA was designed to prevent," with case seeking to apply FDCPA to violation of state procedural rule).

1524 *See* § 11.15.1, *supra*.

1525 *See* § 11.15.3.1, *supra* (overview of first wave of *Spokeo* decisions by U.S. Courts of Appeals).

without prejudice.[1526] In that case, it can be refiled in another court, assuming that the statute of limitations has been tolled or has not passed.

11.15.3.3 Distinguishing Between Procedural and Substantive Violations

In framing an FDCPA claim, it may be helpful to present it as a violation of a substantive rather than a procedural right to the extent possible. In *Spokeo*, the Supreme Court drew a distinction between "procedural" rights and "substantive" rights. It characterized the rights involved in the case as procedural, and held that, at least in some circumstances, a "bare procedural violation" without some other concrete harm would not establish standing.[1527]

After *Spokeo*, some courts concluded that, as long as a right created by the FDCPA can be characterized as substantive, the plaintiff has standing without the need to allege any other concrete harm.[1528] However, the Supreme Court's 2021 decision in *Ramirez* throws the role of any distinction between procedural and substantive rights into doubt.[1529] While *Ramirez* deals only with FCRA violations that it or *Spokeo* characterizes as procedural, it broadly states that Congress's creation of a statutory prohibition and a private cause of action to enforce it does not mean that Article III is satisfied,[1530] and it does not confine this statement to procedural rights. Indeed, *Ramirez* makes nothing of the distinction between procedural and substantive rights that seemed so central to the *Spokeo* court. Even before *Ramirez*, several Seventh Circuit decisions held that the distinction was irrelevant.[1531]

Given the uncertainty created by *Ramirez*, it is unclear whether the distinction between procedural and substantive rights matters in the Article III analysis. Nonetheless, it will be worthwhile to stress the substantive nature of FDCPA rights. Many post-*Spokeo* decisions hold that rights created by the FDCPA are substantive.[1532] Some decisions treat violations

1526 Cheatham v. Adams, 2021 WL 4313961, at *6 (E.D. Ark. Sept. 22, 2021) (post-*Ramirez* decision).

1527 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

1528 *See, e.g.*, Meyer v. Fay Servicing, L.L.C., ___ F. Supp. 3d ___, 2019 WL 2009378 (M.D. Fla. May 7, 2019) (sections 1692e and 1692f create substantive rights, and no additional harm need be shown to establish standing); Williams v. Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 1582515, at *5 (D. Conn. Mar. 31, 2018); Bock v. Pressler & Pressler, L.L.P., 254 F. Supp. 3d 724 (D.N.J. 2017); Taylor v. Fin. Recovery Services, Inc., 252 F. Supp. 3d 344 (S.D.N.Y. 2017), *aff'd*, 886 F.3d 212 (2d Cir. 2018); Prindle v. Carrington Mortg. Services, L.L.C., 2016 WL 4369424 (M.D. Fla. Aug. 16, 2016). *See also* Church v. Accretive Health, Inc., 654 Fed. Appx. 990 (11th Cir. 2016) (finding standing where right is substantive and Congress has elevated its violation to status of legally cognizable injury).

1529 *See* § 11.15.2.2.5, *supra*.

1530 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2205, ___ L. Ed. 2d ___ (2021).

1531 Nettles v. Midland Funding L.L.C., 983 F.3d 896, 899 (7th Cir. 2020); Gunn v. Thrasher, Buschmann & Voelkel, P.C., 928 F.3d 1069 (7th Cir. 2020); Larkin v. Finance Sys. of Green Bay, Inc., 982 F.3d 1060 (7th Cir. 2020).

1532 Church v. Accretive Health, Inc., 654 Fed. Appx. 990 (11th Cir. 2016); Pastian v. Internal Credit Sys., Inc., 2020 WL 6445836 (S.D. Ohio Nov. 3, 2020) (mag.; requirements of § 1692e are substantive); Kranz v. Midland Credit Mgmt., Inc., 2020 WL 3899223, at *5 (W.D. Tex. July 10, 2020) (claim that subpoenas that falsely threatened contempt affected substantive rights, even though deception arose because they were sent by mail instead of by sheriff service, in violation of state's procedural rules); Cartmell v. Credit Control, L.L.C., 2020 WL 113829 (E.D. Pa. Jan. 10, 2020) (right to receive truthful information); Gause v. Medical Business Consultants, Inc., 424 F. Supp. 3d 1175 (M.D. Fla. Dec. 12, 2019) (rights created by § 1692e and 1692f are substantive, but § 1692g is procedural); Beane v. RPW Legal Services, P.L.L.C., 378 F. Supp. 3d 948, 956 (W.D. Wash. 2019) ("allegations of 'informational violations' of the FDCPA under Section 1692e are sufficient to satisfy standing, even absent allegations of additional harm"); Adams v. Jackson, 2019 WL 5865510, at *4 (D.S.C. Apr. 30, 2019); Wenger v. Seterus, Inc., 2019 WL 2119980 (M.D. Pa. May 15, 2019) (FDCPA creates substantive right to receive truthful information); Meyer v. Fay Servicing, L.L.C., ___ F. Supp. 3d ___, 2019 WL 2009378 (M.D. Fla. May 7, 2019) (sections 1692e and 1692f create substantive rights, and no additional harm need be shown to establish standing); Walker v. Lamb, 2019 WL 542328, at *6 (W.D. Ark. Feb. 11, 2019) (violation of § 1692e(10) is substantive); Dreisen v. RSI Enters. Inc., 2019 WL 283646 (D. Ariz. Jan. 22, 2019) (requirement that collector disclose its purpose in initial communication was enacted to protect concrete interests, not procedural rights); Hovermale v. Immediate Credit Recovery, Inc., 2018 WL 6322614, at *4–5 (D.N.J. Dec. 4, 2018) (right to receive accurate information is substantive); Im v. Bayview Loan Servicing L.L.C., 2018 WL 840088, at *6 (S.D.N.Y. Feb. 12, 2018) (materially false or misleading statement is not a bare procedural violation, but infringes on substantive rights conferred by FDCPA); Watkins v. Investment Retrievers, Inc., 2018 WL 558833 (E.D. Cal. Jan. 24, 2018) (§§ 1692e and 1692f); Ceban v. Capital Mgmt. Services, L.P., 2018 WL 451637 (E.D.N.Y. Jan. 17, 2018) (right to be free from deceptive or unfair debt collection practices is substantive); Ferrell v. HIS Fin. Services, L.L.C., 2017 WL 8186795, at *6 (N.D. Ga. Dec. 22, 2017); Rhein v. Forster, Garbus & Garbus, L.L.P., 2017 WL 4969335 (D.N.J. Nov. 1, 2017); Napolitano v. Ragan & Ragan, 2017 WL 3535025, at *7 (D.N.J. Aug. 17, 2017) (right created by FDCPA to be free from receiving false or deceptive information is substantive); Pritchett v. Paul Mason & Assoc., Inc., 2017 WL 11151610 (N.D. Ga. Mar. 2, 2017) (right to be free from deception is substantive); Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521, at *6 (D.N.J. July 27, 2017); Byrne v. Oregon One, Inc., 2017 WL 3568412, at *5 (D. Or. July 18, 2017) (FDCPA creates substantive right to receive information), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017); Matute v. A.A. Action Collection Co., 2017 WL 2573714 (D.N.J. June 13, 2017) (complaint alleging that collector sought amounts not owed and failed to comply with § 1692g asserts rights that are not merely procedural); Pogorzelski v. Patenaude & Felix APC, 2017 WL 2539782 (E.D. Wis. June 12, 2017) (informational injury, here misrepresentation of attorney's involvement, is more than procedural); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (collection letter seeking payment of contingent fees that were not yet incurred, in violation of §§ 1692e and 1692f); Bock v. Pressler & Pressler, L.L.P., 254 F. Supp. 3d 724 (D.N.J. 2017) (deceptive implication that attorney was meaningfully involved in preparation of complaint violates substantive rights and is concrete injury; right to truthful information is substantive right); Taylor v. Fin. Recovery Services, Inc., 252 F. Supp. 3d 344 (S.D.N.Y. 2017) ("a materially false or misleading statement is not a 'bare procedural violation' but rather an infringement on an individual's substantive right conferred by Congress to receive truthful information in debt collection communications"), *aff'd*, 886 F.3d 212 (2d Cir. 2018); Gibson v. US Collections West, Inc., 2017 WL 1833597, at *3–4 (D. Ariz. May 8, 2017) (contacting consumer who sent cease-contact letter is not a

of FDCPA § 1692g as procedural,[1533] and very occasionally a court has referred to some other FDCPA protection as procedural, usually without any detailed analysis.[1534]

The *Spokeo* Court did not define what makes a right "procedural" vs. "substantive." Its discussion of whether an incorrect zip code or failure to provide a notice to a user of a credit report causes concrete harm suggests that it considered those violations to be procedural, but it did not explain its criteria.[1535] An earlier decision, *Massachusetts v. EPA*, characterizes the right to challenge an agency's action as an example of a procedural right.[1536] It holds that a litigant who has been denied such a right has standing if there is some possibility that the requested relief will prompt the agency to reconsider the decision that harmed the litigant.

An FDCPA decision expresses the distinction as follows:

> A "procedural right" is defined as "[a] right that derives from legal or administrative procedure; a right that helps in the protection or enforcement of a substantive right." On the other hand, a "substantive right" is "[a] right that can be protected or enforced by law; a right of substance rather than form."[1537]

This decision also defines a "bare procedural violation" that does not support standing as one that "has no effect on the substantive right."

11.15.3.4 Types of Harms That FDCPA Violations May Cause

Before filing an FDCPA claim, advocates must inquire carefully about any harms the consumer suffered.[1538]

Spokeo and *Ramirez* make clear that both tangible and intangible injuries can meet the concreteness requirement.[1539] Concrete harms that would satisfy the injury-in-fact requirement and that an individual consumer might suffer as a result

procedural violation); Reed v. Receivable Recovery Services, L.L.C., 2017 WL 1399597 (E.D. La. Apr. 19, 2017) (consumer has substantive right to be free from debt collection abuse; claims include repeated calls and failure to make disclosures required by § 1692g), *aff'd*, 706 Fed. Appx. 239 (5th Cir. 2017); Garcia v. Law Offices Howard Lee Schiff P.C., 2017 WL 1230847 (D. Conn. Mar. 30, 2017); Guerrero v. GC Services, L.P., 2017 WL 1133358 (E.D.N.Y. Mar. 23, 2017) (mag.); Verdun v. Fidelity Creditor Serv., 2017 WL 1047109, at *5–6 (S.D. Cal. Mar. 20, 2017) (mag.); Remington v. Fin. Recovery Services, Inc., 2017 WL 1014994, at *2 (D. Conn. Mar. 15, 2017) (false statement that settlement may have tax consequences is "impairment of an FDCPA-created substantive right to truthful, non-deceptive information in debt collection communications"); Bautz v. ARS Nat'l Services, Inc., 226 F. Supp. 3d 131 (E.D.N.Y. Dec. 23, 2016) (right to truthful information in debt collection communications is substantive); Hill v. Accounts Receivable Services, L.L.C., 2016 WL 6462119 (D. Minn. Oct. 31, 2016) (right to truthful information and to be free from collection of unauthorized interest are not merely procedural violations), *aff'd on other grounds*, 888 F.3d 343 (8th Cir. 2018); Sullivan v. Allied Interstate, L.L.C., 2016 WL 7187507 (W.D. Pa. Oct. 18, 2016) (section 1692e provides substantive rights, which Congress has elevated to status of legally cognizable injury), *adopted*, 2016 WL 7189859 (W.D. Pa. Dec. 9, 2016); Irvine v. I.C. Sys., Inc., 198 F. Supp. 3d 1232 (D. Colo. 2016); Barkley v. Santander Consumer USA, Inc. (*In re* Martin), 617 B.R. 866 (Bankr. S.D. Miss. 2020) (filing a proof of claim on extinguished time-barred debt is substantive violation). *See also* Nettles v. Midland Funding L.L.C., 983 F.3d 896 (7th Cir. 2020) (stating that §§ 1692e and 1692f are substantive protections, but holding distinction irrelevant and finding no standing). *But cf.* Galea v. Midland Credit Mgmt. Inc., 2020 WL 905747 (E.D. Mich. Feb. 25, 2020) (claim that "Time Sensitive" on envelope created false sense of urgency is bare procedural violation; no standing without allegation of some resulting harm).

533 Macy v. GC Services L.P., 897 F.3d 747 (6th Cir. 2018); Zirogiannis v. Seterus, Inc., 707 Fed. Appx. 724 (2d Cir. 2017) (section 1692g requirement that validation notice specify the amount of the debt is a procedural requirement); Garrett v. Fin. Bus. & Consumer Solutions, Inc., 2021 WL 3726199, at *2–3 (D. Colo. Aug. 23, 2021) (mag.; finding standing for § 1692 claim, but not for § 1692g claim because that section confers procedural rights); Kale v. Procollect, Inc., 2021 WL 2784556 (W.D. Tenn. July 2, 2021) (post-*Ramirez* decision; terming failure to state amount of debt, in violation of § 1692g, a procedural violation); Gause v. Med. Business Consultants, Inc., 424 F. Supp. 3d 1175 (M.D. Fla. Dec. 12, 2019); Walker v. Lamb, 2019 WL 542328, at *5 (W.D. Ark. Feb. 11, 2019); O'Boyle v. GC Services L.P., 2018 WL 2271033 (E.D. Wis. May 17, 2018); Tyler v. Timothy E. Baxter & Assoc., 2018 WL 5078373 (E.D. Mich. Oct. 18, 2018); Kimble v. W. Ray Jamieson, P.C., 2018 WL 814225 (W.D. Tenn. Feb. 9, 2018) (referring to § 1692g rights as procedural, but without analysis); Abercrombie v. Rogers, Carter, & Payne, 2016 WL 8201965 (W.D. La. Nov. 22, 2016) (misstatement about whether writing is required to dispute debt, and about extent to which debt will be presumed valid if debtor does not dispute it, affects procedural right, designed to buttress substantive right to be free from debt collection abuse), *adopted*, 2017 WL 489426 (W.D. La. Feb. 6, 2017); Perry v. Columbia Recovery Group, L.L.C., 2016 WL 6094821 (W.D. Wash. Oct. 19, 2016) (right to dispute debt is procedural right; plaintiff who received § 1692g notice does not have standing to assert that it misstated deadline for disputing debt where he did not allege that he was confused, that debt was invalid, or that he intended to dispute it). *Cf.* Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75, 81 (2d Cir. 2018) (finding standing; analogizing improper identification of creditor, in violation of §§ 1692e and 1692g(a), as procedural violation; procedural violation may manifest injury in fact if Congress conferred procedural right to protect concrete interests; since § 1692g protects concrete interests, violation may demonstrate risk of real harm to underling interest, sufficient to establish concreteness without need to allege any additional harm); Hargis v. Equinox Collection Services, Inc., 2019 WL 2341662 (N.D. Okla. June 3, 2019) (section 1692g was enacted to protect consumers' concrete interests, not purely procedural rights, but collector's misstatements about whether dispute must be in writing are procedural).

1534 Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855, 867–868 (6th Cir. 2020) (treating deception in collection letter as procedural violation, without explaining why); Brown v. R & B Corp., 267 F. Supp. 3d 692 (E.D. Va. 2017) (finding standing, but stating that requirement that debt be reported as disputed is procedural requirement intended to protect substantive right to be free from abusive debt collection practices); Wheeler v. Am. Profit Recovery, Inc., 2017 WL 4358718 (E.D. Mo. Sept. 29, 2017) (characterizing prohibition against flat-rating that gives false impression that collector is involved as procedural, but without analysis; no standing without allegation of harm that goes beyond inconvenience).

1535 *See* § 11.15.2, *supra*.

1536 549 U.S. 497, 517–518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

1537 Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521, at *6 (D.N.J. July 27, 2017).

1538 *See* § 11.15.3.2, *supra*.

1539 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021); Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

of nondisclosure, false, deceptive, or misleading statements, telephone harassment, or other FDCPA violations might include:

- Paying more than is actually owed;[1540]
- Paying a debt that the consumer would have preferred to contest;[1541]
- Disclosing detrimental information that the consumer would have preferred not to reveal;[1542]
- Paying a low-priority debt, instead of essential immediate obligations such as rent, commuting expenses, day care, utility costs, and food, because the debt collector imparts a deceptive sense of urgency about paying the past-due debt;[1543]

1540 *See, e.g.*, Bassett v. Credit Bur. Servs., Inc., 2021 WL 3579073 (D. Neb. Aug. 13, 2021) (post-*Ramirez* decision; finding Article III standing for claim against collector that dunned consumer for amounts not owed; analogizing to common law conversion claim); Seib v. Metropolitan Ins. Co., 2020 WL 2531119, at *5 (D. Or. Mar. 30, 2020) (paying inflated mortgage payments), *adopted*, 2020 WL 2529615 (D. Or. May 15, 2020); Shallenburg v. PNC Bank, 2020 WL 555447, at *4 (M.D. Fla. Feb. 4, 2020) (payment of contested mortgage debt in order to avoid loss of opportunity to sell home is concrete injury); Farina v. Metropolitan Transportation Authority, 2019 WL 3966163 (S.D.N.Y. Aug. 21, 2019) (plaintiffs who made payments toward E-Z Pass fines that were wrongfully imposed have standing); Ferrell v. HIS Fin. Services, L.L.C., 2017 WL 8186795 (N.D. Ga. Dec. 22, 2017) (demand for unauthorized convenience fee for payment by credit card puts consumer at material risk of paying it); Ozmun v. Portfolio Recovery Assoc., 2017 WL 3140660, at *6 (W.D. Tex. July 24, 2017) (misstatement of balance due or character or status of debt "could have disastrous financial, legal, and reputational consequences for a consumer"); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (overstatement of amount of debt—here, collection letter seeking payment of contingent fees that were not yet incurred—in violation of §§ 1692e and 1692f creates risk that consumer will pay more than is owed); Bell v. Adler Wallach & Assocs., Inc., 2016 WL 11583377 (W.D. Tex. Sept. 15, 2016) (concrete harm sufficiently alleged where plaintiff paid charges he believed he did not owe because he was fearful he might be sued or the debt might be reported to credit bureaus). *See also* Brunett v. Convergent Outsourcing, Inc., 982 F.3d 1067, 1069 (7th Cir. 2020) (suggesting in *dicta* that debtor who, because of intimidating or confusing debt collection communication, pays something she does not owe would have standing); Larkin v. Fin. Sys. of Green Bay, Inc., 982 F.3d 1060, 1066 (7th Cir. 2020) (suggesting that paying debts that were not owed, or appreciable risk of doing so, would be injury-in-fact, but not shown here); Powell v. Palisades Acquisition XVI, L.L.C., 782 F.3d 119 (4th Cir. 2014) (pre-*Spokeo* decision; debt collector's overstatement of amount of a debt by double-counting attorney fees and failing to give credit for payments is material because it can lead consumer to pay more than she otherwise would). *Cf.* Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75, 81 (2d Cir. 2018) (finding standing for claim regarding incorrect identification of creditor; noting that requirement of detailed validation notice enables consumers to confirm that they owe the debt and its amount before paying it). *See generally* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021) (monetary harm is concrete).

1541 *See, e.g.*, Brown v. SWC Group L.P., 2019 WL 1147125, at *7 (N.D. Ga. Jan. 10, 2019) (finding standing where identity theft victim offered to pay debt she did not owe in order to keep it off her credit report), *adopted*, 2019 WL 2306115 (N.D. Ga. Feb. 12, 2019); Ferris v. Transworld Systems, Inc., 2018 WL 701285, at *3 (N.D. Ill. Jan. 31, 2018) ("[w]thout knowing the identity of the current creditor, Ferris might have been tricked into paying a debt he did not actually owe or a debt he intended to dispute"); Watkins v. Investment Retrievers, Inc., 2018 WL 558833, at *4 (E.D. Cal. Jan. 24, 2018) (finding standing where plaintiff alleged that false statement in dunning letter was intended to intimidate him into making a payment). *See also* Lox v. CDA, Ltd., 689 F.3d 818, 827 (7th Cir. 2012) (pre-*Spokeo* decision; debt collector's false statement that the court could require the consumer to pay the debt collector's attorney fees in addition to the debt "would have undoubtably been a factor in his decision-making process, and very well could have led to a decision to pay a debt that he would have preferred to contest"); Muha v. Encore Receivable Mgmt., Inc., 558 F.3d 623, 629 (7th Cir. 2009) (pre-*Spokeo* decision; "Confusing language in a dunning letter can have an intimidating effect by making the recipient feel that he is in over his head and had better pay up rather than question the demand for payment."); Johnson v. Enhanced Recovery Co., 325 F.R.D. 608, 612–614 (N.D. Ind. 2018) (standing established by collector's misrepresentation or implication that by paying settlement debtor would avoid negative credit report, when in fact the debt had already been reported; denial of right to truthful information is concrete injury). *See generally* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021) (monetary harm is concrete).

1542 Pastian v. Internal Credit Sys., Inc., 2020 WL 6445836, at *10 (S.D. Ohio Nov. 3, 2020) (mag.; collector's failure to identify itself as a collector is concrete harm because it created risk that she might volunteer detrimental information), Dreisen v. RSI Enter. Inc., 2019 WL 283646, at *3 (D. Ariz. Jan. 22, 2019) (collector's failure to disclose debt collection purpose of call "created a risk that Driesen might volunteer information to her detriment during subsequent interactions"); Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435, at *4 (W.D. Wash. Mar. 29, 2017) (collector contacts with represented debtor create substantial risk of harm in that it "can result in the inadvertent and uncounseled disclosure of information, to the debtor's detriment").

1543 *See* Adams v. Seterus, Inc., 2019 WL 4735157, at *3 (E.D. Mich. Sept. 27, 2019) (citing both plaintiff's mental anguish and risk that deceptive debt collection letter would induce debtor to pay low-priority debt as concrete harms); Biber v. Pioneer Credit Recovery, Inc., 229 F. Supp. 3d 457 (E.D. Va. 2017) (consumer has standing to assert claims under §§ 1692e and 1692f against collector that misrepresented that administrative wage garnishment proceedings had already commenced or were imminent; these misrepresentations "could have materially and adversely affected [plaintiff's] decisions regarding debt repayment"); Martin v. Trott Law, P.C., 265 F. Supp. 3d 731 (E.D. Mich. 2017) (finding standing under *Spokeo*; noting inherent danger that deceptive or harassing debt collection practices will induce consumer to make decisions detrimental to his personal financial position or legal rights, such as uninformed decisions about debt prioritization). *See also* Bazile v. Fin. Sys. of Green Bay, Inc., 983 F.3d 274, 280 (7th Cir. 2020) (stating in *dicta* that choosing to pay lower interest rate debt because of collector's failure to disclose that this debt was accruing interest would be concrete injury); Oyola v. Cavalry SPV I, L.L.C., 2018 WL 1940313 (D. Mass. Mar. 1, 2018) (consumer who had been unable to pay for food for her family because of wrongful garnishment still has standing even if collector has now returned the garnished funds), *adopted*, 2018 WL 2010574 (D. Mass. Mar. 21, 2018). *See generally* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021) (monetary harm is concrete).

- Forgoing or losing an opportunity that the plaintiff would have exercised to dispute[1544] or settle[1545] a debt;
- Paying the wrong person;[1546]
- Spending time or money to learn the truth about a matter that was misrepresented[1547] or to contest a false claim or stop further abuse;[1548]

1544 Casillas v. Madison Ave. Assoc., Inc., 926 F.3d 329, 334 (7th Cir. 2019) (Barrett, J.) (lost opportunity to obtain benefit because of defendant's failure to provide information is concrete harm; plaintiff need not allege that attempt would have been successful); Macy v. GC Services L.P., 897 F.3d 747 (6th Cir. 2018) (finding standing; failure of § 1692g notice to specify that dispute must be in writing creates risk of unintentional waiver of FDCPA's debt validation rights); Thome v. Sayer Law Group, 2021 WL 4690829 (N.D. Iowa Oct. 7, 2021) (post-*Ramirez* decision; harms made actionable by misrepresentation torts stem from inequity of knowledge; finding standing where plaintiff would have disputed debt but for section 1692g notice's statement that she had only 14 days to pay balance); Byrne v. Oregon One, Inc., 2017 WL 3568412 (D. Or. July 18, 2017) (failure to disclose that dispute must be in writing created risk that consumer would dispute debt by phone, which would not trigger collector's statutory duties to verify debt and cease collection), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017); Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016) (pointing out that denial of § 1692g rights deprives debtor not only of information but also of ability to force thirty-day cessation of collection activity). *Cf.* Rossi v. Kohn Law Firm S.C., 2020 WL 2527176, at *5 (W.D. Wis. May 18, 2020) (loss of opportunity to challenge claim could be concrete, but not shown here). But cf. Cheatham v. Adams, 2021 WL 4313961 (E.D.. Ark. Sept. 22, 2021) (post-*Ramirez* decision; loss of opportunity to dispute debt and obtain pause in collection activity not concrete injury where complaint did not allege that debtor would have exercised these rights).

1545 Tourgeman v. Collins Fin. Services, Inc., 197 F. Supp. 3d 1205 (S.D. Cal. 2016) (misidentification of creditor in complaint served on debtor caused risk of harm in that it could have affected consumer's litigation strategy, led to lost opportunities to settle the debt, and exposed the consumer to the possibility of a default judgment), *aff'd on other issues*, 735 Fed. Appx. 340 (9th Cir. 2018) (affirming Art. III dismissal of different claim that was based on letter that debtor never received); Bautz v. ARS Nat'l Services, Inc., 226 F. Supp. 3d 131 (E.D.N.Y. Dec. 23, 2016) (deceptive statement about tax consequences of settling debt presents a material risk of injury, because misinformation about tax consequences could impact whether debtor decides to pay the lesser amount offered as opposed to the full debt or some other option). *See also* Beane v. RPW Legal Services, P.L.L.C., 378 F. Supp. 3d 948, 958–959 (W.D. Wash. 2019) (finding standing for § 1692g claim; collector's wildly varying statements about amount of debt and its failure to respond to debtor's request for clarification likely prejudiced her ability to dispute it or make intelligent decision on whether to settle it). *Cf.* Rossi v. Kohn Law Firm S.C., 2020 WL 2527176, at *7 (W.D. Wis. May 18, 2020) (loss of opportunity to settle debt would be concrete, but not shown here).

1546 Byrne v. Oregon One, Inc., 2017 WL 3568412, at *9 (D. Or. July 18, 2017) (failure to identify current creditor creates risk that debtor will pay wrong person), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017); Hsu v. Enhanced Recover Co., L.L.C., 2017 WL 4310643 (W.D. Tex. July 10, 2017) (consumer has standing to assert claim regarding collector's failure to provide its true legal name, in violation of § 1692e(14); information would help debtor evaluate whether collector runs legitimate or fraudulent operation, whether its claim is valid, and how to respond); Janetos v. Fulton Friedman & Gullace, L.L.P., 2016 WL 9446140 (N.D. Ill. Sept. 21, 2016) (denial of statutorily-required information, here disclosure of name of creditor, is concrete harm as matter of law; noting that this requirement reduces the risk of fraud by scammers who claim falsely to be entitled to collect a debt). *See also* Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163, 171 (E.D.N.Y. 2013) (pre-*Spokeo* decision; noting that misrepresentation about ownership of debt could lead consumer to pay wrong person).

1547 Sykes v. Veripro Solutions, Inc., 2020 WL 4926547 (N.D. Ill. Aug. 21, 2020) (finding standing where consumer alleged that collection letter misinformed him about character of debt, whether there was enforceable lien on his property, and whether debt could be legally reported to credit agencies, and that as a result he was harassed, aggravated, concerned, and intimidated, and retained counsel); Keys v. Collection Professionals, Inc., 2018 WL 1469006 (N.D. Ill. Mar. 26, 2018) (paying for credit report to determine whether collector was adding unauthorized interest is concrete injury); Ferris v. Transworld Systems, Inc., 2018 WL 701285, at *3 (N.D. Ill. Jan. 31, 2018) (collector's provision of false information creates risk of harm, in that, if debtor is forced to investigate it, the delay may result in further fees and harm to credit rating); Horowitz v. GC Services L.P., 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016) (non-debtor's expenditure of time to respond to voice mail, his use of a cell phone minute, and collector's recording of his call without telling him). *See also* Tourgeman v. Collins Fin. Services, Inc., 755 F.3d 1109, 1119–1122 (9th Cir. 2014) (pre-*Spokeo* decision; identifying "American Investment Bank, N.A.," instead of "CIT Online Bank "as the originator of loan could cause consumer to engage in attempt to investigate debt that would use up part of thirty-day period to dispute it). *See also* Spuhler v. State Collection Serv., Inc., 983 F.3d 282 (7th Cir. 2020) (suggesting that debtor's calls and letters to investigate accuracy of the debts might be concrete injury if she had made them because of confusion arising from violation alleged, i.e., collector's failure to disclose whether interest was accruing); Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 997 (11th Cir. 2020) (suggesting that "wast[ing] time or money in determining whether to" make payments in response to defendant's letters might be a concrete injury, but not shown here); Frank v. Autovest, L.L.C., 961 F.3d 1185, 1190 (D.C. Cir. 2020) (stating in *dicta* that standing might be established by "investigatory injuries—e.g. resources spent uncovering or confirming the truth"). *But see* Nettles v. Midland Funding L.L.C., 983 F.3d 896 (7th Cir. 2020) (consulting attorney because of overstatement of debt is not concrete injury); Brunett v. Convergent Outsourcing, Inc., 982 F.3d 1067, 1069 (7th Cir. 2020) (fact that debtor hired lawyer because of her confusion about collection letter's accurate statement that she might owe taxes on forgiven debt does not establish standing; "[a] desire to obtain legal advice is not a reason for universal standing"); Valenzuela v. Axiom Acquisition Ventures, L.L.C., 2021 WL 62495 (M.D. Fla. Jan. 7, 2021) (stating that "expenditure of resources" to speak with law firm regarding his rights because of his frustration with misleading collection letter is not concrete harm). *See generally* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021) (monetary harm is concrete).

1548 Pinson v. JPMorgan Chase Bank, 942 F.3d 1200, 1209 (11th Cir. 2019) (spending time and incurring out-of-pocket expenses to contest creditor's use of false name when reporting debt to credit bureau is concrete injury); Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017) (spending time and money to defend against meritless suit is an injury); Fullmer v. A-1 Collection Agency, LLC, 2021 WL 4155068, at *2 (D. Utah Sept. 13, 2021) (post-*Ramirez* decision; attorney fees and costs that consumer incurred to get confidential medical information that had been filed in state court debt collection suit reclassified as private is concrete injury); Neal v. Adams, 2021 WL 4466392 (E.D. Ark. Sept. 29, 2021) (post-*Ramirez* decision; finding attorney fees to defend collection action to be sufficient for standing to extent they were caused by collector's filing of suit in wrong venue, but insufficient for claim that collector failed to give § 1692g notice in absence of showing that incurring fees was caused by that violation); Lako v. Portfolio Recovery Assoc., 2021 WL 3403632 (W.D. Wis. Aug. 4, 2021) (post-*Ramirez* decision; cost of hiring attorney to defend collection action is concrete harm); Smith v. Moss Law Firm, P.C., 2020

- Waiver of a right or a defense;[1549]
- Increasing the consumer's burden of proof in a collection action, or otherwise negatively impacting the posture of the case;[1550] and
- The entry of a judgment against the debtor due to a false statement that is filed in court, with the potential additional harm of credit reports, garnishment, and other methods of judgment execution.[1551]

WL 584617 (N.D. Tex. Feb. 6, 2020) (plaintiff's anxiety and legal costs when he is wrongly sued and case is not immediately dismissed are concrete harms); Roe v. Roosen, Varchetti & Oliver, P.L.L.C., 2019 WL 2523589 (E.D. Mich. June 19, 2019) (finding standing; citing fact that consumer contacted attorney after her employer received garnishment notice for debt that was not hers as one of the concrete harms); Mills v. Turner, 2017 WL 3670967, at *13 (D. Mass. Aug. 25, 2017) (finding standing where false threat of suit prompted consumer to retain counsel); Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435, at *5 (W.D. Wash. Mar. 29, 2017) (plaintiff's telephone call to ask counsel to dispute amount of debt is concrete injury); Verdun v. Fidelity Creditor Serv., 2017 WL 1047109 (S.D. Cal. Mar. 20, 2017) (mag.; plaintiff's expenditure of funds to hire attorney to clarify his legal obligations after receiving confusing debt collection letter is concrete injury); Everett v. Fin. Recovery Services, Inc., 2016 WL 6948052 (S.D. Ind. Nov. 28, 2016) (finding standing to bring claim regarding letter's misrepresentation of tax consequences of settling claim; citing costs consumer incurred to consult her attorney as one of the harms); Mogg v. Jacobs, 2016 WL 4395899 (S.D. Ill. Aug. 18, 2016) (concrete harm shown where consumer incurred costs to defend against collection action that was filed in violation of automatic stay); Robinson v. JH Portfolio Debt Equities, L.L.C. (*In re* Robinson), 554 B.R. 800 (Bankr. W.D. La. 2016) (attorney fee for contesting time-barred proof of claim is concrete injury). *See also* Ngo v. NPAS, Inc., 2021 WL 149121, at *4 (E.D. La. Jan. 15, 2021) (consumer retained counsel because he felt harassed by collector's contacts); LoMastro v. Baxter Credit Union, 2018 WL 5885536 (W.D. Wis. Nov. 9, 2018) (finding standing where plaintiff alleged that meritless suit was filed because of collection attorney's failure to be meaningfully involved, causing her to have to defend it); Moran v. Greene & Cooper Attorneys L.L.P., 43 F. Supp. 3d 907, 914 (S.D. Ind. 2014) (pre-*Spokeo* decision; "[u]nsophisticated consumers may lose track of their debts . . . and it is plausible that Plaintiff here would reasonably be confused by a letter demanding that he pay a sum of money to 'Unknown'"). *But see* Ward v. Nat'l Patient Account Services Solutions, Inc., ___ F.4th ___, 2021 WL 3616067 (6th Cir. Aug. 16, 2021) (post-*Ramirez* decision; expense of retaining counsel to stop further calls is not concrete harm because it is voluntary); Frank v. Autovest, L.L.C., 961 F.3d 1185 (D.C. Cir. 2020) (hiring of attorney to defend collection action is not concrete harm where it was prompted by collection suit itself rather than by false affidavits collector filed); Lyshe v. Levy, 854 F.3d 855 (6th Cir. 2017) (potential harm that debtor might, because of collector's violation of state procedural rule, be required to visit a notary or contact the collector to request an electronic copy of discovery requests is not the type of harm FDCPA was enacted to prevent); Alarcon v. Vital Recovery Services, Inc., 2018 WL 6266558 (S.D. Cal. Nov. 30, 2018) (stating in *dicta* that being forced to hire attorney because defendant brought suit on debt that had been extinguished is not concrete harm; asserting, contrary to law's general recognition of consequential damages, that "[t]he concrete harm that confers standing must be a direct result of the defendant's statutory violation, not simply by plaintiff's chosen response to the harm"); Johnston v. Midland Credit Mgmt., 229 F. Supp. 3d 625 (W.D. Mich. Jan. 26, 2017) (disregarding without explanation plaintiff's travel expenses and time he spent consulting with counsel and making telephone calls after receiving settlement offer that collector then refused to implement). *But cf.* Tolliver v. Nat'l Credit Sys., Inc., 2021 WL 4306056 (W.D. Wis. Sept. 22, 2021) (post-*Ramirez* decision; time and expenses spent to file FDCPA suit not concrete harm); Allgire v. HOVG, L.L.C., 2017 WL 1021394 (S.D. Ind. Mar. 16, 2017) (costs of consulting with attorney because of allegedly deceptive demand for payment "is not an injury sought to be avoided by enforcement of the FDCPA" because FDCPA gives court authority to award costs and attorney fees; not clear from opinion whether consultation was about filing FDCPA claim or about interpreting misleading collection letter); Bass v. Blitt & Gaines, P.C., 2016 WL 6877729 (N.D. Ill. Nov. 22, 2016) (fact that consumer hired attorney after receiving deceptive notice from collection firm is not concrete harm where court speculates that he might have hired attorney even without deception).

1549 Macy v. GC Services L.P., 897 F.3d 747 (6th Cir. 2018) (finding standing; failure of § 1692g notice to specify that dispute must be in writing creates risk of unintentional waiver of FDCPA's debt validation rights); Diehm v. Messerli & Kramer, P.A., 426 F. Supp. 3d 578 (W.D. Wis. 2019) (finding standing at summary judgment stage where debtor submitted evidence that she would have disputed claim but for her belief that collection attorney had reviewed it; fact that she does not identify any substantive defenses does not negate standing); Adams v. Seterus, Inc., 2019 WL 4735157, at *3 (E.D. Mich. Sept. 27, 2019) (finding standing; noting that false statement that homeowner could raise defenses in foreclosure by advertisement proceeding could induce homeowners into inaction or delay in raising defenses; plaintiff also alleged mental anguish); Navarroli v. Midland Funding L.L.C., 2019 WL 1044801 (N.D. Ill. Mar. 3, 2019) (offer to settle time-barred debt, without disclosing that payment would revive the debt, created risk of waiver of the statute of limitations defense); Kaiser v. Cascade Capital, L.L.C., 2018 WL 1521892 (D. Or. Mar. 28, 2018) (demands for time-barred debt create risk that debtor would make a payment and thereby waive the defense); Byrne v. Oregon One, Inc., 2017 WL 3568412, at *9 (D. Or. July 18, 2017) (failure to disclose that dispute must be in writing created risk that consumer would dispute the debt by phone, which would not trigger collector's statutory duties to verify the debt and cease collection), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017); Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016) (pointing out that denial of § 1692g rights deprives debtor not only of information but also of the ability to force a thirty-day cessation of collection activity). *But see* Bass v. Blitt & Gaines, P.C., 2016 WL 6877729 (N.D. Ill. Nov. 22, 2016) (holding that fact that consumer would have waived defense of lack of service of process by attending hearing as wrongfully instructed in notice from collector is not sufficiently concrete where he did not, in fact, attend hearing; failing to consider risk of harm).

1550 Scarbrough v. Rausch, Sturm, Israel, Enerson & Hornick, L.L.P., 2018 WL 5305080 (E.D. Mich. July 26, 2018) (creditor's filing of false affidavit caused concrete harm by shifting burden of proof and forcing debtor to file counter-affidavit); Newman v. Encore Capital Group, 2017 WL 3479510 (E.D. Mich. Aug. 14, 2017) (injury shown where collector's filing of false affidavit may have changed burden of proof in collection action to consumer's detriment). *See generally* § 11.15.5.4, *Infra* (Article III standing for claims involving false statements in collection actions).

1551 *See, e.g.*, McMurray v. Forsythe Fin., L.L.C., 2021 WL 83265, at *2 (D. Utah Jan. 11, 2021) (finding standing for claim that collection agency garnished debtor's wages after obtaining money judgment without having registered, in violation of state law); Sayeed v. Cheatham Farms Master Homeowners' Ass'n, 2018 WL 8053811 (C.D. Cal. Oct. 29, 2018) (plaintiff has standing to bring FDCPA claim against creditor for recording an Arizona judgment in debtor's current home state after serving notice on the wrong person, even though creditor did not seek to enforce judgment against him, where he alleged that he suffered emotional distress, damaged credit rating, and unspecified pecuniary loss); Oyola v. Cavalry SPV I, L.L.C., 2018 WL 1940313 (D. Mass. Mar. 1, 2018) (finding standing; judgment was entered against consumer after service at address where she no longer lived, then her wages were garnished and she could not feed her family), *adopted*, 2018 WL 2010574 (D. Mass. Mar. 21, 2018); Toohey v. Portfolio Recovery Assoc., 2017 WL 2271548

Some of these decisions find standing based on the risk of a particular harm, rather than the actual materialization of that harm. As noted in § 11.15.2.2.6, *supra*, the majority opinion in the Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*[1552] states that a risk of harm can serve as a concrete injury only in a suit seeking prospective relief such as an injunction. Decisions based on a risk of harm are still relevant after *Ramirez* for suits seeking money damages rather than prospective relief, because they support that view that the harm in question is concrete if it materializes.

Other types of harm that consumers may suffer due to FDCPA violations include:

- Damage to the consumer's credit rating;[1553]
- Damage to the consumer's reputation;[1554]
- Reluctance to seek further care from a medical provider on whose behalf the collector is acting;[1555]
- Forgoing or delaying other actions that the consumer would otherwise have taken;[1556]
- Invasion of privacy;[1557]
- Wasted time and annoyance,[1558] although some courts, including the Seventh Circuit, disagree;[1559]

(S.D.N.Y. May 12, 2017) (filing of affidavit of merit in state court collection suit that gave false impression that collector had reviewed account-level documentation is procedural violation that caused concrete harm by enabling collector to obtain state court judgment). *See also* Budewitz v. Daubert Law Firm, S.C., 2020 WL 5775428 (W.D. Wis. Sept. 28, 2020) (serving wage garnishment before responding to debtor's request for verification is concrete harm). *But see* Burns v. Midland Funding, L.L.C., 2019 WL 3003598 (E.D. Mich. July 10, 2019) (finding lack of standing where false affidavit of service led to default judgment, but consumer later got judgment vacated; failing to recognize harm of having to take steps to have it vacated).

1552 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021).

1553 *See, e.g.*, Lueck v. Bureaus, Inc., 2021 WL 4264368 (N.D. Ill. Sept. 20, 2021) (post-*Ramirez* decision; decreased credit score is concrete harm); Maxwell v. Law Office of Jennifer McCoy, P.C., 2021 WL 3741999 (S.D. Ind. Aug. 23, 2021) (post-*Ramirez* decision; damage to credit rating caused by failure to report debt as disputed is concrete harm); Escobar v. Midland Credit Mgmt., 2019 WL 3751486, at *2–3 (D. Conn. Aug. 8, 2019) (collector caused concrete harm by wrongfully reporting debt to credit reporting agencies as unpaid); Oyola v. Cavalry SPV I, L.L.C., 2018 WL 1940313, at *7 (D. Mass. Mar. 1, 2018) (decrease in credit score is itself concrete injury), *adopted*, 2018 WL 2010574 (D. Mass. Mar. 21, 2018). But see Norman v. Bosak Motors of Burns Harbor L.L.C., 2021 WL 4749617 (N.D. Ind. Oct. 12, 2021) (post-*Ramirez* decision; lower credit score is not a concrete harm in itself). *See generally* § 11.15.5.3, *infra* (standing to assert claim that collector wrongfully reported information to credit reporting agency).

1554 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021) (credit reporting agency's dissemination of derogatory information about plaintiff to third parties is concrete harm in and of itself because of close relationship to harm that is actionable through common law tort of defamation); Robbins v. Resident Verify, L.L.C., 2021 WL 3292652 (D. Utah Aug. 2, 2021) (post-*Ramirez* decision; embarrassment due to tenant screening company's exaggeration of plaintiff's criminal record is concrete harm); Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798, 805 (E.D. Mich. 2017) (embarrassment due to dissemination of private information to others in the community is concrete harm); Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340, at *3 (E.D. Mich. Nov. 2, 2017). *But cf.* Tolliver v. Nat'l Credit Sys., Inc., 2021 WL 4306056 (W.D. Wis. Sept. 22, 2021) (collector's failure to report debt as disputed not closely enough related to defamation tort; distinguishing *Ramirez* and denying standing). *See generally* § 11.15.5.3 (credit reporting), § 11.15.8 (wrongful third-party contacts), *infra*.

1555 Larkin v. Fin. System of Green Bay, Inc., 982 F.3d 1060, 1066 (7th Cir. 2020) (suggesting in dicta that consumers might have had standing if collection letters regarding medical bill had deterred them from seeking medical care).

1556 *See, e.g.*, TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2213 ___ L. Ed. 2d ___ (2021) (citing fact that plaintiffs did not show that they "would have tried to correct their credit files . . . had they been sent the information in the proper format" in support of conclusion that they lacked standing). *See also* Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1023 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021) (post-*Ramirez* decision; finding standing; communication of debtor's personal information to third party in violation of FDCPA creates harm analogous that recognized by tort of public disclosure of private facts); Thome v. Sayer Law Group, 2021 WL 4690829, at *13-14 (N.D. Iowa Oct. 7, 2021) (post-*Ramirez* decision; fees that accrued because § 1692g notice's confusing language led plaintiff not to dispute debt is concrete harm if proven); Roe v. Roosen, Varchetti & Oliver, P.L.L.C., 2019 WL 2523589 (E.D. Mich. June 19, 2019) (finding standing where wage garnishment sent to wrong person's employer caused plaintiff, a real estate agent, to suffer embarrassment and emotional distress and to refrain from selling real estate for fear that her wages would be garnished). But cf. Kola v. Forster & Garbus L.L.P., 2021 WL 4135153 (S.D.N.Y. Sept. 10, 2021) (post-*Ramirez* decision; passing by opportunity to pay a debt because of conflicting notices about its amount, and thereby incurring more interest, is not concrete injury where facts showed that plaintiff could not have afforded to pay it anyway).

1557 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021); Donovan v. FirstCredit, Inc., 983 F.3d 246, 250-252 (6th Cir. 2020) (visible indications on letter that it was from debt collector causes harm closely related to that which forms basis of common law invasion of privacy claim; consumer has standing); St. Pierre v. Retrieval-Masters Creditors Bur., Inc., 898 F.3d 351 (3d Cir. 2018) (finding standing; disclosure of debtor's account number implicates a core concern animating the FDCPA—invasion of privacy—so is closely related to harm that has traditionally been regarded as providing the basis for a lawsuit in English and American courts). *See also* FDCPA § 1692(a) (citing invasion of privacy as one of the harms FDCPA was designed to prevent). *See generally* §§ 11.15.7, 11.15.8, *infra*; National Consumer Law Center, Federal Deception Law § 6.10.3.2 (3d ed. 2017), *updated at* www.nclc.org/library (invasion of privacy as basis for standing for violation of restrictions on robocalls).

1558 *See, e.g.*, Ngo v. NPAS, Inc., 2021 WL 149121 (E.D. La. Jan. 15, 2021) (finding standing where plaintiff felt harassed by collector's contacts and retained counsel); Alarcon v. Vital Recovery Services, Inc., 2018 WL 6266558 (S.D. Cal. Nov. 30, 2018) (receipt of repeated calls creates standing, as they take time to answer); Swike v. Med-1 Solutions, L.L.C., 2017 WL 4099307, at *4 (S.D. Ind. Sept. 15, 2017) (recognizing wasted time and annoyance from receipt of debt collection communications as concrete injury); Reed v. IC Sys., Inc., 2017 WL 89047 (W.D. Pa. June 10, 2017) (wasted time and annoyance caused by repeated calls is concrete harm, even if consumer does not answer them). *See generally* National Consumer Law Center, Federal Deception Law § 6.10.3.4 (3d ed. 2017), *updated at* www.nclc.org/library (wasted time and annoyance as concrete harms from unwanted calls in violation of Telephone Consumer Protection Act).

1559 Gunn v. Thrasher, Buschmann & Voelkel, P.C., 982 F.3d 1069 (7th Cir. 2020) (where language in collection letter was legally sound and factually correct, fact that consumers were annoyed or intimidated by receiving it is insufficient); Tolliver v. Nat'l Credit Sys., Inc., 2021 WL 4306056, at *4 (W.D. Wis. Sept. 22, 2021) (post-*Ramirez* decision); Wheeler v. Am. Profit Recovery, Inc., 2017 WL 4358718 (E.D. Mo.

- Confusion about the claim or the individual's rights,[1560] although there is contrary authority, particularly from the Seventh Circuit;[1561]
- Being named as the defendant in a collection action;[1562]
- Interference with the debtor's employment;[1563]
- Travel expenses to get to a court in a distant venue where the collector has filed suit;[1564] and
- Emotional distress.[1565]

Sept. 29, 2017) (no standing for procedural violation without allegation of harm that goes beyond inconvenience).

1560 Perez v. McCreary, Veselka, Bragg & Allen, P.C., 2021 WL 3639801 (W.D. Tex. Aug. 17, 2021) (post-*Ramirez* decision; confusion is sufficient basis for Art. III standing); Tataru v. RGS Fin., 2021 WL 38142 (N.D. Ill. Jan. 4, 2021) (allegation that debtor was confused about creditor's identification and thought letter might be a scam is sufficient, because thinking that letter was a scam could lead debtor to fail to exercise rights); Pierre v. Midland Credit Mgmt., Inc., 2019 WL 4059154 (N.D. Ill. Aug. 28, 2019) (finding standing where deceptive collection letter caused fear, confusion, and emotional distress, even though debtor was not deceived); Rodriguez v. Codilis & Assoc., 2018 WL 1565596, at *3 (N.D. Ill. Mar. 30, 2018) (confusion is sufficiently concrete); Watkins v. Investment Retrievers, Inc., 2018 WL 558833, at *4 (E.D. Cal. Jan. 24, 2018) (agreeing with debtor that dissemination of false information constitutes risk of harm because it confuses consumer as to FDCPA rights); Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798, 805 (E.D. Mich. 2017) (confusion is concrete harm); Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340, at *3 (E.D. Mich. Nov. 2, 2017) (citing debtors' confusion; finding standing). *See also* Heisler v. Convergent Healthcare Recoveries, Inc., 2020 WL 1249481 (E.D. Wis. Mar. 16, 2020) (where alleged injury is deprivation of substantive information, must still allege actual injury, but opening letter, reading parts of it, and being left unsure as to whom to pay and to whom this debt related is sufficient. *See generally* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2213, ___ L. Ed. 2d ___ (2021) (citing fact that plaintiffs did not present any evidence "that they were confused, distressed, or relied on the information in any way" as support for conclusion that they had not alleged concrete harm).

Note that the decisions from district courts in the Seventh Circuit cited in this note were decided before *Smith v. GC Services L.P.*, ___F.3d ___, 2021 WL 210948 (7th Cir. Jan. 21, 2021), and so do not take its holding about confusion into account.

1561 Ward v. Nat'l Patient Account Services Solutions, Inc., ___ F.4th ___, 2021 WL 3616067 (6th Cir. Aug. 16, 2021) (post-*Ramirez* decision; confusion is not concrete injury); Wadsworth v. Kross, Lieberman & Stone, Inc., ___ F.4th ___, 2021 WL 3877930 (7th Cir. Aug. 31, 2021) (post-*Ramirez* decision; confusion is not concrete injury); Markakos v. Medicredit, Inc., 997 F.3d 778 (7th Cir. 2021) (confusion and aggravation because § 1692g notices letters stated inconsistent amounts due is not concrete harm); Pennell v. Global Trust Mgmt., L.L.C., 990 F.3d 1041 (7th Cir. 2021) (stress and confusion insufficient); Smith v. GC Services, L.P., ___ F.3d ___, 2021 WL 210948 (7th Cir. Jan. 21, 2021) (confusion insufficient unless it leads debtor to take some detrimental step); Spuhler v. State Collection Serv., Inc., 983 F.3d 282 (7th Cir. 2020) (holding that confusion alone is not injury-in-fact; suggesting that taking action to clarify confusion might be, but finding debtor's phone calls and letters to clarify amount of debt insufficiently tied to alleged violation, failure to state that interest was accruing); Brunett v. Convergent Outsourcing, Inc., 982 F.3d 1067, 1069 (7th Cir. 2020) (neither confusion, nor fact that consumer found letter intimidating is concrete injury); Cooper v. Atlantic Credit & Fin. Inc., 822 Fed. Appx. 951 (11th Cir. 2020) (confusion caused by letter that contradicted and overshadowed validation notice is insufficient without any allegation of possible financial or legal consequences); Marcano v. Nationwide Credit & Collection, Inc., 2021 WL 4523218, at *6 (N.D. Ill. Oct. 4, 2021) (post-*Ramirez* decision; plaintiff's failure to pay debt because of collection letter's confusing presentation of amount owed not concrete harm where no interest or fees accrued as a result); Rodriguez v. Beyer & Assoc., 2021 WL 179596 (E.D. Wis. Jan. 19, 2021) (confusion insufficient without allegation that it detrimentally affected debtor's handling of her debts); Matthias v. Tate & Kirlin Assoc., Inc., 2021 WL 107181 (W.D. Wis. Jan. 12, 2021) (confusion insufficient where debtor did not seek clarification, make a payment, or otherwise attempt to manage his debt; fact that he turned the letter over to his bankruptcy lawyer does not change this conclusion); Martinez v. Aargon Agency, Inc., 2018 WL 4355162 (D. Nev. Sept. 12, 2018) (improperly mixing merits of FDCPA claim in with standing; holding that, even though debtor was confused by collection letter's reference to interest, she lacks standing because letter was not deceptive). *See also* Adams v. Skagit Bonded Collectors, L.L.C., ___ Fed. Appx. ___, 2020 WL 7055395 (9th Cir. Dec. 2, 2020) (bare allegation of confusion is insufficient).

1562 Boerner v. LVNV Funding L.L.C., 326 F. Supp. 3d 665 (E.D. Wis. July 25, 2018) (being named as a defendant in a collection action that should not have been brought, with its attendant legal costs, anxiety, and worry, is a concrete injury).

1563 *See* § 11.15.8, *infra* (wrongful third-party contacts).

1564 *See* § 11.15.12, *infra* (standing for suits regarding venue abuse).

1565 Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1022 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021) (post-*Ramirez* decision; emotional distress is tangible harm); Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017); Moore v. Blibaum & Assoc., 693 Fed. Appx. 205 (4th Cir. 2017); Westerman v. Cintar Fin. Services, L.L.C., 2021 WL 4554334 (D. Md. Oct. 5, 2021) (post-*Ramirez* decision); Thome v. Sayer Law Group, 2021 WL 4690829, at *13–15 (N.D. Iowa Oct. 7, 2021) (post-*Ramirez* decision; confusing notice's exacerbation of plaintiff's emotional distress regarding potential foreclosure on home is concrete injury); Crandall v. Miller & Stephens, P.A., 2021 WL 4595535, at *3 (D. Minn. Oct. 6, 2021) (post-*Ramirez* decision; emotional distress is "obviously" concrete injury; here, plaintiff also asserted common law claims for malicious prosecution and abuse of process); Haynes v. TransUnion, L.L.C., 2021 WL 3185581 (E.D.N.Y. July 28, 2021) (post-*Ramirez* decision; emotional distress due to collection attempts is concrete injury); Robbins v. Resident Verify, LLC, 2021 WL 3292652 (D. Utah Aug. 2, 2021) (post-*Ramirez* decision; embarrassment due to tenant screening company's exaggeration of plaintiff's criminal record is concrete harm); McMurray v. Forsythe Fin., L.L.C., 2021 WL 83265, at *2 (D. Utah Jan. 11, 2021); Kranz v. Midland Credit Mgmt., Inc., 2020 WL 3899223, at *5 (W.D. Tex. July 10, 2020) (holding that false threat to take oral deposition at debtor's exam is concrete harm because it is violation of substantive right created by Congress; finding, in footnote 9, that plaintiff's emotional distress is also sufficiently concrete); Sykes v. Veripro Solutions, Inc., 2020 WL 4926547 (N.D. Ill. Aug. 21, 2020) (finding standing where consumer alleged that collection letter misinformed him about character of debt, whether there was enforceable lien on his property, and whether debt could be legally reported to credit agencies, and that as a result he was harassed, aggravated, concerned, and intimidated, and retained counsel); Smith v. Moss Law Firm, P.C., 2020 WL 584617 (N.D. Tex. Feb. 6, 2020) (plaintiff's anxiety and legal costs when he is wrongly sued and case is not immediately dismissed are concrete harms); Palmer v. Online Information Services, Inc., 2020 WL 7658063 (E.D. Tex. Nov. 9, 2020), *adopted*, 2020 WL 7388963 (E.D. Tex. Dec. 16, 2020); Waldrop v. LTS Collections Inc., 2020 WL 6545772 (D. Ariz. Nov. 6, 2020) (default judgment); Mraz v. I.C. Sys., Inc., 2020 WL 5876947 (M.D. Fla. Oct. 2, 2020); Lamirand v. Ray Servicing, L.L.C., 2020 WL 6134356 (M.D. Fla. Oct. 19, 2020); Rivera v. Dove Investment Corp., 2020 WL 6366054 (S.D. Fla. Oct. 23, 2020); Shallenburg v. PNC Bank, 2020 WL 555447, at *4 (M.D. Fla. Feb. 4, 2020); Hampton v. Barclays Bank Del., 2019 WL 6727083 (D. Kan. Dec. 11, 2019); Camaj v. Makowever Abbate Guerra Weggner Vollmer P.L.L.C., 2019 WL 6037597, at *4 (E.D. Mich. Nov. 14, 2019); Heinitz v. Seterus, Inc., 2019 WL 4805326 (N.D.N.Y. Sept. 30,

The conclusion that emotional distress is a concrete harm is particularly clear, since emotional distress is widely allowed as an element of actual damages in FDCPA cases.[1566] Indeed, courts often look to common law to determine whether actual damages are available for certain types of harm in FDCPA cases,[1567] so FDCPA decisions awarding emotional distress damages are based on the very analogy to common law and other traditional claims that the Supreme Court's Article III rulings require. While *Ramirez* explicitly avoids taking a position on whether emotional distress is concrete harm,[1568] the Supreme Court has held in the past that "[d]istress is a personal injury familiar to the law" and is compensable as an actual injury.[1569] In addition, Congress's statement of its purposes in enacting the FDCPA stresses its intent to protect consumers from injuries that are primarily emotional, such as marital instability and invasions of individual privacy.[1570] Since *Ramirez*, a number of courts have held that emotional distress is a concrete injury,[1571]

2019) (anxiety is concrete harm; fact that debtor also had other reasons to be anxious about foreclosure does not preclude tracing his anxiety to collector's misrepresentations about its imminence); Adams v. Seterus, Inc., 2019 WL 4735157 (E.D. Mich. Sept. 27, 2019) (consumer has standing; letter that conveyed false sense of urgency caused mental anguish and has potential to induce debtor to send money that is needed for necessities); Spehr v. Seterus, Inc., 2019 WL 4246929 (E.D. Mo. Sept. 6, 2019); Henderson v. Gen. Revenue Corp., 2019 WL 4148172, at *6 (W.D. Va. Aug. 30, 2019); Pierre v. Midland Credit Mgmt., Inc., 2019 WL 4059154 (N.D. Ill. Aug. 28, 2019) (finding standing where deceptive collection letter caused fear, confusion, and emotional distress, even though debtor was not deceived); Escobar v. Midland Credit Mgmt., 2019 WL 3751486, at *2-3 (D. Conn. Aug. 8, 2019); Villalobos v. Meyer Njus Tanick, P.A., 2019 WL 3562663 (N.D. Ill. Aug. 5, 2019) (increased confusion and pressure); Suarez v. Camden Prop. Trust, 2019 WL 3423427, at *3 (E.D.N.C. July 29, 2019); Roe v. Roosen, Varchetti & Oliver, P.L.L.C., 2019 WL 2523589 (E.D. Mich. June 19, 2019) (finding standing where wage garnishment sent to wrong person's employer caused plaintiff, a real estate agent, to suffer embarrassment and emotional distress and to refrain from selling real estate for fear that her wages would be garnished); Wenger v. Seterus, Inc., 2019 WL 2119980 (M.D. Pa. May 15, 2019) (anxiety); Decker v. Receivables Performance Mgmt., L.L.C., 2019 WL 1112256 (N.D. Ill. Mar. 11, 2019); Brown v. SWC Group LP, 2019 WL 1147125, at *7 (N.D. Ga. Jan. 10, 2019), *adopted*, 2019 WL 2306115 (N.D. Ga. Feb. 12, 2019); Peacock v. Stewart Zlimen & Jungers, Attorneys, Ltd., 2018 WL 5808808 (D. Minn. Nov. 6, 2018) (frustration, confusion, and helplessness); Yergovich v. Small Community Specialists L.L.C., 337 F. Supp. 3d 635 (E.D. Va. 2018); Sayeed v. Cheatham Farms Master Homeowners' Ass'n, 2018 WL 8053811 (C.D. Cal. Oct. 29, 2018); Boerner v. LVNV Funding L.L.C., 326 F. Supp. 3d 665 (E.D. Wis. July 25, 2018); Plouffe v. Bayview Loan Servicing, L.L.C., 2018 WL 2984874 (E.D. Pa. June 13, 2018) (standing established where plaintiff alleged that violations caused him to incur "numerous costs" and caused excessive stress and aggravation of his existing medical condition); Proescher v. Security Collection Agency, 2018 WL 3432737 (M.D. Fla. June 8, 2018) (finding standing where collector reported debt to credit bureau even though consumer had already paid it, causing her emotional and physical distress), *adopted*, 2018 WL 3428157 (M.D. Fla. July 16, 2018); Kaiser v. Cascade Capital, L.L.C., 2018 WL 1521892, at *4 (D. Or. Mar. 28, 2018) (anxiety is sufficient); Lewis v. Experian Info. Solutions, Inc., 2018 WL 1989449 (C.D. Cal. Mar. 20, 2018) (finding standing where debtor alleged that collector reported a debt she did not owe, thereby preventing her from qualifying for a loan and causing emotional distress); Oyola v. Cavalry SPV I, L.L.C., 2018 WL 1940313 (D. Mass. Mar. 1, 2018), *adopted*, 2018 WL 2010574 (D. Mass. Mar. 21, 2018); Dixon v. Law Office of J. Scott Watson P.C., 2018 WL 705032 (E.D. Pa. Feb. 5, 2018) (fear and anxiety due to confusing settlement proposal is concrete injury); Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798, 805–806 (E.D. Mich. 2017) (embarrassment); Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340 (E.D. Mich. Nov. 2, 2017); Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017); Barnhill v. FirstPoint, Inc., 2017 WL 22178439 (M.D.N.C. May 17, 2017); Bartl v. Enhanced Recovery Co., 2017 WL 1740152 (D. Minn. May 3, 2017); Ghanta v. Immediate Credit Recovery, Inc., 2017 WL 1423597, at *4 (N.D. Tex. Apr. 8, 2017); Morris v. Ocwen Loan Servicing, L.L.C., 2017 WL 1035944 (D.S.C. Mar. 17, 2017). *But see* Wadsworth v. Kross, Lieberman & Stone, Inc., ___ F.4th ___, 2021 WL 3877930 (7th Cir. Aug. 31, 2021) (post-*Ramirez* decision); Mishniot v. Int'l Recovery Sys. Ltd., 2017 WL 714345 (D. Nev. Feb. 22, 2017) (stating that "embarrassment, frustration, personal humiliation, mental anguish, and anger" are not concrete harms and are not analogous to traditionally-recognized injuries, without mentioning torts such as intentional infliction of emotional distress or Congress's focus on emotional harms such as marital instability and invasions of privacy). *But cf.* Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855 (6th Cir. 2020) (questioning in *dicta* whether emotional distress is concrete harm; concurring opinion convincingly rebuts the majority on this point); Bass v. Blitt & Gaines, P.C., 2016 WL 6877729 (N.D. Ill. Nov. 22, 2016) (finding allegation of emotional distress insufficient to satisfy concreteness requirement on ground that it could not be fairly traced to the deceptive communication, as opposed to collection suit to which communication related).

1566 *See* §§ 2.6.2.2.2, 2.6.3, 2.6.4, *supra*.

1567 *See* § 11.8.1 (standards for actual damages), § 11.15.2.2.3 (role of analogies to common law in determining Art. III standing), *supra*.

1568 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2211 n.7 ___ L. Ed. 2d ___ (2021). *See also* Gadelhak v. AT&T Services, Inc., 950 F.3d 458, 463 n.2 (7th Cir. 2020) (Barrett, J.) (discussed in § 11.15.7, *infra*).

1569 Carey v. Piphus, 435 U.S. 247, 263, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) (holding that mental suffering and emotional anguish are compensable in § 1983 suit). *See generally* § 11.8.2, *supra*.

1570 FDCPA § 1692(a), (b) (referring to marital instability and invasion of privacy caused by abusive debt collection practices, and the inadequacy of existing laws to redress "these injuries"); S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 2, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A, *infra* (referring to "suffering and anguish" caused by unscrupulous debt collectors). *See* Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017) ("Congress recognized that abusive debt collection practices contribute to harms that can flow from mental distress, like 'marital instability' and 'the loss of jobs.'"); Pastian v. Internal Credit Sys., Inc., 2020 WL 6445836, at *12 (S.D. Ohio Nov. 3, 2020) (mag.; detailing Congress's concerns).

1571 Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1022 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021) (post-*Ramirez* decision); Westerman v. Contar Fin. Services, L.L.C., 2021 WL 4554334 (D. Md. Oct. 5, 2021) (post-*Ramirez* decision); Thome v. Sayer Law Group, 2021 WL 4690829, at *13–15 (N.D. Iowa Oct. 7, 2021) (post-*Ramirez* decision; confusing notice's exacerbation of plaintiff's emotional distress regarding potential foreclosure on home is concrete injury); Crandall v. Miller & Stephens, P.A., 2021 WL 4595535, at *3 (D. Minn. Oct. 6, 2021) (post-*Ramirez* decision; emotional distress is "obviously" a concrete injury); Haynes v. TransUnion, L.L.C., 2021 WL 3185581 (E.D.N.Y. July 28, 2021) (post-*Ramirez* decision; emotional distress due to collection attempts is concrete injury); Robbins v. Resident Verify, LLC, 2021 WL 3292652 (D. Utah Aug. 2, 2021) (post-*Ramirez* decision; embarrassment due to tenant screening company's exaggeration of plaintiff's criminal record is concrete harm); Benjamin v. Rosenberg & Assoc., 2021 WL 3784320, at *5–6 (D.D.C. Aug. 26, 2021) (post-*Ramirez* decision; finding Article III standing for claims involving unfounded threat to conduct foreclosure sale, misrepresentations to obtain summary

but the Seventh Circuit continues to hold that it is not.[1572]

In *Buchholz v. Meyer Njus Tanick, PA*,[1573] the Sixth Circuit questioned whether anxiety could ever be a concrete injury, but in doing so it focused on the severity of the emotional distress required for certain common law tort claims, rather than whether anxiety is closely related to a traditionally actionable harm. This view is inconsistent with *Ramirez*, which holds that the fact that a federal claim presents a scaled-down version of an element of a common law claim does not mean that a harm is not concrete.[1574] *Buchholz*'s analysis of this question is *dicta* and is convincingly rebutted by a special concurrence in the case.[1575]

Section 2.6.2.2, *supra*, includes a list of many other types of harm that FDCPA violations can cause.

11.15.4 Article III Standing for Deception or Nondisclosure Violations

11.15.4.1 Generally

Congress identified deceptive debt collection practices as one of its primary concerns when it enacted the FDCPA.[1576] Many provisions of the FDCPA protect debtors from false, deceptive, or misleading practices. These are found primarily in FDCPA § 1692e, but violations of the disclosure requirements of FDCPA § 1692g can also be framed as false, deceptive, or misleading.[1577] Complaints about deception by debt collectors continue to be common.[1578]

Where a deceptive statement or failure to make a required disclosure does not cause tangible harm, one approach to establish standing, recognized by both *Spokeo* and *Ramirez*, is to show that the intangible harm "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[1579] A number of courts recognize that the FDCPA's prohibition of false, deceptive, and misleading statements protects against a harm analogous to that which has been traditionally recognized as actionable at common law through torts such as fraud and deceit.[1580] To the extent that false statements reach third

judgment, misrepresentation of legal status of debt, attempts to collect illegal or unreasonable amounts, and false representation that certain parties had rights in debt, on ground that these acts have close relationship to wrongful litigation torts and cause emotional distress). Cf. Santiago v. Hunter Warfield, Inc., 2021 WL 4894092 (M.D. Fla. Oct. 20, 2021) (denying standing where plaintiff's allegations of emotional distress were conclusory).

1572 Wadsworth v. Kross, Lieberman & Stone, Inc., ___ F.4th ___, 2021 WL 3877930 (7th Cir. Aug. 31, 2021) (post-*Ramirez* decision). *Accord* Marcano v. Nationwide Credit & Collection, Inc., 2021 WL 4523218, at *6 (N.D. Ill. Oct. 4, 2021) (post-*Ramirez* decision).

1573 946 F.3d 855 (6th Cir. 2020).

1574 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2209 ___ L. Ed. 2d ___ (2021) (harm has close relationship to that made actionable by common law tort of defamation, even though defendant's statement was only misleading, rather than literally false as required for that tort).

1575 Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855, 872–873 (6th Cir. 2020) (Murphy, J., concurring in part and in the judgment). *Accord* Pastian v. Internal Credit Sys., Inc., 2020 WL 6445836, at *11–12 (S.D. Ohio Nov. 3, 2020) (mag.; agreeing with *Buchholz* concurrence that emotional distress is concrete injury).

1576 15 U.S.C. § 1692a (referring to "abundant evidence of the use of . . . deceptive . . . debt collection practices").

1577 *See generally* § 11.15.5.2, *infra* (applying *Spokeo* to § 1692g claims).

1578 Consumer Fin. Protection Bur., Fair Debt Collection Practices Act, CFPB Annual Report 20 (Mar. 2016), *available at* www.consumerfinance.gov (noting that common complaints include false threats of arrest or jail, threats to sue on a debt that is too old, attempts to collect the wrong amount, impersonation of an attorney or a law enforcement or government official, and claims that the consumer committed a crime by not paying the debt).

1579 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016).

1580 Thome v. Sayer Law Group, 2021 WL 4690829 (N.D. Iowa Oct. 7, 2021) (post-*Ramirez* decision; harms made actionable by misrepresentation torts stem from inequity of knowledge; finding standing where plaintiff would have disputed debt but for § 1692g notice's statement that she had only 14 days to pay the balance); Bassett v. Credit Bur. Services, Inc., 2021 WL 3579073, at *3 (D. Neb. Aug. 13, 2021) (post-*Ramirez* decision; finding standing); Pastian v. Internal Credit Sys., Inc., 2020 WL 6445836, at *10 (S.D. Ohio Nov. 3, 2020) (mag.); Gibbons v. Weltman, Weinberg & Reis Co., 2020 WL 5039316 (E.D. Pa. Aug. 26, 2020) (false implication that collection letter was from attorney causes concrete harm because it is closely related to common law misrepresentation claims and Congress has elevated it to an actionable harm; plaintiff's fear of suit is also sufficient to confer standing); Cunningham v. Credit Bur. of Lancaster Cty., Inc., 2018 WL 6062351 (E.D. Pa. Nov. 20, 2018); Haddad v. Midland Funding, L.L.C., 255 F. Supp. 3d 735, 739 (N.D. Ill. 2017) (false statement that flexible payment arrangements would no longer be available if account was forwarded to attorney is concrete harm because of Congress's judgment that there is intrinsic value in truthful information and because of its historical relationship to liability for fraudulent misrepresentation); Aguirre v. Absolute Resolutions Corp., 2017 WL 4280957, at *3 (N.D. Ill. Sept. 27, 2017) (language in collection letter that falsely threatened to add charges to the debt "is well within the heartland of common law fraud"); Scibetta v. TD Banknorth, 2017 WL 3448544, at *3 (D.N.J. Aug. 11, 2017); Griffin v. Andrea Visgilio-McGrath, L.L.C., 2017 WL 3037387, at *6 (D.N.J. July 18, 2017); Bock v. Pressler & Pressler, L.L.P., 254 F. Supp. 3d 724 (D.N.J. 2017); Haddad v. Midland Funding, L.L.C., 255 F. Supp. 3d 735 (N.D. Ill. 2017); Thomas v. John A. Youderian Jr., L.L.C., 232 F. Supp. 3d 656, 669 (D.N.J. Feb. 3, 2017) ("The right not to be given false information about the true amount owed is rooted in an interest traditionally recognized at law."). *See also* Hovermale v. Immediate Credit Recovery, Inc., 2018 WL 6322614, at *4 (D.N.J. Dec. 4, 2018) (the informational injury that results from receiving false information is closely related to that made actionable by common law fraud). *But see* Adams v. Skagit Bonded Collectors, L.L.C., ___ Fed. Appx. ___, 2020 WL 7055395 (9th Cir. Dec. 2, 2020) (finding no standing to assert claim that collection letter was deceptive, because reliance is element of common law fraud claim); Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990 (11th Cir. 2020) (rejecting analogy between FDCPA deception claim and common law claim for fraudulent or negligent misrepresentation, because those torts require showing of reliance and damages); Kola v. Forster & Garbus L.L.P., 2021 WL 4135153, at *7–8 (S.D.N.Y. Sept. 10, 2021) (post-*Ramirez* decision; rejecting analogy to fraud or negligent misrepresentation because of failure to allege reliance); Brown v. R & B Corp., 267 F. Supp. 3d 692 (E.D. Va. 2017) (rejecting common law tort analogy on ground that common law does not permit recovery for false statements in context of debt collection, but finding standing on ground that

parties, the harm caused is closely analogous to that long recognized as actionable by the torts of libel and slander.[1581] False representations about the amount of a debt, particularly when made in the context of litigation or threatened litigation, create the same harms as are traditionally actionable through torts such as malicious prosecution and abuse of process.[1582]

In *Spokeo,* the Supreme Court recognized a second approach to show that an injury is concrete: that Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."[1583] Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[1584] Congress could not have made its intent clearer to define deception in debt collection as an injury that gives rise to a cause of action. Its legislative findings,[1585] the legislative history,[1586] the broad prohibitions of deception in FDCPA § 1692e and 1692e(1), the fifteen specific deceptive acts prohibited by subsections 1692e(2) through 1692e(16), and the explicit private remedies created by section 1692k all show that the FDCPA's prohibition against debt collectors' use of false, deceptive, or misleading representations or means "is a core object of the FDCPA."[1587]

The Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez* throws this second approach into some confusion, however.[1588] There, the Supreme Court held that a federal court did not have Article III jurisdiction over various FCRA claims, even though Congress had unmistakably provided that they were privately actionable.[1589] The Court cited with approval decisions from the Sixth, Seventh, and Eleventh Circuits that held that Congress's judgment was not sufficient to give federal courts Article III jurisdiction over FDCPA claims involving deception or non-disclosure.[1590] The *Ramirez* decision was 5-4, however, and it dealt with FCRA rights that the Supreme Court has characterized as procedural. It is conceivable that the Court might give more weight to Congress's judgment in a case involving substantive protections.[1591] At the very least, it is clear that a showing that Congress intended to make a particular harm privately actionable will strongly buttress a claim of standing.[1592]

Prior to *Ramirez,* a number of courts had also concluded that the violation of the debtor's right under the FDCPA to receive truthful information from a debt collector was a concrete "informational injury."[1593] *Ramirez* declined to accept this theory, albeit in the context of a violation that the Court characterized as involving nothing more than formatting. While the Court used broad language that lower courts may construe as applicable to substantively deceptive statements as well,[1594] that language is *dicta,* and the Court also cited favorably a Seventh Circuit decision that draws a distinction between disclosures that involve substantive information, rather than information about statutory rights.[1595] Accordingly, courts may be willing to look more favorably on claims regarding false or deceptive statements that involve substantive matters, and may be willing to give more weight to Congress's judgment that these violations are actionable.

Ramirez also declined to apply the principle, articulated in *Spokeo,* that Article III standing can be based on the fact that the defendant's acts created a risk of real harm. A number of courts have held that, after *Ramirez,* a risk of harm can create standing only for a claim for prospective relief such as an injunction.[1596]

In summary, after *Ramirez,* it is still clear that federal courts have Article III jurisdiction over FDCPA claims if the harm the plaintiff suffered has a close relationship to a harm

reporting debt without reporting it as disputed violates right created by Congress and creates risk of harm).

1581 *See, e.g.,* Pinson v. JPMorgan Chase Bank, 942 F.3d 1200 (11th Cir. 2019) (harm caused by reporting false information to credit bureau is closely related to that caused by defamation; consumer has standing). *See generally* §§ 11.15.5.2, 11.15.5.4, 11.15.8, 15.5, *infra.*

1582 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017); Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017). *But see* Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855, 870 (6th Cir. 2020) (finding consumer's receipt of debt collection from attorney not to be analogous to malicious prosecution or abuse of process, because it did not explicitly threaten civil litigation or criminal prosecution). *See generally* § 11.15.5.4, *infra.*

1583 *Id.* at 1549 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

1584 *Id.* at 1549 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (J. Kennedy, concurring)).

1585 FDCPA § 1692(a) ("There is abundant evidence of the use of . . . deceptive . . . debt collection practices by many debt collectors."). See also S. Rep. No. 95-382, at 2 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695, 1696 (identifying "misrepresentation of a consumer's legal rights" as a reason for enacting the statute).

1586 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 2, *reprinted in* 1977 U.S.C.C.A.N. 1695, and reproduced in Appx. A.3, *infra* ("Collection abuse takes many forms, including . . . misrepresentation of a consumer's legal rights").

1587 Macy v. GC Services L.P., 897 F.3d 747, 759 (6th Cir. 2018).

1588 *See* § 11.15.2.2.4, *supra.*

1589 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021). *See* § 11.15.2.2.4, *supra.*

1590 Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990 (11th Cir. 2020); Casillas v. Madison Ave. Assoc., Inc., 926 F.3d 329, 337–338 (7th Cir. 2019) (Barrett, J.); Hagy v. Demers & Adams, 882 F.3d 616 (6th Cir. 2018).

1591 But see Kola v. Forster & Garbus L.L.P., 2021 WL 4135153, at *7–8 (S.D.N.Y. Sept. 10, 2021) (post-*Ramirez* decision; whether right is substantive or procedural, Congress's judgment is insufficient to establish standing).

1592 *See* § 11.15.2.2.4, *supra.*

1593 *See, e.g.,* Pastian v. Internal Credit Sys., Inc., 2020 WL 6445836 (S.D. Ohio Nov. 3, 2020) (mag.; caller's failure to identify that he is a debt collector and that call concerns debt is concrete injury without need to show any additional harm, because it places debtor at risk of disclosing information that she would prefer not to disclose).

1594 *See, e.g.,* Neal v. Adams, 2021 WL 4466392, at *5 (E.D. Ark. Sept. 29, 2021) (post-*Ramirez* decision; plaintiff must allege downstream consequences even for complete failure to provide information required by § 1692g).

1595 Casillas v. Madison Ave. Assoc., Inc., 926 F.3d 329, 334–335 (7th Cir. 2019) (Barrett, J.). *See, e.g.,* Perez v. McCreary, Veselka, Bragg & Allen, P.C., 2021 WL 3639801 (W.D. Tex. Aug. 17, 2021) (post-*Ramirez* decision; finding Art. III standing for claim that debtor received false, misleading, and deceptive debt collection communications; also finding anxiety and worry to be concrete injuries).

1596 *See* § 11.15.2.2.6, *supra.*

that has traditionally provided the basis for a claim in English and United States courts. In the absence of a common law analogy, if the violation relates to format, the plaintiff will have to show additional harm, and practitioners must also be prepared for courts to require such a showing for violations that go beyond format. Practitioners should interview potential plaintiffs thoroughly to identify any harm they may have suffered in addition to the violation itself. Types of tangible and intangible harms that consumers are likely to suffer as a result of deceptive debt collection practices or non-disclosure are listed in § 11.15.3.4, *supra*, and cited in the following sections in connection with the particular violation.

11.15.4.2 Article III Standing for Claims That Collector Misstated Amount Owed or Demanded an Unauthorized Fee

A common consumer claim is that a debt collector has overstated the amount of the debt in a letter or a pleading in violation of FDCPA § 1692e(2)(A), often in combination with parallel claims under sections 1692e(5), 1692e(10), and 1692f(1). Prior to the Supreme Court's 2021 opinion in *TransUnion L.L.C. v. Ramirez*,[1597] many courts held that misstatement of the amount of the debt was concrete harm in and of itself.[1598] However, other courts, including the Seventh Circuit, disagreed, and held that the consumer must show some harm in addition to the violation itself.[1599] Similarly, prior to *Ramirez* many courts

1597 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021).

1598 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 693 (8th Cir. 2017) (false representation in pleadings of amount of debt is concrete injury; creates same risk of mental distress as is traditionally recognized in torts such as abuse of process); Pastian v. Internal Credit Sys., Inc., 2020 WL 6445836, at *10 (S.D. Ohio Nov. 3, 2020) (mag.; consumer has standing to sue regarding overstatement of amount of debt because it claim has close relationship to common law fraud and correlates with Congress's judgment); Zuniga v. TrueAccord, 2020 WL 2840318 (D.N.M. June 1, 2020) (plaintiff has standing to sue regarding letter that offered payment plan that would overpay debt, because claim involves substantive rights created by Congress); Richardson v. Diversified Consultants, Inc., 2019 WL 3216030 (N.D. Ill. July 17, 2019) (receipt of letter seeking allegedly improper fees is concrete harm, because it is injury Congress sought to protect against; plaintiff also testified that he found letter misleading, but only for reasons other than statement of amount owed); Garland v. Wells Fargo Home Mortg. Inc., 303 F. Supp. 3d 554 (E.D. Mich. 2018) (any violation of FDCPA is concrete injury; in enacting FDCPA, Congress created new right and new injury); Stinson v. Nat'l Credit Systems Inc., 2018 WL 3954764, at *6 n.6 (N.D. Ga. June 26, 2018) (finding standing where plaintiff was confused by the collection letter and frustrated and embarrassed about the debt, and the situation caused a strain on her marriage), *adopted*, 2018 WL 4471930 (N.D. Ga. July 27, 2018); Keys v. Collection Prof'ls, Inc., 2018 WL 1469006 (N.D. Ill. Mar. 26, 2018) (receiving debt collection letter that wrongly assesses and seeks interest is concrete injury; Congress's judgment is sufficient); Drew v. Valley Credit Serv., Inc., 2018 WL 1321587 (W.D. Va. Mar. 14, 2018) (misleading statements regarding amount of debt is concrete harm because this is direct violation of specific statutory interest that Congress has created); Castellanos v. Portfolio Recovery Assoc., 297 F. Supp. 3d 1301, 1305–1307 (S.D. Fla. 2017) (consumer has standing to bring FDCPA claim for sending collection letters seeking payment of debt that had been fully settled); Chernyakhovskaya v. Resurgent Capital Services L.P., 2017 WL 3593115 (D.N.J. Aug. 18, 2017) (risk of harm from receipt of misinformation is concrete injury); Ozmun v. Portfolio Recovery Assoc., 2017 WL 3140660, at *6 (W.D. Tex. July 24, 2017) (misstatement of balance due or character or status of debt "could have disastrous financial, legal, and reputational consequences for a consumer"); Martin v. Trott Law, P.C., 265 F. Supp. 3d 731, 746–750 (E.D. Mich. 2017) (finding standing where plaintiffs alleged they were deceived, but alleged no other harm); Gonzalez v. Credit Protection Ass'n, L.P., 2017 WL 2798404 (N.D. Ill. June 28, 2017) (collection letters sought sales tax that was not owed; informational injury provides standing); Stockman v. Credit Protection Ass'n, 2017 WL 2798403 (N.D. Ill. June 28, 2017) (collection letters sought sales tax that was not owed; informational injury provides standing); Genova v. IC Sys., Inc., 2017 WL 2289289 (D.N.J. May 25, 2017) (collection letter seeking payment of contingent fees that were not yet incurred, in violation of §§ 1692e and 1692f); Taylor v. Fin. Recovery Services, Inc., 252 F. Supp. 3d 344 (S.D.N.Y. 2017) (plaintiff has standing to pursue claim that letters were misleading as to whether debts were accruing interest and fees), *aff'd*, 886 F.3d 212 (2d Cir. 2018); Haddad v. Midland Funding, L.L.C., 255 F. Supp. 3d 735 (N.D. Ill. 2017) (falsely stating that additional charges may continue to be added to balance); Masson v. Pioneer Credit Recovery, Inc., 2017 WL 819099 (E.D. La. Mar. 2, 2017) (misrepresentation of liability for collection costs); Kaymark v. Udren Law Offices, P.C., 2016 WL 7187840 (W.D. Pa. Dec. 12, 2016) (allegation that complaint sought amounts to which creditor was not entitled, in violation of §§ 1692e(2)(A), 1692e(5), 1692e(10), and 1692f(1), shows concrete injury; FDCPA gives consumer the right to truthful information); Munoz v. Cal. Business Bur., Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016); Hill v. Accounts Receivable Services, L.L.C., 2016 WL 6462119 (D. Minn. Oct. 31, 2016) (consumer has standing to assert claim under §§ 1692e(2)(A), 1692e(5), 1692e(10), and 1692f against collector that filed suit seeking interest to which it is not entitled, even though consumer defeated collector's claim at trial, because consumer has right to truthful information; consumer could probably also have shown expenditure of time and money to defend the false claim), *aff'd on other grounds*, 888 F.3d 343 (8th Cir. 2018); Jorgensen v. Accounts Receivable Services, L.L.C., 2016 WL 11003432 (D. Minn. Aug. 31, 2016) (debtor has standing where collector seeks to collect more than is owed, even if debtor does not overpay); Bernal v. NRA Group, L.L.C., 318 F.R.D. 64, 72 (N.D. Ill. Aug. 30, 2016) (receiving collection letter that wrongfully assessed percentage-based collection fee is concrete harm, even without allegation that debtor paid it); Nyberg v. Portfolio Recovery Assoc., 2016 WL 3176585 (D. Or. June 2, 2016) (incorrect statement of amount of debt).

The Illinois and Indiana district court decisions cited in this note were issued before the Seventh Circuit's decision in *Nettles v. Midland Funding L.L.C.*, 983 F.3d 896 (7th Cir. 2020), which held that overstatement of the amount of a debt was not a concrete injury in itself, so do not take that decision into account. The Florida and Georgia district court decisions predate *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990 (11th Cir. 2020), which found no standing for a misleading collection letter where the consumer did not act to his detriment in reliance on it, and so do not take it into account.

1599 Nettles v. Midland Funding L.L.C., 983 F.3d 896 (7th Cir. 2020) (finding no standing where consumer stated on appeal that only injury was receipt of collection letter that overstated amount of debt and that letter did not affect her at all); Maxwell v. Law Office of Jennifer McCoy, P.C., 2021 WL 3741999 (S.D. Ind. Aug. 23, 2021) (post-*Ramirez* decision; following 7th Cir. precedent; threat to charge late fees did not cause concrete harm where plaintiff suffered anxiety but did not alter her course of action); Montgomery v. Everest Receivable Services, Inc., 2021 WL 4806388 (N.D. Ill. Oct. 14, 2021) (post-*Ramirez* decision: collection letters that suggested that debtor owed double the amount of the debt and that multiple accounts were owing did not cause concrete injury where debtor did not allege any risk of overpaying); Jones-Bell v. Dynamic Recovery Solutions, L.L.C., 2019 WL 4746766 (E.D. Mich.

held that a demand for an unauthorized fee caused concrete harm to the debtor in and of itself,[1600] but others held that it was necessary for the debtor to show some harm in addition to the demand itself.[1601]

Ramirez appears to reject two of the rationales that some of the decisions finding standing cite. First, the majority opinion in *Ramirez* states that a risk of harm—a rationale on which some of the decisions finding standing relied—is sufficient to create Article III standing only for prospective relief such as an injunction.[1602] Second, *Ramirez* rejects the argument that provision of information to class members in the wrong format was a concrete injury in and of itself and in *dicta* makes the sweeping statement that "an asserted informational injury that causes no adverse effects cannot satisfy Article III."[1603]

Ramirez continues to recognize, as *Spokeo* did, that an intangible harm is a concrete injury if it has a close relationship to a harm recognized as a traditional basis for suit in English and American courts.[1604] Misstatement of the amount owed will thus amount to a concrete injury in and of itself if there is a close common law analogy for the FDCPA claim. The Eighth Circuit has held that being subjected to attempts to collect debts not owed has a close relationship to the harm made actionable by the common law torts of malicious prosecution, wrongful use of civil proceedings, and abuse of process.[1605]

Sept. 30, 2019) (two-cent discrepancy between amount collector proposed to settle debt and amount that proposed installment payments would have totaled does not create concrete harm); Smith v. U.S. Bank, 2018 WL 4489466 (N.D. Ohio Sept. 19, 2018) (finding no standing where plaintiffs alleged that collector's debt validation letter included unexplained charges and misrepresented the identity of owner of their note and mortgage, but did not allege that they lost or spent any money or suffered any cognizable non-economic harm; failing to evaluate risk of harm); Martin v. Consumer Adjustment Co., 2017 WL 6570210 (W.D. Mo. Dec. 22, 2017) (consumer lacks standing to bring FDCPA claim regarding letter that, through clerical error, stated two different amounts owed, where she had not read letter); Allgire v. HOVG, L.L.C., 2017 WL 1021394 (S.D. Ind. Mar. 16, 2017) (debtor has no risk of harm from misrepresentation that is not material—here $1.90 misstatement of amount required to settle debt—so does not have standing); Borg v. Phelan, Hallinan, Diamond & Jones, P.L.L.C., 2017 WL 2226649 (M.D. Fla. May 22, 2017) (where foreclosure firm had not yet requested allegedly illegal fee in any demand or complaint, but was merely keeping track of it with intent to ask court to include it in award of costs if foreclosure action was successful, injury is too speculative and consumer lacks standing). *See also* Fuchs v. Selene Fin., L.P., 2018 WL 2268132 (S.D. Ohio Mar. 29, 2018) (no standing where plaintiffs have now admitted that amount sought in Notice of Default was correct, and do not claim it caused any economic injury or emotional distress). *Cf.* Van Hoven v. Buckles & Buckles, P.L.C., ___ F. Supp. 3d ___, 2021 WL 2947593 (W.D. Mich. July 1, 2021) (post-*Ramirez* decision; questioning standing where collector carried charge on its books that it was not allowed to impose on consumers, but had procedure in place to back these charges out before instituting garnishments).

1600 Bass v. I.C. Sys., Inc., 316 F. Supp. 3d 1047 (N.D. Ill. 2018) (demanding unauthorized collection fee creates concrete injury even if debtor does not pay it, because it injures debtor's interest in receiving accurate information); Diaz v. FCI Lender Services, Inc., 2018 WL 4581013 (S.D.N.Y. Sept. 28, 2018) (following unreported 2d Cir. decision; finding standing where collection letter wrongfully claimed late charges); Williams v. Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 1582515, at *6 (D. Conn. Mar. 31, 2018) (violation of FDCPA's protections against seeking unauthorized fees is concrete injury because it is core object of FDCPA); Ferrell v. HIS Fin. Services, L.L.C., 2017 WL 8186795 (N.D. Ga. Dec. 22, 2017) (demand for unauthorized convenience fee for payment by credit card puts consumer at material risk of paying it); Aguirre v. Absolute Resolutions Corp., 2017 WL 4280957 (N.D. Ill. Sept. 27, 2017) (false statement that other charges would be added); McLain v. Head Mercantile Co., 2017 WL 3710073 (M.D. La. Aug. 28, 2017) (finding standing where violation was misrepresentation that debtor would have to pay unauthorized convenience fee if she paid with check by phone); Fuentes v. AR Resources, Inc., 2017 WL 1197814 (D.N.J. Mar. 31, 2017) (misrepresentation that consumer would have to pay unauthorized convenience fee for credit card payments creates risk that she will pay it, so plaintiff has standing); Thomas v. John A. Youderian Jr., L.L.C., 232 F. Supp. 3d 656, 669 (D.N.J. Feb. 3, 2017) (demanding fee for making payment on debt by credit card creates concrete injury, although barely; misrepresentation might deter consumers from using this convenient payment method, even though plaintiff did not suffer this effect personally); Bell v. Adler Wallach & Assoc., Inc., 2016 WL 11583377 (W.D. Tex. Sept. 15, 2016) (debtor who, as a result of collection letter, paid an allegedly inflated debt because he was fearful of suit has standing); Simmet v. Collection Consultants, 2016 WL 11002359 (C.D. Cal. July 7, 2016) ("[e]ven if Plaintiff never actually paid the alleged convenience fee, mere 'attempt[s] to collect a debt in violation of the FDCPA' are sufficient to constitute concrete and particularized injuries"). *See also* Jaber v. GC Services L.P., 2019 WL 2579459 (E.D. Mich. June 24, 2019) (plaintiff has standing to assert FDCPA claim regarding letter that threatened to impose charges even though, as an identity theft victim, she knew that she did not owe the debt). *Cf.* Martinez v. Integrated Capital Recovery, L.L.C., 2021 WL 124523 (E.D. Cal. Jan. 13, 2021) (holding that Congress elevated FDCPA violations to status of legally cognizable harm, with no need to show additional harm, but concluding that this means that plaintiff must plead sound FDCPA claim on merits, which this plaintiff did not do).

1601 Fulp v. Sykes, Bourdon, Ahern, & Levy, P.C., 2020 WL 4926176 (E.D. Va. Aug. 21, 2020) (collection letter that stated that $3 fee would be required for payments by phone did not cause concrete harm where consumer had other cost-free payment options and did not intend to pay by phone; also finding no analogous common law tort); Perea v. Codilis & Assoc., 2019 WL 4750283 (N.D. Ill. Sept. 30, 2019) (false statement that late charges could be added to debt is not concrete injury unless plaintiff was misled or would have acted differently; risk to unsophisticated consumer is insufficient); Viera v. Bank of N.Y. Mellon, 2018 WL 4964545 (D.R.I. Oct. 12, 2018) (consumer who did not pay unauthorized fee that servicer demanded and who did not allege that fee continues to appear on his account has not alleged concrete injury and cannot bring claim under state debt collection practices statute in federal court; no discussion of intangible injuries or risk of harm); Alexander v. Account Discovery Systems, L.L.C., 2018 WL 1225887 (N.D. Ga. Jan. 4, 2018) (consumer does not have standing to bring suit regarding creditor's demand for unauthorized convenience fee for online credit or debit card payments where he did not pay fee); Blue v. Diversified Adjustment Serv., 2017 WL 3600723 (C.D. Cal. Aug. 11, 2017) (debtor who did not pay fee lacks standing to sue regarding collector's demand for unauthorized convenience fee if debtor chooses to pay online).

1602 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2210, ___ L. Ed. 2d ___ (2021). *See* § 11.15.2.2.6, *supra*.

1603 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2214, ___ L. Ed. 2d ___ (2021). *See* § 11.15.2.2.6, *supra*.

1604 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). *See* § 11.15.3.4, *supra*.

1605 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017). *See also* Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1025 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th

Overstatement of the amount owed might also be analogous to the harm recognized by the common law torts of fraud and negligent misrepresentation.[1606] To the extent the false statement about the debt has been shared with others, the harm would be similar to common law defamation.[1607] While *Ramirez* holds that the statutory claim must have the same "fundamental requirement[s]" as the common law claim, the Court did not require that the elements be the same.[1608] Indeed, *Ramirez* holds that there need not be "an exact duplicate" in common law for the federal claim.[1609]

Spokeo also held that Congress has the power to elevate to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.[1610] *Ramirez* throws the role of Congress into confusion,[1611] but it is still important to point out how clearly Congress expressed its intent to make deception such as misstatement of the amount owed actionable in federal court. At the very least, Congress's judgment buttresses other theories of standing.

Since *Ramirez*, one court analogized to the common law tort of conversion to find Article III standing for a claim against a collector that dunned a consumer for amounts not owed.[1612] Another court held that a consumer had standing where she alleged that defendant's filing of a collection suit in violation of the bankruptcy stay caused her emotional distress.[1613] Decisions from courts in the Seventh Circuit are likely to continue to hold that anxiety, confusion, and emotional distress are insufficiently concrete to justify standing for claims regarding misstatement of the amount owed or demands for unauthorized fees.[1614]

Even though there may be arguments for distinguishing *Ramirez*, advocates should not rely on doing so, but should be prepared to produce evidence of downstream consequences whenever possible. A number of pre- and post-*Ramirez* decisions, cited in § 11.15.4.2, *supra*, provide guidance about the types of adverse consequences that will support standing for a claim that the collector overstated the amount of the debt or demanded an unauthorized fee. One possible adverse consequence of this deception is that the debtor may spend time, effort, or money to investigate the amount owed or defend against the inflated claim. For example, in *Demarais v. Gurstel Chargo, P.A.*,[1615] the Eighth Circuit held that a consumer had standing to assert FDCPA claims against a collection firm that filed a collection action seeking interest to which it was not entitled. The consumer's allegations that he had to retain an attorney and serve discovery requests and that he spent time to defend against the meritless claim amounted to concrete injuries.[1616]

Misstatement of the amount of the debt also causes consumers tangible harm if they pay more than actually owed.[1617] The consumer may also have a diminished credit score due to the overstated amount of a debt that is reported to consumer reporting agencies, thereby impeding the consumer's access to lower-cost credit, jobs, or housing.[1618] Demanding unexpected fees as a condition of paying the debt may mean that the money that a debtor has saved up is insufficient.[1619] Some courts hold that confusion caused by misleading debt collection notices is a concrete harm.[1620] Emotional distress[1621] may be sufficient to

1103 (11th Cir. 2021) (post-*Ramirez* decision; citing this holding of *Demarais* with approval). *See generally* §§ 11.15.5.4, 15.6, *infra*.

1606 *See, e.g.*, § 11.15.5.0, *supra*.

1607 *See* §§ 11.15.2, 11.15.5.2, *supra*, § 11.15.8, *infra*.

1608 *See* § 11.15.2.2.3, *supra*.

1609 TransUnion L.L.C. v. Ramirez, __U.S.___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021). *See generally* § 11.15.2.2.3, *supra*.

1610 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

1611 *See* § 11.15.2.2.4, *supra*.

1612 Bassett v. Credit Bur. Services, Inc., 2021 WL 3579073 (D. Neb. Aug. 13, 2021).

1613 Crandall v. Miller & Stephens, P.A., 2021 WL 4595535, at *3 (D. Minn. Oct. 6, 2021).

1614 *See, e.g.*, Maxwell v. Law Office of Jennifer McCoy, P.C., 2021 WL 3741999 (S.D. Ind. Aug. 23, 2021) (post-*Ramirez* decision; following 7th Cir. precedent; threat to charge late fees did not cause concrete harm where plaintiff suffered anxiety but did not alter her course of action). *See also* Shields v. Professional Bur. of Collections of Md., Inc., 2021 WL 4806383 (D. Kan. Oct. 14, 2021) (post-*Ramirez* decision; debtor's general confusion about the amount due and whether interest was accruing is not concrete harm). *See generally* § 11.15.3.4, *supra*.

1615 869 F.3d 685 (8th Cir. 2017). *See also* Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435, at *4 (W.D. Wash. Mar. 29, 2017) (consumer has standing where, upon receiving collection letter demanding unauthorized attorney fees and filing fees, he made telephone call to ask counsel to dispute the debt); Hill v. Accounts Receivable Services, L.L.C., 2016 WL 6462119 (D. Minn. Oct. 31, 2016) (consumer has standing to assert claim under §§ 1692e(2)(A), 1692e(5), 1692e(10), and 1692f against collector that filed suit seeking interest to which it is not entitled, even though consumer defeated collector's claim at trial, because consumer has right to truthful information; consumer could probably also have shown expenditure of time and money to defend the false claim), *aff'd on other grounds*, 888 F.3d 343 (8th Cir. 2018). *But cf.* Spuhler v. State Collection Serv., Inc., 983 F.3d 282 (7th Cir. 2020) (receipt of collection letter that fails to state that debt would accrue interest is not concrete injury, nor are debtor's calls and letters to inquire about accuracy of amount demanded, because she was not seeking clarification about interest).

1616 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017).

1617 *See, e.g.*, Bassett v. Credit Bur. Services, Inc., 2021 WL 3579073 (D. Neb. Aug. 13, 2021) (post-*Ramirez* decision); Shallenburg v. PNC Bank, 2020 WL 555447, at *4 (M.D. Fla. Feb. 4, 2020) (payment of contested mortgage debt in order to avoid loss of opportunity to sell home is concrete injury); Bell v. Adler Wallach & Assoc., Inc., 2016 WL 11583377 (W.D. Tex. Sept. 15, 2016) (debtor who, as result of collection letter, paid allegedly inflated debt because he was fearful of suit has standing). *See generally* § 11.15.3.4, *supra*.

1618 *See generally* § 11.15.5.2, *infra* (applying *Spokeo* to misstatements to credit reporting agencies).

1619 *See, e.g.*, Grandberry v. Medical-Commercial Audit, Inc., 2019 WL 1978590 (E.D. Mo. May 3, 2019) (imposition of unauthorized charge for online payment, which prevented consumer from paying debt because she did not have the additional funds, caused concrete injury).

1620 *See* § 11.15.3.4, *supra*.

1621 *See, e.g.*, Ben-Davies v. Blibaum & Assoc., 695 Fed. Appx. 674 (4th Cir. 2017) (seeking interest on judgment debt at unauthorized rate, causing consumer to suffer emotional distress, is concrete injury); Moore v. Blibaum & Assoc., P.A., 693 Fed. Appx. 205 (4th Cir. 2017) (finding standing where plaintiff alleged that she suffered emotional distress, anger, and frustration as consequence of collector's demand for inflated amount); Crandall v. Miller & Stephens, P.A., 2021 WL 4595535, at *3 (D. Minn. Oct. 6, 2021) (post-*Ramirez* decision; finding

support Article III standing, although advocates should select cases where the plaintiff's distress was significant and the debt collection communication was of a nature that many people would find distressing. Standing problems are particularly likely if the claim is based on incorrect inferences that debtors might draw from collection letters, rather than on direct misstatements.

If downstream consequences cannot be alleged and proven, state court may be a better forum for the case.[1622] Even in state courts that have broad standing doctrines, though, *Ramirez* heightens the importance of case selection. Cases that appear to be making mountains out of molehills could cause state courts to rethink and tighten their standing doctrines.

11.15.4.3 Article III Standing for Claims Regarding Collector's Misstatements to Credit Reporting Agencies

Section 1692e(8) of the FDCPA prohibits collectors from reporting or threatening to report false credit information to any person.[1623] This section includes a requirement that, when a collector communicates with a credit reporting agency about a debt that the consumer has disputed, it must indicate that the debt is disputed.[1624]

Misstatements to credit reporting agencies or other third parties cause harm that is closely analogous to the harm traditionally regarded as providing the basis for libel and slander claims in English and American courts.[1625] In *TransUnion L.L.C. v. Ramirez*,[1626] the Supreme Court held that reporting derogatory information about a consumer to a third party is concrete harm in and of itself, because of its close relationship to the common law tort of defamation. The court therefore concluded that a court had Article III jurisdiction over an FCRA claim based on a credit bureau's misleading report about a consumer to a car dealer. This opinion provides strong support for the view that a false statement about a consumer made by a debt collector to a credit bureau is also a concrete injury in and of itself.

The Eleventh Circuit reached just that conclusion in a decision issued two years before *Ramirez*.[1627] Many lower court decisions have also held that a consumer who alleged that a collector failed to report a disputed debt as disputed had Article III standing as interpreted by *Spokeo*.[1628] While some of these

standing where plaintiff alleged that defendant's filing of collection suit in violation of bankruptcy stay caused her emotional distress); Lamirand v. Ray Servicing, L.L.C., 2020 WL 6134356 (M.D. Fla. Oct. 19, 2020) (finding standing where plaintiffs alleged that collector's overstatement of amount owed in letter to their attorney caused them emotional distress); Hernandez v. BC Services, Inc., 2020 WL 2308233 (S.D. Ill. May 8, 2020) (standing established where flurry of collection letters and telephone conversations listed inconsistent amounts owed and pressured debtor to pay, impeding his ability to respond and causing him stress); Peacock v. Stewart Zlimen & Jungers, Attorneys, Ltd., 2018 WL 5808808 (D. Minn. Nov. 6, 2018) (understatement of amount owed in garnishment summons caused concrete injury where debtor alleged that, if the garnishment had been successful it would not have paid off entire debt, and he suffered frustration, confusion, and helplessness). *See generally* § 11.15.3.4, *supra*.

1622 *See* § 11.15.14, *infra* (advantages of filing suit in state court).

1623 15 U.S.C. § 1692e(8), *discussed at* § 7.2.8, *supra*.

1624 *See* 15 U.S.C. § 1692e(8), *discussed at* § 7.2.8, *supra*.

1625 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016); Pinson v. JPMorgan Chase Bank, 942 F.3d 1200 (11th Cir. 2019) (harm caused by reporting false information to credit bureau is closely related to that caused by defamation; consumer has standing to assert FDCPA claim); Pedro v. Equifax, Inc., 868 F.3d 1275, 1279–1280 (11th Cir. 2017) (FCRA case; "the reporting of inaccurate information about [plaintiff's] credit to a credit monitoring service" was a concrete injury because it had "a close relationship to the harm caused by the publication of defamatory information, which has long provided the basis for a lawsuit in English and American courts."). *See* § 11.15.2, *supra*.

1626 ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

1627 Pinson v. JPMorgan Chase Bank, 942 F.3d 1200 (11th Cir. 2019).

1628 Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 345–346 (7th Cir. 2018); Sayles v. Advanced Recovery Sys., Inc., 206 F. Supp. 3d 1210, 1211 (S.D. Miss. 2016), *aff'd*, 865 F.3d 246 (5th Cir. 2017); Webster v. Receivables Performance Mgmt., L.L.C., 473 F. Supp. 3d 861 (S.D. Ind. July 21, 2020) (failing to report disputed debt as disputed is concrete injury even though this consumer testified that she did not know if it affected her credit score); Pastian v. Internal Credit Sys., Inc., 2020 WL 6445836, at *11 (S.D. Ohio Nov. 3, 2020) (mag.; no need to show additional harm); Centeno v. LVNV Funding, L.L.C., 2020 WL 7310761 (N.D. Ill. Dec. 10, 2020) (finding standing even though consumer could not identify any specific impact on her credit score or ability to obtain credit); Foster v. AFNI, Inc., 2020 WL 1531651, at *4 (E.D. Mich. Mar. 31, 2020) (failure to report debt as disputed causes the type of harm Congress intended to prevent; no further harm need be shown); Escobar v. Midland Credit Mgmt., 2019 WL 3751486 (D. Conn. Aug. 8, 2019) (consumer has standing to bring FDCPA claim against collector that continued to report debt as unpaid after consumer paid it); Thar v. Nationwide Collection Agencies, Inc., 2019 WL 1768869 (E.D. Mich. Mar. 4, 2019), *adopted*, 2019 WL 1765756 (E.D. Mich. Apr. 22, 2019); Francisco v. Midland Funding, L.L.C., 2019 WL 498936 (N.D. Ill. Feb. 8, 2019) (finding standing even though plaintiff viewed her credit report only once, which was before she disputed the debt, her credit score was not reduced, and there was some evidence that her attorneys invited the violation); Lewis v. Experian Info. Solutions, Inc., 2018 WL 1989449 (C.D. Cal. Mar. 20, 2018) (finding standing where debtor alleged that collector reported a debt she did not owe, thereby preventing her from qualifying for a loan and causing emotional distress); Baranowski v. Portfolio Recovery Assoc., 2018 WL 1534967 (N.D. Ill. Mar. 29, 2018); Denson v. Virtuoso Sourcing Group, L.L.C., 2017 WL 8229343 (C.D. Cal. Oct. 31, 2017) (finding standing because the provision was enacted to protect consumers' concrete interests, and the violation here actually harms, or threatens to harm, those interests); Flores v. Portfolio Recovery Assoc., 2017 WL 5891032 (N.D. Ill. Nov. 29, 2017) (noting that an incorrectly reported debt can be a "red flag" to anyone who runs a credit check, including landlords and employers, and thus can be used to pressure debtors to pay debts without exploring their legal options); Guerrero v. Credit Mgmt., L.P., 2017 WL 7052292, at *3 (W.D. Tex. Oct. 24, 2017) (mag.; following *Sayles*; consumer has standing because failure to report debt as disputed exposes her to risk of harm), *adopted*, 2017 WL 7052319 (W.D. Tex. Dec. 19, 2017); Arellano v. Virtuoso Sourcing Group, L.L.C., 2017 WL 3993959 (S.D. Cal. Sept. 11, 2017) (finding standing because the provision was enacted to protect consumers' concrete interests, and the violation here actually harms, or threatens to harm, those interests); Jones v. Portfolio Recovery Assoc., 2017 WL 7052288 (W.D. Tex. Aug. 16, 2017) (plaintiff alleged that failure to report debt as disputed lowered her credit rating; court finds standing because lowered credit rating creates risk of harm); Tejero v. Portfolio Recovery Assoc., 2017 WL 3217101 (W.D. Tex. July 27, 2017) (following *Sayles*; failure

decisions are based on the fact that such a report causes a risk of harm, a theory that the majority opinion in *Ramirez* states can only justify jurisdiction to issue injunctive relief,[1629] their conclusions that the consumer had standing are well-supported by *Ramirez*'s holding that the mere fact of dissemination of derogatory information to a third party causes concrete harm. Courts have also held that consumers have Article III standing to assert other violations of FDCPA § 1692e(8), including reporting an inflated amount to a credit reporting agency,[1630] reporting a debt that is not owed,[1631] or re-aging an account so that it stays on a debtor's credit report longer.[1632]

There are only a few contrary opinions. A series of nearly identical pre-*Ramirez* decisions issued by a judge in the Eastern District of Virginia[1633] hold that the risk of harm from failure to report a debt as disputed is too speculative. These decisions fail to consider the relationship of the harm alleged to the harm made actionable by common law defamation torts, an analogy on which the Supreme Court relied in *Ramirez*.[1634]

Three other decisions hold complaints insufficient where they did not allege specifically or failed to prove that the consumer's credit score was damaged.[1635] However, the credit scores that credit reporting agencies disclose to consumers may differ from the FICO scores that most lenders actually use, and many creditors use specialized scores or even custom-built ones.[1636]

In any event, it will often be possible to allege that the false report to the credit bureau did cause a reduction in the consumer's credit score, which many decisions, both before[1637] and after[1638] *Ramirez*, hold to be concrete harm. The fact that a credit score that a credit reporting agency provides to a consumer is unaffected by a misstatement is no assurance that a specialized FICO score or custom-built score used by a particular creditor has not been or will not be affected. In addition, *Ramirez* supports the view that the collector's misstatement to the credit bureau has a close relationship to the harm made actionable by the common law tort of defamation, as it amounts to dissemination of the false information to a third party—the credit bureau. This is the case whether or not the credit bureau uses that information to produce a reduced credit score.

The argument for standing may be strengthened by pointing out that the FDCPA's prohibition should be characterized as substantive. In *Spokeo*, the Supreme Court treated the FCRA's protection against dissemination of an inaccurate credit report as a procedural protection. But the FCRA provision requires only that credit reporting agencies use "reasonable *procedures* to assure maximum possible accuracy."[1639] By contrast, the FDCPA flatly prohibits reporting of information that the collector knows or should know to be false—clearly a substantive protection. Indeed, many decisions characterize all of the FDCPA's protections as substantive.[1640] After *Ramirez*, it is not clear what weight the Supreme Court will give to the distinction between procedural and substantive protections,[1641]

to report debt as disputed creates risk of harm); Ozmun v. Portfolio Recovery Assoc., 2017 WL 3140660, at *6 (W.D. Tex. July 24, 2017) (failure to report debt as disputed creates risk of real harm); Duchene v. Aargon Collection Agency, Inc., 2017 WL 2402464, at *2 (M.D. Fla. June 2, 2017) ("Plaintiff has statutorily-created rights under the FDCPA to dispute a debt and have that debt properly reported to credit reporting agencies, so that Plaintiff's credit is not adversely impacted. It is axiomatic that an inaccurate credit rating poses a risk of harm because it may influence other creditors or potential creditors to take an adverse action, such as declining future credit."); Taylor v. Collection Consultants, 2016 WL 10968140 (C.D. Cal. Aug. 31, 2016); Irvine v. I.C. Sys., Inc., 198 F. Supp. 3d 1232, 1236–1237 (D. Colo. 2016) (reporting debt without reporting that it is disputed is concrete harm because it is violation of substantive right). *Cf.* Castillo v. Convergent Outsourcing, Inc., 2017 WL 2902844 (N.D. Cal. July 7, 2017) (dismissing complaint so that plaintiff can moot the standing question by adding allegations asserted in his opposition briefs that his credit score was in fact lowered because of collector's failure to report debt as disputed). *But see* Brown v. R & B Corp., 267 F. Supp. 3d 692 (E.D. Va. 2017) (rejecting analogy to harm recognized at common law, but finding standing on other grounds for failure to report disputed debt as disputed). *But cf.* Nevils v. Rent Recover of Better NOI, L.L.C., 2017 WL 5947399 (D. Nev. Nov. 30, 2017) (dismissing with leave to amend; simply pleading "Plaintiff has been damaged" by collector's reporting of debt, without noting that it was disputed, is insufficient).

1629 *See* § 11.15.2.2.6, *supra*.

1630 Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435, at *5 (W.D. Wash. Mar. 29, 2017).

1631 Proescher v. Security Collection Agency, 2018 WL 3432737 (M.D. Fla. June 8, 2018) (finding standing where collector reported debt to credit bureau even though consumer had already paid it, causing her emotional and physical distress), *adopted*, 2018 WL 3428157 (M.D. Fla. July 16, 2018).

1632 O'Dell v. Nat'l Recovery Agency, ___ F. Supp. 3d ___, 2018 WL 1172435 (E.D. Pa. Mar. 6, 2018).

1633 Taylor v. Medical Data Systems, Inc., 2017 WL 2989184 (E.D. Va. July 13, 2017); Gathers v. CAB Collection Agency, Inc., 2017 WL 2703686 (E.D. Va. June 22, 2017); Holmes v. Contract Callers, Inc., 2017 WL 2703685 (E.D. Va. June 22, 2017); Coleman v. Charlottesville Bur. of Credits, Inc., 2017 WL 1381666 (E.D. Va. Apr. 17, 2017).

1634 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021). *See* § 11.15.2.2.3, *supra*.

1635 McKibben v. I.C. System, Inc., 2018 WL 1896419 (N.D. Ga. Jan. 19, 2018) (finding no standing for claim that collector should have reported that debt, currently listed as "past due" and "in collection," was included in consumer's bankruptcy, as court was unpersuaded that this would have improved consumer's credit score), *adopted*, 2018 WL 1905067 (N.D. Ga. Feb. 20, 2018); Piper v. Meade & Assoc., Inc., 282 F. Supp. 3d 905 (D. Md. Oct. 10, 2017) (finding no standing where plaintiff alleged only that she was "damaged" by the failure to report debt as disputed; suggesting that plaintiff must show actual effect on credit score, not just risk); Higgens v. Trident Asset Mgmt., L.L.C., 2017 WL 1230537 (S.D. Fla. Mar. 28, 2017) (finding no standing where complaint did not allege an effect on plaintiff's credit score, how plaintiff's score was affected, or whether reduction in his score caused adverse consequences).

1636 *See* National Consumer Law Center, Fair Credit Reporting § 16.4.5.4 (9th ed. 2017), *updated at* www.nclc.org/library.

1637 *See* § 11.15.3.4, *supra*.

1638 Lueck v. Bureaus, Inc., 2021 WL 4264368 (N.D. Ill. Sept. 20, 2021). Cf. Tolliver v. Nat'l Credit Sys., Inc., 2021 WL 4306056, at *3 (W.D. Wis. Sept. 22, 2021) (post-*Ramirez* decision; no standing where plaintiff did not allege that collector's failure to report debt as disputed lowered his credit score or created that risk).

1639 FDCPA § 1682e(b) (emphasis added).

1640 *See* § 11.15.3.3, *supra*.

1641 *See* § 11.15.2.2.5, *supra*.

but pointing out that the FDCPA's protection is substantive is likely at least to buttress the argument for standing.

Defendants may point to the fact that *Ramirez* holds that a credit reporting agency was liable for false statements in its database only if it disseminated those statements to third parties, and argue that, therefore, a collector's report of false information to a credit reporting agency is concrete harm only if the credit reporting agency, in turn, disseminates the false information to additional parties. That would be a solid argument if the credit reporting agency were the defendant, but when the collector is the defendant its report of the false information to the credit reporting agency is a publication to a third party.

Even though there is a strong argument that a collector's false report to a credit bureau is concrete harm in and of itself, it is always advisable to plead any known facts showing an actual reduction in the plaintiff's credit score or other adverse consequences. For example, an alternate ground on which the Eleventh Circuit found that a consumer had standing was that the plaintiff spent time and incurred out-of-pocket costs to contest a creditor's use of a false name when reporting a debt to a credit bureau.[1642] Any reporting of the false information by the credit bureau to potential creditors or other third parties should be documented and alleged, as broader dissemination magnifies the harm recognized by the common law tort of defamation.[1643] Evidence that the consumer's credit score was decreased or the consumer was denied credit because of the violation will make it even clearer that the consumer suffered concrete harm.[1644]

FDCPA § 1692e(8) also prohibits collectors from threatening to report false information. For threats, it may be possible to establish concrete harm by evidence that the consumer suffered emotional distress,[1645] and the tort of intentional infliction of emotional distress may provide an analogy to a harm that is actionable under common law. Concrete harm may also be shown by evidence that the consumer took steps or refrained from doing so because of the threat.[1646] Standing when consumers assert a violation of the related provision in FDCPA § 1692g against reporting a debt to a credit reporting agency before responding to a consumer's dispute is discussed in § 11.15.7, *infra*.

1642 Pinson v. JPMorgan Chase Bank, 942 F.3d 1200, 1209 (11th Cir. 2019).

1643 *See, e.g.*, Lewis v. Experian Info. Solutions, Inc., 2018 WL 1989449 (C.D. Cal. Mar. 20, 2018) (finding standing where debtor alleged that collector reported debt she did not owe, thereby preventing her from qualifying for loan and causing emotional distress).

1644 *See, e.g.*, Lewis v. Experian Info. Solutions, Inc., 2018 WL 1989449 (C.D. Cal. Mar. 20, 2018) (finding standing where debtor alleged that collector reported debt she did not owe, thereby preventing her from qualifying for loan and causing emotional distress); Castillo v. Convergent Outsourcing, Inc., 2017 WL 2902844 (N.D. Cal. July 7, 2017) (dismissing complaint so that plaintiff can moot standing question by adding allegations asserted in his opposition briefs that his credit score was in fact lowered because of collector's failure to report debt as disputed).

1645 *See* § 11.15.3.4, *supra*.

1646 *See* § 11.15.3.4, *supra*.

11.15.4.4 Article III Standing for Claims Involving False or Fabricated Statements in Collection Actions

Prior to *Ramirez*, a number of courts found Article III standing over claims based on a collector's presentation of false or fabricated statements to debtors[1647] or courts[1648] in collection actions. Other courts found Article III jurisdiction where the collector gave the consumer misleading instructions about how to respond to discovery requests[1649] or about the deadlines for seeking administrative review of a claim;[1650]

1647 Hill v. Accounts Receivable Services, L.L.C., 2016 WL 6462119 (D. Minn. Oct. 31, 2016) (consumer has standing to assert claim under §§ 1692e(2)(A), 1692e(5), 1692e(10), and 1692f against collector that presented fabricated assignment document to him during court hearing, even though consumer defeated collector's claim at trial, because consumer has right to truthful information; consumer could probably also have shown expenditure of time and money to defend false claim), *aff'd on other grounds*, 888 F.3d 343 (8th Cir. 2018). *See also* Roe v. Roosen, Varchetti & Oliver, P.L.L.C., 2019 WL 2523589 (E.D. Mich. June 19, 2019) (finding standing where wage garnishment sent to wrong person's employer caused plaintiff, a real estate agent, to suffer embarrassment and emotional distress, to contact attorney, and to refrain from selling real estate for fear that her wages would be garnished).

1648 Loewe v. Weltman, Weinberg & Reis Co., 2020 WL 409655 (E.D. Mich. Jan. 24, 2020); Scarbrough v. Rausch, Sturm, Israel, Enerson & Hornick, L.L.P., 2018 WL 5305080 (E.D. Mich. July 26, 2018) (creditor's filing of false affidavit caused concrete harm by shifting burden of proof and forcing debtor to file counter-affidavit); Newman v. Encore Capital Group, 2017 WL 3479510 (E.D. Mich. Aug. 14, 2017) (injury shown where collector's filing of false affidavit may have changed burden of proof in collection action to consumer's detriment); Toohey v. Portfolio Recovery Assoc., 2017 WL 2271548 (S.D.N.Y. May 12, 2017) (filing of affidavit of merit in state court collection suit that gave false impression that collector had reviewed account-level documentation is a procedural violation that caused concrete harm by enabling collector to obtain state court judgment); Ozmun v. Portfolio Recovery Assoc., 2017 WL 3140660, at *6 (W.D. Tex. July 24, 2017) (finding standing because collector's misrepresentation of amount of debt in its motion for default judgment creates risk of harm, even though no default judgment was granted). *But see* Frank v. Autovest, L.L.C., 961 F.3d 1185 (D.C. Cir. 2020) (false affidavits stating that affiants were employees of original creditor when they were actually collection firm's employees do not create concrete harm where consumer did not take or fail to take any action because of them); Daniels v. Aldridge Pite Haan, L.L.P., 2020 WL 3866649 (M.D. Ga. July 8, 2020) (finding no standing where collection firm sent debtor's attorney two filings that contained misstatements, and debtor cited no resulting harm); Elston v. Encore Capital Group, Inc., 2019 WL 3037054 (E.D. Wash. July 11, 2019); Burns v. Midland Funding, L.L.C., 2019 WL 3003598 (E.D. Mich. July 10, 2019) (making allegations in collection suit without having possession of supporting evidence did not cause harm where consumer did not dispute the allegations; also holding that false affidavit of service in earlier collection action, which led to default judgment, caused no harm where consumer later got the judgment vacated, but failing to recognize the harm of having to take the steps to have it vacated).

1649 Washington v. Brumbaugh & Quandahl, P.C., 2017 WL 4174754, at *4–5 (D. Neb. Sept. 19, 2017) (finding standing for claim based on collector's false statement that debtor's responses to request for admissions must be sworn and filed, on which debtor relied to her detriment).

1650 Henderson v. Gen. Revenue Corp., 2019 WL 4148172, at *6 (W.D. Va. Aug. 30, 2019) (misinformation about deadlines for seeking administrative review of student loan debt and for requesting hearing on garnishment).

The harm caused by this type of misconduct has a close relationship to the common law torts of malicious prosecution[1651] and abuse of process,[1652] and these analogies may provide a basis for Article III jurisdiction after *Ramirez*. In a pre-*Ramirez* decision against a collector that had abused the court system, the Eighth Circuit held:

> With [FDCPA] § 1692f(1), Congress identified a harm—being subjected to attempts to collect debts not owed. This "alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* It is similar to the harm suffered by victims of the common-law torts of malicious prosecution, wrongful use of civil proceedings, and abuse of process. *See, e.g.*, Bertero v. Nat'l Gen. Corp., 13 Cal. 3d 43, 118 Cal. Rptr. 184, 529 P.2d 608, 614 (1974) (in bank) ("The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings."); Carter v. Oster, 134 Mo. App. 146, 112 S.W. 995, 999 (1908) ("But there are torts of which mental distress is the proximate and natural result, and for which damages may be assessed. Such are malicious prosecutions. . . ."); Baglini v. Lauletta, 338 N.J. Super. 282, 768 A.2d 825, 839 (2001) ("Courts have required little or no proof with regard to intangible damages for malicious use of process, apparently *692 in the belief that a 'normal person' subjected to wrongful litigation would have suffered at least some damages."). *See also* Restatement (Second) of Torts §§ 674, 681 (June 2017 update); Dan B. Dobbs et al., The Law of Torts § 593 (2d ed. June 2017 update) ("According to most counts, a majority of American courts allow the plaintiff to pursue the wrongful civil litigation claim without showing any special kind of injury.").[1653]

Since *Ramirez*, at least one court has held that the analogy to common law wrongful litigation torts meant that a consumer had standing to bring FDCPA claims regarding misrepresentations made in the context of a foreclosure case.[1654]

Filing false or fabricated statements with a court also means that false information about the consumer has been disseminated to third parties—it is disseminated to the court and to any other parties in the case, and, unless it is filed under seal, is fully available to any member of the public. *Ramirez* holds that, because of its close relationship to the common law tort of defamation, a consumer suffered a concrete harm when a credit reporting agency made a derogatory report to a third party.[1655] The same analogy supports the view that dissemination of false derogatory material to third parties by filing it with a court causes a concrete injury in and of itself. While common law recognizes a privilege for statements made in judicial proceedings, *Ramirez* requires only that the "fundamental requirements" of the federal claim and the common law claim be closely related,[1656] not that the potential defenses be similar.

In addition, in many cases the presentation of the fraudulent material to a court will, in and of itself, cause concrete harm. For example, in one case a court found that a collector's submission of a false affidavit to a court caused concrete harm to the debtors because it shifted the burden of proof and forced them to file a counter-affidavit.[1657] It will often be true that the mere filing of false or fabricated documents in court has consequences with respect to the posture of the case, the burdens of proof, or the actions required of the consumer. The false document may even enable the collector to obtain a state court judgment.[1658] One court found a lack of standing where a false affidavit of service in a collection action led to a default judgment, on the ground that the consumer later got the judgment vacated, but the court erred in failing to recognize the harm of having to take the steps to have it vacated.[1659]

Consumers are also likely to be able to document out-of-pocket costs, expenditure of time to contest the false statements, or entry of adverse rulings. The collector's false filings may have made it necessary for the consumer to retain counsel.[1660] The consumer may have acted or failed to act in some way because of believing the false information.

Another possibility is that the false information may have caused the consumer confusion or emotional distress, which

1651 *See* § 15.6.2, *infra*.

1652 *See* § 15.6.3, *infra*.

1653 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 691–692 (8th Cir. 2017). *See also* Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1025 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021) (post-*Ramirez* decision; citing this holding of *Demarais* with approval).

1654 Benjamin v. Rosenberg & Assoc., 2021 WL 3784320, at *5–6 (D.D.C. Aug. 26, 2021) (post-*Ramirez* decision; finding Article III standing for claims involving unfounded threat to conduct foreclosure sale, misrepresentations to obtain summary judgment; misrepresentation of legal status of the debt, attempts to collect illegal or unreasonable amounts, and false representation that certain parties had rights in the debt, on ground that these acts have close relationship to wrongful litigation torts and cause emotional distress).

1655 *See* §§ 11.15.2.2.1, 11.15.2.2.3, *supra*, §§ 11.15.5.2, 15.5, *infra*.

1656 *See* § 11.15.2.2.3, *supra*.

1657 Scarbrough v. Rausch, Sturm, Israel, Enerson & Hornick, L.L.P., 2018 WL 5305080 (E.D. Mich. July 26, 2018). *See also* Newman v. Encore Capital Group, 2017 WL 3479510 (E.D. Mich. Aug. 14, 2017) (injury shown where collector's filing of false affidavit may have changed burden of proof in collection action to consumer's detriment).

1658 *See, e.g.*, Toohey v. Portfolio Recovery Assoc., 2017 WL 2271548 (S.D.N.Y. May 12, 2017) (filing of affidavit of merit in state court collection suit that gave false impression that collector had reviewed account-level documentation is procedural violation that caused concrete harm by enabling collector to obtain state court judgment).

1659 Burns v. Midland Funding, L.L.C., 2019 WL 3003598 (E.D. Mich. July 10, 2019).

1660 *See, e.g.*, Lako v. Portfolio Recovery Assoc., 2021 WL 3403632 (W.D. Wis. Aug. 4, 2021) (post-*Ramirez* decision; cost of hiring attorney to defend collection action is concrete harm). *See generally* § 11.15.3.4, *supra*.

may amount to concrete harm.[1661] However, as a matter of case selection, cases should be brought only where the consumer can testify to serious confusion or distress and the false statement is one that would often cause consumers to respond in the same way.

Exploring and alleging any steps that the consumer took or failed to take because of the false filing or deceptive information is particularly important in light of *Lyshe v. Levy*, a pre-*Ramirez* Sixth Circuit decision.[1662] The court held that there was no Article III standing for a claim regarding a collector's false statement that requests for admission would be deemed admitted unless the consumer provided sworn responses, where the consumer did not allege that he was misled, took any action, or was harmed in any other way by the false statement. It may be possible to distinguish *Lyshe* on the ground that the court characterized the alleged violation as a procedural one that did not involve any harm that the FDCPA was designed to prevent. In addition, the court only addressed the consumer's claim that the violation of the FDCPA was a concrete harm in and of itself, and did not explore any common law tort analogies. Nonetheless, advocates should take care not only to develop tort analogies but also to explore and document any consequences the consumer suffered because of the violation.

In *Frank v. Autovest, L.L.C.*,[1663] the District of Columbia Circuit held that false statements in court filings by a debt buyer and its collection law firm did not cause a concrete injury to a consumer who testified that she had not taken any action or refrained from taking any action because of the misrepresentations. She testified that the collection suit itself caused her stress and inconvenience, and that she incurred court costs and attorney fees to respond to the suit, but she did not tie these injuries to the false statements. The decision rejects the argument that, because of Congress's authority to define new injuries and identify new chains of causation, every violation of the FDCPA creates a concrete injury.[1664] It also holds that the debtor's "informational injury"—the denial of access to truthful information—was not a concrete injury in itself.[1665]

11.15.4.5 Article III Standing for Claims Involving Collector's Failure to Identify Itself As a Collector and Disclose the Debt Collection Purpose of the Contact

FDCPA § 1692e(11) requires a debt collector to identify itself as such in communications with the consumer and, in initial communications, to disclose the debt collection purpose of the communication. These requirements address collection abuses observed by the Senate when the FDCPA was enacted, specifically "obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."[1666] To end these abuses, Congress gave consumers the right to be informed that the entity contacting them is a debt collector and that any information obtained from the consumer will be used for collection purposes.[1667]

The harms to consumers that failure to provide this congressionally mandated information can cause is seen in cases like *Romine v. Diversified Collection Services*.[1668] In that case, Western Union urged consumers to call Western Union to confirm information to get delivery of a personal telegram. When the consumer called Western Union, it recorded the consumer's telephone caller ID, confirmed it with the consumer, and then provided the phone number to the debt collector, who used it to contact the consumer for debt collection. In addition to disclosing personal contact information, consumers might unwittingly disclose personal information like bank account or credit card details, believing that this information was being provided for some other purpose.

Obtaining personal information without FDCPA § 1692e(11) disclosures causes harm that is analogous to that made actionable by the common law tort of intrusion upon seclusion, and the consumer is harmed even if there is no publication of that information.[1669] As examples of this tort, the Restatement cites highly analogous actions such as eavesdropping and surreptitiously or deceptively obtaining access to personal information.[1670]

If no personal information is disclosed, a court might give weight to Congress's judgment that this injury is sufficiently concrete to confer standing.[1671] In *Church v. Accretive Health, Inc.*, an unpublished decision, the Eleventh Circuit held that a consumer had Article III standing to assert a claim that a medical accounts servicer failed to provide the FDCPA § 1692e(11) notice, even though she did not allege any actual damages resulting from the violation.[1672] The court held that the right to receive this information was substantive, and that Congress had elevated the injury to the status of a legally cognizable injury through the FDCPA. However, in 2020 the Eleventh Circuit issued two decisions that are inconsistent with *Church*,[1673] and the Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*[1674] throws the role of Congress into some doubt.

1661 *See* § 11.15.3.4, *supra*.
1662 854 F.3d 855 (6th Cir. 2017).
1663 961 F.3d 1185 (D.C. Cir. 2020).
1664 *Id.* at 1188–1189.
1665 *Id.* at 1188.
1666 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A.3, *infra*.
1667 FDCPA § 1692e(11).
1668 55 F.3d 1142 (9th Cir. 1998).
1669 *See* § 11.15.2.1, *supra*, § 11.15.10, *infra*; National Consumer Law Center, Federal Deception Law § 6.10.3.2.1 (3d ed. 2017), *updated at* www.nclc.org/library (harm caused by unwanted calls and texts is analogous to that made actionable by tort of invasion of privacy, so consumer has standing to bring Telephone Consumer Protection Act claim).
1670 Restatement (Second) of Torts § 652B, Illustrations 2, 3, 4 (1977).
1671 *See* § 11.15.2.2.4, *supra*.
1672 654 Fed. Appx. 990 (11th Cir. 2016).
1673 Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990 (11th Cir. 2020); Cooper v. Atlantic Credit & Finance Inc., 822 Fed. Appx. 951 (11th Cir. 2020).
1674 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021).

A Sixth Circuit decision also holds that the failure of a letter from a law firm stating that a creditor was waiving a deficiency claim to state that it was from a debt collector did not cause the consumers any concrete harm.[1675] The decision deals only with the level of deference due to Congress's judgment, not with any possible analogy to a common law claim.

In the first Circuit-level post-*Ramirez* decision on the question, *Wadsworth v. Kross, Lieberman & Stone, Inc.*,[1676] the Seventh Circuit ruled that a consumer did not have standing to bring suit regarding a collector's failure to identify herself as a collector or state that she was attempting to collect a debt. The court applied its earlier decisions that, when a debt collector fails to inform a debtor of the debtor's statutory rights, then the debtor has suffered a concrete injury only if impairs the debtor's ability to use that information for a substantive purpose that the statute envisioned. The debtor had not paid the debt in the wake of the calls, and the court followed its earlier decisions holding that emotional harms are not concrete injuries.[1677]

A post-*Ramirez* district court decision similarly holds that failure to inform the debtor of the debt collection purpose of a communication did not cause a concrete injury where the debtor did not allege any downstream consequences.[1678] The court stressed that the debtor had been served with a complaint that included the required information, and characterized the violation as involving only format. Another post-*Ramirez* decision deals with an unintelligible five-second voicemail message, probably left by a collector when he did not realize he had connected to the debtor's phone. The court denied standing over a claim that the message did not identify the caller as a collector where the debtor made only conclusory allegations that the message caused to be upset and to feel threatened.[1679]

In light of these developments, advocates should not rely on the judgment of Congress as the sole basis for standing in cases where the collector did not succeed in obtaining information that the consumer would have preferred not to reveal. Such claims will be more likely to proceed in federal court if the consumer can allege and prove some other harm beyond the non-disclosure itself.[1680] The distress that calls or letters from unidentified or poorly-identified entities may cause might be a sufficient basis for standing, but as a matter of case selection the advocate should make sure that the distress is significant and a natural result of receipt of such communications.[1681]

675 Hagy v. Demers & Adams, 882 F.3d 616 (6th Cir. 2018) (plaintiffs lack standing to sue for law firm's failure to identify itself as collector, where they identified no harm or risk of harm that this caused in these circumstances).

676 ___ F.4th ___, 2021 WL 3877930 (7th Cir. Aug. 31, 2021).

677 *See* § 11.15.3.4, *supra*.

678 Cheatham v. Adams, 2021 WL 4313961 (E.D. Ark. Sept. 22, 2021).

679 Santiago v. Hunter Warfield, Inc., 2021 WL 4894092 (M.D. Fla. Oct. 20, 2021).

680 See, e.g., Neal v. Adams, 2021 WL 4466392, at *6 (E.D. Ark. Sept. 29, 2021) (post-*Ramirez* decision; finding no standing where plaintiff already knew that defendant was a debt collector).

681 *See* § 11.15.3.4, *supra*.

11.15.4.6 Article III Standing for Other Claims of False, Deceptive, or Misleading Acts

Courts have held that many other types of false, deceptive, or misleading acts cause concrete harm to consumers and meet the requirements for Article III jurisdiction:

- Deception regarding the involvement of an attorney in a collection effort;[1682]

1682 Gibbons v. Weltman, Weinberg & Reis Co., 2020 WL 5039316 (E.D. Pa. Aug. 26, 2020) (false implication that collection letter was from attorney causes concrete harm, because it is closely related to common law misrepresentation claims and Congress has elevated it to actionable harm; plaintiff's fear of suit is also sufficient to confer standing); Kranz v. Midland Credit Mgmt., Inc., 2020 WL 3899223, at *6 (W.D. Tex. July 10, 2020) (even if deception about attorney involvement is considered procedural, violation is sufficient to constitute injury-in-fact); Diehm v. Messerli & Kramer, P.A., 426 F. Supp. 3d 578 (W.D. Wis. 2019) (finding standing at summary judgment stage where debtor submitted evidence that she would have disputed claim but for her belief that collection attorney had reviewed it; fact that she does not identify any substantive defenses does not negate standing); Adams v. Jackson, 2019 WL 5865510 (D.S.C. Apr. 30, 2019) (finding standing to assert claim that carefully-hedged collection letter from attorney was deceptive, but rejecting claim on merits); Villalobos v. Meyer Njus Tanick, P.A., 2019 WL 3562663 (N.D. Ill. Aug. 5, 2019) (finding standing where letter implied that it was the product of attorney's professional judgment, causing consumer to suffer increased confusion and pressure); LoMastro v. Baxter Credit Union, 2018 WL 5885536 (W.D. Wis. Nov. 9, 2018) (finding standing where plaintiff alleged that meritless suit was filed because of collection attorney's failure to be meaningfully involved, causing her to have to defend it); Degrasse v. Fin. Recovery Services, Inc., 2018 WL 2214651 (E.D.N.Y. Mar. 5, 2018) (finding standing on theory that procedural violations of sections 1692e and 1692g are concrete injuries, but denying claim on the merits); Martin v. Trott Law, P.C., 265 F. Supp. 3d 731 (E.D. Mich. 2017) (allegation that consumers were deceived and misled is sufficient; earlier decision notes that one of claims is that letters deceptively conveyed impression of attorney involvement); Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798 (E.D. Mich. 2017) (letter misrepresenting attorney's involvement; allegation of confusion is sufficient); Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351, at *4 (E.D. Mo. Oct. 3, 2017) (being subjected to baseless collection suit creates basis for both FDCPA claim and unjustified-litigation torts); Napolitano v. Ragan & Ragan, 2017 WL 3535025 (D.N.J. Aug. 17, 2017) (misrepresentation of level of attorney involvement places debtor at risk of economic injury); Pogorzelski v. Patenaude & Felix APC, 2017 WL 2539782 (E.D. Wis. June 12, 2017) (informational injury is more than procedural; consumer who has received debt collection communication misrepresenting attorney's involvement has suffered the type of injury FDCPA was intended to protect against); Bock v. Pressler & Pressler, L.L.P., 254 F. Supp. 3d 724 (D.N.J. 2017) (finding standing because right to truthful information is substantive right made actionable by Congress); Carter v. CACH, L.L.C., 2016 WL 11581052 (N.D. Ga. Nov. 30, 2016) (consumer has standing because Congress created substantive right to be free from abusive debt collection practices), *adopted*, 2016 WL 11581047 (N.D. Ga. Dec. 27, 2016). *But see* Buchholz v. Meyer Njus Tanick, P.A., 946 F.3d 855 (6th Cir. 2020) (plaintiff must show harm in addition to FDCPA violation; finding no standing on theory that plaintiff did not show that receipt of collection letters that misrepresented attorney's involvement created anxiety that was more than he would experience in facing debt collection). *But cf.* Rossi v. Kohn Law Firm S.C., 2020 WL 2527176 (W.D. Wis. May 18, 2020) (rejecting argument that attorney's signature on complaint led her to infer that attorney had

- Falsely identifying the collector as a credit bureau;[1683]
- Misrepresentation regarding the imminence of suit, garnishment, seizure of the debtor's assets, or some other action;[1684]
- False threats to take action that the collector does not intend to take[1685] or has no right to take;[1686]
- Threatening to report a discharged debt;[1687]
- Demanding payment of a debt that has been discharged in bankruptcy,[1688] that was incurred by an identity thief,[1689] or otherwise is not owed;[1690]

investigated it significantly and substantially, which deterred her from contesting it; concluding on summary judgment that real reason that she failed to contest it was not this unreasonable inference, but because she knew she owed debt).

1683 Cunningham v. Credit Bur. of Lancaster Cty., Inc., 2018 WL 6062351 (E.D. Pa. Nov. 20, 2018).

1684 Heinitz v. Seterus, Inc., 2019 WL 4805326 (N.D.N.Y. Sept. 30, 2019) (misrepresentation of imminence of foreclosure); Spehr v. Seterus, Inc., 2019 WL 4246929 (E.D. Mo. Sept. 6, 2019) (finding standing where plaintiff alleged that collector made false threat to accelerate mortgage, causing him mental distress); Wenger v. Seterus, Inc., 2019 WL 2119980 (M.D. Pa. May 15, 2019) (misrepresentation that debt would be accelerated if full amount was not paid by stated date); Moukengeschaie v. Eltman, Eltman & Cooper, P.C., 277 F. Supp. 3d 337 (E.D.N.Y. Sept. 29, 2017) (mag.; threatening to seize assets, without first having sent debtor a notice of assignment of the debt); Biber v. Pioneer Credit Recovery, Inc., 229 F. Supp. 3d 457 (E.D. Va. 2017) (consumer has standing to assert claims under §§ 1692e and 1692f against collector that misrepresented that administrative wage garnishment proceedings had already commenced or were imminent; these misrepresentations "could have materially and adversely affected [plaintiff's] decisions regarding debt repayment"). ***But see*** Gunn v. Thrasher, Buschmann & Voelkel, P.C., 928 F.3d 1069 (7th Cir. 2020) (treating statement that creditor "may seek to foreclose" its lien as true even though, because of low amount of debt, collector sued solely for money, not foreclosure; allegation that consumers were "annoyed or intimidated" by letter is insufficient for standing); Galea v. Midland Credit Mgmt. Inc., 2020 WL 905747 (E.D. Mich. Feb. 25, 2020) (claim that "Time Sensitive" on envelope created false sense of urgency is a bare procedural violation; no standing without allegation of some resulting harm); Scibetta v. TD Banknorth, 2017 WL 3448544 (D.N.J. Aug. 11, 2017) (holding that consumer lacks standing to assert claim that collector threatened repossession when it had no intention of doing so).

1685 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017) (consumer has standing to assert claim that collector made false threat to proceed to trial when it did not have any evidence or witnesses; threat caused consumer to obtain counsel, serve discovery requests, prepare for trial, and appear); Kranz v. Midland Credit Mgmt., Inc., 2020 WL 3899223, at *5 (W.D. Tex. July 10, 2020) (false threat to take oral deposition at debtor's exam is concrete harm because it is violation of substantive right created by Congress; finding, in footnote 9, that plaintiff's emotional distress is also sufficiently concrete); Adams v. Seterus, Inc., 2019 WL 4735157 (E.D. Mich. Sept. 27, 2019) (consumer has standing; letter that conveyed false sense of urgency caused mental anguish and has potential to induce debtor to send money that is needed for necessities); Suarez v. Camden Prop. Trust, 2019 WL 3423427, at *3 (E.D.N.C. July 29, 2019) (finding standing where false threat to refer small claim to collection agency caused emotional distress, anger, and frustration); Mills v. Turner, 2017 WL 3670967, at *13 (D. Mass. Aug. 25, 2017) (finding standing where false threat of suit prompted consumer to retain counsel; misleading statements also create risk of harm); Lee v. Select Portfolio Servicing, Inc., 2016 WL 9275411 (N.D. Ga. Aug. 25, 2016) (finding standing because Congress elevated right to be free from deceptive or unfair debt collection tactics to legally cognizable injury).

1686 *See* Benjamin v. Rosenberg & Assoc., 2021 WL 3784320 (D.D.C. Aug. 26, 2021) (post-*Ramirez* decision; finding Article III standing for FDCPA claim regarding false threat to schedule foreclosure sale because of its close relationship to wrongful litigation torts); Im v. Bayview Loan Servicing L.L.C., 2018 WL 840088 (S.D.N.Y. Feb. 12, 2018) (collector's misrepresentation of its right to foreclose is concrete injury in and of itself). *See also* Farina v. Metropolitan Transportation Authority, 2019 WL 3966163 (S.D.N.Y. Aug. 21, 2019) (claims under section 1983 and state laws; unconstitutional threat to enforce disputed obligation is sufficient). ***But see*** Seung Eun Oh v. Collecto, Inc., 2021 WL 3732881 (D.N.H. Aug. 23, 2021) (post-*Ramirez* decision; no standing where consumer did not read letter). ***But cf.*** Hunter v. NHCash.com, L.L.C., 2017 WL 4053769 (E.D. Va. Sept. 12, 2017) (no standing for claim based on collection letters that sought to enforce payday loan that was illegal and void, where plaintiffs pled no other harm; rejecting argument that there is a common law analog for this claim; suggesting that allegations of anxiety and emotional distress will be sufficient if plaintiffs amend their complaint).

1687 Caprel v. Specialized Loan Servicing, Inc., 2017 WL 1739919, at *3 (N.D. Ill. May 4, 2017) (noting that plaintiff's failure to allege financial injury did not mean that he did not suffer any concrete injury; listing intangible injuries he might have suffered).

1688 Barnhill v. FirstPoint, Inc., 2017 WL 22178439 (M.D.N.C. May 17, 2017) (collector represented that consumer owed debt that had been discharged in bankruptcy, causing her emotional distress); Pritchett v. Paul Mason & Assoc., Inc., 2017 WL 11151610 (N.D. Ga. Mar. 2, 2017) (finding standing for § 1692e claim and parallel § 1692f claim where collector filed proof of claim for debt that had been discharged in an earlier bankruptcy; invasion of these rights is sufficient to give plaintiff standing); Prindle v. Carrington Mortg. Services, 2016 WL 4369424 (M.D. Fla. Aug. 16, 2016) (plaintiff has standing to assert that letter regarding discharged mortgage debt disclosed too inconspicuously that it was not seeking payment, because this breaches statutory right created by Congress); Mogg v. Jacobs, 2016 WL 4395899 (S.D. Ill. Aug. 18, 2016) (false representations in letter and state court complaint that debt was collectible when it was subject to automatic bankruptcy stay; having lawsuit filed against him and incurring costs to obtain representation in collection action is concrete harm); McCamis v. Servis One, Inc., 2016 WL 4063403 (M.D. Fla. July 29, 2016) (Congress has elevated FDCPA violations to the status of legally cognizable injuries).

1689 Brown v. I.C. Sys., Inc., 2019 WL 1281972 (N.D. Ill. Mar. 20, 2019) (collection calls to identity theft victim; finding standing because being subject to unlawful debt collection demands is concrete harm); Brown v. SWC Group L.P., 2019 WL 1147125, at *7 (N.D. Ga. Jan. 10, 2019) ("There is clearly a risk of material harm from debt collectors attempting to collect fraudulent debts from identity theft victims, and that risk falls squarely within the ambit of what Congress was trying to remedy in the FDCPA's prohibitions on false and misleading representations and abusive practices"), *adopted*, 2019 WL 2306115 (N.D. Ga. Feb. 12, 2019).

1690 Roe v. Roosen, Varchetti & Oliver, P.L.L.C., 2019 WL 2523589 (E.D. Mich. June 19, 2019) (finding standing where wage garnishment sent to wrong person's employer caused plaintiff, a real estate agent, to suffer embarrassment and emotional distress, to contact attorney, and to refrain from selling real estate for fear that her wages would be garnished); Wagner v. Chiari & Ilecki, L.L.P., 2019 WL 1083025 (W.D.N.Y. Mar. 7, 2019) (finding standing where collector sent and served postjudgment execution documents (information subpoenas) on non-debtor plaintiff, whose name was similar to actual debtor's; plaintiff probably suffered additional harm besides the violation itself, but court finds it unnecessary to address this), ***aff'd in part, vacated in part on other grounds***, 973 F.3d 154 (2d Cir. 2020) (addressing merits of claims); LoMastro v. Baxter Credit Union, 2018 WL 5885536 (W.D. Wis. Nov. 9, 2018) (finding standing for claim that defendant brought suit without giving consumer notice of her statutory right to cure;

- Misrepresentations about the nature or benefits of settlement offers, such as a false statement that an offer to settle a debt is time-limited;[1691]
- Deceptive or misleading statements about potential tax consequences of settling a debt;[1692]
- False statements about how long a debt would appear on the debtor's credit report;[1693]
- Seeking payment of a debt without disclosing that it is time-barred[1694] or that making a payment will revive the debt;[1695]

finding it plausible that plaintiff would have been able to cure default if she had been notified of this right); Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017) (being subjected to baseless collection suit creates basis for both FDCPA claim and unjustified-litigation torts); Matute v. A.A. Action Collection Co., 2017 WL 2573714 (D.N.J. June 13, 2017) (violating FDCPA by seeking amounts not owed is concrete injury because it is type of practice FDCPA is intended to prevent). *But cf. In re* FDCPA Mailing Vendor Cases, ___ F. Supp. 3d ___, 2021 WL 3160794, at *5–6 (E.D.N.Y. July 23, 2021) (post-*Ramirez* decision; treating plaintiff's allegation that debts were not owed as merely allegation that collector failed to identify original creditor; finding no Art. III standing where plaintiffs alleged no actual injury, and rejecting argument that standing can be based on informational injury).

1691 Johnson v. Enhanced Recovery Co., 325 F.R.D. 608, 612–614 (N.D. Ind. 2018) (standing established by collector's misrepresentation or implication that by paying settlement debtor would avoid negative credit report, when in fact the debt had already been reported; denial of right to truthful information is concrete injury); Haddad v. Midland Funding, L.L.C., 255 F. Supp. 3d 735, 739 (N.D. Ill. 2017) (false statement that flexible payment arrangements would no longer be available if account was forwarded to attorney is concrete harm because of Congress's judgment that there is intrinsic value in truthful information and because of its historical relationship to liability for fraudulent misrepresentation). *But see* Johnston v. Midland Credit Mgmt., 229 F. Supp. 3d 625 (W.D. Mich. Jan. 26, 2017) (holding that collector's refusal to implement settlement that collection letter said was available did not cause concrete harm; disregarding without explanation plaintiff's travel expenses and the time he spent consulting with counsel and making telephone calls, and inexplicably holding that further collection attempts were not "certainly impending" in light of collector's repudiation of settlement it offered).

1692 Schultz v. Midland Credit Mgmt., Inc., 2020 WL 3026531 (D.N.J. June 5, 2020); Leonard v. Capital Mgmt. Services, L.P., 364 F. Supp. 3d 198 (W.D.N.Y. 2019); Taylor v. Fin. Recovery Services, Inc., 252 F. Supp. 3d 344 (S.D.N.Y. 2017), *aff'd*, 886 F.3d 212 (2d Cir. 2018); Rhein v. Forster, Garbus & Garbus, L.L.P., 2017 WL 4969335 (D.N.J. Nov. 1, 2017) (finding standing but rejecting claim on merits); Remington v. Fin. Recovery Services, Inc., 2017 WL 1014994 (D. Conn. Mar. 15, 2017) (plaintiff who received letter falsely stating "this settlement may have tax consequences" has standing); Medina v. AllianceOne Receivables Mgmt., Inc., 2017 WL 220328, at *1 (E.D. Pa. Jan. 19, 2017) ("The FDCPA is designed to protect the consumer from the inherent harm caused when a debt collector, in seeking to collect a debt, is not straight with the consumer but instead makes a false or deceptive statement to achieve its purpose. The deceptive declaration in the letter about a requirement to report the consumer's resolution of the debt to the IRS creates a particularized and concrete injury, at the very least unnecessary fear and anxiety on the part of the consumer."); Bautz v. ARS Nat'l Services, Inc., 226 F. Supp. 3d 131 (E.D.N.Y. Dec. 23, 2016) (even if this misrepresentation were procedural rather than substantive, it presents a material risk of injury because misinformation about tax consequences could impact whether debtor decides to pay the lesser amount offered as opposed to the full debt or some other option). *See also* Everett v. Fin. Recovery Services, Inc., 2016 WL 6948052 (S.D. Ind. Nov. 28, 2016) (plaintiff's allegation that letter that misrepresented tax consequences caused her to incur costs consulting her attorney, suffer financial loss, and be subject to the threat of harm is sufficient). *But see* Brunett v. Convergent Outsourcing, Inc., 982 F.3d 1067, 1069 (7th Cir. 2020) (finding no standing where collector's statement about tax consequences was not inaccurate and consumer alleged only confusion, not that she acted to her detriment on that confusion).

1693 Griffin v. Andrea Visgilio-McGrath, L.L.C., 2017 WL 3037387 (D.N.J. July 18, 2017) (false statement about how long judgment debt would appear on credit record is sufficient to establish standing because it is breach of plaintiff's personal statutory right to be free from abusive debt collection practices).

1694 Perez v. McCreary, Veselka, Bragg & Allen, P.C., 2021 WL 3639801 (W.D. Tex. Aug. 17, 2021) (post-*Ramirez* decision; receipt of false information and confusion are sufficient grounds for Art. III standing); Schafer v. Allied Interstate L.L.C., 2018 WL 10303096 (W.D. Mich. Feb. 9, 2018); Kaiser v. Cascade Capital, L.L.C., 2018 WL 1521892 (D. Or. Mar. 28, 2018) (noting that, if plaintiffs had been induced to make payment on debt they would have waived statute of limitations defense); McMahon v. LVNV Funding, L.L.C., ___ F. Supp. 3d ___, 2018 WL 1316736 (N.D. Ill. Mar. 14, 2018); Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017) (being subjected to baseless collection suit creates basis for both FDCPA claim and unjustified-litigation torts); Wheeler v. Midland Funding, L.L.C., 2017 WL 3235683 (N.D. Ill. July 31, 2017) (consumer has standing to make claim that collector violated §§ 1692e(2)(A) and 1692f by offering a settlement through website without indicating that debt was time-barred, even though earlier collector had told him six months earlier that limitations period had expired), *later op. at* 2018 WL 1920254 (N.D. Ill. Apr. 24, 2018) (certifying class and rejecting defendant's renewed challenge to plaintiff's standing); Taymuree v. Nat'l Collegiate Student Loan Trust 2007-2, 2017 WL 952962 (N.D. Cal. Mar. 13, 2017) (rejecting argument that harm was caused by consumer's breach of payment obligation); Sullivan v. Allied Interstate, L.L.C., 2016 WL 7187507 (W.D. Pa. Oct. 18, 2016), *adopted*, 2016 WL 7189859 (W.D. Pa. Dec. 9, 2016); Hayes v. Convergent Healthcare Recoveries, Inc., 2016 WL 5867818 (C.D. Ill. Oct. 7, 2016) ("[F]ailure to disclose that debt is not legally enforceable creates "material risk of harm—the risk that the consumer would be misled into believing that the debt is legally enforceable. Furthermore, a dunning letter that misleads the consumer as to the legal status of the debt is exactly the harm that Congress identified and sought to curb by creating a statutory right to accurate information under the FDCPA."); Nyberg v. Portfolio Recovery Assoc., 2016 WL 3176585, at *7 (D. Or. June 2, 2016) (mag.; filing of time-barred state collection suit is concrete injury); Barkley v. Santander Consumer USA, Inc. (*In re* Martin), 617 B.R. 866 (Bankr. S.D. Miss. 2020) (filing proof of claim on extinguished time-barred debt); Robinson v. JH Portfolio Debt Equities, L.L.C. (*In re* Robinson), 554 B.R. 800 (Bankr. W.D. La. 2016) (attorney fee for contesting time-barred proof of claim is concrete injury). *See also* Buchholz v. Meyer Njus Tanick, P.A., 946 F.3d 855, 864 (6th Cir. 2020) (stating in *dicta* that knowingly litigating time-barred claim may be concrete injury in itself). *But cf.* Nitti v. Penn Credit Corp., 2017 WL 4381683 (E.D. Va. Oct. 2, 2017) (dismissing contract claim that was based on FDCPA where plaintiff did not allege that he suffered actual injury or was exposed to risk of harm by collector's demand for time-barred tax debt).

1695 Cartmell v. Credit Control, L.L.C., 2020 WL 113829 (E.D. Pa. Jan. 10, 2020) (plaintiff has Art. III standing even though he did not intend to make payment and did not feel threatened by letter); Navaroroli v. Midland Funding L.L.C., 2019 WL 1044801 (N.D. Ill. Mar. 5, 2019) (seeking to bait consumer into reviving debt by making payment is concrete harm, because it is type of conduct Congress sought to deter); Pierre v. Midland Credit Mgmt., Inc., 2017 WL 1427070 (N.D. Ill. Apr. 21, 2017) (consumers have standing because this practice invades

- Failure to disclose the amount of the debt or other information that the FDCPA requires;[1696]
- Misidentification of the collector;[1697]
- Misidentification of, or failure to identify, the current creditor;[1698]
- Misrepresentations regarding the identity of the owner of a debt or the real party in interest in a collection action;[1699]
- Statement of the amount owed in a confusing way or without sufficient detail,[1700] although there is significant contrary authority;[1701] and

their legally-protected interest in certain information about their debts). *But see* Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990 (11th Cir. 2020) (finding no standing for collection letter that deceptively offered payment plan "designed to save you money" that would have resulted in restarting statute of limitations for a time-barred debt, on ground that consumer did not act to his detriment in reliance on it).

1696 Byrne v. Oregon One, Inc., 2017 WL 3568412 (D. Or. July 18, 2017) (finding standing for variety of disclosure violations under §§ 1692e, 1692f, and 1692g, including failure to state current amount of debt and current creditor), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017). *But see* Bazile v. Finance Sys. of Green Bay, Inc., 983 F.3d 274 (7th Cir. 2020) (must show harm beyond non-disclosure of amount of debt and that it may increase due to interest; nonreceipt of information to which plaintiff is entitled under statute may amount to concrete injury, but only if it impairs plaintiff's ability to use that information for substantive purpose that statute envisioned); Spuhler v. State Collection Serv., Inc., 983 F.3d 282 (7th Cir. 2020) (debtors lack standing to assert claim under §§ 1692e and 1692f that collection letter failed to disclose that interest was accruing; must show that non-disclosure detrimentally affected debtors' handling of their debts). *See generally* § 11.15.6, *infra* (violations of § 1692g).

1697 Ngo v. NPAS, Inc., 2021 WL 149121, at *4 (E.D. La. Jan. 15, 2021); Busby v. Vacation Resorts Int'l, 2019 WL 669641 (S.D. Tex. Feb. 19, 2019) (finding standing for claim under §§ 1692e, 1692f, and 1692*i* that collection letter purported to be from attorney, even though creditor itself was actually handling collection, where debtor alleges he was misled); McLain v. Head Mercantile Co., 2017 WL 3710073 (M.D. La. Aug. 28, 2017) (use of unregistered name on collection letter); Scibetta v. TD Banknorth, 2017 WL 3448544, at *3 (D.N.J. Aug. 11, 2017) (collector's failure to identify itself as collector, using its proper name); Hsu v. Enhanced Recover Co., L.L.C., 2017 WL 4310643 (W.D. Tex. July 10, 2017) (consumer has standing to assert claim regarding collector's failure to provide its true legal name, in violation of § 1692e(14); information would help a debtor evaluate whether collector runs legitimate or fraudulent operation, whether its claim is valid, and how to respond); Velez v. Healthcare Revenue Recovery Group, L.L.C., 2017 WL 1476144 (M.D.N.C. Apr. 24, 2017) (plaintiff has standing to assert claim that collection letter gave unregistered false name for collector; injury in fact is being subjected to unfair and abusive practices); Verdun v. Fidelity Creditor Serv., 2017 WL 1047109, at *5–6 (S.D. Cal. Mar. 20, 2017) (mag.; finding standing where debt collection letter gave impression that collector was the creditor and that California law required debtor to contact the collector). *See also* Derosia v. Credit Corp Solutions, Inc., 2018 WL 1513043 (E.D. Wis. Mar. 27, 2018) (consumer has standing to assert FDCPA claim regarding false statement on collection letter that collector was licensed). *But see* Ward v. Nat'l Patient Account Services Solutions, Inc., ___ F.4th ___, 2021 WL 3616067 (6th Cir. Aug. 16, 2021) (post-*Ramirez* decision; rejecting analogy to intrusion upon seclusion and finding no standing to assert § 1692e(14) claim based on caller's identification of itself as NPAS, rather than as NPAS, Inc.; consumer's resulting confusion was not concrete injury, nor was her voluntary decision to retain counsel to prevent further calls); Hagy v. Demers & Adams, 882 F.3d 616 (6th Cir. 2018) (plaintiffs lack standing to sue for law firm's failure to identify itself as collector, where they identified no harm or risk of harm that this caused in these circumstances). *But cf.* Benjamin v. Rosenberg & Assoc., 2021 WL 3784320 (D.D.C. Aug. 26, 2021) (post-*Ramirez* decision; finding no standing where plaintiff's complaint did not identify any way in which collection firm's failure to add mortgage servicer as plaintiff in foreclosure complaint harmed her). *See generally* § 11.15.5.3, *supra* (standing to assert violation of § 1692e(11) requirement that collector identify itself as debt collector).

1698 Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75 (2d Cir. 2018); Klein v. Affiliated Group, Inc., 2019 WL 246768, at *6 (D. Minn. Jan. 17, 2019) (rejecting collector's argument that amending complaint would be futile because of lack of standing: "A debt collector's alleged misrepresentation regarding the current legally authorized creditor could create a concrete risk of Article III harm, because a debtor who is confused about the identity of the authorized collector might be misled into making payments to the wrong entity"); Byrne v. Oregon One, Inc., 2017 WL 3568412, at *9 (D. Or. July 18, 2017) (failure to identify current creditor creates risk that debtor will pay wrong person), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017). *But see* Adams v. Skagit Bonded Collectors, L.L.C., ___ Fed. Appx. ___, 2020 WL 7055395 (9th Cir. Dec. 2, 2020) (finding no standing; allegation of confusion is insufficient). *But cf.* Tourgeman v. Collins Fin. Services, Inc., 197 F. Supp. 3d 1205 (S.D. Cal. 2016) (risk of harm from misidentification of creditor in letter that consumer never received is too hypothetical; no standing), *aff'd*, 735 Fed. Appx. 340 (9th Cir. 2018). *See generally* § 11.15.6.3, *infra* (standing to assert violation of requirement that § 1692g notice identify the current creditor).

1699 Tourgeman v. Collins Fin. Services, Inc., 197 F. Supp. 3d 1205 (S.D. Cal. 2016) (misidentification of original creditor in complaint creates risk of affecting debtor's litigation strategy, could lead to lost opportunities to settle the debt, and could expose debtor to a default judgment, but risk of harm is too hypothetical as to misidentification and misrepresentations in letter that consumer never received), *aff'd*, 735 Fed. Appx. 340 (9th Cir. 2018). *But see* Smith v. U.S. Bank, 2018 WL 1488391 (N.D. Ohio Mar. 27, 2018) (finding no standing; rejecting plaintiffs' claim that complaint's misidentification of ownership of debt forced them to have to defend the action, as they would have had to defend it even without the misidentification). *See generally* § 11.15.6.3, *infra* (violation of requirement that § 1692g notice identify current creditor).

1700 Espinal v. Enhanced Recovery Co., 2020 WL 4048213 (D.N.J. July 16, 2020); Hackler v. Tolteca Enters., Inc., 2019 WL 7759523, at *2 (W.D. Tex. Sept. 9, 2019); Roth v. Solomon and Solomon, P.C., 2018 WL 718402 (E.D.N.Y. Feb. 5, 2018); Feldheim v. Fin. Recovery Services, Inc., 257 F. Supp. 3d 361 (S.D.N.Y. 2017); Grubb v. Green Tree Servicing, L.L.C., 2017 WL 3191521, at *5–7 (D.N.J. July 27, 2017) (collection letters stated contradictory amounts owed, did not explain the calculation, and did not give amount owed on date of letter; plaintiff alleged that the letters confused her); Byrne v. Oregon One, Inc., 2017 WL 3568412 (D. Or. July 18, 2017) (collector's failure to disclose current amount due and interest rate create risk that consumer would pay wrong amount), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017); Garcia v. Law Offices Howard Lee Schiff P.C., 2017 WL 1230847 (D. Conn. Mar. 30, 2017) (consumer has standing to assert claim under §§ 1692d, 1692e, and 1692f(1) for unclear statement of amount of debt; distinguishing cases where a required disclosure related to something that did not affect the consumer, such as a payment plan the consumer did not have; here the disclosure relates to consumer's own debt); George v. Wright, Lerch & Litow, L.L.P., 2016 WL 6963990 (S.D. Ind. Nov. 29, 2016) (holding that plaintiff has standing to assert claim that demand for 75% of debt, when the balance changed daily due to accrual of interest, was misleading, and need not show that she herself was deceived, but dismissing claim on merits).

1701 Markakos v. Medicredit, Inc., 997 F.3d 778 (7th Cir. 2021) (confusion and aggravation because section 1692g notices letters stated

- Other deception.[1702]

Ramirez holds that federal courts do not have Article III jurisdiction over a claim that a defendant violated a statutory requirement regarding the format of a disclosure unless the plaintiff shows some "downstream consequences" resulting from the violation. As discussed in § 11.15.2.2.7, *supra*, there may be an argument that this rule should be confined to format violations, and so should not apply to a claim involving failure to provide a required disclosure or provision of a false or deceptive disclosure.[1703] However, advocates should not rely on distinguishing *Ramirez* on this ground, but should be prepared to produce evidence of downstream consequences or point to analogous common law torts that treat the harm, or a closely related harm, as actionable.

One possible downstream consequence of false, deceptive, or misleading communications is that they may cause the debtor to be confused or deceived. Although there is significant contrary authority,[1704] a number of pre-*Ramirez* decisions find the debtor's actual confusion or deception, after opening the letter and reading it, to be a concrete injury.[1705] This theory should be pursued only when the letter was likely to be confusing or deceptive to many typical readers, and the debtor can testify convincingly about the confusion it caused.

A danger of relying solely on the debtor's confusion or deception as a concrete injury is that courts may not consider the debtor's state of mind after receiving a deceptive communication to be concrete enough and "downstream" enough from the deception to support Article III standing. For this reason, it is important to allege and be prepared to prove other adverse effects of the deception whenever possible. The debtor may have taken some action because of the deception. For example, a debtor who was deceived by the collector's false statements about the urgency or the validity of the claim may have paid a debt that the debtor otherwise would not have paid, or put it ahead of more important obligations. A debtor who was not deceived may have felt compelled to respond by retaining counsel, defending against the debt, or spending time and effort to document the true facts.[1706] A showing that, because of the deceptive communication, the debtor refrained from taking some action that the debtor otherwise would have taken should also be sufficient.[1707]

Deceptive communications—particularly threats or letters that convey a false sense of urgency—can cause mental anguish or emotional distress. Since emotional distress is recognized as providing a basis for some common law torts, there is a good claim that it is a concrete injury for purposes of Article III standing, and a number of courts have so held in

inconsistent amounts due is not concrete harm); Spuhler v. State Collection Serv., Inc., 983 F.3d 282 (7th Cir. 2020) (receipt of collection letter that fails to state that debt would accrue interest is not concrete injury, nor are debtor's calls and letters to inquire about accuracy of amount demanded, because she was not seeking clarification about interest); Marcano v. Nationwide Credit & Collection, Inc., 2021 WL 4523218 (N.D. Ill. Oct. 4, 2021) (post-*Ramirez* decision; plaintiff's failure to pay a debt because of collection letter's confusing presentation of amount owed not concrete harm where no interest or fees accrued as a result); Kola v. Forster & Garbus L.L.P., 2021 WL 4135153, at *7-8 (S.D.N.Y. Sept. 10, 2021) (post-*Ramirez* decision; inconsistent statements about amount of debt not concrete even if this violates a substantive right); Shields v. Professional Bur. of Collections of Md., Inc., 2021 WL 4806383 (D. Kan. Oct. 14, 2021) (post-*Ramirez* decision; collection letters' failure to state that balance could increase due to interest and other changes, and their confusing presentation of the amount owed, not concrete injury where plaintiff alleged only that they caused general confusion); Wright v. AR Resources, Inc., 2020 WL 7047804 (M.D. Fla. Dec. 1, 2020) (finding no standing where collection letter cited two different amounts owed, but plaintiff alleged only hypothetical harm); Hill v. Resurgent Capital Services, L.P., 2020 WL 4429254 (S.D. Fla. July 31, 2020) (misrepresentation that claim is for principal, not interest, did not cause concrete harm in absence of allegation that consumer was led to pay this amount or spent time and money to contest it; potential effect on other consumers insufficient); Smith v. U.S. Bank Ass'n, 2018 WL 1488391 (N.D. Ohio Mar. 27, 2018) (failure to respond to consumers' request for an explanation of certain charges is not the same as false representation of amount of debt and does not cause concrete harm); May v. Consumer Adjustment Co., 2017 WL 227964 (E.D. Mo. Jan. 19, 2017) (failure to state that interest was accruing did not cause harm to this plaintiff, who called collector and got explanation of why amount due was changing, so she does not have standing).

1702 Rivera v. Dove Investment Corp., 2020 WL 6366054 (S.D. Fla. Oct. 23, 2020) (consumer has standing where collector sent him discovery in aid of execution based on collection suit that had been dismissed ten years earlier, causing him emotional distress); Sykes v. Veripro Solutions, Inc., 2020 WL 4926547 (N.D. Ill. Aug. 21, 2020) (finding standing where consumer alleged that collection letter misinformed him about character of debt, whether there was enforceable lien on his property, and whether debt could be legally reported to credit agencies, and that as a result he was harassed, aggravated, concerned, and intimidated, and retained counsel).
See § 11.15.4, *supra*.

1704 *See, e.g.*, Smith v. GC Services L.P., ___ F.3d ___, 2021 WL 210948 (7th Cir. Jan. 21, 2021) (confusion insufficient unless it leads debtor to take some detrimental step).

1705 *See, e.g.*, Perez v. McCreary, Veselka, Bragg & Allen, P.C., 2021 WL 3639801 (W.D. Tex. Aug. 17, 2021) (post-*Ramirez* decision; confusion is sufficient basis for Art. III standing); Martin v. Trott Law, P.C., 265 F. Supp. 3d 731 (E.D. Mich. 2017) (allegation that consumers were deceived and misled is sufficient; earlier decision notes that one of claims is that letters deceptively conveyed impression of attorney involvement); Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798 (E.D. Mich. 2017) (letter misrepresenting attorney's involvement; allegation of confusion is sufficient). *See generally* § 11.15.4.3, *supra*.

1706 *See* § 11.15.3.4, *supra*.

1707 *See, e.g.*, Dichm v. Messerli & Kramer, P.A., 426 F. Supp. 3d 578 (W.D. Wis. 2019) (finding standing at summary judgment stage where debtor submitted evidence that she would have disputed claim but for her belief that collection attorney had reviewed it; fact that she does not identify any substantive defenses does not negate standing). *But cf.* Rossi v. Kohn Law Firm S.C., 2020 WL 2527176 (W.D. Wis. May 18, 2020) (rejecting argument that attorney's signature on complaint led her to infer that attorney had investigated it significantly and substantially, which deterred her from contesting it; concluding on summary judgment that real reason that she failed to contest it was not this unreasonable inference, but because she knew she owed debt). *See generally* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2213 ___ L. Ed. 2d ___ (2021) (citing fact that plaintiffs did not show that they "would have tried to correct their credit files . . . had they been sent the information in the proper format" in support of conclusion that they lacked standing); § 11.15.3.4, supra (decisions regarding standing where FDCPA violation caused plaintiff to forgo or delay some action).

cases involving deceptive communications.[1708] However, cases should rely on emotional distress to establish standing only where the plaintiff's distress was significant and the communication was of a nature that would cause many people to feel distress.

If the deceptive statement reached third parties and reflects negatively on the debtor, *Ramirez* makes it particularly clear that the consumer has suffered a concrete harm. This issue is discussed in § 11.15.5.2, *supra*, and § 11.15.9, *infra*.

11.15.5 Article III Standing for FDCPA § 1692g Claims

11.15.5.1 Generally

FDCPA § 1692g gives consumers the right to identifying information about the debt and the debt collector at the beginning of a debt collector's work:

- The amount of the debt;[1709] and
- The name of the current creditor.[1710]

The section 1692g notice also gives the consumer the right to request additional information and access to an informal dispute resolution mechanism by requiring that the notice contain:

- A statement that the consumer has the right to dispute the debt orally or by letter within thirty days, and that the debt collector will assume the debt is valid if it is not disputed;[1711]
- A statement that if the consumer disputes the debt, or requests verification of the debt or the name of the original creditor in writing within thirty days, the debt collector will provide that verification[1712] or the name of the original creditor.[1713]

By clear implication and necessity, the debt collector must also identify itself and provide its contact information in these initial communications.[1714]

In addition to these disclosures, FDCPA § 1692g requires collectors to take specific actions if the consumer exercises the right to dispute the debt or requests the name and address of the original creditor. It also requires a thirty-day pause in collection activity until the collector obtains verification of the debt, or the original creditor's name and address, and mails the information to the consumer.[1715]

This section discusses Article III standing after *Spokeo* for claims under FDCPA § 1692g. In general, the Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*[1716] is likely to make litigation of violations of FDCPA § 1692g's disclosure requirements in federal court more difficult unless the consumer can allege and prove "downstream consequences" resulting from the violation. Claims based on the collector's failure to comply with its substantive duties under FDCPA § 1692g may fare better, but practitioners should select cases carefully to make sure that it is clear that the violation harmed the consumer.

Advocates should also refer to the general discussion in § 11.15.5.3, *supra*, of standing to assert claims for violation of the related requirement in FDCPA § 1692e(11) to disclose the debt collector's identity as a debt collector and the debt collection purpose of a communication.

11.15.5.2 Whether Violations of FDCPA § 1692g's Disclosure Requirements Cause Concrete Harm

11.15.5.2.1 The purposes behind FDCPA § 1692g's disclosure requirements

The rights and obligations established by FDCPA § 1692g were considered by the Senate at the time of passage to be a "significant feature" of the Act.[1717] "This provision [FDCPA § 1692g] will eliminate the recurring problem of collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."[1718] Congress enacted section 1692g to protect debtors' concrete interest in avoiding abusive debt collection practices.[1719]

The problems originally addressed by Congress in FDCPA § 1692g have widened, and its importance has increased over the years. The last few decades have seen the rise of the debt buying industry, which often collects debt with incomplete and sometimes erroneous data.[1720] The rise of the Internet has also introduced massive thefts of individuals' personal financial information from corporate computers and the subsequent sale of that data to identity theft networks as well as scammers who use the data to impersonate legitimate debt collectors.[1721]

The initial FDCPA § 1692g disclosures help consumers determine whether a debt collector is legitimate, whether the debt is the consumer's, and whether the debt is for the correct amount. For example, if the consumer has never heard of the creditor or does not recognize the amount of the debt, this may raise red flags that the debt collector's claim is mistaken or even fraudulent. The disclosures required by FDCPA § 1692g also inform consumers of their verification rights so that they

1708 *See* § 11.15.3.4, *supra*.
1709 15 U.S.C. § 1692g(a)(1).
1710 15 U.S.C. § 1692g(a)(2). *See* § 9.3.5, *supra*. Section 1692e(11) also requires an initial disclosure to consumers that the debt collector is collecting a debt and any information obtained will be used be used to collect the debt. *See* §§ 7.2.11, 11.15.4.8, *supra*.
1711 15 U.S.C. § 1692g(a)(3).
1712 15 U.S.C. § 1692g(a)(4).
1713 15 U.S.C. § 1692g(a)(5).
1714 *See* § 9.3.5, *supra*.
1715 15 U.S.C. § 1692g(b).
1716 ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021).
1717 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.
1718 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.
1719 Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75, 81 (2d Cir. 2018); Macy v. GC Services L.P., 897 F.3d 747, 757–758 (6th Cir. 2018).
1720 *See* § 1.3.4, *supra*.
1721 *See* National Consumer Law Center, Fair Credit Reporting Ch. 9 (9th ed. 2017), *updated at* www.nclc.org/library.

can inquire further about the identity of the original creditor, the amount of the debt, etc. Unfortunately, disclosures are often inadequate, not sent, or sent to the wrong address.

11.15.5.2.2 Article III standing for violation of FDCPA § 1692g's disclosure requirements prior to Ramirez

Prior to the Supreme Court's decision in *Ramirez*, a number of courts held that a violation of the disclosure requirements of FDCPA § 1692g was a concrete injury. Stressing the risk of harm caused by depriving the plaintiff of information that might have helped him defend a foreclosure proceeding, the Second Circuit held that FDCPA § 1692g protects concrete interests, so an alleged violation satisfied the injury-in-fact requirement.[1722] The Sixth Circuit held that a debtor had Article III standing to assert a claim that a validation notice violated the FDCPA because it failed to state that the creditor was obligated to provide additional information about the creditor and the debt only if the debtor disputed the debt in writing.[1723] The court treated this as a procedural violation, but held that it was one that created a risk of real harm to a concrete interest, so the plaintiff did not need to allege any additional harm beyond the one Congress had identified. An unpublished Eleventh Circuit decision, giving weight to Congress's judgment, held that failure to give the FDCPA § 1692g notice was in itself a concrete harm.[1724]

Many lower courts similarly found Article III standing where the consumer alleged that the collector failed to:

- Give the consumer the FDCPA § 1692g notice;[1725]
- Disclose the amount of the debt, in violation of FDCPA § 1692g(a)(1);[1726]
- Identify the current creditor, in violation of FDCPA § 1692g(a)(2);[1727]

1722 Cohen v. Rosicki, Rosicki & Assoc., 897 F.3d 75 (2d Cir. 2018). *Accord* Papetti v. Does 1–25, 691 Fed. Appx. 24 (2d Cir. 2017) ("[s]ection 1692g furthers [the FDCPA's] purpose by requiring a debt collector who solicits payment from a consumer to provide that consumer with 'a detailed validation notice,' which allows a consumer to confirm that he owes the debt sought by the collector before paying it; [T]he FDCPA violations alleged by Papetti, taken as true, 'entail the concrete injury necessary for standing'"); Zirogiannis v. Seterus, Inc., 707 Fed. Appx. 724 (2d Cir. 2017) (failure to give debtor § 1692g notice that adequately specifies amount of debt is concrete injury).

1723 Macy v. GC Services L.P., 897 F.3d 747 (6th Cir. 2018).

1724 Church v. Accretive Health, Inc., 654 Fed. Appx. 990 (11th Cir. 2016) ("Church did not receive information to which she alleges she was entitled. While this injury may not have resulted in tangible economic or physical harm that courts often expect, the Supreme Court has made clear an injury need not be tangible to be concrete. *See* Spokeo, Inc., 578 U.S. at ___, 136 S. Ct. at 1549; Havens Realty Corp., 455 U.S. at 373. Rather, this injury is one that Congress has elevated to the status of a legally cognizable injury through the FDCPA. Accordingly, Church has sufficiently alleged that she suffered a concrete injury, and thus, satisfies the injury-in-fact requirement.").

1725 Lavallee v. Med-1 Solutions, L.L.C., 932 F.3d 1049 (7th Cir. 2019); Church v. Accretive Health, Inc., 654 Fed. Appx. 990 (11th Cir. 2016) (failure to give all required disclosures is concrete harm); Ngo v. NPAS, Inc., 2021 WL 149121, at *4 (E.D. La. Jan. 15, 2021); Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201, 207 (E.D.N.Y. 2019); Cohen v. Ditech Fin., L.L.C., 342 F. Supp. 3d 460 (S.D.N.Y. Sept. 21, 2018) (finding standing for claim that mortgage field service company's door hanger notice failed to include the disclosures required by § 1692g, but dismissing claim on merits); Stinson v. Nat'l Credit Systems Inc., 2018 WL 3954764, at *6 n.6 (N.D. Ga. June 26, 2018); Geary v. Green Tree Servicing, L.L.C., 2017 WL 2608691 (S.D. Ohio June 16, 2017) (finding standing to assert claim that initial communication did not contain § 1692g disclosures, which "go to the heart of the FDCPA"; noting that these plaintiffs would have disputed the debt, and did so once they received the § 1692g disclosures). *But see* Wadsworth v. Kross, Lieberman & Stone, Inc., ___ F.4th ___, 2021 WL 3877930 (7th Cir. Aug. 31, 2021) (post-*Ramirez* decision; finding no standing for claim of failure to give § 1692g notice within five days of first contact where debtor did not show that this impaired her ability to use information for substantive purpose that statute envisioned); Cheatham v. Adams, 2021 WL 4313961 (E.D. Ark. Sept. 22, 2021) (post-*Ramirez* decision; dismissing claim where plaintiff did not allege any downstream consequences from collector's failure to give section 1692g notice; stressing that consumer had gotten the required information in other ways). *But cf.* Dennin v. Waypoint Resource Group, L.L.C., 2020 WL 6205836 (C.D. Ill. Oct. 22, 2020) (consumer who already knew about and exercised his validation rights lacks standing for claim that validation notice was sent to wrong address, as he suffered no harm or risk of harm).

1726 Zirogiannis v. Seterus, Inc., 707 Fed. Appx. 724 (2d Cir. 2017) (violation of requirement to give debtor a notice that adequately specifies the amount of the debt is a concrete injury; violation creates material risk that debtor will fall victim to the abusive debt collection practices that Congress passed the FDCPA to prevent); Beane v. RPW Legal Services, P.L.L.C., 378 F. Supp. 3d 948 (W.D. Wash. 2019) (finding standing; collector's uncertain and varying statements about the amount of the debt likely had negative impact on debtor's ability to dispute it or make an intelligent decision on whether to settle it); Byrne v. Oregon One, Inc., 2017 WL 3568412 (D. Or. July 18, 2017) (failure to state current amount of the debt, including interest, created risk that consumer would pay wrong amount), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017); Balke v. Alliance One Receivables Mgmt., Inc., 2017 WL 2634653 (E.D.N.Y. June 19, 2016) (no need to plead facts showing an injury beyond the statutory violation itself). *But see* Martinez v. Aargon Agency, Inc., 2018 WL 4355162 (D. Nev. Sept. 12, 2018) (mixing merits of the FDCPA claim in with standing; holding that debtor lacks standing because collection letter's statement of amount owed was accurate).

1727 Hargis v. Equinox Collection Services, Inc., 2019 WL 2341662 (N.D. Okla. June 3, 2019) (consumer has standing even if he did not experience confusion about the creditor's identity); Ferris v. Transworld Systems, Inc., 2018 WL 701285 (N.D. Ill. Jan. 31, 2018) (misstatement about identity of current creditor creates risk that consumer will be deceived into paying debt he does not know or wishes to dispute); Huyghue v. Shafritz & Assoc., 2018 WL 7457827 (M.D. Fla. Apr. 12, 2018); Degrasse v. Fin. Recovery Services, Inc., 2018 WL 2214651 (E.D.N.Y. Mar. 5, 2018) (finding standing but denying claim on the merits); Peña v. IQ Data Int'l Inc., 2017 WL 11591837 (D. Ariz. 2017); Byrne v. Oregon One, Inc., 2017 WL 3568412, at *9 (D. Or. July 18, 2017) (failure to disclose current creditor created risk that consumer would pay someone who did not legitimately own the debt), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017); Long v. Fenton & McGarvey Law Firm P.S.C., 223 F. Supp. 3d 773 (S.D. Ind. 2016); Janetos v. Fulton Friedman & Gullace, L.L.P., 2016 WL 9446140 (N.D. Ill. Sept. 21, 2016) (denial of statutorily-required information, here disclosure of name of creditor, is concrete harm as a matter of law). *See also* Heisler v. Convergent Healthcare Recoveries, Inc., 2020 WL 1249481 (E.D. Wis. Mar. 16, 2020) (where alleged injury is deprivation of substantive information, must still allege actual injury, but opening letter, reading parts of it, and being left unsure as to whom to pay and to whom this

- Make the required disclosures accurately, clearly, and without omissions;[1728] or
- State accurately the steps the consumer must take to dispute the debt, such as whether the dispute must be in writing.[1729]

However, in 2019, in *Casillas v. Madison Avenue Assoc., Inc.*,[1730] the Seventh Circuit held that violation of an FDCPA disclosure requirement—the failure to specify that a section 1692g dispute must be in writing in order to trigger the collector's duties—did not create standing in and of itself. The court relied heavily on a non-FDCPA decision[1731] in which it held that a plaintiff cannot satisfy the injury-in-fact element of standing simply by alleging that the defendant violated a disclosure provision of a consumer protection statute. It further concluded that the plaintiff had not alleged any other concrete harm. The plaintiff had not alleged that she read the disclosure, had tried to dispute the debt, had even considered contacting the collector, or had any doubt about whether she owed the debt. Even though the notice might create a materially greater risk that an unsophisticated consumer would fall victim to abusive debt collection practices, it did not create such a risk for her, so the court concluded that she lacked standing. The *Casillas* opinion was written by Justice Barrett when she was on the Seventh Circuit, and the Supreme Court cites it with approval three times in *Ramirez*.[1732]

Two years later, in *Smith v. GC Services L.P.*,[1733] the Seventh Circuit held more broadly that a that a consumer did not have standing to bring suit regarding a confusing FDCPA § 1692g notice unless the notice's lack of clarity led her to take a detrimental step, such as paying money she did not owe. The consumer had alleged that the notice failed to specify what must be in writing.

In addition, the Eleventh Circuit held, in an unpublished decision, that a debtor did not have standing to litigate a claim regarding a letter that overshadowed the validation notice in an earlier letter.[1734] The court relied on the fact that the debtor had not alleged any harm other than confusion.

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debt related is sufficient); Bell v. Adler Wallach & Assoc., Inc., 2016 WL 11583377 (W.D. Tex. Sept. 15, 2016) (finding standing, but without discussing this particular claim).

Note that the Illinois, Indiana, and Wisconsin district court decisions cited in this note predate *Smith v. GC Services L.P.*, ___ F.3d ___, 2021 WL 210948 (7th Cir. Jan. 21, 2021), and so do not take it into account.

1728 Rhee v. Client Services, Inc., 2020 WL 4188161 (D.N.J. July 21, 2020) (finding standing to assert claim that validation notice was overshadowed); Oloko v. Receivable Recovery Services, L.L.C., 2019 WL 3889587 (N.D. Ill. Aug. 19, 2019) (claim that collection letter sent during 30-day validation period, demanding immediate payment, overshadowed validation notice involves inaccurate information; plaintiff has standing); Untershine v. Encore Receivable Mgmt., Inc., 2019 WL 3766564, at *3 (E.D. Wis. Aug. 9, 2019) (finding standing where collection letter allegedly overshadowed validation notice by inviting consumer to call if payment had already been made); Martin v. Trott Law, P.C., 265 F. Supp. 3d 731 (E.D. Mich. 2017) (holding that consumer has standing to assert several claims, one of which alleged that debt collection letters contained material that overshadowed dispute rights); Byrne v. Oregon One, Inc., 2017 WL 3568412 (D. Or. July 18, 2017) (finding standing in case alleging overshadowing and failure to disclose that dispute must be in writing), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017); Matute v. A.A. Action Collection Co., 2017 WL 2573714 (D.N.J. June 13, 2017) (finding standing where plaintiff alleged that defendant mailed collection letters that did not comply with § 1692g); Reed v. Receivable Recovery Services, L.L.C., 2017 WL 1399597 (E.D. La. Apr. 19, 2017) (finding standing; claims include failure to make disclosures required by § 1692g), *aff'd*, 706 Fed. Appx. 239 (5th Cir. 2017); Allah-Mensah v. Law Office of Patrick M. Connelly, P.C., 2016 WL 6803775 (D. Md. Nov. 17, 2016) (misstatement of § 1692g rights—here, the extent to which debt will be assumed valid if consumer does not contest it—is concrete, especially in the context of this letter, which stresses the negative consequences such as garnishment that flow from a valid debt; noting at *8 that this violation "presents a material risk that the consumer would be misled into believing that the consumer has no right to challenge the debt after thirty days"); Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467 (N.D. Ill. July 11, 2016) (consumer has standing to assert claim that other material in collection letter overshadowed validation notice); Balke v. Alliance One Receivables Mgmt., Inc., 2017 WL 2634653 (E.D.N.Y. June 19, 2016) (no need to plead facts showing an injury beyond the statutory violation itself, here overshadowing of notice of right to dispute the debt).

Note that the Illinois and Wisconsin district court decisions cited in this note predate *Smith v. GC Services L.P.*, ___ F.3d ___, 2021 WL 210948 (7th Cir. Jan. 21, 2021), so do not take it into account.

1729 Macy v. GC Services L.P., 897 F.3d 747 (6th Cir. 2018) (finding standing; failure of § 1692g notice to specify that dispute must be in writing creates risk of unintentional waiver of FDCPA's debt validation rights); Hackler v. Tolteca Enters., Inc., 2019 WL 7759523, at *2 (W.D. Tex. Sept. 9, 2019); Hargis v. Equinox Collection Services, Inc., 2019 WL 2341662 (N.D. Okla. June 3, 2019) (right to dispute a debt is the most fundamental of those set forth in § 1692g(a); failure to provide accurate information about how to do so creates risk that consumers will forgo disputing the debt and lose important protections); Kausar v. G.C. Services L.P., 2017 WL 5175596 (D.N.J. Nov. 8, 2017); Byrne v. Oregon One, Inc., 2017 WL 3568412 (D. Or. July 18, 2017) (failure to disclose that dispute must be in writing created risk that consumer would dispute debt by phone, which would not trigger collector's statutory duties to verify debt and cease collection), *adopted*, 2017 WL 3568398 (D. Or. Aug. 16, 2017); Schweer v. HOVG, L.L.C., 2017 WL 2906504 (M.D. Pa. July 7, 2017) (letter advised consumer to call to dispute the debt, overshadowing the § 1692g notice); Jones v. Advanced Bur. of Collections, L.L.P., 317 F.R.D. 284, 289 n.2 (M.D. Ga. 2016) (finding standing for claim that § 1692g notice failed to indicate that request for verification must be in writing); Dickens v. GC Services L.P., 2016 WL 3917530 (M.D. Fla. July 20, 2016) (failure to state that dispute must be in writing to trigger collector's duty to verify debt), *later op. after remand*, 336 F. Supp. 3d 1369 (M.D. Fla. 2018) (reiterating conclusion that debtor has standing). *See also* Kimble v. W. Ray Jamieson, P.C., 2018 WL 814225 (W.D. Tenn. Feb. 9, 2018) (failure to specify that dispute must be in writing in order to trigger collector's duty of verification, as required by § 1692g(a)(4), creates material risk of harm, so plaintiff has standing, but collector's allegedly false statement that dispute must be in writing to prevent collector from assuming that debt is valid does not cause concrete injury where collector will honor written or oral disputes).

1730 926 F.3d 329 (7th Cir. 2019) (Barrett, J.).

1731 Groshek v. Time Warner Cable, Inc., 865 F.3d 884 (7th Cir. 2017).

1732 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2203, 2205, 2214 ___ L. Ed. 2d ___ (2021).

1733 ___ F.3d ___, 2021 WL 210948 (7th Cir. Jan. 21, 2021). Accord Markakos v. Medicredit, Inc., 997 F.3d 778 (7th Cir. 2021) (confusion and aggravation because § 1692g notices letters stated inconsistent amounts due is not concrete harm).

1734 Cooper v. Atlantic Credit & Fin. Inc., 822 Fed. Appx. 951 (11th Cir. 2020).

A number of lower courts likewise held, prior to *Ramirez*, that consumers did not have standing to raise claims regarding FDCPA § 1692g's disclosure requirement unless they could show some concrete harm beyond the non-disclosure or misleading disclosure itself.[1735]

11.15.5.2.3 Article III standing for violation of FDCPA § 1692g's disclosure requirements after Ramirez

The Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*[1736] appears to reject some of the theories on which decisions relied to find Article III standing for violation of FDCPA § 1692g's disclosure requirements. First, although it appears to be *dicta* since the Court held that there was insufficient proof of a risk of harm in the first place, the majority opinion states that a risk of harm can be a basis for standing only for a suit seeking prospective relief such as an injunction.[1737] Second, it rejects the theory that a violation of a format requirement for a disclosure can be a concrete injury in and of itself: some "downstream consequences" must be alleged and proven.[1738] It also suggests that a denial of information is a concrete injury only if it is required by a sunshine law.[1739] In addition, *Ramirez* throws the role of Congress into doubt. While the decision states that courts "must give due respect" to Congress's judgment, it goes on to disregard Congress's creation of rights under the FCRA and a cause of action to enforce them.[1740] The opinion gives far greater weight to whether the harm alleged bears a close relationship to a harm made actionable under common law.

Ramirez is particularly significant for cases involving violation of FDCPA § 1692g's disclosure requirements because it cites the Seventh Circuit's 2019 decision in in *Casillas v. Madison Avenue Assoc., Inc.*[1741] three times with approval. Courts may view this as an implicit adoption of *Casillas'* holding that a federal court has Article III jurisdiction over a claimed violation of a FDCPA § 1692g disclosure requirement only if the violation caused the plaintiff some particular harm beyond the violation itself.[1742] However, as discussed in

1735 *See, e.g.*, Cooper v. Atlantic Credit & Fin. Inc., 822 Fed. Appx. 951 (11th Cir. 2020) (confusion caused by letter that contradicted and overshadowed validation notice is insufficient without any allegation of possible financial or legal consequences); Sevela v. Kozeny & McCubbin, L.C., 2020 WL 469970 (D. Neb. Jan. 28, 2020) (no standing for claim that § 1692g notice was unclear about who would assume debt to be valid; plaintiff did not plead any particular harm or risk of harm); Pozzuolo v. Portfolio Recovery Assoc., 371 F. Supp. 3d 217 (E.D. Pa. 2019) (plaintiff did not suffer concrete harm from letter that wrongly stated that he could dispute debt by calling collector, where he merely scanned over letter before forwarding it to counsel, neither wrote nor called collector, and did not dispute debt and had no reason to do so, as he acknowledges debt and amount); Gause v. Med. Bus. Consultants, Inc., 424 F. Supp. 3d 1175 (M.D. Fla. Dec. 12, 2019) (denying standing to bring overshadowing claim where debtor did not allege that debt was incorrect or that he intended to dispute it or request verification, or would have done so but for errors in the notice); Johnson v. Wetsch Abbott Osborn Van Vliet P.L.C., 2019 WL 7666751 (S.D. Iowa Mar. 21, 2019) (§ 1692g notice's slightly inconsistent timelines, creating minor uncertainty about how cure period related to validation period, did not cause concrete harm); Walker v. Lamb, 2019 WL 542328, at *3–5 (W.D. Ark. Feb. 11, 2019) (no standing where plaintiff's response to motion to dismiss asserted that she suffered confusion and stress, but she had not pleaded any harm in her complaint other than informational injury); Tyler v. Timothy E. Baxter & Assoc., 2018 WL 5078373 (E.D. Mich. Oct. 18, 2018) (no standing where collection letter left name of creditor blank, but collector sent corrected letter 19 days later, and plaintiff alleged no confusion, anxiety, risk of overpayment, or other harm); Adams v. Universal Fid., L.P., 2018 WL 4030639 (S.D. Tex. Aug. 23, 2018) (consumer who admits she knows origin of debt does not have standing to bring claim about collector's failure to identify current creditor); Sebestyen v. Leikin, Ingber & Winters, P.C., 2018 WL 3036342 (E.D. Mich. June 19, 2018) (finding no standing where plaintiff did not allege that minor deviation from language required by § 1692g confused her, caused her anxiety, or created any other concrete or imminent injury); Jackson v. Abendroth & Russell, P.C., 2017 F. Supp. 3d 945 (S.D. Iowa 2016) (finding no standing for including language that overshadowed the § 1692g notice and failing to disclose the means of requesting verification of original creditor's identity, where plaintiff conceded that the creditor identified in the notice was correct and he was not planning to dispute the debt); Abercrombie v. Rogers, Carter, & Payne, 2016 WL 8201965 (W.D. La. Nov. 22, 2016) (misstatement about whether writing is required to dispute debt, and about extent to which debt will be presumed valid if debtor does not dispute it, is procedural right, designed to buttress substantive right to be free from debt collection abuse, so plaintiff must allege additional facts showing that errors materially threatened his ability to contest erroneous debt; no standing where he did not contest debt or intend to dispute it), *adopted*, 2017 WL 489426 (W.D. La. Feb. 6, 2017); Perry v. Columbia Recovery Group, L.L.C., 2016 WL 6094821 (W.D. Wash. Oct. 19, 2016) (misstatement of deadline in § 1692g notice did not cause concrete harm where plaintiff did not allege that he was confused, that debt was incorrect, or that he intended to dispute it; denial of information is not concrete harm in itself). *See also* Beane v. RPW Legal Services, P.L.L.C., 378 F. Supp. 3d 948 (W.D. Wash. 2019) (consumer did not have standing for claim that validation notice was sent 27 days rather than five days after the initial contact or for overshadowing claim, where these violations did not appear to have prejudiced the consumer or impeded purpose of validation notice to avoid collection attempts against wrong person or for sums not owed); Yeager v. Ocwen Loan Servicing, L.L.C., 237 F. Supp. 3d 1211 (M.D. Ala. 2017) (holding that failure to include § 1692g disclosures in initial letter does not entail degree of risk sufficient to establish concreteness where collector provided information thirteen days later, but noting in footnote that longer delay would present different question). *See also* Garrett v. Fin. Bus. & Consumer Solutions, Inc., 2021 WL 3726199, at *2–3 (D. Colo. Aug. 23, 2021) (mag.; post-*Ramirez* decision; denying standing over § 1692 claim on ground that rights it confers are procedural and particular plaintiff alleged no cognizable harm).

1736 ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021).

1737 *See* § 11.15.2.2.6, *supra*.

1738 *See* § 11.15.2.2.7, *supra*.

1739 *See* § 11.15.2.2.7, 11.15.5.1, *supra*.

1740 *See* Neal v. Adams, 2021 WL 4466392 (E.D. Ark. Sept. 29, 2021) (concluding that, after *Ramirez*, Congress's creation of a private cause of action for failure to send validation notice is insufficient to establish standing). *See generally* § 11.15.2.2.4, *supra*.

1741 926 F.3d 329 (7th Cir. 2019) (Barrett, J.).

1742 *See, e.g.*, Cheatham v. Adams, 2021 WL 4313961 (E.D. Ark. Sept. 22, 2021) (post-*Ramirez* decision; citing Casillas's emphasis on debtor's failure to allege that he would have used the § 1641g information if it had been provided); Kale v. Procollect, Inc., 2021 WL 2784556 (W.D. Tenn. July 2, 2021) (post-*Ramirez* decision; risk of harm due to failure to state amount of debt, in violation of § 1692g, is not concrete injury; decision does not address any other grounds for standing); Garrett v. Fin. Bus. & Consumer Solutions, Inc., 2021 WL 3726199, at *2–3 (D. Colo. Aug. 23, 2021) (mag.; post-*Ramirez* decision; denying standing

§ 11.15.2.2.7, *supra*, while some of *Ramirez* 's statements are broad, the Court was only addressing a violation that the Court has characterized as procedural, and *Casillas* decision carefully distinguishes cases involving an obligation to provide substantive information.

It may be possible to show "downstream" harm in some FDCPA § 1692g disclosure cases. For example, if the required notice was omitted altogether, a consumer who would have read the notice and would have exercised the right to dispute the debt may have standing, because loss of the thirty-day pause in collection activity that would have resulted is clearly a substantive right.[1743] A Seventh Circuit decision cited favorably by the Supreme Court in *Ramirez* holds that the lost opportunity to obtain a benefit because of the defendant's failure to provide information is a concrete injury,[1744] and the pause is certainly a benefit.

A post-*Ramirez* decision holds that a consumer suffered concrete harm when she paid for a postage stamp to mail a dispute letter because of the collector's misleading statement about whether disputes could be oral.[1745] Standing might also be found if the collector provided the notice, but it was so defective that it actually misled the consumer, as there is some support for the view that confusion or misunderstanding is a concrete harm.[1746] However, an argument that Article III is satisfied because a disclosure confused the consumer should be reserved only for cases where the disclosure is about a topic that would strike an ordinary person as important, it is objectively confusing, and the consumer can convincingly describe the confusion it caused. The case for standing will be stronger if the consumer acted or failed to act because of the confusion the notice caused. Format violations, unless extreme, are unlikely to be sufficient.

Section 11.15.3.4, *supra*, lists many other kinds of harm that may be caused by false information or nondisclosure, with citations to decisions holding that these harms are concrete.

11.15.5.3 Whether a Collector's Failure to Perform its Duties upon Receipt of a Dispute is Concrete Harm

FDCPA § 1692g requires collectors not only to make various disclosures to consumers, but also to perform affirmative duties upon receipt of a dispute. After the consumer submits a written dispute or request for the name and address of the original creditor, the collector must comply with the request, and must cease collection until it does so.[1747] Prior to *Ramirez*, a number of decisions held that a consumer suffered concrete harm if the collector failed to perform these duties.[1748]

Ramirez does not appear to undercut these decisions. Continued collection activities may result in monetary harm due to wage garnishment, seizure of other assets, or payment by the consumer.[1749] Collection activities are almost certain to amount to invasion of privacy, and are very likely to cause anxiety and emotional distress. As discussed elsewhere in this section,[1750] these harms are also likely to be considered concrete after *Ramirez*.

In the first Circuit-level decision on this question since *Ramirez*, *Lupia v. Medicredit, Inc.*,[1751] the Tenth Circuit held that, because of the close relationship to the common law tort of intrusion upon seclusion, a consumer had Article III standing to litigate a claim that a collector violated FDCPA § 1692g by leaving a voicemail message for a consumer after she had disputed the debt and asked that collection contacts cease. The

over § 1692 claim on ground that rights it confers are procedural and particular plaintiff alleged no cognizable harm).

1743 Thome v. Sayer Law Group, 2021 WL 4690829 (N.D. Iowa Oct. 7, 2021) (post-*Ramirez* decision; harms made actionable by misrepresentation torts stem from inequity of knowledge; finding standing where plaintiff would have disputed debt but for § 1692g notice's statement that she had only 14 days to pay the balance); Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016) (pointing out that denial of § 1692g rights deprives debtor not only of information, but also of the ability to force a thirty-day cessation of collection activity: "[U]nder the FDCPA, the right to information is not merely an end unto itself, but it actually permits the debtor to trigger (by disputing the debt in writing) a moratorium on collection efforts until the verification information is mailed to the debtor. This further demonstrates the concreteness of the injury arising from a § 1692g violation. . . . The concrete harm, then, is the loss of the right to verification, which is enough to satisfy the concreteness requirement of Article III standing."). *See also* Ghanta v. Immediate Credit Recovery, Inc., 2017 WL 1423597, at *4 (N.D. Tex. Apr. 8, 2017) (collector harmed consumer by reinitiating collection activity before mailing him a proper response to his dispute). But cf. Cheatham v. Adams, 2021 WL 4313961 (E.D. Ark. Sept. 22, 2021) (post-*Ramirez* decision; loss of opportunity to dispute debt and obtain pause in collection activity not concrete injury where complaint did not allege that debtor would have exercised these rights); Neal v. Adams, 2021 WL 4466392 (E.D. Ark. Sept. 29, 2021) (post-*Ramirez* decision; failure to send validation notice caused no concrete harm where plaintiff already knew the information it would have disclosed). *See generally* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2213 ___ L. Ed. 2d ___ (2021) (citing fact that plaintiffs did not show that they "would have tried to correct their credit files . . . had they been sent the information in the proper format" in support of conclusion that they lacked standing).

1744 Casillas v. Madison Ave. Assoc., Inc., 926 F.3d 329, 334 (7th Cir. 2019) (Barrett, J.).

1745 Foley v. Mary Washington Healthcare Services, Inc., 2021 WL 3193177 (E.D. Va. July 28, 2021).

1746 *See* §§ 11.15.3.4, 11.15.5.4, *supra*.

1747 15 U.S.C. § 1692g(b).

1748 Budewitz v. Daubert Law Firm, S.C., 2020 WL 5775428 (W.D. Wis. Sept. 28, 2020) (finding standing where collector garnished consumer's wages within less than 30 days after she disputed debt and before sending verification to her); Livingstone v. Haddon Point Manager, L.L.C., 2020 WL 902218 (D.N.J. Feb. 25, 2020) (failure to suspend collection activity until verification of debt is sent); Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017); Ghanta v. Immediate Credit Recovery, Inc., 2017 WL 1423597, at *4 (N.D. Tex. Apr. 8, 2017) (collector's failure to deliver verification of debt by mail, and its re-initiation of collection activities without doing so, is concrete harm); Bartl v. Enhanced Recovery Co., 2017 WL 1740152 (D. Minn. May 3, 2017).

1749 *See* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021) (monetary harm is concrete injury).

1750 *See* § 11.15.3.4, *supra* (emotional distress), §§ 11.15.7, 11.15.8, *infra* (privacy).

1751 ___ F.4th ___, 2021 WL 3627103 (10th Cir. Aug. 17, 2021) (finding standing for claims under §§ 1692g and 1692c(c)).

court stressed that, whether or not this contact intruded to the degree required by common law, it was the same kind of harm recognized at common law—intrusion into a plaintiff's peace and quiet. As additional support for its conclusion that the plaintiff's claim satisfied Article III, the court cited Congress's judgment that unwanted debt collection contacts were abusive and enacted the FDCPA to protect against them.

If the violation is failure to provide the requested verification of the debt, it may also be worth exploring whether this violation has a close relationship to a suit for an accounting, an action long recognized in English and United States courts.

11.15.6 Article III Standing for Claims Involving Unwanted, Inconvenient, or Repeated Calls or Other Contacts with Debtor

The FDCPA places four restrictions on contacts with consumers at inconvenient times or places.[1752] Section 1692c(a)(1) prohibits debt collector calls at times and places that are inconvenient for the consumer. Section 1692c(a)(3) prohibits debt collector calls to consumers at their workplaces if such calls are prohibited. Section 1692c(c) allows the consumer to stop most future debt collector phone calls and letters altogether. And section 1692d(5) prohibits repeated calls with the intent to annoy or abuse any person. These four FDCPA provisions combine to protect the consumer's individual privacy and personal relationships. Consumers often complain to the CFPB about violations of these provisions.[1753]

A consumer who suffers a violation of one of these four provisions might experience specific harms, such as mental distress, sleeplessness, or anxiety, that would constitute injury in fact.[1754] Annoyance, waste of time, and embarrassment may also be concrete injuries that may result from these violations.[1755] Some of these violations also create a risk of tangible injuries such as loss of a job.

Where the injury is intangible, one of the approaches *Spokeo* approves to establish that the injury is concrete is to show that it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[1756] This standard is readily met by these four restrictions on contact with the debtor.[1757] The harm they address is closely analogous to that made actionable by the branch of the common law tort of invasion of privacy that protects against intrusion upon seclusion.[1758] The "core" of the privacy right to seclusion "is the offensive prying into the private domain of another . . . [such as] persistent and unwanted telephone calls."[1759] A violation of FDCPA §§ 1692c(a)(1), 1692c(a)(3), 1692c(c), or 1692d(5) is an intrusion into the consumer's right to seclusion at night, at work, or at home.

The Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez* should remove all doubt that intrusion upon seclusion is a concrete harm that satisfies Article III. The Court stated: "Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion."[1760] To illustrate its point that intrusion on seclusion is a concrete injury, the Court cited *Gadelhak v. AT&T Services, Inc.*,[1761] a TCPA decision written by Justice Barrett when she was on the Seventh Circuit that holds that five unwanted text messages amounted to a concrete injury. A wealth of other decisions under the Telephone Consumer Protection Act similarly hold that receipt of unwanted calls is closely related to the harm made actionable by the common law claim of intrusion upon seclusion, so amounts to concrete harm.[1762]

The Court's explicit approval of *Gadelhak* should also suffice to rebut any defense argument that the court lacks standing because the elements of the plaintiff's FDCPA claim do not exactly match the elements of the common law claim.[1763] *Gadelhak* holds:

> A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such

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1752 *See* §§ 5.4, 6.7, *supra*.

1753 *See* Consumer Fin. Protection Bur., Annual Report on the Fair Debt Collection Practices Act 18–20 (Mar. 2016).

754 *See* §§ 2.6, 11.15.3.4, *supra*.

755 *See, e.g.*, Swike v. Med-1 Solutions, L.L.C., 2017 WL 4099307 (S.D. Ind. Sept. 15, 2017) (recognizing waste of time and annoyance as concrete injury; debtor invoked her rights under § 1692c(c), yet collector persisted in calls and letters). *See generally* § 11.15.3.4, *supra* (types of harm that FDCPA violations may cause).

'56 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

'57 *See, e.g.*, Lupia v. Medicredit, Inc., 8 F.4th 1184 (10th Cir. 2021) (post-*Ramirez* decision; citing both Congress's judgment and analogy to intrusion upon seclusion; finding standing where collector called plaintiff and left voicemail message after she disputed debt and asked that contacts cease); Schultz v. Southwest Credit Sys., L.P., 2017 WL 11457912, at *6 (N.D. Iowa Oct. 13, 2017) (receipt of letter after instructing collection to cease communication is injury; citing both Congress's judgment and analogy to common law invasion of privacy claim).

1758 *See* § 11.15.8 (tort of invasion of privacy as analog to other FDCPA claims), § 15.3.2 (nature of this tort), *infra*; National Consumer Law Center, Federal Deception Law § 6.10.3.2.1 (3d ed. 2017), *updated at* www.nclc.org/library (harm caused by unwanted calls and texts is analogous to that made actionable by tort of invasion of privacy, so consumer has standing to bring Telephone Consumer Protection Act claim).

1759 Lovgren v. Citizens First Nat'l Bank of Princeton, 534 N.E.2d 987, 989 (Ill. 1989) (citing Restatement (Second) of Torts § 652B, comments a, b, at 378–379 (1977); W. Prosser & W. Keeton, Torts § 117, at 854–856 (5th ed. 1984)).

1760 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

1761 950 F.3d 458 (7th Cir. 2020).

1762 *See* National Consumer Law Center, Federal Deception Law § 6.10.2.2.3 (3d ed. 2017), *updated at* www.nclc.org/library.

1763 *See* National Consumer Law Center, Federal Deception Law § 6.10 (3d ed. 2017), *updated at* www.nclc.org/library (more detailed discussion of this issue); Restatement (Second) of Torts § 652 (setting forth elements), §§ 652F, 652G (privileges) (1977) (elements of common law claim for intrusion upon seclusion); § 15.3.2, *infra* (discussing common law claim for intrusion upon seclusion).

> texts nevertheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable.[1764]

Ramirez confirms that while the federal claim must include the "fundamental requirements" of the analogous common law tort, Article III "does not require an exact duplicate in American history and tradition."[1765]

The fact that the right to privacy is protected under the Constitution[1766] can buttress the claim that consumers have Article III standing to litigate claims involving unwanted debt collection contacts. The Supreme Court's decision in *Ramirez* points out that "harms specified by the Constitution" are one of the types of intangible harms that can be concrete.[1767]

Spokeo also summarized a second way that an intangible injury may meet the requirement of concreteness: Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."[1768] Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[1769] While the Court's 2021 decision in *Ramirez*[1770] throws the role of Congress into some uncertainty, it is still worthwhile to stress Congress's judgment that a violation of these provisions is an actionable harm. Congress enacted FDCPA §§ 1692c(a)(1), 1692c(a)(3), 1692c(c), and 1692d(5) for the purpose of protecting consumers' privacy and relationships. Congress expressly stated in FDCPA § 1692 its findings and declaration of purpose that "(a) . . . Abusive debt collection practices contribute . . . to the loss of jobs, and to the invasions of individual privacy . . . [and] . . . (b) Existing laws and procedures for redressing these injuries are inadequate."[1771] While *Spokeo* added that an allegation of deprivation of a mere *procedural* right created by Congress would not necessarily meet the concreteness requirement without an allegation of additional harm, these four provisions create substantive prohibitions—they affirmatively prohibit collectors from taking actions that would harm consumers.[1772]

In *Lupia v. Medicredit, Inc.*,[1773] the first Circuit-level decision on this question since *Ramirez*, the Tenth Circuit held that the close relationship to the common law tort of intrusion upon seclusion provided a satisfactory basis for Article III jurisdiction over a claim that a collector left a voicemail message for a consumer after she had disputed the debt and asked that collection contacts cease. It stressed that, whether or not this contact intruded to the degree required by common law, it was the same kind of harm recognized at common law—intrusion into a plaintiff's peace and quiet. As additional support for its conclusion that the plaintiff's claim satisfied Article III, the court cited Congress's judgment that unwanted debt collection contacts were abusive and enacted the FDCPA to protect against them.

A number of courts have also held that the emotional distress that unwanted contacts cause is a concrete injury.[1774] Section 11.15.3.4, *supra*, lists many other kinds of harm that may be caused by contacts at inconvenient times or places, with citations to decisions holding that these harms are concrete.

11.15.7 Article III Standing for Claims Involving Third-Party Contacts or Public Disclosure of Information About a Debt

Many provisions of the FDCPA protect the consumer's privacy and relationships from harm by prohibiting third-party contacts or disclosure of information about the debt in a public way. FDCPA § 1692c(b) generally prohibits debt collector calls to friends, parents, children, other relatives, neighbors,

1764 Gadelhak v. AT&T Services, Inc., 950 F.3d 458, 463 (7th Cir. 2020) (Barrett, J.). *See generally* § 11.15.2.2.3, *supra*.

1765 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021). *Accord* Lupia v. Medicredit, Inc., 8 F.4th 1184 (10th Cir. 2021) (post-*Ramirez* decision; citing *Gadelhak*; a single unwanted voicemail message from collector is concrete injury because of close relationship to common law tort of intrusion upon seclusion; question is whether this is same kind of harm, not whether call intruded to degree required at common law).

1766 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); Frisby v. Schultz, 487 U.S. 474, 484–485, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society"; "individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom"); Winston v. Lee, 470 U.S. 753, 758, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (characterizing Fourth Amendment as protecting expectations of privacy, "the most comprehensive of rights and the right most valued by civilized men"); Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); Barrett v. Vivint, Inc., 2020 WL 2558231, at *3 (D. Utah May 20, 2020); Mey v. Venture Data, L.L.C., 245 F. Supp. 3d 771, 777 (N.D. W. Va. 2017).

1767 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021).

1768 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

1769 *Id.* at 1549 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (J. Kennedy, concurring)). *See, e.g.*, Wise v. Credit Control Services, 2018 WL 5112983, at *3 (N.D. Ill. Oct. 19, 2018) (holding Congress's judgment to be sufficient basis for standing to bring claim for sending collection letter after cease-contact notice).

1770 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021). *See* § 11.15.2.2.4, *supra*.

1771 *See also* S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra* ("this legislation strongly protects the consumer's right to privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons"; the report continues by describing the narrow circumstances in which third party contacts are permitted by the Act).

1772 *See, e.g.*, Gibson v. US Collections W. Inc., 2017 WL 1833597, at *3 n.4 (D. Ariz. May 8, 2017) (contacting consumer in violation of cease-contact letter is not procedural violation; plaintiff has standing).

1773 ___ F.4th ___, 2021 WL 3627103 (10th Cir. Aug. 17, 2021) (finding standing for claims under §§ 1692g and 1692c(c)).

1774 Decker v. Receivables Performance Mgmt., L.L.C., 2019 WL 1112256 (N.D. Ill. Mar. 11, 2019) (finding standing where collector made frequent calls despite consumer's request that the calls stop, and consumer alleged emotional distress).

and employers. FDCPA § 1692d(3) prohibits the publication of shame lists of consumers alleged to be refusing to pay their debts, and section 1692d(4) prohibits advertising debts for sale in order to coerce their payment. FDCPA § 1692f(8) prohibits debt collectors from placing debt collection information on postcards and envelopes. FDCPA § 1692b provides a narrow exception to the prohibition on third-party contact by allowing limited contacts that are for the sole purpose of obtaining the consumer's location information. These restrictions combine to provide significant protection of consumers' privacy, reputation, friendships, and familial and work relationships.[1775]

One of the ways that *Spokeo* identifies to establish that an intangible injury is concrete is to evaluate whether it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[1776] There is little question that a violation of these protections is a concrete harm under this standard, as all of them involve publication of derogatory and embarrassing material to third parties. In *Transunion L.L.C. v. Ramirez*, the Supreme Court held that consumers had Article III standing to sue a credit reporting agency under the FCRA for disseminating deceptive information in its files to third parties. The Court held that these consumers did not need to show any other harm, because the harm they suffered—injury to reputation—is closely related to that made actionable by common law defamation torts.[1777] The Court reached this conclusion even though the misinformation in the consumer's credit file was arguably only deceptive, rather than false, as required for a common law defamation claim. On the other hand, the Court held that consumers did not have standing if the deceptive information had not been disseminated to third parties unless they showed that they had suffered a concrete harm in some other way. It held that, without publication to third parties, the FCRA claim lacked one of the "fundamental requirements" of the common law claim.[1778] The FDCPA provisions that prohibit debt collectors from advertising debts for sale or otherwise revealing information about the debt to third parties have the same close relationship to defamation torts.

The common law invasion of privacy torts provide a second close common law analog to these FDCPA protections.[1779] Invasion of privacy is an intangible harm that is recognized by the common law in almost all states.[1780] Violations of FDCPA §§ 1692d(3), 1692d(4), and 1692f(8), which involve publication of information about the debt, are analogous to the branch of the common law invasion of privacy tort that protects against public disclosure of private facts.[1781] In *Ramirez*, the Supreme Court singled out "disclosure of private information" as a type of injury that is concrete.[1782] If the information that is disclosed is inaccurate, the claim may also have a close relationship to the branch of invasion of privacy tort that allows suit for holding a person up to a false light.[1783] Many courts, including the Second, Third, Fourth, Eighth, Ninth, and Eleventh Circuits,[1784] have held since *Spokeo* that the invasion of privacy in other contexts is a concrete injury.

1775 In addition, FDCPA § 1692c(a)(1), which prohibits calls at inconvenient times and places, FDCPA § 1692c(a)(3), which restricts calls to consumers at their workplaces, FDCPA § 1692c(c), which allows the consumer to stop debt collector contacts, and FDCPA § 1692d(5), which restricts repeat calls, protect the consumer's right to seclusion, an interest that is tightly tied to protecting the consumer's privacy and relationships. These provisions are discussed in § 5.4, *supra*, and Article III standing to assert them is discussed in § 11.15.7, *supra*.

1776 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

1777 *See* § 15.5, *infra* (discussion of defamation torts).

1778 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2209–2210 n.6, ___ L. Ed. 2d ___ (2021). *See* § 11.15.2.2, *supra*.

1779 *See, e.g.*, Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021) (post-*Ramirez* decision; finding standing for claim based on collector's disclosure of information about debt to mailing vendor because of close relationship to common law tort of public disclosure of private facts; also noting that Congress's findings express address this very harm); DiNaples v. MRS BPO, Inc., 934 F.3d 275 (3d Cir. 2019) (disclosure of consumer's account number through easily scannable barcode is concrete injury because of its close relationship to common law invasion of privacy); St. Pierre v. Retrieval-Masters Creditors Bur., Inc., 898 F.3d 351 (3d Cir. 2018) (disclosure of debtor's account number implicates a core concern animating the FDCPA—invasion of privacy—so is closely related to harm that has traditionally been regarded as providing the basis for a lawsuit in English and American courts); Thomas v. Unifin, Inc., 2021 WL 3709184 (N.D. Ill. Aug. 20, 2021) (post-*Ramirez* decision; collector's disclosure of information about debt to third-party mailing vendor is concrete injury because of close relationship to common law tort of public disclosure of private facts); Keller v. Northstar Location Services, 2021 WL 3709183 (N.D. Ill. Aug. 20, 2021) (post-*Ramirez* decision; finding Art. III standing over claim that collector wrongfully disclosed information about debt to third party mailing vendor, because of close relationship to common law tort of public disclosure of private facts); Brown v. Asset Acceptance, L.L.C., 2018 WL 6011934 (W.D. Mich. Nov. 15, 2018); Stever v. Harrison, 2017 WL 2869505 (D.N.J. July 5, 2017) (noting that privacy is protected at common law, and that the disclosure of personal information is the very harm that Congress intended to prevent). *See generally* § 11.15.7, *supra*; National Consumer Law Center, Federal Deception Law § 6.10.3.2 (3d ed. 2017), *updated at* www.nclc.org/library (close relationship of harm caused by unwanted robocalls to tort of invasion of privacy).

1780 Eli A. Meltz, *No Harm, No Foul? Attempted Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 Fordham L. Rev. 3431, 3440 (May 2015) (state-by-state survey; "Currently, the vast majority of states recognize the intrusion strand of invasion of privacy either under common law or by statute"); Restatement (Second) of Torts §§ 652B (1977). *See generally* § 2.6.2.2.5, *supra* (cases awarding damages for violation of consumer's privacy and interference with personal relationships), § 15.3, *infra* (tort claims related to invasion of privacy in debt collection cases).

1781 *See* § 15.3.4, *infra*.

1782 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204, ___ L. Ed. 2d ___ (2021). *See also* Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016, 1023 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021) (post-*Ramirez* decision; disclosure of private information to mail vendor is concrete injury).

1783 *See* § 15.3.3, *infra*.

1784 *See, e.g.*, Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1305–1306 (11th Cir. 2020) (receipt of more than one telemarketing call); Cordoba v. DirecTV, L.L.C., 942 F.3d 1259 (11th Cir. 2019) (receipt of more than one unwanted telemarketing call in violation of TCPA is concrete injury); Melito v. Experian Mktg. Solutions, Inc., 923 F.3d 85, 93–94 (2d Cir. 2019) (receipt of unwanted text

An additional reason that federal courts should have Article III standing to hear claims alleging these FDCPA violations is that Congress's judgment that these violations produce injuries that are actionable in federal court. The FDCPA's strong limitations on debt collectors' third-party contacts were "extremely important" to congressional lawmakers and consumers.[1785] Congress listed "disclosing a consumer's personal affairs to friends, neighbors, or an employer" as one of the collection abuses the FDCPA was intended to address, and stated that the Act "strongly protects the consumer's right to privacy, by prohibiting a debt collector from communicating the consumer's personal affairs to third persons."[1786] Congress expressly stated in FDCPA § 1692 its findings and declaration of purpose that "(a) . . . Abusive debt collection practices contribute . . . to the loss of jobs, and to the invasions of individual privacy . . . [and] . . . (b) Existing laws and procedures for redressing these injuries are inadequate."[1787]

As the *Spokeo* majority said, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'"[1788]

While the Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*[1789] throws the weight to be given to Congress's judgment into some confusion, stressing the clarity and specificity of Congress's judgment will, at a minimum, buttress the other grounds for asserting standing.

One of the FDCPA's privacy protections is its prohibition against the use of any language or symbol on an envelope that reveals that the sender is in the debt collection business.[1790] Since *Spokeo*, several courts, including the Third and Sixth Circuits, have held that a consumer suffers concrete injury when a collector violates this prohibition, for example by sending a dunning letter in a window envelope that allows an account number (or a scannable barcode that will reveal an account number) to be seen.[1791] A post-*Ramirez* district court decision agrees that disclosure of the collector's name on an envelope is concrete harm, citing the close relationship to the common law tort of public disclosure of private information.[1792] Violation of the prohibition against communicating by post card[1793] is a concrete injury for the same reasons.[1794] These

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messages is concrete harm and no additional harm need be shown); Krakauer v. Dish Network, L.L.C., 925 F.3d 643 (4th Cir. 2019); Golan v. FreeEasts.com, 930 F.3d 950 (8th Cir. 2019) (plaintiffs who received two answering machine messages from telemarketer have standing); Heglund v. Aitkin County, 871 F.3d 572 (8th Cir. 2017); Robins v. Spokeo, Inc., 867 F.3d 1108 (9th Cir. 2017) (on remand from Supreme Court); Susinno v. Work Out World, Inc., 862 F.3d 346 (3d Cir. 2017); Eichenberger v. ESPN, Inc., 876 F.3d 979, 983 (9th Cir. 2017); Perry v. Cable News Network, Inc., 854 F.3d 1336 (11th Cir. 2017); Van Patten v. Vertical Fitness Grp., 847 F.3d. 1037, 1042–1043 (9th Cir. 2017); In re Horizon Healthcare Services Inc. Data Breach Litig., 846 F.3d 625 (3d Cir. 2017) (invasion of privacy caused by failure to protect consumers' personal information in violation of FCRA is a concrete harm; it is closely related to harm recognized at common law, and Congress's passage of the FCRA and creation of cause of action establishes that unauthorized dissemination of personal information causes an injury in and of itself); In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262 (3d Cir. 2016). *But cf.* Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019) (concluding that consumer who received just single text message lacked standing). *See generally* National Consumer Law Center, Federal Deception Law § 6.10.3.2.1 (3d ed. 2017), *updated at* www.nclc.org/library.

1785 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra*. ("[T]his legislation adopts an extremely important protection . . . it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as loss of jobs."). *See also id.* at 2 ("collection abuse takes many forms, including . . . disclosing a consumer's personal affairs to friends, neighbors, or an employer").

1786 *Id.* at 2.

1787 *See also* S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696, *and reproduced at* Appx. A.3, *infra* ("this legislation strongly protects the consumer's right to privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons"; the report continues by describing the narrow circumstances in which third party contacts are permitted by the Act).

1788 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

1789 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021). *See* § 11.15.2.2.4, *supra*.

1790 15 U.S.C. § 1692f(8).

1791 Donovan v. FirstCredit, Inc., 983 F.3d 246, 250–252 (6th Cir. 2020) (visible indications on letter that it was from debt collector causes harm closely related to that which forms basis of common law invasion of privacy claim; consumer has standing); DiNaples v. MRS BPO, Inc., 934 F.3d 275 (3d Cir. 2019) (scannable barcode); St. Pierre v. Retrieval-Masters Creditors Bur., Inc., 898 F.3d 351 (3d Cir. 2018) (finding standing; disclosure of debtor's account number implicates core concern animating FDCPA—invasion of privacy—so is closely related to harm that has traditionally been regarded as providing basis for lawsuit in English and American courts); McRobie v. Credit Protection Ass'n, 2020 WL 1181974 (E.D. Pa. Mar. 11, 2020) (finding standing to assert claim that printing on front of mailer revealed its debt collection purpose); Brown v. Asset Acceptance, L.L.C., 2018 WL 6011934 (W.D. Mich. Nov. 15, 2018); Stever v. Harrison, 2017 WL 2869505 (D.N.J. July 5, 2017) (noting that privacy is protected at common law, and that the disclosure of personal information is the very harm that Congress intended to prevent); Michael v. HOVG, L.L.C., 232 F. Supp. 3d 1229 (S.D. Fla. Jan. 10, 2017); Hartman v. Medicredit, Inc., 2016 WL 7669858, at *3 (W.D. Pa. Dec. 2016), *adopted*, 2017 WL 90383 (W.D. Pa. Jan. 10, 2017); Daubert v. NRA Group, L.L.C., 2016 WL 4245560 (M.D. Pa. Aug. 11, 2016) ("unlawful disclosure of legally protected information" is an injury-in-fact sufficient to satisfy Article III standing). *But cf.* Estate of Caruso v. Fin. Recoveries, 2017 WL 2704088 (D.N.J. June 22, 2017) (where the barcode that was visible through the window envelope did not have any personal information, scannable or otherwise, its display did not implicate any privacy concerns so there was no particularized injury).

1792 Foley v. Mary Washington Healthcare Services, Inc., 2021 WL 3193177, at *3 n.5 (E.D. Va. July 28, 2021). But cf. Lueck v. Bureaus, Inc., 2021 WL 4264368 (N.D. Ill. Sept. 20, 2021) (post-*Ramirez* decision; marking envelope "Personal and Confidential" is not a disclosure of private information, so no standing even if the statement violated section 1692f(8)).

1793 15 U.S.C. § 1692f(7).

1794 *See* McRobie v. Credit Protection Ass'n, 2020 WL 1181974 (E.D. Pa. Mar. 11, 2020) (finding standing to assert claim that mailer was

courts typically cite both the historical recognition of invasion of privacy as a cognizable harm and Congress's unequivocal intent to create a right against disclosure of personal information and make it actionable. The consumer has standing, even without showing that someone has actually viewed the private information, because it has been made accessible to the public.[1795]

In a post-*Ramirez* decision, now vacated and scheduled for rehearing *en banc*, the Eleventh Circuit upheld Article III standing over a claim that was based on a collector's disclosure of information about the debt to a mailing vendor.[1796] The court cited the close relationship to the common law tort of public disclosure of private facts, and Congress's findings that expressly addressed this very harm. Since *Ramirez*, several district courts have agreed,[1797] but other decisions disagree.[1798]

Other courts have held that a consumer has standing to pursue an FDCPA claim based on the embarrassment suffered due to a collector's publication of a non-judicial foreclosure notice that included personal information that was not required by law.[1799] Similarly, a court held that serving postjudgment execution papers on a co-worker of the debtor caused concrete injury to the debtor.[1800] A post-*Ramirez* decision holds that attorney fees and costs that consumer incurred to get confidential medical information that had been filed in state court debt collection suit reclassified as private is concrete injury.[1801]

Even though there are compelling arguments that violations of the FDCPA's protections against third-party contacts and public disclosure of information meet Article III's requirements without the need to allege additional harm, advocates should always explore and allege all the harm that the violations caused the consumer. Those allegations will demonstrate the seriousness of the case to the court, and may obviate the need to litigate the intricacies of Article III standing.

11.15.8 Article III Standing for Claims Involving Collector's Contacts with Represented Debtor

With limited exceptions, FDCPA § 1692c(a)(2) prohibits a collector from communicating with a consumer who is represented by an attorney. It recognizes the consumer's right to retain and be represented by counsel, protects consumers' relationship with their attorneys, and protects the attorney's authority to effectively represent the consumer.[1802]

The right of the represented consumer to be free of debt collector contacts is not procedural. It does not merely require collectors to follow certain procedures that might result in a benefit to a consumer, but affirmatively prohibits collectors from contacting represented consumers. This is a right that is invoked by the consumer's unilateral action of notifying the debt collector of the retention, name, and address of their attorney. But even if this right were merely procedural, its breach causes concrete harm to consumers. A contact in violation of this provision not only breaches the represented consumer's right to be free of debt collector contacts, but also harms the consumer by interfering with the attorney-client relationship and undermining the consumer attorney's authority as the consumer's representative.[1803] These harms have a close relationship to those made actionable by the common law tort of interference with contract.[1804] Claims based on a collector's contacts with a represented debtor may also have a close relationship to common law wrongful litigation torts, particularly if they occur in the context of ongoing or threatened litigation.[1805] Before the Supreme Court's 2021 decision in *Ramirez*, decisions were nearly uniform in confirming that a collector's contact with a represented debtor causes concrete harm sufficient for Article III standing.[1806] Since *Ramirez*, one

postcard).

1795 DiNaples v. MRS BPO, Inc., 934 F.3d 275, 280 (3d Cir. 2019); Stever v. Harrison, 2017 WL 2869505 (D.N.J. July 5, 2017).

1796 Hunstein v. Preferred Collection & Mgmt. Services, Inc., 17 F.4th 1016 (11th Cir. 2021), *vacated, rehearing en banc granted*, 17 F.4th 1103 (11th Cir. 2021).

1797 Liu v. Radius Global Solutions, L.L.C., 2021 WL 4167585 (N.D. Ill. Sept. 14, 2021) (denying plaintiff's motion to remand case to state court); Thomas v. Unifin, Inc., 2021 WL 3709184 (N.D. Ill. Aug. 20, 2021) (collector's disclosure of information about debt to a third-party mailing vendor is concrete injury because of close relationship to common law tort of public disclosure of private facts); Keller v. Northstar Location Services, 2021 WL 3709183 (N.D. Ill. Aug. 20, 2021) (post-*Ramirez* decision; finding Art. III standing over claim that collector wrongfully disclosed information about debt to third party mailing vendor, because of close relationship to common law tort of public disclosure of private facts).

1798 Shields v. Professional Bur. of Collections of Md., Inc., 2021 WL 4806383 (D. Kan. Oct. 14, 2021) (post-*Ramirez* decision; rejecting analogy to tort of public disclosure of private facts where plaintiff did not allege that anyone had read the information, and owing a student loan would not be highly offense to a reasonable person); *In re* FDCPA Mailing Vendor Cases, ___ F. Supp. 3d ___, 2021 WL 3160794, at *5–6 (E.D.N.Y. July 23, 2021) (treating this as intra-company disclosure; relying on observation in *TransUnion L.L.C. v. Ramirez*, 141 S. Ct. 2190, 2210 n.6 that courts have not "necessarily recognized disclosures to printing vendors as actionable publications"; rejecting analogy to intentional infliction of emotional distress because conduct here was less than "extreme and outrageous").

1799 Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798, 805 (E.D. Mich. 2017); Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340, at *3 (E.D. Mich. Nov. 2, 2017).

1800 Langley v. Gamache & Myers, P.C., 2018 WL 2059545 (E.D. Ark. May 3, 2018).

1801 Fullmer v. A-1 Collection Agency, L.L.C., 2021 WL 4155068, at *2 (D. Utah Sept. 13, 2021).

1802 *See generally* § 5.5, *supra*.

1803 Erickson v. Elliot Bay Adjustment Co., 2017 WL 1179435, at *4 (W.D. Wash. Mar. 29, 2017).

1804 *See, e.g.*, Polis v. Am. Liberty Fin., Inc., 237 F. Supp. 2d 681 (S.D. W. Va. 2002) (refusing to dismiss claim for tortious interference with contract against creditor that contacted consumers while knowing they were represented by counsel; not necessary to show that these contacts caused attorney-client relationship to be terminated). *See generally* § 15.4, *infra*.

1805 *See* § 11.15.5.4, *supra*.

1806 Williams v. Rushmore Loan Mgmt. Services, L.L.C., 2018 WL 1582515, at *6 (D. Conn. Mar. 31, 2018); Castellanos v. Portfolio Recovery Assoc., ___ F. Supp. 3d ___, 2017 WL 5514368, at *3–5 (Nov. 3, 2017); Foster v. Green Tree Servicing, L.L.C., 2017 WL 5508371 (M.D. Fla. Nov. 15, 2017); Erickson v. Elliot Bay Adjustment

district court decision has found standing based on the consumer's allegations that the collector's continued contacts with him caused him emotional distress.[1807] Another decision finds no standing, but the case arose in special circumstances, as the collector was complying with a foreclosure court's order to send a notice of sale to the debtor, and the debtor did not allege that the collector's actions caused her any harm.[1808]

11.15.9 Article III Standing for Claims Involving Conduct Serving to Harass, Oppress, or Abuse

FDCPA § 1692d prohibits conduct that serves to harass, oppress, or abuse any person in connection with the collection of a debt. It includes both a general prohibition and prohibitions of six specific practices. This section discusses standing to assert claims regarding the general prohibition and the specific prohibitions of threats of violence or other criminal means (§ 1692d(1)); obscene, profane, or abusive language (§ 1692d(2)); and calls without meaningful disclosure of the caller's identity (§ 1692d(6)). Standing to assert claims regarding repeated calls to the debtor in violation of FDCPA § 1692d(5)) is not discussed here, but rather in § 11.15.8, *supra*. Standing to assert claims regarding publication of lists of consumers who refuse to pay debts in violation of FDCPA § 1692d(3)) and advertisement of debts for sale in violation of FDCPA § 1692d(4)) is discussed in § 11.15.9, *supra*.

In some cases involving FDCPA § 1692d violations, the injury-in-fact element of standing will be easily established by demonstrating tangible harm as a result of the harassment, oppression, or abuse.[1809] Courts have awarded actual damages under FDCPA § 1692k(a)(1) for a wide variety of injuries as a result of abusive collection practices, including stress-related injuries,[1810] out-of-pocket losses,[1811] and injuries to personal relations.[1812] Consumer attorneys should take care to plead any actual damages[1813] suffered by the consumer, as such damages will show that the plaintiff's injury is "real and not abstract."[1814]

In the absence of evidence of tangible harms, the *Spokeo* court held that consumers can demonstrate the injury-in-fact element of standing through intangible injuries.[1815] First, an intangible harm may be concrete if it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[1816] All of the acts prohibited by FDCPA § 1692d are of a type that is likely to cause consumers emotional distress, a harm that is recognized as an element of damages for a wide variety of common law torts.[1817]

In addition, the harms caused by violations of FDCPA § 1692d(1) (use or threats of violence) are closely related to those made actionable by the common law tort of assault.[1818] FDCPA § 1692d(2) (obscene, profane, or abusive language) and section 1692d(6) (anonymous telephone calls) protect consumers against the same harm as the common law torts of intentional infliction of emotional distress[1819] and invasion of privacy.[1820] Obtaining personal information from the debtor without meaningful disclosure of the collector's identity, in violation of FDCPA § 1692d(6), is closely related to the common law tort of intrusion upon seclusion, and common law recognizes that the consumer is harmed even if there is no publication of that information.[1821] As examples of this tort, the Restatement cites actions such as eavesdropping and

Co., 2017 WL 1179435, at *4 (W.D. Wash. Mar. 29, 2017); Scibetta v. TD Banknorth, 2017 WL 3448544, at *4 (D.N.J. Aug. 11, 2017) (plaintiff has standing to assert claims under §§ 1692b(6) and 1692c(a)(2); there are similar requirements in other contexts such as professional responsibility, so this harm "is found in traditions of common law"); Capel v. Specialized Loan Servicing, Inc., 2017 WL 1739919, at *3 (N.D. Ill. May 4, 2017) (noting that sending collection letter to represented debtor can confuse the debtor and can require debtor to spend time and effort deciphering it, deciding how to respond, and contacting his attorney); Munoz v. Cal. Bus. Bureau, Inc., 2016 WL 6517655 (E.D. Cal. Nov. 1, 2016); Mogg v. Jacobs, 2016 WL 4395899 (S.D. Ill. Aug. 18, 2016) (finding standing where one of the claims was that collector contacted represented debtor); McCamis v. Servis One, Inc., 2016 WL 4063403 (M.D. Fla. July 29, 2016) Bradbury v. Deutsche Bank Nat'l Trust Co., 2020 WL 1815897, at *8 (D.R.I. Apr. 10, 2020) (finding cursory allegations of calls to represented debtor, which did not include any allegations of a concrete injury-in-fact, insufficient), *adoption noted*, 2021 WL 673481 (D.R.I. Feb. 22, 2021) (noting earlier adoption of magistrate's recommendation; amending dismissal on Art. III grounds to be without prejudice).

1807 Westerman v. Contar Fin. Services, L.L.C., 2021 WL 4554334 (D. Md. Oct. 5, 2021).

1808 Benjamin v. Rosenberg & Assoc., 2021 WL 3784320 (D.D.C. Aug. 26, 2021).

1809 *See* § 11.15.3.4, *supra* (listing types of harm that consumers may suffer).

1810 *See* § 2.6.2.2.2 (list of stress-related injuries and case citations), § 11.15.3.4, *supra*.

1811 *See* § 2.6.2.2.4, *supra* (list of out-of-pocket injuries and case citations).

1812 *See* § 2.6.2.2.5, *supra* (list of injuries to personal relations and case citations).

1813 *See* § 11.8.6, *infra* (discussion of actual damages).

1814 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016) ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'").

1815 *Id.* at 1549.

1816 *Id. See generally* §§ 11.15.2.1, 11.15.2.2.2, 11.15.2.2.3, *supra*.

1817 *See, e.g.*, Pastian v. Internal Credit Sys., Inc., 2020 WL 6445836 (S.D. Ohio Nov. 3, 2020) (mag.; consumer who suffers emotional distress because of collector's offensive and threatening language has standing); Smith v. Moss Law Firm, P.C., 2020 WL 584617, at *4–5 (N.D. Tex. Feb. 6, 2020) (plaintiff's anxiety and legal costs when he was wrongfully sued and case was not immediately dismissed are concrete harms; finding standing for § 1692d and other claims); Decker v. Receivables Performance Mgmt., L.L.C., 2019 WL 1112256 (N.D. Ill. Mar. 11, 2019) (finding standing for § 1692d and other claims where debtor alleged that collector's frequent calls caused her emotional distress). *See generally* § 11.15.3.4, *supra*, § 15.2.6, *infra*.

1818 *See* § 15.7.1, *infra*.

1819 *See* § 15.2, *infra*.

1820 *See* § 11.15.7, *supra*, § 15.3, *infra*; National Consumer Law Center, Federal Deception Law § 6.10.3.2.1 (3d ed. 2017), *updated at* www.nclc.org/library (harm caused by unwanted calls and texts is analogous to that made actionable by tort of invasion of privacy, so consumer has standing to bring Telephone Consumer Protection Act claim).

1821 Restatement (Second) of Torts § 652B, Illustrations 2, 3, 4 (1977). *See generally* § 15.3.2, *infra*.

surreptitiously or deceptively obtaining access to personal information, acts that are highly analogous to the harm against which FDCPA § 1692d(6) is intended to protect.[1822] However, a post-*Ramirez* Sixth Circuit decision holds that the mere placement of a call with a somewhat incomplete disclosure of the collector's identity is not a concrete harm in and of itself.[1823]

The *Spokeo* Court identified a second way that an intangible injury may be concrete: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[1824] While the Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*[1825] throws the question of the weight to be given to Congress's judgment into some confusion, it is always worthwhile to buttress the case for Article III standing by pointing out that Congress determined that a violation was a privately actionable injury. Congress clearly did so when it enacted FDCPA § 1692d. Indeed, prohibiting these abuses by debt collectors was a central motivation for Congress when it enacted the FDCPA.[1826] Senate Report No. 95-382 noted that:

> The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

Congressional findings and the declaration of purpose in the statute itself also highlight Congress's concerns about eliminating abusive collection behaviors:

> (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.
>
> . . .
>
> (e) It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors. . . .[1827]

An Eighth Circuit decision holds that a consumer had standing to bring an FDCPA claim against a collector for filing a debt collection lawsuit with no ability to prove the claim, but with the unfair, harassing, and abusive purpose of obtaining either a default or consent judgment.[1828] Section 11.15.3.4, *supra*, lists many other kinds of harm that may be caused by harassment and abuse, with citations to decisions holding that these harms are concrete.

11.15.10 Article III Standing for Claims Involving Unfair or Unconscionable Collection Methods

FDCPA § 1692f prohibits unfair or unconscionable collection methods, including several specifically enumerated acts, such as misuse of postdated checks (section 1692f(2), (3), (4)), causing charges for communications to be made to a person while concealing their true purpose (section 1692f(5)), and wrongful repossession or threats of repossession (section 1692f(6)). This section discusses Article III standing to assert claims regarding violation of these provisions. Article III standing to assert violations of FDCPA § 1692f(1) (collection of unauthorized amounts) is discussed in § 11.15.5.1, *supra*, and standing to assert violations of FDCPA § 1692f(7) and 1692f(8) (sending mail to the debtor in a way that reveals the existence of the debt) is discussed in § 11.15.9, *supra*.

In some cases involving unfair practices in violation of FDCPA § 1692f, the injury-in-fact element of standing will be easily established by demonstrating tangible harm as a result of unfair or unconscionable collection practices.[1829] The Supreme Court has stated, "If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III."[1830] Causing charges for communications to be assessed against the plaintiff is monetary harm by definition.[1831] Similarly, consumers with FDCPA § 1692f(2) to (4) claims may have incurred fees related to a postdated check such as overdraft fees or late fees. Even if it does not result in overdraft fees or late fees, by depositing a postdated check early a collector deprives the consumer of the use of that money, which a court may find to be a monetary injury. If the account is interest-bearing, the consumer will also lose the interest that would have accrued on the amount of

1822 Restatement (Second) of Torts § 652B, Illustrations 2, 3, 4 (1977).

1823 Ward v. Nat'l Patient Account Services Solutions, Inc., ___ F.4th ___, 2021 WL 3616067 (6th Cir. Aug. 16, 2021) (caller identified itself as NPAS rather than NPAS, Inc.; court does not mention any information that caller obtained from consumer).

1824 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

1825 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021). *See* § 11.15.2.2.4, *supra*.

1826 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A.3, *infra*.

1827 15 U.S.C. § 1692.

1828 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017) (finding standing to assert similar claims under §§ 1692e and 1692f). *See also* Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017) (being subjected to baseless collection suit creates basis for both FDCPA claim and unjustified-litigation torts).

1829 *See* § 11.15.3.4, *supra* (types of harm that FDCPA violations may cause).

1830 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204 ___ L. Ed. 2d ___ (2021).

1831 Horowitz v. GC Services L.P., 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016) (non-debtor who received telephone call had standing to assert a claim under § 1692f(5) where it used cell phone minute for which plaintiff had paid, but debtor (his former roommate), who was not responsible for paying bill for phone service, did not have standing to assert this claim).

the check. Wrongful repossession deprives the consumer of a specific item of tangible personal property, clearly a tangible loss and one that is the equivalent of a monetary harm.

Harms for which courts have awarded actual damages on FDCPA claims are also likely to be considered concrete. This is particularly true since courts often look to common law to determine whether actual damages are available for certain types of harm in FDCPA cases.[1832] Courts have awarded actual damages for a wide variety of injuries resulting from abusive collection practices, including stress-related injuries,[1833] out-of-pocket losses,[1834] and injuries to personal relations.[1835] Consumer attorneys should take care to allege any actual damages[1836] suffered by the consumer in pleadings, as such damages will illustrate that the plaintiff's injury is "real and not abstract."[1837]

In the absence of evidence of tangible harms, the *Spokeo* court held,[1838] and *Ramirez* confirms,[1839] that consumers can demonstrate the injury-in-fact element of standing through intangible injuries. First, an intangible harm may be concrete if it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[1840] The acts prohibited by FDCPA § 1692f cause harms that closely resemble those recognized as a basis for common law torts. Violations of FDCPA § 1692f(6) (prohibiting wrongful repossession or threats of repossession) cause harms that are closely related to common law conversion and trespass to chattels.[1841] FDCPA § 1692f(3) (solicitation of postdated checks for the purpose of threatening or instituting criminal prosecution) and section 1692f(4) (depositing or threatening to deposit postdated checks prior to the date on the check) protect consumers against the same harms as the common law claims of intentional infliction of emotional distress[1842] and extortion.[1843]

The *Spokeo* court identified a second way that an intangible injury may be concrete: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[1844] As discussed in § 11.15.2.2.4, *supra*, the Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*[1845] throws the weight to be given to Congress's judgment into some doubt. Nonetheless, in any case involving unfair or unconscionable acts that violate the FDCPA it is always worthwhile to buttress the argument for standing by pointing out how clearly Congress expressed its concern about these practices and its intent to provide a private cause of action for violations. Senate Report No. 95-382 noted that:

> This legislation expressly prohibits a host of . . . unfair debt collection practices. These include: . . . collecting more than is legally owing; and misusing postdated checks. In addition to these specific prohibitions, this bill prohibits in general terms any . . . unfair . . . collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.[1846]

Congressional findings and the declaration of purpose in the statute itself also highlight Congress's concerns about eliminating unfair collection practices:

> (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.[1847]

In an Eighth Circuit decision, a collection firm was alleged to have filed a collection action seeking interest to which it was not entitled, and then to have scheduled the case for trial without having any evidence to present, on the assumption that the consumer would not appear and that it would be able to obtain a default judgment. When the consumer appeared, it asked for a continuance. The consumer alleged that these actions amounted to use of an unfair means to attempt to collect a debt, in violation of FDCPA § 1692f(1). The court held that the consumer's allegations that he had to retain an attorney and serve discovery requests and that he spent time to defend against the meritless claim amounted to concrete injuries.[1848] These holdings appear to be consistent with the Supreme Court's 2021 decision in *TransUnion L.L.C. v. Ramirez*.[1849] The Eighth Circuit also held that the lower court had Article III jurisdiction over a claim regarding the collector's false threat to proceed to trial, because of the close relationship to common law torts such as malicious prosecution and abuse of process.[1850]

1832 *See* § 11.8.1 (standards for actual damages), § 11.15.2.2.3 (role of analogies to common law in determining Art. III standing), *supra*.

1833 *See* § 2.6.2.2.3, *supra* (list of stress-related injuries and case citations).

1834 *See* § 2.6.2.2.4, *supra* (list of out-of-pocket injuries and case citations).

1835 *See* § 2.6.2.2.5, *supra* (list of injuries to personal relations and case citations).

1836 *See* § 11.8, *supra* (discussion of actual damages).

1837 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016) ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'").

1838 *Id.* at 1549.

1839 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204 ___ L. Ed. 2d ___ (2021).

1840 *Id.*

1841 *See* § 15.7.3, *infra*. *See also* National Consumer Law Center, Repossessions § 13.6 (9th ed. 2017), *updated at* www.nclc.org/library (discussion of tort claims for wrongful repossession).

1842 *See* § 15.2, *infra*.

1843 *See* § 15.7.5, *infra*.

1844 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

1845 ___ U.S. ___, 141 S. Ct. 2190, 2204 ___ L. Ed. 2d ___ (2021).

1846 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A.3, *infra*.

1847 15 U.S.C. § 1692.

1848 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685 (8th Cir. 2017).

1849 ___ U.S. ___, 141 S. Ct. 2190, 2204 ___ L. Ed. 2d ___ (2021). *See* § 11.15.2.2, *supra*.

1850 Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 694 (8th Cir. 2017).

A 2018 decision provides an example of "downstream consequences"[1851] that are likely to be considered concrete. The decision finds standing where the collector served requests for admission on the consumer, without an explanation that they would be deemed admitted if the consumer did not deny them within the thirty-day response period, in violation of FDCPA § 1692f's general prohibition of unfair or unconscionable debt collection practices. The court noted that the consumer had filed an answer to the collection action but did not respond to the request for admissions, and he filed an affidavit in the FDCPA case stating that he was in fact misled by this omission.[1852] A number of other decisions find standing for a FDCPA § 1692f claim without additional analysis, after finding standing for parallel claims under other FDCPA provisions.[1853]

Other decisions find standing for claims regarding unfair or unconscionable collection tactics on theories that may no longer be viable after *Ramirez*, but where the facts, if analyzed, may have presented adequate grounds for standing. For example, a district court in New York held that a nondebtor had standing to assert claims under FDCPA § 1692f and 1692f(1) against a collector for serving postjudgment subpoenas on him, seeking information to enable it to collect against a different person with a similar name.[1854] The court based its conclusion on Second Circuit decisions that a violation of the FDCPA is a concrete injury in and of itself, a theory that *Ramirez* undercuts.[1855] However, the facts recited in the opinion—the plaintiff's repeated attempts to get the collection contacts to stop, the fact that he felt harassed by the defendant's actions—suggest that the defendant's acts may have caused other harms that would be considered concrete. Another decision held that a debtor had standing to pursue a claim under FDCPA § 1692f for using high-pressure tactics arising from repeated calls and letters seeking wildly inconsistent amounts.[1856] While the court characterized this as an informational injury, a theory that the Supreme Court did not accept in *Ramirez* in the context of a formatting violation,[1857] the debtor's testimony that the collector's action made him upset, confused, and stressed might independently support Article III standing.[1858]

The only negative pre-*Ramirez* decision of any substance holds that a debtor had no standing to assert a claim that a collector threatened repossession when it did not intend to repossess.[1859] The court stressed that none of the collector's statements about the debtor's rights were false, and stated that it did not see how a false threat to repossess goods causes harm. The court erred in failing to recognize the way a threat creates a false sense of urgency, and can cause a debtor to prioritize this debt over others.[1860] However, after *Ramirez* it will probably be necessary to allege and prove not only that this risk exists, but also that the risk materialized or caused the consumer to take or fail to take some action or to incur some other harm.[1861] Standing for claims involving false threats is also discussed in § 11.15.5.2 and § 11.15.5.4, *supra*.

11.15.11 *Article III Standing for Claims Involving Lawsuits in Distant Forums*

FDCPA § 1692*i* prohibits venue abuse—the collection tactic whereby the collector sues the consumer in an inconvenient forum where it will be easy to obtain a default judgment.[1862] In some cases involving FDCPA § 1692*i* violations, the concreteness requirement will be easily established by demonstrating tangible harm as a result of a collection lawsuit filed in the wrong venue. For example, consumers might demonstrate that they incurred additional travel expenses, childcare expenses, or lost work hours due to the need to travel to a distant forum. The *Ramirez* Court makes it clear that "monetary harms" are concrete.[1863] The consumer may have to spend time researching and filing a motion to transfer venue. Once venue is transferred, the consumer may have to repeat some of the early steps in the case, wasting more time and incurring new travel expenses. If the consumer has retained an attorney, the

1851 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2214 ___ L. Ed. 2d ___ (2021) (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F. 3d 990, 1004 (11th Cir. 2020)).

1852 Patterson v. Howe, 307 F. Supp. 3d 927 (S.D. Ind. Mar. 30, 2018). *See generally* § 11.15.5, *supra* (standing to assert claims regarding deception).

1853 *See, e.g.*, Busby v. Vacation Resorts Int'l, 2019 WL 669641 (S.D. Tex. Feb. 19, 2019) (finding standing for claim under §§ 1692e, 1692f, and 1692*i* that collection letter purported to be from attorney but creditor itself was actually handling the collection, where debtor alleges he was misled); Biber v. Pioneer Credit Recovery, Inc., 229 F. Supp. 3d 457 (E.D. Va. 2017) (consumer has standing to assert claims under §§ 1692e and 1692f against collector that misrepresented that administrative wage garnishment proceedings had already commenced or were imminent); Pritchett v. Paul Mason & Assocs., Inc., 2017 WL 11151610 (N.D. Ga. Mar. 2, 2017) (finding standing for § 1692e deception claim and parallel § 1692f claim where collector filed proof of claim for debt that had been discharged in earlier bankruptcy); Everett v. Fin. Recovery Services, Inc., 2016 WL 6948052 (S.D. Ind. Nov. 28, 2016) (finding standing to bring claims, including one under § 1692f, regarding letter's misrepresentation of tax consequences of settling claim; citing costs consumer incurred to consult her attorney as one harm). *See also* Velez v. Healthcare Revenue Recovery Group, L.L.C., 2017 WL 1476144 (M.D.N.C. Apr. 24, 2017) (analyzing standing for claim under § 1692f together with other claims; finding standing for collector's failure to disclose its registered name on theory that informational injury is concrete, theory undercut by *Ramirez*).

1854 Wagner v. Chiari & Ilecki, L.L.P., 2019 WL 1083025 (W.D.N.Y. Mar. 7, 2019), *aff'd in part, rev'd in part on other grounds*, 973 F.3d 154 (2d Cir. 2020) (addressing merits of plaintiff's claim).

1855 *See* §§ 11.15.2.2.1, 11.15.2.2.4, *supra*.

1856 Hernandez v. BC Services, Inc., 2020 WL 2308233 (S.D. Ill. May 8, 2020). *See also* Velez v. Healthcare Revenue Recovery Group, L.L.C., 2017 WL 1476144 (M.D.N.C. Apr. 24, 2017) (relying on theory that informational injury is concrete; finding standing for claim that creditor violated, *inter alia*, § 1692f).

1857 *See* § 11.15.2.2.7, *supra*.

1858 *See* § 11.15.3.4, *supra*.

1859 Scibetta v. TD Banknorth, 2017 WL 3448544 (D.N.J. Aug. 11, 2017).

1860 *See* § 11.15.3.4, *supra*.

1861 *See* § 11.15.2.2.6, *supra* (discussion of risk of harm).

1862 *See* § 10.3, *supra*.

1863 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204 ___ L. Ed. 2d ___ (2021).

venue issue is likely to complicate the case, requiring more of the attorney's time.[1864] In any event, the fact that the case was filed in a distant court is likely to increase the consumer's anxiety. In some cases it will also have contributed to the creditor's success in obtaining a default judgment. The entry of a judgment against the consumer because of a violation of the FDCPA is itself a concrete harm.[1865]

Intangible harms caused by violations of FDCPA § 1692*i* may also be sufficiently concrete to establish standing.[1866] First, an intangible harm may be concrete if it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[1867] Forum abuse is analogous to the abuse of process cause of action at common law.[1868] While state formulations of the elements of an abuse of process claim vary, the Supreme Court's 2021 decision *TransUnion L.L.C. v. Ramirez* holds that that Article III "does not require an exact duplicate in American history and tradition,"[1869] but only that the "fundamental requirement[s]" of the two claims be analogous.[1870]

The Supreme Court's *Ramirez* decision also stresses that intangible harms specified by the Constitution may be concrete.[1871] The right to a day in court is so fundamental to the Constitution's guarantee of due process of law that using venue abuse to obstruct this right may be a concrete harm in and of itself.[1872]

In addition, the *Spokeo* Court held that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[1873] While *Ramirez* leaves the role of Congress in some confusion, pointing to clear action by Congress to define a harm and make it privately actionable will, at a minimum, strengthen the argument for standing. Congress clearly did so when it enacted FDCPA § 1692*i*. When it enacted the FDCPA, Congress included section 1692*i* because it was concerned with abusive practices by debt collectors filing collection lawsuits in distant forums. Senate Report No. 95-382 explained that:

> This legislation also addresses the problem of "forum abuse," an unfair practice in which debt collectors file suit against consumers in courts which are so distant or inconvenient that consumers are unable to appear. As a result, the debt collector obtains a default judgment and the consumer is denied his day in court.[1874]

Section 1692*i* unequivocally prohibits this practice, and the FDCPA makes it actionable.

In *Spokeo*, the Supreme Court stated that deprivation of a "bare procedural right," without some other concrete harm, would not establish standing.[1875] According to the Court, an example of a procedural right is the right to challenge an agency's action, and a litigant has standing if there is some possibility that the requested relief will prompt the agency to reconsider the decision that harmed the litigant.[1876] The FDCPA's protection against venue abuse is not a mere procedural right by this standard. It imposes a substantive prohibition that directly protects the consumer from harm, rather than a procedural requirement that the consumer might invoke in order to persuade some third party to adopt a favorable position.

The concerns that prompted Congress to define forum abuse as an injury redressable by consumers are underscored by a 2014 decision in the Seventh Circuit. The court emphasized that forum abuses continue to be a problem in debt collection lawsuits because:

> [a]s this case illustrates, one common tactic for debt collectors is to sue in a court that is not convenient to the debtor, as this makes default more likely; or in a court perceived to be friendly to such claims; or, ideally, in a court having both of these characteristics. In short, debt collectors shop for the most advantageous forum. By imposing an inconvenient forum on a debtor who may be impecunious, unfamiliar with law and legal processes, and in no position to retain a lawyer (and even if he can afford one, the lawyer's fee is bound to exceed the debt itself), the debt collector may be able to obtain through default a remedy for a debt that the defendant doesn't actually owe.[1877]

1864 *See* Neal v. Adams, 2021 WL 4466392 (E.D. Ark. Sept. 29, 2021) (post-*Ramirez* decision; attorney fees are concrete harm to extent they were incurred to assert defense of improper venue); Lako v. Portfolio Recovery Assoc., 2021 WL 3403632 (W.D. Wis. Aug. 4, 2021) (post-*Ramirez* decision; cost of hiring attorney to defend collection action is concrete harm).

1865 *See generally* § 11.15.3.4, *supra*.

1866 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (or if Congress has defined the injury and articulated a chain of causation that will give rise to a case or controversy).

1867 *Id.*

1868 *See, e.g.*, Barquis v. Merchants Collection Ass'n, 496 P.2d 817 (Cal. 1972) (claim stated by allegations that defendant knowingly filed legally insufficient complaints against consumers in improper venues to procure default judgments for the ulterior purpose of impairing the consumers' defenses); Dishaw v. Wadleigh, 44 N.Y.S. 207 (N.Y. App. Div. 1897) (claim for abuse of process stated where attorney filed collection suits in distant counties, took default judgments, and collected them by issuing subpoenas to debtors, who paid debts rather than journeying to cities where subpoenas were issued). *See generally* § 15.6.3, *infra*.

1869 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204 ___ L. Ed. 2d ___ (2021).

1870 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2210 n.6 ___ L. Ed. 2d ___ (2021). *See generally* § 11.15.2.2.3, *supra*.

1871 TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2204 ___ L. Ed. 2d ___ (2021).

1872 *See* § 11.15.2.2.2, *supra*.

1873 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

1874 S. Rep. No. 382, 95th Cong., 1st Sess. 4, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, *and reproduced in* Appx. A.3, *infra*.

1875 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

1876 Massachusetts v. EPA, 549 U.S. 497, 517–518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

1877 Suesz v. Med-1 Solutions, L.L.C., 757 F.3d 636, 639 (7th Cir. 2014).

The first post-*Spokeo* decision to address the question, *Linehan v. Allianceone Receivables Management, Inc.*,[1878] had no trouble determining that venue abuse caused the consumer a concrete injury. However, the court based its decision on its conclusion that violation of the substantive rights granted by the FDCPA is a concrete injury in and of itself, a conclusion thrown into doubt by *Ramirez*.[1879] As a result, it did not find it necessary to consider whether the plaintiff had suffered tangible or intangible harms. Nor did it analyze whether there was a close relationship to a harm made actionable by common law, or to analyze the role of Congress beyond the simple enactment of the FDCPA. After *Ramirez*, decisions about standing are likely to turn on these factors.

11.15.12 Burden of Proof

The party invoking federal jurisdiction bears the burden of establishing standing.[1880] For a case filed in federal court, the burden of establishing standing thus falls on the plaintiff.[1881] However, when a defendant removes a case from state court to federal court, it is the defendant who is invoking federal jurisdiction, so the defendant bears the burden of showing the plaintiff's standing.[1882]

Whichever party bears the burden must support it with the manner and degree of evidence required at the successive stages of the litigation.[1883] At the pleading stage, general factual allegations may suffice.[1884] For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.[1885] However, it is within the trial court's power to allow or require the party invoking federal jurisdiction to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing.[1886] If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.[1887]

At the summary judgment stage, the party invoking federal jurisdiction can no longer rest on allegations, but must present evidence of the specific facts supporting standing.[1888] At trial, those facts, if controverted, must be supported adequately by the evidence.[1889] Standing is determined as of the time the case is filed.[1890]

11.15.13 Removal; Benefits of Initially Filing in State Court

When a defendant removes a case from state court to federal court, it is the defendant who is invoking federal jurisdiction, so the defendant bears the burden of showing the plaintiff's standing.[1891] If the court concludes that standing is lacking, the proper remedy is not to dismiss the case, but to remand it to state court.[1892] Where the defendant invokes federal jurisdiction by removing a case, and then argues for dismissal based on the plaintiff's lack of standing, courts may be willing to award the plaintiff the attorney fees incurred as a result of the removal.[1893]

If there are concerns about whether a federal court will find that it has Article III standing over a particular case, the best strategy may be to file the case initially in state court. Then, if the defendant removes it to federal court, the defendant will

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1878 2016 WL 4765839 (W.D. Wash. Sept. 13, 2016).

1879 *See* § 11.15.2.2, *supra*.

1880 Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 2136 119 L. Ed. 2d 351 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these elements"). *Accord* TransUnion L.L.C. v. Ramirez, ___ U.S. ___, 141 S. Ct. 2190, 2206 ___ L. Ed. 2d ___ (2021) ("As the party invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have standing.").

1881 Spokeo, Inc. v. Robins, ___U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016); Spuhler v. State Collection Serv., Inc., 983 F.3d 282 (7th Cir. 2020) (as party invoking federal jurisdiction, plaintiff bears burden of establishing standing).

1882 Thornley v. Clearview AI, Inc., ___F.3d ___, 2021 WL 128170 (7th Cir. Jan. 14, 2021); Bryant v. Compass Group USA, Inc., 958 F.3d 617 (7th Cir. 2020).

1883 Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

1884 *Id.* at 2137; Bennett v. Spear, 520 U.S. 154, 117 S. Ct. 1154, 1163-1164, 137 L. Ed. 2d 281 (1997).

1885 Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206 45 L. Ed. 2d 343 (1975).

1886 *Id.*, 95 S. Ct. at 2206–2207. *See, e.g.*, Bazile v. Finance Sys. of Green Bay, Inc., 983 F.3d 274 (7th Cir. 2020) (remanding case to trial court to resolve factual issues that bear on question whether motion to dismiss for lack of Art. III standing should be granted); Spuhler v. State Collection Serv., Inc., 983 F.3d 282, 285 (7th Cir. 2020) (if plaintiff's standing is questioned as factual matter on motion to dismiss, plaintiff must supply proof, by preponderance of evidence, that standing exists).

1887 Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

1888 Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 (1992). *See, e.g.*, Spuhler v. State Collection Serv., Inc., 983 F.3d 282 (7th Cir. 2020) (holding that plaintiff failed to show standing at summary judgment stage); Frank v. Autovest, L.L.C., 961 F.3d 1185, 1187 (D.C. Cir. 2020) (vacating district court judgment and ordering dismissal of action where facts did not show standing at summary judgment stage).

1889 Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 (1992).

1890 Thomas v. Ocwen Loan Servicing, 2018 WL 3608398 (W.D. Wash. July 26, 2018) (standing for claim under § 1692f(6) can be based on collector's commencement of unjustified non-judicial foreclosure and filing of notice of trustee's sale, even though collector stipulated to preliminary injunction against the foreclosure shortly after consumer filed FDCPA claim).

1891 Thornley v. Clearview AI, Inc., 984 F.3d 1241 (7th Cir. 2021); Bryant v. Compass Grp. USA, Inc., 958 F.3d 617 (7th Cir. 2020). *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these elements").

1892 Thornley v. Clearview AI, Inc., 984 F.3d 1241 (7th Cir. 2021); Collier v. SP Plus Corp., 889 F.3d 894 (7th Cir. 2018); St. Louis Heart Ctr., Inc. v. Nomax, Inc., 899 F.3d 500 (8th Cir. 2018). *See generally* National Consumer Law Center, Fair Credit Reporting § 11.2.1.3.1 (9th ed. 2017), *updated at* www.nclc.org/library.

1893 28 U.S.C. § 1447(c). *See, e.g.*, Barnes v. ARYZTA, L.L.C., 288 F. Supp. 3d 834 (N.D. Ill. 2017); Mocek v. Allsaints USA Ltd., 220 F. Supp. 3d 910 (N.D. Ill. 2016) (awarding fees).

have to argue that the case meets Article III's requirements. If the court disagrees, the case will not be dismissed, but will be remanded to state court. A number of states have broader standing doctrines than the federal system,[1894] so it may be possible to litigate the case successfully there. In states that have broader standing doctrines than the federal system, plaintiffs who wish to stay in state court have occasionally even pleaded that the claim does not involve any injury or involves a bare procedural violation.[1895] The strategy of filing suit in state court should, however, be reserved for strong cases that present serious violations involving at least a clear risk of harm.

If an FDCPA case in federal court is settled, a helpful settlement term is an agreement that if the federal court holds that it does not have Article III jurisdiction over the case and cannot enter the settlement, the defendant agrees that the case will be refiled in a state court that has jurisdiction for approval of the settlement.

11.16 Relation of the FDCPA to State Laws and Other Federal Statutes

11.16.1 FDCPA Preemption of and Relation to State Law

Section 1692n states:

> This title does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.[1896]

Effective on November 31, 2021, Regulation F § 1006.104 updated section 1692n by replacing "title" and "subchapter" with "the Act or the corresponding provisions of this part."

An Official Interpretation of Regulation F § 1006.104 provides clarification that "[a] disclosure required by applicable State law that describes additional protections under State law does not contradict the requirements of the Act or the corresponding provisions of this part."[1897] Section 1692(e) of the Act also provides: "It is the purpose of this subchapter . . . to promote consistent State action to protect consumers against debt collection abuses."[1898]

Together, sections 1692(e), 1692n, and Reg. F § 1006.104 of the FDCPA express a clear intent only to preempt state laws that are inconsistent with the FDCPA—those that conflict with, impede, or detract from the FDCPA and only to the extent of the inconsistency. Courts have generally rejected claims that the FDCPA preempts state laws that protect consumers,[1899] but have found that the FDCPA preempts state statutes or common law doctrines that provide *less* protection to consumers.[1900]

1894 Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 Minn. L. Rev. 1211, 1233 (2021) (map showing whether state has adopted the Article III standing formulation of *Lujan v. Defenders of Wildlife*); Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric. & Nat. Res. L. 349 (2015) (state-by-state survey).

1895 *See, e.g.*, Thornley v. Clearview AI, Inc., 984 F.3d 1241 (7th Cir. 2021); Morgan v. Bank of Am., 2020 WL 3979660 (E.D. Wash. July 14, 2020).

1896 15 U.S.C. § 1692n.

Every bill leading to the FDCPA contained language nearly identical to that in the first sentence of this section. The first House bill and every major Senate bill contained language virtually identical to that in the second sentence of this section; subsequent House bills and the Senate minority bill did not.

1897 Reg. F Official Interpretations § 104-1.

1898 15 U.S.C. § 1692(e).

1899 *See* Gonzales v. Arrow Fin. Serv., L.L.C., 660 F.3d 1055 (9th Cir. 2011) (FDCPA explicitly does not preempt state laws that provide similar protection); Davidson v. Seterus, Inc., 21 Cal. App. 5th 283, 304 n.15 (2018) (the possibility that a state might adopt a more expansive definition of "debt collector" than is provided by the FDCPA is contemplated by section 1692n); Montemayor v. GC Serv. L.P., 302 F.R.D. 581 (S.D. Cal. 2014) (claims alleging that agency, by recording its collection calls without consent or disclosure, violated state telephone privacy statute and penal code were allowed to go forward); Desmond v. Phillips & Cohen Assoc., Ltd., 724 F. Supp. 2d 562 (W.D. Pa. 2010) (FDCPA does not preempt negligence or invasion of privacy claims); DeNicolo v. Hertz Corp., 2020 WL 5816365 (N.D. Cal. 2020) (section 1692n "specifically allows for a state law to provide for greater consumer protections than the FDCPA"); Burthlong v. Midland Funding, L.L.C., 2010 WL 420554 (E.D. La. Jan. 29, 2010) (FDCPA does not preempt state negligence claims); Marcotte v. Gen. Elec. Capital Serv., Inc., 2009 WL 10671521 (S.D. Cal. Aug. 31, 2009) (FDCPA does not preempt California debt collection statute because it defines "debt collector" more broadly to include federal savings associations collecting debts on their own behalf); Pirouzian v. SLM Corp., 396 F. Supp. 2d 1124 (S.D. Cal. 2005); Joseph v. J.J. MacIntyre Cos., L.L.C., 238 F. Supp. 2d 1158 (N.D. Cal. 2002) (FDCPA does not preempt invasion of privacy tort claim); Klingensmith, FTC Informal Staff Letter (Aug. 9, 1978). *See also* Missionary Sisters v. Dowling, 703 N.Y.S.2d 362 (Civ. Ct. 1999) (FDCPA does not preempt state eviction law requiring three-day notice); Mendus v. Morgan & Assoc., 994 P.2d 83 (Okla. Civ. App. 1999) (FDCPA does not preempt Oklahoma's twenty-day answer period); FTC Official Staff Commentary § 816, *reproduced at* Appx. C.2, *infra*, *discussed at* § 3.4.4.4, *supra*.

1900 *See* Cappetta v. GC Serv., L.P., 654 F. Supp. 2d 453 (E.D. Va. 2009) (voluntary payment doctrine not applicable to FDCPA claim); Gonzalez v. Codilis & Assoc., P.C., 2004 WL 719264 (N.D. Ill. Mar. 31, 2004) (voluntary-payment doctrine preempted); Garmus v. Borah, Goldstein, Altschuler & Schwartz, P.C., 1999 WL 46682 (S.D.N.Y. Feb. 1, 1999) (FDCPA's thirty-day verification provision preempts state law allowing three-day rent demand notice); Clayton v. Bryan, 753 So. 2d 632 (Fla. Dist. Ct. App. 2000) (offer of judgment statute providing for fee award against consumer was preempted by FDCPA provisions allowing fees only if consumer acted in bad faith and for purpose of harassment). *Cf.* Irwin v. Mascott, 94 F. Supp. 2d 1052 (N.D. Cal. 2000) (preempting debt collector's third-party malpractice claim against his own attorney, because there was no express or implied right of contribution or indemnity under FDCPA). *But see* Ziobron v. Crawford, 667 N.E.2d 202 (Ind. Ct. App. 1996) (refusing to preempt malicious prosecution claim based on dismissed FDCPA claim without considering conflict between state and federal law).

Thus, the FDCPA establishes federal minimum standards for debt collectors that state law may supplement or increase.[1901] State laws are preempted if they make it impossible to comply with both state and federal law,[1902] or frustrate the purpose of the FDCPA to protect consumers from abusive debt collection practices.[1903]

On the other hand, compliance with state law does not necessarily immunize the debt collector's conduct from being considered a violation of the FDCPA.[1904] State law cannot permit conduct that the FDCPA prohibits. For example, direct communication with a debtor represented by an attorney is a violation even though state law permits service of a garnishment summons directly on the consumer.[1905]

The "inconsistency" and "greater protection" standards provide some guidance to courts deciding whether a state law is preempted by the FDCPA, but these standards are intentionally vague in order to leave some discretion in borderline cases. In a formal FDCPA advisory opinion, the Federal Trade Commission (FTC) determined that the FDCPA did not preempt any state laws that would keep the FDCPA verification notice out of the summons because the FDCPA allows the verification notice to be separately sent from the summons.[1906] An FDCPA amendment as to the verification notice requirements overruled the substance of this FTC formal advisory letter, but its analysis of FDCPA preemption is still instructive:

> The quoted provision makes express that Congress did not intend to preempt the field, but allowed only for conflict preemption. However, there is no conflict preemption here.
>
> First, there is no conflict preemption based on impossibility of compliance because it is possible for attorney debt collectors to comply with both the federal provision and the state provisions. . . .
>
> Second, there is no conflict preemption based on state law standing as an obstacle to the full accomplishment and execution of congressional purposes and objectives. As Congress declared in Section 802(e) of the FDCPA, 15 U.S.C. § 1692(e), the purpose of the panoply of protections under the federal debt collection statute is:
>
> > to eliminate debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.
>
> The state provisions about which you inquire do not prevent consumers from receiving the full panoply of protections from abusive debt collection practices afforded by the FDCPA.[1907]

An FTC informal staff letter has found no conflict between a state provision requiring that a debt collector's communications with a consumer's employer be in writing and the FDCPA requirement that a debt collector's inquiries seeking location information, including those made to an employer, not divulge their debt collection purpose.[1908] FTC informal staff letters have also advised that state laws may provide greater consumer protection than the FDCPA; for instance, states may completely prohibit the use of aliases[1909] or may prohibit debt collectors from practicing law.[1910]

1901 S. Rep. No. 95-382, at 6, 9 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695 *and at* Appx. A.3, *infra*. *See* Pirouzian v. SLM Corp., 396 F. Supp. 2d 1124 (S.D. Cal. 2005) (section 1692n does not preempt California's fair debt collection statute with broader scope than FDCPA); Albanese v. Portnoff Law Assoc., Ltd., 301 F. Supp. 2d 389 (E.D. Pa. 2004); Albright v. Allied Int'l Credit Corp., 2003 WL 22350928 (C.D. Cal. Aug. 25, 2003); United States v. Sullivan, 1998 WL 223709 (N.D. Tex. Apr. 28, 1998) (FDCPA does not preempt state debt collection statute that was more protective of rights of consumers); Sibley v. Firstcollect, Inc., 913 F. Supp. 469 (M.D. La. 1995) (state collection license requirement offered consumers greater protection and was thus not preempted). *See also* Codar v. Arizona, 1996 WL 471335 (9th Cir. Aug. 19, 1996) (FDCPA preempted Arizona's debt collector licensing scheme only to extent Arizona law prohibited unlicensed out-of-state debt collector from sending FDCPA-required debt verification notice); Irwin v. Mascott, 96 F. Supp. 2d 968 (N.D. Cal. 1999) (the FDCPA did not preempt state laws that provided consumers with greater protection in form of injunctive relief); Premier Capital, Inc. v. Grossman, 2000 WL 1838695 (Conn. Super. Ct. Nov. 22, 2000) (notice required by state law making demand for payment was effective even if notice failed to inform debtors of their rights under FDCPA), *rev'd in part, aff'd in part*, 789 A.2d 565 (Conn. App. Ct. 2002).

1902 *See* Sanchez v. Client Serv., Inc., 520 F. Supp. 2d 1149 (N.D. Cal. 2007). *See also* Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340 (E.D. Mich. Nov. 2, 2017) (compliance with Michigan's foreclosure statutes did not immunize collection law firm from FDCPA liability where foreclosure notice contained private information about homeowners not required by state law and that violated FDCPA).

1903 Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). *See* Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). *See also* Lensch v. Armada Corp., 795 F. Supp. 2d 1180 (W.D. Wash. 2011) (state law preempted where it authorized collectors of dishonored checks to notify drawers that they may be subject to criminal prosecution, directly conflicting with plain language of FDCPA provision prohibiting collector from representing or implying that nonpayment of debt would result in debtor's arrest or imprisonment).

1904 *See, e.g.*, Patterson v. Howe, 307 F. Supp. 3d 927, 934 (S.D. Ind. 2018) (holding that debt collector's service of Requests for Admissions in conjunction with the Complaint and summons was authorized by state law and yet was found to violate the Act); Walker v. Fabrizio & Brook, P.C., 2017 WL 5068340 (E.D. Mich. Nov. 2, 2017) (compliance with Michigan's foreclosure statutes did not immunize collection law firm from FDCPA liability where foreclosure notice contained private information about homeowners not required by state law and that violated FDCPA).

1905 Ojogwu v. Rodenburg Law Firm, 2019 WL 6130450 (D. Minn. Nov. 19, 2019).

1906 Mezines, FTC Advisory Opinion (Mar. 31, 2000), *reproduced at* Appx. C.1.5, *infra*.

1907 *Id. See* § 9.3.4, *supra*.

1908 Eskanos, FTC Informal Staff Letter (July 19, 1978).

1909 Foote, FTC Informal Staff Letter (Sept. 11, 1978). *See* § 6.8, *supra*.

1910 McGrody, FTC Informal Staff Letter (Sept. 4, 1979). *See also* Kolker v. Duke City Collection Agency, 750 F. Supp. 468 (D.N.M. 1990); § 8.3.6, *supra* (unauthorized practice of law by a debt collector may violate 15 U.S.C. § 1692f); § 16.5, *infra*.

The FDCPA does not preempt tort actions for debt collection abuse. The only judge to have held to the contrary[1911] later overruled himself[1912] and found there was no preemption, after his earlier decision was criticized and not followed.[1913] Tort actions for debt collection harassment are frequently pursued because they allow punitive damages in egregious cases.[1914] The FDCPA was intended "to promote consistent State action to protect consumers against debt collection abuses."[1915]

Occasionally, collectors argue that the FDCPA is displaced by or limited by state law—that a state's regulation of a transaction should take precedence and that it would be excessive or inconsistent for a collector to comply with both federal and state requirements. Courts reject such specious defenses.[1916] For example, an FTC staff interpretation states that even if consumer has violated a state criminal bad check law, the FDCPA still prohibits a collector from reporting a possible bad check to a law enforcement official.[1917] Similarly, although state law may permit an unlicensed debt collector to escape full payment of penalties owed and be considered retroactively licensed upon payment of a fee, filing a lawsuit against a consumer before the collector had acquired a collection agency license may nevertheless violate the FDCPA.[1918] On the other hand, if state law provides greater protection for the consumer and is not inconsistent with the requirements of the FDCPA, compliance with state law will not violate the FDCPA.[1919]

11.16.2 Relationship to Other Federal Statutes

Where the FDCPA regulates practices also regulated by other federal statutes, questions arise as to whether both statutes are applicable. In general, two federal statutes are to be construed so as to uphold both and any conflict between the federal statutes should be construed to give the maximum effect to both.[1920] Thus, while the Fair Credit Reporting Act preempts many state law claims, it does not preempt an FDCPA claim.[1921] A lower court found no conflict between an FDCPA claim and the Higher Education Act.[1922] More complicated questions arise as to the interrelationship of the Bankruptcy Code and the FDCPA, discussed elsewhere in this treatise.[1923]

1911 Thrasher v. Cardholder Serv., 74 F. Supp. 2d 691 (S.D. Miss. 1999).

1912 Virgil v. Reorganized M.W. Co., 156 F. Supp. 2d 624 (S.D. Miss. 2001).

1913 Binion v. Franklin Collection Serv., Inc., 147 F. Supp. 2d 519 (S.D. Miss. 2001). *See also* Albright v. Allied Int'l Credit Corp., 2003 WL 22350928 (C.D. Cal. Aug. 25, 2003); Hage v. Gen. Serv. Bur., 2002 WL 1796575 (D. Neb. Aug. 5, 2002).

1914 *See* Ch. 15, *infra*.

1915 15 U.S.C. § 1692(e).

1916 Romea v. Heiberger & Assoc., 163 F.3d 111 (2d Cir. 1998) (rejecting argument that FDCPA should not apply to state eviction proceedings because combined effect of applying both the New York and federal protections was more than Congress intended); Taylor v. United Collection Bur., Inc., 2009 WL 1708762 (S.D. Ill. June 17, 2009) (rejecting defendant's efforts to put its answer and counterclaim under seal lest it violate state privacy laws; state-law privileges and protections do not control in federal question cases).

1917 Atteberry, FTC Informal Staff Letter (July 18, 1978).

1918 Alexander v. Absolute Resolutions Corp., 2019 WL 1938811 (W.D. Ark. May 1, 2019).

1919 Rocha v. Zwicker & Assoc., 474 F. Supp. 3d 388 (D. Mass. 2020) (collection letter complied with and was mandated by Massachusetts debt collection regulation which affords greater protection to consumers and is, therefore, not preempted by FDCPA).

1920 *See* Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004). *See also* Maxwell v. St. Francis Health Ctr., 2017 WL 4037732 (D. Kan. Sept. 13, 2017) (recognizing cause of action under FDCPA, filing false affidavit regarding consumer's active duty in armed services, that may also be cause of action under Servicemembers Civil Relief Act); Carocci v. Greenpoint Mortg. Funding, Inc., 2008 WL 4415855, at *7 (Conn. Super. Ct. Sept. 9, 2008) (motion to dismiss FDCPA claim on the basis of Fair Credit Reporting Act preemption denied because "[15 U.S.C.] § 1681t(b)(1)(F) only preempts state law claims . . . [and] the FDCPA is a federal statute" that therefore is not impacted); § 13.3, *infra* (relationship between the Bankruptcy Code and FDCPA and state claims).

1921 *See* Ramirez v. Mandarich Law Group, L.L.P., 2019 WL 1426015 (N.D. Ill. Mar. 29, 2019) (noting that FCRA's primary goal, which is to improve accuracy and fairness of credit reporting, is not precisely the same as primary purpose of FDCPA, which is to deter abusive, deceptive, and unfair debt collection practices; holding that just because obtaining credit report is permissible under FCRA, does not mean that same conduct is immune from liability under FDCPA); Carocci v. Greenpoint Mortg. Funding, Inc., 2008 WL 4415855 (Conn. Super. Ct. Sept. 9, 2008).

1922 *See* Wheeler v. Premiere Credit of N. Am., L.L.C., 80 F. Supp. 3d 1108 (S.D. Cal. 2015).

1923 *See* § 13.3, *infra*. *See also* Midland Funding, L.L.C. v. Johnson, ___ U.S. ___, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017).

Chapter 12 Debt Collectors' Defenses and Counterclaims

12.1 Introduction

The FDCPA sets forth three specific defenses to debt collector liability: bona fide error,[1] the statute of limitations,[2] and good faith compliance with a Consumer Financial Protection Bureau advisory opinion.[3] Regulation F[4] (effective November 30, 2021) also sets out nine safe harbors for debt collectors, where conduct or disclosures are not required, but where complying conduct or disclosures is sufficient to avoid violation of specified Regulation F provisions.[5]

FDCPA defendants raise, with varying success, a number of other defenses when there has been a prior collection action against the consumer, particularly where the consumer's FDCPA claim relates to conduct in that prior litigation:

- *Res judicata*, collateral estoppel, and that the FDCPA claim should have been raised as a compulsory counterclaim;[6]
- That a federal court should abstain from an FDCPA action while a state collection action is pending;[7] and
- The *Rooker-Feldman* doctrine that federal courts do not have jurisdiction to review a state court proceeding.[8]

Other potential defenses are based on the FDCPA defendant's immunity, such as litigation or witness immunity for its conduct in a prior collection litigation,[9] and sovereign immunity.[10] Consumers raising FDCPA claims must also be prepared for defendants to raise all kinds of other defenses, whatever their merit: that a violation is merely technical or *de minimis*, that the defendant acted in good faith, that the consumer was at fault, that the consumer waived FDCPA claims, or that there were alleged preconditions to the consumer being able to bring suit.[11]

The FDCPA defendant may also attempt to raise counterclaims on the underlying debt.[12] Inventive FDCPA defendants have even sought to use a prior judgment against the consumer to garnish the consumer's recovery on the FDCPA claim, or even garnish ownership of the claim itself.[13] An unsuccessful consumer FDCPA plaintiff must also be prepared to explain why the FDCPA defendant is not entitled to attorney fees or sanctions against the consumer or the consumer's attorney.[14]

Other defenses and defense strategies are addressed elsewhere in this treatise:

- Alleging "injury in fact" for the **constitutional standing requirement** raised in *Spokeo* is discussed at § 11.15, *supra*, and cases summarized at Appx. E.1.4.1, *infra*.
- Other **standing issues** implicated when an FDCPA claim is brought by persons other than the consumer affected, such as by relatives or neighbors, are discussed at § 4.4, *supra*, and cases summarized at Appx. E.1.4.2, *infra*.
- **Offers of judgment or settlement** creating a mootness issue are a routine debt collector strategy in response to a consumer's FDCPA suit and are discussed at § 11.6, *supra*, with cases summarized at Appx. E.3.6.3, *infra*.
- **Jurisdictional and venue** issues for FDCPA suits are discussed at § 11.2, *supra*, and cases summarized at Appx. E.3.7, *infra*.
- **Bankruptcy issues**, including conflict between the consumers' FDCPA claim and the Bankruptcy Code, are discussed at Ch. 13, *infra*, and cases summarized at Appx. E.3.7.5, *infra*.
- The FDCPA's **constitutionality** is discussed at § 3.3, *supra*, and cases summarized at Appx. E.1.7.1, *infra*.
- The **specificity requirements for the FDCPA complaints** are discussed at § 11.6.1, *supra*, and cases summarized at Appx. E.3.8, *infra*.
- The **materiality requirement** for FDCPA deception violations is discussed at § 7.2.7, *supra*, and cases summarized at Appx. E.2.4.1.2, *infra*. Materiality for FDCPA **unfairness claims** is discussed at § 8.1.5, *supra*, and cases summarized at Appx. E.2.5.1, *infra*.
- An FDCPA defendant's answer adopting a **kitchen sink strategy** with a laundry list of defenses or with scandalous accusations is discussed at § 2.5.7.9, *supra*, and cases summarized at Appx. E.3.6.2, *infra*.
- **Mandatory arbitration** of consumer's claims is discussed at § 11.3, *supra*, and cases summarized at Appx. E.3.6.5, *infra*.
- An FDCPA claim filed in state court prompting **removal to federal court** is discussed at § 11.2.1, *supra*, and cases summarized at Appx. E.3.7.1, *infra*.

12.2 Bona Fide Error Defense

12.2.1 Overview

The FDCPA provides:

> (c) A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error

1 15 U.S.C. § 1692k(c). *See* Appx. E.3.6.1, *infra*.
2 15 U.S.C. § 1692k(d). *See* Appx. E.3.5, *infra*.
3 15 U.S.C. § 1692k(e). *See* § 12.4, *infra*.
4 12 C.F.R. Part 1006.
5 *See* § 12.5, *infra*.
6 *See* § 12.6.2, *infra*.
7 *See* § 12.6.3, *infra*.
8 *See* § 12.6.4, *infra*.
9 *See* § 12.6.6, *infra*.
10 *See* § 12.6.5, *infra*.
11 *See* §§ 12.7.2 to 12.7.6, *infra*.
12 *See* § 12.8, *infra*.
13 *See* § 12.9, *infra*.
14 *See* § 12.10, *infra*.

notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.[15]

The bona fide error defense is a narrow exception[16] to the rule that the FDCPA is a strict liability statute, generally not requiring proof of intent.[17] The language of the FDCPA bona fide error defense was borrowed from nearly identical language, at that time, in the Truth in Lending Act (TILA), which also is narrowly construed.[18] Decisions interpreting the TILA provision should provide guidance in construing the FDCPA provision.[19]

The bona fide error defense is an affirmative defense, so the collector bears the burden of timely[20] pleading[21] and proving[22] the defense by a preponderance of the evidence. Thus, the affirmative defense of bona fide error should not be addressed by a motion to dismiss the complaint.[23]

Federal Rule of Civil Procedure 9(b) requires allegations of mistake to be pleaded with particularity,[24] and a majority of lower courts hold that this requirement applies to the pleading of the bona fide error defense.[25] The *Twombly-Iqbal*

15 15 U.S.C. § 1692k(c). *See also* §§ 12.2.5, 12.2.8, 12.2.9, *infra* (discussing elements of bona fide error defense).

16 *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 581 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) ("We decline to adopt the expansive reading of § 1692k(c) that [defendant] Carlisle proposes."). *See also* Clark v. Capital Credit & Collection Serv., Inc. 460 F.3d 1162, 1177 (9th Cir. 2006); Eide v. Colltech, Inc., 987 F. Supp. 2d 951 (D. Minn. 2013).

17 *See, e.g.*, McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 948 (9th Cir. 2011); Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991 (7th Cir. 2003); § 3.2.4, *supra*. *See also* Engelen v. Erin Capital Mgmt., L.L.C., 544 Fed. Appx. 707 (9th Cir. 2013).

18 *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 589–590, 130 S. Ct. 1605,176 L. Ed. 2d 519 (2010). *Cf.* 15 U.S.C. § 1640(c) (1976) (after passage of FDCPA, this provision of TILA was amended to include "calculation, computer malfunction and programming, and printing errors"). *See generally* National Consumer Law Center, Truth in Lending (10th ed. 2019), *updated at* www.nclc.org/library.

19 *See, e.g.*, Baker v. G.C. Serv. Corp., 677 F.2d 775, 779 (9th Cir. 1982); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980, 982 (N.D. Ill. 1979).

20 *See* Chung v. U.S. Bank, 250 F. Supp. 3d 658, 682 (D. Haw. 2017) (refusing to consider bona fide error defense that was not raised until loan servicer filed its opposition to consumer's motion for summary judgment, as consumer was prejudiced by this late assertion); Newton v. Credit Specialty Serv., Inc., 2016 WL 6693073 (D. Nev. Nov. 14, 2016) (allowing collection agency to first assert bona fide error defense three years after case was filed would unfairly prejudice consumer); Philhower v. Express Recovery Serv., Inc., 2014 WL 692908 (D. Utah Feb. 21, 2014) (where plaintiff would be prejudiced by defendant's failure to plead affirmative defense of bona fide error, defense was waived); Dorris v. Accounts Receivable Mgmt., Inc. 2013 WL 1209629 (D. Md. Mar. 22, 2013) (too late to raise defense at summary judgment stage). *But cf.* Smith v. Transworld Sys., Inc., 953 F.2d 1025 (6th Cir. 1992) (debt collector allowed to raise defense for first time in opposition to motion for partial summary judgment because consumer failed to demonstrate prejudice).

21 *See* Nguyen v. HOVG, L.L.C., 2014 WL 5361935 (S.D. Cal. Oct. 20, 2014) (because bona fide error defense rests upon mistake and circumstances surrounding mistake were not stated with particularity, affirmative defense was stricken with leave to amend); Jacobson v. Persolve, L.L.C., 2014 WL 4090809 (N.D. Cal. Aug. 19, 2014) (applied heightened pleading standard); Dunn v. Premier Capital, Inc., 2013 WL 3466826 (D.N.J. July 9, 2013). *See also* Buzzell v. Citizens Auto. Fin., Inc., 802 F. Supp. 2d 1014 (D. Minn. 2011); Cordes v. Frederick J. Hanna & Assoc., 789 F. Supp. 2d 1173 (D. Minn. 2011); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002). *But see* Shula v. Lawent, 2002 WL 31870157 (N.D. Ill. Dec. 23, 2002) (although collector failed to plead bona fide error defense, use of former lawyer's letterhead was not violation of FDCPA where consumer failed to demonstrate any prejudice or harm suffered as result of erroneous substitution), *aff'd on other grounds*, 359 F.3d 489 (7th Cir. 2004). *But cf.* § 3.2.4, *supra*.

22 *See* Currier v. First Resolution Inv. Corp., 762 F.3d 529, 537 (6th Cir. 2014); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011); Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991 (7th Cir. 2003); Ewers v. Rainmaker Recovery 3, Inc., 393 F. Supp. 3d 614, 618 (E.D. Mich. 2019) (recognizing that, on summary judgment, defendant bears burden of proving elements of defense, but nevertheless denying summary judgment, even though debt collector did not show how error "occurred, or to what extent [its] procedures were reasonably designed to prevent errors"); Thompson v. Gen. Revenue Corp., 2017 WL 3276018 (S.D. Ohio Aug. 2, 2017); Webster v. ACB Receivables Mgmt., Inc. 15 F. Supp. 3d 619 (D. Md. 2014); Wyman v. Northland Grp., Inc., 2014 WL 12586057 (M.D. Fla. Jan. 3, 2014); Lee v. Kucker & Bruh, L.L.P., 958 F. Supp. 2d 524 (S.D.N.Y. 2013) (no procedures to identify errors); McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513 (E.D. Mich. 2013) (no evidence in support of defense); Rogers v. Medicredit, Inc., 2013 WL 2403661 (E.D. Mo. May 31, 2013) (no facts offered); Ploch v. Client Serv., Inc., 2013 WL 1319347 (E.D. Mo. Apr. 1, 2013) (no evidence error was unintentional); Santos v. LVNV Funding, L.L.C., 2012 WL 3985527 (N.D. Cal. Sept. 11, 2012); Cordes v. Frederick J. Hanna & Assoc., 789 F. Supp. 2d 1173 (D. Minn. 2011); Slanina v. United Recovery Sys., L.P., 2011 WL 5008367 (M.D. Pa. Oct. 20, 2011); Paul v. Metro Area Collections, Inc., 2011 WL 2270515 (D. Or. May 4, 2011), *adopted*, 2011 WL 2261301 (D. Or. June 8, 2011); Regan v. Law Offices of Edwin A. Abrahamsen & Assoc., 2009 WL 4396299 (E.D. Pa. Dec. 1, 2009); Gathuru v. Credit Control Serv., Inc., 623 F. Supp. 2d 113 (D. Mass. 2009); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002); Clark's Jewelers v. Humble, 823 P.2d 818 (Kan. Ct. App. 1991); Appx. E.3.6.1, *infra*.

23 *See* Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 235 (4th Cir. 2007); Wong v. Alternative Claims Mgmt., L.L.C., 2017 WL 5635533 (S.D.N.Y. Nov. 22, 2017); White v. First Step Grp. L.L.C., 2017 WL 4181121 (E.D. Cal. Sept. 20, 2017); Glazewski v. CKB Firm, P.C., 2015 WL 661278 (N.D. Ill. Feb. 15, 2015); Moore v. Fein, Such, Kahn & Shepard, P.C., 2012 WL 3945539 (D.N.J. June 13, 2012); Beeler v. C.S.D., L.L.C., 2012 WL 2045863 (D. Md. June 5, 2012); Koller v. West Bay Acquisitions, L.L.C., 2012 WL 1189481 (N.D. Cal. Apr. 9, 2012). *But see* Amaya v. Crowson & Crowson, L.L.P., 2013 WL 12126784 (W.D. Tex. Aug. 19, 2013).

24 Rule 9(b) states: "In alleging . . . mistake, a party must state with particularity the circumstances constituting . . . mistake . . . intent, knowledge, and other conditions of a person's mind may be alleged generally."

25 *Compare* CFPB v. Fair Collections & Outsourcing, Inc., 2021 WL 2685251, at *3 (D. Md. June 30, 2021) ("a *bona fide* error defense is subject to the heightened pleading standard of Rule 9(b)"); Tolliver v. National Credit Sys., Inc., 2021 WL 704175 (W.D. Wis. Feb. 23, 2021) (collector did not satisfy Rule 9(b)); Newton v. Roosen Varchetti & Oliver, 2020 WL 201179, at *2 (S.D. Ga. Jan. 10, 2020) ("Because Defendants' affirmative [BFE] defenses do not include anything beyond a recitation of the language found in Section 1692k(c), they fail to meet Rule 9(b)'s 'who, what, when, where, and how' requirement that the circumstances of the mistake be pleaded with particularity."). Martin v. Trott Law, P.C., 265 F. Supp. 3d 731, 740 (E.D. Mich. 2017). Rahman v. San Diego Accounts Serv., 2017 WL 1387206 (S.D. Cal.

pleading requirements may also apply, so that the party pleading an affirmative defense must allege enough supporting facts to nudge a legal claim across the line separating plausibility from mere possibility.[26]

The collector must establish each element of the defense—unintentional, bona fide error, maintenance of procedures to avoid such error—which are separate requirements, although they blur together and overlap in some circumstances.[27]

Where there is conflicting evidence regarding whether the elements of the bona fide error defense have been established, the trier of fact must resolve the remaining questions of fact.[28] Sometimes, however, one or more of the components of the defense can be so clearly inadequately supported by evidence as to be determined as a matter of law.[29]

Even where a collection agency has a bona fide error defense, it can be vicariously liable for the violations of its collection attorney if the attorney cannot prove bona fide error.[30]

Similarly, even when a debt collector is entitled to the FDCPA bona fide error defense, the collector may be liable under state law. For example, where a clerical error leads the debt collector to collect too much on a debt, state claims—such as UDAP, breach of contract, conversion, or unjust enrichment—may provide a recovery for the consumer.

12.2.2 Mistaken Interpretation of FDCPA Not a Bona Fide Error

The Supreme Court held in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, that a debt collector's mistaken interpretation of the FDCPA does not entitle the collector to the FDCPA bona fide error defense.[31] The Court distinguished

Apr. 18, 2017), Balon v. Enhanced Recovery Co., 316 F.R.D. 96 (M.D. Pa. 2016), Nyberg v. Portfolio Recovery Assoc., L.L.C., 2016 WL 3176585, at *4 (D. Or. June 2, 2016), Vanhuss v. Kohn Law Firm S.C., 127 F. Supp. 3d 980, 984 (W.D. Wis. 2015) (Fed. R. Civ. P. 9(b) requires debt collector to plead the "who, what, when, where, and how" of the alleged bona fide error; debt collectors did exactly that), Walters v. Performant Recovery, Inc., 124 F. Supp. 3d 75, 81–83 (D. Conn. 2015) (same), Wiebe v. Sachem & Lavrar, P.A., 2012 WL 5382181 (M.D. Fla. Nov. 1, 2012), Lowe v. Diversified Consultants, Inc., 2012 WL 3776715 (N.D. Ill. Aug. 30, 2012), *and* Bradshaw v. Hilco Receivables, L.L.C., 725 F. Supp. 2d 532 (D. Md. 2010), *with* Polk v. Legal Recovery Law Offices, 291 F.R.D. 485, 492 (S.D. Cal. 2013) (no need to address Fed. R. Civ. P. 9(b) as debt collector's pleadings did not meet even Fed. R. Civ. P. 8's "fair notice" standard). *Contra* Ruff v. Credit Adjustment, Inc., 2018 WL 4019464, at *4 (S.D. Ohio Aug. 23, 2018); Talamor v. I.C. Sys., Inc., 2016 WL 8674348, at *2 (W.D. Tex. Aug. 30, 2016); Prindle v. Carrington Mortg. Serv., L.L.C., 2016 WL 9504253 (M.D. Fla. May 27, 2016); Saeedi v. M.R.S. Assoc., Inc., 2007 WL 1875975, at *1 (N.D. Cal. June 28, 2007). *But cf.* Burns v. Dodeka, 2010 WL 1903987, at *1 n.2 (N.D. Tex. May 11, 2010).

26 *See, e.g.*, Izett v. Crown Asset Mgt., L.L.C., 2018 WL 6592442 (N.D. Cal. Dec. 14, 2018); Polk v. Legal Recovery Law Offices, 291 F.R.D. 485 (S.D. Cal. 2013); Godson v. Eltman, Eltman & Cooper, P.C., 285 F.R.D. 255 (W.D.N.Y. 2012). *But see* Michaud v. Greenberg & Sada, P.C., 2011 WL 2885952, at *2 (D. Colo. July 18, 2011) (declining to apply plausibility standard and holding that "an affirmative defense is sufficient if stated 'in short and plain terms' pursuant to Rule 8(b)(1)(A) and if the movant fails to demonstrate that the defense cannot succeed under any circumstance").

27 *See* Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009); Johnson v. Riddle, 443 F.3d 723 (10th Cir. 2006).

28 *See* Engelen v. Erin Capital Mgmt., L.L.C., 544 Fed. Appx. 707, 709 (9th Cir. 2013) (split decision; reversing summary judgment for debt collector, holding that it failed to meet its burden of proof on bona fide error defense where bookkeeper's failure to enter ten consumers' garnishment payments on one day was not picked up by spot-checking, because no evidence presented that debt collector's procedures were "designed to catch human recording errors"); Hess v. Cohen & Slamowitz L.L.P., 637 F.3d 117 (2d Cir. 2011); Danow v. Borack, 346 Fed. Appx. 409 (11th Cir. 2009) (jury could properly reject bona fide error defense where defendant did not record calls or produce procedures concerning how it processes letters from consumers, how it determined to place a "cease and desist" on an account, or if anyone reviewed employees' actions or call logs); Johnson v. Riddle, 443 F.3d 723 (10th Cir. 2006); Woodall v. Williams, Rush & Assoc., 2020 WL 2839286 (N.D. Tex. June 1, 2020); Masters v. Harrison & Johnston P.L.C., 2018 WL 988097 (W.D. Va. Feb. 20, 2018); Guerrero v. Credit Mgmt., L.P., 2017 WL 7052292 (W.D. Tex. Oct. 24, 2017), *adopted*, 2017 WL 7052319 (W.D. Tex. Dec. 19, 2017); Jenkins v. Lazega & Johanson, L.L.C., 2017 WL 6519028 (M.D. Ga. Dec. 20, 2017) (adequacy of collection law firm's policies to avoid § 1692i violations was question for jury); Pfeffer v. Nat'l Credit Sys., Inc., 2017 WL 3600437 (S.D. Ohio Aug. 18, 2017) (reasonable jury could find that collection agency's procedures were not reasonably adapted to avoid pursuit of debts discharged in bankruptcy when, despite its procedures, agency failed to identify and correct error on at least four occasions); Jones v. Portfolio Recovery Assoc., 2017 WL 7052288 (W.D. Tex. Aug. 16, 2017) (whether or not debt buyer's procedures were sufficient to avoid § 1692e(8) violation—namely, failing to recognize consumer's letter as a dispute—was question for jury); Eide v. Colltech, Inc., 987 F. Supp. 2d 951, 967 (D. Minn. 2013) ("[A] reasonable jury could, but would not be required to, conclude that Colltech's reliance on the Hospital to determine whether debts had been previously discharged in bankruptcy was unreasonable."); *In re* Uplinger, 2012 WL 7150435 (E.D. Va. Feb. 8, 2012), *aff'd*, 475 Fed. Appx. 28 (4th Cir. 2012); Agostino v. Quest Diagnostics, Inc., 2011 WL 5410667 (D.N.J. Nov. 3, 2011); Walter v. Palisades Collection, L.L.C., 2011 WL 1666869 (E.D. Pa. May 2, 2011); Basile v. Blatt, Hasenmiller, Leibsker & Moore L.L.C., 632 F. Supp. 2d 842 (N.D. Ill. 2009). *See also* Campbell v. Hall, 624 F. Supp. 2d 991 (N.D. Ind. 2009); Arrow Fin. Serv., L.L.C. v. Wright, 715 S.E.2d 725, 727 (Ga. Ct. App. 2011) (affirming lower court's rejection of collector's proposed jury charge as to bona fide error doctrine, specifying that if debt collector offered evidence that it was unaware of violation, "the burden shifts" to alleged debtor to show that collector "was indeed acting intentionally," and that to discharge this burden, alleged debtor would be "'required to present evidence creating a reasonable inference, [and] not a mere possibility[,] of intent'").

29 *See* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 948 (9th Cir. 2011); Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007) (no reasonable jury could find that the violation was in good faith or that the defendant maintained reasonable preventive procedures where a notice added language foreign to the Graham-Leach-Bliley form notice).

30 Santacruz v. Standley & Assoc., 2011 WL 1043338 (D. Colo. Mar. 17, 2011).

31 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010). *See also* DiNaples v. MRS BPO, L.L.C., 934 F.3d 275, 283 (3d Cir. 2019) (defendant's error in following industry standard by using QR code on face of envelope containing collection letter arose from its misunderstanding of its obligations under FDCPA, and was not mistake of fact to which bona fide error defense applies); Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 350 (7th Cir. 2018) ("Here, PRA incorrectly believed the statement 'the amount reported is not accurate' did not constitute a 'dispute' under § 1692e(8). In other words, it 'incorrect[ly] interpret[ed] . . . the requirements of [the FDCPA]. This is a mistake

factual errors for which the bona fide defense was available. The Court expressly did not address whether an error of *state* law or *other federal* law could form the basis of the bona fide error defense.[32] This subject is discussed in § 12.2.3, *infra*.

The Court started its decision with the deeply rooted principle in American jurisprudence that ignorance of the law is not an excuse. Moreover, the language of the FDCPA bona fide error defense is silent about excusing errors of law. The Court noted that when Congress intended to provide a mistake of law defense, it usually did so explicitly.

Thus, the bona fide error defense does not apply even where the debt collector in good faith relied on existing circuit precedent that was later reversed en banc, and also immediately stopped as soon as it learned its practice was a violation.[33] Such good faith reliance, though, can be a factor in reducing the size of statutory damages.

12.2.3 Errors of State Law or Other Federal Law

In *Jerman*, the Supreme Court expressly did not decide whether an error of *state* law or *other federal* law could form the basis of a bona fide error defense.[34] However, the reasoning in *Jerman* supports the view that mistakes of this type of other law also cannot form the basis for a bona fide error defense.

Even before *Jerman*, the Second, Sixth, Eighth, and Ninth Circuits rejected errors of law as a basis for the bona fide error defense under the FDCPA.[35] Several other circuits held that the essentially identical bona fide error provision in TILA covers only clerical mistakes, thus effectively excluding mistakes of law of any kind.[36] On the other hand, prior to *Jerman*, the Tenth[37] and Sixth[38] Circuits had held that the FDCPA forgave mistakes of law, and the Seventh Circuit had indicated it might follow that view in the future.[39]

After *Jerman*, the Ninth Circuit ruled that a mistake about the time-barred status of a debt under state law may qualify as a bona fide error because "a mistake about the time-barred status of a debt is a mistake regarding a collateral legal element of an offense, which we treat as a mistake of fact."[40]

Most district courts hold that "error" does not include mistakes of state or other federal law, following the approach and expanding upon the holding in *Jerman*.[41] Both before and after

of law." (citation omitted)); Leeb v. Nationwide Credit Corp., 806 F.3d 895 (7th Cir. 2015) (following *Jerman*; finding collection employee's mistaken interpretation of FDCPA was not unintentional error, since it was based on employee's mistaken interpretation of § 1692g, and company policy prohibited that violation but did not provide specific policy or procedure to avoid violation); Palmer v. Dynamic Recovery Solutions, L.L.C., 2016 WL 2348704 (M.D. Fla. May 4, 2016); New v. Gemini Capital Grp., 859 F. Supp. 2d 990 (S.D. Iowa 2012) (belief that collection action was timely, based on unpublished, non-binding state court opinion constituted mistake of law); Moxley v. Pfundstein, 2012 WL 4848973 (N.D. Ohio Oct. 11, 2012) (mistaken belief that recovery of prohibited attorney fees was lawful not defense); Holton v. Huff, 2012 WL 1354024 (M.D. Pa. Apr. 16, 2012) (rejecting defendants' bona fide error defense for filing their collection suit in venue prohibited by § 1692*i*, since mistakes of law are not bona fide errors under FDCPA); Puglisi v. Debt Recovery Solutions, L.L.C., 822 F. Supp. 2d 218 (E.D.N.Y. 2011); Smith v. Greystone Alliance L.L.C., 2011 WL 1303377 (N.D. Ill. Mar. 29, 2011) (because debt collector's actual policy explicitly directed collectors to withhold information required by § 1692e(11), its error could not be unintentional, nor could its policies be designed to prevent such errors; therefore, bona fide error defense was not available); Kempa v. Cadlerock Joint Ventures, L.P., 2011 WL 761500 (E.D. Mich. Feb. 25, 2011) (collector did not admit to making any clerical mistakes and instead acted intentionally in calling third parties based on mistake of law that it had right to make the calls).

32 559 U.S. at 580 n.4.

33 Oliva v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 864 F.3d 492 (7th Cir. 2017). *See also* Daubert v. NRA Grp., L.L.C., 861 F.3d 382 (3d Cir. 2017).

34 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 580 n.4, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010). *See also* Hall v. LVNV Funding, L.L.C., 2013 WL 5550838 (W.D. Ky. Oct. 8, 2013).

35 Picht v. Jon R. Hawks, Ltd., 236 F.3d 446 (8th Cir. 2001); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1034 (6th Cir. 1992); Pipiles v. Credit Bur., Inc., 886 F.2d 22 (2d Cir. 1989); Baker v. G.C. Serv. Corp., 677 F.2d 775 (9th Cir. 1982). *See also* Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961, 978 (D. Minn. 2019) (citing *Picht* for proposition that "within the Eighth Circuit . . . a debt collector's mistake of law—whether as to the FDCPA or as to some other state or federal law implicated by its debt-collection activities—does not provide it safe harbor under § 1692k(c)"). *But see* Watkins v. Peterson Enters., Inc., 57 F. Supp. 2d 1102 (E.D. Wash. 1999) (Ninth Circuit, in *Baker*, stated twice that legal error "by itself" is not bona fide error, implying that such errors might be permitted in some instances; here, state courts instituted challenged practice, which resulted from official interpretation of state law later overturned).

36 *See, e.g.*, McGowan v. King, Inc., 569 F.2d 845 (5th Cir. 1979); Ives v. W.T. Grant Co., 522 F.2d 749 (2d Cir. 1975); Palmer v. Wilson, 502 F.2d 860 (4th Cir. 1974); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 749 (7th Cir. 1974).

37 Johnson v. Riddle, 443 F.3d 723 (10th Cir. 2006) (mistake of state law).

38 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 538 F.3d 469 (6th Cir. 2008) (mistake of FDCPA law), *rev'd*, 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010).

39 Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002). *See* Ruth v. Triumph P'ships, 577 F.3d 790, 804 (7th Cir. 2009) (if claimed error is legal, it is only available to debt collectors "who can establish that they reasonably relied on either: (1) the legal opinion of an attorney who has conducted the appropriate legal research, or (2) the opinion of another person or organization with expertise in the relevant area of law—for example, the appropriate government agency." (dictum)); Campbell v. Hall, 624 F. Supp. 2d 991 (N.D. Ind. 2009) (holding that bona fide error defense applies to mistakes of law). *See also* Seeger v. AFNI, Inc., 548 F.3d 1107, 1114 (7th Cir. 2008) (declining to reach issue because defendant failed to follow reasonable procedures to avoid error of law).

40 Kaiser v. Cascade Capital, L.L.C., 989 F.3d 1127, 1139 (9th Cir. 2021) ("a mistake about the time-barred status of a debt is a mistake regarding a collateral legal element of an offense, which we treat as a mistake of fact").

41 *See, e.g.*, Thompson v. Midland Funding, L.L.C., 375 F. Supp. 3d 774, 785 (E.D. Ky. 2019) (reasoning of *Jerman* applies to mistakes of state law, such as controlling limitations period for filing suit); Ceraldi v. Strumpf, 2020 WL 2611119 (D. Conn. May 19, 2020) (error based on state law not covered by bona fide error defense); Infante v. Samara Portfolio Mgmt., L.L.C., 2017 WL 1102757 (E.D. Tex. Jan. 20, 2017) (defendant's reliance on state venue rules did not amount to bona fide error, since such rules are preempted by federal law and defendant, an attorney, is charged with knowledge of such laws), *adopted*, 2017 WL 1113322 (E.D. Tex. Mar. 23, 2017); Harden v. Autovest, L.L.C., 2016 WL 6997905, at *1 (W.D. Mich. Nov. 30, 2016) (defense does not

the *Jerman* decision, some lower courts have allowed collectors to assert the defense when they relied on the advice of counsel, especially when the law was unsettled,[42] or when the collector relied on an official interpretation.[43] However, even those courts required that reliance on the advice of counsel be reasonable.[44] Note, too, that assertion of reliance on the advice of counsel may constitute a waiver of the attorney-client privilege.[45]

It is not a misinterpretation of state law where a debt collector believes it should comply with state law that conflicts with the FDCPA. This is a misinterpretation as to the preemptive effect of the FDCPA, and thus, under *Jerman*, cannot form the basis of a bona fide error defense.[46]

12.2.4 Clerical and Factual Errors and Clerical Mistakes

As noted above, the FDCPA's bona fide error defense is patterned after that found in the Truth in Lending Act (TILA). Thus, of relevance is the TILA provision's examples of bona fide errors: "Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error."[47]

As with TILA, courts are likely to find unintentional bona fide clerical errors form the basis of such a defense. For example, a clerk's faulty input of information into an otherwise effective computer program to prevent improper communications may be a valid clerical error.[48]

Older FDCPA cases limited the bona fide error defense to the type of clerical errors listed in the TILA provision.[49] But

include mistakes of state law, noting that "[t]he Sixth Circuit has also suggested, but has not expressly held, that the reasoning in *Jerman II* extends to mistakes of state law."). *See also* Wise v. Zwicker & Assoc., 780 F.3d 710, 713 (6th Cir. 2015) ("The Supreme Court declined to address whether the defense is available for mistakes of law other than the FDCPA itself, but the discussion of the affirmative defense makes clear that mistakes of state law can give rise to liability."); Collins v. Portfolio Recovery Assoc., 2013 WL 9805805, at *9 n.10 (E.D. Tenn. June 7, 2013) (mistake of state law regarding whether civil warrant is not formal pleading under state law, thus exempt from § 1692g notice requirements, would not qualify as bona fide error); McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1, 82 (D. Mass. 2012) ("Three principles used to support the holding in *Jerman* lead to the conclusion that section 1692k(2) does not encompass mistakes based on state law"), *aff'd in part, rev'd in part on other grounds*, 775 F.3d 109 (1st Cir. 2014); New v. Gemini Capital Corp., 859 F. Supp. 2d 990, 998 (S.D. Iowa 2012) (reasoning of *Jerman* applies to mistakes of state law); Moxley v. Pfundstein, 2012 WL 4848973 (N.D. Ohio Oct. 11, 2012) (mistaken belief that recovery of prohibited attorney fees was lawful under state law is not a defense); Ballou v. Law Offices Howard Lee Schiff, P.C., 713 F. Supp. 2d 79 (D. Conn. 2010) (same); New v. Gemini Capital Grp., 859 F. Supp. 2d 990, 998 (S.D. Iowa 2012) (mistake of state law regarding limitations period not bona fide errors protected by FDCPA). *But see* Puffinberger v. Commercion, L.L.C., 2014 WL 120596 (D. Md. Jan. 10, 2014) (denying plaintiff summary judgment where debt collector's filing suit beyond applicable limitations period may have been unintentional mistake of state law). *See also* Stratton v. Portfolio Recovery Assoc., 171 F. Supp. 3d 585, 603 (E.D. Ky. 2016) (without analysis, stating in *dicta* that "[t]his affirmative defense applies to both mistakes of state law and clerical errors") (citing Sixth Circuit decision in *Wise* even though it indicates to the contrary), *aff'd on other grounds*, 706 Fed. Appx. 840 (6th Cir. 2017); Ryan v. Law Offices Howard Lee Schiff, P.C., 2011 WL 1060287 (D. Conn. Mar. 23, 2011) (post-*Jerman;* denying consumer's motion to strike affirmative defense, noting as open question whether mistake of state law may be considered bona fide error under FDCPA).

42 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010); Hare v. Hosto & Buchan, P.L.L.C., 774 F. Supp. 2d 849, 855–856 (S.D. Tex. 2011) (attorneys who brought unsuccessful, time-barred arbitration award confirmation proceeding could assert bona fide error defense where there was split in circuits as to whether limitations provisions of Federal Arbitration Act were mandatory or permissive; notably, stating that plaintiff had "not pointed out facts that show, nor argued, that the requirements of § 1692k(c) of the Act have not been satisfied by the Defendants"); Pescatrice v. Orovitz, 539 F. Supp. 2d 1375 (S.D. Fla. 2008) (finding applicable statute of limitations rule unsettled; excusing resulting FDCPA violation as bona fide error of law); Taylor v. Luper, Sheriff, & Niedenthal, 74 F. Supp. 2d 761 (S.D. Ohio 1999) (state law divided; attorney's duty to zealously represent client would present ethical dilemma if attorney held personally liable for asserting a good faith claim in litigation). *See also* Castro v. Collecto, Inc., 634 F.3d 779 (5th Cir. 2011) (bona fide error defense shielded error applying Texas statute of limitations rather than the correct federal FCC two-year period; reasonable lawyers readily disagree on which limitation period to apply).

43 *See* Frye v. Bowman, Heintz, Boscia & Vician, P.C., 193 F. Supp. 2d 1070 (S.D. Ind. 2002) (pre-*Jerman*; granting summary judgment to defendants where summons forms matched ones approved by court clerks); Murphy v. Bonded Adjustment Co., No. CS-99-0100-WFN (E.D. Wash. Jan. 6, 2000) (allowing defense for both payment order and attorney fee practices later found unlawful); Watkins v. Peterson Enters., Inc., 57 F. Supp. 2d 1102 (E.D. Wash. 1999) (upholding defense for use of payment orders required by state courts, later held unlawful, but not for seeking fees on unsuccessful writs, error based on debt collector's own interpretation of law).

44 Bernstein v. Howe, 2003 WL 1702254, at *6 (S.D. Ind. Mar. 31, 2003) (mistake of law not forgiven if unreasonable). *See also* Heisler v. Convergent Healthcare Recoveries, Inc., 2020 WL 1249481, at *12 (E.D. Wis. Mar. 16, 2020) (even if counsel made error in legal judgment in approving particular template used, collector's active collaboration with counsel to ensure that its letters fulfilled FDCPA requirements "was a reasonable step in a process reasonably adapted to ensure that letters clearly identified the creditor as the FDCPA required").

45 *See* Anchondo v. Anderson, Crenshaw & Assoc., 256 F.R.D. 661, 671 (D.N.M. 2009).

46 *See* Washington v. Portfolio Recovery Assoc., 211 F. Supp. 3d 1041 (N.D. Ill. 2016).

47 15 U.S.C. § 1640(c). *See* National Consumer Law Center, Truth in Lending § 12.4.4.4 (10th ed. 2019), *updated at* www.nclc.org/library.

48 *See* Erez v. Steur, 2014 WL 6069847 (W.D. Wash. Nov. 13, 2014). *See also* Arnold v. Bayview Loan Servicing, L.L.C., 659 Fed. Appx. 568 (11th Cir. 2016) (employee mistakenly changed status field); Rodriguez v. Reg'l Recovery Serv., Inc., 2019 WL 8231645 (N.D. Ill. Jan. 24, 2019) (occasional failure to tag entry as disputed is exactly kind of clerical or factual mistake covered by § 1692k(c)); Puncochar v. Revenue Mgmt. of Illinois Corp., 2017 WL 1208426 (N.D. Ill. Mar. 31, 2017) (where consumer had not listed the debt in her bankruptcy schedules); Libby v. Alessi & Koenig, L.L.C., 2014 WL 5506794 (D. Nev. Oct. 31, 2014) (omission of § 1692e(11) notice in one letter was unintentional single occurrence resulting from isolated mistake).

49 *See, e.g.*, Smith v. Transworld Sys., Inc. 953 F.2d 1025 (6th Cir. 1992); Baker v. G.C. Serv. Corp., 677 F.2d 775 (9th Cir. 1982); Hubbard v. Nat'l Bond & Collection Assoc., 126 B.R. 422, 427 (D. Del. 1991),

language in the Supreme Court's *Jerman* decision raises the question whether factual errors beyond just clerical ones can also form the basis of a bona fide error defense. The Court stated in a footnote:

> While factual mistakes might, in some circumstances, constitute bona fide errors and give rise to violations that are "not intentional" within the meaning of [FDCPA] § 1692k(c), we need not and do not decide today the precise distinction between clerical and factual errors, or what kinds of factual mistakes qualify under the FDCPA's bona fide error defense.[50]

It is clear that debt collectors cannot use legal errors as a defense, even when they try to label those errors as factual. For example, sending a collection letter after receiving a proper dispute under FDCPA § 1692g was a legal error, not a factual one.[51] Likewise, a collector's policy of sending two verification notices on different dates with different deadlines to consumers who moved, which can confuse the consumer who receives both, is not excused as a factual mistake.[52] On the other hand, a transcription error that double-counted attorney fees can be viewed as a factual error to which the bona fide error defense might apply,[53] as can a credit reporting error made because a debt collector was unaware that it had received a dispute letter where that letter was sent to a fax number that was no longer being used by the agency.[54]

12.2.5 The Error Must Be Bona Fide

An error is bona fide if it is made in a good faith attempt at compliance and is a genuine as opposed to a contrived mistake.[55] An early, but still authoritative, Seventh Circuit decision on a TILA claim held that an error is not made in good faith if it was due to reliance on untrained employees.[56] However, even reliance on a trained employee may also not suffice. A district court has held that "more is required than reliance on a single person, no matter how well-trained and knowledgeable."[57]

The error must be made without fraud or deceit and with faithfulness to the collector's duty or obligation.[58] Where a violation was repeated[59] or routinely committed it cannot be said to be either an error or bona fide.[60] Further, a violation that begins as a bona fide error may lose that protection when it goes uncorrected after it becomes apparent.[61]

The test is an objective one—is the error objectively reasonable regardless of the collector's subjective intent.[62] For example, where one debt collector referred to another collector

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aff'd, 947 F.2d 935 (3d Cir. 1991); Garrick v. Hosp. Collection Serv., 1990 U.S. Dist. LEXIS 20961 (D. Conn. Jan. 31, 1990); Minick v. First Fed. Credit Control, Inc., 1981 U.S. Dist. LEXIS 18622 (N.D. Ohio June 9, 1981); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002).

50 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 591 n.12, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010). *See* Appx. E.3.6.1, *infra*. *See also* Reese v. CAC Serv., Inc., 2011 WL 830084 (D. Or. Mar. 3, 2011) (defendant's assertion that it was entitled to defense, because it made mistake of fact when it operated on belief that plaintiff's letter was not letter of dispute, survived plaintiff's motion for summary judgment).

51 Leeb v. Nationwide Credit Corp., 806 F.3d 895 (7th Cir. 2015).

52 *See* Christopher v. RJM Acquisitions L.L.C., 2015 WL 437541 (D. Ariz. Feb. 3, 2015).

53 Powell v. Palisades Acquisition XVI, L.L.C., 782 F.3d 119 (4th Cir. 2014).

54 Webster v. Receivables Performance Mgmt., L.L.C., 2020 WL 4192896, at *9 (S.D. Ind. July. 21, 2020).

55 Kort v. Diversified Collection Serv., 394 F.3d 530, 538 (7th Cir. 2005) (quoting *Black's Law Dictionary*) (7th ed. 1999) (defining "bona fide" as "1. Made in good faith; without fraud" and "2. Sincere; genuine" and finding test met); Totten v. Evergreen Prof'l Recoveries, Inc., 2014 WL 4145517 (E.D. Wash. Aug. 19, 2014) (sending copy of judgment directly to represented consumer was bona fide error where undisputed evidence showed that debt collector trained its employees not send mail to represented consumers and only copy of judgment, not collection letter, was mailed; including collection letter would have indicated that collector's alleged error was contrived in order to circumvent plaintiff's counsel); Davis v. Nat'l Credit Sys., Inc., 2014 WL 12539688 (D. Neb. Apr. 29, 2014) (collection employee's failure to identify herself in voicemail was "inadvertent mistake" where it was against company policy and was part of collector's training and testing). *But see* Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007) (violation was not in good faith where collector's notice added language foreign to Graham-Leach-Bliley form notice); Borcherding-Dittloff v. Transworld Sys., Inc., 58 F. Supp. 2d 1006 (W.D. Wis. 1999) (waiting in hope that Seventh Circuit would reverse decision on misleading collection letters was business decision, not bona fide error).

56 Mirabal v. Gen. Motors Acceptance Corp., 537 F.2d 871, 878 (7th Cir. 1976).

57 Gathuru v. Credit Control Serv., Inc., 623 F. Supp. 2d 113, 122–123 (D. Mass. 2009) (citing *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 878 (7th Cir. 1976) as "interpreting identical defense in Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*: ('Congress left the exact nature of the preventative mechanism undefined. It is clear, however, that Congress required more than just a showing that a well-trained and careful clerk made a mistake.')").

58 *See* Bynum v. Cavalry Portfolio Serv., L.L.C., 2006 WL 850935 (N.D. Okla. Mar. 30, 2006).

59 Castillo v. Nationstar Mortg. L.L.C., 2016 WL 6873526 (N.D. Cal. Nov. 22, 2016).

60 *See* Beasley v. Blatt, 1994 WL 362185 (N.D. Ill. July 11, 1994) (debt collector regularly mailed identical form collection letters to consumer and commercial debtors alike); Sutton v. Law Offices of Alexander L. Lawrence, 1992 U.S. Dist. LEXIS 22761 (D. Del. June 17, 1992) (no bona fide error defense where no evidence that FDCPA-required disclosures were normally sent). *But see* Herbert v. Monterey Fin. Serv., Inc., 2001 WL 1266299, at *5 (D. Conn. Sept. 28, 2001) (error in failing for four years to report to credit bureaus that the debt was disputed was "bona fide error" that was "bound to occur").

61 Currier v. First Resolution Inv. Corp., 762 F.3d 529 (6th Cir. 2014). *See* also Wagner v. Chiari & Ilecki, L.L.P., 973 F.3d 154 (2d Cir. 2020) (reasonable jury could find that collector's error was not bona fide since consumer was served in postjudgment collection efforts after he twice informed collector that he was not judgment debtor); Stephenson v. Green Tree Servicing, L.L.C., 2014 WL 4410132 (E.D. Mich. Sept. 8, 2014) (faulty scanning of cease letter not defense where collector kept calling even after consumer notified collector that cease letter had been sent).

62 Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350 (11th Cir. 2009); Johnson v. Riddle, 443 F.3d 723 (10th Cir. 2006) (although also noting that "the intent prong of the bona fide error defense is a subjective test" turning on defendant's subjective intent to violate FDCPA); Kort v. Diversified Collection Serv., Inc. 394 F.3d 530, 538 (7th Cir.

as the creditor, when the identity of the real creditor was known, was found not to be an "objectively reasonable mistake."[63] A debt collector's failure to include the consumer's payments to the creditor in a programmable field of its form debt collection letter, which therefore showed an inaccurate current balance, is not objectively reasonable.[64] Nor is the debt collector's continuing to garnish wages, despite two calls from the debtor's employer informing the collector that the employer had received paperwork from a court indicating that the debtor was no longer to be garnished.[65]

The defense is most naturally available for clerical mistakes, such as a recently broken keyboard key, an error in transposing numerals,[66] a computer glitch,[67] or an innocent error of fact regarding the consumer (as opposed to commercial) nature of a debt being collected.[68]

12.2.6 Violation Must "Result From" Bona Fide Error

Even if a violation is unintentional, it must have "resulted from" the "bona fide" error. There is little case law on what "resulted from" means. In a thoughtful analysis of the term, one district court rejected a debt collector's bona fide error defense for failure to prove this element of the defense. The court found that the "error merely played a nonessential contributing role in the violations' occurrence."[69]

12.2.7 Is Collector's Reasonable Reliance on the Creditor's Information a Defense?

Debt collectors may claim that they are acting in good faith when they violate the FDCPA, relying on the information they receive from the creditor—that is, the creditor is at fault, and not them. Is the collector's conduct an unintentional bona fide error?

Many courts soundly reject reliance on the creditor's information as the basis of a bona fide error defense,[70] while other courts accept this as grounds for the defense.[71] Collectors

2005); Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961, 978 (D. Minn. 2019).

63 Hepsen v. Resurgent Capital Serv., L.P., 383 Fed. Appx. 877, 883 (11th Cir. 2010).

64 Garcia v. Law Offices Howard Lee Schiff, P.C., 401 F. Supp. 3d 241, 254 (D. Conn. 2019).

65 Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961, 978–979 (D. Minn. 2019).

66 *See, e.g.*, Washington v. Convergent Outsourcing, Inc., 2017 WL 1093152 (N.D. Ill. Mar. 23, 2017) (when agency's employee processed dispute letter from consumer's attorneys, but manually updated account with incorrect code, it was textbook example of clerical mistake and procedures in place satisfied criteria of bona fide error defense).

67 Purnell v. Arrow Fin. Serv., L.L.C., 2007 WL 1840057 (E.D. Mich. June 26, 2007) (conversion process from Metro 1 to Metro 2 caused the error, which was unintentional); Hernandez v. Affiliated Grp., Inc., 2006 WL 83474 (E.D.N.Y. Jan. 12, 2006) (coding glitch in mail merge letter resulting in misplacement, not elimination, of required information). *See also* Cook v. Credit Sys. Int'l, Inc., 2020 WL 5797715 (E.D. Tex. Sept. 10, 2020), *adopted*, 2020 WL 5764363 (E.D. Tex. Sept. 28, 2020) (genuine issue of material fact remained as to whether agency had reasonable policies to avoid software glitch).

68 *See* Wilhelm v. Credico, Inc., 426 F. Supp. 2d 1030 (D.N.D. 2006) (collector defendant established bona fide error defense by showing amount of principal and assigned interest was mistakenly entered); Goodman v. S. Credit Recovery, Inc., 1999 WL 14004 (E.D. La. Jan. 8, 1999) (placement of collection letter in envelope with incorrect address was bona fide error); Parks v. Chlan, 1996 WL 243473 (D. Md. May 3, 1996) (due to a clerical error, lawyer sent out dunning letter for paid hospital bill, indicating amount due of $0.00); Hubbard v. Nat'l Bond & Collection Assoc., 126 B.R. 422, 427 (D. Del. 1991), *aff'd*, 947 F.2d 935 (3d Cir. 1991); Garrick v. Hosp. Collection Serv., Inc., 1990 U.S. Dist. LEXIS 20961 (D. Conn. Jan. 31, 1990). *See also* Kujawa v. Palisades Collection, L.L.C., 614 F. Supp. 2d 788 (E.D. Mich. 2008) (debt collectors did not violate FDCPA by recording judgment lien on property of plaintiff who had same last name as debtor or by mailing garnishment release to plaintiff; even if this were violation of FDCPA, bona fide error defense would apply).

69 Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961, 977 (D. Minn. 2019) (granting summary judgment for debtor, utilizing but-for causality as explained in *Burrage v. United States*, 571 U.S. 204, 212, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014), and finding debt collector's internal mishandling of debtor's application to vacate judgment merely played nonessential role in violation).

70 *See, e.g.*, McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011); Owen v. I.C. Sys., Inc., 629 F.3d 1263, 1277 (11th Cir. 2011) (debt collector required to have procedure to check creditor's computations for errors apparent on face of contract, noting that "[d]ebt collectors who presently maintain *internal* procedures to avoid FDCPA errors would be incentivized to scrap these measures altogether, since full immunity could be guaranteed by placing the onus of accuracy on creditors. This would precipitate a race to the bottom among debt collectors, rendering the FDCPA a dead letter."); Garcia v. Miramed Revenue Grp., L.L.C., 2018 WL 701283 (N.D. Ill. Jan. 30, 2018) (rejecting as matter of law collection agency's bona fide error defense that it merely presented debt based upon account information provided by creditor; although agency may not have intentionally and willfully violated FDCPA, it intentionally chose to present creditor's very conflicting information concerning amount of debt owed); Barnes v. Northwest Repossession, L.L.C., 210 F. Supp. 3d 954 (N.D. Ill. 2016) (company's reliance on secured creditor's order to repossess was not adequate preventive procedure); Ellis v. Phillips & Cohen Assoc., 2016 WL 3566981, at *6 (N.D. Cal. June 30, 2016) ("A debt collector is not entitled under the FDCPA to sit back and wait until a creditor makes a mistake and then institute procedures to prevent a recurrence"). *See also* Esch v. Legacy Salmon Creek Hosp., 738 Fed. Appx. 430, 431 (9th Cir. 2018) (mem.; "One could reasonably determine that Asset violated . . . § 1692e when it attempted to collect more than what was owed, continued to do so after Plaintiffs and their attorney told Asset about the error, and despite having been told of the billing error, improperly threatened a lawsuit without adequate inquiry."); § 12.2.9.2, *infra*.

71 *See* Abdollahzadeh v. Mandarich Law Grp., L.L.P., 922 F.3d 810 (7th Cir. 2019) (bona fide error defense protected collector charged with attempting to collect time-barred debt that relied on data provided by its client which did not identify that debtor's last attempt at payment was reversed and final payment to clear was prior year); McLean v. Ray, 488 Fed. Appx. 677, 683 (4th Cir. 2012) (FDCPA does not create heightened duty of investigation for attorney debt collectors engaging in ordinary debt collection activity; finding that attorney was entitled to bona fide error defense where there was clearly "colorable basis" for creditor's claim, its attorney could reasonably rely on creditor's representations, and where attorney "made a true effort to verify the accuracy" of claim and took action to address problem once it came to light); Lewis v. ACB Bus. Serv., 135 F.3d 389 (6th Cir. 1998) (where creditor returned debt to collection agency marked "new" rather than returned, bona fide error defense existed for collector's contact of debtor who

will also argue that the requirement as to procedures to avoid errors is met not by their own procedures, but by those the creditor uses.

Even if a court were to accept a bona fide error defense based on reasonable reliance on the creditor, the reliance must be reasonable.[72] Some courts find reasonable reliance where the creditor has a contractual duty to provide an accurate statement of the debt amount[73] or the creditor has proven trustworthy in the past.[74] In the absence of warning signs of creditor errors,[75] some courts hold the Act does not require collectors to undertake an independent investigation of a debt referred for collection.[76]

had sent cease communication letter); Roe v. Roosen, Varchetti & Olivier, P.L.L.C., 2020 WL 1873329 (E.D. Mich. Apr. 15, 2020) (where plaintiff had same name as judgment debtor, debt collector's reliance on creditor to verify judgment debtor's employment information was reasonable, given that creditor typically verified employment when it extended credit and had ongoing communications with debtor during business relationship; collector's policy of not reinvestigating employment information verified by its clients was not unreasonable); Pettitt v. Chiari & Ilecki, L.L.P., 419 F. Supp. 3d 627, 636 (W.D.N.Y. 2019) (genuine issue of material fact as to whether debt collector's reliance on judgment creditor's statement, confirming she had in her possession debtor's written acknowledgement of debt, was objectively reasonable precluded summary judgment with respect to this element of bona fide error defense); Sayyed v. Wolpoff & Abramson, L.L.P., 733 F. Supp. 2d 635 (D. Md. 2010) (bona fide error where amount requested in summary judgment motion was verified under oath by client in accompanying affidavit, and was supported by documentation provided by client; Charbonneau v. Mary Jane Elliott, P.C., 611 F. Supp. 2d 736 (E.D. Mich. 2009) (defendant's reliance on information provided by selling creditor to determine statute of limitations sufficient to establish bona fide error defense); Krawczyk v. Centurion Capital Corp., 2009 WL 395458 (N.D. Ill. Feb. 18, 2009) (debt buyers entitled to rely on creditor's statement that payment was made within limitations period); Whitaker v. Hudson & Keyse, L.L.C., 2007 WL 2265057 (S.D. Ind. Aug. 6, 2007) (error was bona fide because collector relied on creditor's referral, but jury question remained as to whether procedures sufficient to prevent miscalculation of interest); Shapiro v. Haenn, 222 F. Supp. 2d 29 (D. Me. 2002) (collector relied on loan documents indicating loan was commercial debt); Stonehart v. Rosenthal, 2001 WL 910771 (S.D.N.Y. Aug. 13, 2001); Jenkins v. Union Corp., 999 F. Supp. 1120 (N.D. Ill. 1998) (collector reasonably relied on creditor referral information that erroneously stated that check was dishonored when in fact consumer had stopped payment due to dispute with merchant); Faust v. Texaco Ref. and Mktg., Inc., 270 B.R. 310 (Bankr. M.D. Ga. 1998). *See also* Sanchez v. United Collection Bur., Inc., 649 F. Supp. 2d 1374 (N.D. Ga. 2009) (collector entitled to bona fide error defense for misrepresenting amount of debt where collector relied on amount as represented by its client). *Cf.* Bradley v. Fairbanks Capital Corp., 2003 WL 21011801 (N.D. Ill. May 5, 2003) (state law permitted attorney to verify complaint on information and belief).

72 *See, e.g.*, McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011) (reliance on creditor here unreasonable); Owen v. I.C. Sys., Inc., 629 F.3d 1263 (11th Cir. 2011) (not reasonable to place responsibility for checking for unauthorized and illegal charges on the creditor); Hyman v. Tate, 362 F.3d 965 (7th Cir. 2004) (collector could rely on historically trustworthy creditor regarding whether had been debt discharged in bankruptcy where immediately stopped collection when put on notice of bankruptcy discharge); Palacios v. Collection Consultants of Cal., 2014 WL 12601019 (C.D. Cal. Aug. 11, 2014) (for debt collector's reliance on creditor to be reasonable, must show that collector had adequate procedures in place to avoid mistakes); Koller v. West Bay Acquisitions, L.L.C., 2012 WL 1189481 (N.D. Cal. Apr. 9, 2012); Buzzell v. Citizens Auto. Fin., Inc., 802 F. Supp. 2d 1014 (D. Minn. 2011) (FDCPA does not allow a repossession company to escape liability under § 1692f(6) simply because it received a repossession order from a creditor that it blindly followed without any assurance of creditor's present right to possess); Healey v. Trans Union L.L.C., 2011 WL 1900149, at *9 (W.D. Wash. May 18, 2011) (denying defendant's motion for summary judgment on its bona fide error defense for mistakenly dunning wrong person since defendant "has pointed the court to no evidence that its reliance on [the creditor's] representations regarding [the plaintiff's] account was reasonable or that it maintained procedures to avoid errors"); Borcherding-Dittloff v. Transworld Sys., Inc., 58 F. Supp. 2d 1006 (W.D. Wis. 1999) (defendant could not rely on state administrators who did not administer FDCPA). *Cf.* Johnson v. Riddle, 443 F.3d 723, 730 (10th Cir. 2006) ("only Riddle, as the attorney in charge, rather than his staff or employees, may make a core legal decision as to whether a particular practice is permitted by law"); Edwards v. McCormick, 136 F. Supp. 2d 795, 804 (S.D. Ohio 2001) (debt collector may rely upon information from client if not "willfully blind" to inaccurate information); *In re* Hodges, 342 B.R. 616 (Bankr. E.D. Wash. 2006) (collector had duty to seek independent, objective legal advice).

73 *See* Klemp v. Columbia Collection Serv., Inc., 2014 WL 5324318 (D. Or. Oct. 17, 2014). *See also* Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991, 996 (7th Cir. 2003) (suggesting that creditors' contractual duty to accurately state the amount might justify reliance). *But see* Urbina v. Nat'l Bus. Factors Inc., 979 F.3d 758, 760 (9th Cir. 2020) ("the FDCPA's bona fide error defense does not allow debt collectors to avoid liability by contractually obligating creditor-clients to provide accurate information, nor by requesting that creditor-clients provide notice of any errors in the accounts assigned for collection without waiting to receive a response before instituting collection efforts").

74 Hyman v. Tate, 362 F.3d 965 (7th Cir. 2004). *See also* Canham v. Fair Collections & Outsourcing, Inc., 2014 WL 3952902 (N.D. Ill. Aug. 13, 2014) (citing *Hyman*, finding requirement of bona fide error defense met where, after consumer disputed his debt, collector followed its verification procedures by double-checking with creditor that amount sought accurately reflected figure that it believed was due). *But cf.* Guevara v. Constar Fin. Serv., L.L.C., 2020 WL 3001390, at *11 (M.D. Pa. June 4, 2020) (while in some cases it may be reasonable for debt collector to rely on creditor who previously provided accurate information in the past, such reliance was not reasonable here).

75 *See* Gallegos v. LVNV Funding L.L.C., 169 F. Supp. 3d 1235, 1242 (D. Utah Mar. 10, 2016) (rejecting application of bona fide error defense because "a debt collector cannot continue to claim that it is reasonably relying on information from the creditor once the debt collector has received clear notice that some of the information may be incorrect").

76 Hyman v. Tate, 362 F.3d 965 (7th Cir. 2004) (collector could rely on historically trustworthy creditor regarding whether had been debt discharged in bankruptcy where immediately stopped collection when put on notice of bankruptcy discharge); Dikeman v. Nat'l Educators, Inc., 81 F.3d 949 (10th Cir. 1996) (jury found debt unverified when the verification given was inadequate due to overstatement of the collector's claim, but excused violation as a bona fide error); Amond v. Brincefield, Hartnett & Assoc., 1999 WL 152555 (4th Cir. Mar. 22, 1999) (lawyer had no reason to question the large increase in the amount of the deficiency debt he was collecting); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1032 (6th Cir. 1992); Buffington v. Schuman & Schuman, P.C., 2001 WL 34082273, at *6 (N.D.N.Y. Feb. 21, 2001) ("the debt collector itself is not obligated to investigate the background of the debt prior to communicating with the debtor"); Bleich v. Revenue Maximization Grp., Inc., 233 F. Supp. 2d 496, 500–501 (E.D.N.Y. 2002); Fitzgerald v. Pekay & Blitstein, 2001 WL 987695 (N.D. Ill. Aug. 9, 2001) (collector did not intentionally waive its right to collect the proper amount due); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 392 (D. Del. 1991) ("[g]enerally, a debt collector may reasonably rely upon information provided by a creditor who has provided accurate information

But the same may not be the case where there is evidence that information from the creditor is not accurate.[77] Where a law firm was working for a debt buyer, the Ninth Circuit found reliance on the debt buyer not reasonable where the debt buyer refused to warrant the accuracy of its information and the collection law firm had previous legal difficulties with that particular debt portfolio of the debt buyer.[78]

Similarly, the Eleventh Circuit found the reliance not reasonable where errors were apparent on the face of the documents.[79] Other courts may find that a debt collector has an independent duty to determine if a debtor has filed bankruptcy, and cannot rely on the creditor or the consumer to provide that information.[80] The fact that the debt collector used or failed to use a bankruptcy screening service may be probative.[81]

In a recent decision, a lower court found that a collection agency's misrepresentation to the plaintiff that she owed a debt belonging to a person with the same name was unintentional. The collector was held to have reasonably relied upon information from the original creditor, as updated by two vendors that specialized in tracking down individuals' location information.[82]

Collectors may also assert bona fide error when they rely in good faith on information from other third parties, including the use of allegedly defective forms provided by government agencies.[83]

For a discussion of when reliance on a creditor is a reasonable procedure under the bona fide error defense, see § 12.2.9.2, *infra*.

12.2.8 The Error Must be Unintentional

The majority of courts hold that the debt collector can establish that its error was unintentional by showing that it did not intend to violate the Act, and that it does not need to demonstrate that it did not intend to commit the act or omission. This view is supported by the language in the statutory definition of a bona fide error that requires the debt collector to show that "*the violation* was not intentional."[84]

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in the past"); Hubbard v. Nat'l Bond & Collection Assoc., Inc., 126 B.R. 422 (D. Del. 1991), *aff'd*, 947 F.2d 935 (3d Cir. 1991) (collector had no obligation to investigate a debtor's financial background to discover whether a debt had been discharged in bankruptcy; unintentional attempt to collect a discharged debt did not violate 15 U.S.C. § 1692e, 1692e(2)(A), or 1692e(5)). *See also* Majeski v. I.C. Sys., Inc., 2010 WL 145861, at *6 (N.D. Ill. Jan. 8, 2010) ("With regard to pre-dispute procedures, debt collector is entitled to rely on its client's obligation to deliver accurate account information on reported debts."). *Cf.* Yu v. Kevin B. Wilson Law Offices, 919 F. Supp. 2d 661 (D. Md. 2013) (collector ceased collection of the debt immediately after learning of the plaintiff's bankruptcy; defense established).

77 Clark v. Capital Credit & Collection Serv., Inc., 460 F.3d 1162, 1177 (9th Cir. 2006) (denying debt collector's motion for summary judgment). *See also* Solomon v. Baer & Timberlake, P.C., 504 Fed. Appx. 702, 705 (10th Cir. 2012); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1032 (6th Cir. 1992); Eide v. Colltech, Inc., 987 F. Supp. 2d 951 (D. Minn. 2013).

78 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011). *See also* Palacios v. Collection Consultants of Cal., 2014 WL 12601019 (C.D. Cal. Aug. 11, 2014) (for debt collector's reliance on creditor to be reasonable, must show that debt collector had adequate procedures in place to avoid mistakes). *Compare* De La Torre v. Legal Recovery Law Office, 2015 WL 574629 (S.D. Cal. Feb. 11, 2015) (defense accepted where creditor warranted information was accurate).

79 Owen v. I.C. Sys., Inc., 629 F.3d 1263 (11th Cir. 2011).

80 Turner v. J.V.D.B. & Assoc., 318 F. Supp. 2d 681 (N.D. Ill. 2004) (passive reliance on creditor for information regarding bankruptcy not enough; contract with creditor did not spell out creditor's duties), *on appeal from later decision*, 202 Fed. Appx. 123, 124 (7th Cir. 2006) (noting that lower court's decision denying bona fide error defense "properly addressed the second part of our [earlier] mandate" on bona fide error, though the issue was not raised on appeal). *See also* Eide v. Colltech, Inc., 987 F. Supp. 2d 951 (D. Minn. 2013).

81 *See, e.g.*, Miller v. Allied Interstate, Inc., 2005 WL 1520802 (N.D. Ill. June 27, 2005) (affidavit from debt collector that it utilized procedure to search database on Lexis-Nexis to uncover debtors in bankruptcy created a genuine issue of material fact precluding determination of consumer's motion for summary judgment). *See also* Ross v. RJM Acquisitions Funding, L.L.C., 2006 WL 752953 (N.D. Ill. Mar. 16, 2006) (debt collector conducted public records bankruptcy search before commencing collection).

82 Christopher v. RJM Acquisitions L.L.C., 2015 WL 437541 (D. Ariz. Feb. 3, 2015) (upholding bona fide error defense because reliance upon vendors was reasonable as they had reported that location information belonged to specific debtor, not just to someone with same name, and using locating specialist rather than "shot gun" approach was reasonable procedure; failing, however, to consider how vendors' errors occurred when debtor and alleged debtor obviously had different identities (e.g., Social Security numbers). *See also* Hedayati v. The Perry Law Firm, 2017 WL 4864491 (C.D. Cal. Oct. 27, 2017) (there were no procedures that would have prevented error of confusing FDCPA plaintiff with debtor brother, because even public records did not differentiate between plaintiff and his brother, who had similar names).

83 Kort v. Diversified Collection Serv., Inc., 394 F.3d 530 (7th Cir. 2005) (pre-garnishment notice form required by Department of Education); Henderson v. Biel, 2007 WL 2286129, at *8 (S.D. Ind. Aug. 7, 2007) ("language in a form provided by the clerks of Indiana state courts, even when inconsistent with one federal district judge's decision, removes any possibility that they intentionally violated the FDCPA"). *But see* Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007) (no bona fide error when defendant added language to statutory language taken from Gramm-Leach-Bliley Act).

84 15 U.S.C. § 1692k(c) (emphasis added). *See, e.g.*, Arnold v. Bayview Loan Servicing, L.L.C., 659 Fed. Appx. 568, 570 (11th Cir. 2016) (must show FDCPA violation, not underlying conduct, was unintentional); Johnson v. Riddle, 443 F.3d 723, 728 (10th Cir. 2006) (same; test is subjective one); Lewis v. ACB Bus. Serv., Inc., 135 F.3d 389, 402 (6th Cir. 1998) (same); Pettitt v. Chiari & Ilecki, L.L.P., 419 F. Supp. 3d 627, 632–633 (W.D.N.Y. 2019); Garcia v. Law Offices Howard Lee Schiff P.C., 401 F. Supp. 3d 241, 252 (D. Conn. 2019); Moore v. Express Recovery Serv., Inc., 2019 WL 77325, at *4 (D. Utah Jan. 2, 2019); Christopher v. RJM Acquisitions L.L.C., 2015 WL 437541 (D. Ariz. Feb. 3, 2015); Puffinberger v. Commercion, L.L.C., 2014 WL 120596 (D. Md. Jan. 10, 2014) (denying plaintiff summary judgment where debt collector's filing suit beyond the applicable limitations period may have been unintentional); McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513, 526 (E.D. Mich. 2013), *quoting* Charbonneau v. Asset Acceptance L.L.C., 611 F. Supp. 2d 736, 743 (E.D. Mich. 2009). *See also* Durthaler v. Accounts Receivable Mgmt., Inc., 854 F. Supp. 2d 485, 493–495 (S.D. Ohio 2012) (relying on Sixth Circuit's decision in *Jerman* which was reversed on other grounds by U.S. Supreme Court, without acknowledging this and without additional analysis); White v. Sherman Fin. Grp., L.L.C., 984 F. Supp. 2d 841 (E.D. Tenn. 2013);

On the other hand, a minority of courts hold that this prong of the defense is not satisfied unless the act was unintentional.[85] Some of these courts note that the Supreme Court, in *Jerman*, made it clear that decisions under the identical provision in TILA are persuasive authority for the FDCPA too,[86] and for decades it has been well established that the required intent there is to do the act, not to violate TILA.[87] Others rely on the observation in *Jerman* that: "Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law."[88]

This split of authority shows up even within some circuits. In *Leeb v. Nationwide Credit Corp.*,[89] the Seventh Circuit followed *Jerman*, finding that the mailing of the letter to the consumer violating FDCPA § 1692g(b) was not an error, as it was mailed intentionally, not by mistake.[90] Four years later, however, a different panel in the Seventh Circuit ignored the *Leeb* court's recognition that the letter could not be a bona fide error because it had been sent intentionally, and held that, to "establish that its error was unintentional, '[a] debt collector need only show that its FDCPA *violation* was unintentional, not that its *actions* were unintentional.'"[91]

The Eleventh Circuit, in *Edwards v. Niagara Credit Solutions, Inc.*,[92] recognized that a debt collector's decision to violate FDCPA § 1692e(11) was not an unintentional error just because the debt collector risked violating FDCPA § 1692c(b), prohibiting disclosure of the debt to third parties, if it complied with section 1692e(11) and disclosed it was a debt collector in a voice message left for the consumer but where others could hear it.[93]

The Ninth Circuit held that a mistake about the time-barred status of a debt under state law may qualify as a bona fide error within the meaning of the FDCPA, noting that the bona fide error defense "relieves liability for certain 'unintentional' violations, thereby functioning similarly to a mens rea requirement."[94]

Courts have found that an error was unintentional under a variety of scenarios, such as:

- When the collector's California headquarters sent the consumer a letter before learning that the Ohio office had received a cease and desist letter the day before;[95]
- When a collector did not realize he was making a pre-8:00 a.m. phone call when he failed to account for different time zones;[96]
- When a student loan collector used a Department of Education form that allegedly violated the FDCPA;[97] and
- When the collector was unaware that a claim included *unauthorized* force-placed insurance charges, though the collector was aware that the bank force-placed insurance generally.[98]

Courts sometimes hold that a debt collector is not charged with the creditor's knowledge[99] and this leads to a finding

McLean v. Ray, 2011 WL 1897436, at *6 (E.D. Va. May 18, 2011), *aff'd*, 488 Fed. Appx. 677 (4th Cir. 2012).

85 Baker v. G.C. Serv. Corp., 677 F.2d 775, 779 (9th Cir. 1982) (rejecting defense because defendant only presented evidence that, at best, might show it had been mistaken about law, and mistake of law does not make defendant's action any less intentional); Webster v. ACB Receivables Mgmt., Inc., 15 F. Supp. 3d 619, 628 (D. Md. 2014) (recognizing "that *Jerman* requires ACB to show that the underlying acts that caused the FDCPA violations were not intentional," but finding the acts unintentional); Allen v. Checkredi of Kentucky, L.L.C., 2010 WL 4791947, at *10 (E.D. Ky. Nov. 17, 2010) (citing *Jerman* and holding that debt collector's assertion of bona fide error defense failed where it intentionally revealed debt to relatives when the relatives pressed for information; holding that "[f]ollowing *Jerman*, the intentional prong of the bona fide error defense can no longer be whether a defendant specifically intended its actions to violate the FDCPA"); Thompson v. Crown Asset Mgmt., L.L.C., 2009 WL 3059123 (D. Ariz. Sept. 23, 2009) (granting summary judgment for defendant who unintentionally contacted plaintiff as result of clerical error); Dunaway v. JBC & Assoc., Inc., 2005 WL 1529574 (E.D. Mich. June 20, 2005) (collector's ignorance of FDCPA's prohibitions does not render collector's violation of those prohibitions unintentional).

86 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 574, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) ("Moreover, in enacting the FDCPA in 1977, Congress copied the pertinent portions of the bona fide error defense from the Truth in Lending Act (TILA), § 1640(c). At that time, the three Federal Courts of Appeals to have considered the question interpreted the TILA provision as referring to clerical errors, and there is no reason to suppose Congress disagreed with those interpretations when it incorporated TILA's language.").

87 *See* National Consumer Law Center, Truth in Lending (10th ed. 2019), *updated at* www.nclc.org/library.

88 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 582, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010).

89 806 F.3d 895, 899 (7th Cir. 2015).

90 *See also* Buckley v. Afni, Inc., 133 F. Supp. 3d 1140 (S.D. Ind. 2016) (agency had actual knowledge of consumer's representation by counsel and did not provide any evidence that its error was unintentional).

91 Abdollahzadeh v. Mandarich Law Grp., L.L.P., 922 F.3d 810, 815 (7th Cir. 2019), *citing* Kort v. Diversified Collection Serv., 394 F.3d 530 (7th Cir. 2005) (emphases added).

92 584 F.3d 1350 (11th Cir. 2009).

93 *Id. See also* Gryzbowski v. I.C. Sys., Inc., 691 F. Supp. 2d 618 (M.D. Pa. 2010) (no bona fide error defense, as defendant admitted that violation was intentional in order to guard against potential violation of § 1692c(b)). *Cf.* Reg. F § 1006.2(j) (creating limited content voicemail messages), discussed at §§ 4.9, 5.7.7, *supra*.

94 Kaiser v. Cascade Capital, L.L.C., 989 F.3d 1127, 1139 (9th Cir. 2021).

95 Smith v. Transworld Sys., Inc., 953 F.2d 1025 (6th Cir. 1992).

96 Juras v. Aman Collection Serv., Inc., 829 F.2d 739 (9th Cir. 1987). *See also* Washington v. Portfolio Recovery Assoc., 211 F. Supp. 3d 1041 (N.D. Ill. 2016) (established bona fide error defense where collector did not receive notice of order vacating its default judgment against consumer until after it had mailed wage deduction notice). *But see* Reg. F Official Interpretations § 6(b)(1)(i)-2 ("If a debt collector has conflicting or ambiguous information regarding a consumer's location, then, in the absence of knowledge of circumstances to the contrary, the debt collector complies with § 1006.6(b)(1)(i) if the debt collector communicates or attempts to communicate with the consumer at a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located."); § 5.4.3, *supra*.

97 Kort v. Diversified Collection Serv., 394 F.3d 530 (7th Cir. 2005).

98 Jenkins v. Heintz, 124 F.3d 824 (7th Cir. 1997).

99 *See* Randolph v. IMBS, Inc., 368 F.3d 726, 729 (7th Cir. 2004) ("[v]erification would be unnecessary if debt collectors were charged

that a violation is unintentional if the collector is unaware of the relevant information, even if that information is in the possession of the creditor. However, the extent of information in the creditor's possession and the collector's failure to obtain that information may be relevant to whether reliance on the creditor was reasonable (and thus whether the error is bona fide) and whether the collector had adopted reasonable procedures to avoid the error.[100] On the other hand, many courts hold that a debt collector is strictly liable for conveying false information that they obtained from the creditor, such as an erroneous amount of the debt, with the bona fide error defense providing debt collectors some limited shelter from creditors' errors.[101]

A willful action by a collector's employee, such as a harassing phone call, cannot be said to be unintentional, even if it violates the collector's policies.[102] Stated differently, even if the debt collection company did not intend to commit the error, the defense will not be sustained if the violation was the result of intentional conduct by the employee.[103] Similarly, even if the collector has procedures in place to prevent the error, it must still introduce evidence to show that the action was unintentional.[104]

Where a violation was routinely committed, it could not be said to be either an error or bona fide.[105]

An error that was initially unintentional may become intentional if the collector fails to take corrective action after becoming aware of the error.[106]

Like the other elements of the defense, the collector must introduce evidence to meet the burden of proving that a violation was unintentional.[107]

12.2.9 *The Collector Must Have Maintained Reasonable Procedures to Avoid the Error*

12.2.9.1 Generally

To establish the bona fide error defense, the debt collector must also establish that the error occurred "notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[108] In *Jerman*,[109] the Supreme Court examined this language:

> The dictionary defines "procedure" as "a series of steps followed in a regular orderly definite way." Webster's Third New International Dictionary 1807 (1976). In that light, the statutory phrase is more naturally read to apply to processes that have mechanical or other such "regular orderly" steps to avoid mistakes—for instance, the kind of internal controls a debt collector might adopt to ensure its employees do not communicate with consumers at the wrong time of day, [FDCPA] section 1692c(a)(1), or make false representations as to the amount of a debt, [FDCPA] section 1692e(2).[110]

Whether a procedure is sufficient depends on the nature of the violation, and the procedures must be designed to avoid

with the creditors' knowledge"); Massa v. I.C. Sys., Inc., 2007 WL 2316470 (S.D. Ind. Aug. 10, 2007) (additional client charge, which was imposed by the creditor, was not intentional); Moya v. Hocking, 10 F. Supp. 2d 847 (W.D. Mich. 1998) (violations of suing on and reporting time-barred debt found unintentional because information provided by creditors was inaccurate); § 12.2.7, *supra*; § 12.2.9.2, *infra*

100 *See* § 12.2.7, *supra*; § 12.2.9, *infra*.

101 *See* Clark v. Capital Credit & Collection Serv., Inc., 460 F.3d 1162 (9th Cir. 2006); § 3.2.4, *supra*.

102 Worch v. Wolpoff & Abramson, L.L.P., 477 F. Supp. 2d 1015 (E.D. Mo. Feb. 28, 2007) (threatening and abusive telephone calls on two separate occasions); Sparks v. Phillips & Cohen Assoc., Ltd., 641 F. Supp. 2d 1234, 1251 (S.D. Ala. 2008) (reasonable factfinder could readily determine that browbeating deceased consumer's daughter's attorney and berating attorney's daughter was not objectively reasonable, even if violations of FDCPA were unintentional). *See also* Acik v. I.C. Sys., Inc., 640 F. Supp. 2d 1019 (N.D. Ill. 2009) (collector was aware that un-itemized "Additional Client Charges" contained $60 in collection fees and $18.50 in interest).

103 *See* Bingham v. Collection Bur., Inc., 505 F. Supp. 864 (D.N.D. 1981) (corporate defendant was liable even though it did not intend error).

104 *See, e.g.*, Booth v. Collection Experts, Inc., 969 F. Supp. 1161 (E.D. Wis. 1997).

105 *See* Beasley v. Blatt, 1994 WL 362185 (N.D. Ill. July 11, 1994) (debt collector regularly mailed identical form collection letters to consumer and commercial debtors alike, and so possible violation did not result from claimed error); Sutton v. Law Offices of Alexander L. Lawrence, 1992 U.S. Dist. LEXIS 22761 (D. Del. June 17, 1992) (failed to provide any evidence that the FDCPA required disclosures were normally sent). *But see* Herbert v. Monterey Fin. Serv., Inc., 2001 WL 1266299, at *5 (D. Conn. Sept. 28, 2001) (defendant's error in reporting that plaintiff owed debt, without reporting that debt was disputed, was type of error that was "bound to occur" despite reasonable safeguards).

106 Currier v. First Resolution Inv. Corp., 762 F.3d 529 (6th Cir. 2014). *See also* Clark v. Capital Credit & Collection Serv., Inc., 460 F.3d 1162 (9th Cir. 2006); Elder v. David J. Gold, P.C., 2009 WL 2580320 (W.D.N.Y. Aug. 18, 2009) (questioning bona fide error defense where defendant continued prosecuting lawsuit in wrong venue after notice that it was wrong), *adopted*, 2009 WL 3459880 (W.D.N.Y. Oct. 19, 2009); Thompson v. D.A.N. Joint Venture III, L.P., 2007 WL 1625926 (M.D. Ala. June 5, 2007) (defendant failed to set aside the default judgment on time-barred debt once fully apprised of its misconduct); Canady v. Wisenbaker Law Offices, P.C., 372 F. Supp. 2d 1379 (N.D. Ga. 2005) (rejecting defense since collection firm after learning that suit was filed in improper venue, continued to pursue collection litigation); State *ex rel.* Hatch v. JBC Legal Grp., P.C., 2006 WL 1388453 (Minn. Dist. Ct. Apr. 13, 2006) (defendants' misstatement of service charge continued for year after it was brought to their attention).

107 *See, e.g.*, Hartman v. Great Seneca Fin. Corp., 569 F.3d 606 (6th Cir. 2009) (reversing summary judgment for defendants on bona fide error defense where evidence supported conclusion that violation was intentional); Booth v. Collection Experts, Inc., 969 F. Supp. 1161 (E.D. Wis. 1997). *See also* Mangum v. Bonneville Billing & Collections, Inc., 2010 WL 672744 (D. Idaho Feb. 20, 2010) (issues of fact prevented summary judgment); Holmes v. Mann Bracken, L.L.C., 2009 WL 518448 (E.D. Pa. Dec. 22, 2009) (denying defendant's motion for summary judgment; could not determine if error was "unintentional"); § 12.2.9, *infra*.

108 15 U.S.C. § 1692k(c).

109 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 587, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010).

110 *Id.*

the type of error that actually occurred.[111] In *Evans v. Portfolio Recovery Associates, L.L.C.*,[112] for example, plaintiffs alleged that the debt collector failed to inform a credit reporting agency that the debtor disputed their debt. The Seventh Circuit found the collector's procedures inadequate:

> [E]ven if we assume that [debt collector] PRA made an unintentional error of fact, it still is not entitled to the bona fide error defense because it did not maintain procedures reasonably adapted to avoid the error. . . . While the evidence demonstrates that PRA provided training sessions and a manual to employees about recognizing and processing [consumer] disputes, "[t]here is no evidence that PRA has measures in place to prevent careless misreading of [consumer's] letters, such as having employees periodically check one another's work, for example."[113]

Scores of cases likewise have found evidence offered by the debt collector insufficient to meet its burden of showing that it had in place reasonable procedures to avoid the alleged violation.[114] And because mistaken interpretations of the FDCPA do

111 *See* Lupia v. Medicredit, Inc., 8 F.4th 1184 (10th Cir. 2021) (finding nothing in record to show that collector's policies were designed to avoid making unauthorized calls to consumers); Kottler v. Gulf Coast Collection Bur., Inc., 847 Fed. Appx. 542 (11th Cir. 2021) (collection agency's procedures not reasonably tailored to identify debt covered by the workers' compensation law); Von Esch v. Asset Sys., Inc., 823 Fed. Appx. 543, 544 (9th Cir. 2020) (collection agency presented sufficient and unrebutted evidence to prove that its procedures were "reasonably adapted to avoid demanding the wrong principal sum"); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939 (9th Cir. 2011); Johnson v. Riddle, 443 F.3d 723 (10th Cir. 2006) (procedures to avoid clerical errors not reasonably adapted to prevent legal errors); Jenkins v. Heintz, 124 F.3d 824 (7th Cir. 1997); Smith v. Transworld Sys., Inc. 953 F.2d 1025, 1035 (6th Cir. 1992) (Krupansky, C.J., concurring in part and dissenting in part; objecting to majority ruling by describing how collector intentionally structured procedure that made mistake inevitable); Guevara v. Constar Fin. Serv., L.L.C., 2020 WL 3001390, at *12 (M.D. Pa. June 4, 2020) (no explanation of any procedures designed to prevent specific error of overstating debt amount to consumer when credit adjustment was applicable to his account); Pettitt v. Chiari & Ilecki, L.L.P., 419 F. Supp. 3d 627, 637–638 (W.D.N.Y. 2019) (denying summary judgment because whether debt collector's procedures were reasonably adapted to avoid error—here, collecting on time-barred debt— is generally fact question for jury); Motes v. Midland Funding, L.L.C., 233 F. Supp. 3d 1256, 1267 (N.D. Ala. 2017); VanHuss v. Rausch, Sturm, Israel, Enerson & Hornik, 2017 WL 1379402 (W.D. Wis. Apr. 14, 2017) (although law firm had extensive written materials explaining how debt verification request should be handled, it did not provide description of any training of its mailroom employees on how to handle consumer's debt verification letters when they arrived, or how to confirm that a piece of mail was properly received and routed); Montgomery v. Shermeta, Adams & Von Allmen, P.C., 885 F. Supp. 2d 849, 857–858 (W.D. Mich. 2012) (though law firm may have had procedures in place to prevent the sort of violation described, fact that computer generated multiple letters after cease letter was received raised issue of fact as to whether those procedures were reasonable); Coleman v. Credit Mgmt., L.P., 2011 WL 5248219, at *4–5 (N.D. Tex. Nov. 2, 2011) (policy of removing incorrect numbers once on notice that number is incorrect and then coding such number was proven effective by absence of calls after plaintiff informed defendant of its mistake); Welker v. Law Office of Daniel J. Horwitz, 699 F. Supp. 2d 1164 (S.D. Cal. 2010) (no evidence explaining any measures used to avoid computer glitches such as occurred here or of preventing letters that accidentally omitted certain warnings required by FDCPA). *Cf.* Stinson v. Receivables Mgmt. Bur. Inc., 2013 WL 1278966 (N.D. Ala. Mar. 26, 2013) (collector could reasonably rely on recipient at wrong phone number to state it was wrong number).

112 889 F.3d 337 (7th Cir. 2018).

113 *Id.* at 350 n.9 (quoting Flores v. Portfolio Recovery Assoc., 2017 WL 5891032, at *6 (N.D. Ill. Nov. 29, 2017)).

114 *See, e.g.*, Lupia v. Medicredit, Inc., 8 F.4th 1184 (10th Cir. 2021) (agreeing with district court's determination that no reasonable jury could find procedure allowing three-day lag between receipt of debtor's dispute and logging of that dispute into collector's system to be reasonably adapted to prevent unauthorized contact with debtor); Wagner v. Chiari & Ilecki, L.L.P., 973 F.3d 154 (2d Cir. 2020) (reasonable jury could find that collector did not maintain reasonable procedures to avoid its error where collector had no written policies to cover circumstances at issue); Weinstein v. Mandarich Law Grp., L.L.P., 798 Fed. Appx. 88 (9th Cir. 2019) (upholding district court finding that debt collector did not explain how its computer system's procedure was adapted to avoid error, *citing* Reichert v. Nat'l Credit Sys, Inc., 531 F.3d 1002, 1007 (9th Cir. 2008)); Leeb v. Nationwide Credit Corp., 806 F.3d 895 (7th Cir. 2015) (general policy against sending particular form letter in response to consumer's § 1692g dispute letter was not adequate "procedure," as it did not provide collector's employees with adequate procedure to respond); Hepsen v. Resurgent Capital Serv., L.P., 383 Fed. Appx. 877, 884 (11th Cir. 2010) (debt collector did not establish that its policies guard against collection of inaccurate debts, because it had no policy in place to verify existence or amount of debts before sending demand notices); Reichert v. Nat'l Credit Sys, Inc., 531 F.3d 1002, 1007 (9th Cir. 2008) ("debt collector has an affirmative obligation to maintain procedures designed to avoid discoverable errors, including, but not limited to, errors in calculation and itemization"); Johnson v. Columbia Debt Recovery, L.L.C., 2021 WL 796332 (W.D. Wash. Mar. 2, 2021) (no evidence for reasonable jury to conclude that collector maintained specific procedure adapted to avoid error at issue, namely continuing to credit-report nonexistent judgment, and mistaken belief that unlawful detainer had proceeded to judgment and then garnishment was not bona fide error); McClanahan v. Medicredit, Inc., 2020 WL 6204419 (M.D. Tenn. Oct. 22, 2020) (dispute of material fact as to whether flawed electronic file contained readily discoverable error and whether agency maintained procedures reasonably adapter to avoid that error); Burr v. Evergreen Prof'l Recoveries, Inc., 2020 WL 4261137 (W.D. Wash. July 24, 2020) (where there was evidence only of system of coding accounts as disputed or paid, there was no evidence that collection agency had procedures to double-check coding before it was implemented, or to audit coding after it had been completed); Hassine v. Simon's Agency, Inc., 2020 WL 3481815 (D.N.J. June. 26, 2020) (the "Policies and Procedures" document agency produced contained vague reference to "steps" and "guidance" that agency takes, but did not actually provide specific details as to what procedures are followed); Malone v. Accounts Receivable Res., Inc., 408 F. Supp. 3d 1335 (S.D. Fla. 2019) (reliance on creditor to report only debts that are validly due and owing is not procedure reasonably adapted to avoid readily discoverable errors, in particular error here—that consumer's treatment at medical center was result of workplace injury); Torres v. LVNV Funding, L.L.C., 2018 WL 1508535 (N.D. Ill. Mar. 27, 2018) (debt buyer failed to establish bona fide error defense where it claimed it did not know that consumer had counsel because its three prior debt collectors failed to notify it of representation, which contradicted its insistence that it had policies in place to ensure that such critical information was retained and shared); Foster v. Green Tree

not support a bona fide error defense under *Jerman*, the training of debt collection employees on FDCPA requirements may not be a procedure relevant to the errors that may be a basis for a bona fide error defense.[115]

Some courts find for the defendant if reasonable procedures are in place, even if the collector could have taken more effective steps to avoid the error.[116] Many courts have found that a

Servicing, L.L.C., 2017 WL 5151354 (M.D. Fla. Nov. 3, 2017) (though mortgage servicer maintained some procedures to avoid errors regarding communication with represented consumers, there was no evidence that it maintained policies requiring communication with its foreclosure counsel or procedures to review its own foreclosure file to determine whether borrower was represented); Fausz v. NPAS, Inc., 237 F. Supp. 3d 559 (W.D. Ky. 2017) (denying summary judgment, finding genuine issue of material fact as to whether collector maintained reasonable procedures to assure that it was not collecting on defaulted medical debts); Cooper v. Retrieval-Masters Creditors Bur., Inc., 2017 WL 2404952 (N.D. Ill. June 2, 2017) (debt collector falsely wrote to consumer that it would update consumer's report at credit bureau, when it had no intention of taking such action; bona fide error defense fails because debt collector had no procedures in place to avoid its FDCPA violation); Garcia v. Creditors Specialty Serv., Inc., 2016 WL 6778681, at *7 (N.D. Cal. Nov. 16, 2016) (argument of owner/president that "he instructed the service company to make only visible the debtor's name and address" insufficient because "mere instruction without more does not constitute 'maintenance of procedures reasonably adapted to avoid any such errors'"); Rawson v. Source Receivables Mgmt., L.L.C., 215 F. Supp. 3d 684 (N.D. Ill. Jan. 6, 2016) (collection agency did not establish it had reasonable system to ensure that its collection letters complied with § 1692g(a)(2)'s requirement of identifying debt's current owner); Kersten v. Quick Collect, Inc., 2015 WL 105797 (D. Or. Jan. 7, 2015) (agency presented no evidence that it maintained "procedures reasonably adapted" to prevent representatives from leaving voice messages that omitted identifying information); Lassiter v. Integrity Sol. Serv., Inc., 2014 WL 1040677 (D. Colo. Mar. 18, 2014) (rejecting collector's bona fide error defense where collector's training materials indicated that employees were trained on general requirements of FDCPA but did not show existence of internal account-handling policies tailored to avoid contacting represented consumer who had also sent cease contacts letter to collector); Webster v. ACB Receivables Mgmt., Inc., 15 F. Supp. 3d 619, 629 (D. Md. 2014) (finding collector violated FDCPA by continuing to communicate with consumer after receiving cease and desist request); Grant-Fletcher v. McMullen & Drury, P.A., 964 F. Supp. 2d 514 (D. Md. 2013) (debt collector failed to maintain procedures designed to avoid discoverable errors, including, but not limited to, error in including fee not yet due); Long v. Nationwide Legal File & Serve, Inc., 2013 WL 5219053 (N.D. Cal. Sept. 17, 2013) (no procedures that would avoid filing of false proofs of service); Elzaghal v. Ray Klein, Inc., 2012 WL 4863704 (D. Or. Oct. 11, 2012) (debt collector provided no documentation establishing policy or training procedures regarding expungement of debt from credit records); Abernathy v. NCC Bus. Serv., Inc., 2012 WL 4320810 (N.D. Miss. Sept. 18, 2012) (generic description of defendant's dialing system was insufficient); Smith v. Nat'l Credit Sys., Inc., 807 F. Supp. 2d 836 (D. Ariz. 2011) (not established where failed to identify procedure regarding disputed debts); Miller v. Gurstel, Staloch & Chargo, P.A., 2011 WL 1404971, at *3 (D. Minn. Apr. 13, 2011) ("no evidence of any procedure designed to avoid coding mistakes"); Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328 (M.D. Fla. 2010) (presented no evidence of agreement or understanding with creditor that it would not refer accounts in bankruptcy, and no evidence that its reliance on creditor had proved effective in avoiding past errors); Johnson v. Prof'l Collection Consultants, 2010 WL 2196571 (S.D. Cal. May 28, 2010) (no evidence of procedures designed to verify accuracy of address received from creditor prior to mailing letters to debtor); Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961, 972 (N.D. Ohio 2009) (no bona fide error defense where "no explanation for how the mistake of preparing a form affidavit that asserts personal knowledge on the part of an affiant who could not possibly have it could be without intent"); Rice v. Troon Co. Partners, 2009 WL 935745, at *2 (W.D. Okla. Apr. 3, 2009) (no explanation of procedures used to generate letters to debtors or to prevent specific clerical error at issue, namely "using the wrong computer template or otherwise printing a document on TC letterhead and, without noticing the error despite distinct letterheads, mailing a TC letter to a TCP debtor"). *See also* Lynch v. Fin. Recovery Serv. of Minn., Inc., 2013 WL 11971263 (S.D. Fla. Sept. 30, 2013) (reasonable jury could find that debt collector did not have reasonable procedures in place to avoid placement of calls without disclosing caller's identity and certainly that any such procedures "were not reasonably adapted to avoid this specific error," since plaintiff allegedly received two noncompliant messages); *In re* Accelerated Recovery Sys., Inc., 431 B.R. 138 (W.D. Va. 2010) (defendant offered no evidence of procedures); Holmes v. Mann Bracken, L.L.C., 2009 WL 5184485, at *9 (E.D. Pa. Dec. 22, 2009) (could not determine if Mann Bracken employed "procedures designed to avoid such errors"); Allen v. NCO Fin. Serv., Inc., 2002 WL 1291791 (N.D. Ill. June 10, 2002) (no bona fide error defense where defendant produced no documents or affidavits of procedures in place). *But see* Puglisi v. Debt Recovery Solutions, L.L.C., 822 F. Supp. 2d 218 (E.D.N.Y. 2011) (established defense where defendant's employees received training and mentoring, and must pass an exam); Thomas v. Boscia, 2009 WL 2778105, at *4–5 (S.D. Ind. Aug. 28, 2009) (established bona fide error defense by showing "numerous safeguards" to identify cases in bankruptcy). Additional cases are summarized at Appx. E.3.6.1, *infra*.

115 *See* Leeb v. Nationwide Credit Corp., 806 F.3d 895 (7th Cir. 2015). *See also* § 12.2.2, *supra*; § 12.2.9.3, *infra*.

116 *See* Ross v. RJM Acquisitions Funding, L.L.C., 480 F.3d 493, 498 (7th Cir. 2007) (bankruptcy missed in computer search due to consumer's use of nickname; reasonable procedures required, not "state of the art" technology); Ewing v. Med-1 Solutions, L.L.C., 2021 WL 243598, at *6 (S.D. Ind. Jan. 25, 2021) (bona fide error defense established where evidence showed reasonable procedures in place to avoid error of continuing to report debt that was previously disputed even though collector did not have procedures in place to redirect improperly forwarded faxes); McInerney v. Roosen Varchetti & Olivier P.L.L.C., 2017 WL 4778724 (E.D. Mich. Oct. 23, 2017) (collection law firm was entitled to bona fide error defense where its act of filing suit in wrong venue was unintentional factual error and law firm reasonably relied on consumer's representations regarding address and on its own procedure to investigate any change of address order on file with Postal Service); Polster v. Van Ru Credit Corp., 2017 WL 1196888 (N.D. Ill. Mar. 31, 2017) (granting defense even though collector could not scrub the debt for bankruptcy because it was proceeding without the consumer's social security number); Rhinehart v. CBE Grp., Inc., 714 F. Supp. 2d 1183 (M.D. Fla. 2010) (procedures need not be foolproof). *See also* Berry v. Van Ru Credit, 2017 WL 4342072, at *1 (D. Utah Sept. 29, 2017) (bona fide error defense applied to § 1692d(6) violation where the collection agent did not identify his employer's identity; however, evidence of several prior calls by the agent with the consumer—in which the agent properly identified himself—demonstrated that "there was ample evidence" of the agency's maintenance of "specific and extensive procedures to avoid such errors"); Stratton v. Portfolio Recovery Assoc., 171 F. Supp. 3d 585, 603 (E.D. Ky. 2016) (stating in *dicta* that defense would be available), *aff'd on other grounds*, 706 Fed. Appx. 840 (6th Cir. 2017).

collector's procedures were reasonable even though they did not prevent the error,[117] while other courts have rejected the defense under those circumstances.[118]

To establish the defense, the collector must not only maintain procedures to comply with the Act, but also maintain a system of checks and reviews to guard against errors that can result in violation of the statute.[119] If the error occurs routinely, the procedures should be found inadequate.[120] If the collector fails to follow the procedures that it has nominally established,[121] or the procedures were not in place at the time of the error,[122] the defense may be denied.

Reasonable procedures that courts have found persuasive for some types of errors include training manuals and

117 *See* Heisler v. Convergent Healthcare Recoveries, Inc., 2020 WL 1249481, at *12 (E.D. Wis. Mar. 16, 2020) (while procedure did not prevent particular error, it prompted change to avoid this error in future); McCorriston v. L.W.T., Inc., 536 F. Supp. 2d 1268 (M.D. Fla. 2008) (procedures were "reasonably adapted" to prevent using wrong statute of limitations); Voris v. Creditors Alliance, Inc., 2007 WL 4219198 (N.D. Ill. Nov. 28, 2007) (defendant maintained procedures to determine whether debt was for consumer or commercial purposes); Lovelace v. Stephens & Michaels Assoc., Inc., 2007 WL 3333019 (E.D. Mich. Nov. 9, 2007) (collector had reasonable procedures to only identify herself and discuss the debt once she determined that she was speaking with consumer, but third party misrepresented himself as consumer); Herbert v. Monterey Fin. Serv., Inc., 2001 WL 1266299 (D. Conn. Sept. 28, 2001) (finding reasonable procedures despite staff procedure for calling dispute to attention of manager, who then had to specifically direct computer operators to enter dispute code); Moya v. Hocking, 10 F. Supp. 2d 847 (W.D. Mich. 1998) (error unintentional because referral information provided by creditors was inaccurate and defendants maintained reasonable and adequate procedures to avoid such violations).

118 Garcia v. Law Offices Howard Lee Schiff, P.C., 401 F. Supp. 3d 241, 256 (D. Conn. 2019) (defendant failed to show reasonable procedures were in place to catch errors where it knew debtors make payments to their creditors, it captured this information in its case management system, and also knew that information should have been programmed into its form letter, yet did not catch omission of credit for such payment); Hernandez v. Midland Credit Mgmt., Inc., 2007 WL 2874059 (N.D. Ill. Sept. 25, 2007) (no reasonable jury could find that violation was in good faith or that defendant maintained reasonable preventive procedures where notice added language foreign to Graham Leach-Bliley form notice); Seeger v. AFNI, Inc., 2007 WL 1598618 (E.D. Wis. June 1, 2007) (defendants failed to procure and examine contract before imposing unauthorized fee); Thompson v. D.A.N. Joint Venture III, L.P., 2007 WL 1625926 (M.D. Ala. June 5, 2007) (debt buyer had no procedures in place to prevent filing of time-barred lawsuits); Smith v. Am. Revenue Corp., 2005 WL 1162906 (N.D. Ind. May 16, 2005) (denying defense due to utter absence of any manuals or instructions on FDCPA and conclusory reference to attorney review); Wehrheim v. James M. Secrest, P.C., 2002 WL 31427515 (S.D. Ind. Oct. 9, 2002) (evidence did not establish who reviewed and proofread the draft foreclosure complaint, their education or training, or whether they were supervised); Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521 (E.D. Pa. 1996) (posting a reminder to include required language in correspondence next to a word processor, as opposed to system of proofreading letters, was inadequate). *See also* Hartman v. Great Seneca Fin. Corp., 569 F.3d 606 (6th Cir. 2009) (reversing summary judgment for defendants where evidence supported conclusion that violation was intentional, and procedures were not designed to avoid violation at issue).

119 *See* Mogg v. Jacobs, 2016 WL 4395899, at *5–6 (S.D. Ill. Aug. 18, 2016) (jury could find that reasonable procedures had been implemented to alert defendant attorney of bankruptcy notices connected with cases referred to him and that any failures were due either to postal service errors or isolated clerical errors within collection agency); McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1, 60 (D. Mass. 2012) (where law firm had practice in place to ensure accuracy of legal bills, and associates reviewed their time slips, and a partner then reviewed bills before they were sent out, testimony that legal fees in letter were correct where amounts in letter differed from amounts due in invoices constituted proof that error was intentional), *aff'd in part, rev'd in part on other grounds*, 775 F.3d 109 (1st Cir. 2014); Marino v. Hoganwillig, P.L.L.C., 910 F. Supp. 2d 492, 499 (W.D.N.Y. 2012) (since mere existence of generic procedures is not enough, debt collector must show that it took precautions meant to eliminate specific error complained of; genuine issue of material fact as to whether agency's act of sending debtor two letters following receipt of a cease-and-desist letter was bona fide error); Wetzel v. AFNI, Inc., 2011 WL 6122963, at *5 (D. Or. Oct. 20, 2011) (procedures were "reasonably adapted" to avoid error of sending letter to the wrong person where debt collector, instead of relying on LexisNexis's past reliability, accepts new information provided by LexisNexis only if address is newer and if identifying characteristics, such as Social Security numbers, match), *adopted*, 2011 WL 6122957 (D. Or. Dec. 8, 2011); Knighten v. Palisades Collections, L.L.C., 721 F. Supp. 2d 1261, 1271 (S.D. Fla. 2010) (while attorney claimed that firm had procedures to avoid error of filing lawsuit under incorrect party name, there was no explanation of procedures used for cases such as this one, since even though attorneys, legal assistants, and clients themselves reviewed documents of the lawsuit to confirm their accuracy, error was not prevented); Edwards v. McCormick, 136 F. Supp. 2d 795, 802 (S.D. Ohio 2001) ("Though there is no doubt that a principal may lawfully assign to his agent the responsibility of performing the 'error-catching' procedure(s) required to invoke the protection of § 1692k(c), where the principal himself has an essential role *in* the actual procedure, an abdication of that responsibility necessarily destroys the effectiveness of the procedure itself." (emphasis in original)); Sibley v. Firstcollect, Inc., 913 F. Supp. 469, 472 (M.D. La. 1995) (debt collector presented no evidence that it had system in place to protect it from errors in legal advice where it did not routinely ask for second opinions or require its attorney to do frequent surveys of applicable law, and there was no evidence that collector's attorney employed any procedure reasonably adapted to prevent dissemination of incorrect legal advice); Stebbins v. Allied Account Serv., 1992 U.S. Dist. LEXIS 22760 (D. Conn. June 23, 1992).

120 *See, e.g.*, Spencer v. Hendersen-Webb, 81 F. Supp. 2d 582, 592 (D. Md. 1999) (procedures "woefully inadequate" where computer program automatically added a 15% attorney fee to every account regardless of the agreement on fees). *See also* Hepsen v. Resurgent Capital Serv., L.P., 383 Fed. Appx. 877 (11th Cir. 2010).

121 *See, e.g.*, Rosales v. Weltman, Weinberg & Reis Co., L.P.A., 2020 WL 6681362, at *7 (N.D. Ill. Nov. 12, 2020) ("standard operating procedures" in place prior to filing of complaint were too vague to support bona fide error defense); Canady v. Wisenbaker Law Offices, P.C., 372 F. Supp. 2d 1379 (N.D. Ga. 2005) (once collection firm learned that suit was filed in improper venue, it failed to follow procedures requiring it to abandon suit).

122 Rosales v. Weltman, Weinberg & Reis Co., L.P.A., 2020 WL 6681362, at *7 (N.D. Ill. Nov. 12, 2020) (specific auditing procedure was developed several months after consumer filed suit); Durham v. Cont'l Cent. Credit, 2009 WL 3416114 (S.D. Cal. Oct. 20, 2009) (the fact that corrective procedures had been put into place suggests that there were no safeguards previously in place to establish a bona fide error defense); Simmons v. Miller & Steeno, P.C., 2002 WL 31898324 (E.D. Mo. Dec. 30, 2002) (collector had adopted a procedure to prevent FDCPA violations but it was not in place until after the letter at issue had been sent).

ıctions on referrals, computer systems, review
ɔaths from the creditor verifying the charge.[123]
s failure to introduce evidence to rebut the use-
/stems and procedures described by the collec-
[124]

; have commented on the procedures that are
ɔnable to avoid errors of state law.[125] General
ɛp abreast of the law are insufficient.[126] The
: has found that an attorney's procedures were
when the procedures included review of legal
pared by the American Creditor Association
Bar Association, submission of form letters
nd regular reading of excerpts of the relevant
utes. The court concluded:

consulted an attorney in Wisconsin on state
or did it ask a Wisconsin governmental agency
was entitled to charge a collection fee as the
ɛ debt. . . . In the end, AFNI is not arguing that
an informed, but mistaken, legal opinion. It
at its ignorance of the law should be excused
ttempted to keep itself informed about the law
ɛ various trade association communications.
enough, in our view, to support the bona fide
ɛe.[127]

nust closely oversee nonlawyers who are using
ɛtterhead.[128]

12.2.9.2 When Is Reliance on the Creditor a Reasonable Procedure?

A debt collector may assert that where it relies on the creditor to provide relevant and accurate information about a debt, such reliance constitutes a reasonable procedure, even if the debt collector itself did not maintain procedures. Is such reliance sufficient?

In *Owen v. I.C. System, Inc.*,[129] the Eleventh Circuit reversed summary judgment for the debt collector concluding that it was not entitled to the bona fide error defense where the collection agency relied on its contract with the creditor, placing the responsibility for checking for unauthorized and illegal charges on the creditor while maintaining no procedures of its own to detect such contractual overcharges.

Some courts hold that collectors are permitted to rely on information provided by the creditor without procedures to check the amount or validity of the claim,[130] and others require that the collector have some procedures to review creditor information.[131] However, the Eleventh Circuit in *Hepsen*[132] and the Ninth Circuit in *Clark*[133] recognized that the debt collector is strictly responsible under FDCPA § 1692e(2)(A) for accurately stating the amount of the debt and cannot establish a bona fide error defense if it lacked reasonable procedures to avoid the inaccuracy. Other courts will also deny the defense when the collector failed to spell out the creditor's duties or otherwise failed to undertake reasonable procedures to catch creditor errors.[134]

Evidence that the collector has procedures in place to promptly correct an error once it occurs can be essential to its prevailing on the defense.[135] For example, a collector may rely

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ɹewis v. ACB Bus. Serv., Inc., 135 F.3d 389 (6th Cir. 1998); Heinz, 124 F.3d 824 (7th Cir. 1997); Pasquale v. Law Offices & Kennard, 940 F. Supp. 2d 1151 (N.D. Cal. 2013); Rose v. 13 WL 1563655 (W.D. Va. Apr. 12, 2013) (defense shown ɛs, training, and monitoring); Hepsen v. J.C. Christensen & ıc., 2009 WL 3064865 (M.D. Fla. Sept. 22, 2009), *aff'd*, 383 ɛ. 877 (11th Cir. 2010); Zaborac v. Mut. Hosp. Serv., Inc., 2005

129 629 F.3d 1263 (11th Cir. 2011).

130 *See* § 12.2.7, *supra*.

131 *See* Shapiro v. Haenn, 222 F. Supp. 2d 29 (D. Me. 2002) (procedures to review documentation from creditor were reasonable); Axtell v. Collections U.S.A. Inc., 2002 WL 32595276 (D. Ariz. Oct. 22, 2002) (creditor's representation that it would assign only amounts legally

to screen out debts that have been discharged in
hat reliance is reasonable, but the collector must
if a discharged debt slips through.[136] Another
: the debt collector lacked adequate procedures
loyee called a consumer when the creditor re-
the debt collector for collection, without check-
e collector's do-not-call list, and the collector
it had later acquired a system that did just that.[137]
ulation F (effective November 30, 2021), use of
ess obtained from a creditor or a prior debt collec-
t of reasonable procedures to prevent third-party
1 email communications if certain procedures
[38] Additionally, whether the email address was
1 the creditor or prior debt collector, the debt col-
ıot send an email address to email address if it
previous communication to that email address
third-party disclosure.[139]

Debt Collection Employee Training As a Reasonable Procedure

staken interpretations of the FDCPA do not sup-
ide error defense under *Jerman*,[140] the training of
on employees on FDCPA requirements should not
reasonable procedure.[141] The same result should
ors of state or other federal law in most jurisdic-
courts have sometimes found persuasive a debt
vidence regarding employee training, including
l seminars, as a basis for the defense for some

However, training is insufficient without monitoring for and correcting violations.[144] Training has been found insufficient where the debt collector does not provide the details of the training or explain how the training was designed to prevent the specific error at issue.[145] But where a collector trains employees not only on the requirements of the FDCPA but also on how to handle the specific matter at issue (such as how to handle disputed debts), and the collector has reasonable procedure in place alongside the employee training, a bona fide error may be established.[146]

Subscribing to this treatise was found part of a reasonable procedure by the Sixth Circuit in a case reversed by the Supreme Court, although the authors believe that debt collector subscribers should be required to rely on the treatise's

Cir. 1998). *See also* Ross v. Northland Grp., Inc., 2011 WL
1, at *2 (D. Minn. Feb. 9, 2011) (denying consumer's motion
nary judgment as to bona fide error defense in case involving
: identity; collection agency contended that "it has serviced
millions of debts and has never before had this particular type
occur" and that "the address mix-up seems to have originated
dit-reporting agency and not from Northland").

false, deceptive or misleading representations, such as falsely stating the character, amount or legal status of the debt" supported finding that servicer had reasonable procedures in place; court notes that it was "uncontroverted and uncontroversial " that if employee had "simply followed the checklist and abided by her FDCPA training," she would not have made error that led to consumer's receipt of challenged billing statements); Green v. Stellar Recovery, Inc., 2013 WL 12106089, at *3 (D. Colo. June 6, 2013) (issue of material fact as to bona fide error defense where debt collector provided "specific citations to and information about specific policies and training materials allegedly provided to new hires and used as ongoing training to its employees to educate them not to make statements that violated the FDCPA, including certain specified statements that are at issue here"); Puglisi v. Debt Recovery Solutions, L.L.C., 822 F. Supp. 2d 218, 228 (E.D.N.Y. 2011) (finding that debt collector's compliance procedures, "including written procedures in the form of a Company Manual and a Training Manual, specific classroom training for compliance with the FDCPA and State law issues, employee examinations, review of communications, mentoring by the senior-most collectors, and various seminars and training programs as part of defendant's membership in its trade association" were sufficient to entitle it to bona fide error defense).

144 *See, e.g.*, Evans v. Portfolio Recovery Assoc., 889 F.3d 337, 349 n.9 (7th Cir. 2018) (while evidence demonstrated that debt collector provided training sessions and manual to employees about recognizing and processing disputes, there was no evidence of measures "in place to prevent careless misreading of letters, such as having employee

text—rather than ignore it—for their subscription to count as part of a reasonable procedure to avoid errors.[147]

12.2.9.4 Reasonable Procedures for Emails and Text Messages

Regulation F (effective November 30, 2021) establishes certain requirements applicable to debt collector communications via emails, text messages and social media. Regulation F also sets out procedures the collector can take in using email and text messaging communications that can lead to a bona fide error defense when sending an email or text message that leads to a third-party in violation of Reg. F § 1006.6(d)(1).[148] Regulation F does not specify procedures that could lead to a bona fide error defense relating to other types of electronic messages, including direct messages via social media.[149]

Compliance with the email and text message procedures does not provide a safe harbor for the debt collector, but only establishes reasonable procedures for a bona fide error defense as to third party communications. Compliance does not lead to a bona fide error defense if the violation is intentional or otherwise does not involve a bona fide error. Nor do the procedures necessarily lead to a bona fide error defense for other Regulation F provisions. On the other hand, failure to comply with these procedures is not an independent Regulation F violation.

The reasonable procedures for email and text message communications outlined in Regulation F require the debt collector to take steps to reasonably confirm and document that the debt collector obtained the email address or phone number for text messages in a way that indicates it was a valid email address or phone number for the consumer and continues to be one.[150] These procedures are indicated in some detail in Reg. F § 1006.6(d)(4) for emails and Reg. F § 1006.6(d)(5) for text messages. The collector must also take steps to reasonably confirm and document, pursuant to Reg. F § 1006.6(d)(3)(ii), that the debt collector did not communicate with the consumer by sending an email to an email address or a text message to a telephone number that the debt collector knows has led to a prohibited third-party disclosure. All of these procedures are examined in detail at § 5.7.9, *supra*.

12.3 FDCPA Statute of Limitations

12.3.1 Overview

The FDCPA limitations period is "one year from the date on which the violation occurs."[151] The Supreme Court, in 2019, ruled that the period begins to run from when the violation occurs, and not from when the consumer discovers the violation.[152] The Court left open extending the statute of limitations based on equitable tolling or on the equitable fraud-specific discovery rule, as discussed at § 12.3.4, *infra*. Because the FDCPA provides a statutory limitations period, the equitable defense of laches is not available.[153]

As is typical for most statutes of limitations, the limitations period uses the date the consumer files the FDCPA action, not the date that the consumer serves the complaint on the defendant. Federal Rule of Civil Procedure 4(m) requires the service be completed within ninety days, so that service of process can be as many as fifteen months after the violation, as long as the action is filed with the court within one year.

For many types of FDCPA violations, such as abusive phone calls, the one-year period is not a problem if the victim complains to a lawyer soon after the abuse. But a consumer may not detect, until after the limitations period has run, violations arising from debt collector reports to credit reporting agencies or from the improper service of a debt collection lawsuit. A violation time-barred under the FDCPA may be actionable under a UDAP, tort, or state debt collection statutory claim if state law provides a longer limitations period or allows the period to begin after the consumer discovers the violation.[154]

With the possible exception of the Eighth Circuit,[155] courts find the statute of limitations is procedural, not jurisdictional, so that if the debt collector does not raise this affirmative defense in a timely manner, it is deemed lost.[156] The defendant

147 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 538 F.3d 496 (6th Cir. 2008), *rev'd on other grounds*, 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010).

148 *See* Reg. F §§ 1006.6(d)(3). *See* § 5.7.9, *supra*.

149 85 Fed. Reg. 76,734, 76,777 (Nov. 30, 2020).

150 See Reg. F § 1006.6(d)(3)(i). *See* § 5.7.9, *supra*.

151 15 U.S.C. § 1692k(d).

152 Rotkiske v. Klemm, ___ U.S. ___, 140 S. Ct. 355, 205 L. Ed. 2d 291 (2019).

153 *See* Prindle v. Carrington Mortg. Serv., L.L.C., 2016 WL 9504253 (M.D. Fla. May 27, 2016), *citing* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 666, 679–680, 134 S. Ct. 1962, 188 L. Ed. 2d 979 (2014).

154 *See* Ch. 16, *infra*. *See, e.g.*, Harrington v. CACV, L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007); Kouabo v. Chevy Chase Bank, 336 F. Supp. 2d 471 (D. Md. 2004).

155 Hageman v. Barton, 817 F.3d 611 (8th Cir. 2016) (FDCPA statute of limitations is jurisdictional); Mattson v. U.S. West Commc'ns, Inc., 967 F.2d 259, 262 (8th Cir. 1992) (same). These rulings are now open to question because of the Supreme Court's decision in *Rotkiske v. Klemm*, ___ U.S. ___, 140 S. Ct. 355, 205 L. Ed. 2d 291 (2019), discussing the application of the fraud-based discovery rule that would not be available if the limitations period is jurisdictional. *See* §§ 12.3.4, 12.3.5, *infra*.

156 Marshall-Mosby v. Corporate Receivables, Inc., 205 F.3d 323 (7th Cir. 2000); Betskoff v. Enter. Rent A Car Co. of Baltimore, L.L.C., 2012 WL 32575 (D. Md. Jan. 4, 2012) (statute of limitations not a jurisdictional bar). *See also* Maynard v. Cannon, 2006 WL 2403591 (D. Utah Aug. 21, 2006) (FDCPA statute of limitations procedural); Barnett v. Experian Info. Solutions, 2004 WL 4033379 (E.D. Tex. Sept. 28, 2004) (same); Hooper v. Capital Credit & Collection Serv., Inc., 2004 WL 825616 (D. Or. Jan. 16, 2004) (same); Clark v. Bonded Adjustment Co., 204 F.R.D. 662 (E.D. Wash. 2002); *In re* Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002).

has the burden to raise[157] and establish[158] a statute of limitations defense.

Even if an FDCPA violation is time-barred, the violation may nevertheless be admissible to show background and to establish a foundation for other evidence, as well as to show the plaintiff's vulnerable state of mind and establish the extent of general damages and a pattern of abuse.[159] Conduct beyond the limitations period also goes to the frequency and persistence of the collector's non-compliance, which is a statutory factor in determining the amount of statutory damages.[160]

A state renewal statute cannot extend the limitations period to the filing of a claim under the FDCPA, in which Congress established an express statute of limitations.[161]

12.3.2 Events That Start the Limitations Period Running

12.3.2.1 Determining the Applicable Date for Debt Collectors' Letters

Some courts start the limitations period running on the date that a collection letter is mailed, reasoning that this is the collector's last opportunity to comply with the FDCPA.[162] The Eleventh Circuit agreed, but the court added five days to the mailing date where the violation involved the verification requirement, which gives the collector five days after the initial communication to deliver the verification notice.[163] Other courts rely on the date that the consumer receives the letter.[164]

12.3.2.2 The Applicable Date for Violations Involving Collection Lawsuits

The Fifth and Tenth Circuits and many lower courts hold that the FDCPA limitations period does not being to run until the consumer is served with or learns of the collection lawsuit, not earlier when the collector files the complaint with a court.[165] Otherwise the debt collector could avoid the FDCPA's

157 *See, e.g.*, Michalak v. LVNV Funding, L.L.C., 604 Fed. Appx. 492 (6th Cir. 2015); Goodin v. Bank of Am., 2015 WL 3866872 (M.D. Fla. June 23, 2015); Duranseau v. Portfolio Recovery Assoc., L.L.C., 2015 WL 632144 (D. Minn. Feb. 13, 2015); Horwitz v. Wells Fargo, 2012 WL 5862752 (N.D. Ill. Nov. 19, 2012).

158 *See, e.g.*, Cain v. Thompson, 2020 WL 42897, at *2 (W.D. Ky. Jan. 3, 2020); Basile v. I.C. Sys., Inc., 2011 WL 4368510 (W.D.N.Y. Sept. 19, 2011).

159 *See* Kapsis v. Am. Home Mortg. Servicing Inc., 923 F. Supp. 2d 430 (E.D.N.Y. 2013); Blue v. Bronson & Migliaccio, 2010 WL 4641666, at *3 (D. Or. Nov. 4, 2010); Mathis v. Omnium Worldwide, 2005 WL 3159663 (D. Or. Nov. 27, 2005) (may use actions to support claims of abuse, harassment, or knowledge of attorney's representation); Joseph v. J.J. Mac Intyre Cos., L.L.C., 281 F. Supp. 2d 1156, 1162 (N.D. Cal. 2003); Padilla v. Payco Gen. Am. Credits, Inc., 161 F. Supp. 2d 264, 273 (S.D.N.Y. 2001); Pittman v. J.J. Mac Intyre Co. of Nev., Inc., 969 F. Supp. 609, 612 (D. Nev. 1997). *See also* Warren v. Halstead Indus. Inc., 802 F.2d 746, 753 (4th Cir. 1986) ("Even where such past discriminatory acts are time-barred for purpose of a particular claim, the Supreme Court has stated that this type of showing 'may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue.' . . . citing *United Air Lines v. Evans*, 431 U.S. 553, 558, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977)."); Goldsmith v. Aargon Agency, Inc., 2018 WL 1567848, at *6, n.8 (D. Nev. Mar. 30, 2018); Derrickson v. Circuit City Stores, Inc., 84 F. Supp. 2d 679, 685, n.1 (D. Md. 2000).

160 *See* § 11.9.5, *supra*.

161 Edwards v. Solomon and Solomon, P.C., 829 Fed. Appx. 425 (11th Cir. 2020).

162 *See* Freyermuth v. Credit Bur. Serv., Inc., 248 F.3d 767 (8th Cir. 2001); Maloy v. Phillips, 64 F.3d 607 (11th Cir. 1995); Mattson v. U.S. West Commc'ns, Inc., 967 F.2d 259, 261 (8th Cir. 1992); Pierce v. Roosen Varchetti & Olivier—Ga. P.L.L.C., 2020 WL 1154757 (M.D. Ga. Mar. 10, 2020); Coure v. Bayview Loan Servicing, L.L.C., 2018 WL 1807011 (N.D. Ga. Feb. 20, 2018); Munoz v. Rushmore Mgmt. Loan Serv. L.L.C., 2017 WL 5629645 (S.D. Ohio. Nov. 22, 2017); Guevara v. Client Serv., Inc., 2011 WL 5082251 (D.N.J. Oct. 26, 2011); Vitullo v. Mancini, 684 F. Supp. 2d 747 (E.D. Va. 2010); Smith v. Rubin & Raine, L.L.C., 2009 WL 2143644 (D.N.J. July 14, 2009); Boudreaux v. Fulcher, Brooks & Daniels, L.L.C., 2008 WL 11337504 (W.D. Mo. Oct. 29, 2008); Pagan v. Monterrey Collection Serv., 2007 WL 966009 (E.D. Pa. Mar. 29, 2007); Camacho v. Nat'l Credit Adjustment Agency, 2007 WL 760416 (E.D. Wash. Mar. 8, 2007); Friedman v. Anvan Corp., 1998 WL 559779 (N.D. Ill. Aug. 28, 1998). *See also* McCready v. Harrison, 67 Fed. Appx. 971 (7th Cir. 2003); Blakemore v. Pekay, 895 F. Supp. 972 (N.D. Ill. 1995).

163 Maloy v. Phillips, 64 F.3d 607 (11th Cir. 1995). *Accord* Gil v. Allied Interstate L.L.C., 2017 WL 5135600 (E.D.N.Y. Nov. 3, 2017); Ivy v. Nations Recovery Ctr., Inc., 2012 WL 2049387 (E.D. Tenn. June 6, 2012); Zarwell v. King & Nordlinger, L.L.P., 2006 WL 5503909 (D. Md. June 6, 2006), *aff'd*, 254 Fed. Appx. 249 (4th Cir. 2007); Cole v. Noonan & Lieberman, Ltd., 2005 WL 2848446 (N.D. Ill. Oct. 26, 2005); Drumright v. Collection Recovery, Inc., 500 F. Supp. 1 (M.D. Tenn. 1980); Russell v. Bowman, Heintz, Boscia & Vician, P.C., 744 N.E.2d 467 (Ind. Ct. App. 2001).

164 Brewi v. RMS-Recovery Mgmt. Serv., Inc., 2020 WL 1866472, at *5 (E.D.N.Y. Jan. 13, 2020) (court notes that "the Second Circuit has not yet spoken on the issue of whether an FDCPA violation occurs at the time a debt collector sends a letter to a debtor or whether it occurs when the debtor receives the communication," but holds that it was "persuaded by the decisions of other district courts in this Circuit that the one-year statute of limitations period for a violation under the FDCPA begins to run on the date the consumer received the debt collection letter"), *adopted*, 2020 WL 746650 (Feb. 14, 2020); Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201, 214 (E.D.N.Y. 2019); Sprouse v. Ditech Fin., L.L.C., 2019 WL 405634, at *4 (E.D. Tenn. Jan. 31, 2019) ("A cause of action based on defects apparent in a letter sent by a debt collector accrues at the time that the debtor receives the letter."); Setton v. Cohen Hurkin Ehrenfeld Pomerantz & Tenenbum, L.L.P., 2014 WL 4724704 (E.D.N.Y. Sept. 22, 2014); Sylvester v. Laks, 1991 U.S. Dist. LEXIS 21777 (N.D. Ohio Aug. 1, 1991). *See also* Bates v. C&S Adjusters, Inc., 980 F.2d 865, 868 n.2 (2d Cir. 1992) (noting that, although the court "need not decide the issue today," at least one court had indicated that a cause of action "might not accrue until receipt of the collection notice").

165 Serna v. Law Office of Joseph Onwuteaka, P.C., 732 F.3d 440, 446 (5th Cir. 2013); Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002); Claiborne v. Portfolio Recovery Assoc., 2020 WL 2842674 (M.D. Ga. June 1, 2020); Mora v. LVNV Funding L.L.C., 408 F. Supp. 3d 297 (W.D.N.Y. 2019); Crisostomo v. Weigel, 2018 WL 7198182 (N.D. Ga. Dec. 6, 2018), *adopted*, 2019 WL 650415 (N.D. Ga. Jan. 16, 2019); Fish v. Stone, Higgs & Drexler, P.C., 2017 WL 6757575 (W.D. Tenn. Dec. 29, 2017); Williams v. Bank of Am., 2017 WL 3662441 (M.D. Fla. Aug. 24, 2017); Dakowa v. MSW Capital, L.L.C., 2017 WL 662975 (D. Minn. Feb. 17, 2017); Living Life v. Deutsche Bank Nat'l Tr. Co., 2016 WL 1562912 (E.D. Pa. Apr. 15, 2016); Jenkins-Brown v. Liberty Acquisitions Servicing, L.L.C., 2016 WL 8710010 (D. Or. Feb. 26, 2016); Sam v. Cohen & Slamowitz, L.L.P., 2015 WL 114076

application to its litigation altogether by delaying service for a year.[166]

Other courts, though, start the FDCPA statute of limitations running on the day the state court complaint violating the FDCPA was filed.[167] Those courts typically adopt the collection letter analogy that the date of sending the letter is the creditor's last day to comply with the FDCPA. The comparison is incomplete, however, because unlike a letter placed in the mail, the collector may control when and whether the consumer is served with a lawsuit, after the complaint is forwarded to the court. In addition, even courts that use the date the lawsuit is filed with the court may delay running the limitations period if the consumer can show fraudulent concealment.[168] Some decisions do not reach the question whether to use the date of filing or the date of service, but reject using the date the complaint is mailed to the court.[169]

Some courts refuse to start the limitations period as of the date when judgment is entered,[170] but other courts hold the limitations period commences when the collector's lawsuit is dismissed or a default judgment taken, because the state court lawsuit constitutes a continuing wrong that is not completed until the date of dismissal.[171]

12.3.2.3 The Applicable Date for Postjudgment Remedies

For statute of limitations purposes, a garnishment action or lien is a new action, running the one-year period from the date of the postjudgment action, not the filing of the underling collection action that produced the judgment.[172] Using any other

(W.D.N.Y. Jan. 8, 2015); Smith v. Lerner, Sampson, & Rothfuss, 2015 WL 1809311 (N.D. Ohio Apr. 20, 2015); Archer v. Aldridge Connors, L.L.P., 998 F. Supp. 2d 1360 (S.D. Fla. 2014); Davis v. Bank of Am., 2014 WL 12778833 (E.D. Pa. Aug. 11, 2014); Lautman v. 2800 Coyle St. Owners Corp., 2014 WL 2200909, at *7 (E.D.N.Y. May 23, 2014) (collecting cases); McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1 (D. Mass. 2012), *aff'd in part, rev'd in part on other grounds*, 775 F.3d 109 (1st Cir. 2014); Polinsky v. Cmty. Health Partners Reg'l Health Sys., 858 F. Supp. 2d 891 (N.D. Ohio 2012); Duffey v. Pope, 2012 WL 4442753 (S.D. Ohio Sept. 25, 2012); Langendorfer v. Kaufman, 2011 WL 3682775 (S.D. Ohio Aug. 23, 2011) (venue violation); Allen v. Bank of Am. Corp., 2011 WL 3654451 (D. Md. Aug. 18, 2011); Perez v. Bureaus Inv. Grp. No. II, L.L.C., 2009 WL 1973476 (S.D. Fla. July 8, 2009); Anderson v. Gamache & Myers, P.C., 2007 WL 1577610 (E.D. Mo. May 31, 2007); Wyles v. Excalibur I, L.L.C., 2006 WL 2583200 (D. Minn. Sept. 7, 2006); Ross v. North MS Health Serv., Inc., 2006 WL 218173 (N.D. Miss. Jan. 27, 2006). *See also* Hendricks v. LVNV Funding, L.L.C., 2014 WL 12534774 (E.D. Tenn. Sept. 30, 2014); Ison v. Javitch, Block & Rathbone, 2007 WL 2769674 (S.D. Ohio Sept. 18, 2007) (rejecting date of filing and finding it unnecessary to decide between the date the summons and complaint were mailed to or received by consumer); Prade v. Jackson & Kelly, 941 F. Supp. 596, 599–600 (N.D. W. Va. 1996), *aff'd*, 135 F.3d 770 (4th Cir. 1998).

166 Serna v. Law Office of Joseph Onwuteaka, P.C., 732 F.3d 440, 446 (5th Cir. 2013); Johnson v. Riddle, 305 F.3d 1107, 1114 (10th Cir. 2002).

167 DeStefano v. Udren Law Offices P.C., 802 Fed. Appx. 688, 691 (3d Cir. 2020); Tyler v. DH Capital Mgmt., Inc., 736 F.3d 455, 465 (6th Cir. 2013); Bybee v. Kovitz, Shifrin Nesbit, 2019 WL 414662 (N.D. Ill. Feb. 1, 2019); Brewer v. William C. Grossman, P.L.L.C., 2018 WL 4688944 (E.D. Mich. Sept. 28, 2018) ("In an action contending that a lawsuit was filed in violation of the FDCPA, the statute of limitations begins to run when the debt-collection suit is filed rather than when the trial court issues its judgment."); Beavers v. Midland Funding, L.L.C., 2017 WL 2568918 (E.D. Ark. June 13, 2017); Anderson v. Jefferson Capital Sys., L.L.C., 2016 WL 9558952 (N.D. Ga. Nov. 7, 2016), *adopted*, 2017 WL 3836126 (N.D. Ga. Jan. 27, 2017); Beekman v. EXL Legal, P.L.L.C., 2016 WL 8678038 (S.D. Fla. Dec. 21, 2016); Billups v. Deutsche Bank, 2016 WL 3633320 (N.D. Ill. July 6, 2016); Boldon v. Riverwalk Holdings, Ltd., 2016 WL 900639 (D. Minn. Mar. 9, 2016); DePizzo v. Bank of N.Y. Mellon, 2015 WL 5675098 (N.D. Ohio Sept. 25, 2015); Toops v. Citizens Bank of Logan, Ohio, 2015 WL 1526411 (S.D. Ohio Apr. 2, 2015); Vaughn v. Nat'l Collegiate Student Loan Tr. 2006-3, 2014 WL 6686751 (E.D. Tenn. Nov. 26, 2014); Burd v. Manley Deas Kochalski P.L.L.C., 2014 WL 12572908 (S.D. Ohio Mar. 31, 2014); Judy v. Blatt, Hasenmiller, Leibsker & Moore L.L.C., 2010 WL 431484 (N.D. Ill. Jan. 29, 2010); Kline v. HomEq, 2008 WL 11351581, at *4 (S.D. Ohio Nov. 25, 2008); Beler v. Blatt, Hasenmiller, Leibsker, & Moore, L.L.C., 2007 WL 1062835 (C.D. Ill. Mar. 30, 2007); Kondratick v. Beneficial Consumer Disc. Co., 2005 WL 2314042 (E.D. Pa. Sept. 21, 2005). *See also* Hansen v. Resurgent Capital Serv., L.P., 2015 WL 3652838 (M.D. Fla. June 11, 2015) (FDCPA statute of limitations began to run the day after filing of proof of claim); Zenon v. Palisades Collection, L.L.C., 2008 WL 506231 (M.D. Fla. Feb. 21, 2008).

168 *See* § 12.3.4, *infra*.

169 Rosado v. Taylor, 324 F. Supp. 2d 917 (N.D. Ind. 2004).

170 *See* Balik v. Blitt and Gaines, P.C., 2015 WL 764013 (N.D. Ill. Feb. 21, 2015) (alleged fair venue violation did not occur when judgment was obtained). *See also* Brewer v. William C. Grossman, P.L.L.C., 2018 WL 4688944 (E.D. Mich. Sept. 28, 2018) ("In an action contending that a lawsuit was filed in violation of the FDCPA, the statute of limitations begins to run when the debt-collection suit is filed rather than when the trial court issues its judgment."); Oyegbola v. Advantage Assets Inc. II, 2009 WL 4738074 (D. Mass. Dec. 7, 2009); Calka v. Kucker, Kraus & Bruh, L.L.P., 1998 WL 437151 (S.D.N.Y. Aug. 3, 1998).

171 *See* Wade v. Account Resolution Corp., 2016 WL 4415353 (E.D. Mo. Aug. 19, 2016); Hoang v. Worldwide Asset Purchasing, L.L.C., 2009 WL 3669883 (S.D. Ill. Nov. 2, 2009). *See also* Mattson v. U.S. West Commc'ns, Inc., 967 F.2d 259, 261 (8th Cir. 1992); Ness v. Gurstel Chargo, P.A., 933 F. Supp. 2d 1156, 1165 (D. Minn. 2013). *But see* Rivas v. Bank of New York Mellon, 676 Fed. Appx. 926 (11th Cir. 2017), *aff'g*, 2015 WL 13203925 (S.D. Fla. Nov. 24, 2015); Bjerke v. Messerli & Kramer, P.A., 2017 WL 2869957, at *4 (W.D. Wis. July 5, 2017) (calling the *Hoang* case "an outlier").

172 *See, e.g.*, Hageman v. Barton, 817 F.3d 611, 619 (8th Cir. 2016); McCrobie v. Palisades Acquisition XVI, L.L.C., 664 Fed. Appx. 81 (2d Cir. Nov. 10, 2016); Stennett v. Midland Funding, L.L.C., 2017 WL 1205589 (W.D. Ky. Mar. 30, 2017); Osinubepi-Alao v. Plainview Fin. Serv., Ltd., 44 F. Supp. 3d 84 (D.D.C. 2014); Collins v. Erin Capital Mgmt., L.L.C., 290 F.R.D. 689, 698 (S.D. Fla. 2013); Reese v. CAC Serv., Inc., 2011 WL 830084 (D. Or. Mar. 3, 2011); Malik v. Unifund CCR Partners, 2009 WL 5197820, at *5 (W.D. Wash. Dec. 22, 2009); Watkins v. Peterson Enter., Inc., 57 F. Supp. 2d 1102, 1106 (E.D. Wash. 1999); Blakemore v. Pekay, 895 F. Supp. 972, 982–983 (N.D. Ill. 1995). *Cf.* Somerset v. Stephen Einstein & Assoc., 351 F. Supp. 3d 201, 214 (E.D.N.Y. 2019) (statute of limitations began to run upon receipt of income execution, not upon entry of default judgment).

A series of 2015 decisions out of the Northern District of Illinois come to the opposite conclusion, which would have the unwanted effect of insulating many garnishment proceedings from the FDCPA. *See* Murry v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 2015 WL 7008139 (N.D. Ill. Nov. 12, 2015); Radcliffe v. Russel G. Winick & Assoc., 2015 WL 3629950 (N.D. Ill. June 9, 2015); Maldanado v. Freedman Anselmo Lindberg, L.L.C., 2015 WL 2330213 (N.D. Ill. May 14, 2015); McCauley v. Hunter, 2015 WL 2193805 (N.D. Ill. May 7, 2015).

approach would be nonsensical where the postjudgment action occurs over a year from the filing of the underlying collection lawsuit.[173]

The Second Circuit has held that an FDCPA violation occurs when the wrong consumer's bank account is frozen and the consumer's cause of action becomes complete, not when the collection lawyer mails notice to the bank requesting the freeze.[174] When a judgment creditor failed to timely file a satisfaction of judgment, the FDCPA statute of limitations was held to begin to run at the end of the state statute's mandated period of sixty days following payment of the judgment to file the satisfaction of judgment.[175]

After a foreclosure action discharges a debt, the limitations period starts where the collector seeks to collect on the discharged debt, not from when the foreclosure action was filed.[176]

12.3.2.4 Other Applicable Dates

A claim based on the addition of unlawful fees to a dishonored check accrues on the date the demand for payment is made, not the date the check was written.[177]

The limitations period began to run not when the consumer paid the debt in full, but when the collector later assigned the debt to another and failed to disclose the full payment to the assignee.[178]

The limitations period began to run when a collector improperly withdrew money from the consumer's bank account, not when the collector first deceptively obtained the banking account information.[179] But a court has found that the limitations period first began to run from when the consumer's vehicle was repossessed, not when the consumer later temporarily regained possession before the car was impounded by the sheriff.[180]

12.3.3 When a Series of Violations Occurs

12.3.3.1 The General Rule

The general rule is that the statute of limitations begins anew and runs separately for each discrete violation of the FDCPA, notwithstanding that the violation is repetitive of an earlier violation in a series of communications or other collector actions which occurred outside the limitations period.[181] Some support had existed for the contrary rule that the statute of limitations for FDCPA claims runs from the date of the initial violation and that later violations of the same kind do not reset the limitations period.[182] However, that case law has been

173 *But see* Hill v. Freedman Anselmo Lindberg, L.L.C., 2015 WL 2000828 (N.D. Ill. May 1, 2015) (period runs from filing of lawsuit not the filing of postjudgment process to discover defendant's assets); Hendricks v. LVNV Funding, L.L.C., 2014 WL 12534774 (E.D. Tenn. Sept. 30, 2014) (limitations period does not run from postjudgment subpoena of consumer's financial information, but from filing of underlying lawsuit).

174 Benzemann v. Citibank, 806 F.3d 98 (2d Cir. 2015).

175 Crossman v. Asset Acceptance, L.L.C., 2014 WL 2612031 (M.D. Fla. June 11, 2014) (rejecting continuing violation theory; discovery or tolling rules not argued).

176 *See* Devine v. Nationstar Mortg. L.L.C., 2015 WL 6555424 (E.D. Pa. Oct. 28, 2015).

177 Eaton v. Credit Bur., Inc., 2007 WL 2781844 (D.N.D. Sept. 21, 2007).

178 Salgado v. Harvard Collection Serv., Inc., 2001 WL 803683 (N.D. Ill. July 17, 2001).

179 Dyer-Andrews v. Academy Collection Serv., Inc., 2005 WL 1871120 (D. Colo. Aug. 5, 2005).

180 James v. Ford Motor Credit Co., 47 F.3d 961 (8th Cir. 1995).

181 Bender v. Elmore & Throop, P.C., 963 F.3d 403, 407 (4th Cir. 2020) ("[N]othing in the FDCPA suggests that 'similar' violations should be grouped together and treated as a single claim for purposes of the FDCPA's statute of limitations. To the contrary, we long have held that a 'separate violation' of the FDCPA occurs 'every time' an improper communication, threat, or misrepresentation is made."); Gomez v. Cavalry Portfolio Serv., L.L.C., 962 F.3d 963, 966 (7th Cir. 2020) ("That Cavalry sent earlier letters that also demanded $1,600 in interest for time between the write-off and the Bank's sale of the debt to Cavalry is neither here nor there. Each violation of a federal statute carries its own period of limitations."); Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 694 (8th Cir. 2017) (each alleged FDCPA violation is evaluated individually to determine whether any portion of claim is barred by statute of limitations, and it does not matter that debt collector's violation restates earlier assertions); Michalak v. LVNV Funding, L.L.C., 604 Fed. Appx. 492, 493 (6th Cir. 2015); Llewellyn v. Allstate Home Loans, Inc., 711 F.3d 1173, 1188 (10th Cir. 2013), *adopting* Solomon v. HSBC Mortg. Corp., 395 Fed. Appx. 494, 497 (10th Cir. 2010), *rev'd on other grounds*, 504 Fed. Appx. 702 (10th Cir. 2012); Purnell v. Arrow Fin. Serv., L.L.C., 303 Fed. Appx. 297, 301–302 (6th Cir. 2008); Mayfield v. Portfolio Recovery Assoc., 2021 WL 3492149, at *4–5 (D. Minn. Aug. 9, 2021); Evans v. Select Portfolio Servicing, Inc., 2020 WL 5848619 (E.D.N.Y. Sept. 30, 2020); Mitchell v. U.S. Bank Nat'l Ass'n as Tr. for Master Asset Backed Sec. Tr. 2005-FRE1, 2020 WL 3050739 (D. Md. June 8, 2020); Rusk v. Specialized Loan Servicing, L.L.C., 2020 WL 2772771 (S.D. Ga. May 28, 2020); Hicks v. Seterus, Inc., 2018 WL 3208177 (N.D. Ohio June 29, 2018); Segovia v. Phoenix Recovery Group, 2018 WL 6809568 (W.D. Tex. Dec. 26, 2018); Willis v. Portfolio Recovery Assoc., L.L.C., 2018 WL 4169327 (W.D. Tex. July 11, 2018), *adopted in part, rejected in part*, 2019 WL 2565243 (W.D. Tex. Mar. 8, 2019), *aff'd*, 803 Fed. Appx. 761 (5th Cir. 2020); Yeager v. Ocwen Loan Servicing, L.L.C., 2018 WL 1004742 M.D. Ala. Feb. 21, 2018); Munoz v. Rushmore Mgmt. Loan Serv. L.L.C., 2017 WL 5629645 (S.D. Ohio. Nov. 22, 2017); Gentleman v. Massachusetts Higher Educ. Assistance Corp., 272 F. Supp. 3d 1054 (N.D. Ill. 2017); Werbicky v. Green Tree Servicing, L.L.C., 2016 WL 1248697 (D. Nev. Mar. 28, 2016); Jean-Baptiste v. Bus. Law Grp. P.A., 2016 WL 4163574 (M.D. Fla. Aug. 4, 2016); Devine v. Nationstar Mortg. L.L.C., 2015 WL 6555424 (E.D. Pa. Oct. 28, 2015); Head v. Ocwen Loan Servicing, L.L.C., 2015 WL 4276148 (D. Kan. July 14, 2015); Wisdom v. Portfolio Recovery Assoc., 2015 WL 1892956 (N.D. Tex. Apr. 24, 2015); Ghawi v. Law Offices Howard Lee Schiff, P.C., 2015 WL 6958010 (D. Conn. Nov. 10, 2015); Kapsis v. Am. Home Mortg. Servicing Inc., 923 F. Supp. 2d 430 (E.D.N.Y. 2013); LeDoux v. JP Morgan Chase, 2012 WL 5874314 (D.N.H. Nov. 20, 2012); Ellis v. Gen. Revenue Corp., 274 F.R.D. 53 (D. Conn. 2011); Basile v. I.C. Sys. Inc., 2011 WL 4368510 (W.D.N.Y. Sept. 19, 2011); Blue v. Bronson & Migliaccio, 2010 WL 4641666, at *3 (D. Or. Nov. 4, 2010); Ehrich v. RJM Acquisitions L.L.C., 2009 WL 4545179 (E.D.N.Y. Dec. 4, 2009); Murphy v. MRC Receivables Corp., 2007 WL 148823, at *3 (W.D. Mo. Jan. 12, 2007); McCorriston v. L.W.T., Inc., 536 F. Supp. 2d 1268, 1272 (M.D. Fla. 2008); Akalwadi v. Risk Mgmt. Alternatives, Inc., 336 F. Supp. 2d 492, 501 (D. Md. 2004); Kaplan v. Assetcare, Inc., 88 F. Supp. 2d 1355, 1360 (S.D. Fla. 2000); Pittman v. J.J. Mac Intyre Co. of Nev., 969 F. Supp. 609, 611 (D. Nev. 1997).

182 *See, e.g.*, Bey v. Shapiro Brown & Alt, L.L.P., 997 F. Supp. 2d 3 315–316 (D. Md. 2014), *aff'd*, 584 Fed. Appx. 135 (4th Cir. 2014).

expressly overruled,[183] or so discredited by the string of consistent circuit court rulings cited in the initial footnote here, that the stated general rule can now be considered established law. Indeed, the Consumer Financial Protection Bureau has approved and adopted this rule in an amicus brief.[184]

Accordingly, when a collector is obligated to stop communicating, each subsequent letter is a violation starting its own limitations period.[185] Similarly, where a collector fails to verify a debt, subsequent communications within one year of the FDCPA suit are actionable, even if the failure to provide verification was more than a year earlier.[186]

Where there is a violation each month that a collector reports to a credit reporting agency, the more recent reports can be actionable even if the first report was outside the limitations period.[187] Where one error in applying payments resulted in a series of late fee assessments, the assessments within a year of suit are actionable, even if the earlier assessments are not.[188]

Where an incorrect calculation of the amount due was made over a year earlier, an attempt to collect that amount within the year is actionable.[189] Where a collector initially sought an excessive amount more than a year earlier, the actual collection of that amount is actionable.[190] A new limitations period applies to each of multiple attempts to foreclose on property without owning the note.[191]

There is a limited exception to this rule where the collector's filing of a collection lawsuit violates the FDCPA and where other aspects of that litigation continue the same FDCPA violation. The extent and viability of this exception is examined at § 12.3.3.2, *infra*.

Generally, where there is a series of violations, some within the limitations period and some outside it, the violations within the period cannot serve to bring the earlier violations within the limitations period. One possible exception to this rule is the "continuing violation" theory examined at § 12.3.3.3, *infra*.

12.3.3.2 Litigation Activity

There is less clarity as to when the statute of limitations begins to run where the FDCPA violations involve collection litigation. (The separate issue as to what date to use for the filing of a lawsuit is examined at § 12.3.2.2, *supra*.)

A number of courts find that where the filing of a lawsuit involves a FDCPA violation, and that violation is repeated throughout the course of the litigation, the limitations period runs from the filing of the lawsuit, not separately for the subsequent litigation activity repeating or emanating from the same violation.[192] This inconsistency with the general rule of the

183 Bender v. Elmore & Throop, P.C., 963 F.3d 403, 407, n.1 (4th Cir. 2020).

184 *See* CFPB amicus brief, Bender v. Elmore & Throop, P.C., 18-cv-979 (4th Cir. May 28, 2019), *available at* https://files.consumerfinance.gov. *See also* § 3.4.4.4, *supra* (discussing deference to federal agency interpretations of FDCPA).

185 Murphy v. MRC Receivables Corp., 2007 WL 148823, at *3 (W.D. Mo. Jan. 12, 2007).

186 *See, e.g.*, Purnell v. Arrow Fin. Serv., L.L.C., 303 Fed. Appx. 297, 304 (6th Cir. 2008), *aff'g*, 2007 WL 421828 (E.D. Mich. Feb. 2, 2007); Ghawi v. Law Offices Howard Lee Schiff, P.C., 2015 WL 6958010 (D. Conn. Nov. 10, 2015).

187 Purnell v. Arrow Fin. Serv., L.L.C., 303 Fed. Appx. 297 (6th Cir. 2008), *aff'g*, 2007 WL 421828 (E.D. Mich. Feb. 2, 2007). *See also* James v. MRC Receivables Corp., 2018 WL 3213147, at *4 (W.D. La. June 28, 2018); Ramos v. Wells Fargo Bank, 2016 WL 6434423, at *8 (D.N.J. Oct. 31, 2016); Walkabout v. Midland Funding L.L.C., 2016 WL 1169540 (W.D. Okla. Mar. 22, 2016); Brooks v. Midland Credit Mgmt., Inc., 2013 WL 1010455 (D. Md. Mar. 13, 2013) Kasalo v. Monco Law Offices, S.C., 2009 WL 4639720 (N.D. Ill. Dec. 7, 2009) (multiple credit reports); Boccone v. Am. Express Co., 2007 WL 2914909, at *4 (D. Md. Oct. 4, 2007) (multiple credit reports); Malm v. Household Bank, 2004 WL 1559370 (D. Minn. July 7, 2004) (failure to report dispute not time-barred because of time-barred credit reports).

188 Pucci v. Bank of Am., 2015 WL 12843199 (M.D. Fla. Mar. 12, 2015).

189 Beeks v. ALS Lien Serv., 2014 WL 7785745 (C.D. Cal. Feb. 18, 2014). *See also* Lindsey v. EquityExperts.org, L.L.C., 2020 WL 5548770, at *3 (N.D. Ga. Aug. 24, 2020) (statute of limitations began to run when defendant tried to collect charge arising from payoff letter, not when charge posted; "To allow the mere posting of the charge to trigger the statute of limitations would allow a debt collector to post a charge and burn a debtor's statute of limitations by delaying a demand for payment. The statutes also requires something more active than an accounting entry to establish a violation—at least an attempt to collect a debt.").

190 Whittingham v. Mortg. Elec. Registration Serv., Inc., 2007 WL 1456196 (D.N.J. May 15, 2007). *See also* Werbicky v. Green Tree Servicing, L.L.C., 2016 WL 1248697 (D. Nev. Mar. 28, 2016); Blackburn v. Mapother & Mapother, P.S.C., 2014 WL 1418224 (W.D. Ky. Apr. 14, 2014); McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513 (E.D. Mich. 2013). *But see* Taylor v. Ocwen Loan Servicing, L.L.C., 2017 WL 3443209, at *6 (C.D. Ill. Aug. 10, 2017); Wirtz v. JPMorgan Chase Bank, 2016 WL 2642999 (D. Minn. May 9, 2016); Aghazu v. Severn Sav. Bank, 2016 WL 808823 (D. Md. Mar. 2, 2016); Angers v. Pennymac Loan Serv., L.L.C., 2014 WL 6668001 (D.N.J. Nov. 24, 2014); Sierra v. Foster & Garbus, 48 F. Supp. 2d 393, 395 (S.D.N.Y. 1999).

191 Quintana v. Bank of Am., 2014 WL 690906 (D. Ariz. Feb. 24, 2014).

192 *See, e.g.*, Smith v. Lerner, Sampson & Rothfuss, L.P.A., 658 Fed. Appx. 268, 273 (6th Cir. 2016); Haye v. Collection Pros., Inc., 2021 WL 2176478, at *7–10 (D. Wyo. Jan. 22, 2021); Trupp v. Bank of Am., 2020 WL 1815940 (W.D. Ky. Apr. 9, 2020); Cain v. Thompson, 2020 WL 42897 (W.D. Ky. Jan. 3, 2020); Thorpe v. Ertz, 2018 WL 616123 (D. Alaska Jan. 29, 2018); Bainbridge v. Ocwen Loan Servicing, L.L.C., 2017 WL 1178047 (M.D. Pa. Mar. 30, 2017); Phillips v. Archstone Simi Valley L.L.C., 2016 WL 7444550 (C.D. Cal. Dec. 15, 2016); Cutler *ex rel.* Jay v. Sallie Mae, Inc., 2015 WL 1909482 (C.D. Cal. Apr. 24, 2015); Wies v. Cavalry SPV I, L.L.C., 2015 WL 569897 (N.D. Ind. Feb. 11, 2015); Sapaula v. Blitt & Gaines, P.C., 2015 WL 1407296 (N.D. Ill. Mar. 24, 2015); Prowell v. Cam Credits, Inc., 2015 WL 2239309, at *3 (D. Or. May 12, 2015); Harris v. Barton, 2014 WL 3701037 (E.D. Mo. July 25, 2014); Bihn v. Fifth Third Mortg. Co., 2013 WL 5657598 (S.D. Ohio Oct. 16, 2013); Simard v. LVNV Funding, L.L.C., 2011 WL 4543956 (D. Mass. Sept. 28, 2011); Hunnicutt v. CACH, L.L.C., 2011 WL 2600651 (M.D. Fla. June 30, 2011); Oyegbola v. Advantage Assets Inc. II, 2009 WL 4738074 (D. Mass. Dec. 7, 2009); Nutter v. Messerli & Kramer, P.A., 500 F. Supp. 2d 1219, 1223 (D. Minn. 2007); Wilhelm v. Credico, Inc., 455 F. Supp. 2d 1006 (D.N.D. 2006), *rev'd on other grounds*, 519 F.3d 416 (8th Cir. 2008) (lower court adopted theory; appellate court ignored it); Calka v. Kucker, Kraus & Bruh, L.L.P., 1998 WL 437151 (S.D.N.Y. Aug. 3, 1998). *See also* Jodway v. Orians, P.C., 759 Fed. Appx. 374 (6th Cir. 2018); Lindsay v. Rushmore Loan Mgmt., Serv., L.L.C., 2017 WL 1230822 (D. Md. Apr. 4, 2017); Hansen v. Resurgent Capital Serv., L.P., 2015 WL 3652838 (M.D. Fla. June 11, 2015). *See also* Walker v. Pitnell, ___ Fed. Appx. ___,

renewal of the statute of limitations for each discrete FDCPA violation[193] reflects the unique features of litigation compared to other forms of collection activity. The prevailing rationale is that "[l]ater court filings and testimony making the same assertion are not akin to discrete communications that are separately actionable under the statute."[194]

Some courts take the opposite view, that the FDCPA statute of limitations starts with the debt collector's last opportunity to comply with the FDCPA in a state court collection suit, such as the point the collector seeks a default judgment or the case is dismissed.[195] The Eighth Circuit and other courts reject this approach.[196]

Even if a court were to accept this exception for litigation conduct that relates back to the filing of the suit, the exception has limited application. Filing of the lawsuit starts a new limitations period, even if a related violation occurred prior to the filing of the lawsuit.[197] That is also the case where a collector files a second lawsuit—the limitations period starts no sooner than the filing of the second suit, not the first lawsuit.[198] Similarly, where a lawsuit is settled and then the collector reinstates the litigation or falsely indicates it has a judgment, the limitations period starts from the later activity, not from the date the case was first filed before settlement.[199]

A new limitations period necessarily begins to run from any new violation occurring during litigation where that violation was not apparent in the collector's originally filed complaint.[200] Consequently, the following (and many other) FDCPA violations occurring during a collection suit start the running the FDCPA statute of limitations for that new violation:

- Violations related to false affidavit of service, if occurring after the filing date;[201]
- Violations related to discovery[202] or refusal to provide documentation later in the case as to the amount owed;[203]
- Violations related to summary judgment motions;[204]
- Claims related to later-filed, falsified billing statements not part of the original complaint;[205] and
- Obtaining unlawful attorney fees that had not been specified in the complaint.[206]

12.3.3.3 The "Continuing Violation Theory"

The continuing violation theory seeks to bring within the limitations period conduct over one year old where the conduct is closely linked to later conduct falling within the limitations period. The Supreme Court addressed the continuing violation theory in *National Railroad Passenger Corp. v. Morgan*,[207] an employment discrimination case, and held that it applied when the unlawful conduct required a pattern of activities that would occur over time and would not be actionable until the pattern reached a point that it was actionable:

> A hostile work environment claim is composed of a series of separate acts that collectively constitute one "unlawful

2021 WL 2816715, at *1 (2d Cir. July 7, 2021) ("we have not decided whether a repeated but otherwise identical misrepresentation in a court filing counts as a separate FDCPA violation for statute of limitations purposes").

193 *See* § 12.3.3.1, *supra*.

194 Haye v. Collection Pros., Inc., 2021 WL 2176478, at *10 (D. Wyo. Jan. 22, 2021).

195 *See* Wade v. Account Resolution Corp., 2016 WL 4415353 (E.D. Mo. Aug. 19, 2016); Hoang v. Worldwide Asset Purchasing, L.L.C., 2009 WL 3669883 (S.D. Ill. Nov. 2, 2009). *See also* Mattson v. U.S. West Commc'ns, Inc., 967 F.2d 259, 261 (8th Cir. 1992); Ness v. Gurstel Chargo, P.A., 933 F. Supp. 2d 1156, 1165 (D. Minn. 2013). *But see* Bjerke v. Messerli & Kramer, P.A., 2017 WL 2869957, at *4 (W.D. Wis. July 5, 2017) (calling the *Hoang* case "an outlier").

196 *See* Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 694 (8th Cir. 2017); Quintana v. Bank of Am., 2014 WL 690906 (D. Ariz. Feb. 24, 2014); Brown v. Udren Law Offices P.C., 2011 WL 4011411, at *6 (E.D. Pa. Sept. 9, 2011); Gruen v. EdFund, 2009 WL 2136785 (N.D. Cal. July 15, 2009) (rejecting theory as unpersuasive).

197 *See* Beals v. Bank of Am., 2011 WL 5415174, at *17 (D.N.J. Nov. 4, 2011); Young v. Thieblot Ryan, P.A., 2011 WL 6217007 (D. Md. Dec. 12, 2011). See also Dunn v. Adams, Stepner, Woltermann & Dusing, P.L.L.C., 2019 WL 6135043, at *3 (E.D. Ky. Nov. 19, 2019).

198 Cortellessa v. Udren Law Offices P.C., 2016 WL 4554539 (E.D. Pa. Sept. 1, 2016); Fuller v. Lerner, Sampson, Rothfuss, L.P.A., 2012 WL 4361454 (N.D. Ohio May 14, 2012), *adopted*, 2012 WL 4361448 (N.D. Ohio Sept. 21, 2012).

199 Glazewski v. CKB Firm, P.C., 2015 WL 661278 (N.D. Ill. Feb. 15, 2015); Brown v. Udren Law Offices P.C., 2011 WL 4011411, at *5 (E.D. Pa. Sept. 9, 2011). *See also* Poghosyan v. First Fin. Asset Mgmt., Inc., 2020 WL 433083 (E.D. Cal. Jan. 28, 2020) (attempt to collect debt in 2018 was within statute of limitations, even though debt had been settled in 2010 where consumer alleged that conduct that violated FDCPA was subsequent attempt to collect on debt that was uncollectible, because it had been settled).

200 *See* Dakowa v. MSW Capital, L.L.C., 2017 WL 662975 (D. Minn. Feb. 17, 2017); Cortellessa v. Udren Law Offices P.C., 2016 WL 4554539 (E.D. Pa. Sept. 1, 2016); Smith v. Discover Bank, 2015 WL 1021423 (E.D. Ky. Mar. 9, 2015); Glazewski v. CKB Firm, P.C., 2015 WL 661278 (N.D. Ill. Feb. 15, 2015); Brown v. Udren Law Offices P.C., 2011 WL 4011411, at *6 (E.D. Pa. Sept. 9, 2011); Jones v. Inv. Retrievers, L.L.C., 2011 WL 1565851, at *3 (M.D. Pa. Apr. 25, 2011). *See also* Almashhadani v. Norris McLaughlin, P.A., 2021 WL 2454456 (E.D. Pa. June 16, 2021); Hemphill v. Nationstar Mortg. L.L.C., 2018 WL 4929864, at *4 (E.D. Pa. Oct. 10, 2018); Strader v. U.S. Bank, 2018 WL 741425, at *13 (W.D. Pa. Feb. 7, 2018).

201 Rendon v. HBLC, Inc., 2017 WL 7275423 (N.D. Ill. Oct. 25, 2017).

202 Dakowa v. MSW Capital, L.L.C., 2017 WL 662975 (D. Minn. Feb. 17, 2017) (allegation that discovery itself was confusing and misleading did not relate back to assertions made in original state court complaint). *See also* Nutter v. Messerli & Kramer, P.A., 500 F. Supp. 2d 1219, 1223 (D. Minn. 2007) ("because plaintiffs filed this federal action within a year of the alleged discovery-related misrepresentation, the statute of limitations does not bar this claim").

203 Jones v. Inv. Retrievers, L.L.C., 2011 WL 1565851, at *4 (M.D. Pa. Apr. 25, 2011).

204 Dakowa v. MSW Capital, L.L.C., 2017 WL 662975 (D. Minn. Feb. 17, 2017) (discrete act that was not barred by statute of limitations).

205 Smith v. Discover Bank, 2015 WL 1021423 (E.D. Ky. Mar. 9, 2015).

206 Walton v. Franklin Collection Agency, Inc., 190 F.R.D. 404 (N.D. Miss. 2000). *See also* Hemphill v. Nationstar Mortg. L.L.C., 2018 WL 4929864, at *4 (E.D. Pa. Oct. 10, 2018) (alleged misstatement regarding attorney fees made during litigation had previously gone unmentioned by defendants and thus was novel representation of consumer's debt, and by challenging new fees consumer was not challenging validity of foreclosure action).

207 Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).

> employment practice." . . . It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.[208]

A time-barred action as part of a series of actions can be actionable if the actions in themselves are not violations, but requires the series of the actions to produce the violation. A good example of a continuing violation in the FDCPA context is where the consumer's harassment claims rested on the volume and pattern of calls, and not on any one call.[209] Another example might be an oral promise where the collector's later actions prove that promise to be false.[210]

Care must be taken to raise the theory in such a proper context. Courts are likely to reject the theory in other contexts, particularly involving collection litigation with no new or different violation beyond the violation initially committed.[211]

Where there has been a pattern of conduct, where each action is independently sufficient to violate the Act, and the final act in the pattern occurred within the limitations period, the court will have separate grounds to find the claim within the FDCPA's statute of limitations without needing to rely on a continuing violation theory.[212]

12.3.4 Equitable Tolling and the Fraud-Based Discovery Rule

The Supreme Court has ruled that the FDCPA one-year limitations period begins to run from the violation's occurrence, not from when the consumer discovers the violation.[213] Nevertheless, this subsection explains how equitable principles can extend the FDCPA statute of limitations beyond one year, either because fraud prevented the consumer's discovery of the violation (the fraud-based discovery rule) or by tolling the limitations period after it starts to run (equitable tolling).

The 2019 Supreme Court decision in *Rotkiske v. Klemm* includes a discussion of these equitable principles as applied to the FDCPA statute of limitations.[214] The majority decision, in rejecting a discovery rule for the FDCPA statute of limitations, specifically modified that holding by stating the period begins to run on the violation date "absent the application of an equitable doctrine,"[215] thus recognizing that equitable principles can prevent expiration of the FDCPA statute of limitations. Justice Sotomayor, in a concurring opinion, states in regard to fraud-specific equitable tolling: "Nothing in today's decision prevents parties from invoking that well-settled doctrine."[216]

Justice Ginsburg's dissent also states: "Unlike the general discovery rule, there is no reason to believe the FDCPA displaced the fraud-based discovery rule. The Court does not hold otherwise."[217] She cites to Justice Scalia's concurring opinion in *TRW Inc. v. Andrews* that "the ordinarily applicable time trigger does not apply when fraud on the creditor's part accounts for the debtor's failure to sue within one year of the creditor's violation."[218]

The majority opinion does not decide whether equitable tolling applies in the case before it because the question was

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208 536 U.S. at 117.

209 *See* Muzyka v. Rash Curtis & Assoc., 2019 WL 2869114, at *6 (E.D. Cal. July 3, 2019); Hernandez v. Ditech Fin., L.L.C., 2019 WL 856406, at *6 (C.D. Cal. Feb. 2, 2019); Hollis v. LVNV Funding, 2019 WL 1091336, at *6 (C.D. Cal. Jan. 2, 2019); Dore v. Five Lakes Agency, Inc., 2015 WL 4113203 (N.D. Ill. July 8, 2015); Bennett v. Portfolio Recovery Assoc., 2013 WL 6320851 (C.D. Cal. Nov. 22, 2013); Hockenhull v. Law Office Howard Lee Schiff, P.C., 2012 WL 6525504 (D.R.I. Dec. 13, 2012); Tucker v. Mann Bracken, L.L.C., 2009 WL 151669, at *3 (M.D. Pa. Jan. 21, 2009); Joseph v. J.J. Mac Intyre Cos., 281 F. Supp. 2d 1156, 1161 (N.D. Cal. 2003).

210 *See* Padilla v. Payco Gen. Am. Credits, Inc., 161 F. Supp. 2d 264, 273 (S.D.N.Y. 2001).

211 *See, e.g.*, Jodway v. Orlans, P.C., 759 Fed. Appx. 374, 379–380 (6th Cir. 2018); McNair v. Maxwell & Morgan P.C., 728 Fed. Appx. 751, 752 (9th Cir. 2018); Gajewski v. Ocwen Loan Servicing, 650 Fed. Appx. 283, 286 (7th Cir. 2016); Slorp v. Lerner, Sampson & Rothfuss, 587 Fed. Appx. 249, 259 (6th Cir. 2014); Peterson v. Portfolio Recovery Assoc., L.L.C., 430 Fed. Appx. 112 (3d Cir. 2011); Schaffhauser v. Citibank, 340 Fed. Appx. 128, 131 (3d Cir. 2009); Haye v. Collection Pros., Inc., 2021 WL 2176478, at *7–10 (D. Wyo. Jan. 22, 2021) (collecting cases); Feder v. SB2, Inc., 2020 WL 996442 (S.D. Ohio Mar. 2, 2020); Michelo v. National Collegiate Student Loan Tr. 2007-2, 419 F. Supp. 3d 668, 694 (S.D.N.Y. Oct. 11, 2019); Hedayati v. Perry Law Firm, A.P.L.C., 2018 WL 3154894, at *4 (C.D. Cal. May 16, 2018); Whitt v. Richland Holdings, Inc., 2018 WL 2972925, at *7–8 (D. Nev. Apr. 27, 2018) (finding that while some of the alleged acts were "interrelated because they deal with the same allegedly unlawful collection fees and interest rates," they were "not sufficiently linked to constitute one pattern of conduct": "Each act is alleged to have violated specific provisions of the FDCPA, occurred on different days, involved different conduct, and extended over multiple years. Any one of those acts could independently give rise to liability if it were timely brought."); Thorpe v. Ertz, 2018 WL 616123, at *3 (D. Alaska Jan. 29, 2018) (no authority providing that "that subsequent filings made in the course of litigation constitute continuing, separate violations of the FDCPA"); Goldsmith v. Aargon Agency, Inc., 2018 WL 1567848, at *6 (D. Nev. Mar. 30, 2018); Tepper v. Amos Fin., L.L.C., 2017 WL 3446886, at *9 n.2 (E.D. Pa. Aug. 11, 2017) ("Each written contact from Amos regarding the Tepper Loan is different from the last; they are independent events, each to be scrutinized on its own terms"), *aff'd on other grounds*, 898 F.3d 364 (3d Cir. 2018); Gentleman v. Massachusetts Higher Educ. Assistance Corp., 272 F. Supp. 3d 1054, 1066 (N.D. Ill. 2017); Stennett v. Midland Funding, L.L.C., 2017 WL 1205589 (W.D. Ky. Mar. 30, 2017); Allen v. Bank of Am., 2012 WL 5412654 (N.D. Ill. Nov. 6, 2012).

212 *See, e.g.*, Devlin v. Law Offices Howard Lee Schiff, P.C., 2012 WL 4469139 (D. Mass. Sept. 25, 2012) ("suit may be timely either because the defendant engaged in a pattern of wrongful conduct under a continuing violation theory or because the March 2011 letter was a discrete act and was within the statutory period"). *See also* Deangelo v. LVNV Funding L.L.C., 2020 WL 3468061, at *5 (D.N.J. June. 25, 2020) (later efforts to collect debt that defendants knew was time-barred when action resulting in default judgment was first brought was new conduct within one-year statute of limitations period).

213 *See* § 12.3.2.2, *supra*.

214 ___ U.S. ___, 140 S. Ct. 355, 205 L. Ed. 2d 291 (2019).

215 *Id.*, 140 S. Ct. at 357.

216 *Id.* at 362.

217 *Id.* at 363.

218 *Id.* at 362, *citing* TRW Inc. v. Andrews, 534 U.S. 19, 27, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001).

not properly raised before the Court. Justice Ginsburg explains why it would apply if properly raised: "By knowingly arranging for service of the complaint against Rotkiske at an address where Rotkiske no longer lived, and filing a false affidavit of service, Rotkiske alleges Klemm engaged in fraud. Such fraud, I would hold, warrants application of the discovery rule to time Rotkiske's FDCPA suit from the date he learned of the default judgment against him."[219]

Justice Ginsburg's opinion also distinguishes the fraud-based discovery rule from equitable tolling. Equitable tolling pauses or "tolls" a statutory limitations period after it has commenced.[220] "A litigant qualifies for equitable tolling only if he establishes "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."[221]

By contrast, the fraud-based discovery rule sets the time at which a claim accrues, i.e., the time when the statute of limitations commences to run.[222] When a plaintiff is injured by fraud, the bar of the statute does not begin to run until the fraud is discovered.[223]

The majority decision, Justice Sotomayor's concurrence, and Justice Ginsburg's dissent all recognize the continued viability of equitable principles to extend the FDCPA's statute of limitations. The unanimous *en banc* opinion of the Third Circuit, that the Supreme Court affirmed, also reaches the same conclusion.[224] This should put to rest contrary rulings from the Eighth Circuit and some lower courts that the FDCPA limitations period is jurisdictional and therefore not subject to equitable tolling rules.[225]

Even before the Court's decision in *Rotkiske*, the Ninth Circuit and many lower courts rejected the Eighth Circuit view. The Ninth Circuit remarked that the Eighth Circuit opinion "was made without any real analysis" and that the word "jurisdiction" was likely "used in a somewhat colloquial sense."[226] While the subsection establishing the FDCPA limitations period is titled "Jurisdiction," this title was given by the Law Revision Counsel after enactment, and it is not part of the law as enacted by Congress.[227]

The fraud-based discovery rule must be distinguished from a general application of the discovery rule, which the Supreme Court rejected in *Rotkiske*. The fraud-based discovery rule requires more than that consumers did not understand their FDCPA rights.[228] Without proof of the defendant's fraud, the consumer's mere failure to discover the violation is insufficient.[229] Fraud in the transaction is not enough—the fraud must prevent the consumer from discovering the violation.[230]

But Justice Ginsburg's opinion in *Rotkiske* finds that the fraud-based discovery rule applies where there is fraud, even though the plaintiff's claim alleges a FDCPA violation and does not include a fraud claim. "I do not view the fraud-based discovery rule as so confined and would hold that the rule governs if either the conduct giving rise to the claim is fraudulent, or if fraud infects the manner in which the claim is presented. That understanding of the rule is consistent with its equitable roots and historic rationale."[231]

A good example of facts that would lead to application of the fraud-based discovery rule are those detailed by Justice Ginsburg in *Rotkiske*—the collector's false affidavit of service

219 *Id.* at 362–363.

220 *Id.* at 363, *citing* Lozano v. Montoya Alvarez, 572 U.S. 1, 10, 134 S. Ct. 1224, 188 L. Ed. 2d 200 (2014).

221 *Id* at 363, *citing* Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 255,136 S. Ct. 750, 193 L. Ed. 2d 652 (2016).

222 *Id.*, *citing* Merck & Co v. Reynolds, 559 U.S. 633, 644–645, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010).

223 *Id.*, *citing* Merck & Co v. Reynolds, 559 U.S. 633, 644–645, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010).

224 Rotkiske v. Klemm, 890 F.3d 422, 428–429 (3d Cir. 2018) (en banc).

225 Hageman v. Barton, 817 F.3d 611 (8th Cir. 2016); Mattson v. U.S. West Commc'ns, Inc., 967 F.2d 259, 262 (8th Cir. 1992); Thompson v. Nat'l Credit Adjusters, L.L.C., 2011 WL 6003955 (D. Minn. Nov. 30, 2011); Deaville v. Capital One Bank, 425 F. Supp. 2d 744 (W.D. La. 2006); Hutt v. Albert Einstein Med. Ctr., 2005 WL 2396313, at *8 (E.D. Pa. Sept. 28, 2005); Zhang v. Haven-Scott Assoc., Inc., 1996 WL 355344 (E.D. Pa. June 21, 1996); Chisolm v. Charlie Falk Auto Wholesalers, Inc., 851 F. Supp. 739, 749 (E.D. Va. 1994); Friedman v. HHL Fin. Serv., Inc., 1993 WL 286487 (N.D. Ill. July 29, 1993). *See also* McMenamin v. Phelan Hallinan, L.L.P., 2015 WL 5515347 (E.D. Pa. Aug. 20, 2015) ("FDCPA is generally characterized as a "strict liability" statute because "it imposes liability without proof of an intentional violation"; thus, FDCPA's statute of limitations is not subject to waiver or tolling); Dixon v. Law Offices of Peter E. Meltzer & Assoc., 2007 WL 275877, at *3 (E.D. Pa. Jan. 26, 2007) (no tolling of the FDCPA statute of limitations); Hutt v. Albert Einstein Med. Ctr., 2005 WL 2396313, at *8 (E.D. Pa. Sept. 28, 2005) (FDCPA statute of limitations not subject to tolling or waiver).

226 Mangum v. Action Collection Serv., Inc., 575 F.3d 935, 940 n.14 (9th Cir. 2009).

227 *Id.* at 939–940. *See also* Brady v. Credit Recovery Co., 160 F.3d 64, 66 (1st Cir. 1998) (citing Pub. Law No. 90-321, § 502 (May 29, 1968) when refusing to rely on FDCPA captions to define term); Pub. Law No. 90-321, 82 Stat. 146, 147, § 502 (May 29, 1968) (reported as note following 15 U.S.C. § 1601; "Captions and catchlines are intended solely as aids to convenient reference, and no inference as to the legislative intent with respect to any provision enacted by this Act.").

228 *See, e.g.*, Maldanado v. Freedman Anselmo Lindberg, L.L.C., 2015 WL 2330213 (N.D. Ill. May 14, 2015); Hunt v. Wells Fargo Bank, 2014 WL 1028391 (E.D. Cal. Mar. 17, 2014).

229 Martin v. Grehn, 546 Fed. Appx. 415, 420 (5th Cir. 2013); Pletos v. Makower Abbate Guerra Wegner Vollmer, P.L.L.C., 2017 WL 3727173 (E.D. Mich. Aug. 30, 2017), *aff'd on other grounds*, 731 Fed. Appx. 431 (6th Cir. 2018); Aghazu v. Severn Sav. Bank, 2016 WL 808823 (D. Md. Mar. 2, 2016); Stephens v. Troy Capital, L.L.C., 2015 WL 2078895 (M.D. Tenn. May 4, 2015); Coles v. Zucker Goldberg & Ackerman, 2015 WL 4578479 (D.N.J. July 29, 2015); Byrd v. Law Offices of John D. Clunk Co., L.P.A., 2010 WL 816932 (S.D. Ohio Mar. 8, 2010); Whittiker v. Deutsche Bank Nat'l Tr. Co., 605 F. Supp. 2d 914 (N.D. Ohio 2009); Oyegbola v. Advantage Assets Inc. II, 2009 WL 4738074 (D. Mass. Dec. 7, 2009). *See also* Iler v. Wells Fargo, 2020 WL 2794529, at *3 (S.D. Ohio May 29, 2020); Faircloth v. AR Res., Inc., 2020 WL 820307, at *8 (N.D. Cal. Feb. 19, 2020); Doughty v. Phelan, Hallinan, Diamond & Jones, L.L.P., 2019 WL 1426290, at *2 (E.D. Pa. Mar. 29, 2019).

230 *See* Ruth v. Unifund CCR Partners, 604 F.3d 908 (6th Cir. 2010); Mason v. Midland Funding L.L.C., 2017 WL 6994577 (N.D. Ga. July 27, 2017), *adopted*, 2017 WL 8186866 (N.D. Ga. Sept. 29, 2017).

231 Rotkiske v. Klemm, ___ U.S., ___, 140 S. Ct. 355, 365, 205 L. Ed. 2d 291 (2019).

in conjunction with sewer service.[232] It is no defense for the collector that the consumer could have discovered the lawsuit if the consumer had checked the court records.[233]

The fraud-based discovery rule can also apply where the collector fraudulently represented that the consumer would not be sued if the matter was settled, and the consumer never received service of the lawsuit.[234] Other fraudulent documents or representations also can trigger the fraud-based discovery rule if they mask the FDCPA violation from the consumer.[235]

As explained above, the fraud-based discovery rule is different than equitable tolling. A good example of equitable tolling is where the consumer seeks to bring an action within the one-year limitations period, but the defendant insists on enforcement of an arbitration requirement and then refuses to participate in the arbitration. Even though the limitations period would have expired before the consumer had an opportunity subsequently to bring the action in court, equitable tolling allows for the action to be brought.[236]

Other examples of equitable tolling include where the consumer filed the action within the limitations period, but the case must be re-filed again for technical reasons,[237] or where the limitations period is tolled during the pendency of a subsequently dismissed class action.[238] If the consumer has no control over discovery delays, and only after discovery learns that a new party defendant should be added, equitable tolling should apply to allow for the addition of that defendant.[239]

Mental and/or physical illness delaying the filing of the FDCPA claim can be the basis for equitable tolling.[240] The statute of limitations can be tolled where the consumer delayed a lawsuit at the defendant's inducement.[241]

12.3.5 Counting the One-Year Period

Most courts follow Federal Rule of Civil Procedure 6(a)(1)(A) that the day of the violation is not counted, so that a suit filed on the anniversary date is not time-barred.[242] A suit filed on July 1, 2020, is within the limitations period where the violation occurred on July 1, 2019.

Under Federal Rule of Civil Procedure 6(a)(1)(C), if the anniversary date is a Saturday, Sunday, or legal holiday, the deadline is extended to the next day that is not a Saturday, Sunday, or a legal holiday.[243] Only the Eighth Circuit and a few lower courts hold that the FDCPA limitations period is jurisdictional and therefore not subject to Federal Rule of Civil Procedure 6(a)(1),[244] and even those decisions are suspect now that the Supreme Court has indicated that equitable principles apply to the FDCPA statute of limitations—which is inconsistent with the limitations period being jurisdictional.[245]

12.3.6 When Is the FDCPA Complaint Deemed Filed?

The consumer's amended FDCPA complaint relates back to the date of filing of the consumer's original complaint if

232 *See* Kearney v. Cavalry Portfolio Serv., L.L.C., 2014 WL 3778746 (E.D.N.Y. July 31, 2014); Coble v. Cohen & Slamowitz, L.L.P., 824 F. Supp. 2d 568 (S.D.N.Y. 2011); Sykes v. Mel Harris & Assoc., L.L.C., 757 F. Supp. 2d 413, 422 (S.D.N.Y. 2010). *See also* Butler v. J.r.S-1, Inc., 2016 WL 1298780 (N.D. Ill. Apr. 4, 2016); Kubiski v. Unifund CCR Partners, 2009 WL 774450 (N.D. Ill. Mar. 25, 2009) (consumer was served with complaint two years after collection lawsuit was filed).

233 *See* Bevan v. Butler & Assoc., 2017 WL 6557418 (D. Kan. Dec. 22, 2017).

234 *See* Scott v. Greenberg, 2017 WL 1214441 (E.D.N.Y. Mar. 31, 2017); Pate v. Law Office of Joe Pezzuto, L.L.C., 2014 WL 12586733 (C.D. Cal. June 16, 2014).

235 *See* Galima v. Ass'n of Apartment Owners of Palm Court, 2017 WL 1240181 (D. Haw. Mar. 30, 2017); Rivera v. JPMorgan Chase & Co., 2015 WL 12851710 (S.D. Fla. July 9, 2015).

236 Soberanis v. City Title Loan, L.L.C., 2017 WL 1232437 (D.S.C. Apr. 3, 2017).

237 Neal v. Buffaloe & Assoc., 2012 WL 1883419 (M.D. Tenn. May 22, 2012) (FDCPA statute of limitations was equitably tolled where plaintiff had to refile for lack of personal jurisdiction over the defendant).

238 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 558–559, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) (non-FDCPA case). *See also* Johnson-Morris v. Santander Consumer USA, Inc., 194 F. Supp. 3d 757 (N.D. Ill. 2016). *See generally* National Consumer Law Center, Consumer Class Actions (10th ed. 2020), *updated at* www.nclc.org/library.

239 *See* Sweet v. Audubon Fin. Bur., L.L.C., 2016 WL 9777177 (D.N.M. June 27, 2016).

240 Garrett v. Empire Cooler Serv., Inc., 2004 WL 2011399 (N.D. Ill. June 21, 2004), *citing* Barnhart v. United States, 884 F.2d 295, 300 (7th Cir. 1989). *But see* Avoki v. Carolina Telco Fed. Credit Union, 2018 WL 3551524, at *5 (W.D.N.C. July 24, 2018) (plaintiff failed to show that he was unable to bring suit prior to his illness or that he made any effort to seek stay or tolling of his prior suit because of illness).

241 *See* Wilson v. Gordon & Wong Law Grp., P.C., 2013 WL 6858975 (E.D. Cal. Dec. 24, 2013) (recognizing doctrine, but finding plaintiff's reliance on possibility of settlement unjustified).

242 *See* Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002); Maloy v. Phillips, 64 F.3d 607 (11th Cir. 1995); Broderick v. Viking Client Serv., Inc., 2017 WL 4269962, at *3 (D.N.J. Sept. 26, 2017); Diena v. Certified Credit & Collection Bur., Inc., 2015 WL 570247 (D.N.J. Feb. 11, 2015); McDonald v. Richard J. Boudreau & Assoc., L.L.C., 2013 WL 3479273 (D.R.I. July 10, 2013); Danow v. Borack, 2006 WL 5516577 (S.D. Fla. Jan. 30, 2006), *rev'd on other grounds*, 197 Fed. Appx. 853 (11th Cir. 2006); Hooper v. Capital Credit & Collection Serv., Inc., 2004 WL 825616 (D. Or. Jan. 16, 2004); Clark v. Bonded Adjustment Co., 204 F.R.D. 662 (E.D. Wash. 2002); Clark v. Bonded Adjustment Co., 176 F. Supp. 2d 1062 (E.D. Wash. 2001); Souife v. First Nat'l Bank of Commerce, 452 F. Supp. 818 (E.D. La. 1978), *aff'd*, 653 F.2d 142 (5th Cir. 1981).

243 *See, e.g.*, Krier v. United Revenue Corp., 2020 WL 2065618, at *4 (N.D. Tex. Apr. 28, 2020); Taymuree v. Nat'l Student Loan Tr. 2007-2, 2017 WL 952962, at *3 (N.D. Cal. Mar. 13, 2017); Horowitz v. GC Serv. L.P., 2015 WL 1959377 (S.D. Cal. Apr. 28, 2015).

244 Hageman v. Barton, 817 F.3d 611 (8th Cir. 2016); Mattson v. U.S. West Commc'ns, Inc, 967 F.2d 259, 262 (8th Cir. 1992); Thompson v. Nat'l Credit Adjusters, L.L.C., 2011 WL 6003955 (D. Minn. Nov. 30, 2011); Dixon v. Law Offices of Peter E. Meltzer & Assoc., 2007 WL 275877 (E.D. Pa. Jan. 26, 2007); Deaville v. Capital One Bank, 425 F. Supp. 2d 744 (W.D. La. 2006); Hutt v. Albert Einstein Med. Ctr., 2005 WL 2396313, at *8 (E.D. Pa. Sept. 28, 2005); Zhang v. Haven-Scott Assoc., Inc., 1996 WL 355344 (E.D. Pa. June 21, 1996); Chisolm v. Charlie Falk Auto Wholesalers, Inc., 851 F. Supp. 739, 749 (E.D. Va. 1994); Friedman v. RHL Fin. Serv., Inc., 1993 WL 286487 (N.D. Ill. July 29, 1993).

245 *See* § 12.3.4, *supra*.

a closely related defendant is added or if added violations relate to the same events as the initial complaint, even if the violations are of different FDCPA provisions.[246] Similarly, an FDCPA claim in an amended complaint has been found to relate back to an original complaint that just alleged TILA violations, where the claims all involved the same credit transaction.[247]

The filing of the consumer's original complaint determines the date the complaint is filed, not when the case is moved to a different venue to exercise personal jurisdiction on the defendant.[248] However, the consumer may not add a defendant in an amended complaint after the FDCPA statute of limitations has run where the consumer's omission of the proposed defendant was intentional.[249]

The limitations period counts the date a complaint and a petition to proceed *in forma pauperis* is presented to the court, even if the complaint is not formally enrolled on the court's records until the later date when the fee waiver is granted.[250] If the fee waiver is denied, the consumer may timely file by paying the filing fee within three days of the order denying the fee waiver, and this delay should not affect the timeliness of the filing of the complaint.[251] Where, however, the complaint is dismissed because the plaintiff chooses not to pay the filing fee, the limitations period may be computed from the date a new complaint is filed with an accompanying filing fee.[252]

12.3.7 Recoupment After Running of the Limitations Period

When a debt buyer brings a collection action against a consumer, the consumer might raise FDCPA counterclaims against the debt buyer for its earlier collection conduct.[253] If the limitations period has run on those FDCPA claims, the question arises whether those claims can still be raised by way of recoupment to offset the debt buyer's recovery in the collection action.

246 *See* Kuehn v. Cadle Co., 335 Fed. Appx. 827 (11th Cir. 2009) (amendment to change name of defendant to closely related defendant relates back); Albright v. Clayton & Myrick, P.L.L.C., 2020 WL 2526457, at *2–3 (E.D. Mo. May 18, 2020) (claim asserted in amended complaint arose out of the conduct, transaction, or occurrence set forth in original pleading, and relation back would not prejudice added defendant in defending merits of case); Hernandez v. BC Serv., Inc., 2020 WL 2308233, at *4 (S.D. Ill. May 8, 2020) (claim alleging "completely new facts" that were unrelated to initial complaint did not relate back, but claims alleging facts similar to those in original claims did relate back); Chan v. Forster & Garbus, L.L.P., 2019 WL 2265135 (C.D. Cal. May 24, 2019); Schultz v. Midland Credit Mgmt., Inc., 2019 WL 2083302, at *8 (D.N.J. May 13, 2019) (in amended complaint consumer relied on language identical to that originally used to allege violations of the same provisions of the FDCPA, "changing his allegations only by supplementing additional letters"); Vanover v. Carruthers, 2018 WL 1407047, at *4 (C.D. Cal. Jan. 24, 2018) (newly claimed violations were directly related to conduct alleged in original complaint); Harrer v. Bayview Loan Servicing, L.L.C., 2016 WL 6995559 (N.D. Ill. Nov. 30, 2016); Nepomuceno v. Focus Receivables Mgmt., L.L.C., 2015 WL 5608130 (D.N.J. Sept. 23, 2015) (adding facts and clarifying which subsections of the FDCPA defendants allegedly violated related back); McQueen v. Huddleston, 2015 WL 3746733 (W.D.N.Y. June 15, 2015) (amended complaint adding the another name of collector related back); Horowitz v. GC Serv. L.P., 2015 WL 1959377 (S.D. Cal. Apr. 28, 2015); Klemp v. Columbia Collection Serv., Inc., 2014 WL 5324318 (D. Or. Oct. 17, 2014) (new allegation arises out of the same attempts to collect more than was owed); Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961 (N.D. Ohio 2009) (claim of excessive interest which arose out of the same circumstances); Jackson v. Adcock, 2004 WL 1900484 (E.D. La. Aug. 23, 2004); Shula v. Lawent, 2002 WL 31870157 (N.D. Ill. Dec. 23, 2002), *aff'd*, 359 F.3d 489 (7th Cir. 2004); Canterbury v. Columbia Gas, 2001 WL 1681132 (S.D. Ohio Sept. 25, 2001); Brink v. First Credit Res., 57 F. Supp. 2d 848 (D. Ariz. 1999). *But see* Echlin v. PeaceHealth, 887 F.3d 967, 978 (9th Cir. 2018) (district court did not err in finding that amendment would have been futile where "materially different" claim that "would not rely on all the same facts and evidence" would not have related back to original complaint); Peragine v. William C. Grossman Law, P.L.L.C., 2019 WL 7293392, at *6 (E.D.N.Y. Dec. 30, 2019) (denying consumer leave to file second amended complaint seeking to add debt collector defendants that were known to consumer at time of original complaint, since claims did not relate back to prior complaints and were time-barred); Mendoza v. Forster, Garbus & Garbus, 2018 WL 785857, at *4 (D.N.J. Feb. 8, 2018) (no relation back where proposed amendment directly reversed a crucial factual allegation in the original complaint and thus reversed the legal theory plaintiff had relied upon, and where the addition of the proposed defendants depended upon such reversal; when an amendment seeks to change a party as opposed to changing just the allegations, the relation back rule is more difficult to satisfy); Smith v. Rubin & Raine, L.L.C., 2009 WL 2143644 (D.N.J. July 14, 2009) (new FDCPA claims alleged in amended complaint were time-barred because they raised new violations based on new facts); Peralta v. Accept Acceptance, L.L.C., 2009 WL 723910 (W.D. Mich. Mar. 10, 2009) dismissing as time-barred new claims that did not arise out of same conduct, transaction, or occurrence as claim in original complaint); Aikens v. Talbot Hoevel & Assoc., P.C., 1996 WL 675780 (N.D. Ill. Nov. 19, 1996); Byes v. Accelerated Cash Flow, Inc., 1996 WL 337222 (E.D. La. June 18, 1996).

247 McLean v. Joel Acceptance Co., 1983 U.S. Dist. LEXIS 13630 (N.D. Ill. Sept. 19, 1983). *See also* Pawelczak v. Fin. Recovery Serv., Inc., 286 F.R.D. 381 (N.D. Ill. 2012). *But see* Glover v. F.D.I.C., 698 F.3d 139 (3d Cir. 2012).

248 *See* Thoennes v. Masari Inv., L.L.C., 2009 WL 4282807 (N.D. Cal. Nov. 25, 2009).

249 *See* Nunez v. Mandarich Law Grp., L.L.P., 2017 WL 4742194 (N.D. Ill. Oct. 19, 2017). *See also* Peragine v. William C. Grossman Law, P.L.L.C., 2019 WL 7293392, at *6 (E.D.N.Y. Dec. 30, 2019) (no relation back where plaintiff did not make a mistake in choosing to sue only one defendant and not others: "Such a choice defeats any claim that Plaintiff made a mistake in naming a defendant sufficient to trigger the relation back doctrine contained in Rule 15(c).").

250 Abrams v. Hilco Receivables, L.L.C., 2011 WL 5138635 (W.D. Wash. Oct. 28, 2011); Peters v. Collection Tech., Inc., 1991 U.S. Dist. LEXIS 21810 (D. Or. Dec. 5, 1991). *See* Prade v. Jackson & Kelly, 941 F. Supp. 596, 599–600 (N.D. W. Va. 1996), *aff'd*, 135 F.3d 770 (4th Cir. 1998) (table).

251 Serna v. Law Office of Joseph Onwuteaka, P.C., 732 F.3d 440, 449 (5th Cir. 2013) (where plaintiff timely filed his original FDCPA complaint and IFP application on August 12, 2011, two days before the expiration of the limitations period, the district court then denied his IFP application on August 15, 2011, and provided notice of its denial by mail and electronic means, consumer was entitled under Federal Rule 6 to three days to file his complaint and filing fee, making his filing on August 18 timely).

252 Kueter v. Chrysler Fin. Corp., 2000 WL 762230 (D. Me. Apr. 5, 2000).

253 *See generally* National Consumer Law Center, Collection Actions § 5.7.1.2 (5th ed. 2020), *updated at* www.nclc.org/library.

There is extensive TILA case law providing for such recoupment claims.[254] There is little or no such case law examining the issue under the FDCPA, but the outcome will likely be determined by how related the FDCPA claims are to the collection action, and how the forum state where the collection action is brought interprets its law of recoupment.[255]

12.4 Good Faith Conformity with CFPB Advisory Opinions

12.4.1 Overview

The FDCPA specifies a defense of good faith conformity with a formal Consumer Financial Protection Bureau (CFPB) advisory opinion, even if the opinion is later ruled invalid:

> (e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the [Consumer Financial Protection] Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[256]

Regulation F (effective November 30, 2021) lists CFPB-issued[257] advisory opinions. The CFPB currently lists only one FDCPA advisory opinion.[258] That advisory opinion provides a safe harbor from FDCPA liability for certain actions taken in compliance with RESPA Regulation X mortgage servicing rules and Truth in Lending Regulation Z.[259] That advisory opinion is explained in more detail at Appx. B.2.2, *infra*, and its full text is reproduced as companion material to the digital version of this treatise under "Primary Sources." The CFPB will update Appendix C to list any new advisory opinions issued by the Bureau.[260]

In 2020, the CFPB issued an Advisory Opinions Policy that prescribes procedures for issuing advisory opinions.[261] Regulation F provides that, "A request for an advisory opinion may be submitted in accordance with the instructions regarding submission and content of requests applicable to any relevant advisory opinion program that the Bureau offers."[262]

The CFPB has issued other debt collection guidance documents,[263] but these documents do not claim to be advisory opinions for the purposes of FDCPA § 1692k(e). In 2019, the CFPB finalized a Compliance Assistance Sandbox Policy under which it planned to issue "approvals" of the practices of specific entities intended to trigger the good-faith defense of EFTA, TILA or the FDCPA.[264] The CFPB has not issued any actual FDCPA-related approvals under this policy.

Another CFPB policy issued in 2020, the No-Action Letter Policy, results in a commitment by the CFPB that it will not take certain actions. But the CFPB has made clear that a no-action letter does not result in legal conclusions or interpretations.[265] Consequently, a No-Action Letter does not trigger the good-faith defense and should receive no deference as an interpretation beyond the extent to which it binds the CFPB with respect to the entity receiving the NAL.

The Truth in Lending Act (TILA) provides a similar good faith conformity defense,[266] and courts may find useful, in construing the FDCPA defense, cases interpreting that TILA defense.[267] Courts rule that a defendant must specifically plead TILA's good faith conformity defense in order for a court to consider it[268] and that evidence must support the pleading.[269] To establish the defense, the defendant must show good faith[270] conformity with[271] and reliance upon[272] an agency's advisory opinion.

12.4.2 Inapplicability of FTC Advisory Opinions

The FDCPA defense of good faith conformity with an advisory opinion at one time applied to FTC advisory opinions.[273]

254 *See* National Consumer Law Center, Truth in Lending § 12.2.5 (10th ed. 2019), *updated at* www.nclc.org/library.

255 *Cf.* Crawford v. LVNV Funding, L.L.C., 2016 WL 4249498 (M.D. Ala. Aug. 9, 2016) (rejecting recoupment counterclaim since FDCPA claim did not arise out of same operative facts).

256 15 U.S.C. § 1692k(e). *See also* Reg. F Appx. C(1).

257 See § 12.4.2, *supra*, for an explanation why compliance with older FTC advisory opinions on the FDCPA should not provide a defense because the CFPB has not adopted those opinions.

258 *See* Reg. F Appx. C(3).

259 *See* 81 Fed. Reg. 71,977 (Oct. 19, 2016).

260 *See* Reg. F Appx. C(1).

261 CFPB, Advisory Opinions Policy, 85 Fed. Reg. 77,987 (Dec. 3, 2020).

262 Reg. F Appx. C(2).

263 *See* Appx. B, *infra*.

264 84 Fed. Reg. 48,246, 48,251 (Sept. 13, 2019).

265 84 Fed. Reg. 48,229 (Sept. 13, 2019). *See id.* at 48,243 ("The Bureau expects a No-Action Letter will: . . . State that the letter: . . . does not purport to express any legal conclusions regarding the meaning or application of the laws and/or regulations within the scope of the letter."); *id.* at 48,237 (rejecting request from some commenters that no-action letters state the CFPB's conclusion that the product or service in question, implemented consistently with the terms and conditions of the letter, does not violate applicable law). No-action letters also are adopted without public notice and opportunity to comment.

266 15 U.S.C. § 1640(f).

267 *See* National Consumer Law Center, Truth in Lending §§ 12.4.2.1, 12.4.2.2, 12.4.3 (10th ed. 2019), *updated at* www.nclc.org/library.

268 *E.g.*, Pollock v. Gen. Fin. Corp., 552 F.2d 1142 (5th Cir. 1977).

269 *Id.*; Leon v. Washington Mut. Bank, 164 F. Supp. 2d 1034 (N.D. Ill. 2001). *See also* Arias v. Albuquerque Nat'l Bank, Consumer Cred. Guide (CCH) ¶ 97,749 (D.N.M. 1979); Smith v. Lewis Ford, Inc., 456 F. Supp. 1138 (W.D. Tenn. 1978); Gillard v. Aetna Fin. Co., 414 F. Supp. 737 (E.D. La. 1976).

270 *E.g.*, Jones v. Cmty. Loan & Inv. Corp., 544 F.2d 1228 (5th Cir. 1976).

271 *E.g.*, Franklin v. First Money, Inc., 599 F.2d 615 (5th Cir. 1979); McGowan v. King, Inc., 569 F.2d 845 (5th Cir. 1978); Harris v. Household Fin. Corp., Consumer Cred. Guide (CCH) ¶ 97,924, 12 Clearinghouse Rev. 239 (D.D.C. 1978).

272 *E.g.*, Arias v. Albuquerque Nat'l Bank, Consumer Cred. Guide (CCH) ¶ 97,749, 13 Clearinghouse Rev. 100 (D.N.M. 1979); Houston v. Atlanta Fed. Sav. & Loan Ass'n, 414 F. Supp. 851 (N.D. Ga. 1976); Lewis v. Walker-Thomas Furniture Co., 416 F. Supp. 514 (D.D.C. 1976).

273 As originally enacted, 15 U.S.C. § 1692k(e) specified "with any advisory opinion of the Commission." Pub. L. No. 95-109, § 813, 91 Stat. 874 (Sept. 20, 1977).

When the CFPB was established in 2010, Congress amended the FDCPA to vest advisory opinion authority in the CFPB instead of the FTC and amended the good faith conformity provision to only apply to CFPB advisory opinions.[274] Congress did not provide for the continued legal force of previous FTC advisory opinions when it transferred authority to the CFPB.[275]

The CFPB's list of applicable advisory opinions found in Regulation F does not include the FTC advisory opinions.[276] In addition, the FTC has removed its four FDCPA advisory opinions from its website.[277] Also removed from its website are hundreds of informal staff letters on the FDCPA.[278] The FTC staff also compiled a commentary to the FDCPA.[279] But neither the staff letters nor the staff commentary are advisory opinions, which were issued by the FTC Commissioners.

It is clear that the good faith conformity defense does not apply to the FTC staff letters or commentary, and it also appears no longer to apply to the four FTC advisory opinions. Of course, courts may consider the FTC materials, particularly as historical context for interpreting the FDCPA.

12.5 Regulation F Safe Harbors

Regulation F (effective November 30, 2021) provides nine new provisions that it either specifically identifies as safe harbors for debt collectors or that function as safe harbors. For simplicity, we refer to all nine as safe harbors in this section.

These safe harbors do not set out requirements for debt collectors, but instead indicate that general standards are met if the collector complies with certain actions or disclosures. The general standards can be met by alternative actions or disclosures, but engaging in the specified conduct, while optional, provides a safe harbor from violation of a specific provision. Conduct or disclosures as specified in the safe harbor immunize the debt collector from the specific violation indicated and not from other possible Regulation F violations.

The nine safe harbors are discussed in the prior substantive chapters on the FDCPA and Regulation F. They are:

- *Reg. F § 1006.2(j):* Voicemails complying with definition of limited content messages do not violate requirements as to third-party communications, meaningful disclosure of the debt collector's identity, or that the call is to collect a debt or that the caller is a debt collector. *See* §§ 5.7.8, 6.8, 7.2.11.2, *supra*.
- *Reg. F Official Interpretations § 6(b)(1)(i)-2:* In determining the consumer's time zone to avoid calls at inconvenient times, where the collector has conflicting or ambiguous information regarding a consumer's location, then, absent knowledge to the contrary, the collector's call is at a convenient time if it would be convenient in all possible time zones where the debt collector's information indicates the consumer might be located. *See* § 5.4.2, *supra*.
- *Reg. F § 1006.6(d)(3):* Complying acquisition of email addresses and phone numbers for text message meet the reasonable procedure prong of the bona fide error defense if the email or text, nevertheless, results in a third-party communication. *See* § 5.7.9, *supra*.
- *Reg. F § 1006.22(g):* Where an email address or phone number for text messages is obtained and used pursuant to Reg. F § 1006.6(d)(3) procedures, a debt collector's use of that email address or phone number for text messages is not unfair or unconscionable even if the email or text message reveals the debt collector's name or other information indicating that the communication relates to the collection of a debt. *See* § 8.9, *supra*.
- *Reg. F Official Interpretation § 30(a)(1)-2*: Debt collectors must wait a reasonable period of time to receive a notice of undeliverability before furnishing information about the debt to a consumer reporting agency. A reasonable time period is fourteen consecutive days. *See* § 8.12, *supra*.
- *Reg. F § 1006.34(d)(2):* Use of the CFPB's model validation notice or a substantially similar notice provides a safe harbor as to the Regulation F validation information and form requirements. *See* § 9.3b.2, *supra*.
- *Reg. F Official Interpretation § 34(e)-1*: If a debt collector sends a consumer a validation notice translated into a language other than English, the translation must be complete and accurate. The language obtained from the CFPB website is considered a complete and accurate translation. *See* § 9.3b.4, *supra*.
- *Reg. F § 1006.38(b)(2):* A debt collector has not overshadowed or acted inconsistently with disclosure of the consumer's right to dispute the debt or request the original creditor's identity if it uses the model validation notice and otherwise responds to the dispute as required by Regulation F. *See* § 9.5.1, *supra*.
- *Reg. F Official Interpretation § 42(a)(1)-3*: Written disclosures are sent in a manner that is reasonably expected to provide actual notice if mailed to the consumer's last known address, unless the debt collector knows or should know that the consumer does not reside or receive mail at that location, or is notified the mail was not delivered. *See* § 9.3.3, *supra*.

12.6 Defenses Based on Prior Litigation or Immunities

12.6.1 Overview

A number of rules fostering judicial economy may bar FDCPA claims involving separate, but related lawsuits. Most typically this occurs when the consumer was first sued by a creditor or debt buyer in state court and the consumer then seeks to bring a separate FDCPA suit against the debt buyer,

274 Pub. L. No. 111-203, tit. X, § 1089(1), 124 Stat. 1376 (July 21, 2010).
275 *Id.*
276 Reg. F Appx. C(3).
277 FTC Advisory Opinions are reproduced in full at Appx. C.1, *infra*.
278 An index of FTC informal staff letters is included at Appx. C.3, *infra*, and the letters themselves are found as companion material to the digital version of this treatise.
279 Appx. C.2, *infra*, reproduces the FTC Staff Commentary on the FDCPA.

the collection attorney, or a collection agency. These rules support judicial economy by avoiding repetitious adjudications of identical or closely related matters in different suits:

- Compulsory counterclaims—that a FDCPA claim should have been brought in the prior litigation as a counterclaim;[280]
- *Res judicata* or claim preclusion—that the prior litigation forecloses the FDCPA claim because the two claims are essentially the same;[281]
- Collateral estoppel or issue preclusion—that consideration of a specific issue related to the FDCPA case has already been decided in the prior litigation;[282]
- Judicial estoppel—preventing a litigant from taking opposite positions on the same issue found in the two litigations;[283]
- Comity—where related issues are being determined in another court, a federal court hearing the FDCPA claim may stay its proceedings pending the outcome of the case;[284] and
- The *Rooker-Feldman* doctrine, which limits federal district courts' jurisdiction to review of the judgments of state courts and is discussed in § 12.6.4, *infra*.[285]

FDCPA claims arising from bankruptcy proceedings may have to be raised in a bankruptcy court or under the Bankruptcy Code. These issues are discussed in Chapter 13, *infra*. Also not discussed in this section are various frivolous claims a collector may raise, such as that the ability to seek under state law a sanction in a state court collection action for the plaintiff or plaintiff attorney's frivolous, groundless, or bad faith conduct would somehow displace the consumer's federal right to sue under the FDCPA.[286]

A related but different issue is whether various immunities or privileges bar liability under the FDCPA:

- Litigation immunity or privilege that in certain situations protects the litigation conduct of a plaintiff or plaintiff's attorney in a state court collection case from subsequent litigation concerning that conduct;[287]
- Witness immunity that in certain situations may protects the conduct of a witness or an affiant in one case from liability in a subsequent litigation;[288] and
- Sovereign immunity that protects certain parties with a governmental function from being sued.[289]

280 *See* § 12.6.2, *infra*.
281 *See* § 12.6.2, *infra*.
282 *See* § 12.6.2, *infra*.
283 *See* § 12.6.2, *infra*.
284 *See* § 12.6.3, *infra*.
285 *See* § 12.6.4, *infra*.
286 *See* Weniger v. Arrow Fin. Serv., L.L.C., 2004 WL 2609192 (N.D. Ill. Nov. 17, 2004) (defendant attorneys' argument that state court counterpart of Rule 11 was exclusive remedy for debt collector's abusive litigation was frivolous).
287 *See* § 12.6.6.2, *infra*.
288 *See* § 12.6.6.3, *infra*.
289 *See* § 12.6.5, *infra*.

12.6.2 Res Judicata, *Preclusion, Collateral Estoppel, and Compulsory Counterclaim Rules*

Res judicata and collateral estoppel are defenses available to prevent a second suit, e.g., an FDCPA suit following a debt collection or foreclosure action, proceeding on claims or issues determined,[290] or that should or could[291] have been determined, in a prior suit.[292] While a court may find that a collection attorney defendant in an FDCPA suit was not in privity with their debt collector client under state law in a prior state debt collection suit, and therefore not protected by *res judicata*,[293] other courts find that state law considers a collection lawyer to be in privity with its creditor client, and therefore protected by *res judicata*.[294]

290 *See* Mains v. Citibank, 852 F.3d 669, 678 (7th Cir. 2017). *See also* Dekom v. Fannie Mae, 846 Fed. Appx. 14 (2d Cir. 2021); Rodrigues v. Unifund CCR, L.L.C., 690 Fed. Appx. 799, 801 (3d Cir. 2017) (dismissing consumer's claims related to debt collector's actions in a prior state court collection suit pursuant to "New Jersey's 'idiosyncratic' application of *res judicata* principles . . . rooted in the belief that 'the adjudication of a legal controversy should occur in one litigation in only one court' "); Humphreys v. McCabe Weisberg & Conway, P.C., 686 Fed. Appx. 95, 97 (3d Cir. 2017) (homeowner's FDCPA claim that the foreclosure law firm made false statements concerning Wells Fargo's enforcement rights in the foreclosure case were precluded, as the state foreclosure proceeding resolved that Wells Fargo had standing to foreclose on the property).
291 *See* Covert v. LVNV Funding, L.L.C., 779 F.3d 242 (4th Cir. 2015); Osowiecki v. Ocwen Loan Servicing, L.L.C., 2020 WL 779509 (D. Md. Feb. 18, 2020) (because FDCPA claim arose out of same transaction at issue in state foreclosure proceeding, consumer could have raised them as counterclaims); Geraldo v. Richland Holdings, Inc., 2017 WL 3174918 (D. Nev. July 26, 2017) (FDCPA claims involving the amount of the debt and the debt collection suit should have been brought as compulsory counterclaims in the prior state debt collection suit as required by Nevada's compulsory counterclaim law); Wallace v. JP Morgan Chase Bank, 2014 WL 4772029 (E.D. Mich. Sept. 24, 2014) (FDCPA claims that could have been asserted in the state court foreclosure action were barred by Michigan's *res judicata* and collateral estoppel rules).
292 *See* Appx. E.3.6.7, *infra*.
293 *See* Worley v. Engel, 2017 WL 4862766 (D. Minn. Oct. 26, 2017) (denying motion to dismiss because *res judicata* did not bar the claim as the eviction attorney (the defendant in this FDCPA suit) was not in privity with the landlord (the eviction attorney's client in the prior state court proceeding); second amended FDCPA complaint raised different claims from the state-court claims so claim preclusion did not apply); Reyes v. Kenosian & Miele, L.L.P., 619 F. Supp. 2d 796 (N.D. Cal. 2008) (no preclusion because law firm was not a party to the state court complaint and not in privity with a party). *See also* Finch v. Slochowsky and Slochowsky, L.L.P., 2020 WL 5848616, at *5 (E.D.N.Y. Sept. 30, 2020) (law firm was not party to Housing Court eviction proceedings against plaintiff, so consumer would not have been required to raise FDCPA counterclaims in Housing Court proceedings against law firm); O'Donnell v. Vial Fotheringham L.L.P., 2020 WL 6365521, at *10 (D. Or. Sept. 15, 2020) (law firm was not party to foreclosure action and was not in privity with condominium association, so FDCPA claims were not precluded).
294 *See* Cross v. Arakaki, 284 Fed. Appx. 443, 444 (9th Cir. 2008) (court split 2–1 on the issue); McGhee v. JP Morgan Chase Bank, 2013 WL 4495797, at *4 (D. Md. Aug. 20, 2013) (*res judicata* shielded foreclosure attorneys from subsequent FDCPA suit as they were in privity

Judicial estoppel may similarly bar a party from taking a contradictory position in a later suit from one taken in prior suit.[295] In general though, judicial estoppel does not apply to conduct engaged in after a collection or foreclosure judgment.[296]

Compulsory counterclaim rules may require joinder of counterclaims bearing a close logical or evidentiary relationship to the plaintiff's claim and may determine the claims that should have been litigated in the prior proceeding. State compulsory counterclaim rules vary greatly from state to state. A compulsory counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[297] This rule encourages judicial efficiency by requiring parties to litigate all closely related claims in a single suit. However, *res judicata* and compulsory counterclaim rules have exceptions and involve distinctions meant to avoid denying a person their day in court.[298]

In the context of the FDCPA, the two rules may determine whether an earlier judgment in a debt collection suit bars a later FDCPA suit related to activities in the prior collection suit or the debt involved in the prior suit. If the law of the jurisdiction in which the prior action was decided (usually a state court) would hold the consumer's FDCPA claim to be a compulsory counterclaim to the debt collection suit, the second court may bar the later FDCPA claim.

However, most of the courts that have considered the issue have found that most FDCPA claims were not compulsory counterclaims in the prior debt collection suit or foreclosure action.[299] If the state compulsory counterclaim rule is unfavorable to the consumer, there is support for arguing that the federal compulsory counterclaim rule applies.[300] If there was a dismissal with no judgment on the merits in the prior case[301] or the prior case is still pending without a judgment,[302] there can be no preclusion in the second suit. If the decision in the prior suit did not clearly state the basis for its decision, *res judicata* may not be available.[303] The defense is waived if not timely raised and may not be untimely raised *sua sponte* by the court.[304]

This issue should not arise in states that bar a debt collector from suing to recover a debt in its own name and the defendant in the second suit is a debt collector, as the parties must be the same[305] or in privity with each other.

The appellate courts are uniform in finding no *res judicata* in an FDCPA case because of a prior state debt collection judgment without a showing that operative facts or claims that were resolved in the first judgment are questioned by the new claims.[306] The district courts also are consistent in finding that most FDCPA claims were distinct from the claim on the debt and were not compulsory counterclaims in the prior collection

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with plaintiffs in foreclosure suit). *Cf.* Tiene v. Law Office of J. Scott Watson P.C., 2018 WL 6267166, at *3 (3d Cir. Nov. 29, 2018) (assumes creditor's collection attorney in state court in privity with creditor plaintiff for *res judicata* purposes); Mendelson v. Southeast Mortg., Inc., 2012 WL 3582630 (N.D. Ga. July 26, 2012), *adopted*, 2012 WL 3579779 (N.D. Ga. Aug. 16, 2012) (consumer was collaterally estopped from claiming that underlying transaction created non-business consumer debt since earlier adjudication on TILA claim in another case had determined that identical transaction was for business purposes and current defendant—attorneys for party in prior case—were in privity with their former client).

295 *See, e.g.*, Haddad v. Randall S. Miller Assoc., 587 Fed. Appx. 959 (6th Cir. 2014) (affirming dismissal of homeowners' suit challenging underlying foreclosure, since homeowners were barred from challenging validity of mortgage by judicial estoppel arising from their sworn representation made in their bankruptcy filing that mortgage was uncontested).

296 Morgan v. Carrington Mortg. Services, 719 Fed. Appx. 735 (10th Cir. 2017) (state court foreclosure proceeding not entitled to *res judicata* treatment for FDCPA claims, because claims arose after foreclosure or dealt with postjudgment proceedings still on appeal); Shaffer v. Servis One, Inc., 347 F. Supp. 3d 1039 (M.D. Fla. 2018) (FDCPA claims arising from enforcement of judgment do not implicate *res judicata*).

297 *E.g.*, Fed. R. Civ. P. 13(a).

298 *See* Neff v. Flagstar Bank, 520 Fed. Appx. 323 (6th Cir. 2013).

299 *See* Appx. E.3.6.7, E.3.11, *infra*. *See, e.g.*, Morgan v. Carrington Mortg. Serv., 2017 WL 481429 (10th Cir. Feb. 6, 2017) (homeowner's FDCPA claims not precluded by Oklahoma preclusion rules as they were based on loss mitigation events occurring after her answer in the state foreclosure proceeding involving her home); Rendon v. HBLC, Inc., 2017 WL 7275423 (N.D. Ill. Oct. 25, 2017) (where the issue of sewer service of the state debt collection suit on the consumer was not clearly resolved in state court's dismissal of the collection suit for lack of prosecution, preclusion did not apply); Infante v. Samara Portfolio Mgmt., L.L.C., 2017 WL 1102757, at *3 (E.D. Tex. Jan. 20, 2017), *adopted*, 2017 WL 1113322 (E.D. Tex. Mar. 23, 2017) (FDCPA § 1692i claim was not a compulsory counterclaim to the state debt collection suit); France v. Ditech Fin., L.L.C., 2018 WL 1695405 (M.D. Fla. Apr. 6, 2018) (FDCPA claims did not arise from same transaction as foreclosure and were not compulsory counterclaims that should have been included in state court action).

300 *See* Lewis v. Marinosci Law Grp., P.C., 2013 WL 5789183 (S.D. Fla. Oct. 29, 2013) (Fed. R. Civ. P. 14 provides that claims against third parties are never compulsory); Rotenberg v. MLG, P.A., 2013 WL 5664886 (S.D. Fla. Oct. 17, 2013).

301 *See* Tyler v. DH Capital Mgmt., Inc., 736 F.3d 455 (6th Cir. 2013); Matute v. A.A. Action Collection Co., 2017 WL 2573714 (D.N.J. June 13, 2017); White v. Sherman Fin. Grp., L.L.C., 984 F. Supp. 2d 841 (E.D. Tenn. 2013); Fritz v. Resurgent Capital Serv., L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013).

302 *See, e.g.*, Adams v. Albertelli, 2016 WL 931103 (M.D. Fla. Mar. 11, 2016).

303 *See* Tiene v. Law Office of J. Scott Watson P.C., 2018 WL 6267166, at *3 (3d Cir. Nov. 29, 2018) (overturning district court's finding that Pennsylvania *res judicata* applied, as it failed address whether the state court found its determination in prior proceeding was essential to its judgment); Harrington v. DH Capital Mgmt., Inc., 2014 WL 5776203 (W.D. Ky. Nov. 5, 2014) (since applicable state law required that the matter have actually been decided in the earlier case and the state court did not fully explain the basis for its rejection of the consumer's motion to vacate, *res judicata* did not apply).

304 *See* Sykes v. Mel S. Harris & Assoc., 780 F.3d 70, 100 n.5 (2d Cir. 2015) ("*Res judicata* is an affirmative defense that must be pleaded."); Neff v. Flagstar Bank, 520 Fed. Appx. 323 (6th Cir. 2013).

305 *See* Kolker v. Duke City Collection Agency, 750 F. Supp. 468 (D.N.M. 1990) (debt collector's practice of bringing suit to collect consumer debts on contingency basis, using its own attorney, constituted unauthorized practice of law); § 16.5.3, *infra*.

306 *See* Whitaker v. Ameritech Corp., 129 F.3d 952 (7th Cir. 1997); Peterson v. United Accounts, Inc., 638 F.2d 1134 (8th Cir. 1981). *See also* Cousins v. Duane St. Assoc., 7 Fed. Appx. 85 (2d Cir. 2001); Roban v. Marinosci Law Grp., 34 F. Supp. 3d 1252 (S.D. Fla. July 29, 2014).

suit.[307] However, an FDCPA claim contesting issues that were adjudicated by the state court, such as liability for the debt,[308] the ownership of the debt,[309] or the amount owed, is likely to be barred.

In a nonprecedential decision, the Third Circuit found that New Jersey's unique entire-controversy doctrine did not require FDCPA claims to be raised as counterclaims in the debt collector's collection suit on the debt involved in the FDCPA claims. The state court collection action had been dismissed with prejudice when the debt buyer dismissed its claim. The consumer had raised the statute of limitations as defense in the state action but not as a counterclaim. Subsequent to the state court dismissal, the consumer brought suit on the FDCPA claim that the debt collector had filed a time-barred state collection action. The Third Circuit found:

> While there is a commonality of parties, the two actions do not arise out of a common nucleus of operative facts sufficient to trigger the necessity of creating a complete litigation as contemplated by the entire controversy doctrine. It is the potentially abusive and harassing nature of the efforts Midland was alleged to have employed in collecting the debt which factually sets apart the two actions. Accordingly, we affirm the District Court's determination that did not bar Mrs. Jackson's FDCPA claim under these circumstances.[310]

This is consistent with the related rule that federal courts generally will not exercise supplemental jurisdiction in an FDCPA action over the collector's counterclaim for the amount of the debt, because the two matters involve distinct issues.[311]

Even if the FDCPA claim is not precluded, some district courts may require the consumer to file the FDCPA claim as a permissive counterclaim in the state suit and may stay its own proceedings unless the state court fails to address the FDCPA claim.[312] One court found that a state court judgment barred an

307 *See* Appx. E.3.11, *infra*. *See, e.g.*, Dixon v. J. Scott Watson, P.C., 2018 WL 4110605 (E.D. Pa. Aug. 28, 2018) (§ 1692*i* claim was not precluded as state court tuition collection suit did not consider *where* tuition agreement was signed—the central § 1692*i* issue); Gonzalez v. Allied Collection Serv., Inc., 2018 WL 715359, at *4 (D. Nev. Feb. 5, 2018) (neither issue preclusion or judicial estoppel applied to spouse's allegation that debt collector sought attachment of her funds when her husband's medical bill had been paid); Hines v. HSBC Bank, 2016 WL 5716749 (E.D.N.Y. Sept. 30, 2016) (post-foreclosure collection-related claims were not barred by *res judicata* or collateral estoppel); Aqeel v. Cach L.L.C., 2016 WL 5334751 (N.D. Ga. Sept. 22, 2016); Jones v. LVNV Funding, L.L.C., 2016 WL 3940310 (E.D. Pa. July 20, 2016); Adams v. Albertelli, 2016 WL 931103 (M.D. Fla. Mar. 11, 2016) (denying dismissal to foreclosure attorneys as FDCPA claim was not compulsory counterclaim in pending foreclosure suit); Roban v. Marinosci Law Grp., 34 F. Supp. 3d 1252 (S.D. Fla. 2014); Carrero v. LVNV Funding, L.L.C., 2014 WL 6433214 (S.D. Fla. Oct. 27, 2014); Collins v. Erin Capital Mgmt., L.L.C., 991 F. Supp. 2d 1195 (S.D. Fla. 2013); Hall v. MLG, P.A., 981 F. Supp. 2d 1267 (S.D. Fla. 2013); Fritz v. Resurgent Capital Serv., L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013); Birge v. Smeall, 2013 WL 5789273 (D. Neb. Sept. 20, 2013); Garcia v. Jenkins/Babb L.L.P., 2012 WL 3847362 (N.D. Tex. July 31, 2012), *adopted*, 2012 WL 3846539 (N.D. Tex. Sept. 5, 2012); Bohannon-Hingston v. Brachfeld Law Grp., 2011 WL 6211756 (E.D. Cal. Dec. 14, 2011); Nikkel v. Wakefield & Assoc., Inc., 2011 WL 4479109 (D. Colo. Sept. 26, 2011); Blaxill v. Arrow Fin. Serv., L.L.C., 2011 WL 1299350 (N.D. Cal. Apr. 4, 2011); Naranjo v. Universal Sur. of Am., 679 F. Supp. 2d 787 (S.D. Tex. 2010); Meyer v. Debt Recovery Solutions of Ohio, Inc., 2010 WL 3515663 (N.D. Ohio Sept. 2, 2010); Swain v. CACH, L.L.C., 699 F. Supp. 2d 1117 (N.D. Cal. 2009); Druther v. Hamilton, 75 Fed. R. Serv. 3d 316 (W.D. Wash. 2009); Gutierrez v. LVNV Funding, L.L.C., 2009 WL 10699516 (W.D. Tex. Mar. 16, 2009); Cowan v. Palisades Collection, Inc., 2007 U.S. Dist. LEXIS 44706 (C.D. Cal. June 19, 2007); Clabault v. Shodeen Mgmt., 2006 WL 87600 (N.D. Ill. Jan. 6, 2006); Todd v. Weltman, Weinberg & Reis, Co., L.P.A., 348 F. Supp. 2d 903 (S.D. Ohio 2004), *aff'd on other grounds*, 434 F.3d 432 (6th Cir. 2006); Egge v. Healthspan Serv. Co., 115 F. Supp. 2d 1126 (D. Minn. 2000); Walton v. Franklin Collection Agency, Inc., 1999 WL 33537147 (N.D. Miss. May 5, 1999); Azar v. Hayter, 874 F. Supp. 1314 (N.D. Fla. 1995), *aff'd without op.*, 66 F.3d 342 (11th Cir. 1995); Watson v. Auto Advisors, Inc., 822 N.E.2d 1017 (Ind. Ct. App. 2005); Caputo v. Koenig, 46 N.Y.S.3d 880 (N.Y. App. Div. 2017). *See also* Keller v. Hosp. of Morristown, 2016 WL 6956621 (E.D. Tenn. Nov. 28, 2016); Frazier v. Matrix Acquisitions, L.L.C., 873 F. Supp. 2d 897 (N.D. Ohio 2012) (claim that the collection suit was brought in violation of § 1692i was not precluded); Todd v. Weltman Weinberg, Reis & Co., L.P.A., 2008 WL 419943 (S.D. Ohio Feb. 14, 2008) (challenge to false garnishment affidavit, not amounts owed, not precluded); Stolicker v. Muller, Muller, Richmond, Harms, Myers, & Sgroi, P.C., 387 F. Supp. 2d 752 (W.D. Mich. 2005) (FDCPA claims not barred by collateral estoppel); §§ 16.2.5.1, 16.2.5.2, 16.2.5.3, Appx. E.3.6.7, *infra*. *Cf.* Collins v. Erin Capital Mgmt., L.L.C., 991 F. Supp. 2d 1195 (S.D. Fla. 2013) (debt collector's collateral estoppel claim was denied where "it is not at all clear that this issue—whether Erin Capital violated the FDCPA—was fully litigated in the underlying state action, or that it was a critical and necessary part of the state court's determination"); *In re* Simmerman, 463 B.R. 47 (Bankr. S.D. Ohio 2011) (denying motion to dismiss since question of whether judicial estoppel barred consumers' FDCPA claim based on their failure to disclose cause of action during their prior bankruptcy case required consideration of facts outside pleading).

308 *See* Mizysak v. LVNV Funding, L.L.C., 2020 WL 956355 (E.D. Wis. Feb. 27, 2020); Clark v. Cavalry Portfolio Serv., L.L.C., 2017 WL 6757224 (S.D.N.Y. Dec. 29, 2017) ("[U]nder New York law a default judgment, such as that against plaintiff, has *res judicata* effect equal to that of a judgment on the merits.").

309 *See* Mains v. Citibank, 852 F.3d 669, 678 (7th Cir. 2017) (issue preclusion prevented federal courts from considering Chase's authority to collect a mortgage debt when state judgment had decided Chase had that authority); Eager v. Credit Bur. Collection Serv., Inc., 2013 WL 5719224 (W.D. Mich. Oct. 18, 2013) (collateral estoppel applied since the validity of the allegedly nonexistent assignments was necessarily determined in state court); McGhee v. JP Morgan Chase Bank, 2013 WL 4495797 (D. Md. Aug. 20, 2013).

310 Jackson v. Midland Funding L.L.C., 468 Fed. Appx. 123, 126 (3d Cir. 2012). *See also* Estate of Torsiello *ex rel.* Torsiello v. McGovern Legal Serv., L.L.C., 2014 WL 4758024 (D.N.J. Sept. 24, 2014) (N.J.'s entire controversy doctrine did not bar consumer's FDCPA claim against the attorney for the creditor in the underlying state collection suit). *Cf.* Salerno v. Selene Fin., 2021 WL 973492, at *3 (D.N.J. Mar. 16, 2021) (denying motion to dismiss on grounds that consumer's FDCPA claims were barred by New Jersey's entire controversy doctrine, because she could raise them in ongoing foreclosure proceeding, noting that "where the underlying state foreclosure proceeding is ongoing and has not been adjudicated on the merits, Courts have found the doctrine inapplicable to bar the federal plaintiff's claims").

311 *See* § 12.8, *infra*.

312 *See* Peterson v. United Accounts, Inc., 638 F.2d 1134 (8th Cir. 1981); Foster v. Ford, 2005 WL 1645953 (N.D. Ohio July 13, 2005). *Cf.* Cunningham v. MBNA Am. Bank, 8 So. 3d 438, 441 (Fla. Dist. Ct.

FDCPA claim that *could* have been raised in the state action, even if it was not a compulsory counterclaim.[313] Courts generally will not stay a state court collection action pending resolution of FDCPA claims.[314]

In a recent Eighth Circuit decision, the court decertified a class after concluding that the defendant was not liable under the FDCPA to any class member who unsuccessfully litigated the defendant's use of a standard-form pleading in state court, concluding that collateral estoppel undermined commonality and predominance in the class.[315]

Of course, if the consumer actually litigated the FDCPA claim in the prior proceeding, the claim is almost certainly barred from relitigation by *res judicata* or collateral estoppel.[316] This may be the case in some states even if the consumer's claims in the prior action were brought under state law but raised essentially the same issues as the FDCPA claim.[317] A dismissal with prejudice in the prior suit, even without a ruling on the merits, may be a bar to a second suit in some states.[318]

Conversely, if the consumer's FDCPA claims were dismissed without prejudice in the state court action, the state court judgment on the debt would have no collateral estoppel or *res judicata* effect on the subsequent FDCPA claims.[319] Where the *pro se* consumer had accepted an offer of judgment from a debt collector for abusive phone calls, *res judicata* did not bar a suit for later abusive calls by the same debt collector. The court stated: "In any event, it seems to the Court that, if Defendant stopped calling Plaintiff, Plaintiff would stop filing suits against it."[320]

Where the defendant obtained a judgment on a check in state court, the consumer's FDCPA claim that the defendant sought fees that were not authorized by state law was barred by *res judicata* as the state court had awarded those fees.[321]

Even if a consumer should have asserted an FDCPA claim as a compulsory counterclaim in a prior action, a court may still allow the FDCPA claim under the exceptions and distinctions it makes to temper the effects of *res judicata* eliminating

App. 2009) (in MBNA arbitration confirmation action, dismissal of consumer's FDCPA counterclaim, alleging misuse of NAF arbitration process to secure payment of credit card debt, was not final and therefore not appealable, as FDCPA claim was compulsory counterclaim under state law "inextricably tied to the transaction or occurrence underlying MBNA's claim").

313 *See* Sheahy v. Primus Auto. Fin. Serv., Inc., 284 F. Supp. 2d 278 (D. Md. 2003). *See also* Christian v. M & R Collection Adjustment, Inc., 307 S.E.2d 523 (Ga. Ct. App. 1983). *But see* Jackson v. Midland Funding L.L.C., 468 Fed. Appx. 123 (3d Cir. 2012).

314 Saunders v. Stigers, 773 A.2d 971 (Conn. App. Ct. 2001); Green Tree Fin. Servicing Corp. v. Lewis, 720 N.Y.S.2d 843 (N.Y. App. Div. 2001).

315 Powers v. Credit Mgmt. Serv., Inc., 776 F.3d 567 (8th Cir. 2015).

316 *See* Appx. E.3.11, *infra*. *See, e.g.*, Mains v. Citibank, 852 F.3d 669 (7th Cir. 2017); Metzenbaum v. Huntington Nat'l Bank, 124 F.3d 198 (6th Cir. 1997) (table) (text at 1997 WL 579155); Mays v. Brent, 546 F.2d 1154 (5th Cir. 1977); Phelps v. Pressler & Pressler, L.L.P., 2013 WL 6094572 (D.N.J. Nov. 19, 2013) (consumer's settlement with Midland Funding of a prior state court collection action precluded this FDCPA action against Midland Funding, but not against Midland Credit and Encore, which were not parties to the settlement); Collins v. Wells Fargo Bank, 2013 WL 3808097 (D. Ariz. July 23, 2013), Smith v. LVNV Funding, L.L.C., 2011 WL 2560234 (N.D. Ill. June 28, 2011); Cortez v. Pharia L.L.C., 2011 WL 2455724 (S.D. Tex. May 18, 2011); Vacanti v. Apothaker & Assoc., P.C., 2010 WL 4702382 (E.D. Pa. Nov. 12, 2010); Seaworth v. Messerli, 2010 WL 3613821 (D. Minn. Sept. 7, 2010) (*pro se* consumer), *aff'd*, 414 Fed. Appx. 882 (8th Cir. 2011); Miller v. Bank of Am., 2010 WL 1489990 (D. Md. Apr. 12, 2010); Bond v. U.S. Bank Nat'l Ass'n, 2010 WL 1265852 (E.D. Mich. Mar. 29, 2010) (*pro se* consumer); Hawkins v. Citicorp Credit Serv., Inc., 665 F. Supp. 2d 518 (D. Md. 2009), *aff'd*, 405 Fed. Appx. 789 (4th Cir. 2010); Dexter v. Tran, 654 F. Supp. 2d 1253 (E.D. Wash. 2009); Cooper v. F.A. Mgmt. Solutions, Inc., 2007 WL 4326800 (M.D. Fla. Dec. 7, 2007); Johnson v. Chase Manhattan Mortg. Corp., 2006 WL 2506598 (D.D.C. Aug. 28, 2006); Tagayun v. Citibank, 2006 WL 5100512 (D.N.J. June 9, 2006). *See also* Dunavant v. Sirote & Permutt, P.C., 603 Fed. Appx. 737 (11th Cir. 2015) (foreclosing attorney was, for purpose of *res judicata*, in privity with the mortgage holder, which had been a successful defendant in state court on the same claim under § 1692f(6) that was before the federal court, requiring dismissal); Lifeng Lee Hsu v. Great Seneca Fin. Corp., 378 Fed. Appx. 196 (3d Cir. 2010); Minton v. Cach, L.L.C., 2014 WL 4764183 (E.D. Pa. Sept. 25, 2014) (consumer's claim that execution on five-year-old default state court judgment was illegal because the judgment included unlawful interest barred by *Rooker-Feldman* and *res judicata*); Hawkins v. Citicorp Credit Serv., Inc., 665 F. Supp. 2d 518 (D. Md. 2009); Sprinkle v. SB&C Ltd., 472 F. Supp. 2d 1235 (W.D. Wash. 2006) (validity of a state court garnishment could not be relitigated, but FDCPA claims arising out of attempt to garnish were not litigated in state court); O'Neil v. Wolpoff & Abramson, L.L.P., 210 P.3d 482 (Colo. App. 2009) (reversing finding of claim preclusion). *Cf.* Marshall v. Deutsche Bank Nat'l Tr. Co., 2011 WL 345988 (E.D. Ark. Feb. 1, 2011) (no consumer rights under § 1692g as bankruptcy determined that the debt was consumer's obligation), *aff'd*, 445 Fed. Appx. 900 (8th Cir. 2011). *But see* Riley v. Giguiere, 631 F. Supp. 2d 1295 (E.D. Cal. 2009) (state court's ruling in setting aside default judgment on basis of improper service precluded federal court's redetermination of same issue).

317 *See* Mains v. Citibank, 852 F.3d 669 (7th Cir. 2017). *See also* Mir v. Frandzel, Robin, Bloom, Csato, L.C., 2016 WL 4425715 (C.D. Cal. Aug. 16, 2016) (where all facts alleged in this case occurred before 2014 suit involving same parties that did not include FDCPA claim and were pleaded in that action, current FDCPA suit based on same facts was barred by claim preclusion or *res judicata*).

318 *See* Lintz v. Credit Adjustments, Inc., 2008 WL 835824 (E.D. Mich. Mar. 28, 2008) (where settled state claims and later federal claim arose from same transaction and could have been raised in prior action, it was precluded); Sibersky v. Borah, Goldstein, Altschuler & Schwartz, P.C., 2000 WL 1448635 (S.D.N.Y. Sept. 22, 2000) (whether state release also released federal FDCPA claims was factual question of intent); Sundwall v. Reiner & Reiner, P.C., 1997 WL 117286 (D. Conn. Feb. 27, 1997). *But cf.* Schuh v. Druckman & Sinel, L.L.P., 602 F. Supp. 2d 454 (S.D.N.Y. 2009) (FDCPA claim that payout figure, given two years after a foreclosure judgment, was inflated was not barred by N.Y. *res judicata*).

319 *See* Columbo v. Asset Acceptance, L.L.C., 2009 WL 10666897 (S.D. Fla. July 29, 2009) ("A dismissal without prejudice is not an adjudication on the merits and thus does not have a *res judicata* effect. . . . In order for an issue to be precluded under the doctrine of collateral estoppel, Asset must demonstrate that 'the precluded issue was actually litigated in the prior proceeding.'"); Jenkins v. Gen. Collection Co., 538 F. Supp. 2d 1165 (D. Neb. 2008) (claim that defendant brought time-barred claims not precluded as it was not litigated in state court collection action); Silva v. Mid Atl. Mgmt. Corp., 277 F. Supp. 2d 460 (E.D. Pa. 2003).

320 Mack v. Midland Credit Mgmt., Inc., 2015 WL 140034, 2015 WL 140106 (E.D. Tex. Jan. 7, 2015).

321 Sorenson v. Yonek, 2011 WL 809664 (W.D. Wash. Feb. 28, 2011).

a party's day in court,[322] especially where the prior case was decided by a default judgment.[323] In one case, a federal court ruled that a TILA claim was a compulsory counterclaim to a prior state foreclosure action, but the court only applied its holding prospectively, since the plaintiffs before the court would otherwise suffer an unexpected forfeiture.[324] A creditor's judgment against the consumer would not provide a *res judicata* defense to a different party, such as a collection agency subsequently hired by the creditor.[325]

Res judicata may prevent a consumer from bringing a second FDCPA suit for a debt collector's continuation of conduct that was found not to violate the FDCPA in the first suit.[326]

Prior litigation of an issue can also work in the consumer's favor. For example, a state court's dismissal of a debt collection suit as time-barred was dispositive of the statute of limitations issue in a later federal court FDCPA claim.[327]

In a twist, in *Bauman v. Bank of America*,[328] a homeowner brought a subsequent declaratory judgment action alleging that a mortgagee had waived its right to foreclosure against their house when it failed to file a foreclosure counterclaim in the homeowner's prior FDCPA suit against the mortgagee. The Sixth Circuit rejected the homeowner's claim because the foreclosure counterclaim would have been permissive and not mandatory in the prior FDCPA suit, as the claims involved many different issues and types of evidence.

Issues of preclusion of a consumer's FDCPA claim related to the consumer's bankruptcy are addressed in Chapter 13, *infra*.

The federal equitable rule against claim-splitting may prohibit two suits comprising the same claim in different courts involving the same parties, requiring dismissal of the second suit.[329]

12.6.3 Comity and Abstention

Res judicata or collateral estoppel[330] will not foreclose an FDCPA action in federal court if a related state court collection action is still pending. Nevertheless, concerns of comity may lead the federal court to stay its proceedings pending resolution of the state court collection action under either the *Colorado River* or the *Younger* doctrines.

The U.S. Supreme Court's *Colorado River* doctrine[331] is a narrow and extraordinary exception to a court's duty to adjudicate a controversy properly before it, allowing a federal court to stay an action when there is an ongoing parallel action in state court.[332] The federal court must determine whether the concurrent state and federal actions are actually parallel, including whether substantially the same parties are involved, and also whether "exceptional circumstances" exist to justify abstention.[333] There must be a substantial likelihood that the state litigation will dispose of *all* claims presented in the federal case, with any doubt favoring the federal court keeping the case.[334] Abstention is even less likely where the federal court is hearing a federal claim such as the FDCPA.[335]

322 *See, e.g.*, 1B J. Moore's Federal Practices ¶ 405 (1999); C. Wright, Law of Federal Courts § 79 (5th ed. 1994). *See also* Kelly v. Wolpoff & Abramson, L.L.P., 2007 WL 2381536 (D. Colo. Aug. 17, 2007) (FDCPA claims not litigated in state court).

323 *See* Estate of Izzo v. Vanguard Funding, L.L.C., 2017 WL 1194464 (E.D.N.Y. Mar. 30, 2017); Lewis v. Marinosci Law Grp., P.C., 2013 WL 5789183 (S.D. Fla. Oct. 29, 2013); Anderson v. Gamache & Myers, P.C., 2007 WL 1577610 (E.D. Mo. May 31, 2007) (state court default judgment did not address issues or claims in plaintiff's case, which was also not the same as plaintiff's FDCPA cause of action); Flores v. Quick Collect, Inc., 2007 WL 433239 (D. Or Jan. 31, 2007) (issue preclusion does not attach by virtue of judgment taken by default).

324 Chapman v. Aetna Fin. Co., 615 F.2d 361 (5th Cir. 1980).

325 Gasser v. Allen County Claims & Adjustment, Inc., 1983 U.S. Dist. LEXIS 20361 (N.D. Ohio Nov. 2, 1983) (to permit the bar would frustrate purposes of FDCPA). *See* Reyes v. Kenosian & Miele, L.L.P., 619 F. Supp. 2d 796 (N.D. Cal. 2008) (no preclusion because law firm was not party). *But cf.* Riley v. Giguiere, 631 F. Supp. 2d 1295 (E.D. Cal. 2009) (collection attorney in privity with her state court landlord client).

326 *See* Hernandez v. Asset Acceptance, L.L.C., 970 F. Supp. 2d 1194 (D. Colo. 2013).

327 *See* Pincus v. Law Offices of Erskine & Fleisher, 617 F. Supp. 2d 1265 (S.D. Fla. 2009).

328 808 F.3d 1097 (6th Cir. 2015).

329 *See* Vanover v. NCO Fin. Serv., Inc., 857 F.3d 833, 840–841 (11th Cir. 2017) (citing Katz v. Gerardi, 655 F.3d 1212, 1214 (10th Cir. 2011) and Stark v. Starr, 94 U.S. 477, 485, 24 L. Ed. 276 (1876)). *See also* Calvert v. Alessi & Koenig, L.L.C., 2013 WL 3833053 (D. Nev. July 22, 2013) (where consumer filed a separate complaint for each of four challenged letters, court consolidated cases and awarded only $1000 because of principle against claim splitting; *citing* Clements v. Airport Auth. of Washoe County, 69 F.3d 321, 328 (9th Cir. 1995)).

330 *See* § 12.6.2, *supra*.

331 Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

332 Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976). *See also* Jackson v. Safeguard Props., L.L.C., 2017 WL 1209544, at *1–2 (N.D. Ill. Mar. 31, 2017); Visceglie v. Seterus, Inc., 2017 WL 4863903, at *2–4 (M.D. Fla. May 1, 2017); Fritz v. Resurgent Capital Serv., LP, 955 F. Supp. 2d 163, 175 (E.D.N.Y. 2013); Owens v. Ronald R. Wolf & Assoc., P.L., 2013 WL 6085121, at *5 (S.D. Fla. Nov. 19, 2013).

333 Jackson v. Safeguard Props., L.L.C., 2017 WL 1209544, at *1–2 (N.D. Ill. Mar. 31, 2017); Visceglie v. Seterus, Inc., 2017 WL 4863903, at *2–4 (M.D. Fla. May 1, 2017); Ashley v. Rushmore Loan Mgmt. Serv., L.L.C., 2017 WL 1135294 (D.S.C. Mar. 27, 2017).

334 Wiley v. Portfolio Recovery Assoc., 2020 WL 6136146 (D. Minn. Oct. 19, 2020); Jackson v. Safeguard Props., L.L.C., 2017 WL 1209544, at *1–2 (N.D. Ill. Mar. 31, 2017); Visceglie v. Seterus, Inc., 2017 WL 4863903, at *2–4 (M.D. Fla. May 1, 2017); Nyberg v. Portfolio Recovery Assoc., 2016 WL 8711506 (D. Or. Jan. 22, 2016) (while many issues will be identical, not all will be); Fritz v. Resurgent Capital Serv., LP, 955 F. Supp. 2d 163, 175 (E.D.N.Y. 2013); Owens v. Ronald R. Wolf & Assoc., P.L., 2013 WL 6085121, at *5 (S.D. Fla. Nov. 19, 2013).

335 Strader v. U.S. Bank, 2018 WL 741425 (W.D. Pa. Feb. 7, 2018) (rejecting *Younger* and *Colorado River* abstention arguments where debtor's FDCPA counterclaims dismissed without prejudice from state court foreclosure action); Dowell v. Bayview Loan Services, L.L.C., 2017 WL 9486188 (M.D. Pa. May 4, 2017) (mag.; rejecting *Colorado River* abstention over certain FDCPA claims despite pending state court foreclosure); Visceglie v. Seterus, Inc., 2017 WL 4863903, at *2–4 (M.D. Fla. May 1, 2017); Owens v. Ronald R. Wolf & Assoc., P.L., 2013 WL 6085121, at *5 (S.D. Fla. Nov. 19, 2013).

The same is the case where the state court plaintiff and the FDCPA defendant are not identical.[336] The same may be the case where the state court action has one consumer defendant and the federal FDCPA claim is a class action.[337]

A federal FDCPA action and a state collection action are not parallel where one deals with misconduct in the collection action and the other with whether the consumer owes the debt.[338] When both a state and a federal action are dependent on an analysis of state law or a federal action depends on the resolution of an issue in state court, the federal court may stay its FDCPA proceedings under *Colorado River*.[339] *Colorado River* may also apply when the consumer raises FDCPA counterclaims in the state case that are essentially the same as the FDCPA claims in the federal case.[340]

Younger is another federal abstention doctrine distinct from *Colorado River*,[341] whereby a federal court might stay, but not dismiss, a FDCPA damages claim where there is a parallel state proceeding.[342] Only exceptional circumstances justify a federal court's refusal under *Younger* to decide a case in deference to the state court, and the only circumstance relevant to the FDCPA is a civil proceeding uniquely in furtherance of the state court's ability to perform its judicial functions.[343]

A federal court FDCPA claim for damages certainly does not interfere with a state court's ability to perform its judicial functions in ruling on a collection lawsuit. FDCPA defendants typically raise a *Younger* defense only where the parallel state proceeding is one to foreclose on the consumer's home. Even then *Younger* should not apply, as an FDCPA claim for damages does not interfere with the foreclosure process.[344] One possible exception is where a consumer (usually acting *pro se*) seeks as FDCPA relief an injunction of the state court foreclosure proceeding.[345]

12.6.4 The Rooker-Feldman *Doctrine*

12.6.4.1 The Doctrine's Supreme Court History

Collectors use, but with declining frequency, the *Rooker-Feldman* doctrine as a defense in cases where the FDCPA violations relate to the collector's state court collection lawsuit.[346] The doctrine is based on two Supreme Court decisions.

336 Visceglie v. Seterus, Inc., 2017 WL 4863903, at *2–4 (M.D. Fla. May 1, 2017); Visceglie v. Seterus, Inc., 2017 WL 4862230 (M.D. Fla. Apr. 27, 2017) (rejecting *Colorado River* abstention asserted by foreclosure law firm; firm not party to pending judicial foreclosure proceeding). *See also* Claflin v. Mandarich Law Grp., L.L.P., 2014 WL 688962 (N.D. Cal. Feb. 21, 2014). But see Norris v. Miller, 926 F. Supp. 776 (N.D. Ill. 1996).

337 Beals v. Bank of Am., 2011 WL 5415174, at *8 (D.N.J. Nov. 4, 2011).

338 Terry v. Portfolio Recovery Assoc., 2020 WL 8172989 (D. Alaska Oct. 16, 2020); Flores v. Forster & Garbus, L.L.P., 2020 WL 5603486 (S.D.N.Y. Sept. 17, 2020); McCrobie v. Palisades Acquisition XVI, L.L.C., 359 F. Supp. 3d 239 (W.D.N.Y. Feb. 15, 2019) (*Colorado River* abstention not appropriate where state court proceedings concerned validity of consumer's underlying debts, not whether debt collector violated FDCPA in attempting to collect those debts); Visceglie v. Seterus, Inc., 2017 WL 4863903, at *2–4 (M.D. Fla. May 1, 2017); Jackson v. Safeguard Props., L.L.C., 2017 WL 1209544 (N.D. Ill. Mar. 31, 2017); Borg v. Phelan, Hallinan, Diamond & Jones, P.L.L.C., 2016 WL 6582901 (M.D. Fla. Nov. 7, 2016) ("As it is uncertain whether this case and the foreclosure action share substantially the same parties and issues, the Court declined to dismiss or stay the case pursuant to the *Colorado River* doctrine."); Claflin v. Mandarich Law Grp., L.L.P., 2014 WL 688962 (N.D. Cal. Feb. 21, 2014) (filing collection action in inconvenient venue); Fritz v. Resurgent Capital Serv., LP, 955 F. Supp. 2d 163, 175 (E.D.N.Y. 2013) (FDCPA claims relate to misrepresentations in the complaint as to who owns the debt and whether the plaintiff is properly licensed); Owens v. Ronald R. Wolf & Assoc., P.L., 2013 WL 6085121, at *5 (S.D. Fla. Nov. 19, 2013); Beals v. Bank of Am., 2011 WL 5415174, at *8 (D.N.J. Nov. 4, 2011); DeHart v. US Bank, 811 F. Supp. 2d 1038 (D.N.J. 2011) (state foreclosure action, seeking judgment of foreclosure, and federal action, seeking only damages for various debt collection practices in connection with foreclosure, but not seeking to invalidate foreclosure proceeding, were not parallel actions and therefore *Colorado River* abstention was not required). *But see* Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. Feb. 20, 2018) (because claims were currently pending in state court foreclosure proceedings, court elected to abstain under *Colorado River* to avoid "duplicative" and "piecemeal" litigation); Dunn v. Daniel S. Gross & Assoc., 2018 WL 583077 (E.D. Mich. Jan. 29, 2018) (staying federal case under *Colorado River* abstention pending resolution of state foreclosure proceedings since, *inter alia*, both cases arose out of—and their respective resolutions turned on—whether modified note was enforceable and whether state's ten-year statute of limitations applied).

339 *See* Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. Feb. 20, 2018) (abstaining under *Colorado River* to avoid "duplicative" and "piecemeal" litigation where FDCPA claim was debt not owed and where that issue was currently pending in the state court foreclosure proceedings); Allison v. Specialized Loan Servicing, L.L.C., 2018 WL 989547 (W.D. Ky. Feb. 20, 2018) (*Colorado River* abstention applied to FDCPA claim about authority to foreclose raised in pending state court foreclosure); Spiegel v. Kim, 2017 WL 11596578 (N.D. Ill. Aug. 2, 2017) (staying proceedings where consumer challenged lawfulness of attorney defendant's request for attorney fees in the pending state court action), *related case*, 2018 WL 11276808 (N.D. Ill. Apr. 24, 2018) (lifting stay after nearly nine months had passed since stay was issued and state court case was not materially closer to resolution); McCray v. Samuel I. White, P.C., 2017 WL 1196586 (D. Md. Mar. 31, 2017) (applying *Younger* abstention to FDCPA claim involving authority to foreclose in ongoing state foreclosure proceeding); Williams v. Quantum Servicing Corp., 2013 WL 271669 (N.D. Ill. Jan. 23, 2013) (issues before both courts essentially the same); Norris v. Miller, 926 F. Supp. 776 (N.D. Ill. 1996) (interpretation of Florida statute of limitations is the issue in both cases).

340 Popescu v. JP Morgan Chase & Co., 2013 WL 5535867 (S.D. Fla. Oct. 7, 2013).

341 Younger v. Harris, 401 U.S. 37 (1971).

342 Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721 (1996). See also Ashley v. Rushmore Loan Mgmt. Serv., L.L.C., 2017 WL 1135294 (D.S.C. Mar. 27, 2017).

343 New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989).

344 *See* Lindsay v. Rushmore Loan Mgmt., Serv., L.L.C., 2017 WL 167832, at *1–4 (D. Md. Jan. 17, 2017); Beals v. Bank of Am., 2011 WL 5415174, at *8 (D.N.J. Nov. 4, 2011); Whittiker v. Deutsche Bank Nat'l Tr. Co., 605 F. Supp. 2d 914, 922 (N.D. Ohio 2009); Williams v. Edelman, 2005 WL 8154686 (S.D. Fla. Oct. 6, 2005).

345 McCray v. Samuel I. White, P.C., 2017 WL 1196586 (D. Md. Mar. 31, 2017); Wilder v. Hutchens, Senter, Kellam & Pettit, P.A., 2014 WL 4854599, at *3 (W.D.N.C. Sept. 30, 2014).

346 *See* Appx. E.3.7.7, *infra*.

Rooker[347] and *Feldman*,[348] discussing limited federal jurisdiction to review prior state litigation. The doctrine gives effect to 12 U.S.C. § 1257, which generally lodges federal appellate jurisdiction over final state court decisions exclusively in the U.S. Supreme Court and prohibits lower federal courts from reviewing state court judgments.

Rooker-Feldman thus limits federal court jurisdiction for a consumer's FDCPA claim attacking a state court collection judgment against the consumer. *Rooker-Feldman* limits federal court jurisdiction; it does not apply to an FDCPA claim heard in state court. It also does not apply where the consumer bringing the FDCPA claim was not a party to the state court collection judgment.[349]

A unanimous Supreme Court in 2005, in *Exxon Mobil Corp. v. Arabia, Inc.*, held that the lower courts had extended the doctrine "far beyond the contours" of the original Supreme Court decisions.[350] Instead it ruled that the doctrine is narrow, confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the [federal] district court proceedings commenced and inviting [federal] district court review and rejection of those judgments."[351]

Exxon Mobil limits *Rooker-Feldman* so that a federal district court does not have jurisdiction "to overturn an injurious state-court judgment"[352] or over later federal action "complaining of an injury caused by a state court judgment and seeking review and rejection of that judgment."[353] Pre-*Exxon* cases finding *Rooker-Feldman* to be a defense must be re-evaluated in light of *Exxon Mobil*, though cases denying the defense before the *Exxon* decision may still be useful.[354]

Since *Rooker-Feldman* is a jurisdictional doctrine, it often will be raised early in the FDCPA action, but it can also be raised at any time. As will be described in the following subsections, the defense is generally avoided by careful drafting of the FDCPA claims. Usually a case that is subject to *Rooker-Feldman* is also subject to defenses related to *res judicata* or collateral estoppel.[355]

Decisions applying the *Rooker-Feldman* doctrine are often confusing and inconsistent with each other. The doctrine is discussed in the context of foreclosure litigation in National Consumer Law Center, Home Foreclosures § 8.7.5 (2019), *updated at* www.nclc.org/library. Its application to claims under the Truth in Lending Act, particularly rescission, is discussed in National Consumer Law Center, Truth in Lending § 11.4.2.5 (10th ed. 2019), *updated at* www.nclc.org/library.

12.6.4.2 Doctrine Requires a Final State Judgment for the Collector

Rooker-Feldman limits federal court challenges to state court *judgments*.[356] *Rooker-Feldman* does not apply where there is no final state court judgment or where the judgment is in the consumer's favor.[357] It does not apply when the state court action was settled and dismissed with prejudice.[358] *Rooker-Feldman* does not apply if the state court judgment is vacated prior to the filing of the FDCPA action.[359]

The defense is not applicable where the federal action is filed prior to entry of the state judgment.[360] The doctrine does not displace concurrent state and federal court jurisdiction. A federal court might abstain or stay its proceeding on the basis of comity,[361] and claim preclusion may affect the federal case if a state court judgment is the first to be entered.[362]

12.6.4.3 FDCPA Claims Vulnerable to *Rooker-Feldman*

The *Rooker-Feldman* defense may apply where the consumer's FDCPA claim is poorly drafted as a direct attack on the state court judgment. An example might be where a state court judgment rules that the collector is the debt's owner, and the FDCPA claim is that the collector does not own the debt.[363] As described in § 12.6.4.4, *infra*, though, the defense should not apply where the FDCPA claim is that the collector submitted a false affidavit in the state court proceeding indicating that it owned the debt, even if the state judgment is based upon the collector owning the debt.

347 Rooker v. Fid. Tr. Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923).

348 Dist. of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).

349 *See* Lance v. Dennis, 546 U.S. 459, 126 S. Ct. 1198, 163 L. Ed. 2d 1059 (2006).

350 Exxon Mobil Corp. v. Arabia, Inc., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005).

351 544 U.S. at 284. *Accord* Lance v. Dennis, 546 U.S. 459, 126 S. Ct. 1198, 163 L. Ed. 2d 1059 (2006).

352 Exxon Mobil Corp. v. Arabia, Inc., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005).

353 *Id.*

354 *See* § 12.6.4.4, *infra*.

355 *See* § 12.6.2, *supra*.

356 *See* VanderKodde v. Mary Jane M. Elliott, P.C., 951 F.3d 397 (6th Cir. 2020) (in Michigan, writ of garnishment is not judgment and *Rooker-Feldman* does not apply to "ministerial" actions by court clerks); Van Hoven v. Buckles & Buckles, P.L.C., 947 F.3d 889 (6th Cir. 2020) (same).

357 *See* Brake v. Slochowsky & Slochowsky, L.L.P., 504 F. Supp. 3d 103 (E.D.N.Y. 2020); Foster v. Velocity Invs., L.L.C., 2007 WL 2461665 (N.D. Ill. Aug. 24, 2007); Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 655 (S.D. Ohio 2004).

358 Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002).

359 *See* Mains v. Citibank, 852 F.3d 669 (7th Cir. 2017); Rendon v. HBLC, Inc., 2017 WL 7275423 (N.D. Ill. Oct. 25, 2017); Rubio v. LVNV Funding, L.L.C., 2015 WL 13650046 (N.D. Cal. July 21, 2015); Hopkins v. Capital One Bank, 2015 WL 327631 (W.D. Wis. Jan. 26, 2015).

360 Exxon Mobil Corp. v. Arabia, Inc., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). *See also* Adams v. Albertelli, 2016 WL 931103 (M.D. Fla. Mar. 11, 2016); Kirk v. Gobel, 622 F. Supp. 2d 1039 (E.D. Wash. 2009); Johnson v. CGR Serv., Inc., 2005 WL 991770 (N.D. Ill. Apr. 7, 2005).

361 *See* § 12.6.3, *supra*.

362 Exxon Mobil Corp. v. Arabia, Inc., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). *See also* Todd v. U.S. Bank, 685 Fed. Appx. 103 (3d Cir. 2017).

363 *See* Mains v. Citibank, 852 F.3d 669 (7th Cir. 2017). *See also* Andress v. Daubert Law Firm, L.L.C., 667 Fed. Appx. 154 (7th Cir. 2016).

ooker-Feldman defense might apply to a
the debt is not owed, where the court judg-
debt is owed,[364] or where the FDCPA claim
is were not owed where the court awarded
e defense may also apply where the FDCPA
llector is seeking to collect on an improper
that amount is authorized by the state court
these cases, it is better to allege deceptive
n the state court litigation relating to these

im seeking to void or enjoin enforcement of
nent is likely to run afoul of the defense.[367]
the case where the FDCPA remedy sought
: consumer any amount the consumer pays
ate court judgment.[368] An FDCPA claim that
a challenge to a state court foreclosure order
ct to the doctrine.[369] Again, it is best instead
independent of the judgment and seeking a
on the judgment amount.

nsone Law, L.L.C., 2016 WL 4089349 (E.D. Mo. Aug. 2,
v. Cach L.L.C., 992 F. Supp. 2d 987 (C.D. Cal. 2014),
enriques, 2013 WL 1704937 (E.D. Cal. Apr. 19, 2013).
ño v. Midland Funding, L.L.C., 2017 WL 4682052 (E.D.
017).

Bank, 685 Fed. Appx. 103 (3d Cir. 2017) (default judg-
in state court foreclosures precluded debt collection
postjudgment attorney fees allowed by judgments);
l-1 Solutions, L.L.C., 548 F.3d 600, 606, 607 (7th Cir.

ank, 852 F.3d 669 (7th Cir. 2017); Minton v. Cach, L.L.C.,
183 (E.D. Pa. Sept. 25, 2014). *See also* Mason v. Midland

12.6.4.4 Defense Inapplicable Where Conduct Is Independent of State Court Judgment

The *Rooker-Feldman* doctrine is the product of a statute, 12 U.S.C. § 1257, which limits federal jurisdiction to review final state court decisions. It is not a constitutional doctrine. The Supreme Court has stated: "Congress, if so minded, may explicitly empower district courts to oversee certain state court judgments."[370]

Congress clearly intended the FDCPA to provide federal court jurisdiction, even where the subject of the claim relates to the conduct of state court litigation. This was affirmed by the Supreme Court in *Heintz v. Jenkins*.[371] A number of FDCPA provisions also apply to state court collection actions, such as the prohibition against filing collection suits in distant forums[372] or using a deceptive summons.[373] Other provisions exempt certain aspects of the collection litigation,[374] an unnecessary provision if the Act did not apply to collection litigation conduct.

Rooker-Feldman may apply where an FDCPA claim directly attacks the state court judgment. It does not apply if the FDCPA claim is not a challenge to that judgment, but is independent of the judgment, even if the challenged conduct has a relationship to the judgment.

Rooker-Feldman does not apply to the collector's collection actions that occur prior to[375] or even during the state court collection litigation, but that do not challenge the judgment itself.[376] The doctrine does not bar an FDCPA claim that the collector illegally sought excessive fees in a collection suit where the judgment did not award the collector the excessive fees.[377]

Where the consumer's FDCPA claim repeats claims that were asserted in a counterclaim that the state court judge dismissed as non-germane to the collection action, *Rooker-Feldman* should not apply even if the state court entered

judgment on the debt against the consumer.[378] *Rooker-Feldman* may apply to a FDCPA claim that the judgment itself damaged the consumer's credit rating, but not to an independent claim that the collector damaged the consumer's credit rating by reporting the debt and failing to retract the report upon verifying that the debt had been satisfied.[379]

An FDCPA claim that the collector failed to verify the debt when requested is consistent with a state court judgment that the consumer owes the debt.[380] An FDCPA challenge to the service of process in the state court does not challenge the state court judgment and is grounds for a separate federal challenge.[381] The same is the case with an FDCPA challenge to the venue in which the collector brought the state court action.[382]

Rooker-Feldman does not apply where the FDCPA challenge is not to the substance of the judgment, but to the collector's conduct in seeking that judgment.[383] A federal court FDCPA challenge to deception in the collector's complaint or affidavits is not foreclosed, since that is independent of a challenge to the judgment itself.[384] The doctrine also does not apply where the FDCPA claim is that the collector is unlicensed, even if the unlicensed collector obtained a court judgment.[385] The doctrine does not apply where the consumer does not challenge a foreclosure judgment, but only the collector's failure to follow FDCPA disclosure requirements.[386]

Challenging the practice of suing on a time-barred debt is not a direct attack on the judgment.[387] Nor is a claim based on the amount of interest the collector sought, not the amount awarded in the judgment, even where a default judgment resulted in the two being the same.[388] The doctrine does not apply to a collector attorney's conduct in obtaining a settlement from the consumer—the challenge is to deceptive conduct and not to the judgment.[389]

A claim based upon a debt collector's conduct after the judgment is also not an attack on the judgment.[390] Neither is a challenge to determine whether the consumer's valid debt was forgiven by the creditor at some point following the state court judgment.[391] An FDCPA claim concerning dunning letters or other communications aimed at collecting on a judgment

378 Destefano v. Udren Law Offices, P.C., 2017 WL 2812886, at *7 (D.N.J. June 29, 2017).

379 McCammon v. Bibler, Newman & Reynolds, P.A., 515 F. Supp. 2d 1220 (D. Kan. 2007).

380 *See, e.g.*, Ferrer v. Bayview Loan Servicing, L.L.C., 2017 WL 5508528 (S.D. Fla. Nov. 16, 2017). *See also* George v. Nationstar Mortg., L.L.C., 2017 WL 3316065 (E.D.N.Y. Aug. 2, 2017) (rejecting application of *Rooker-Feldman*, so that validation notice claim not precluded).

381 Wood v. Midland Funding, L.L.C., 698 Fed. Appx. 260, 263 (6th Cir. 2017); Keller v. Hosp. of Morristown, 2016 WL 6956621 (E.D. Tenn. Nov. 28, 2016); Engelen v. Erin Capital Mgmt., 2011 WL 3844587 (S.D. Cal. Aug. 30, 2011); Blaxill v. Arrow Fin. Serv., L.L.C., 2011 WL 1299350 (N.D. Cal. Apr. 4, 2011).

382 Gibson v. Grupo de Ariel, L.L.C., 2006 WL 42369, at *2 (N.D. Tex. Jan. 9, 2006).

383 *See, e.g.*, Mayotte v. U.S. Bank Nat'l Ass'n for Structured Asset Inv. Loan Tr. Mortg. Pass-Through Certificates, Series 2006-4, 880 F.3d 1169, 1176 (10th Cir. 2018); Elyazidi v. SunTrust Bank, 780 F.3d 227, 233 (4th Cir. 2015) (*Rooker-Feldman* doctrine does not bar claim that collection firm misrepresented in collection action complaint that consumer owed attorney fees that had not yet been incurred, even though court ultimately awarded fees in that amount after they had been incurred); Brake v. Slochowsky & Slochowsky, L.L.P., 504 F. Supp. 3d 103 (E.D.N.Y. 2020); Cutts v. Richland Holdings, Inc., 2018 WL 1073135 (D. Nev. Feb. 27, 2018), *aff'd in part, rev'd in part on other grounds*, 773 Fed. Appx. 954 (9th Cir. 2019) (reversing District Court's conclusion that claim preclusion bars abuse of process claim but affirming ruling that it bars misrepresentation and civil conspiracy claims); Geraldo v. Richland Holdings, Inc., 2017 WL 3174918 (D. Nev. July 26, 2017); Haney v. Fed. Nat'l Mortg. Ass'n, 2017 WL 1404103 (D. Colo. Mar. 9, 2017); Sykes v. Mel S. Harris & Assoc., 780 F.3d 70, 94–95 (2d Cir. 2015); Gabriele v. Am. Home Mortg. Serv., Inc., 503 Fed. Appx. 89 (2d Cir. 2012); *In re* FDCPA Cognate Cases, 2016 WL 1273349 (W.D. Mich. Mar. 28, 2016); Mueller v. Barton, (E.D. Mo. Sept. 12, 2014); Woltring v. Specialized Loan Servicing, L.L.C., 2014 WL 2708581 (E.D. Wis. June 16, 2014); McDermott v. Barton, 2014 WL 6704544, at *4 (S.D. Ill. Nov. 26, 2014); Adeniji v. Wells Fargo Bank, 2014 WL 117105 (N.D. Ill. Jan. 13, 2014); Gonzalez v. Bank of Am., 2014 WL 26283 (N.D. Ill. Jan. 2, 2014); Eager v. Credit Bur. Collection Serv., Inc., 2013 WL 5719224, at *2 (W.D. Mich. Oct. 18, 2013); Montalbano v. Nat'l Arbitration Forum, L.L.C., 2012 WL 3233595 (D. Md. Aug. 3, 2012) (RICO and FDCPA claims that defendants were involved in a fraudulent arbitration enterprise are not barred by state court judgment confirming arbitration award where plaintiff does not seek to overturn that judgment); Dexter v. Tran, 654 F. Supp. 2d 1253, 1260 (E.D. Wash. 2009); Whittiker v. Deutsche Bank Nat'l Tr, Co., 605 F. Supp. 2d 914, 922 (N.D. Ohio 2009); McCammon v. Bibler, Newman & Reynolds, P.A., 493 F. Supp. 2d 1166, 1171 (D. Kan. 2007); Anderson v. Gamache & Myers, P.C., 2007 WL 1577610, at *6 (E.D. Mo. May 31, 2007); Kelly v. Wolpoff & Abramson, L.L.P., 2007 WL 2381536 (D. Colo. Aug. 17, 2007); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783, 798 (S.D. Ohio 2006).

384 Janson v. Katharyn B. Davis, L.L.C., 806 F.3d 435 (8th Cir. 2015); Lautman v. 2800 Coyle Street Owners Corp., 2014 WL 4843947, at *6–7 (E.D.N.Y. Sept. 26, 2014); Harrington v. DH Capital Mgmt., Inc., 2014 WL 5776203 (W.D. Ky. Nov. 5, 2014); Hageman v. Barton, 2014 WL 5320265 (E.D. Mo. Oct. 17, 2014); Ness v. Gurstel Chargo, P.A., 933 F. Supp. 2d 1156, 1162 (D. Minn. 2013); Hammond v. Citibank, 2011 WL 4484416 (S.D. Ohio Sept. 27, 2011); Jenkins v. Gen. Collection Co., 538 F. Supp. 2d 1165, 1172 (D. Neb. 2008); Cano v. Deutsche Bank Nat'l Tr. Co., 2013 WL 3930087 (E.D. La. July 29, 2013); Whittiker v. Deutsche Bank Nat'l Tr. Co., 605 F. Supp. 2d 914 (N.D. Ohio Mar. 17, 2009).

385 Collins v. Erin Capital Mgmt., L.L.C., 991 F. Supp. 2d 1195 (S.D. Fla. 2013); Bradshaw v. Hilco Receivables, L.L.C., 765 F. Supp. 2d 719 (D. Md. 2011).

386 Johnson-Gellineau v. Steine & Assoc., 2018 WL 1605574 (S.D.N.Y. Mar. 29, 2018).

387 Naranjo v. Universal Sur. of Am., 679 F. Supp. 2d 787, 794 (S.D. Tex. 2010); Jenkins v. Gen. Collection Co., 538 F. Supp. 2d 1165, 1172 (D. Neb. 2008); Stolicker v. Muller, Muller, Richmond, Harms, Myers, & Sgroi, P.C., 387 F. Supp. 2d 752, 755 (W.D. Mich. 2005). *See also* Bond v. U.S. Bank, 2010 WL 1265852, at *4 (E.D. Mich. Mar. 29, 2010).

388 Martinez v. CACH, L.L.C., 2011 WL 2560251, at *3 (S.D. Cal. June 27, 2011).

389 Cameron v. LR Credit 22, L.L.C., 998 F. Supp. 2d 293, 297 (S.D.N.Y. 2014); Turner v. Nesbit, 2014 WL 6908541 (N.D. Ill. Dec. 8, 2014). *See also In re* FDCPA Cognate Cases, 2016 WL 1273349 (W.D. Mich. Mar. 28, 2016); Nikkel v. Wakefield & Assoc., Inc., 2011 WL 4479109 (D. Colo. Sept. 26, 2011).

390 *See, e.g.*, Mueller v. Barton, (E.D. Mo. Sept. 12, 2014). *See also* Ahmed v. West Coast Servicing Inc., ___ F. Supp. 3d ___, 2021 WL 2072192 (E.D. Pa. May 24, 2021); Smith v. Kramer & Frank, P.C., 2009 WL 4725285, at *3 (E.D. Mo. Dec. 2, 2009).

391 Bampoky v. Daubert Law Firm, L.L.C., 2021 WL 1087040 (E.D. Wis. Mar. 22, 2021).

ge the judgment.[392] A garnishment order is re the FDCPA claim relates to the collector's to the consumer of the garnishment,[393] or the per service of the garnishment order on a ldition of allegedly improper fees to the total garnished.[395]

an is not a defense to a claim based upon isrepresentations in its affidavits seeking to ment order—the claim does not challenge the presentations in obtaining the order.[396] But mer challenges the substance of the judgment ament affidavit as false, and the court rules in order that the affidavit is accurate, the con- able to bring the same challenge in a federal tion.[397]

reign Immunity and Government ncies

does not apply to the conduct of federal, state, ment employees.[398] The explicit language of 6)(C) excludes from the definition of debt col- d employees of government entities, and not entities themselves.[399] However, the govern- e likely to claim sovereign immunity.

that sovereign immunity applies to the ducation and by extension other federal agen- cannot be liable under the Act. There is no Congress intended to abrogate that immunity e FDCPA.[400] A federal agency suing the con- waive its sovereign immunity when the con- s to sue the agency under the FDCPA.[401]

The Eleventh Amendment protects states from being sued in federal court, unless abrogated by Congress for a particular statute or waived by the state. Congress did not abrogate that immunity when it enacted the FDCPA.[402] The Amendment also protects arms of the state, and state student loan guaranty agencies are generally found to be arms of the state.[403] As a result states can only be sued under the FDCPA in the courts of that state. If a state is sued in state court and removes the case to federal court, it has waived its Eleventh Amendment protection.[404] If sued in the courts of the state, the extent of the state's sovereign immunity and whether that immunity has been waived will be a matter of state law.[405]

12.6.6 Litigation and Witness Immunity

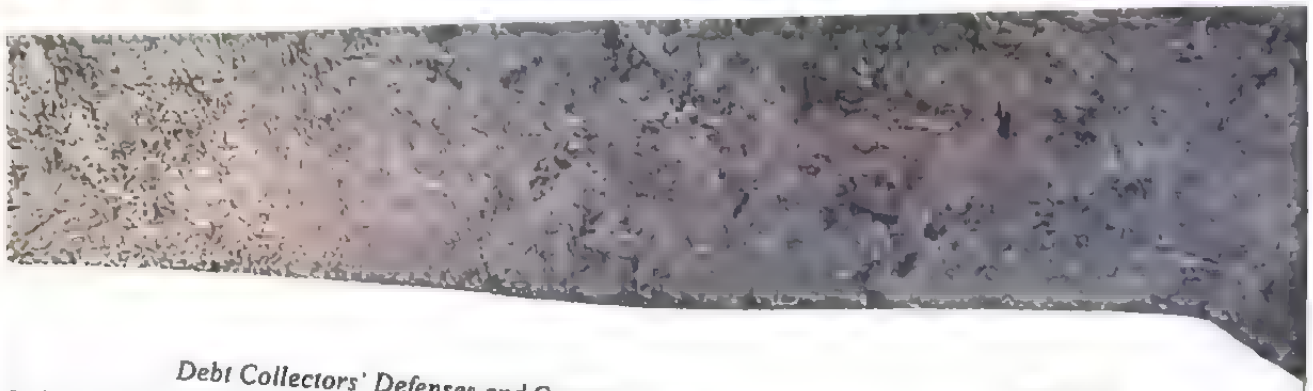
12.6.6.1 Generally

Litigation immunity is generally not a FDCPA defense to the actions of collectors or their attorneys in a state court collection action.[406] Witness immunity based on *Noerr-Pennington* doctrine (the right to petition legislatures and the courts under the First Amendment) is generally not a defense that protects from FDCPA liability witnesses in state court collection litigation.

12.6.6.2 Litigation Immunity and Litigation Privilege

Courts uniformly reject litigation immunity as a defense to collector or collection attorney FDCPA liability for their conduct in their state court collection litigation.[407] Some courts

402 Kozaczek v. New York Higher Educ. Serv. Corp., 503 Fed. Appx. 60 (2d Cir. 2012); Codar, Inc. v. State of Arizona, 168 F.3d 498 (9th Cir. 1999); Abellard v. Oklahoma Student Loan Auth., 2018 WL 654462 (S.D. Fla. Jan. 29, 2018); Sorrell v. Illinois Student Assistance Comm'n, 214 F.



'ivilege protects collection litigation der state debt collection statutes,[408] f a defamation claim.[409] Such cases, ne FDCPA.

in *Heintz v. Jenkins* ruled that the lection activities of lawyers in the z does not discuss litigation immunity, implicit in this holding is that collection attorneys are not protected by the litigation privilege.[411] Moreover, a number of FDCPA provisions prohibit certain litigation activities, such as limiting collection suits to convenient forums[412] and prohibiting collection lawyer misrepresentations about legal process and the need to file a written answer to avoid default judgment.[413] Another FDCPA provision exempts from liability certain litigation conduct.[414] None of these provisions would make sense if litigation immunity applied to FDCPA claims.

Nor does the constitutional right to petition the government, as enunciated in the *Noerr-Pennington* doctrine[415] provide a defense to an FDCPA claim for litigation misconduct. While the collector may have the right to use the courts, it does not have the right to use them in a deceptive or unlawful way.[416] For example, "[n]o debt collector has a legitimate interest in pursuing collection litigation without notifying debtors, or in seeking to default incompetent debtors without notice to their lawyers or guardians."[417] And of course the litigation immunity defense does not apply to conduct not involving litigation.[418]

doval v. Law Office of John Bouzane, 2016 WL 5, 2016); Rubio v. LVNV Funding, L.L.C., 2015 Cal. July 21, 2015); Parker v. CitiMortg., Inc., .D. Fla. July 10, 2014); Gates v. MCT Grp., Inc., .D. Cal. Feb. 18, 2014), *aff'd on other grounds*, 9th Cir. 2017); Lewis v. Marinosci Law Grp., 3 (S.D. Fla. Oct. 29, 2013); Eager v. Credit Bur. 2013 WL 5719224 (W.D. Mich. Oct. 18, 2013); Peaks Fin. Serv., Inc., 2013 WL 485763 (S.D. rr v. Kimball, Tirey & St. John L.L.P., 2012 WL Aug. 14, 2012); Kline v. Mortg. Elec. Sec. Sys., S.D. Ohio 2009); Eckert v. LVNV Funding L.L.C., (E.D. Mo. 2009); Gallagher v. Gurstel, Staloch & Supp. 2d 795 (D. Minn. 2009); Eads v. Wolpoff , 538 F. Supp. 2d 981 (W.D. Tex. 2008); Jenkins 'o., 538 F. Supp. 2d 1165 (D. Neb. 2008); N. Star s, L.L.C. v. Krig, 2008 WL 346021 (M.D. Fla. an v. Carlisle, McNellie, Rini, Kramer & Ulrich, N.D. Ohio June 20, 2007), *aff'd on other grounds*, r. 2008), *rev'd on other grounds*, 559 U.S. 573, 130 d. 2d 519 (2010); Ison v. Javitch, Block & Rathbone, 6 (S.D. Ohio 2007); Nutter v. Messerli & Kramer, 2d 1219 (D. Minn. 2007); Oei v. N. Star Capital; 'ed. Bank, 2006 WL 4495659 (E.D. Ark. Feb. 2, 'at Seneca Fin. Corp., 2005 WL 2372851 (S.D. Ohio ivarrubias v. Zee Law Grp., 2017 WL 6570281 (Cal. 2017); Deutsche Bank v. Lichtenfels, 48 Conn. L. uper. Ct. 2009); Appx. E.3.6.6, *infra*. *See also* Akar g. Ass'n, 2011 WL 6288055 (D. Mass. Dec. 1, 2011); ate Mgmt. Serv. L.L.C., 2011 WL 5419679 (D.N.H.

Appeals for the Seventh Circuit held that it does. We agree with the Seventh Circuit and we affirm its judgment."). *See* § 4.3.1, *supra*.

411 Hartman v. Great Seneca Fin. Corp., 569 F.3d 606, 615–617 (6th Cir. 2009).

412 15 U.S.C. § 1692*i*.

413 15 U.S.C. § 1692e(15).

414 15 U.S.C. § 1692a(6)(D).

415 This doctrine was first announced in United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). It was extended to the right to petition in the courts in California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

416 Hartman v. Great Seneca Fin. Corp., 569 F.3d 606, 615–617 (6th Cir.

12.6.6.3 Witness Immunity

Witness immunity will rarely apply to an FDCPA action. The defense does not apply at all when used to protect actions by the collection attorney, when not acting as a witness. It may not even apply to a witness who is an employee of the collector.[419] It does not apply to an affidavit attached to the complaint[420] or to an affidavit to institute a garnishment.[421]

It does not apply at all to FDCPA claims for litigation conduct unrelated to witness testimony even if an employee of the collector testifies in the collection action.[422] Nor does it apply to non-litigation conduct seeking to collect on a judgment.[423] Other courts reject general application of the witness immunity defense to the FDCPA as inconsistent with the FDCPA and the Supreme Court's ruling in *Heintz*.[424]

12.7 Other Defenses

12.7.1 Overview

Courts generally refuse to imply new defenses under the FDCPA, but these attempts should be taken seriously, particularly before some courts. Pointing out the FDCPA's purposes and requirements often will be useful in countering these novel approaches. This section examines a number of such defenses. Other defense strategies are listed at § 12.1, *supra*, with references to other chapters where they are examined.

12.7.2 Technical, De Minimis, *or Harmless Violations*

Defendants may claim that a violation is only technical or *de minimis*, and on rare occasion a court may prove receptive.[425] To overcome this argument, point out the care that Congress took in crafting each FDCPA protection,[426] explain the violation is not *de minimis* because of the provision's purposes,[427] argue that the statute provides strict liability and courts must enforce the FDCPA's plain language,[428] and argue that the courts should not substitute their judgment for that of Congress.[429]

Whether a consumer's harm from a FDCPA violation is sufficient to create a case or controversy to allow for a federal court's Article III standing to hear a FDCPA case is examined in some detail at § 11.10, *supra*. If there is standing for the case, then size of the injury is not a defense under the FDCPA. Statutory damages can be awarded even when no actual damages are proven. This, instead, goes to the amount of damages rather than liability.[430]

12.7.3 Defendant's Good Faith or Lack of Intent

That the debt collector acted in good faith is no defense to an FDCPA violation.[431] Following a state law that conflicts

419 Foster v. Velocity Invs., L.L.C., 2007 WL 2461665 (N.D. Ill. Aug. 24, 2007).

420 Hartman v. Great Seneca Fin. Corp., 569 F.3d 606, 615–617 (6th Cir. 2009); Gionis v. Javitch, Block & Rathbone, 238 Fed. Appx. 24 (6th Cir. 2007); Foster v. Velocity Invs., L.L.C., 2007 WL 2461665 (N.D. Ill. Aug. 24, 2007). *See also* Ison v. Javitch, Block & Rathbone, 2007 WL 2769674 (S.D. Ohio Sept. 18, 2007); Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 662 (S.D. Ohio 2004). *But see* Reynolds v. Persolve, L.L.C., 2008 WL 379695 (E.D. Mo. Feb. 11, 2008) (finding witness immunity defense as alternative ground for dismissal where consumer did not respond to motion to dismiss); Cox v. Great Seneca Fin. Corp., 2007 WL 772937 (E.D. Mo. Mar. 9, 2007) (same); Etapa v. Asset Acceptance Corp., 373 F. Supp. 2d 687 (E.D. Ky. 2004); Beck v. Codilis & Stawiarski, P.A., 2000 WL 34490402 (N.D. Fla. Dec. 26, 2000).

421 Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006); Jordan v. Thomas & Thomas, 2007 WL 2838474 (S.D. Ohio Sept. 26, 2007).

422 Clark v. Bonded Adjustment Co., 176 F. Supp. 2d 1062 (E.D. Wash. 2001).

423 Schuh v. Druckman & Sinel, L.L.P., 602 F. Supp. 2d 454 (S.D.N.Y. 2009).

424 *See* Hartman v. Great Seneca Fin. Corp., 569 F.3d 606, 615–617 (6th Cir. 2009); Kelly v. Great Seneca Fin. Corp., 443 F. Supp. 2d 954 (S.D. Ohio 2005), appeal dismissed, 447 F.3d 944 (6th Cir. 2006); Hartman v. Asset Acceptance Corp., 467 F. Supp. 2d 769 (S.D. Ohio Sept. 29, 2004). *See also* Stolicker v. Muller, Muller, Richmond, Harms, Myers, and Sgro, P.C., 2005 WL 2180481 at note 6 (W.D. Mich. Sept. 9, 2005).

425 *See* Volden v. Innovative Fin. Sys., Inc., 440 F.3d 947 (8th Cir. 2006) (omission of creditor's name found too technical to be a violation where consumer knew who the creditor was); Parks v. Chlan, 1996 WL 243473 (D. Md. May 3, 1996) (due to a clerical error, dunning letter for a paid hospital bill indicated an amount due of $0.00; collector acknowledged the error and advised the consumer to "tear up the letter"; summary judgment entered for collector on the dubious basis of a bona fide error defense).

426 *See* § 3.4.2, *supra*.

427 *See* §§ 3.1, 3.4.2, *supra*. *See also* Ghanta v. Immediate Credit Recovery, Inc., 2017 WL 1423597, at *8 (N.D. Tex. Apr. 18, 2017) (collection agency's "failure to provide sufficient debt verification and failure to send it through the statutorily prescribed means is not a *de minimis* violation").

428 *See* Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995); Kimble v. W. Ray Jamieson, P.C., 2018 WL 814225, at *7 (W.D. Tenn. Feb. 9, 2018) ("[T]he FDCPA must be enforced as written, even if the violation is innocent or *de minimis*."). *See also* Racick v. Dominion Law Assoc., 270 F.R.D 228 (E.D.N.C. 2010) (consumer argued that statute provides for strict liability).

429 *See* Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995); § 3.4.1, *supra*.

430 *See* Huff v. Dobbins, Fraker, Tennant, Joy & Perlstein, 1999 U.S. App. LEXIS 12055 (7th Cir. June 2, 1999) (court was bound to follow plain language of FDCPA); Ditty v. Check Rite, Ltd., 182 F.R.D. 639, 644 (D. Utah 1998) (does not matter whether or not plaintiff read letter or paid unlawful fee; "it is the sending of the illegal letter that creates liability"); Crawford v. Equifax Payment Serv., Inc., 1998 WL 704050 (N.D. Ill. Sept. 30, 1998) ("defense" that the consumer suffered no actual damages was stricken, as none required); Gasser v. Allen County Claims & Adjustments, Inc., 1983 U.S. Dist. LEXIS 20361 (N.D. Ohio Nov. 2, 1983) (collector's alleged oral representations to consumer could not cure violations in dunning letter). *Cf.* Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996) (jury found that collection lawyer's assistant had violated FDCPA, but that consumer had sustained no actual or statutory damages as a result of that violation; award of attorney fees to consumer for assistant's violation was improper; consumer awarded $500 statutory damages against lawyer; fee award against lawyer was proper).

431 *See* Rahman v. San Diego Accounts Serv., 2017 WL 1387206 (S.D. Cal. Apr. 18, 2017). *See also* Lewis v. Hanks, 1991 U.S. Dist. LEXIS 21807, at *3 (E.D. Mo. Feb. 26, 1991).

with an FDCPA requirement is no defense to the FDCPA violation.[432] Nor is a collector's correction of a violation a valid defense.[433] It is no defense that the FDCPA violation was unintentional.[434] The FDCPA is a strict liability statute.[435] The FDCPA's only allowed FDCPA defense in this area is if the collector has complied with the requirement of the statutory bona fide error defense.[436]

12.7.4 Consumer's Culpability

Collectors argue unsuccessfully that the consumer is unworthy of protection (and presumably a suitable target for the collector's abuse) because of some perceived or actual misdeed committed by the consumer.[437]

For example, consumers are not held to have assumed the risk that third parties would overhear the collector's voice mail.[438]

Any claim the collector or creditor has against the consumer should be brought as an independent claim,[439] and is not a defense to an FDCPA claim.

One defense strategy that bears highlighting is for the debt collector to go on the offensive and sue the consumer in the debt collector's distant home state alleging that the consumer has created long arm jurisdiction in that state by mailing to the debt collector a demand letter for consumer protection claims. This claim of long arm jurisdiction has been rejected.[440] The tactic is costly enough for consumers that many consumer attorneys avoid sending demand letters to distant debt collectors, unless they know the recipient does not engage in this practice.[441]

While the FDCPA focuses on misconduct by debt collectors,[442] not the consumer's conduct, some judges and juries will react negatively to consumers who appear to be unlawfully gaming the financial and legal systems.[443] Care should be taken to probe the client's story to avoid embarrassment, and potential sanctions, if the client fabricated some part of the FDCPA claim[444] or concealed their own misbehavior in dealing with the creditor or debt collector.[445]

12.7.5 Consumer's Waiver of FDCPA Protection

That the consumer has paid on a debt is not a defense to an FDCPA claim. The voluntary payment doctrine is not a defense to an FDCPA claim.[446]

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432 *See* Fisher v. Bernhardt and Strawser, P.A., 2013 WL 3990744 (W.D.N.C. Aug. 2, 2013) (state rules of civil procedure requiring collector to confer directly with the *pro se* consumer defendant in state court even after the consumer retained an attorney not a defense).

433 *See* Holton v. Huff, 2012 WL 1354024 (M.D. Pa. Apr. 16, 2012); Montgomery v. Donnett, 2006 WL 293727 (S.D. Ohio Feb. 7, 2006).

434 *See* Jenkins v. Heintz, 124 F.3d 824 (7th Cir. 1997). *See also* Heritage Pac. Fin., L.L.C. v. Monroy, 156 Cal. Rptr. 3d 26 (Cal Ct. App. 2013) (debt collector's ignorance of the law of assignments did not provide it with an affirmative defense to FDCPA).

435 *See* § 3.2.4, *supra*. *See also* Engelen v. Erin Capital Mgmt., L.L.C., 544 Fed. Appx. 707 (9th Cir. 2013); McCollough v. Johnson, Rodenberg & Lauinger, 637 F.3d 939 (9th Cir. 2011); Clark v. Capital Credit & Collection Serv., Inc., 460 F.3d 1162, 1177 (9th Cir. 2006); Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991 (7th Cir. 2003).

436 *See* § 12.2, *supra*.

437 *See* § 3.2.6, *supra*; Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007) (fraudulent consumers still covered by FDCPA's protections); Goss v. Receivables Performance Mgmt., L.L.C., 2020 WL 2219048 (N.D. Ill. May 7, 2020) (unclean hands not a defense in an FDCPA action); Johnson v. Nationstar Mortg., L.L.C., 2017 WL 3705838 (M.D. Fla. Aug. 28, 2017) (no defense that collection violations caused by consumer failing to pay the debt); Beckles v. Aldridge Connors, L.L.P., 2013 WL 5355481 (N.D. Ga. Feb. 27, 2013) (consumer's failure to make payments did not preclude FDCPA claim); Sewell v. Allied Interstate, Inc., 2011 WL 32209 (E.D. Tenn. Jan. 5, 2011) (no comparative fault defense); Mejia v. Marauder Corp., 2007 WL 806486 (N.D. Cal. Mar. 15, 2007) (no fraud or unclean hands exception to FDCPA even if consumer never intended to repay loan); Irwin v. Mascott, 96 F. Supp. 2d 968 (N.D. Cal. 1999) (consumer's alleged fraudulent intent was irrelevant); Ditty v. Check Rite, Ltd., 182 F.R.D. 639 (D. Utah 1998) (FDCPA protects even dishonest check-writers). *See also* Appx. E.3.6.2, *infra*.

438 *See* Branco v. Credit Collection Serv. Inc., 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011).

439 *See, e.g.*, Buser v. Asset Recovery Grp., Inc., 2014 WL 693493 (D. Or. Feb. 21, 2014) (collection agency's claim for fraud against FDCPA plaintiff's roommate, who answered debt collector's call to plaintiff and pretended to be plaintiff).

440 *See* Riddle & Assoc. v. Morcos, 2007 WL 2061054 (D. Utah July 12, 2007) (dismissing Utah SLAPP suit on due process grounds where the only Utah contacts by debtor's attorney were two letters mailed to the debt collector).

441 *See* § 2.5.7.6, *supra*.

442 *See* Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159, 170–171 (3d Cir. 2007).

443 *See, e.g.*, Terran v. Kaplan, 109 F.3d 1428 (9th Cir. 1997) (Fed. R. Civ. P. 11 sanctions upheld when FDCPA claims were made without adequate investigation). *See also* Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814 (8th Cir. 2012).

444 *See, e.g.*, Goodson v. Designed Receivable Solutions, Inc., 2016 WL 5799321 (C.D. Cal. Sept. 21, 2016) (an unusual, but cautionary case: granting summary judgment for collection agency and dismissing § 1692d claim based on evidence of two recorded telephone calls several days apart, where transcripts revealed short, polite conversations in which representative determined that debt had recently been paid to medical provider); Camacho v. Northland Group, Inc., 2014 WL 12586233 (D. Mass. Sept. 17, 2014) (granting summary judgment for collection agency on claims that it made threatening telephone calls where its "extensive and undisputed documentary evidence of its phone records showing all calls placed to plaintiff, together with certified transcripts of each . . . reflect that no such threats took place"); Wolfe v. GC Services, L.P., 2009 WL 230637 (E.D. Mich. Jan. 30, 2009) (consumer's call log in no small part a fabrication made in bad faith). *See also* § 2.2.5, *supra*.

445 *See* Scroggin v. Credit Bur., Inc., 973 F. Supp. 2d 961 (E.D. Ark. 2013) (where consumer bragged online that he had set up debt collector for its FDCPA violations and publicly reviled debt collector and its counsel during litigation, court awarded debt collector over $30,000 in attorney fees and jury refused to award damages), *aff'd*, 576 Fed. Appx. 632 (8th Cir. 2014). *See also* Huebner v. Midland Credit Mgmt., Inc., 85 F. Supp. 3d 672 (E.D.N.Y. 2015) (consumer called debt collector and tried to get it to commit an FDCPA violation).

446 *See* Hamid v. Stock & Grimes, L.L.P., 876 F. Supp. 2d 500 (E.D. Pa. 2012); Gonzalez v. Codilis & Assoc., P.C., 2004 WL 719264 (N.D. Ill. Mar. 31, 2004); Scott v. Fairbanks Capital Corp., 284 F. Supp. 2d 880 (S.D. Ohio 2003).

A release signed in connection with a suit to collect a debt does not release the collector of liability for a subsequent FDCPA claim, unless the waiver clearly states that it does.[447] But the consumer's release in a prior FDCPA suit may be construed to preclude a second FDCPA suit against the same debt collector for misconduct occurring prior to the filing of the first suit.[448]

12.7.6 Preconditions to FDCPA Lawsuit

The consumer requesting the collector to verify a debt is not a precondition to the consumer bringing an FDCPA suit against the collector. Nothing in the FDCPA requires consumers to use the section 1692g debt verification procedure, and section 1692g(c) explicitly prohibits construing the failure of the consumer to seek verification as an admission of liability.[449]

Courts also reject the defense that mortgage provisions requiring the consumer to provide notice before filing suit apply to the consumer's FDCPA action.[450] Nor is there any general requirement that a consumer contact the debt collector before filing suit.[451]

12.8 Collection Counterclaims to Consumer's FDCPA Claim

Where a consumer brings a federal court FDCPA action against a debt buyer (or a creditor covered by the FDCPA), the defendant may seek supplemental jurisdiction to bring a state law counterclaim on the underlying debt. Collection agency defendants sometimes can seek this as well on behalf of the creditor, but in many states this practice is viewed as the unauthorized practice of law[452] or is prohibited by a debt collection statute.

While federal courts have discretion to hear state law counterclaims, they usually do not hear state law counterclaims on the underlying debt to the consumer's FDCPA claim,[453] though they will do so occasionally.[454] Courts are particularly likely to deny supplemental jurisdiction where the collection counterclaims do not involve the same controversy, the same evidence, or the same federal law and policy. Such a counterclaim also impedes the Congressional intent in enacting the FDCPA and chills the raising of FDCPA claims.[455]

If the collector does file a counterclaim, the consumer must file a motion to dismiss or an answer or the counterclaim may be granted.[456]

FDCPA actions brought in state courts do not involve federal jurisdiction issues, and state procedural law governs what claims a party may join.

12.9 Creditor Garnishment of Consumer's FDCPA Claim or Recovery

Consider a situation where a creditor obtains a default or other judgment against a consumer, and the consumer then successfully sues the creditor's collection agency or attorney under the FDCPA. A creative creditor may seek to serve a garnishment order on its own collection agency or attorney

447 *See* Estate of Torsiello *ex rel.* Torsiello v. McGovern Legal Serv., L.L.C., 2014 WL 4758024 (D.N.J. Sept. 24, 2014); Hines v. G. Reynolds Sims & Assoc., P.C., 2013 WL 1774938 (E.D. Mich. Apr. 25, 2013).

448 Palmer v. Enhanced Recovery Co., 2017 WL 550054 (E.D. Pa. Feb. 9, 2017).

449 *See* § 9.6, *supra*. *See also* Eide v. Colltech, Inc., 987 F. Supp. 2d 951 (D. Minn. 2013).

450 *See* Foster v. Green Tree Servicing, L.L.C., 2017 WL 5151354, at *3 (M.D. Fla. Nov. 3, 2017); Belcher v. Ocwen Loan Servicing, L.L.C., 2016 WL 7243100, at *4 (M.D. Fla. Dec. 15, 2016); Colon v. Nationstar Mortg., L.L.C., 2015 WL 7422598, at *2 (S.D. Fla. Nov. 17, 2015).

451 *See* Branco v. Credit Collection Serv. Inc., 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011).

452 *See* §§ 16.5.1, 16.5.2, 16.5.3, *infra* (discussion of unauthorized practice laws). *See also* Kolker v. Sanchez, 1991 U.S. Dist. 20783 (D.N.M. 1991) (attorney filing suit in name of collection agency rather than true creditor engaged in the unauthorized practice of law in violation of § 1692e); Kolker v. Duke City Collection Agency, 750 F. Supp. 468 (D.N.M. 1990) (debt collector's practice of using its own attorney to bring suit for collecting consumer debts on contingency basis constituted unauthorized practice of law).

453 *See* Appx. E.2.7.2, *infra*. *See also* Nichols v. Niagara Credit Recovery, Inc., 2013 WL 1899947 (N.D.N.Y. May 7, 2013); Robles v. Ally Bank, 2013 WL 28773 (S.D. Cal. Jan. 2, 2013); Harris v. Jacobs, Marsh, L.L.C., 2012 WL 3655334 (W.D.N.Y. Aug. 23, 2012); Unangst v. Evans Law Assoc., P.C., 798 F. Supp. 2d 409 (N.D.N.Y. 2011); Balk v. Fererstein & Smith, L.L.P., 2011 WL 1560984 (W.D.N.Y. Feb. 18, 2011), *adopted*, 2011 WL 1557948 (W.D.N.Y. Apr. 25, 2011); Martin v. Law Offices of John F. Edwards, 262 F.R.D. 534 (S.D. Cal. 2009); Randall v. Nelson & Kennard, 2009 WL 2710141 (D. Ariz. Aug. 26, 2009); Hurtado v. TAM Fin. Corp., 2007 WL 1746884 (W.D. Tex. June 5, 2007); Avery v. First Resolution Mgmt. Corp., 2007 WL 1560653 (D. Or. May 25, 2007); Evans v. Am. Credit Sys., Inc., 2003 WL 23018529 (D. Neb. Dec. 10, 2003); Orloff v. Syndicated Office Sys., 2003 WL 22100868 (E.D. Pa. Aug. 20, 2003); Taylor v. Bryant, Inc., 275 F. Supp. 2d 1305 (D. Nev. 2003); Berrios v. Sprint Corp., 1998 WL 199842 (E.D.N.Y. Mar. 16, 1998); Hart v. Clayton-Parker & Assoc., Inc., 869 F. Supp. 774 (D. Ariz. 1994). *See also* Tworek v. Asset Acceptance, L.L.C., 2010 WL 707365 (E.D. Mich. Feb. 23, 2010) (denying defendant's motion for summary judgment asserting that amount of its setoff of debt allegedly exceeded plaintiff's affirmative claims); Appx. E.3.7.2, *infra*.

454 *See* Hunt v. 21st Mortg. Corp., 2012 WL 3903783 (N.D. Ala. Sept. 7, 2012); Waid v. Credit Collections, Inc., 2011 WL 5555683 (W.D. Okla. Nov. 15, 2011); Mufwene v. Am. Credit Exch., 2010 WL 4539451 (N.D. Ill. Nov. 3, 2010); Mathy v. Chase Manhattan Bank, 2009 WL 3489398, at *4 (C.D. Cal. Oct. 26, 2009); Gerber v. Citigroup, Inc., 2009 WL 2058576 (E.D. Cal. July 14, 2009); Padilla v. Clovis & Roche, Inc., 2007 WL 4264582 (N.D.N.Y. Nov. 30, 2007); Krutchkoff v. Fleet Bank, 960 F. Supp. 541 (D. Conn. 1996); Sluys v. Hand, 831 F. Supp. 321 (S.D.N.Y. 1993). *See also* Rahman v. San Diego Accounts Serv., 2017 WL 1387206 (S.D. Cal. Apr. 18, 2017).

455 *See, e.g.*, Campos v. W. Dental Serv., Inc., 404 F. Supp. 2d 1164 (N.D. Cal. 2005); Sparrow v. Mazda Am. Credit, 385 F. Supp. 2d 1063 (E.D. Cal. 2005); Ballard v. Equifax Check Serv., Inc., 186 F.R.D. 589 (E.D. Cal. 1999).

456 *See* Skoczylas v. Atl. Credit & Fin., Inc., 2002 WL 55298 (E.D. Pa. Jan. 15, 2002).

to seize the amounts the collection agency must pay the consumer in damages and attorney fees.

A federal court has prevented such a garnishment as inconsistent with the Congressional intent for the FDCPA to eliminate abusive debt collection and to encourage consumer access to an attorney. In particular, an attorney might think twice about representing the consumer where there is a risk that the prevailing consumer's attorney fee award goes to the creditor and not to the attorney.[457] The Fifth and Ninth Circuits have reached a similar result in Truth in Lending Act litigation.[458]

Even more creatively, a collector with a judgment against the consumer obtained an order for the sheriff to levy on the consumer's FDCPA claim against the collector, and then the collector purchased at the sheriff's auction the consumer's claim against the collector. The Ninth Circuit disallowed the effect of the collector's actions and allowed the consumer to bring FDCPA claims against the collector. In *Arellano v. Clark County Collection Service, L.L.C.*, the Ninth Circuit held that "[d]ebt collectors cannot evade the restrictions of the Act by forcing a debtor's [FDCPA] claims to be auctioned, acquiring the claims, and dismissing them. To allow otherwise would thwart enforcement of the FDCPA and undermine its purpose."[459]

12.10 Attorney Fees and Sanctions Against Consumers or Their Attorney

12.10.1 Statutory Attorney Fees Awards to FDCPA Defendants

12.10.1.1 Generally

The FDCPA provides:

> (3) On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.[460]

This language was modified from the original proposal in a Senate minority debt collection bill[461] that provided that such fees "shall" be awarded. In the final bill the wording was changed to "may award." As a result, a court has discretion not to award attorney fees to a defendant even when there is a finding of both bad faith and harassment. Appellate courts will review a lower court's decision under this provision only for an abuse of discretion.[462]

A defendant's claim for attorney fees must be raised by motion after the dismissal of the consumer's FDCPA claim, not as a counterclaim to the FDCPA claim.[463] A debt collector's counterclaim for attorney fees should be met with a motion to dismiss, especially because fee claims have the potential for intimidation.

The FDCPA provision of fees for the defendant's attorney fees does not make the consumer's lawyer responsible for the FDCPA defendant's fees, even where it makes the consumer responsible for them.[464] The Supreme Court has held that an

457 Isa v. Law Office of Timothy Baxter & Assoc., 2013 WL 5692850 (E.D. Mich. Oct. 21, 2013). *But see* Kaylor-Trent v. John C. Bonewicz, P.C., 2013 WL 980290 (C.D. Ill. Mar. 13, 2013).

458 *See* Dias v. Bank of Hawaii, 732 F.2d 1401, 1403 (9th Cir. 1984), *modified*, 764 F.2d 1292 (9th Cir. 1985); Wright v. Tower Loan of Mississippi, Inc., 679 F.2d 436, 446 (5th Cir. 1982); Plant v. Blazer Fin. Serv., Inc. of Georgia, 598 F.2d 1357, 1365–1366 (5th Cir. 1979). *See also* Olevares v. Viking Dodge, Inc., 626 F. Supp. 114 (N.D. Ill. 1985).

459 875 F.3d 1213, 1218 (9th Cir. 2017).

460 15 U.S.C. § 1692k(a)(3).

461 S. 1130, 95th Cong., 1st Sess. § 805(c) (1977).

462 *See, e.g.*, Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85 (2d Cir. 2008); Morgovsky v. Creditor Collection Serv., 166 F.3d 343 (9th Cir. 1998); Duranseau v. Portfolio Recovery Assoc., 644 Fed. Appx. 702, 707 (8th Cir. 2016); Diaz v. First Marblehead Corp., 643 Fed. Appx. 916, 922 (11th Cir. 2016). *Cf.* Welch v. Credit Adjustment Co., 161 F.3d 19 (10th Cir. 1998) (district court's finding that plaintiff did not bring the FDCPA suit in bad faith or for purpose of harassment was reviewed for clear error (citing *Swanson*, 869 F.2d at 1229) and affirmed).

463 Emanuel v. Am. Credit Exch., 870 F.2d 805 (2d Cir. 1989); Juras v. Aman Collection Serv., Inc., 829 F.2d 739 (9th Cir. 1987); Haverstick v. J&M Sec., L.L.C., 2016 WL 6560402 (E.D. Mo. Nov. 3, 2016); Walter v. HSM Receivables, 2014 WL 5394986 (D. Colo. Oct. 23, 2014); Spencer v. Receivables Performance Mgmt., L.L.C., 2013 WL 797335 (S.D. Tex. Mar. 4, 2013); Noreikas v. Roach, 2013 WL 28082 (S.D. Ohio Jan. 2, 2013); Johnson v. Brock & Scott, P.L.L.C., 2012 WL 4483916 (E.D.N.C. Sept. 27, 2012); Whatley v. AHF Fin. Serv., L.L.C., 2012 WL 4062508 (E.D. Tex. Aug. 16, 2012), *adopted*, 2012 WL 4059906 (E.D. Tex. Sept. 14, 2012); Borges v. Thomas F. Farrell, P.C., 2012 WL 3473109 (D. Colo. Aug. 14, 2012); Marcum v. Eastman Credit Union, 2011 WL 1225792 (E.D. Tenn. Mar. 30, 2011); Coleman v. Credit Mgmt. L.P., 2011 WL 913210 (N.D. Tex. Mar. 16, 2011); Allen v. Scott, 2011 WL 219568 (N.D. Tex. Jan. 19, 2011); Kropf v. TCA, Inc., 752 F. Supp. 2d 797 (E.D. Mich. 2010); Kirscher v. Messerli & Kramer, P.A., 2006 WL 145162 (D. Minn. Jan. 18, 2006); Young v. Reuben, 2005 WL 1484671 (S.D. Ind. June 21, 2005); Micare v. Foster & Garbus, 132 F. Supp. 2d 77 (N.D.N.Y. 2001); Johnson v. Ardec Credit Serv., Inc., 1984 U.S. Dist. LEXIS 24889 (N.D. Ga. Mar. 21, 1984). *See also* Young v. McDowell Serv., 1991 U.S. Dist. LEXIS 21814 (N.D. Ga. Apr. 30, 1991) (no discovery on § 1692k(a)(3) claim prior to ruling on merits of FDCPA claims). *But see* Erickson v. Brock & Scott, P.L.L.C., 2009 WL 4884424 (W.D. Tenn. Dec. 8, 2009); Stoddard v. Nationwide Recovery Serv., Inc., 2003 WL 25273708 (D.N.H. Nov. 25, 2003).

464 *See* Tejero v. Portfolio Recovery Assoc., 955 F.3d 453, 462 (5th Cir. 2020) (§ 1692k(a)(3) "permits fee awards only against parties, not against their counsel" since permitting fee awards against counsel is contrary to common law and not specifically allowed by the FDCPA); Hyde v. Midland Credit Mgmt., Inc., 567 F.3d 1137 (9th Cir. 2009); Camacho v. Bridgeport Fin., Inc., 430 F.3d 1078 (9th Cir. 2005). *Cf.* Ceresko v. LVNV Funding, L.L.C., 484 Fed. Appx. 113 (9th Cir. 2012) (2–1 decision) (affirming a $10,467 award against the consumer plaintiff; agreeing that the underlying FDCPA action was brought in bad faith and for the purpose of harassment because the plaintiff's counsel suffered the same failure to state an FDCPA violation in two previous lawsuits). *But see* Forto v. Capital One Bank, 2017 WL 4168529 (N.D. Cal. Sept. 20, 2017) (finding that the consumer and her counsel brought action in bad faith and for the purpose of harassment; awarding collection agency a total of $57,457.50 to be paid jointly and severally by the consumer and her attorneys); CUDA & Assoc., L.L.C. v. Evon, 2009 WL 5698132 (Conn. Super. Ct. Dec. 16, 2009) (FDCPA does not preempt a state law claim against a consumer and her attorney for allegedly filing a vexatious FDCPA case); Appx. E.3.6.4, *infra*.

attorney is liable for the other attorney's fees under a statute only where that statute explicitly so provides.[465]

If the consumer voluntarily dismisses the FDCPA case, some courts find that the collector is not a "prevailing party" and therefore may not recover statutory attorney.[466] Attorney fees may not be awarded against a consumer who prevails on any of their FDCPA claims, even if others are dismissed.[467]

Courts have ruled that the FDCPA § 1692k(a)(3) provision does not prevent state courts from issuing sanctions under state rules[468] or bankruptcy courts issuing such sanctions under the Bankruptcy Code.[469]

12.10.1.2 The Bad Faith and Harassment Standards

The FDCPA provision states that attorney fees can be awarded to a debt collector only if the court finds that the action was brought by a consumer *both* in bad faith *and* for the purpose of harassment.[470] Proof of only one or the other is insufficient to recover fees. This comports not only with the statutory language ("bad faith and for the purpose of harassment"), but is consistent with the legislative history. The Senate minority bill.[471] required an award of attorney fees on a finding either bad faith *or* harassment. The final version requires both elements.

The FDCPA provision can thus be distinguished from statutory provisions providing fees for a prevailing party, and also distinguished from federal statutes[472] and the federal common law rule that provide for awards if either bad faith or harassment or some other standard is met.[473] In the absence of a showing that a case was brought both in bad faith and for the purposes of harassment, a court may not award fees under this provision against the consumer, even if the consumer's lawsuit is without merit.[474]

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465 *See* Lamie v. United States Tr., 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004); Roadway Express, Inc. v. Piper, 447 U.S. 752, 761, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980) (indicating that fees under 42 U.S.C. § 1988 may be recovered only against a party, not the party's attorney). *See also* Heckethorn v. Sunan Corp., 992 F.2d 240, 242 (9th Cir. 1993); Healey v. Chelsea Res., Ltd., 947 F.2d 611, 624 (2d Cir. 1991).

466 *See* Smalley v. Account Serv. Collections, Inc., 2017 WL 1092678 (W.D. Pa. Mar. 23, 2017). *See also* Marx v. Gen. Revenue Corp., 668 F.3d 1174, 1178 (10th Cir. 2011) ("When a defendant prevails *and* the court finds that the suit was brought in bad faith and for the purpose of harassment, then (in the court's discretion) that defendant may also recover attorney's fees."), *aff'd*, 568 U.S. 371, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013); Rubakha v. Kenneth J. Breitbart & Assoc., P.A., 2014 WL 2452575 (D. Md. May 30, 2014); Felton v. Convergent Outsourcing, Inc., 2014 WL 1408054 (D. Colo. Apr. 11, 2014).

467 *See* Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998) (§ 1692k(a)(3) not available where FDCPA claim prevailed); Moore v. Diversified Collection Serv., Inc., 2009 WL 1873654 (E.D.N.Y. June 29, 2009); Eckert v. LVNV Funding L.L.C., 647 F. Supp. 2d 1096 (E.D. Mo. 2009); Randall v. Midland Funding, L.L.C., 2009 WL 2358350 (D. Neb. July 23, 2009); Gonzalez v. Lawent, 2004 WL 2036409 (N.D. Ill. Sept. 10, 2004) (other issues remained unresolved); Dechert *ex rel.* Estate of Oyler v. The Cadle Co., 2004 WL 2999112 (S.D. Ind. Nov. 10, 2004), *rev'd on other grounds*, 441 F.3d 474 (7th Cir. 2006); Blum v. Lawent, 2003 WL 22078306 (N.D. Ill. Sept. 8, 2003).

468 CUDA & Assoc., L.L.C. v. Evon, 2009 WL 5698132 (Conn. Super. Ct. Dec. 16, 2009) (FDCPA does not preempt a state law claim against a consumer and her attorney for allegedly filing a vexatious FDCPA case); Ziobron v. Crawford, 667 N.E.2d 202 (Ind. Ct. App. 1996) (FDCPA did not preempt state law claim awarding damages to a collector for malicious prosecution based on FDCPA claim considered legally correct but technical by the court).

469 *See, e.g., In re* Cooper, 253 B.R. 295 (Bankr. N.D. Fla. 2000) (granting sanctions of $5000 to creditor's attorney against the consumers' attorney under Bankr. R. 9011 for the costs of defending against a groundless FDCPA claim).

470 *See* Sorensen v. Credit Int'l Corp., 475 Fed. Appx. 244 (9th Cir. 2012) (reversing award of $250 in attorney fees made by the lower court to the debt collector without a finding that the litigation was brought in bad faith and for the purpose of harassment); Smith v. Solomon and Solomon, P.C., 887 F. Supp. 2d 334 (D. Mass. 2012), *aff'd*, 714 F.3d 73 (1st Cir. 2013); S. Rep. No. 382 at 5, *reproduced at* Appx. A.3, *infra*; Appx. E.3.6.4, *infra*.

471 S. 1130, 95th Cong., 1st Sess. § 805(c) (1977).

472 *See, e.g.*, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978) (EEOA); Smyth v. Merchants Credit Corp., 2014 WL 12707240, at *2 (W.D. Wash. May 14, 2014) (where jury found no FDCPA violations, "conclusory assertions of frivolous claims, absent evidence of bad faith or harassing purpose" were insufficient for a debt collector to recover attorney fees under § 1692k(a)(3)); RBC Bank (USA) v. Glass, 773 F. Supp. 2d 1245 (N.D. Ala. 2011) (marked difference between FDCPA and RESPA is that FDCPA requires a showing that non-prevailing plaintiff asserted his claim in bad faith, whereas under RESPA fees to prevailing party are a matter of discretion for court). *See also* Dexter v. Tran, 2009 WL 5208800 (E.D. Wash. Dec. 22, 2009) (defendants not entitled to recover attorney fees and costs by virtue of parties' reaffirmation agreement because consumer brought this action pursuant to the FDCPA only and did not allege breach of reaffirmation agreement; to recover fees defendant would have to meet requirements of § 1692k(a)(3)).

473 *See* Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240, 258–259, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975).

474 *See* Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996); Kurzdorfer v. Constar Fin. Serv., L.L.C., 490 F. Supp. 3d 663 (W.D.N.Y. 2020); Thomas v. Stokes & Clinton, P.C., 2014 WL 11279816 (N.D. Ala. Aug. 27, 2014); Montero-Hernandez v. Palisades Collection, L.L.C., 2014 WL 505119 (M.D. Fla. Feb. 7, 2014); Tourgeman v. Collins Fin. Serv., Inc., 2012 WL 12863967 (S.D. Cal. Dec. 13, 2012); Neal v. CAC Fin. Corp., 2011 WL 4072144 (D. Or. Sept. 13, 2011); Fields v. Law Offices of James West, P.C., 2010 WL 2245036 (M.D. Ala. June 4, 2010); Parker v. Shaw & Lines, L.L.C., 2010 WL 1640963 (D. Ariz. Apr. 20, 2010); Campbell v. Credit Bur. Sys. Inc., 655 F. Supp. 2d 732 (E.D. Ky. 2009); Hoang v. Worldwide Asset Purchasing, L.L.C., 2009 WL 3669883 (S.D. Ill. Nov. 2, 2009); Hinds v. Credigy Receivables, Inc., 2008 WL 5381345 (M.D. Fla. Dec. 23, 2008) ("The standard for bad faith is higher than the standard for mere frivolousness."); Deere v. Javitch, Block &

Of course, where both the bad faith and harassment standards are met, a court has discretion to award such fees.[475] But a court has noted: "Section 1692k(a)(3) should be construed narrowly as not to discourage private litigation under the FDCPA."[476] Courts may be especially reluctant to award attorney fees against *pro se* litigants.[477] Nor should attorney fees be awarded where the consumer does not prevail, but in good faith was seeking to overturn existing FDCPA precedent.[478]

The defendant has the burden of proving the plaintiff's subjective bad faith and the plaintiff's harassing purpose in instituting the FDCPA action.[479] To prove bad faith or harassment, the defendant must show not only that the plaintiff had no basis for believing that the defendant violated the Act, but also that the plaintiff did not entertain a subjective belief that that Act had been violated.[480]

Rathbone, L.L.P., 413 F. Supp. 2d 886 (S.D. Ohio 2006); Tagayun v. Citibank, 2006 WL 5100512 (D.N.J. June 9, 2006); Lemieux v. Jensen, 2004 WL 302318 (S.D. Cal. Jan. 29, 2004) (consumer could not determine whether the attorney regularly collected debts until he filed suit, and when he found out his mistake, he promptly dismissed the FDCPA suit); Turner v. J.V.D.B. & Assoc., Inc., 211 F. Supp. 2d 1108 (N.D. Ill. 2002) (though unsuccessful, consumer's FDCPA claims "were a good faith interpretation of the . . . law"), *aff'd in part, rev'd in part on other grounds*, 330 F.3d 991 (7th Cir. 2003). *See also* Brooks v. Citibank, 345 Fed. Appx. 260 (9th Cir. 2009) (remanding for factual findings on whether lawsuit was filed in bad faith within § 1692k).

475 *See* Kraemer v. Fox Hills Owners Ass'n, 697 Fed. Appx. 935 (10th Cir. June 27, 2017) (consumer involved in online harassment of debt collector); LSR Consulting, L.L.C. v. Wells Fargo Bank, 835 F.3d 530 (5th Cir. 2016); Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999); Bjornsdotter v. Suttell & Hammer, P.S., 2020 WL 2840245, at *2 (D. Or. June 1, 2020) (claims were "clearly untenable from the outset of this litigation," and plaintiff's attorneys "lobbed several insults and accusations at Defendants, which supports an inference that she sought to embarrass or annoy them"); Cobb v. Enhanced Recovery Co., L.L.C., 2020 WL 1158468, at *14 (D. Conn. Mar. 10, 2020) (awarding fees based on consumer's attorney's "behavior during this litigation, in combination with the baselessness" of claim); Huebner v. Midland Credit Mgmt., Inc., 85 F. Supp. 3d 672 (E.D.N.Y. 2015) (consumer called debt collector and tried to get it to commit an FDCPA violation); Diaz v. First Marblehead Corp., 2014 WL 7251648 (M.D. Fla. Nov. 3, 2014), *adopted*, 2014 WL 7251653 (M.D. Fla. Dec. 18, 2014) (based on attorney's experience in another case, attorney knew loan servicers obtaining debt before default were not FDCPA debt collectors); Nguyen v. Capital One Bank, 2014 WL 1344512 (E.D. Mo. Apr. 4, 2014); Scroggin v. Credit Bur., Inc., 973 F. Supp. 2d 961 (E.D. Ark. 2013), *aff'd*, 576 Fed. Appx. 632 (8th Cir. 2014); Jones v. Ravitz, 2007 WL 2004755 (E.D. Mich. July 6, 2007) (case was nonsense); Dean v. Gillette, 2005 WL 2810539 (D. Kan. Oct. 27, 2005) (awarding some $42,000 in fees to defendant creditor but refusing to award fees to defendant attorney); Nat'l Union Fire Ins. Co. v. Hartel, 782 F. Supp. 22 (S.D.N.Y. 1992) (insurer was awarded attorney fees including time expended in obtaining a declaratory judgment that it was not in violation of the FDCPA).

476 Wattie-Bey v. Modern Recovery Solutions, 2016 WL 8229211, at *4 (M.D. Pa. Dec. 30, 2016), *adopted*, 2017 WL 529989 (M.D. Pa. Feb. 9, 2017).

477 *See, e.g.*, Grimsley v. Focus Fin. Serv., 2016 WL 9176591 (S.D. Fla. July 22, 2016), *adopted*, 2017 WL 2665156 (S.D. Fla. June 19, 2017); Rink v. Bernhardt & Strawser P.A., 2014 WL 113577 (W.D.N.C. Jan. 10, 2014); Harris v. Crisis Collections Mgmt., L.L.C., 2013 WL 1759609 (D. Nev. Apr. 24, 2013); Geist v. Onewest Bank, 2011 WL 223727 (N.D. Cal. Jan. 24, 2011); Murungi v. Mercedes Benz Credit Corp., 2001 U.S. Dist. LEXIS 19490 (E.D. La. Nov. 20, 2001). *See also* Gulley v. Markov & Krasny Assoc., P.C., 2011 WL 1630670 (N.D. Ill. Apr. 26, 2011), *aff'd on other grounds*, 664 F.3d 1073 (7th Cir. 2011). *But see* Kraemer v. Fox Hills Owners Ass'n, 697 Fed. Appx. 935 (10th Cir. June 27, 2017) (affirming the § 1692k(a)(3) award of $33,700 attorney fees to the debt collector against the *pro se* consumer for filing the FDCPA case in bad faith where similar FDCPA claims had been decided against her in earlier state court cases and there was evidence showing the consumer harassed the debt collector online); Cortez v. Mann Bracken, L.L.P., 2011 WL 4424293 (Tex. App. Sept. 22, 2011) (affirming award of attorney fees against *pro se* plaintiff, finding that trial court's determination of bad faith and purpose of harassment was supported by facts).

478 Winn v. Unifund CCR Partners, 2007 WL 2701941 (D. Ariz. Sept. 14, 2007); Bezpalko v. Gilfillan, Gilpin & Brehman, 1998 WL 321268, at *7 (E.D. Pa. June 17, 1998) ("In order for such necessary adjustments in the law to be made, attorneys must bring to the attention of the courts the need and reasoning for such a change.").

479 Guerrero v. RJM Acquisitions, L.L.C., 499 F.3d 926 (9th Cir. 2007). *See* Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996); Mayhall v. Berman & Rabin, P.A., 13 F. Supp. 3d 978, 984 (E.D. Mo. 2014); Thompson v. S & S Recovery, Inc., 2013 WL 5278022 (S.D. Miss. Sept. 18, 2013); Branco v. Credit Collections Serv., Inc., 2012 WL 1143562 (E.D. Cal. Apr. 4, 2012); Bank v. Cooper, 2009 WL 1491227 (E.D.N.Y. May 27, 2009), *aff'd on other grounds*, 356 Fed. Appx. 509 (2d Cir. 2009); Sanchez v. United Collection Bur., Inc., 649 F. Supp. 2d 1374 (N.D. Ga. 2009); Black v. Equinox Fin. Mgmt. Solutions, 2007 U.S. Dist. LEXIS 16767 (N.D. Ga. Feb. 1, 2007); Grant v. Barro, 2007 WL 3244986 (M.D. La. Nov. 1, 2007); Walthorn v. Law Offices of Timothy E. Baxter, P.C., 2006 U.S. Dist. LEXIS 54030 (W.D. Mich. Aug. 2, 2006); Ricciardi v. Serv. Credit Union, 2006 U.S. Dist. LEXIS 28468 (D.N.H. May 11, 2006); Hooper v. Capital Credit & Collection Serv., Inc., 2005 WL 2297062 (D. Or. Sept. 20, 2005) (following a jury trial, which resulted in a $1570 actual damage award against collection agency and a defense verdict for agency's named employee, denying any additional statutory damages, awarded plaintiff $17,467 in attorney fees, and denying any fees to exonerated employee since claims against her were not "brought in bad faith and for the purpose of harassment"); Phernetton v. First Revenue Assur., 2003 WL 21246037 (D. Minn. May 19, 2003); Wilson v. Transworld Sys., Inc., 2003 WL 21488206 (M.D. Fla. June 10, 2003); Degrosiellier v. Solomon & Solomon, P.C., 2001 WL 1217181 (N.D.N.Y. Sept. 27, 2001); Csugi v. Monterey Fin. Serv., Inc., 2001 WL 1841444 (D. Conn. Oct. 30, 2001); Countryman v. Solomon & Solomon, 2000 WL 156837 (N.D.N.Y. Feb. 7, 2000); Filsinger v. Upton, Cohen & Slamowitz, 2000 WL 198223 (N.D.N.Y. Feb. 17, 2000); Olson v. Carter-Jones Collections, 2020 WL 5869078 (Cal. Ct. App. Oct. 2, 2020); Allied Collection Serv., Inc. v. Byrd, 2007 WL 2340784 (Ky. Ct. App. Aug. 3, 2007); Mendez v. Apple Bank for Sav., 143 Misc. 2d 915 (N.Y. Civ. Ct. 1989); Conley v. KCA Fin. Serv., Inc., 931 P.2d 808 (Or. Ct. App. 1997). *Cf.* Corridean v. Restore Fin. Serv. Network, L.L.C., 2007 WL 1989622 (D. Or. July 6, 2007) (costs but no fees, though action brought to punish defendants for pursuing a debt plaintiff did not owe, where action not brought in bad faith and for purpose of harassment); Sierra v. Garbus, 48 F. Supp. 2d 393 (S.D.N.Y. 1999) (attorney fees of $4586.60 awarded to collection firm, pursuant to § 1692k(a)(3), against consumer and his attorney for bringing a meritless FDCPA suit several times; prior suits claimed violation of FDCPA for unreasonable addition of $507.92 in attorney fees on $3500 credit card debt).

480 *See* Johnson v. Eaton, 884 F. Supp. 1068 (M.D. La. 1995), *aff'd in part and rev'd in part*, 80 F.3d 148 (5th Cir. 1996) (withdrawal by the consumer of an actual damages claim for emotional distress shortly before trial did not constitute in itself a basis for finding of bad faith or harassment under § 1692k(a)(3)); Friedman v. HHL Fin. Serv., Inc., 1994 WL 22969 (N.D. Ill. Jan. 25, 1994); Phillips v. Amana Collection Serv., 1992 WL 227839 (W.D.N.Y. Aug. 25, 1992) (because Congress

A consumer's mistaken belief in the merits of their claim undermines a finding of bad faith.[481] This is even more the case where the defendant's resistance to discovery prevented the consumer from timely learning that a case was not meritorious.[482] Similarly, there is no bad faith where the consumer in good faith relied on the consumer's attorney and it was the attorney who decided to bring a meritless claim.[483]

To show bad faith, the debt collector must establish that there was no legal or factual basis for any of the consumer's claims.[484] For example, while expressing skepticism about the merits of plaintiff's attorney's claims and finding his "aggressive use of the Act unworthy of commendation," the Ninth Circuit upheld the denial of fees, because the claims were "minimally colorable" and the defendant offered no evidence of bad faith other than conclusory assertions.[485]

Even if the consumer has a collateral purpose in suing and refusing to accept a settlement offer, this does not establish bad faith if there is merit to the FDCPA claims.[486]

Bad faith is not to be inferred even where the consumer was not misled or harmed by the violation because the Act encourages private enforcement of the Act.[487] Even if there is no basis for the consumer's FDCPA claim, such as where

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authorized the award of additional damages and attorney fees for enforcement of the FDCPA by "private attorneys general," the award of sanctions or costs to the collector would be inappropriate on the collector's contention that the consumer demonstrated only "technical" violations); Knowles v. Credit Bur., 1992 WL 131107 (W.D.N.Y. May 28, 1992) (failed to demonstrate that the consumer brought the suit in bad faith and for the purpose of harassment). *See also* Franco v. Maraldo, 2000 WL 288378 (E.D. La. Mar. 16, 2000) (plaintiff and his attorney could have "plausibly" believed that the defendant attorney was a debt collector).

481 *See* Johnson v. Credit Prot. Ass'n, L.P., 2013 WL 3834400 (S.D. Fla. July 24, 2013); Harris v. Crisis Collections Mgmt., L.L.C., 2013 WL 1759609 (D. Nev. Apr. 24, 2013).

482 Conover v. BYL Collection Serv., L.L.C., 2012 WL 4363740 (W.D.N.Y. Sept. 21, 2012). *See also* Bendickson v. Messerli & Kramer, P.A., 2016 WL 4408822 (D. Minn. Aug. 16, 2016) (collection firm's request for fees rejected in part because it unreasonably refused to allow consumer's attorney to listen to recording that was linchpin of its defense).

483 Diaz v. First Marblehead Corp., 643 Fed. Appx. 916 (11th Cir. 2016). *But cf.* Alcivar v. Enhanced Recovery Co., 2020 WL 2559845 (E.D.N.Y. May 20, 2020) (awarding prevailing defendant $33,916.84 in attorney fees and sanctions under U.S.C. § 1927 where consumer's attorneys filed "a meritless case" without "client's involvement or knowledge," finding that § 1692k(a)(3) relates to behavior of counsel when it brings case without its client's knowledge or involvement).

484 *See* Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769 (7th Cir. 2003); Navarro v. Portfolio Recovery Assoc., 2020 WL 2199478, at *2 (D. Ariz. May 6, 2020) (claim "may have rested on faulty logic" but was not "wholly baseless"); Mellon v. Monarch Recovery Mgmt., Inc., 2017 WL 4776738 (E.D.N.Y. Oct. 17, 2017) (although court was "troubled" by counsel's filing of three duplicative, putative class action cases for different consumers involving a debt collector's form letter for the same bank on various credit card accounts, such conduct did not rise to the level of bad faith); Fields v. Credit Mgmt. Sys., 2016 WL 9088755 (C.D. Cal. Apr. 20, 2016); Philhower v. Express Recovery Serv. Inc., 2014 WL 1648724 (D. Utah Apr. 23, 2014); Abby v. Paige, 2013 WL 12246348 (S.D. Fla. Aug. 2, 2013), *adopted*, 2013 WL 12246349 (S.D. Fla. Oct. 1, 2013) (plaintiff prevailed on one of her FDCPA claims; the fact that Plaintiff recovered less than the amount defendant offered under Rule 68 did not establish that Plaintiff litigated the claim in bad faith and for the purpose of harassment); Chavez v. Northland Grp., 2011 WL 317482 (D. Ariz. Feb. 1, 2011); Andre v. CCB Credit Serv., Inc., 2010 WL 3222500 (S.D. Fla. July 21, 2010), *adopted*, 2010 WL 3222501 (S.D. Fla. Aug. 13, 2010); Tucker v. CBE Grp., Inc., 710 F. Supp. 2d 1301 (M.D. Fla. 2010); Acosta v. Campbell, 2009 WL 4639704 (M.D. Fla. Dec. 4, 2009) (colorable claim made); Allers-Petrus v. Columbia Recovery Grp., L.L.C., 2009 WL 1160061 (W.D. Wash. Apr. 29, 2009) (denying debt collector's motion for attorney fees and costs pursuant to § 1692k(a)(3)); Sorey v. Computer Credit, Inc., 2006 WL 1896401 (S.D.N.Y. July 7, 2006) (action was "not objectively baseless"); Kaiser v. Braje & Nelson, L.L.P., 2006 WL 1285143 (N.D. Ind. May 5, 2006) (consumer had colorable claim); Guidry v. Clare, 442 F. Supp. 2d 282 (E.D. Va. 2006) ("the standard for sanctions liability under the FDCPA essentially mirrors Rule 11's 'improper purpose' analysis"; where five of seven of plaintiff's claims were "frivolous," "baseless," without "even a scintilla of evidence," and thus unsupported in fact or law, court awarded debt collector sanctions under its inherent powers, Rule 11 and § 1692k(a)(3), finding harassment by the plaintiff); Dean v. Gillette, 2005 WL 2810539 (D. Kan. Oct. 27, 2005); Shah v. Collecto, Inc., 2005 WL 2216242 (D. Md. Sept. 12, 2005) (suit must be completely without merit); Oliphant v. Simboski, 2005 WL 927169 (D. Conn. Apr. 19, 2005); *In re* Faulkner, 1998 WL 34342248 (Bankr. E.D. Va. May 12, 1998). *See also* Arutyunyan v. Cavalry Portfolio Serv., 2013 WL 500452 (C.D. Cal. Feb. 11, 2013) (mere inartful pleading and failure to state a claim did not demonstrate that an action was brought in bad faith). *But see* Scroggin v. Credit Bur., Inc., 973 F. Supp. 2d 961 (E.D. Ark. 2013) (awarding debt collector over $30,000 in fees where the consumer bragged online that he set up the debt collector for its FDCPA violations and publicly reviled the debt collector and its counsel during the litigation; jury found for the plaintiff but refused to award any damages), *aff'd*, 576 Fed. Appx. 632 (8th Cir. 2014).

485 Guerrero v. RJM Acquisitions, L.L.C., 499 F.3d 926 (9th Cir. 2007). *See also* Baylon v. Wells Fargo Bank, 2016 WL 7494256 (D.N.M. Mar. 9, 2016); Brown v. Van Ru Credit Corp., 2015 WL 225727 (E.D. Mich. Jan. 16, 2015), *aff'd*, 804 F.3d 740 (6th Cir. 2015); Rubakha v. Kenneth J. Breitbart & Assoc., P.A., 2014 WL 2452575 (D. Md. May 30, 2014); Boon v. Prof'l Collection Consultants, 2014 WL 12526274 (S.D. Cal. Apr. 11, 2014) (denying attorney fees as filing of third amended complaint, without more, did not rise to level of bad faith or harassment); Woodward v. Pressler & Pressler, L.L.P., 2014 WL 809003 (D.N.J. Feb. 28, 2014); Eide v. Colltech, Inc., 987 F. Supp. 2d 951 (D. Minn. 2013); Ford v. Principal Recovery Grp., Inc., 2012 WL 930334 (W.D.N.Y. Mar. 19, 2012); Carman v. CBE Grp., Inc., 782 F. Supp. 2d 1223 (D. Kan. 2011); Mahan v. Retrieval-Masters Credit Bur., Inc., 777 F. Supp. 2d 1293 (S.D. Ala. 2011); Bergey v. Accelerated Receivables, 2011 WL 6012502 (W.D.N.Y. Nov. 2, 2011), *adopted*, 2011 WL 6012499 (W.D.N.Y. Dec. 1, 2011); Hammett v. AllianceOne Receivables Mgmt., Inc., 2011 WL 3819848 (E.D. Pa. Aug. 30, 2011); Henderson v. N.A.R., Inc., 2011 WL 2312170 (D. Utah June 10, 2011); Hasbrouck v. Arrow Fin. Serv. L.L.C., 2011 WL 1899250 (N.D.N.Y. May 19, 2011); Karns v. QAR, L.L.C., 2011 WL 1791296 (S.D. Fla. Apr. 18, 2011), *adopted*, 2011 WL 1770830 (S.D. Fla. May 10, 2011); Jackson v. Diversified Collection Serv., Inc., 2011 WL 1235553 (D. Colo. Mar. 31, 2011); *In re* Holyfield, 2017 WL 2274939 (Bankr. N.D. Ga. May 24, 2017).

486 Juras v. Aman Collection Serv., Inc., 829 F.2d 739 (9th Cir. 1987).

487 Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85 (2d Cir. 2008). *See also* Schultz v. Portfolio Recovery Assoc., L.L.C., 2012 WL 5332194 (N.D. Iowa Oct. 29, 2012). *But see* Yitzchok Majerowitz v. Stephen Einstein & Assoc., 2013 WL 4432240 (E.D.N.Y. Aug. 15, 2013) (awarding debt collector attorney fees pursuant to § 1692k(a)(3) as the consumer's § 1692e(11) claim was frivolous as he knew the caller was debt collector all along, and he concealed that he was a frequent filer of FDCPA suits).

FDCPA claims are time-barred, there is no bad faith if the FDCPA claim is joined with a successful alternative.[488]

That the consumer has lost similar claims in other litigation does not prove bad faith.[489] The consumer voluntarily dismissing an action early in the litigation does not show bad faith, but the contrary.[490]

Similarly, the defendant's burden to also show harassment is not an easy one to meet.[491] Conduct after filing the FDCPA suit is not relevant to a claim that the action was brought for purposes of harassment.[492]

A consumer's prior FDCPA claims do not show a vexatious litigator when most of those cases are settled.[493]

12.10.2 Rule 11 Sanctions

An FDCPA defendant's ability to recover attorney fees via sanctions under Federal Rule of Civil Procedure 11 is different from its ability to recover attorney fees under FDCPA § 1692k(a)(3).[494] Rule 11 sanctions are addressed to the consumer's attorney or to an unrepresented consumer,[495] while the FDCPA § 1692k(a)(3) liability for the defendant's attorney fees are born by the consumer. Rule 11 is also available against the debt collector's attorney.

Rule 11 sanctions can include a number of different monetary and non-monetary options in addition to or instead of attorney fees.[496] "A sanction imposed under [Rule 11] must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[497]

Arguably, FDCPA § 1692k(a)(3) standards override any looser standards under Rule 11, at least for the defendant's attorney fees.[498]

Claims under Rule 11 may not be asserted as an affirmative defense or counterclaim but may be raised later in the case.[499] Rule 11 sanctions must be based upon a reasonable inquiry into the consumer attorney's factual[500] and legal[501] basis for the FDCPA claim and, even if there was no basis for the claim, whether it was still brought in good faith.[502] After such an inquiry, many courts deny the debt collector a sanction of attorney fees,[503] while other courts have required the consumer's

488 *See* Strange v. Armor Sys. Corp., 2004 WL 46244 (N.D. Ill. Jan. 7, 2004) (FDCPA claim joined with a Fair Credit Reporting Act claim that was not time-barred; court should consider entire suit, not just the FDCPA claim).

489 Crail v. I.C. Sys., Inc., 2016 WL 4592208 (S.D. Ind. Sept. 2, 2016).

490 See Millard v. Northland Grp., Inc., 2014 WL 6455986 (D. Nev. Nov. 17, 2014).

491 *See* Cohen v. Potenza, 2016 WL 6581233 (E.D.N.Y. Nov. 3, 2016) (evidence required to prevail); Ford v. Principal Recovery Grp., Inc., 2012 WL 930334 (W.D.N.Y. Mar. 19, 2012); Shah v. Collecto, Inc., 2005 WL 2216242 (D. Md. Sept. 12, 2005); Phernetton v. First Revenue Assur., 2003 WL 21246037 (D. Minn. May 19, 2003); Jones v. Weiss, 95 F. Supp. 2d 105 (N.D.N.Y. 2000) (inadequate evidence that FDCPA suit was instituted only to harass); Campion v. Credit Bur. Serv., Inc., 2000 WL 33255504 (E.D. Wash. Sept. 19, 2000); Riebe v. Juergensmeyer & Assoc., 979 F. Supp. 1218 (N.D. Ill. 1997); Villarreal v. Snow, 1997 WL 116801 (N.D. Ill. Mar. 12, 1997); Knowles v. Credit Bur., 1992 WL 131107 (W.D.N.Y. May 28, 1992).

492 *See* Arutyunyan v. Cavalry Portfolio Serv., 2013 WL 500452 (C.D. Cal. Feb. 11, 2013). *But see* Scroggin v. Credit Bur., Inc., 973 F. Supp. 2d 961 (E.D. Ark. 2013), *aff'd*, 576 Fed. Appx. 632 (8th Cir. 2014).

493 Wattie-Bey v. Modern Recovery Solutions, 2016 WL 8229211, at *4 (M.D. Pa. Dec. 30, 2016), *adopted*, 2017 WL 529989 (M.D. Pa. Feb. 9, 2017).

494 *See* De Dios v. Int'l Realty & Invs., 641 F.3d 1071, 1076 (9th Cir. 2011) ("vexatious litigation strategy" in filing nine separate, but identical, actions for alleged violations of the FDCPA instead of a single action); Huff v. Dobbins, Fraker, Tennant, Joy & Pearlstein, 243 F.3d 1086 (7th Cir. 2001); Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999); Terran v. Kaplan, 109 F.3d 1428 (9th Cir. 1997); Torres v. Am. Tel. & Tel. Co., 1990 WL 130690 (7th Cir. Sept. 12, 1990). *See also* Diaz v. First Marblehead Corp., 643 Fed. Appx. 916, 922 (11th Cir. 2016) (Rule 11 violated where FDCPA complaint made clear on its face that FDCPA did not apply). *Cf.* Wissner v. DeWitt Law Firm, P.A., 2019 WL 11502877 (M.D. Fla. Dec. 4, 2019), *adopted sub nom. In re* Phillips, 2019 WL 11502881 (M.D. Fla. Dec. 23, 2019) (denying attorney fees under § 1692k(a)(3) and sanctions under § 1927, but imposing sanctions under Rule 11 for "objectively frivolous" claim). *But cf.* Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998) (to the extent request for Rule 11 sanctions could be construed as request for fees under the FDCPA, the FDCPA's standards must be met). *See also* § 12.10.1, *supra*, for a discussion of fees under section 1692k(a)(3).

495 *See* Fed. R. Civ. P. 11(b). *See also* Tacoronte v. Cohen, 654 Fed. Appx. 445 (11th Cir. 2016).

496 Fed. R. Civ. P. 11(c)(4).

497 *Id.*

498 *See* Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997 (5th Cir. 1995) (Rule 11 did not apply to an action where the provisions of the Longshore and Harbor Workers' Compensation Act were more specific about fee shifting). *See also* Phillips v. Amana Collection Serv., 1992 WL 227839 (W.D.N.Y. Aug. 25, 1992) (because Congress encouraged enforcement of the FDCPA by "private attorneys general," sanctions or costs to the collector would be inappropriate on the collector's contention that the consumer demonstrated only "technical" violations); Clayton v. Bryan, 753 So. 2d 632 (Fla. Dist. Ct. App. 2000) (state's offer of judgment statute providing for fee award preempted by FDCPA attorney fee provisions, 15 U.S.C. § 1692k(3)).

499 Crow v. Wolpoff & Abramson, 2007 WL 1247393 (D. Minn. Apr. 19, 2007).

500 *See* Rodriguez v. Credit Bur., 1993 WL 535174 (6th Cir. Dec. 27, 1993); Marin v. Alvarez, Armas & Borron, P.A., 2010 WL 338839 (S.D. Fla. Jan. 28, 2010); Argentieri v. Fisher Landscapes, Inc., 15 F. Supp. 2d 55 (D. Mass. 1998), *later op.*, 27 F. Supp. 2d 84 (D. Mass. 1998).

501 *See* Torres v. Am. Tel. & Tel. Co., 1990 WL 130690 (7th Cir. Sept. 12, 1990); Shepard-Hall v. Gordon & Wong Law Grp., 2017 WL 2654855 (E.D. Cal. June 20, 2017); Williams v. Javitch, Block & Rathbone, L.L.P., 2006 WL 1672897 (S.D. Ohio June 12, 2006); Martens v. Countrywide Home Loans Serv., L.P., 2006 WL 544209 (E.D. Mo. Mar. 3, 2006).

502 *See* Kegley v. Miles Mgmt. Corp., 1992 WL 370251 (N.D. Ill. Dec. 3, 1992).

503 *See, e.g.*, Duranseau v. Portfolio Recovery Assoc., 644 Fed. Appx. 702, 707 (8th Cir. 2016); Macelus v. Capital Collection Serv, 2017 WL 5157389, at *3–4 (D.N.J. Nov. 7, 2017) (even though the complaint "verges on the silly," "is bereft of merit," and "presented precious little to show this claim was remotely meritorious," court denied Rule 11 sanctions because "some courts have entertained similar actions"); Mellon v. Monarch Recovery Mgmt., Inc., 2017 WL 4776738 (E.D.N.Y. Oct. 17, 2017) (although court was "troubled" by counsel's filing of three duplicative, putative class action cases for different consumers involving a debt collector's form letter for the same bank on various credit card accounts, such conduct did not rise to the level of bad faith); Seamans v. Hoffman, Swartz & Assoc., Inc., 2017 WL 3780317 (N.D. Ill. Aug. 31, 2017) (denying Rule 11 sanctions where motion

attorney under Rule 11 to pay the debt collector's attorney fees and costs.[504]

12.10.3 Sanctions for Multiplying Proceedings, 28 U.S.C. § 1927

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

This statute was applied in a case where a debt collector responded that the consumer attorney's FDCPA demand letter was frivolous and filed a declaratory action. When the consumer filed an FDCPA counterclaim on the same frivolous grounds, the court, pursuant to 28 U.S.C. § 1927, awarded over $18,000 in sanctions for the debt collector. The Seventh Circuit affirmed and held that sanctions should go not only to the collector, but also the collector's attorney.[505]

The Ninth Circuit has also affirmed a sanction award against the consumer's attorney under 28 U.S.C. § 1927 based on a groundless motion to disqualify the defense counsel.[506] A federal court also awarded over $79,000 in sanctions against a consumer's attorney for failing to communicate to the client the collector's proposal for an FDCPA case's settlement.[507] Sanctions under 28 U.S.C. § 1927 can be awarded if the consumer attorney continues to litigate after it is clear the case is hopeless,[508] or if the attorney brings a case shortly after filing suit against the same defendant on the same facts and asserting the same claims that were dismissed.[509] Sanctions may also be awarded where the consumer's attorneys file a meritless case without their client's involvement, participation, or knowledge.[510] Sanctions might be awarded even when not meeting the standards under FDCPA § 1692k(a)(3) for such an award.[511]

Nevertheless, a debt collector's request for sanctions under 28 U.S.C. § 1927 are more often rejected, such as where the blame could be put on both sides,[512] where the consumer's FDCPA claims had some merit,[513] where the consumer attorney acted in good faith,[514] or where the consumer attorney's conduct was not egregious enough.[515] The statute also does not apply to original filings in the case, only subsequent conduct after the case is initiated.[516]

12.10.4 Cost Awards for Prevailing FDCPA Defendants

Federal Rule of Civil Procedure 54(d)(1) provides that unless a federal statute provides otherwise, that costs (other than attorney fees) may be awarded to the prevailing party. The FDCPA is no exception.

An argument could be made that FDCPA § 1692k(a)(3) is a federal statute providing otherwise—it provides for an award of costs only where an FDCPA action is brought in bad faith and for purposes of harassment. But the Supreme Court in *Marx v. General Revue Corp.*,[517] ruled to the contrary

for sanctions was not made until after judgment; because suit did not lack factual basis, court did not have to address argument that suit was brought for improper purpose); Muhammad v. Reese Law Grp., 2017 WL 2578915 (S.D. Cal. June 14, 2017) (denying the collection law firm's motion for Rule 11 sanctions where the consumer's FDCPA claims were not objectively baseless and where her counsel conducted a reasonable inquiry before signing the complaint); Infante v. Portfolio Recovery Assoc., L.L.C., 2017 WL 2445133 (N.D. Ill. June 6, 2017) ("As a general matter, Rule 11 and § 1927 do not require litigants and counsel to abandon pursuit of claims in the face of contrary evidence.").

504 *See, e.g.*, Tacoronte v. Cohen, 654 Fed. Appx. 445 (11th Cir. 2016); Diaz v. First Marblehead Corp., 643 Fed. Appx. 916, 922 (11th Cir. 2016); Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999); Oganyan v. Square Two Fin., 2012 WL 4466607 (C.D. Cal. Sept. 26, 2012); Ford v. Principal Recovery Grp., Inc., 2011 WL 4549200 (W.D.N.Y. Sept. 29, 2011); Schaffhauser v. Citibank, 2007 WL 3342788 (M.D. Pa. Nov. 8, 2007); Grimard v. Palmer, Reifler & Assoc., P.A., 2007 WL 2221396 (E.D. Mich. July 31, 2007); Wilkinson v. Wells Fargo Bank MN, 2007 WL 1655222 (E.D. Wis. June 6, 2007), *aff'd*, 268 Fed. Appx. 476 (7th Cir. 2008); Jones v. Fisher Law Grp., P.L.L.C., 334 F. Supp. 2d 847 (D. Md. 2004).

505 Riddle & Assoc., P.C. v. Kelly, 414 F.3d 832 (7th Cir. 2005).

506 De Dios v. Int'l Realty & Invs., 641 F.3d 1071, 1076–1077 (9th Cir. 2011).

507 Blowers v. Lerner, 2016 WL 4575315 (E.D. Va. Aug. 31, 2016), *modified*, 2017 WL 4080990 (E.D. Va. Sept. 14, 2017).

508 Conner v. BCC Fin. Mgmt. Serv., Inc., 597 F. Supp. 2d 1299 (S.D. Fla. 2008).

509 Wiley v. Notte & Kreyling, P.C., 2019 WL 8587293, at *3 (N.D. Ga. May 10, 2019) (disagreement with binding precedent was not valid basis for filing second lawsuit that was substantially similar to the one previously dismissed, and counsel's conduct was "objectively in bad faith, as well as vexatious").

510 Alcivar v. Enhanced Recovery Co., 2020 WL 2559845 (E.D.N.Y. May 20, 2020).

511 Pescatrice v. Nat'l Action Fin. Serv., Inc., 2007 WL 9611055 (S.D. Fla. May 8, 2007). *See also* Lacayo v. Wells Fargo Bank, 2020 WL 2488377 (S.D. Fla. Apr. 13, 2020) (denied defendants' request for attorney fees under § 1692k(a)(3) since there was no proof that the consumers knew the action was meritless, but awarded fees under 28 U.S.C. § 1927 where consumers' attorney's conduct was deemed unreasonable and vexatious).

512 See Duranseau v. Portfolio Recovery Assoc., 644 Fed. Appx. 702, 707 (8th Cir. 2016); Anderson v. Asset Acceptance, L.L.C., 2010 WL 1752609 (N.D. Cal. Apr. 29, 2010).

513 *See* Duranseau v. Portfolio Recovery Assoc., 644 Fed. Appx. 702, 707 (8th Cir. 2016). See also Infante v. Portfolio Recovery Assoc., 2017 WL 2445133 (N.D. Ill. June 6, 2017); Stewart v. Chambless, 2016 WL 3583811 (M.D. Ala. June 30, 2016); Smyth v. Merchants Credit Corp., 2014 WL 12707240, at *2 (W.D. Wash. May 14, 2014); Montero-Hernandez v. Palisades Collection, L.L.C., 2014 WL 505119 (M.D. Fla. Feb. 7, 2014); Anderson v. Asset Acceptance, L.L.C., 2010 WL 1752609 (N.D. Cal. Apr. 29, 2010).

514 *See* Mellon v. Monarch Recovery Mgmt., Inc., 2017 WL 4776738 (E.D.N.Y. Oct. 17, 2017). *See also* Carner v. MGC Mortg., Inc., 2020 WL 7481170 (S.D. Fla. May 13, 2020), *adopting* 2020 WL 7481269 (S.D. Fla. Feb. 23, 2020).

515 *See* Appx. E.3.6.4, *infra*.

516 *See* Montero-Hernandez v. Palisades Collection, L.L.C., 2014 WL 505119 (M.D. Fla. Feb. 7, 2014).

517 568 U.S. 371, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013).

that FDCPA § 1692k(a)(3) was not a federal statute providing otherwise.

The Court in *Marx* also clarified that the award of costs to the prevailing party is not mandatory and that the court has discretion as to the award of costs, for example in a situation where the consumer is indigent.[518] A defendant has not prevailed and is not entitled to costs where the consumer voluntarily dismisses the suit.[519]

12.10.5 Other Sources of Fee Awards for the Collector's Attorney

Courts may seek to award sanctions under their inherent authority or through a civil contempt order.[520]

One court required that such sanctions must involve bad faith, which requirement may not be met even "in instances where a litigant's arguments are characterized as frivolous, outrageous, inexcusable, or even when the litigant's behavior is appalling."[521]

The federal removal statute provides "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."[522] If a collector sues the consumer in state court and the consumer removes the case to federal court (such as incorrectly assuming an FDCPA counterclaim provides federal jurisdiction), the consumer may owe the defendant's attorney fees to remand the case to state court.[523]

A litigious collector may try other theories to recover attorney fees from a FDCPA plaintiff, such as a counterclaim or separate action for abuse of process or malicious prosecution,[524] or even for libel.[525]

518 568 U.S. 371, 386 n.9, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013). *See also* Tallman v. Freedman Anselmo Lindberg L.L.C., 2013 WL 4041412 (C.D. Ill. Aug. 7, 2013) (no award of costs to defendant where consumer incapable of paying court-imposed costs). *But see* Raya v. NPAS, Inc., 2020 WL 3550002 (E.D. Va. May. 11, 2020) (court declined to award prevailing defendant attorney fees pursuant to § 1692k(a)(3), but did award costs of $2,910.47 despite plaintiff's claim of indigency).

519 *See* Montgomery v. Sessoms & Rogers, P.A., 2013 WL 593949 (E.D.N.C. Feb. 15, 2013).

520 *See* Ozmun v. Portfolio Recovery Assoc., 2018 WL 912286 (W.D. Tex. Feb. 15, 2018) (contempt sanction where consumer violated amended scheduling order by failing to extend settlement offer and to designate witnesses, experts, and exhibits by extended deadline).

521 *See* Fields v. Credit Mgmt. Sys., 2016 WL 9088755 (C.D. Cal. Apr. 20, 2016).

522 28 U.S.C. § 1447(c).

523 U.S. Bank v. Butler, 2011 WL 13234968, at *2 (E.D.N.C. Aug. 26, 2011).

524 *Compare* Ziobron v. Crawford, 667 N.E.2d 202 (Ind. Ct. App. 1996) (malicious prosecution claim could proceed); Egan v. Williams, 709 A.2d 1057 (R.I. 1998) (abuse of process counterclaim against consumer could proceed, but not against the consumer's attorneys), *with* Emanuel v. Am. Credit Exch., 870 F.2d 805 (2d Cir. 1989) (malicious prosecution counterclaim by a collector in FDCPA action cannot succeed if FDCPA claim was successful), Traverso v. Sharinn, 1989 U.S. Dist. LEXIS 19095 (D. Conn. Apr. 9, 1989) (dismissing as premature in FDCPA suit a counterclaim for malicious prosecution), *and In re* Germain, 249 B.R. 47 (Bankr. W.D.N.Y. 2000) (malicious prosecution claim not allowed).

525 *See* Conner v. Instant Cash Advance, 2003 WL 446378 (S.D. Ind. Feb. 20, 2003) (dismissing counterclaim for libel for failure to state cause of action).

Chapter 13 Bankruptcy and Affirmative Claims Arising from Debt Collection

13.1 Introduction

13.1.1 Effect of Bankruptcy on Debt Collection Claims

Claims against debt collectors and consumer bankruptcy filings often go hand-in-hand. Consumers who have filed or are considering filing for bankruptcy have frequently suffered from abusive debt collection practices. Virtually all bankruptcy debtors have received dunning letters and phone calls from debt collection agencies and collection lawyers, and many of these communications violate the Fair Debt Collection Practices Act and state debt collection laws. Potential bankruptcy clients should be asked to identify and bring in all collection letters that they have received and to describe the date and contents of telephone calls received from debt collectors.

If a consumer has potential claims against debt collectors but nevertheless files for bankruptcy, it is important to understand how bankruptcy will affect those claims.[1] This impact varies, depending upon whether the debt collection claims arose before, during, or after the bankruptcy case was filed, and on whether the bankruptcy case proceeded under chapter 7 or chapter 13. A bankruptcy will also have an effect on who can bring the claims against the debt collector and the procedure for recovery of the consumer's attorney fee. A bankruptcy filing also provides options to litigate the debt collection claim in the bankruptcy court.

In addition, debt collection claims can arise out of or in conjunction with a bankruptcy case. Courts are divided over whether the Bankruptcy Code provides the only remedy for such claims, or whether debtors may also seek remedies under state and federal fair debt collection laws.

13.1.2 Organization of This Chapter

An understanding of the interrelation of a consumer bankruptcy and debt collection claims requires an understanding of certain key bankruptcy features, including the automatic stay, the property of the estate, exemptions, and the bankruptcy discharge. For those less familiar with these concepts, § 13.2, *infra*, provides bankruptcy basics: an overview of chapters 7 and 13 bankruptcies, how they differ, and their advantages and disadvantages, and then covers in more detail the key concepts of the automatic stay, property of the estate, exemptions, and the discharge.

More detail on these topics and a complete discussion of the bankruptcy process can be found in *Consumer Bankruptcy Law and Practice*.[2] That treatise is recommended for those considering using bankruptcy to assist their clients. In addition, *NCLC's Guide to Surviving Debt*[3] offers an overview of when to file for bankruptcy and the advantages and disadvantages of such a filing.

Section 13.3, *infra*, considers the impact of a bankruptcy filing on a consumer bringing a debt collection claim during or after the bankruptcy, where the debt collection claim arose before the bankruptcy filing. Topics of particular importance are the impact of not disclosing the debt collection claim on the bankruptcy schedules, and standing and judicial estoppel problems where the claim has not been scheduled. Section 13.4, *infra*, then examines the impact of a bankruptcy filing where the debt collection claim arose during or after the bankruptcy case.

Section 13.5, *infra*, covers the litigation of debt collection claims in the bankruptcy proceeding. Section 13.6, *infra*, considers the payment of the consumer's attorney fees where the consumer has filed bankruptcy.

Section 13.7, *infra*, examines federal and state debt collection claims that relate to the debt collector's actions during and after the bankruptcy case. Do the FDCPA and state laws apply where the Bankruptcy Code provides remedies for the same conduct? A 2017 Supreme Court case addressed issues that arise when debt collection claims relate to a debt collector's actions in filing a bankruptcy proof of claim, and this topic is treated in depth in § 13.7.3, *infra*.

13.2 Bankruptcy Basics

13.2.1 Chapter 7 Overview

A bankruptcy case filed under chapter 7 is often called a "liquidation." In a chapter 7 case, the debtor's assets are examined by a court-appointed trustee to determine if anything is available to be sold or recovered for the benefit of creditors. Certain property cannot be liquidated by the trustee because it is exempt.[4] In most consumer cases, virtually all of the debtor's assets are exempt.

To be eligible to file a chapter 7 bankruptcy, a debtor, with limited exception, must receive budget and credit counseling within the 180 days before the bankruptcy case is filed.[5] To

1 *See* § 13.3, *infra*.

2 National Consumer Law Center, Consumer Bankruptcy Law and Practice (12th ed. 2020), *updated at* www.nclc.org/library.

3 National Consumer Law Center, Surviving Debt Ch. 24 (2019 ed.), *updated at* www.nclc.org/library.

4 *See* § 13.2.5, *infra*; National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 10 (12th ed. 2020), *updated at* www.nclc.org/library.

5 11 U.S.C. § 109(h). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 3.2.1.5 (12th ed. 2020), *updated at* www.nclc.org/library.

receive a discharge, the debtor must complete a financial education course.[6] Both sessions can be completed online or over the phone with little difficulty.

Debtors whose debts are primarily consumer debts and whose income is above the median family income for family size for their state of residence are subject to the "means test" in section 707(b) of the Bankruptcy Code.[7] This test was intended to make it more difficult for wealthy consumers to file a chapter 7 bankruptcy. After the application of the means test, debtors whose disposable income exceeds a certain threshold may have their cases dismissed as abusive, or they may have to convert to a chapter 13 bankruptcy.

Creditors may ask debtors in bankruptcy to reaffirm a debt.[8] A reaffirmation is an agreement by which the debtor agrees to remain legally obligated on some or all of a debt to a creditor that would otherwise be discharged.[9] Debt collectors have been known to use a variety of coercive levers to lure debtors into giving up the protections of their bankruptcy discharge by making new and binding promises to pay debts that have been discharged. Although the Code does not completely bar reaffirmation of discharged debts, it does restrict them, on the theory that it is rarely a wise step for a debtor.

Reaffirmation agreements must meet the specific requirements set forth in 11 U.S.C. § 524 to be enforceable.[10] Reaffirmation agreements are most common for debts that are secured by property that the debtor wishes to keep.[11] Generally, it is never a good idea for a debtor to reaffirm a credit card debt or other unsecured debt. Careful consideration should also be given to reaffirming store credit cards that purport to be secured. In many instances, a detailed letter of inquiry asking for proof of the security interest will reveal that the creditor does not, in fact, have a valid security interest.

At the conclusion of a chapter 7 case eligible debtors will receive a "discharge" from their debts, except for certain debts that are excluded from discharge.[12] In most cases, a debtor will receive a discharge in a chapter 7 case within approximately four months of the filing of the petition. A discharge may not be available if the debtor has received a discharge in a previous bankruptcy case within certain time periods set forth in the Code.[13]

13.2.2 Chapter 13 Overview

A case filed under chapter 13 is often called a "reorganization" because it provides for the "adjustment of debts." Unlike chapter 7, chapter 13 gives debtors the opportunity to adjust their financial affairs without having to liquidate their non-exempt assets.[14] In a chapter 13 case, the debtor submits a plan to repay creditors all or part of the money owed to them over a three to five year period.[15] If the proposed plan meets the requirements set out in the Bankruptcy Code, it must be confirmed by the bankruptcy court.[16] The effect of confirmation is to bind the debtor and all creditors of the debtor to the terms of the plan.[17] After confirmation, creditors taking actions inconsistent with the plan may be subject to contempt proceedings.[18] The plan is usually funded from the debtor's future income. The debtor makes payments in the amount specified by the plan to the chapter 13 trustee, who in turn, distributes the funds to creditors in accordance with the plan and applicable Code provisions.

To be eligible to file a chapter 13 case, debtors must satisfy the same credit counseling requirements as chapter 7 debtors.[19] In addition, chapter 13 debtors (or debtors and their spouses) must have regular income[20] and have unsecured and secured debts below certain thresholds set forth in the Code.[21]

Upon successful completion of the plan and a financial management course,[22] the debtors receive a discharge from their debts, except for certain debts that are excluded from discharge.[23] In some cases, a chapter 13 debtor may be eligible

6 11 U.S.C. § 727(a)(11). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 8.3.3 (12th ed. 2020), *updated at* www.nclc.org/library.

7 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 13.4 (12th ed. 2020), *updated at* www.nclc.org/library.

8 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.2 (12th ed. 2020), *updated at* www.nclc.org/library.

9 11 U.S.C. § 524(k).

10 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.2 (12th ed. 2020), *updated at* www.nclc.org/library.

11 For more detail on dealing with secured creditors, see National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 11 (12th ed. 2020), *updated at* www.nclc.org/library. For a discussion of reaffirmation agreements, see National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.2 (12th ed. 2020), *updated at* www.nclc.org/library.

12 *See* § 13.2.6, *infra*; National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.4 (12th ed. 2020), *updated at* www.nclc.org/library (discussing non-dischargeable debts).

13 *See* § 13.2.6, *infra*; National Consumer Law Center, Consumer Bankruptcy Law and Practice §§ 15.2.2.8, 15.2.2.9 (12th ed. 2020), *updated at* www.nclc.org/library.

14 For a more complete discussion of chapter 13, see National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 12 (12th ed. 2020), *updated at* www.nclc.org/library.

15 11 U.S.C. § 1321.

16 11 U.S.C. §§ 1322, 1325. *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 12 (12th ed. 2020), *updated at* www.nclc.org/library.

17 11 U.S.C. § 1327(a). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.11 (12th ed. 2020), *updated at* www.nclc.org/library.

18 *See* 11 U.S.C. § 105 (permitting the bankruptcy court to do what is necessary to carry out the provisions of the Code).

19 11 U.S.C. § 109(h). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 3.2.1.5 (12th ed. 2020), *updated at* www.nclc.org/library.

20 11 U.S.C. § 109(e). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.2.2 (12th ed. 2020), *updated at* www.nclc.org/library.

21 11 U.S.C. § 109(e). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.2.3 (12th ed. 2020), *updated at* www.nclc.org/library.

22 11 U.S.C. § 1328(g). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 8.3.3 (12th ed. 2020), *updated at* www.nclc.org/library.

23 11 U.S.C. § 1328. *See* § 13.2.6, *infra*; National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.4 (12th ed. 2020), *updated at* www.nclc.org/library.

for a hardship discharge even if the plan is not completed.[24] A discharge may not be available if the debtor has received a discharge in a previous bankruptcy case within certain time periods set forth in the Code.[25]

13.2.3 Choosing to File and Choosing a Chapter

Before a bankruptcy case can be filed, it is necessary that a decision be made that bankruptcy is, in fact, the best vehicle for dealing with the problems facing a particular client. Most of the legal analysis that occurs in a typical consumer bankruptcy case involves comparing bankruptcy with other possible avenues of relief. In some cases, a client's objectives will be fully satisfied by alternatives such as a letter from an attorney asking the debt collector to cease collection contacts[26] or an affirmative suit for abusive debt collection.

In deciding whether to file for relief, a debtor will need to weigh the advantages and disadvantages of bankruptcy. The primary advantages of bankruptcy can be summarized as: the discharge of most debts, the protection of property and income from unsecured creditors, the automatic stay, and tools for eliminating or modifying secured debts.[27] Bankruptcy may also provide a more advantageous litigation forum.[28] The disadvantages of bankruptcy, or reasons not to file, might include: the loss of non-exempt property, the effect on credit history and reputation, possible discrimination after bankruptcy, and the client's personal feelings about not paying their debts.[29] Additionally, opting not to file a bankruptcy will preserve the right to obtain relief in years to come.[30] Clients that are judgment-proof or otherwise not in danger of sustaining any tangible loss may consider waiting to file. On the other hand, the peace of mind that comes from having the burden of debt lifted may justify filing sooner rather than later.

Bound up with the decision to file a bankruptcy case is the question of which type of bankruptcy offers the greatest benefit to the client.[31] For many consumer debtors, chapter 7 offers the quickest and most complete relief. Chapter 7 will be attractive to consumers that have little or no non-exempt property that needs to be protected in a chapter 13. Chapter 7 may also be the better choice for consumers that have little excess income, beyond that necessary for living expenses, with which to pay unsecured creditors through a chapter 13 plan.

The most common reason for filing a chapter 13 is the presence of one or more secured creditors who cannot be satisfactorily handled in any other way.[32] One frequent example is the bank or finance company that is about to repossess a car or foreclose on a home. The automatic stay will generally stop the repossession or foreclosure, and chapter 13 offers debtors a number of ways to deal with secured creditors that are not available to chapter 7 debtors.[33] For example, chapter 13 debtors may be able to lower monthly payments on secured debts or cure long-term loans over a three-to-five year period. Debtors that wish to protect non-exempt assets are likely to find chapter 13 the better choice. Chapter 13 also might be favored because it offers a slightly broader discharge than chapter 7. Individuals are barred from obtaining chapter 7 relief if, within a certain number of years in the past, they received a discharge in another bankruptcy. The time frames depend on the type of prior bankruptcy. Chapter 13 may be an option for a debtor who cannot file a chapter 7 case due to the time limits on repeat filings.[34]

Another factor to consider before filing is the timing of the filing.[35] Of course, in some cases, such as when repossession or foreclosure is threatened, prompt filing may be necessary. In other cases, such as where the debtor has recently transferred property, delay may be more advisable. Issues related to exemptions and the dischargeability of certain debts may also depend on the timing of the bankruptcy filing.

13.2.4 The Automatic Stay

The automatic stay is a fundamental cornerstone of the bankruptcy system.[36] In most cases,[37] it is triggered instantly

24 11 U.S.C. § 1328(b). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 6.2.1 (12th ed. 2020), *updated at* www.nclc.org/library.

25 11 U.S.C. § 1328(f). *See* § 13.2.6, *infra*; National Consumer Law Center, Consumer Bankruptcy Law and Practice §§ 15.2.2.8, 15.2.2.9 (12th ed. 2020), *updated at* www.nclc.org/library.

26 *See* § 5.10, *supra*.

27 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 6.2.1 (12th ed. 2020), *updated at* www.nclc.org/library.

28 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 15 (12th ed. 2020), *updated at* www.nclc.org/library.

29 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 6.2.2 (12th ed. 2020), *updated at* www.nclc.org/library.

30 *See* § 13.2.6, *infra* (discussing of the bar to discharge in later cases); National Consumer Law Center, Consumer Bankruptcy Law and Practice §§ 15.2.2.8, 15.2.2.9 (12th ed. 2020), *updated at* www.nclc.org/library.

31 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 6.3.2 (12th ed. 2020), *updated at* www.nclc.org/library.

32 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 6.3.3 (12th ed. 2020), *updated at* www.nclc.org/library.

33 For more detail on dealing with secured creditors, see National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 11 (12th ed. 2020), *updated at* www.nclc.org/library.

34 *See* § 13.2.6, *infra* (discussion of time limits on repeat bankruptcy filings).

35 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 6.5 (12th ed. 2020), *updated at* www.nclc.org/library.

36 11 U.S.C. § 362(a). *See* H.R. Rep No. 95-595, at 340 (1977) ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment plan or reorganization, or simply to be relieved of the financial pressures caused by overextension of credit.").

37 Several exceptions to this general rule were added to the Bankruptcy Code in 2005. For debtors who have had one or more cases dismissed in the year preceding their current filing the duration of the stay may be limited or the stay may not come into effect upon filing the case. *See* 11 U.S.C. §§ 362(c)(3), 362(c)(4); National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.3.3 (12th ed. 2020), *updated at* www.nclc.org/library.

upon the filing of a bankruptcy petition.[38] The main purpose of the automatic stay is to protect the debtor[39] and the debtor's property and to allow the bankruptcy court to deal with the debtor's situation in an orderly manner. With few exceptions,[40] the automatic stay stops creditors from taking any action to collect on a prepetition claim against the debtor,[41] from pursuing or continuing a civil legal action against the debtor,[42] and from exercising control over property of the estate.[43] Courts generally construe the automatic stay prohibitions broadly.[44] In some cases, the creditor may be required to take affirmative action to prevent a violation of the stay.[45] For example, counsel bringing a collection lawsuit against the debtor has a duty to take action to halt the non-bankruptcy court proceedings.[46] Actions taken in violation of the stay, regardless of whether a creditor has notice, are void.[47]

The duration of the automatic stay varies, but in consumer bankruptcy cases, the stay commonly lasts for the duration of the case, three to six months in chapter 7 cases and up to five years in chapter 13 cases.[48] The duration of the stay also depends to some extent on the nature of the action to be stayed. Technically, if no prior case was dismissed in the year prior to filing, the stay continues until the following dates. To the extent the stay is based upon provisions barring an act against property of the estate, the stay continues until the property is no longer property of the estate or until the court order terminating the stay becomes effective, whichever is sooner. To the extent the stay is against any other act, the stay continues until the earliest of the following: the case is closed, the case is dismissed, a discharge is granted or denied, or a court order terminating the stay becomes effective.

Section 362(k)[49] of the Code provides a private right of action for anyone injured by a willful violation of the automatic stay. A willful violation is one committed knowingly; no malice need be shown.[50] To be liable under section 362(k), the creditor must also have notice of the stay.[51] Creditors are notified officially of the automatic stay in the notice of the meeting of creditors sent out by the court. However, this notice usually is not mailed until several weeks after the petition is filed. Therefore, debtor's counsel may give additional notice of the stay to creditors and others who might violate the stay without prompt, clear notice. While formal written notice is not required for a creditor to be subject to the stay, the better practice is to send notice by certified mail, return receipt requested, immediately after the petition is filed. If time is a critical factor, a telephone call, email, or facsimile preceding the mailed notification may be appropriate.[52]

Unlike the FDCPA, there is no bona fide error defense for an automatic stay violation.[53] As a result, courts have routinely rejected creditors' attempts to blame automatic stay violations on computer glitches.[54] Creditors, especially those regularly

38 11 U.S.C. § 362(a).

39 In chapter 13, a codebtor stay prohibits any act or civil legal action to collect all or part of a consumer debt of the debtor from any codebtor. 11 U.S.C. § 1301. *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.4.5 (12th ed. 2020), *updated at* www.nclc.org/library.

40 Section 362(b) contains a list of exceptions to the automatic stay. Most significant to consumer are the exceptions relating to criminal proceedings, certain family law proceedings, and residential tenant evictions. *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.4.6 (12th ed. 2020), *updated at* www.nclc.org/library.

41 11 U.S.C. § 362(a)(6). *See, e.g., In re* Grisham, 2013 WL 427935 (Bankr. D. Haw. Feb. 4, 2013) (condominium association's shutting off utilities was prohibited attempt to collect debt). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.4.4 (12th ed. 2020), *updated at* www.nclc.org/library.

42 11 U.S.C. § 362(a)(1). *But see In re* Sori, 513 B.R. 728, 733–734 (Bankr. N.D. Ill. 2014) (summarizing split in case law interpreting scope of stay exception applicable to criminal proceedings related to prepetition debt). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.4.2 (12th ed. 2020), *updated at* www.nclc.org/library.

43 11 U.S.C. § 362(a)(3). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.4.3 (12th ed. 2020), *updated at* www.nclc.org/library. For a description of property of the estate, see § 13.2.5, *infra*.

44 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.4 (12th ed. 2020), *updated at* www.nclc.org/library.

45 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.4 (12th ed. 2020), *updated at* www.nclc.org/library. *See, e.g.*, Cross v. City of Chicago, 584 B.R. 833 (Bankr. N.D. Ill. 2018) (city required to return vehicle seized for nonpayment of tickets in violation of stay).

46 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.4.2 (12th ed. 2020), *updated at* www.nclc.org/library. *See, e.g., In re* Swindle, 584 B.R. 259 (Bankr. N.D. Ill. 2018) (attorney for condominium association had duty to ensure that order for possession was not enforced postpetition).

47 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.6.1 (12th ed. 2020), *updated at* www.nclc.org/library.

48 11 U.S.C. §§ 362(c) to 362(e). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.3.2 (12th ed. 2020), *updated at* www.nclc.org/library.

49 11 U.S.C. § 362(k) (formerly § 362(h)).

50 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.6.2 (12th ed. 2020), *updated at* www.nclc.org/library.

51 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.5 (12th ed. 2020), *updated at* www.nclc.org/library.

Section 342(g)(2) provides that a "monetary penalty" may not be imposed on a creditor under section 362(k) for violation of the stay if the creditor has not received "effective notice" of the order for relief as defined in section 362(g)(1). This provision, when it applies, precludes only the recovery of punitive damages—a monetary penalty—under section 362(k)(1). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.6 (12th ed. 2020), *updated at* www.nclc.org/library.

52 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.5 (12th ed. 2020), *updated at* www.nclc.org/library.

53 *See In re* Wingard, 382 B.R. 892 (Bankr. W.D. Pa. 2008).

54 *In re* Campion, 294 B.R. 313 (B.A.P. 9th Cir. 2003) (failure of debt collector to match debtor's name with name in its database did not render violation non-willful); *In re* Rijos, 263 B.R. 382 (B.A.P. 1st Cir. 2001) (creditor's "computer did it" defense allegedly caused by installation of new software system rejected); *In re* Hill, 523 B.R. 704, 714 (Bankr. D. Mont. 2014) (creditor has affirmative duty to adjust computer system to comply with stay; debt collector violated stay when did not have adequate procedures in effect to prevent negative credit reporting of debt after bankruptcy petition filed); *In re* Wingard, 382 B.R. 892 (Bankr. E.D. Pa. 2008) (computer error defense cannot excuse stay violation that resulted from creditor's losing notice of bankruptcy filing); *In re* Andrus, 2004 WL 2216493 (Bankr. D. Idaho Sept. 23, 2004) (computer error defense by lender rejected); *In re* McCormack, 203 B.R. 521 (Bankr. D.N.H. 1996) (computer error defense called a "non-starter").

involved with bankruptcy cases, have a duty of establish procedures that ensure compliance with the stay.[55]

Where a creditor has violated the automatic stay, Bankruptcy Code section 362(k) provides for actual damages, costs, and attorney fees, and, if appropriate, punitive damages.[56] The Bankruptcy Code mandates that the court determine actual damages upon a finding of willful violation of the automatic stay.[57] A creditor's good faith belief that it was entitled to take the action that violated the stay is generally not a defense.[58] The only exception is for creditors who act in a good faith belief that Bankruptcy Code section 362(k)(2) applies to the debtor, in which case the recovery against the creditor is limited to actual damages.[59] Most courts hold that emotional distress damages are compensable as actual damages under section 362(k).[60] If the court finds a willful violation of the stay, the debtor is entitled to reasonable attorney fees and costs required to remedy the violation and prosecute an action for damages.[61] Section 362(k) expressly authorizes the award of

55 *In re* Govero, 439 B.R. 917 (Bankr. S.D. Fla. 2010) (creditors cannot avoid liability for willful violation of the stay because they failed to properly keep records of bankruptcy notices); *In re* Perviz, 302 B.R. 357 (Bankr. N.D. Ohio 2003) (creditor must ensure that bankruptcy notices sent to an internally improper, but otherwise valid, corporate address are forwarded in a prompt and timely manner to the correct person/department); *In re* Stucka, 77 B.R. 777 (Bankr. C.D. Cal.1987) (failure to adopt procedures to prevent stay violations rendered violations "willful" and "wanton").

56 11 U.S.C. § 362(k). *See* Houck v. Substitute Trustee Serv., Inc., 791 F.3d 473 (4th Cir. 2015) (U.S. district courts as well as bankruptcy courts have subject matter jurisdiction over § 362(k) claims); *In re* Stanwyck, 450 B.R. 181 (Bankr. C.D. Cal. 2011) (right to bring action for damages for stay violation survives closing of bankruptcy case and there is no statute of limitations applicable to action); National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.6.2 (12th ed. 2020), *updated at* www.nclc.org/library.

57 *In re* Vazquez Laboy, 647 F.3d 367, 375–376 (1st Cir. 2011).

58 Internal Revenue Service v. Murphy, 892 F.3d 29, 37–38 (1st Cir. 2018) (willful violation of stay occurs when defendant knew of automatic stay and took intentional action that violated stay); *In re* Chesnut, 422 F.3d 298 (5th Cir. 2005) (creditor's belief that property it unilaterally seized was not part of bankruptcy estate is irrelevant to determination of willfulness); *In re* Atl. Bus. & Cmty. Corp., 901 F.2d 325 (3d Cir. 1990) (creditor landlord acted deliberately in denying debtor access to premises; good faith defense rejected); *In re* Ozenne; 337 B.R. 214 (B.A.P. 9th Cir. 2006) (uncertainty about legal status of property under state law does not affect award of compensatory damages for willful stay violation).

59 11 U.S.C. § 362(k)(2) creates a narrow exception for certain creditor actions that may be triggered by the chapter 7 debtor's non-compliance with the "Statement of Intention" provisions for scheduled debts secured by property of the bankruptcy estate, 11 U.S.C. § 521(a)(2). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 11.4 (12th ed. 2020), *updated at* www.nclc.org/library.

60 *In re* Lansaw, 853 F.3d 657, 669 (3d Cir. 2017) (emotional distress damages recoverable for violation of stay and in appropriate cases no corroborating medical evidence necessary); Lodge v. Kondaur Capital Corp., 750 F.3d 1263 (11th Cir. 2014) (emotional distress damages fall within term "actual damages" in § 362(k), although debtor failed to make adequate showing for recovery in this case); *In re* Repine, 536 F.3d 512 (5th Cir. 2008) (emotional distress damages are available when supported by specific information, but not based on general assertion of emotional harm); Dawson v. Washington Mut. Bank, 390 F.3d 1139, 1148 (9th Cir. 2004) ("'actual damages' that may be recovered by an individual who is injured by a willful violation of the automatic stay include damages for emotional distress"); Fleet Mortg. Grp., Inc. v. Kaneb, 196 F.3d 265 (1st Cir. 1999) (affirming $25,000 assessment of damages for emotional anguish related to creditor's delay in dismissing foreclosure action after bankruptcy petition filed); Sundquist v. Bank of Am. (*In re* Sundquist), 566 B.R. 563 (Bankr. E.D. Cal. 2017) (awarding debtors over one million dollars in actual damages, including $300,000 for emotional harm, for mortgage servicer's foreclosure in violation of stay), *later decision vacating judgment based on parties' settlement*, 580 B.R. 536 (Bankr. E.D. Cal. 2018); *In re* Burns, 503 B.R. 666, 674 (S.D. Miss. 2013) (uncorroborated testimony from debtor may be "particularized and extensive enough" to meet specificity requirement for proof of emotional harm from stay violation); Green Tree Servicing, L.L.C. v. Taylor, 369 B.R. 282 (S.D. W. Va. 2007) (approving award of $5000 emotional distress damages against creditor who visited debtors' home for debt collection purposes on two occasions after bankruptcy petition filed); *In re* Flynn, 185 B.R. 89 (S.D. Ga. 1995) (expert medical testimony not necessary to establish damages for emotional harm resulting from IRS's stay violation); *In re* Hill, 523 B.R. 704 (Bankr. D. Mont. 2014) (even if violation of the stay is not egregious, debtor may recover emotional distress damages that arose from stay violation, and debtor may establish emotional distress damages without corroborating evidence if circumstances make it obvious that a reasonable person would have suffered significant emotional harm); *In re* Juliano, 2012 WL 760312 (Bankr. N.D.N.Y. Mar. 2, 2012) (assessing emotional distress damages against bank that continued preauthorized withdrawals from bank account after petition filing); *In re* Coleman, 2011 WL 5025499 (Bankr. D.S.C. Oct. 20, 2011) (awarding emotional distress and punitive damages against payday lender for harassing debt collection activities in violation of stay; medical evidence not presented); *In re* Swilling, 2008 WL 4999090 (Bankr. M.D. Ala. Nov. 20, 2008) (awarding $5000 emotional distress damages and $10,000 punitive damages against creditor who refused to turn over debtor's Social Security funds diverted into account controlled by creditor); *In re* Caffey, 384 B.R. 297 (Bankr. S.D. Ala. 2008) ($5000 emotional distress damages awarded in addition to other compensatory and punitive damages after debtor incarcerated postpetition in creditor's attempt to collect child support from estate property), *aff'd*, 384 Fed. Appx. 882 (11th Cir. 2010); *In re* Caldwell, 2006 WL 3541931 (Bankr. D. Or. Dec. 7, 2006) ($50,000 emotional distress award for debtor arrested on outstanding prepetition warrant for non-appearance at debtor's examination hearing; creditor liable for failing to rescind warrant); *In re* Curtis, 322 B.R. 470 (Bankr. D. Mass. 2005) ($15,000 damages for emotional distress for violations of automatic stay, post-discharge injunction, and FDCPA by communicating directly with debtor regarding debt with knowledge that debtor was represented by counsel and by misrepresenting status of the debt in its demands for payment of discharged second mortgage); *In re* Covington, 256 B.R. 463 (Bankr. D.S.C. 2000) (emotional distress damages awarded without need for medical testimony). *But see* Aiello v. Providian Fin. Corp., 239 F.3d 876, 881 (7th Cir. 2001) (financial loss, not emotional harm, constitutes "actual damages"; however, court noted that "under the 'clean-up doctrine' of equity, emotional distress might be compensable if there was a 'financial loss to hitch it to'"); United States v. Harchar, 331 B.R. 720 (Bankr. N.D. Ohio 2005) ("it is clear that Congress did not intend to authorize the award of emotional damages under § 362(h)").

61 *In re* Horne, 876 F.3d 1076 (11th Cir. 2017) (attorney fees must be awarded in connection with obtaining damages judgment for violation of stay and defending judgment on appeal); *In re* Schwartz-Tallard, 803 F.3d 1095, 1099 (9th Cir. 2015) (*en banc*; overruling prior Ninth Circuit decision that limited attorney fees recovery under § 362(k) to fees incurred in remedying stay violation); *In re* Johnson, 580 B.R. 766 (S.D. Ohio 2018) (awarding $422,373 in attorney fees and $100,000 in punitive damages in § 362(k) action; noting defendant's combative litigation tactics in justifying fees award); *In re* Voll, 512 B.R.

punitive damages.[62] Courts have used a variety of standards to determine appropriate punitive damage awards.[63] Significant punitive damage awards play an important role in deterring future misconduct by large and sophisticated creditors who would otherwise feel little incentive to develop effective procedures to protect the rights of bankruptcy debtors.[64]

132, 141 (Bankr. N.D.N.Y. 2014) (in § 362(k) proceeding, debtor may recover attorney fees and costs even where debtor did not suffer any form of compensable harm); *In re* Cousins, 404 B.R. 281 (Bankr. S.D. Ohio Apr. 28, 2009) (need to incur attorney fees alone can be basis for damages to support claim under § 362(k)); *In re* Will, 303 B.R. 357 (Bankr. N.D. Ill. 2003) (attorney fees recoverable when incurred to remedy continuing infraction that was initially only technical violation of stay); *In re* Gagliardi 290 B.R. 808 (Bankr. D. Colo. 2003); *In re* Robinson, 228 B.R. 75, 85 (Bankr. E.D.N.Y. 1998). *See In re* Lopez, 405 B.R. 24 (B.A.P. 1st Cir. 2009) (reversing bankruptcy court's reduction of attorney fees award by two-thirds of lodestar amount ($27,926) due to relatively low compensatory damages award ($2500); disparity between award for compensatory damages and attorney fees claim not basis for reduction in attorney fees award under § 362(k)); *In re* Johnson, ___ B.R. ___, 2019 WL 2122732 (Bankr. E.D. Pa. May 14, 2019) (in order to recover fees under § 362(k) counsel providing services pro bono need not have actually billed client for fees).

62 *See, e.g., In re* Johnson, ___ B.R. ___, 2019 WL 2122732, at *12 n.37 (Bankr. E.D. Pa. May 14, 2019) (collecting decisions awarding punitive damages under § 362(k)); *In re* Stringer, 586 B.R. 435 (Bankr. S.D. Ohio 2018) (punitive damages assessed against both creditor and its attorney who initiated garnishment in violation of stay); *In re* Banks, 577 B.R. 659 (Bankr. E.D. Va. 2017) (punitive damages awarded against experienced collections attorney for failing to dismiss garnishment action after notice of stay); *In re* Vaughn, 542 B.R. 589, 603 (Bankr. M.D. Ala. 2015) ($50,000 punitive damages against creditor that mistakenly garnished bankruptcy debtor and delayed corrective action); Credit Nation Lending Serv., L.L.C. v. Nettles, 489 B.R. 239 (N.D. Ala. 2013) (punitive damages against repossessing creditor in amount sufficient to cancel debt and discharge lien); *In re* Rivera, 511 B.R. 6 (Bankr. D. P.R. 2014), *aff'd*, 2015 WL 4078107 (D. P.R. June 30, 2015) (awarding $100,000 punitive damages in addition to $100,000 emotional distress damages against homeowner association creditor for willful stay violation in pursuing collection of fees during bankruptcy case); *In re* Law, 497 B.R. 843 (Bankr. N.D. Tex. 2013) ($10,000 punitive damages assessed against auto finance lender that sent letter demanding postpetition payment as personal liability of debtor who intended to surrender vehicle); *In re* Stephens, 495 B.R. 608 (Bankr. N.D. Ga. 2013) (awarding punitive damages in twice amount of debt for refusal to return repossessed vehicle in violation of stay); *In re* Hildreth, 357 B.R. 650 (Bankr. M.D. Ala. 2006) (assessing $18,000 punitive damages and actual damages against mortgagee at $100 per phone call for each of sixty calls and $1000 per letter for postpetition collection demands to debtor); *In re* Pawlowicz, 337 B.R. 640 (Bankr. N.D. Ohio 2005) (assessing $5000 punitive damages against pawnbroker who sold chapter 13 debtor's possessions); *In re* Hromidko, 302 B.R. 629 (Bankr. N.D. Iowa 2003) (awarding $5000 actual damages, $5000 punitive damages, and attorney fees against collector who contacted debtor's employer and misrepresented nature of debt and employee's liability for it after creditor was notified of debtor's bankruptcy filing); *In re* Solfanelli, 206 B.R. 699 (Bankr. M.D. Pa. 1996) (nominal compensatory damages, attorney fees, and $10,000 in punitive damages against bank that violated automatic stay by executing upon funds that had been deposited postpetition), *aff'd in relevant part, rev'd in part on other grounds*, 230 B.R. 54 (M.D. Pa. 1999), *aff'd*, 203 F.3d 197 (3d Cir. 2000); *In re* Kaiser, 158 B.R. 808 (Bankr. D. Neb. 1993) (where mortgagee willfully violated automatic stay by entering debtor's home without permission and by removing and disposing of debtor's personal property, debtor entitled to compensatory damages equal to value of personal property removed ($670), items of sentimental value ($500), reasonable attorney fees, and punitive damages ($7500), and mortgagee deprived of any deficiency claim for offset or recoupment against debtor); *In re* Jacobs, 100 B.R. 357 (Bankr. S.D. Ohio 1989) (American Express required to pay $80 lost wages, $200 for embarrassment and humiliation, $500 attorney fees, and $1500 punitive damages for engaging two collection agencies which used threatening and harassing tactics after American Express was informed of bankruptcy petition and that debtor was represented by counsel); Mercer v. D.E.F., Inc., 48 B.R. 562 (Bankr. D. Minn. 1985) (Color Tyme TV Rental required to pay $1510 compensatory, $5000 punitive, and $1907.99 attorney fees for repossession of stereo in spite of automatic stay). *See also In re* Gates, 2005 Bankr. LEXIS 2034 (Bankr. E.D. Va. May 10, 2005) (where debt collector violated bankruptcy discharge injunction by telephoning consumer , threatening arrest, and withdrawing $50 from her checking account, court found collector, Rapid Recovery Credit & Collections, in contempt and awarded nominal actual damages, $500 punitive damages, attorney fees, an additional sanctions of $50 per day for each day that attorney fees remained unpaid, and permanent injunction of further collection activities; court lacked subject matter jurisdiction over related FDCPA claims and debtor failed to pursue reference back of FDCPA claims).

63 *See, e.g., In re* Snowden, 769 F.3d 651 (9th Cir. 2014) (punitive damages can be awarded for stay violation under "reckless or callous disregard for the law or rights of others" standard); *In re* Repine, 536 F.3d 512 (5th Cir. 2008) (adopting "egregious conduct" standard for assessing punitive damages); *In re* Crysen/Montenay Energy Co. v. Esselen Assoc., Inc., 902 F.2d 1098 (2d Cir. 1990) (finding of "maliciousness or bad faith" supports award of punitive damages); *In re* Ocasio, 272 B.R. 815 (B.A.P. 1st Cir. 2002) (in evaluating propriety of awarding punitive damages court will consider reprehensibility of creditor's conduct, ratio between compensatory and punitive damages, and difference between punitive damage award and civil penalties imposed for comparable conduct); *In re* Brodgen, 588 B.R. 625, 631 (Bankr. M.D. Ala. 2018) (in assessing punitive damages under § 362(k) court considers five factors, including nature of creditor conduct, harm to debtor, defendant's ability to pay, defendant's motive, and any "provocation by debtor"); *In re* Jean-Francois, 532 B.R. 449, 457 (Bankr. E.D.N.Y. 2015) (awarding $50,000 punitive damages where violence accompanied eviction carried out in violation of stay; applying standard that creditor's actions "were conducted in bad faith, with malice, or in a particularly egregious manner"); Green Tree Servicing, L.L.C. v. Taylor, 369 B.R. 282 (S.D. W. Va. 2007) (collecting cases on standards for imposing punitive damages under § 362(k)); *In re* Escobedo, 513 B.R. 605, 613 (Bankr. D.N.M. 2014) (more than "willful violation" of stay required for punitive damages; here punitive damages appropriate where creditor refused to allow debtor on to his property by threatening to shoot him and hit his dog with a shovel); *In re* Tezla, 2009 WL 212542 (Bankr. E.D. Pa. Jan. 28, 2009) (punitive damages awarded despite only "minor" actual damages in view of egregious nature of creditor's postpetition debt collection activities, which included twenty-four automated calls in one day to debtor); *In re* Shade, 261 B.R. 213 (Bankr. C.D. Ill. 2001) (primary purpose of punitive damages for willful stay violation is to cause change in creditor's behavior, listing factors for imposing punitive damages); *In re* Wagner, 74 B.R. 898, 904 (Bankr. E.D. Pa. 1987) (for award of punitive damages debtor must show creditor acted with actual knowledge that it was violating the federally protected right or with reckless disregard of whether it was doing so).

64 *See, e.g., In re* Diviney, 225 B.R. 762 (B.A.P. 10th Cir. 1998) ($40,000 punitive damages award merited to deter bank engaged in high volume of bankruptcy work from similar conduct (a repossession) in violation of stay); Sundquist v. Bank of Am. (*In re* Sundquist), 566 B.R. 563 (Bankr. E.D. Cal. 2017) (assessing $45 million in punitive damages against mortgage servicer that conducted trustee's sale of debtor's home in violation of stay, with punitive damages payable to various non-profit legal groups), *later decision vacating judgment based on*

In addition to remedies under Bankruptcy Code section 362(k), the debtor also has remedies for violation of the automatic stay as contempt of a court order.[65] Contempt sanctions can be imposed regardless of whether the violation is in willful disregard of the stay. Sanctions that may be imposed for contempt are similar to those available under section 362(k), except that punitive damages are not available.[66] Several courts have held that proceedings for contempt must be brought by motion, rather than by a complaint instituting an adversary proceeding.[67]

The impact of sovereign immunity should be considered where the creditor violating the stay is a government agency.[68] Bankruptcy Code section 106(a) abrogates sovereign immunity for the federal government with respect to section 362. The Supreme Court's decision in *Central Virginia Community College v. Katz*,[69] appears to permit most, and perhaps all, bankruptcy proceedings, including actions for violation of the automatic stay, to be brought against state governments.[70] However, punitive damages may not be awarded against government entities, and there are limitations on attorney fees that may be assessed against these units.[71] Even if remedies are precluded under section 362(k) based on sovereign immunity, contempt remedies should remain available.

13.2.5 Property of the Estate and Exemptions

The concepts of *property of the estate* and *exemptions* are keys to deciding whether to file a bankruptcy and under which chapter to file. They are also important for understanding how a debtor's federal and state debt collection claims will be treated with respect to bankruptcy.[72]

The term *bankruptcy estate* describes the aggregation of property rights that can be administered by the court in a bankruptcy case.[73] The estate is created upon the commencement of the case.[74] Based on the broad definition of "property of the estate" found in section 541 of the Bankruptcy Code, virtually all assets and property interests of the debtor as of the time the case is filed come into the bankruptcy estate and are subject to being administered for the benefit of creditors if not exempt. Such property includes intangible, contingent, and future property interests, such as any interest a debtor has in any pending lawsuit or potential cause of action. In chapter 7, most property acquired by the debtor *after* the commencement of the case does not come into the estate.[75] In a chapter 13 case, property of the estate also includes property and earnings acquired while the case is pending, unless the case is converted to another chapter.[76]

In keeping with the "fresh start" purpose of bankruptcy relief, debtors are permitted to claim certain property as exempt in the bankruptcy process and are allowed to retain

parties' settlement, 580 B.R. 536 (Bankr. E.D. Cal. 2018); *In re* Iskric, 496 B.R. 355 (Bankr. M.D. Pa. 2013) (assessing $30,000 punitive damages against creditor who failed to release bench warrant in collection proceeding, leading to debtor's postpetition incarceration; court notes not first time same creditor violated stay); *In re* Crawford, 388 B.R. 506 (Bankr. S.D.N.Y. 2008) (finding that creditor's lack of supervision of agents and subagents led to conduct of foreclosure sale in violation of stay, court assessed $60,000 punitive damages award against creditor to encourage exercise of more effective control over agents); *In re* Nosek, 363 B.R. 643 (Bankr. D. Mass. 2007) (applying its contempt powers to impose $500,000 punitive damages award, court notes "Ameriquest is a national mortgage company, which supports the contention that the amount of punitive damages must be significant enough to garner its attention"), *rev'd*, 544 F.3d 34 (1st Cir. 2008) (mortgage servicer's accounting practice did not violate terms of particular confirmed chapter 13 plan at issue, but could be violation if plan had specified manner of application and servicer's practices countered these plan terms); *In re* Lukach, 2007 WL 1365436 (Bankr. E.D.N.Y. May 8, 2007) ($5000 punitive damages assessed against Chase after postpetition collection contacts with debtor, with order providing for $2500 sanctions for each future occurrence); *In re* Dynamic Tours & Transp., Inc., 359 B.R. 336 (Bankr. M.D. Fla. 2006) (assessing $50,000 punitive damages against GE, noting that company "is an international corporation with vast resources capable of employing competent staff to understand and abide by bankruptcy law"); *In re* Cullen, 329 B.R. 52 (Bankr. N.D. Iowa 2005) (punitive damages appropriate against "sophisticated player" in credit industry); *In re* Shade, 261 B.R. 213 (Bankr. C.D. Ill. 2001) ($9000 punitive damages award for postpetition debt collection appropriate against sophisticated creditor with large volume of business in the bankruptcy court).

65 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.6.4 (12th ed. 2020), *updated at* www.nclc.org/library.

66 *See, e.g., In re* Dyer, 322 F.3d 1178 (9th Cir. 2003) (although attorney fees may be awarded and mild non-compensatory fines may be necessary under some circumstances, serious punitive penalties not available for civil contempt); *In re* H Granados Communications, Inc., 503 B.R. 726 (B.A.P. 9th Cir. 2013) (in action brought under 11 U.S.C. § 105(a) chapter 11 debtor can recover damages, including attorney fees, as remedies for stay violation).

67 Barrientos v. Wells Fargo Bank, 633 F.3d 1186 (9th Cir. 2011); Price v. America's Servicing Co., 2013 WL 1914939 (N.D. Tex. May 19, 2013); *In re* Frambes, 454 B.R. 437 (Bankr. E.D. Ky. 2011).

68 *See* Hunsaker v. United States, 902 F.3d 963 (9th Cir. 2018) (Bankruptcy Code § 106(a) waives immunity of IRS for emotional distress damages in action under § 362(k)); National Consumer Law Center, Consumer Bankruptcy Law and Practice §§ 9.6.6, 14.3.2.2 (12th ed. 2020), *updated at* www.nclc.org/library.

69 546 U.S. 356, 126 S. Ct. 990, 163 L. Ed. 945 (2006).

70 *See also In re* Omine, 485 F.3d 1305 (11th Cir. 2007) (bankruptcy courts may hold states liable for compensatory damages for stay violations, but § 106(a)(3) limits states' liability for punitive damages, fees, and costs). *See also In re* Odom, 571 B.R. 687 (Bankr. E.D. Pa. 2017) (rejecting local government entity's claim for immunity against § 362(k) action, except as to punitive damages).

71 *See, e.g., In re* Duby, 451 B.R. 664 (B.A.P. 1st Cir. 2011) (reversing award of punitive damages against federal agency). *See generally* National Consumer Law Center, Consumer Bankruptcy Law and Practice §§ 9.6.6, 14.3.2.2 (12th ed. 2020), *updated at* www.nclc.org/library.

72 *See* § 13.3, *infra*.

73 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 2.5 (12th ed. 2020), *updated at* www.nclc.org/library.

74 11 U.S.C. § 541.

75 There are exceptions for certain types of property acquired within 180 days of filing. *See* 11 U.S.C. § 541(a)(5).

76 *See* 11 U.S.C. § 1306(a). *But see* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.8.5 (12th ed. 2020), *updated at* www.nclc.org/library (discussing various approaches to treatment of property of bankruptcy estate after confirmation of chapter 13 plan).

this property after bankruptcy free from creditor's claims.[77] Exempting property effectively removes it from the bankruptcy estate. Bankruptcy Code section 522(d) lists the exemptions available under the federal exemption scheme.[78] In some states, the debtor is given the choice between using either the state exemption scheme or the federal bankruptcy exemption scheme. Other states have "opted out" of the federal bankruptcy exemptions, and in those states the debtor may use only the state law exemptions, exemptions provided by federal non-bankruptcy law, and the Code's special exemption for certain retirement funds.[79] A few states have also enacted "bankruptcy specific" exemptions that apply only in bankruptcy cases filed by state residents.[80]

The Bankruptcy Code itself says little regarding the procedure for claiming exemptions, other than that the debtor or a dependent shall "file a list" of property claimed as exempt.[81] The Bankruptcy rules require this list to be filed by the debtor as part of the schedules of property.[82] The list of property claimed as exempt is set forth on Schedule C of Official Form 6. The property must be described with some specificity, otherwise the debtor may have problems later protecting that property.[83] The Code allows objections to claims of exemption by "a party in interest"—usually the trustee or a creditor. If no timely and successful objection to the debtor's exemptions is made, the exemptions listed by the debtor are automatically allowed.[84]

13.2.6 Discharge

The ultimate goal of most consumer bankruptcies is the discharge, which frees the debtor from personal liability on almost all debts.[85] It is this clean slate that normally gives debtors the fresh start that bankruptcy is meant to provide. However, under limited circumstances the court may deny a discharge, or the discharge may be inapplicable to some debts. The most common nondischargeable debts are certain tax debts, domestic support obligations, most student loans, and debts incurred by fraud or false pretenses.[86] Additionally, debtors may be barred from receiving a discharge if they have received a discharge in a prior case within a specified period of time.[87] Chapter 7 debtors may not receive a discharge if they received a prior discharge in a chapter 7 or 11 case commenced within eight years of the current filing.[88] Chapter 7 debtors are also barred from receiving a discharge if they received a discharge under chapter 13 in a case commenced within six years of the current filing.[89] A significant exception to this general bar allows a chapter 7 discharge when the previous chapter 13 case completely, or in large part, paid off unsecured debts. Similarly, a discharge cannot be entered in a chapter 13 case if the debtor received a discharge in a prior chapter 7, 11, or 12 case that was filed within four years before the date of the chapter 13 order for relief.[90] Chapter 13 debtors are also barred from receiving a discharge if they received a discharge in a prior chapter 13 case that was filed within two years before the date of the chapter 13 order for relief.[91]

To become eligible for a discharge in chapter 7 or 13 a debtor must, with very limited exceptions, complete a personal financial management instructional course offered by an approved provider, which can be taken in person, on the telephone, or over the Internet.[92]

Once the discharge order enters, it acts as an injunction that prohibits creditors from taking or continuing any action to collect any discharged debt as a personal liability of the debtor.[93] The discharge injunction covers not only legal proceedings, but also any other acts of creditors, such as dunning, harassment, withholding further credit, threatening criminal proceedings, and the like, whether directed at the debtor or at anyone else.[94] The courts interpret the scope of the discharge

77 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 10 (12th ed. 2020), *updated at* www.nclc.org/library.

78 11 U.S.C. § 522(d). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 10.2.2 (12th ed. 2020), *updated at* www.nclc.org/library.

79 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 10.2.1 (12th ed. 2020), *updated at* www.nclc.org/library.

80 *See, e.g., In re* Schafer, 689 F.3d 601 (6th Cir. 2012) (upholding Michigan's expanded homestead exemptions applicable only in bankruptcy cases).

81 11 U.S.C. § 522(l). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 10.3 (12th ed. 2020), *updated at* www.nclc.org/library.

82 Fed. R. Bankr. P. 4003.

83 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 10.3 (12th ed. 2020), *updated at* www.nclc.org/library.

84 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 10.3.4 (12th ed. 2020), *updated at* www.nclc.org/library.

85 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 15 (12th ed. 2020), *updated at* www.nclc.org/library.

86 For an in depth discussion of all exceptions to the discharge, see National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.4 (12th ed. 2020), *updated at* www.nclc.org/library.

87 Notably, there is no bar on the *filing* of a case after a previous discharge. *See, e.g., In re* Bateman, 515 F.3d 272 (4th Cir. 2008).

88 11 U.S.C. § 727(a)(8). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.2.2.8 (12th ed. 2020), *updated at* www.nclc.org/library.

89 11 U.S.C. § 727(a)(9). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.2.2.9 (12th ed. 2020), *updated at* www.nclc.org/library.

90 11 U.S.C. § 1328(f)(1). *See In re* Sanders, 551 F.3d 397 (6th Cir. 2008) (time period measured from filing date of previous case to filing date of new case); *In re* Johnson, 488 B.R. 46 (Bankr. D. Mass. 2013) (same); National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.2.2.9 (12th ed. 2020), *updated at* www.nclc.org/library.

91 11 U.S.C. § 1328(f)(2). *See In re* Bateman, 515 F.3d 272 (4th Cir. 2008) (two-year period ran from filing date of previous case to filing of current case).

92 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 8.3.3 (12th ed. 2020), *updated at* www.nclc.org/library.

93 11 U.S.C. § 524(a)(2). *But see* 11 U.S.C. § 524(j) (exception to § 524(a)(2) allows creditor with claim secured by residential real property to communicate with debtor about obtaining periodic payments and avoiding foreclosure despite discharge of personal liability on mortgage debt).

94 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.1.4 (12th ed. 2020), *updated at* www.nclc.org/library.

injunction expansively, as its purpose is to "eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts."[95]

In both chapter 7 and chapter 13 cases, the discharge automatically voids any judgment obtained at any time to the extent such judgment is a determination of the debtor's personal liability for a discharged debt.[96] Doctrines of finality or issue and claim preclusion do not apply to judgments entered in violation of the discharge order.[97]

Although the rule is not universally applied, in most jurisdictions the discharge order in a chapter 7 case in which no distribution is made to creditors discharges the debtor's personal liability on all prepetition debts, even those not listed on the debtor's bankruptcy schedules. Therefore, a creditor may violate the discharge injunction by attempting to enforce personal liability on such an unlisted debt.[98]

Violation of the discharge injunction is contempt, punishable by awards of damages and attorney fees.[99] Contempt sanctions serve either to coerce a party into future compliance with the discharge order or to compensate the debtor for injury caused by past non-compliance.[100] In *Taggart v. Lorenzen* the Supreme Court distinguished the *scienter* threshold for a claim for damages for violation of the automatic stay from the standard that may trigger contempt sanctions for violation of the discharge order.[101] The courts have applied a strict liability standard for violations of the automatic stay. This standard does not consider the creditor's good faith belief that it acted lawfully. In *Taggart*, the Court adopted a slightly different standard for violations of the discharge order. According to the Supreme Court, a court may hold the creditor in civil contempt of the discharge order "where there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order."[102] To avoid contempt the creditor's conduct must be objectively reasonable, a standard that takes into account current judicial interpretations of the scope and impact of the discharge order.

The debtor may enforce the discharge injunction through a contempt of court proceeding brought as a motion (a "contested matter") in the same bankruptcy court that entered the discharge order.[103] As discussed later in this chapter, the courts are divided on the issue of whether the debtor may file a complaint in a different court and seek a wider range of remedies for violation of the discharge injunction.[104]

Damages include compensation for emotional distress.[105] Debt collection harassment destroys the peace of mind that the debtor had a right to expect after the discharge. The debtor's own testimony, without expert evidence, may establish the compensable emotional harm.[106]

There is ample authority to enforce the discharge injunction by requiring disgorgement and other equitable remedies under 11 U.S.C. § 105(a).[107] The court may also award punitive damages for violations of the discharge injunction.[108] An

95 *In re* McLean, 794 F.3d 1313, 1321 (11th Cir. 2015).

96 Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.1.3 (12th ed. 2020), *updated at* www.nclc.org/library.

97 *In re* Gray, 573 B.R. 868 (Bankr. D. Kan. 2017) (*Rooker-Feldman* doctrine does not bar federal court from determining that state court judgment entered in violation of discharge order is void).

98 *In re* Hammerle, 529 B.R. 17 (Bankr. E.D.N.Y. 2015); *In re* Ritchey, 512 B.R. 847 (Bankr. S.D. Tex. 2014).

99 11 U.S.C. § 524(a)(2). *See generally* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.1.4 (12th ed. 2020), *updated at* www.nclc.org/library.

100 *In re* Covelli, 550 B.R. 256, 269 (Bankr. S.D.N.Y. 2016).

101 Taggart v. Lorenzen, ___ U.S. ___, 139 S. Ct. 1795, ___ L. Ed. 2d ___ (2019).

102 *Id.* at 1804.

103 *See, e.g., In re* Marshall, 491 B.R. 217 (Bankr. S.D. Ohio 2012) (discussing debtor's options of bringing "adversary action" as opposed to "contested matter" in bankruptcy court in response to creditor's violation of discharge order).

104 *See* § 13.5.1, *infra*. While courts disagree over whether there is a private right of action under 11 U.S.C. § 524, there is no significant dispute that bankruptcy courts can hear actions to remedy violations of the discharge order pursuant to 11 U.S.C. § 105, the bankruptcy courts' general authority to exercise equity powers. *See, e.g., In re* Orrin, 550 B.R. 228, 240 (S.D.N.Y. 2016).

105 *In re* Marino, 577 B.R. 772, 787 (B.A.P. 9th Cir. 2017) (affirming award of emotional distress damages of $119,000 based on $1000 per letter and call mortgage servicer made in in violation of discharge order); McLean v. Greenpoint Credit L.L.C., 515 B.R. 841 (M.D. Ala. 2014) (awarding emotional distress damages for creditor conduct that violated both discharge order and FDCPA), *aff'd on these grounds and vacated in part on other grounds*, 794 F.3d 1313 (11th Cir. 2015) (vacating award of punitive damages on procedural grounds). *See also In re* Meyers, 344 B.R. 61 (Bankr. E.D. Pa. 2006)("[t]here is a direct nexus between the purpose of the discharge order and the emotional distress which may result from the violation of the order"); *In re* Gervin, 337 B.R. 854 (Bankr. W.D. Tex. 2005) ("significant component of the fresh start is being free of the kinds of harassment, threats, and anxiety that debtors were suffering before they filed"), *aff'd*, 300 Fed. Appx. 293 (5th Cir. 2008) (affirming district court reversal of bankruptcy court's award of contempt damages); *In re* Feldmeier, 335 B.R. 807 (Bankr. D. Or. 2005) (discharge injunction intended to protect debtors from more than financial harm).

106 *See In re* Vanamann, 561 B.R. 106, 129–130 (Bankr. D. Nev. 2016) (assessing $60,000 emotional distress damages against mortgage servicer that tried to collect on discharged deficiency debt; court relied solely on debtor's testimony); *In re* Breul, 533 B.R. 782 (Bankr. C.D. Cal. 2015); *In re* Culpepper, 481 B.R. 650 (Bankr. D. Or. 2012); *In re* Meyers, 344 B.R. 61 (Bankr. E.D. Pa. 2006); *In re* Gervin, 337 B.R. 854 (Bankr. W.D. Tex. 2005), *aff'd*, 300 Fed. Appx. 293 (5th Cir. 2008) (affirming district court reversal of bankruptcy court's award of contempt damages); *In re* Feldmeier, 335 B.R. 807 (Bankr. D. Or. 2005) (finding that "a 'reasonable person' would suffer significant emotional harm" from debt collector's phone call threatening criminal prosecution).

107 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.5.7 (12th ed. 2020), *updated at* www.nclc.org/library. *See generally In re* Garcia, 2013 WL 414177 (Bankr. W.D. Tex. Feb. 1, 2013) (assessing various categories of damages under § 105(a) for debt collector's violation of discharge order, noting dispute among courts over applicability of § 105(a) to claims of violation of the discharge order).

108 *See In re* Marino, 577 B.R. 772, 789 (B.A.P. 9th Cir. 2017) (reversing bankruptcy court for refusal to consider award of punitive damages for violation of discharge order); *In re* Van Winkle, 2017 WL 2729069, at

assessment of punitive damages performs an important role in enforcing the congressional intent embodied in the fresh start concept and in the discharge order.[109]

There is no provision in the Bankruptcy Code that prohibits a debtor from voluntarily repaying a discharged debt, but the voluntary repayment must not in any manner have been induced by acts of the creditor.[110] Any agreement in which a debtor reaffirms an obligation to repay a prebankruptcy obligation is subject to the strict requirements of Bankruptcy Code section 524. A creditor's action to enforce any type of repayment agreement made outside of the context of a formal reaffirmation agreement approved by the bankruptcy court violates the discharge order.[111] A number of creditors have engaged in the practice of obtaining reaffirmation agreements during the debtor's bankruptcy, but never filing the agreement with the court.[112] Since reaffirmation agreements are invalid unless they are filed with the court and either approved by the court after a hearing or presented with an affidavit from the debtor's attorney,[113] attempts to collect on the debts represented by these reaffirmation agreements violate the discharge injunction.[114] A judgment based upon a claim that a debtor breached a reaffirmation agreement executed in violation of the Bankruptcy Code is void as entered contrary to the discharge order.[115]

Class actions against a number of major retailers who engaged in this practice, including Sears, May Department Stores, Montgomery Ward, and the Federated Department stores, have resulted in favorable settlements for class members. In *Bessette v. Avco Financial Services, Inc.*,[116] the First Circuit held that the district and bankruptcy court's equitable powers under Bankruptcy Code section 105 allow a class to obtain a disgorgement order of funds collected in violation of the discharge injunction. However, other courts have held that there is no right of action that allows a class of debtors to pursue relief for violations of the discharge order.[117]

13.3 Bankruptcy's Impact on Consumers' Claims Arising Before Bankruptcy

13.3.1 The Importance of "Scheduling" a Debt Collection Claim

Under the Bankruptcy Code's broad definition of property of the estate, existing claims for violations of the FDCPA or state debt collection law become property of the bankruptcy estate upon the filing of a petition for relief.[118] This is true regardless of the chapter under which the debtor files.

*6 (Bankr. D.N.M. June 23, 2017) (awarding punitive damages where creditor's pursuit of state court action contrary to discharge order was reckless and willful); *In re* Diaz, 526 B.R. 685 (Bankr. S.D. Tex. 2015) (assignee of prepetition creditor liable for punitive damages where had notice of discharge order; sanctions ranging from $500 to $1500 for each of assignee's twenty-six violative communications); *In re* Fauser, 545 B.R. 907 (Bankr. S.D. Tex. 2016) (in awarding punitive damages against Green Tree for violations of discharge order court points to systemic nature of this creditor's infractions, including other court ruling for similar misconduct); *In re* Otero, 498 B.R. 313 (Bankr. D.N.M. 2013) (awarding $10,000 punitive damages in contempt proceeding for violation of discharge order; numerous harassing calls to debtor, friends, and relatives); *In re* Poindexter, 376 B.R. 732 (Bankr. W.D. Mo. 2007) ($7235.19 punitive damages awarded where creditor showed "clear disregard and disrespect of the bankruptcy laws" in coercing reaffirmation of discharged debt); *In re* Mooney, 340 B.R. 351 (Bankr. E.D. Tex. 2006) (assessing $40,000 punitive damages and $21,000 attorney fees against Green Tree after it harassed debtor and "plowed ahead" with state court action seeking to hold debtor personally liable for discharged debt); *In re* Perviz, 302 B.R. 357 (Bankr. N.D. Ohio 2003) ($8000 punitive damages awarded against institutional creditor); *In re* Atkins, 279 B.R. 639 (Bankr. N.D.N.Y. 2002) ($30,000 compensatory damages for emotional harm; no expert medical evidence needed to establish emotional harm); *In re* Henry, 266 B.R. 457 (Bankr. C.D. Cal. 2001) ($65,700 punitive damages against creditor who contacted debtors repeatedly seeking reaffirmation agreement after bankruptcy filing); *In re* Poole, 242 B.R. 104 (Bankr. N.D. Ga. 1999) (damages for emotional harm and $7500 punitive damages arising from creditor's deliberate refusal to set aside void judgment); *In re* Watkins, 240 B.R. 668 (Bankr. E.D.N.Y. 1999) ($15,000 attorney fees award appropriate as incurred to secure rights of discharged debtors). *But see In re* McLean, 794 F.3d 1313 (11th Cir. 2015) (because punitive damages are designed to compensate for reckless or callous disregard for rights of others, rather than to coerce change of behavior, court must consider creditor's specific *mens rea* regarding legal effect of its actions in violation of discharge order).

109 *In re* Mooney, 340 B.R. 351, 361 (Bankr. E.D. Tex. 2006) (limiting sanctions for discharge order violation to compensatory damages would "send a clear and damaging signal" to creditors that they could make calculated decisions to continue unlawful collection actions and pay only nominal damages when challenged); *In re* Curtis, 322 B.R. 470 (Bankr. D. Mass. 2005) (creditor not only repeatedly violated stay and discharge order but engaged in frivolous litigation defending debtor's claims, justifying $30,000 punitive damages award against creditor).

110 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.1 (12th ed. 2020), *updated at* www.nclc.org/library.

111 *See generally In re* Jones, 389 B.R. 146 (Bankr. D. Mont. 2008) (finding creditor in contempt when it pursued legal action to enforce debtor's voluntary agreement to repay discharged debt despite lack of approved reaffirmation agreement).

112 *See In re* Latanowich, 207 B.R. 326, 336 (Bankr. D. Mass. 1997).

113 11 U.S.C. § 524(c). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 11.4.2, 15.5.2 (12th ed. 2020), *updated at* www.nclc.org/library.

114 First State Bank of Roscoe v. Stabler, 914 F.3d 1129, 1140 (8th Cir. 2019) (finding discharge violation where creditor exercised coercion in having debtors execute new note obligating repayment of discharged debt); *In re* Vazquez, 221 B.R. 222 (Bankr. N.D. Ill. 1998) (creditor and attorney for creditor sanctioned for collection actions on debt for which reaffirmation agreement never filed); *In re* Latanowich, 207 B.R. 326, 336 (Bankr. D. Mass. 1997).

115 *In re* Bagbag, 595 B.R. 164 (Bankr. S.D.N.Y. 2018).

116 230 F.3d 439 (1st Cir. 2000). *See also In re* Alley, 2014 WL 2987656, at *3 (Bankr. D. Me. July 1, 2014) (summarizing recent decisions following *Bessette*).

117 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 14.6 (12th ed. 2020), *updated at* www.nclc.org/library.

118 *See* § 13.2.5, *supra*; *In re* Cheaves, 439 B.R. 220 (Bankr. M.D. Fla. 2010) (prepetition claims for alleged violations of the FDCPA and the FCCPA are property of the bankruptcy estate and subject to administration by the trustee).

Any potential claims must be listed as an asset on the debtor's schedule of personal property—Schedule B. On Line 21 of Schedule B, the debtor must list "Other contingent and unliquidated claims of every nature." Here, the debtor should describe the debt collection claim. For example, the debtor might list "unliquidated FDCPA claims against PayNow Collection Agency."

The value of the cause of action must also be listed on the schedule. Any value given should be discounted for the likelihood of success and the ultimate probability of collecting any judgment obtained. Alternatively, if the value of the claim is truly unknown, it is often best simply to state the value as "unknown," leaving it to the trustee and creditors to assess the value on their own. This treatment of a cause of action has the advantage of ensuring that the debtor will not be accused of undervaluing it, and has been deemed sufficient by the Supreme Court.[119]

While statutes and court rules do not define the degree of detail required, the description of an FDCPA claim in the debtor's schedules should give the trustee reasonable notice of the need for further investigation into the designated claim.[120]

A 2016 federal district court decision highlighted some of the contingencies that can affect whether a description of an FDCPA claim in bankruptcy schedules meets this standard. In *Romeo v. FMA Alliance, Ltd.*[121] the court considered standing challenges raised against two FDCPA plaintiffs who had filed chapter 7 bankruptcy cases in the past.[122] In both cases, the debtors' FDCPA claims pre-dated their bankruptcy filings, but they did not disclose the claims in their initial schedules. Both debtors filed their FDCPA lawsuits in U.S. district court after they filed for bankruptcy relief and before they received discharge orders. During the pendency of their bankruptcy cases, both debtors amended their schedules to list as an asset a "Possible Fair Debt Collection Claim" and assigned the claim a $1000 exemption.

In reviewing the adequacy of the two debtors' disclosures, the court reached different outcomes. The first debtor actually had two distinct FDCPA lawsuits pending when he amended his schedules to disclose a "Possible Fair Debt Collection Claim." According to the court, this disclosure was inadequate and misleading, because it effectively concealed one lawsuit. The court dismissed the first debtor's FDCPA action that was the subject of the debt collector's standing challenge. By contrast, the second debtor had only one FDCPA case pending when he amended his schedules to list a "Possible Fair Debt Collection Claim." Although this description failed to include any basic information about the pending FDCPA action, including the identities of the parties, the court found this description adequate to put the trustee on notice about the existence of the FDCPA case. In the second debtor's case the court considered the identity of the FDCPA defendant irrelevant because, the stated value of the claim, the $1000 statutory penalty, would not vary depending on the identity of the defendant.[123] In another recent decision, the district court held that the debtor's disclosure on bankruptcy schedules of "FDCPA Actions" valued at $2000 was sufficient to put the trustee on inquiry notice of more than one FDCPA claim.[124]

Because the courts have not formulated a clear minimal standard for the adequacy of a description of a legal claim in bankruptcy schedules, advocates should err on the side of more rather than less detail. This should include docket information

119 *See* Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992) (cause of action described, but valued as "unknown," was sufficient to put trustee on notice of exemption). *See also* Schwab v. Reilly, 560 U.S. 770, 789 n.16, 130 S. Ct. 2652, 177 L. Ed. 2d 234 (2010) (noting that listing law suit exemption amount as "unknown" or "to be determined" are "red flags" signaling that trustee must object in timely fashion or otherwise be precluded from challenging exemption); Cincinnati Life Ins. Co. v. Grottenhuis, 2011 WL 1107114, at *5 (S.D. Ind. Mar. 23, 2011) (rejecting judicial estoppel where debtor listed value of claim against identified parties as "unknown"); Pulice v. Botsford Gen. Hosp., 2012 WL 716286 (Mich. Ct. App. Mar. 6, 2012) (scheduling of prebankruptcy lawsuit as asset of unknown value, claiming exemption up to maximum allowed, and lack of objection to exemption preserved debtor's standing to pursue lawsuit).

120 Nardino v. Credit Control, L.L.C., 2019 WL 2053708, at *4 (E.D.N.Y. Mar. 26, 2019) (summarizing rulings defining acceptable specificity for disclosures of FDCPA claims in bankruptcy schedules), *adopted*, 2019 WL 2056701 (E.D.N.Y. Apr. 10, 2019); Chatman v. Weltman, 325 F. Supp. 3d 875, 881 (N.D. Ill. 2018) (FDCPA claim adequately scheduled where debtor listed claim as against original creditor rather than against debt collector); Stepp v. U.S. Bank, 2018 WL 6625081 (W.D. Va. Dec. 18, 2018) (rejecting standing challenge where debtor amended schedules during chapter 7 case to generally identify claim against mortgagee, and described nature of FDCPA claims in more detail in answer to mortgagee's motion for relief from stay; trustee was on notice and court found no evidence of misrepresentation or concealment); Bejarano v. Bravo! Facility Serv., Inc., 251 F. Supp. 3d 27 (D.D.C. 2017); Nicholas v. Green Tree Servicing, L.L.C., 173 F. Supp. 3d 250, 255 (D. Md. Mar. 25, 2016) ("debtors' schedules need not identify every potential cause of action, every possible defendant, or even any defendant at all, so long as a partially scheduled claim contains enough information that a reasonable investigation by the trustee would reveal the claim ultimately asserted"; finding standard not met where debtor listed wrong party defendant); Joo Lee v. Forster & Garbus, L.L.P., 926 F. Supp. 2d 482 (E.D.N.Y. 2013) (rejecting challenges where debtor listed FDCPA claim in schedules, even though one potential defendant's name omitted from description); Nielsen v. Dickerson, 1999 WL 350649, at *5–6 (N.D. Ill. May 20, 1999) (description adequate where amended schedules identified law firm as defendant in FDCPA claim but omitted the creditor that was alleged to be falsely using law firm's name for its own debt collection). *See generally* Hermann v. Hartford Cas. Ins. Co., 675 Fed. Appx. 856 (10th Cir. 2017) (listing of "Potential Personal Injury Award" on schedules was insufficient to disclose claims for damages related to debtor's claim against insurer for unreasonable handling of insurance claim). *But cf.* Pohl v. U.S. Bank, 2016 WL 1178278 (D. Colo. May 28, 2016) (debtor's vague references to potential fraud claims against mortgage lender at trustee's meeting did not outweigh non-disclosure of TILA rescission claim in schedules, resulting in imposition of judicial estoppel).

121 2016 WL 3647868 (E.D.N.Y. June 30, 2016).

122 The court also considered the case of a chapter 13 debtor and applied judicial estoppel to dismiss the FDCPA claim. Judicial estoppel in the context of unscheduled bankruptcy claims is discussed in § 13.3.3, *infra*.

123 *See also* Taylor v. Fin. Recovery Serv., Inc., 252 F. Supp. 3d 344 (S.D.N.Y. 2017) ("Possible FDCPA Claims" with value of $1000 adequate for avoiding judicial estoppel and standing challenges).

124 Roth v. Solomon & Solomon, P.C., 2018 WL 718402 (E.D.N.Y Feb. 5, 2018) (rejecting standing challenge to FDCPA claims).

for a lawsuit that has been filed. For potential claims the description should include the identity of all potential parties, the approximate time frame covered, and a brief description of the nature of the claim, with a reference to the FDCPA.

After identifying the debt collection claims on the schedule of assets, the next step is to determine whether the debtor can exempt the claims, thereby removing them from the bankruptcy estate and precluding the trustee's administration of the claims.[125] In states that have not opted out of the federal bankruptcy exemption scheme, the debtor may use the federal "wild card" exemption, which can be used to exempt any property.[126] Some states also provide "wild card" exemptions.[127]

Exemptions are listed on Schedule C—Property Claimed as Exempt. The debtor should specifically identify the claim on Schedule C, as well as the federal or state law under which the debtor claims the exemption. The current value of the property should be listed. Again, for causes of action this value should be discounted for the likelihood of success and the ultimate probability of collecting any judgment obtained. If the value is truly unknown, then state the value as such.

Based on the Supreme Court's decision in *Schwab v. Reilly*,[128] it is recommended that the "value of the claimed exemption" for potential causes of action on Schedule C be listed as "100% fair market value" or "100% FMV."[129] If an actual dollar amount for the "value of claimed exemption" is listed, the debtor may be bound by the dollar value of that exemption.[130] If the receipt of damages is greater than the dollar value exempted, the trustee, on behalf of creditors, may have the right to receive the amount in excess of the exemption. By contrast, if the claim is exempted up to its full fair market value, then the debtor should be entitled to keep the full amount of any damage award. If no timely and successful objection to the debtor's exemptions is made, the exemptions listed by the debtor are automatically allowed and the cause of action belongs to the debtor.[131] If there has been no timely objection to the exemption claimed for the properly scheduled FDCPA claim, the debtor need not wait until the closing of the bankruptcy case to bring the FDCPA action.[132]

The bankruptcy schedules serve the important function of notifying the chapter 7 trustee of the existence of non-exempt assets of the bankruptcy estate. The trustee's role is to "administer" any non-exempt assets. Typically, this means selling these assets and distributing the proceeds to creditors in the priority order that the Code requires. In a chapter 7 case, the debtor's prepetition legal claims that were not fully exempted may be administered and liquidated by the trustee.[133] When administering prepetition causes of action the trustee may be substituted as the plaintiff in a pending action, may bring an action not yet filed, may settle the claim,[134] or may sell the claim. Trustees that are unfamiliar with debt collection law may retain debtor's counsel as special counsel to pursue the claim postpetition.[135] Any recovery by the trustee on the claim will first be distributed to the debtor to the extent of any exemption before any remaining funds are made available to creditors.

Alternatively, the cause of action listed on the schedules may be "abandoned" by the trustee in one of two ways: (1) if, on request by the trustee or party in interest and after notice and hearing, the court finds that the property is "burdensome" or of "inconsequential value and benefit to the estate"; or (2) by the closing[136] of the case.[137] Thus, the debtor may seek

125 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 10.3 (12th ed. 2020), *updated at* www.nclc.org/library.

126 *See* 11 U.S.C. § 522(d)(5).

127 A summary of state exemption law, including citations to state opt-out statutes, is contained in National Consumer Law Center, Consumer Bankruptcy Law and Practice Appx. J (12th ed. 2020), *updated at* www.nclc.org/library.

128 560 U.S. 770, 130 S. Ct. 2652, 177 L. Ed 2d 234 (2010).

129 *But see In re* Massey, 465 B.R. 720 (B.A.P. 1st Cir. 2012) (listed exemption for "100% of FMV" is facially invalid, sustaining objection to exemption claim); *In re* Gregory, 487 B.R. 444, 451 (Bankr. E.D.N.C. 2013) (where statutory basis for exemption limits it to specific amount in certain property, value of claimed exemption must be identified as a monetary value). *But cf. In re* Hall, 453 B.R. 22 (Bankr. D. Mass. 2011) (when listing value of exemption as "unknown," reference to the specific statute authorizing the exemption limits the exempt amount to the maximum allowed under the statutory provision). *See generally* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 10.3.1 (12th ed. 2020), *updated at* www.nclc.org/library.

130 *See In re* Heisler, 2019 WL 2476977 (E.D. Wis. June 12, 2019) (rejecting application of judicial estoppel where debtor's initial and amended schedules valued FDCPA claims for amount no greater than amount debtor later claimed in civil action).

131 *See* Wilborn v. Dun & Bradstreet Corp., 180 F.R.D. 347 (N.D. Ill. 1998) (because defendant did not object to plaintiff's exemption of his FDCPA claim from bankruptcy estate, this cause of action belonged to plaintiff, not bankruptcy trustee).

132 Meyer v. Timothy E. Baxter & Assoc., 2018 WL 1858182 (E.D. Mich. Apr. 18, 2018) (refusing to dismiss FDCPA claim on standing grounds where claim exempted and action filed before bankruptcy case closed).

133 11 U.S.C. § 704(a)(1). *See In re* Solt, 425 B.R. 263 (Bankr. W.D. Va. 2010) (only chapter 7 trustee, not the debtor, has standing to pursue FDCPA claim that is property of the bankruptcy estate). *But see In re* Bottcher, 441 B.R. 1 (Bankr. D. Mass. 2010) (debtor has standing to pursue state law truth in lending damages action against creditor up to amount claimed as exempt; trustee entitled to receive non-exempt portion of any recovery).

134 *See, e.g.*, Jenkins v. CACH L.L.C., 2012 WL 2131903 (E.D.N.C. June 12, 2012) (applying Fed. R. Civ. P. 17, court allows chapter 7 trustee to substitute as real party in interest in place of originally named plaintiff in FDCPA action that was pending when bankruptcy petition filed).

135 Such an arrangement should yield some benefit for the debtor. Also due to the potential conflicts of interest in representing the bankruptcy estate and the debtor, the debtor must make a fully informed waiver of the conflict.

136 Note that the closing of the case is not synonymous with the date upon which the discharge order is granted. After the discharge enters, the bankruptcy clerk's office will close the case pursuant to section 350(a) and Fed. R. Bankr. P. 5009. Ideally this will be only a short time after the discharge has entered. However, in some cases it may take much longer.

137 11 U.S.C. § 554. *See* Barletta v. Tedeschi, 121 B.R. 669 (N.D.N.Y. 1990) (denying debt collector's motion to dismiss FDCPA claim based upon consumer's lack of standing when bankruptcy trustee acknowledged his intention to abandon the consumer's claim but never formally did

formal abandonment of the scheduled debt collection claim by the trustee by filing a motion while the bankruptcy case is open. The trustee has discretion to exercise business judgment in deciding whether to abandon a potential estate asset.[138] Upon the court's entry of the order designating the legal claim as "abandoned," the debtor is free to pursue the claim as the real party in interest while the bankruptcy case is open and after the bankruptcy has been closed.[139]

The other approach is simply to wait until the case is closed to file any lawsuit that was listed as a claim, provided of course that waiting will not pose a statute of limitations problem. The closing of the bankruptcy after the trustee has administered the case returns any unliquidated legal claims described in the debtor's schedules to the debtor.[140] The debtor has standing to pursue the claims in the future as if no bankruptcy occurred. Exemption or abandonment are thus two ways in which the chapter 7 debtor can control what happens with a prepetition debt collection claim.

Keep in mind, however, that both options require that the debtor have scheduled the claim, giving the trustee notice of its existence, and allowing the trustee to make an informed decision about whether to administer the asset. As will be discussed in the next subsection, serious negative consequences can flow from failure to disclose a prepetition legal claim in the debtor's schedules.

Unlike chapter 7, in chapter 13, the debtor normally has the right to fully control any litigation, because the debtor remains in the possession of all property of the estate.[141] Therefore, most courts have held that a chapter 13 debtor has standing to pursue prepetition causes of action.[142] The debtor should also have the right to dictate the terms of any settlement of the debt collection claim, though the bankruptcy court must normally approve the settlement.[143] The debtor should advise the trustee of any recovery, which, depending upon the terms of the confirmed chapter 13 plan and allowed exemptions, may be distributed in full, or in part, to creditors.[144] In some cases, potential recovery on a debt collection claim may be used to partially fund the plan, and thereby reduce the amount of the debtor's installment plan payments.[145]

13.3.2 Unscheduled Debt Collection Claims—the Standing Problem

13.3.2.1 Generally

A consumer's failure to disclose a legal claim in bankruptcy schedules can create a significant problem in later litigation. When a prebankruptcy asset is unscheduled, it is never administered, exempted, or abandoned. Instead, it remains property of the bankruptcy estate. It is not considered property of the debtor, but continues to reside with the bankruptcy estate in a state of perpetual suspense.[146] As the representative of the bankruptcy estate, only the chapter 7 trustee, not the debtor,

so). *See also In re* Ventura, 582 B.R. 755, 767 (Bankr. N.D. Iowa 2018) (under § 554(d) bankruptcy court has authority to order abandonment of unscheduled claim after closing of case where court determines abandonment would have occurred had the claim been scheduled).

138 *In re* Blasingame, 598 B.R. 864, 871 (B.A.P. 6th Cir. 2019) (party challenging trustee's abandonment decision has burden to show abuse of discretion).

139 *See, e.g.*, Okoro v. Wells Fargo Bank, 2016 WL 5870031, at *5 (D. Md. Oct. 6, 2016) (because bankruptcy court granted debtor's motion to abandon FDCPA claim, "the bankruptcy case has no effect" on district court's handling of FDCPA claims).

140 11 U.S.C. § 554(c); Lane v. Bayview Loan Servicing, L.L.C., 2016 WL 3671467, at *5 n.7 (N.D. Ill. July 11, 2016) (where there is no dispute that plaintiff adequately scheduled FDCPA claim as personal property in past bankruptcy case, trustee's report of no distribution issued prior to closing of bankruptcy case established bankruptcy estate's abandonment of FDCPA claim).

141 11 U.S.C. §§ 1303, 1306(b); Wilson v. Dollar Gen. Corp., 717 F.3d 337 (4th Cir. 2013); Smith v. Rockett, 522 F.3d 1080 (10th Cir. 2008) (chapter 13 debtor can pursue prepetition FDCPA case in own name on behalf of estate); Crosby v. Monroe County, 394 F.3d 1328 (11th Cir. 2004); Cable v. Ivy Tech State Coll., 200 F.3d 467 (7th Cir. 1999) (after conversion to chapter 13, debtor became real party in interest with standing to prosecute lawsuit on behalf of the bankruptcy estate); Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513 (2d Cir. 1998) (chapter 13 debtor has exclusive standing to pursue claims of estate); Momoh v. Wells Fargo Bank, 2016 WL 8729939, at *4 (N.D. Cal. July 1, 2016) ("it does not matter whether the claims arose pre- or postpetition because claims held by the Chapter 13 bankruptcy estate may always be prosecuted by the plaintiff [the debtor] in her own name"); Foronda v. Wells Fargo Home Mortg., Inc., 2014 WL 6706815, at *4 (N.D. Cal. Nov. 26, 2014) (summarizing decisions).

142 Barker v. Asset Acceptance, L.L.C., 874 F. Supp. 2d 1062, 1065 (D. Kan. 2012) (debtor can pursue scheduled prepetition FDCPA action "in his capacity as a Chapter 13 bankruptcy debtor rather than in his individual capacity"); *In re* Turner, 436 B.R. 153, 157 (M.D. Ala. 2010) (upholding bankruptcy court's exercise of "related to" jurisdiction over chapter 13 debtor's FDCPA adversary proceeding raising prebankruptcy collection violations); *In re* Ramirez, 2012 WL 1072821 (Bankr. D. P.R. Mar. 28, 2012) (debtor may amend schedules in open chapter 13 case to add prepetition FDCPA claim inadvertently omitted from original schedules); *In re* Simmerman, 463 B.R. 47 (Bankr. S.D. Ohio 2011) (chapter 13 debtors have standing to bring various consumer claims, including FDCPA claims, on behalf of bankruptcy estate; but FDCPA claims time-barred). *See also In re* Lacey, 480 B.R. 13, 53 (Bankr. D. Mass. 2012) (denying mortgage servicer's motion for summary judgment on chapter 13 debtor's FDCPA claim alleging improper prebankruptcy collection demands).

143 *See* Fed. R. Bankr. P. 9019.

144 *See* 11 U.S.C. §§ 1306(a), 1325(c); *In re* Fisher, 203 B.R. 958 (N.D. Ill. 1997).

145 *See In re* Baxter, 374 B.R. 292 (Bankr. M.D. Ala. 2007); National Consumer Law Center, Consumer Bankruptcy Law and Practice § 13.4.4 (12th ed. 2020), *updated at* www.nclc.org/library.

146 11 U.S.C. § 554(d); Tyler v. DH Capital Mgmt., Inc., 736 F.3d 455, 465 (6th Cir. 2013) (unscheduled FDCPA claim could not be "abandoned" and trustee retained exclusive authority to pursue it); Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004) (failure to list an interest in bankruptcy schedules leaves that interest in the estate); Pretscher-Johnson v Aurora Bank, 2017 WL 2779977 (B.A.P. 9th Cir. May 31, 2017) (unscheduled prebankruptcy wrongful foreclosure claim never exempted or abandoned and therefore remains property of bankruptcy estate); *In re* Riazuddin, 363 B.R. 177 (B.A.P. 10th Cir. 2007); Romeo v. FMA All., Ltd., 2016 WL 3647868, at *6 (E.D.N.Y. June 30, 2016) (unscheduled legal claim can remain property of bankruptcy estate forever); *In re* Lehosit, 344 B.R. 782 (Bankr. N.D. W. Va. 2006) (unscheduled asset remains property of chapter 7 estate after case closing unless case is reopened to give trustee the opportunity

has standing to pursue the unscheduled claim after the bankruptcy case is closed.[147] This standing rule has been applied to dismiss FDCPA claims that had accrued prior to a consumer's past bankruptcy filing, but were not mentioned in the bankruptcy schedules.[148]

It has become a common practice among defense attorneys to investigate whether a plaintiff filed a bankruptcy case in the past. If the plaintiff filed for bankruptcy relief, and if the events that were the basis for the current lawsuit occurred before the bankruptcy filing, defense counsel will check to see if the plaintiff included the legal claim in the bankruptcy schedules. If the claim existed at the time of the bankruptcy filing and the plaintiff did not disclose it, the defendant will move to dismiss the postbankruptcy civil action. Many state and federal courts will grant the dismissal on the theory that the cause of action belongs to the bankruptcy estate in the closed case and the individual plaintiff lacks standing to enforce the claim.

Many plaintiffs have had their consumer claims dismissed as a result of a bankruptcy "standing" problem. This outcome can seem particularly harsh at times. When individuals file bankruptcy cases, they are often unaware that they have certain consumer claims. They may be generally aware of the operative facts, such as receipt of a letter or the assessment of a charge at some point in the past. However, they may not have understood that those facts gave them a right to sue.[149] One court has held that even a change in the interpretation of the FDCPA after the termination of a bankruptcy case did not convert an FDCPA claim that accrued prebankruptcy to a postbankruptcy claim.[150] When strictly applied, the bankruptcy standing rule gives no weight to the absence of bad faith in the debtor's omission of a potential legal claim from the bankruptcy schedules.

For example, the Sixth Circuit applied the bankruptcy standing rule in a particularly strict way in in *Tyler v. DH Capital Management, Inc.*[151] In *Tyler*, a consumer filed a federal court class action alleging that a collection lawsuit filed by a debt collector violated the FDCPA and other state laws. The consumer had filed a bankruptcy case in the past. The creditor's collection complaint that violated the FDCPA had been filed in a court before the consumer filed the bankruptcy petition. The consumer had not listed an FDCPA claim in his bankruptcy schedules, because he had not yet been served with the collection complaint when he filled out the schedules. He was not aware that the violative complaint had been filed.

Nevertheless, according to the court of appeals the filing of the complaint was the actionable FDCPA violation. Because the FDCPA claim triggered by the complaint had existed when the debtor filed the bankruptcy petition, the claim became property of the bankruptcy estate. The claim was never abandoned by the estate because the consumer never listed it in his schedules. After the bankruptcy case closed, the claim remained property of the estate. For this reason, the consumer lacked standing to pursue the claim after the bankruptcy case closed.[152] In this case, amending the bankruptcy schedules

to administer or abandon the asset); *In re* Darrah, 337 B.R. 313, 316 (Bankr. N.D. Ohio 2005).

147 *See, e.g.*, Biesek v. Soo Line R Co., 440 F.3d 410 (7th Cir. 2006) (trustee, not debtor, is real party in interest to prosecute unscheduled prepetition claim); *In re* Riazuddin, 363 B.R. 177 (B.A.P. 10th Cir. 2007) (same); Canterbury v. J.P. Morgan Acquisition Corp., 958 F. Supp. 2d 637 (W.D. Va. 2013), *aff'd*, 561 Fed. Appx. 293 (4th Cir. 2014) (TILA rescission claim existed before bankruptcy filing, became property of bankruptcy estate, and remained estate property due to debtor's failure to schedule it).

148 Tyler v. DH Capital Mgmt., Inc., 736 F.3d 455 (6th Cir. 2013); Nardino v. Credit Control, L.L.C., 2019 WL 2053708 (E.D.N.Y. Mar. 26, 2019) (dismissal for lack of standing where no reference to prepetition FDCPA claims in chapter 7 schedules and no amendment of schedules), *adopted*, 2019 WL 2056701 (E.D.N.Y. Apr. 10, 2019); Thompson v. Ocwen Fin. Corp., 2018 WL 513720 (D. Conn. Jan. 23, 2018) (consumer had no standing to pursue FDCPA and other undisclosed prebankruptcy consumer law claims); Dalley v. Rubenstein & Assoc., 172 F. Supp. 3d 6 (D.D.C. 2016) (debtor knew of attempt to collect debt four months before she filed chapter 7 petition and was therefore required to schedule FDCPA claim even though she was not aware of all facts or legal basis for claim when filing her bankruptcy petition); Lewis v. Caliber Home Loans, Inc., 2016 WL 8715675 (D. Md. Feb. 26, 2016) (debtor had no standing to bring unscheduled FDCPA claims related to prebankruptcy foreclosure); Thompson v. Ocwen Fin. Corp., 2013 WL 4522504 (D. Conn. Aug. 27, 2013) (mortgage assignment that was predicate act for FDCPA claim occurred before bankruptcy filing; failure to schedule claim in bankruptcy precluded consumer's standing to raise claim in later action); Gonyo v. Midland Funding, L.L.C., 2012 WL 2564711 (D. Md. June 29, 2012) (because he failed to schedule preexisting FDCPA claim in prior chapter 7 case, debtor lacked standing to file later action raising claim); Tworek v. Hudson & Keyse, L.L.C., 2009 WL 4946723 (E.D. Mich. Dec. 14, 2009) (consumer who failed to disclose her FDCPA claim in her bankruptcy schedules lacked standing to assert the claim later); Griffith v. Javitch, Block & Rathbone, L.L.P., 358 B.R. 338 (S.D. Ohio 2007); *In re* Leslie, 2007 WL 80806 (Bankr. D. Conn. Jan. 5, 2007) (debtor lacked standing to assert claims which arose prior to the petition); *In re* Davis, 158 B.R. 1000 (Bankr. N.D. Ind. 1993); Miller v. Accelerated Bureau of Collections, Inc., 932 P.2d 824 (Colo. App. 1996) (FDCPA) (discharged debtors lacked standing to sue a collection agency; claim had not been properly exempted). *But see* Eun Joo Lee v. Forster & Garbus, L.L.P., 926 F. Supp. 2d 482 (E.D.N.Y. 2013) (rejecting standing challenges where debtor disclosed FDCPA claim in bankruptcy schedules, even though one potential defendant's name omitted from description); Greenfield v. Kluever & Platt, L.L.C., 2010 WL 604830 (N.D. Ill. Feb. 16, 2010) (consumer who filed bankruptcy petition on same day as FDCPA action without disclosing FDCPA case nevertheless had standing since she voluntarily dismissed bankruptcy action six weeks later); *In re* Belile, 209 B.R. 658 (Bankr. E.D. Pa. 1997) (alleged failure of the consumer to list her fair debt claims on her bankruptcy schedules could not be considered where the schedules were not offered into evidence).

149 Nicholas v. Green Tree Servicing, L.L.C., 173 F. Supp. 3d 250 (D. Md. 2016) (in dismissing RESPA and FDCPA claims court finds "[t]he debtor lacks standing to bring an unscheduled, and thus never abandoned, prepetition claim even if the debtor was not aware of a legal basis for bringing that claim at the time the bankruptcy petition was filed"); Dalley v. Rubenstein & Assoc., 172 F. Supp. 3d 6 (D.D.C. 2016) (debtor knew of attempt to collect debt four months before filing chapter 7 petition, therefore was required to schedule FDCPA claim, even though not aware of all facts or legal basis for claim when filed bankruptcy petition).

150 *In re* Bushberger, 588 B.R. 44 (Bankr. E.D. Wis. 2018).

151 736 F.3d 455 (6th Cir. 2013).

152 *Id* at 465. *Cf.* Stanfill v. Hawthorn Recovery Serv., Inc., 2013 WL 6197357 (E.D. Mo. Nov. 27, 2013) (FDCPA claims not property of

promptly upon learning of the filing of the collection complaint would likely have preserved the consumer's rights. The Sixth Circuit's ruling does not discuss this option.

With proper scheduling of the claim, along with exemption or abandonment by the bankruptcy estate, there is no reason why a party cannot serve as a class representative for an FDCPA claim despite an earlier bankruptcy.[153] A 2013 consumer law class action case provided an example of the impact of failure to schedule claims in old bankruptcy cases on certain parties' ability to serve as class representatives.

In *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, forty-three named plaintiffs brought a class action against several banks and the FDIC.[154] The plaintiffs alleged violations of TILA, RESPA, and other consumer laws. Sixteen of the individual plaintiffs were ultimately dismissed from the case because they had filed bankruptcy cases in the past and not scheduled the claims against the banks and the FDIC. By contrast, one plaintiff with a prior bankruptcy filing had reopened her bankruptcy case and added the claims to her bankruptcy schedules. The trustee had abandoned any interest in the claims. According to the court, this plaintiff, along with the non-bankruptcy filers, had standing to pursue the consumer claims in the current litigation.

One lesson to be learned from decisions such as these is that counsel who are contemplating bringing a debt collection action need to check the PACER bankruptcy court records for each client. It is possible to reopen a closed bankruptcy case for the purpose of amending schedules to add an omitted claim.[155] Once the legal claim is disclosed in a reopened case, the trustee can decide whether to liquidate the claim for creditors or abandon the estate's interest in the claim to the debtor. If the claim is abandoned or exempted, the debtor is then free to pursue it.[156] If the trustee decides to take over the claim, the borrower may still be entitled to receive up to the exempted amounts in the claim, while the rest would go to bankruptcy creditors.[157] The debtor's right to the exempted amount of the claim should be routinely recognized.[158]

There are strong arguments in favor of allowing reopening to amend schedules. To the extent that the claims are a valuable asset, the trustee can provide a benefit for creditors. To the extent that the claim is exempt or has little value for creditors, the initial omission of the claim from bankruptcy schedules did not harm anyone.[159] From a policy perspective, reopening and amendment is preferable to use of the bankruptcy standing doctrine to create a windfall for defendants who engaged in unlawful conduct.

When a debtor initially omitted a legal claim from schedules, but reopens the closed bankruptcy case, adds the claim, and seeks to pursue the claim after abandonment or exemption, courts may still limit the debtor's rights over the claim. A court may review the evidence of the debtor's conduct in initially omitting the claim and deciding to add it later. In determining whether to give the debtor control over the claim after reopening, the courts may consider factors such as the timing of the reopening in relation to the defendant's standing objection, the length of time since the bankruptcy case was closed, and any evidence of deliberate misrepresentation.[160] The doctrine of judicial estoppel, discussed in the next subsections, often comes into play in these determinations.

13.3.2.2 Other Limits to Postbankruptcy Standing Challenges

The bankruptcy standing doctrine has other important limitations. Many bankruptcy cases, particularly under chapter 13, are dismissed without a discharge. Different Bankruptcy Code provisions govern what happens with property of a bankruptcy estate upon a dismissal, as opposed to when a bankruptcy case is closed after entry of a discharge.[161]

bankruptcy estate where operative events occurred after date of filing chapter 7 petition for relief).

153 Nielsen v. Dickerson, 1999 WL 350649 (N.D. Ill. May 20, 1999) (rejecting challenge to class representative's typicality where proposed representative had amended schedules to give bankruptcy trustee reasonable notice of potential FDCPA claim).

154 954 F. Supp. 2d 360, 382 (W.D. Pa. 2013).

155 Schaefer v. First Source Advantage, L.L.C., 2013 WL 509001 (E.D. Mo. Feb. 12, 2013) (denying dismissal of FDCPA claim on standing grounds where, after debt collector raised standing issue, debtor reopened bankruptcy case, scheduled claim, and obtained order of abandonment); Christensen v. United Res. Sys., Inc., 2008 WL 2811749 (D. Colo. July 18, 2008) (granting motion to reconsider and vacating dismissal of FDCPA claim where debtor showed trustee had now abandoned claim). *See generally* Brown v. Allied Home Mortg. Capital Corp., 588 B.R. 271 (D.D.C. 2018) (motion to dismiss debtor's various prebankruptcy consumer claims for lack of standing denied where debtor amended schedules and trustee had not yet determined whether to take over claims or abandon them).

156 *See, e.g.*, Best v. Fed. Nat'l Mortg. Ass'n, 2017 WL 6550671, at *3 (D. Md. Dec. 21, 2017) (rejecting standing challenge where *pro se* debtor reopened closed bankruptcy case to add an exempt FDCPA claim and other consumer claims valued at $340,000; concluding that "the claims were both exempt and properly abandoned, and the Court has subject matter jurisdiction to hear them now").

157 Paige v. Waukesha Health Sys., Inc., 2013 WL 3560944 (E.D. Wis. July 11, 2013) (debtor satisfied standing requirements to pursue FDCPA action where claimed $1000 exemption in the claim valued at total of $4000 in the bankruptcy schedules).

158 *See, e.g., In re* Bushberger, 588 B.R. 44, 49 (Bankr. E.D. Wis. 2018) (summarizing Seventh Circuit decisions on amendment and exemption, allowing amendment of schedules to add FDCPA claim in reopened bankruptcy case), *later decision*, 2019 WL 2271043 (E.D. Wis. May 28, 2019) (although debtor did not become real party in interest until she amended bankruptcy schedules, district court properly had jurisdiction over FDCPA claims when they were filed in district court).

159 *But see* Nardino v. Credit Control, L.L.C., 2019 WL 2053708, at *5–6 (E.D.N.Y. Mar. 26, 2019) (in dismissing FDCPA claims on standing grounds court disregards debtor's statement that local chapter 7 trustee had policy of not wanting "speculative" FDCPA claims listed in schedules), *adopted*, 2019 WL 2056701 (E.D.N.Y. Apr. 10, 2019).

160 Macauley v. Estate of Nicholas, 7 F. Supp. 3d 468 (E.D. Pa. 2014) (dismissing of mortgagor's fraud claim on bankruptcy standing grounds, noting that could allow substitution but giving significant weight to fact that in several years after bankruptcy while aware of claim debtor did not try to open and amend).

161 *Compare* 11 U.S.C. § 349(b)(3), *with* 11 U.S.C. § 554(d). *See* Barnes v. Northwest Repossession, L.L.C., 2017 WL 4410109 (N.D. Ill. Oct. 4,

Upon dismissal, the estate property, whether scheduled or not, reverts back to the debtor. Thus, the perpetual limbo status for unscheduled debts should occur only after bankruptcy cases that were closed out after the bankruptcy court entered a discharge order.[162]

Most chapter 13 cases are dismissed without a discharge, typically because the debtors failed to keep up with plan payments. In certain instances, chapter 7 cases are also dismissed without entry of a discharge. This can occur when the debtor failed to file all documents necessary to proceed to a discharge. A standing problem cannot arise after these dismissals.

The bankruptcy standing problem does not exist if the FDCPA claim arose *after* the filing of the chapter 7 petition for relief. A legal claim acquired after the date of filing the chapter 7 petition does not belong to the bankruptcy estate.[163] Occasionally a continuing pattern of debt collection violations straddles the pre- and postpetition time periods.[164] In these instances it will be to the consumer's advantage to characterize the critical events as occurring postpetition. Similar timing issues appear in the judicial estoppel context, discussed below.

13.3.2.3 When Standing Problems Cannot Be Avoided

If the trustee does not abandon the debt collection claim, the court will likely find that the bankruptcy trustee, rather than the consumer plaintiff, has standing to pursue the claim. In this instance, dismissal of the lawsuit is the least appropriate option for the court to choose. The court should allow for substitution of the trustee as plaintiff.[165] The trustee then decides the appropriate actions to take.

One option is for the trustee to appoint the plaintiff's non-bankruptcy counsel to represent the bankruptcy estate in the debt collection lawsuit. The bankruptcy court must approve this representation. The process for approval of counsel to represent the estate focuses on disclosure and is not particularly burdensome.

The arrangement should provide that, from the proceeds of the action, the debtor receives amounts covered by exemptions and any sum left over after payments due creditors.[166] The only exception to this form of distribution should occur if a court finds that the debtor engaged in intentionally deceitful conduct in the initial omission of the claim from schedules. Under these circumstances the bankruptcy court may have authority to limit the debtor's personal recovery as part of the court's general authority to sanction inequitable conduct.[167]

The bankruptcy court should make this determination. However, non-bankruptcy courts hearing the postbankruptcy lawsuit sometimes impose these sanctions as well. The sanctions include the application of judicial estoppel, discussed in the next subsection.

13.3.3 Unscheduled Debt Collection Claims—the Judicial Estoppel Problem

13.3.3.1 Generally

Judicial estoppel is another doctrine that courts apply in situations where a plaintiff brings a consumer claim that existed at the time of a prior bankruptcy case, but did not disclose the claim in the schedules filed with the bankruptcy

2017) (consumer had standing to bring claims against repossession company despite two chapter 13 cases that were dismissed without discharge orders; however, judicial estoppel applied to bar claims).

162 Crawford v. Franklin Credit Mgmt. Corp., 758 F.3d 473 (2d Cir. 2014) (dismissal under § 349(b)(3) revests estate property in debtor, whether property scheduled or not; only closing case under § 554(d) distinguishes scheduled and unscheduled property and provides that unadministered property remains with estate); Mackall v. JPMorgan Chase Bank, 356 P.3d 946, 950 (Colo. App. 2014) ("where a bankruptcy case is dismissed, the Bankruptcy Code seems to unequivocally grant a debtor standing to assert any claim that it possessed before it filed for bankruptcy, regardless of whether it disclosed the claim to the bankruptcy court during the bankruptcy proceedings").

163 *See* Yarid v. Ocwen Loan Servicing, L.L.C., 2018 WL 3631883 (E.D. Va. July 31, 2018) (certain FDCPA claims of plaintiff arose postpetition and did not present standing problems, while for other FDCPA claims plaintiff must amend complaint to specify when they arose); Engelby v. I.C. Sys., Inc., 2018 WL 1514246 (D. Minn. Mar. 27, 2018) (discussing different concepts of bankruptcy estate in chapter 7 and chapter 13 in context of FDCPA claims accruing postpetition).

164 *See, e.g.*, Hernandez v. Dyck-O'Neal, Inc., 2015 WL 2094263 (M.D. Fla. May 5, 2015) (refusing to dismiss FDCPA claims on standing grounds; claims involved improper deficiency action where foreclosure sale occurred prepetition, but creditor filed deficiency lawsuit postpetition). *See generally In re* Porrett, 564 B.R. 57, 66–67 (D. Idaho 2016) (in context of consumer loan origination fraud claim, court discusses timing issues that determine inclusion of legal claim in property of bankruptcy estate).

165 *See* Kitchner v. Fiergola, 2018 WL 4473359 (E.D. Wis. Sept. 18, 2018) (rather than dismissal of debtor's FDCPA and FCRA claims on bankruptcy standing grounds, Rule 17 requires that court allow reasonable time for bankruptcy trustee to join in action or abandon claims); Didonato v. Imagine One Tech. & Mgt., Ltd., 2016 WL 6584911, at *3 (D.N.J. Nov. 7, 2016) (refusing to dismiss action on bankruptcy standing grounds, recognizing trustee as substituted plaintiff with debtor's counsel designated to represent bankruptcy estate); Nicholas v. Green Tree Servicing, L.L.C., 173 F. Supp. 3d 250 (D. Md. 2016) (before dismissing FDCPA claims court must first consider whether trustee has had reasonable time to ratify, join, or be substituted in the action pursuant to Rule 17).

166 Bargo v. Porter County Indiana, 2017 WL 3107161 (N.D. Ind. July 19, 2017) (to allow reasonable time for substitution of trustee as plaintiff is more appropriate than dismissal of action where former debtor lacks standing to maintain case); Jeziorowski v. Credit Prot. Assn., L.P., 2017 WL 1549965, at *2 (W.D.N.Y. May 1, 2017) (preferred way to address postbankruptcy standing problem in FDCPA action is to allow trustee to act as the real party in interest for the claim, with non-exempt proceeds of action going to debtor).

167 *But see* Metrou v. M.A. Mortenson Co., 781 F.3d 357, 360 (7th Cir. 2015) (debtor-plaintiff who amends schedules to list omitted claim presumptively remains eligible to receive non-exempt proceeds remaining after creditors are paid from lawsuit; reversing trial court that set cap on amount recoverable from lawsuit based on amount needed to pay creditors).

court. Judicial estoppel and lack of standing are related in that both can be consequences of an omitting a preexisting legal claim from bankruptcy schedules.

However, the concepts are distinct. For example, a plaintiff may amend schedules postbankruptcy, overcome standing objections, and be the proper party to pursue a claim, but still may be precluded from doing so by judicial estoppel. While standing goes to jurisdiction, and specifically to who is the real party in interest to bring the case, judicial estoppel is an affirmative defense.[168] The defense may bar a party who otherwise has standing from litigating the claim.[169] Courts sometimes apply both doctrines to dismiss a case.[170]

Judicial estoppel is an equitable doctrine intended to protect the integrity of the court by preventing a party from intentionally changing positions in litigation depending upon the "exigencies of the moment" to the detriment of an opposing party.[171] Under the doctrine, a party is precluded from asserting a claim in a legal proceeding inconsistent with a claim the same party made in a previous proceeding.

While there is no bright line test to determine when judicial estoppel may be invoked, the Supreme Court has focused on the following general considerations: (1) whether the party's later position was clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading the court to accept the earlier position, so that later judicial acceptance would suggest that the first or second court was deliberately misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.[172] Courts have imposed judicial estoppel in numerous instances in which a party omitted a prebankruptcy legal claim from bankruptcy schedules, then attempted to assert the claim in a post-discharge lawsuit.[173] Courts have applied judicial estoppel in the context of both chapter 13 and chapter 7 cases.[174]

Judicial estoppel has its place in certain instances where a party made a calculated decision not to disclose a valuable claim to bankruptcy creditors. For example, an individual about to pursue a tort claim worth hundreds of thousands of dollars should not be able to omit the claim intentionally from bankruptcy schedules, obtain a discharge of debts, and later retain all of the proceeds from the lawsuit.

However, the circumstances surrounding consumer debt collection claims are usually very different. Bankruptcy debtors often do not know that they have the claims when they complete their schedules of assets in preparation for a bankruptcy filing. Because the debt collection claims can often be exempted or will be abandoned by the bankruptcy estate, debtors have little reason to engage in deliberate manipulation to conceal these claims. Nevertheless, courts have applied judicial estoppel to dismiss FDCPA claims that the plaintiff did not disclose in prior bankruptcy schedules.[175]

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168 *But see* Davis v. District of Columbia, ___ F.3d ___, 2019 WL 2398007, at *11 (D.C. Cir. June 7, 2019) (in addition to considering judicial estoppel as affirmative defense, court may *sua sponte* raise judicial estoppel because doctrine protects integrity of judicial process).

169 Romeo v. FMA All., Ltd., 2016 WL 3647868 (E.D.N.Y. June 30, 2016).

170 *See, e.g.*, Lapointe v. Target Corp., 2017 WL 1397311 (N.D.N.Y. Feb. 14, 2017) (dismissal of wage and hour action for bankruptcy standing and for judicial estoppel as alternative ground); Jimenez v. Wells Fargo Bank, 2016 WL 4059161 (E.D. Va. July 26, 2016) (dismissing TILA rescission claim on both standing and judicial estoppel grounds); Johnson v. Deutsche Bank Nat'l Trust Co., 2013 WL 3810715 (N.D. Tex. July 23, 2013) (challenge to foreclosure practices asserting various consumer claims, including FDCPA, dismissed for bankruptcy-related lack of standing and judicial estoppel). *See also* Weingard v. Unifund CCR, L.L.C., 2015 WL 2149482 (N.D. Ill. May 6, 2015) (court confuses standing and judicial estoppel, dismisses FDCPA claim).

171 New Hampshire v. Maine, 532 U.S. 742, 753, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

172 New Hampshire v. Maine, 532 U.S. 742, 750–751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) ("the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle"). *See also* Ajaka v. BrooksAmerica Mortg. Corp., 453 F.3d 1339 (11th Cir. 2006) (factors are whether allegedly inconsistent positions were taken under oath in a prior proceeding, whether they were calculated to make a mockery of judicial system, whether present position is clearly inconsistent with earlier position, whether a court accepted the earlier position, and whether party would derive unfair advantage if not estopped); 18 Moore's Federal Practice § 134.30, at 134–162 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."). Note that state courts may apply judicial estoppel standards that differ from the criteria that a federal court in the same jurisdiction would apply. *See, e.g.*, Salazar-Abreu v. Walt Disney Parks & Resorts U.S., Inc., ___ So. 3d ___, 2018 WL 6816757 (Fla. Ct. Dist. App. Dec. 28, 2018) (reversing trial court for incorrectly applying stricter Eleventh Circuit judicial estoppel standard to dismiss action instead of Florida state law standard under which claims survive).

173 BPP Illinois, L.L.C. v. Royal Bank of Scotland Grp. P.L.C., 859 F.3d 188 (2d Cir. 2017); White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472 (6th Cir. 2010); Moses v. Howard Univ. Hosp., 606 F.3d 789 (D.C. Cir. 2010); Eastman v. Union Pac. R. Co., 493 F.3d 1151 (10th Cir. 2007); Cannon-Stokes v. Potter, 453 F.3d 446 (7th Cir. 2006); Stallings v. Hussmann Corp., 447 F.3d 1041 (8th Cir. 2006); Jethroe v. Omnova Solutions, Inc., 412 F.3d 598 (5th Cir. 2005); Krystal Cadillac Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314 (3d Cir. 2003); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001); Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc., 989 F.2d 570 (1st Cir. 1993).

174 *See, e.g.*, Kimberline v. Dollar Gen. Corp., 520 Fed. Appx. 312 (6th Cir. 2013) (judicial estoppel applied where cause of action accrued during final weeks of five-year chapter 13 plan and debtor did not disclose claim before discharge); DeLeon v. Comcar Indus., Inc., 321 F.3d 1289 (11th Cir. 2003).

175 *See* Romeo v. FMA All., Ltd., 2016 WL 3647868, at *14–15 (E.D.N.Y. June 30, 2016) (applying judicial estoppel where chapter 13 debtor amended schedules to disclose only one "possible" FDCPA claim, when in fact she had four prepetition FDCPA claims and eventually filed four separate FDCPA lawsuits); McCauley v. Hunter, 2015 WL 2193805 (N.D. Ill. May 7, 2015) (dismissing FDCPA action because was property of bankruptcy estate, confusing judicial estoppel and standing); Weingard v. Unifund CCR, L.L.C., 2015 WL 2149482 (N.D. Ill. May 6, 2015) (rejecting debtor's argument that was not aware of FDCPA claim when filed bankruptcy petition, dismisses FDCPA claim); Barris v. Midland Funding L.L.C., 2015 WL 519176 (D.N.J. Feb. 9, 2015) (plaintiff was aware of FDCPA violation three weeks before filed chapter 7 petition, never scheduled claim; dismissing plaintiff's postbankruptcy FDCPA action for lack of standing); Sinju v. Express Recovery Serv., Inc., 2013 WL 6621120 (D. Utah Dec. 16, 2013); Black v. Midland Credit Mgmt., Inc., 2013 WL 5140181 (W.D.

Judicial estoppel rulings vary greatly from jurisdiction to jurisdiction, and even within a jurisdiction.[176] The decisions focus heavily on the facts of a given case.[177] Advocates should always emphasize the equitable nature of judicial estoppel.[178] Application of the doctrine is discretionary, even when all elements are present. In applying equitable principles, courts should give weight to the relatively low value of certain FDCPA claims and take into account that the amount of the claim can be easily exempted.[179]

The Eleventh Circuit's recent *en banc* ruling in *Slater v. United States Steel Corp.*[180] highlights a trend among the appellate courts to reject rigid formulae in applying judicial estoppel based on the prior omission of a claim from bankruptcy schedules.[181] Instead, where the debtor has gone ahead and corrected the schedules, the courts should apply judicial estoppel only where there is evidence that the debtor deliberately intended to "make a mockery of the judicial system."[182] The appropriate evaluation should include consideration of the debtor's level of sophistication, the explanation for the omission, actions to correct the omission, and the bankruptcy court's response to the correction.[183]

The purpose of judicial estoppel is to protect innocent parties from severe prejudice and uphold respect for the judicial process. The purpose is not to create a shield for offensive creditor practices. If a debtor's omission of a claim from bankruptcy schedules had no tangible negative impact on any party or the bankruptcy system, judicial estoppel serves no purpose. In jurisdictions that favor implying a presumption of deceit from the debtor's knowledge of facts and the timing of the bankruptcy filing, advocates need to highlight the evidence of the consumer's good faith. The courts should not apply an equitable doctrine without considering this evidence.

13.3.3.2 When Judicial Estoppel Should Not Apply

A court's adoption of a position asserted by the party in a prior proceeding is a required element of judicial estoppel. Many bankruptcy cases, particularly under chapter 13, are dismissed without a discharge. Debtors should argue that, in prior bankruptcy cases in which the court never entered a discharge order, the bankruptcy court did not "adopt" any position based on the omission of a claim from schedules.[184] There is no risk

Wash. Sept. 12, 2013) (receipt of debt collection letter before she filed for bankruptcy relief gave debtor enough information to know she should have listed FDCPA claim in her bankruptcy schedules); Otter v. Northland Croup. Inc., 2013 WL 2243874 (W.D. Wash. May 21, 2013) (debtor aware of collection letters and did not amend schedules during pendency of bankruptcy case and before discharge); Kee v. Evergreen Prof'l Recoveries, Inc., 2009 WL 2578982 (W.D. Wash. Aug. 19, 2009) (consumer judicially estopped from proceeding with FDCPA claim not listed in bankruptcy); Allers-Petrus v. Columbia Recovery Grp., L.L.C., 2009 WL 799676 (W.D. Wash. Mar. 24, 2009) (FDCPA claim based on judicial estoppel where debtor did not schedule known claim and did not seek to amend until after defendant filed summary judgment motion); Toma v. Gen. Revenue Corp., 2008 WL 302378 (E.D. Mich. Feb. 1, 2008) (plaintiff was judicially estopped from maintaining an FDCPA claim because the claim was not disclosed as an asset in her bankruptcy filing, thus creating the inconsistency to support judicial estoppel that no such claim existed); *In re* Barnes, 2010 WL 3895463 (Bankr. E.D. Mo. Sept. 29, 2010) (*pro se* consumers who failed to list the alleged FDCPA action on their bankruptcy schedules as property of the estate were estopped from pursuing it). *See also* Demarest v. Ocwen Loan Servicing, L.L.C., 481 Fed. Appx. 352, 353 (9th Cir. 2012) (affirming dismissal of borrowers' TILA rescission claim on ground of judicial estoppel, finding debtor "responsible for the consequences of her [bankruptcy] attorney's alleged negligence"); Tyson v. Bank of Am., 2016 WL 4070134 (N.D. Cal. July 29, 2016) (applying judicial estoppel where borrowers gave TILA rescission notice before filing chapter 7 case and never disclosed potential claim in schedules).

176 *See, e.g.*, Ashmore v. CGI Groups, Inc., 923 F.3d 260, 272 (2d Cir. 2019) Marshall v. Honeywell Tech. Sys., Inc., 828 F.3d 923, 932 (D.C. Cir. 2016) (reviewing recent court of appeals rulings on judicial estoppel and cautioning against use of standards that limit courts' flexibility to consider specific facts of cases).

177 *See, e.g.*, Ashmore v. CGI Groups, Inc., 923 F.3d 260, 272 (2d Cir. 2019) (application of judicial estoppel depends heavily on specific factual contexts).

178 New Hampshire v. Maine, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001); Slater v. United States Steel Corp., 871 F.3d 1174, 1186 (11th Cir. 2017) (en banc) (rejecting mechanical approach to judicial estoppel in favor of flexible approach that requires consideration of all facts and circumstances to evaluate debtor's intent in omitting claim from bankruptcy schedules); Clark v. All Acquisition, L.L.C., 886 F.3d 261, 267 (2d Cir. 2018) (before applying judicial estoppel court must consider whether balance of equities favors application); Ah Quin v. Cty. of Kauai Dep't of Trans., 733 F.3d 267, 272 (9th Cir. 2013); Cannon-Stokes v. Potter, 453 F.3d 446 (7th Cir. 2006); Browning v. Levy, 283 F.3d 761, 776 (6th Cir. 2002); *In re* Riazuddin, 363 B.R. 177 (B.A.P. 10th Cir. 2007); *In re* An-Tze Cheng, 308 B.R. 448, 459 (B.A.P. 9th Cir. 2004), *aff'd*, 160 Fed. Appx. 644 (9th Cir. 2005); Miller v. Conagra, 991 So. 2d 445, 453 (La. 2008) (courts must ultimately look to equitable principles, not fixed formula, to apply doctrine). *See also* Marshall v. Honeywell Tech. Sys., Inc., 828 F.3d 923, 933 (D.C. Cir. 2016) (Griffith, J. dissenting). *See generally* Hicks v. U.S. Bank, 2018 WL 1115367 (S.D. Ga. Feb. 27, 2018) (noting unlikelihood that debtor intended to make mockery of judicial system when bringing unscheduled consumer claim before same bankruptcy court that is presiding over main bankruptcy case).

179 *See, e.g.*, Basconcello v. Experian Info. Solutions, Inc., 2017 WL 1046969, at *4 (N.D. Cal. Mar. 20, 2017) (failure to amend schedules in a more timely fashion did not disadvantage creditors where damages under Fair Credit Reporting Act (FCRA) claim likely nominal); Sovik v. Ducks Unlimited, Inc., 2011 WL 1397970, at *4 (M.D. Tenn. Apr. 13, 2011) (relatively small monetary value of debtor's Fair Labor Standards Act (FLSA) claim is a factor tending to negate finding of bad faith in omission of claim from schedules).

180 871 F.3d 1174, 1186 (11th Cir. 2017).

181 *See also* Clark v. All Acquisition, L.L.C., 886 F.3d 261, 267 (2d Cir. 2018); Spaine v. Cmty. Contacts, Inc., 756 F.3d 542 (7th Cir. 2014); Ah Quin v. Cty. of Kauai Dep't of Trans., 733 F.3d 267 (9th Cir. 2013).

182 Slater v. U.S. Steel Corp., 871 F.3d 1174, 1185 (11th Cir. 2017).

183 *Id.* at 1185–1189.

184 Crawford v. Franklin Credit Mgmt. Corp., 758 F.3d 473 (2d Cir. 2014); Stallings v. Hussmann Corp., 447 F.3d 1041 (8th Cir. 2006) (no judicial estoppel where party's prior chapter 13 case dismissed without discharge); Walker v. Specialized Loan Servicing, L.L.C., 2018 WL 784416 (E.D. Cal. Feb. 8, 2018) (FDCPA plaintiff never persuaded bankruptcy court to accept his position because court never confirmed a chapter 13 plan based on debtor's schedules); Gelinas v. U.S. Bank, 2017 WL 553277, at *6 (W.D. Wash. Feb. 10, 2017) (no benefit to former debtor from an inconsistent statement in bankruptcy schedules where

of inconsistent adjudications in this situation. This is also true when the bankruptcy court did not confirm a chapter 13 plan.

However, some courts have found that plan confirmation, and even the temporary implementation of the automatic stay, sufficed to indicate that a bankruptcy court relied on the representations in a debtor's schedules.[185] The courts will be more inclined to impose judicial estoppel in non-discharge cases when the evidence shows a pattern of repeat bankruptcy filings intended to delay collection actions along with little effort to obtain a discharge.[186]

There are other instances where the bankruptcy court simply did not rely on the omissions in the debtor's schedules and statements to grant a discharge or other relief to the debtor. In these situations judicial estoppel should not apply.[187] For example, debtors may overcome the inference that they intended to mislead the bankruptcy court if they disclosed the claims in some way during the pendency of the bankruptcy case, even though they did not meet the technical requirements to schedule them.[188] The Second Circuit appropriately held that judicial estoppel should not apply where the party

bankruptcy was dismissed without confirmation of plan or order of discharge); Ellis v. Phillips and Cohen Assoc., Ltd., 2015 WL 4396375 (N.D. Cal. July 17, 2015) (no judicial estoppel for prepetition FDCPA claim where debtor's two prior chapter 7 cases were dismissed without discharge; no evidence bankruptcy court or creditors relied on nondisclosure to determine any action); Royal v. R & L Carriers Shared Serv., L.L.C., 2013 WL 1736658 (E.D. Va. Apr. 22,2013) (must be discharge in chapter 13, not just plan confirmation, to show bankruptcy court accepted debtor's position and debtor received advantage); Village of Canon v. Bankers Trust Co., 1997 WL 47804 (S.D.N.Y. Feb. 5, 1997) (no judicial estoppel where plan never confirmed in party's past chapter 11 case). *See also* Lewis v. McCabe, Weisberg & Conway, L.L.C., 2014 WL 3845833 (D. Md. Aug. 4, 2014) (dismissing state debt collection claims on other grounds but holding no judicial estoppel where borrower had not contested validity of note in stay relief proceeding, then later voluntarily dismissed chapter 13 case); Chancellor v. OneWest Bank, 2012 WL 1868750 (N.D. Cal. May 22, 2012) (borrower's wrongful foreclosure and RESPA claims not barred by judicial estoppel where chapter 13 plans not confirmed in prior bankruptcies); Sannah v. Wells Fargo Bank BA, 2012 WL 10423186, at *4 (C.D. Cal. Mar. 19, 2012) (no judicial estoppel where chapter 13 plan never filed before dismissal); Bates v. Dura Auto. Sys., Inc., 650 F. Supp. 2d 754 (M.D. Tenn. 2009) (no judicial estoppel for parties whose prior bankruptcy cases were dismissed without discharge), *rev'd in part on other grounds*, 625 F.3d 283 (6th Cir. 2010); Wilson v. City of Springfield, 2009 WL 1687934 (S.D. Ohio June 15, 2009) (no estoppel where prior chapter 7 case dismissed without discharge); *In re* DiVittorio, 430 B.R. 26 (Bankr. D. Mass. 2010) (judicial estoppel not applied to chapter 13 debtor's TILA rescission action which had not been scheduled prior to plan confirmation; court had not yet formally "accepted" debtor's schedules by granting discharge), *aff'd on other grounds*, 670 F.3d 273 (1st Cir. 2012); Ass'n Resources, Inc. v. Wall, 2 A.3d 873, 892 (Conn. 2010) (rejecting judicial estoppel where chapter 13 case dismissed after plan confirmation but before discharge). *See also In re* Oparaji, 698 F.3d 231, 238 (5th Cir. 2012) (refusing to apply judicial estoppel to creditor because confirmation of plan did not represent judicial acceptance of a position in a chapter 13 case dismissed without discharge).

185 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001) (applying judicial estoppel although prior chapter 7 discharge had been revoked); Assasepa v. JPMorgan Chase Bank, 2012 WL 88162, at *11 (S.D. Ohio Jan. 11, 2012) (mag.; applying judicial estoppel although debtor had not obtained discharge; chapter 13 debtor received benefit of automatic stay and court approved payment plan); Hamilton v. Greenwich Investors XXVI, L.L.C., 126 Cal. Rptr. 3d 174 (Cal. Ct. App. 2011) (judicial estoppel barred consumer's lender liability claims where claims not scheduled in debtor's pending chapter 13 case; plan had been confirmed, distinguishing cases in which plans not confirmed); Becker v. Wells Fargo, 2012 WL 5187792 (E.D. Cal. Oct. 18, 2012) (judicial estoppel applied where debtor failed to disclose legal claims related to improper foreclosure sale that occurred after bankruptcy petition was filed, but before chapter 13 plan confirmed). *But see* Basconcello v. Experian Info. Solutions, Inc., 2017 WL 1046969 (N.D. Cal. Mar. 20, 2017) (plan confirmation did not satisfy bankruptcy court reliance element, because legal claim did not arise until after plan confirmation order); Mensah v. Experian Info. Solutions, Inc., 2017 WL 1246892, at *10–11 (N.D. Cal. Apr. 5, 2017) (same); Jones v. Randle, 373 P.3d 1186, 1191 (Or. Ct. App. 2016) (applying state law, automatic stay in effect in plaintiff's two prior dismissed chapter 13 cases not a benefit derived from nondisclosure of property interest); Fricke v. Healthcare Revenue Recovery Grp., L.L.C., 2015 WL 4778527 (N.D. Ill. Aug. 12, 2015) (temporary benefit from automatic stay alone not sufficient to trigger judicial estoppel); Zyla v. Am. Red Cross Blood Serv., 2014 WL 3868735 (N.D. Cal. Aug. 6, 2014) (where plan amended to add omitted claim and mistake averred, benefit debtor received from automatic stay not sufficient to impose judicial estoppel); Boatright v. Aurora Loan Serv., 2012 WL 2792415 (N.D. Cal. July 9, 2012) (mere imposition of automatic stay in prior chapter 13 case without confirmation of plan did not create requisite benefit to debtor to justify imposition of judicial estoppel); Campbell v. Bank of Am., 2013 WL 3833669 (Cal. Ct. App. July 24, 2013) (unpublished) (implementation of stay in dismissed bankruptcy cases not sufficient to meet requirement for court adoption of position, borrower may pursue loan servicing claims); Gottlieb v. Kest, 46 Cal. Rptr. 3d 7 (Cal. Ct. App. 2006) (implementation of automatic stay not sufficient to trigger adoption of legal position prong of judicial estoppel test).

186 Nuno v. Wells Fargo Bank, 2017 WL 4083140 (C.D. Cal. Sept. 13, 2017) (although no plan confirmation or discharge in recent chapter 13 case, debtor filed three bankruptcy cases within a year and failed to schedule pending wrongful foreclosure case in most recent bankruptcy filing); Sharp v. Nationstar Mortg., L.L.C., 2015 WL 106844 (N.D. Cal. Jan. 7, 2015) (judicial estoppel applied where debtor filed four consecutive bankruptcy cases that were dismissed without discharge, delaying foreclosures), *aff'd*, 2017 WL 2859105 (9th Cir. 2017); HPG Corp. v. Aurora Loan Serv., L.L.C., 436 B.R. 569 (E.D. Cal. 2010) (judicial estoppel applied against debtors who did not obtain discharges in prior bankruptcy cases, but who obtained benefits of automatic stay in multiple cases).

187 Meyer v. U.S Bank, 530 B.R. 767, 775 (W.D. Wash. 2015) (judicial estoppel not applied where bankruptcy court did not rely on absence of legal claim in schedules; unsettled issues of state foreclosure law were clarified after bankruptcy and debtors not aware had legal claim at time of bankruptcy); Pavelka v. Allstate Prop. & Cas. Ins. Co., 91 F. Supp. 3d 931 (E.D. Mich. 2015) (different valuation figures in debtor's schedules and in later insurance claim did not present direct contradiction, but reflected valuations for different purposes and applied different standards). *See also* Khair-Dorsey v. WellSpan Health, 2017 WL 770590 (M.D. Pa. Feb. 28, 2017) (even though plaintiff did not provide evidence to rebut a presumption of deceit, court will apply judicial estoppel only to bar claims for monetary relief, and not claims for injunctive relief).

188 Ashmore v. CGI Group, Inc., 923 F.3d 260 (2d Cir. 2019) (debtor did not list claim on Schedule B, but mentioned it in Statement of Financial Affairs and at other times during pendency of bankruptcy case); Spaine v. Community Contracts, Inc., 756 F.3d 542, 547 (7th Cir. 2014) (declining to enter summary judgment based on judicial estoppel where, although debtor did not schedule pertinent claim, she disclosed claim at creditor's meeting and trustee considered it).

seeking the benefit of the doctrine was not prejudiced by the non-disclosure.[189]

Judicial estoppel assumes that the legal claim at issue would have been property of the bankruptcy estate and available to pay creditors if it had been disclosed. As was true for the analysis of standing, the claim's inclusion in the bankruptcy estate depends on when the claim arose. Judicial estoppel cannot apply if the infractions occurred *after* the consumer filed a chapter 7 case.[190] Legal claims that the debtor acquires after filing the chapter 7 petition do not belong the bankruptcy estate and there is no duty to disclose them.[191] Since judicial estoppel is an affirmative defense, the defendant carries the burden of establishing that the cause of action accrued prebankruptcy.[192]

The application of judicial estoppel in chapter 13 cases has raised some particularly thorny issues. The Code and the federal bankruptcy court rules do not expressly mandate that debtors amend schedules to list legal claims that accrue during the pendency of a confirmed chapter 13 plan.[193] Chapter 13 plans typically fund payments to creditors through the debtor's regular earnings during the three- to five-year term of a plan. After plan confirmation, the appearance of a new unliquidated legal claim that may produce a one-time payment to the debtor should arguably not require amendment of schedules.[194] The claim may not produce the payment to the debtor until years after the plan has terminated.

However, several courts have rejected the view that debtors have no duty to amend their schedules to list claims that arise during a chapter 13 case. The courts applied judicial estoppel when chapter 13 debtors did not amend schedules to reflect legal claims that arose while they were in chapter 13 and later attempted to pursue the claims.[195]

The source of this obligation to amend is not clear, although the courts seem to focus on the definition of estate property for chapter 13 cases. The definition includes property acquired postpetition.[196] In addition, form chapter 13 plan confirmation orders and local rules may expressly require disclosure of post-confirmation legal claims.[197]

Finally, creditors argue that the Code provisions for amendment of plans during chapter 13 presume some obligation to disclose new property acquired, so that the trustee or court may consider whether modification of a plan is appropriate.[198] Therefore, in order to avoid judicial estoppel problems in the future, it may be appropriate to amend schedules to

189 Clark v. All Acquisition, L.L.C., 886 F.3d 261, 266–267 (2d Cir. 2018) (abuse of discretion to impose judicial estoppel where party seeking estoppel was in no way prejudiced by the omission from schedules).

190 Engelby v. I.C. Sys., Inc., 2018 WL 1514246 (D. Minn. Mar. 27, 2018) (chapter 7 filing creates clean break with debtor's financial past; under FDCPA a discrete claim arises each time a debt collector makes a false representation after chapter 7 petition filed; it is irrelevant that underlying debt arose prebankruptcy); Knight v. Wells Fargo Bank, 2016 WL 3221593 (D. Mont. June 8, 2016) (although borrowers were experiencing payment difficulties with servicer before filing for bankruptcy relief, nature and existence of legal claims did not become clear until after bankruptcy filed, precluding judicial estoppel for not listing claims in chapter 7 schedules); Moreno v. Wells Fargo Home Mortg., 2014 WL 5934722 (E.D. Cal. Nov. 12, 2014) (denying judicial estoppel where debtor filed bankruptcy in reliance on servicer's promise to consider for loan modification, but after bankruptcy servicer refused to consider modification because debtor filed for bankruptcy: claim arose postpetition); Garcia v. Receivables Performance Mgmt., L.L.C., 2014 WL 5543885 (N.D. Ill. Nov. 3, 2014) (FDCPA claims arose after conversion of bankruptcy case to chapter 7 and therefore debtor had no duty to disclose and schedule claims; fact that underlying debt arose prebankruptcy not determinative); *In re* Rivera, 2014 WL 287517 (Bankr. E.D. Va. Jan. 27, 2014) (rejecting creditor's standing and judicial estoppel claims; while the creditor's promise to modify loan occurred prepetition, the foreclosure sale that was the subject of complaint occurred after chapter 7 filing; debt collection claims dismissed on other grounds). *See also In re* Rivera, 2014 WL 287517 (Bankr. E.D. Va. Jan. 27, 2014) (because debtor's major claims related to a foreclosure that occurred postpetition and not to origination issues, judicial estoppel not applicable); Famatiga v. Mortg. Elec. Registration Sys., Inc., 2011 WL 3320480 (E.D. Mich. Aug. 2, 2011) (no judicial estoppel where major part of borrower's claim related to a wrongful foreclosure that occurred after the bankruptcy filing); Doran v. Wells Fargo Bank, 2011 WL 2160643 (D. Haw. May 31, 2011) (judicial estoppel applied to one claim related to series of foreclosure actions lender took against borrower, but not to other claims related to misconduct that occurred postpetition). *But cf.* Clementson v. Countrywide Fin. Corp., 464 Fed. Appx. 706 (10th Cir. 2012) (unreported) (borrower's efforts to modify mortgage loan were rooted in lender's prebankruptcy pattern of conduct so that failure to schedule legal claims against lender triggered judicial estoppel).

191 Combs v. The Cordish Companies, Inc., 862 F.3d 671, 679–680 (8th Cir. 2017) (in chapter 7 case, debtor had no duty to disclose discrimination claim based on incidents that occurred after chapter 7 filing, reversing trail court's imposition of judicial estoppel); Carter v. Richland Holdings, Inc., 2018 WL 4566667 (D. Nev. Sept. 24, 2018) (FDCPA claims that are allowable under statute of limitations occurred *after* closing of bankruptcy case).

192 Gritters v. Ocwen Loan Servicing, L.L.C., 2015 WL 6784352 (N.D. Ill. Nov. 6, 2015) (rejecting creditor's standing and judicial estoppel challenges because did not specify that debtor knew of injuries before filing bankruptcy petition).

193 Fed. R. Bankr. P. 1007(h) requires amendment of schedules to list property acquired postpetition only in limited instances defined by Code § 541(a)(5) (property in the form of inheritance, divorce settlement, and insurance proceeds to which debtor becomes entitled within 180 days of filing petition).

194 *In re* Adair, 253 B.R. 85, 90 (B.A.P. 9th Cir. 2000); *In re* Haber, 547 B.R. 252, 260 (Bankr. S.D. Ohio 2016); *In re* Batten, 351 B.R. 256, 259 (Bankr. S.D. Ga. 2006).

195 United States v. GSDMIDEA City, L.L.C., 798 F.3d 265 (5th Cir. 2016) (rejecting debtor's argument that law on duty to amend schedules for postpetition claims during chapter 13 was unclear, applying judicial estoppel to bar False Claims Act lawsuit); Jones v. Bob Evans Farms, Inc., 811 F.3d 1030 (8th Cir. 2016) (judicial estoppel applied to bar pursuit of employment discrimination claim that arose postpetition and despite debtor's amending schedules after defendant raised judicial estoppel); Allen v. C & H Distributors, L.L.C., 813 F.3d 566 (5th Cir. 2015) (judicial estoppel applied to bar personal injury action that accrued during chapter 13 case, even though debtor never obtained chapter 13 discharge); D'Antignac v. Deere & Co., 604 Fed Appx. 875 (11th Cir. Mar. 25, 2015) (dismissing employment discrimination action unscheduled in chapter 13 case); *In re* Flugence, 738 F.3d 126 (5th Cir. 2013) (imposing judicial estoppel to bar debtor from litigating undisclosed claim that arose during chapter 13 case after confirmation of plan).

196 11 U.S.C. § 1306(a)(1).

197 *See* Jones v. Bob Evans Farms, Inc., 811 F.3d 1030 (8th Cir. 2016).

198 11 U.S.C. § 1329; Fed. R. Bankr. P. 1009.

add postpetition legal claims before the chapter 13 case is closed out.[199]

13.3.3.3 Amending Bankruptcy Schedules to Avoid Judicial Estoppel

As with the standing problem, the plaintiff can seek to reopen a closed bankruptcy case, file an amended schedule listing the debt collection claim, and have the claim exempted, administered, or abandoned.[200] If the action is taken promptly and there is no evidence of bad faith, the court should decline to impose judicial estoppel.[201] Many courts will not imply the intent to deceive from an omission that was clearly inadvertent or based on lack of knowledge of the claim.[202] This is

199 *See* Fricke v. Healthcare Revenue Recovery Grp., L.L.C., 2015 WL 4778527 (N.D. Ill. Aug. 12, 2015) (district refuses to apply judicial estoppel to FDCPA claim where chapter 13 debtor amended schedules four months after claim arose and after plan confirmation, but while bankruptcy case still subject to administration). *See also* Thomas v. Economy Premier Assur. Co., 196 So. 3d 7, 18, (La. Ct. App. 2016) (applying federal law, declining to apply judicial estoppel, recognizing that law regarding debtor's post-confirmation duty to amend schedules in chapter 13 was not clear).

200 Under the Supreme Court's *Law v. Siegel* decision, debtors should not face barriers to claiming an exemption based solely on the late amendment to their schedules. *See* Law v. Siegel, 571 U.S. 415, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014); *In re* Padula, 542 B.R. 753, 759 (Bankr E.D. Va. 2015), *aff'd*, 651 Fed. Appx. 228 (4th Cir. 2016).

201 Slater v. U.S. Steel Corp., 871 F.3d 1174, 1186 (11th Cir. 2017) (en banc) (before imposing judicial estoppel, courts must consider wide range of factors, including whether debtor corrected non-disclosure); Spaine v. Cmty. Contacts, Inc., 756 F.3d 542 (7th Cir. 2014); Ah Quin v. Cty. of Kauai Dep't of Taxes, 733 F.3d 267, 275 276 (9th Cir. 2013) (presumption of intent to deceive by omission from schedules rebutted by later amendment and disclosure); Matthews v. Potter, 316 Fed. Appx. 518 (7th Cir. 2009) (rejecting estoppel against debtor who modified initial schedules and had previously informed trustee verbally of preexisting employment claim); Ajaka v. Brooksamerica Mortg. Corp., 2009 WL 453 F.3d 1339 (11th Cir. 2006) (amendment after chapter 13 plan confirmation to add TILA claim did not prejudice any parties); *In re* Lopez, 283 B.R. 22 (B.A.P. 9th Cir. 2002) (debtor should have been permitted to reopen and amend to schedule cause of action because, even if claim had been intentionally concealed, asset could be administered to benefit creditors); Bejarano v. Bravo! Facility Serv., Inc., 251 F. Supp. 3d 27 (D.D.C. 2017) (distinguishing cases where debtor amended schedules only after defendant raised judicial estoppel claim; rejecting estoppel where amendment and abandonment had occurred before the debtor filed the postbankruptcy lawsuit); Momoh v. Wells Fargo Bank, 2016 WL 8729939, at *4 (N.D. Cal. July 1, 2017) (although considering it a "more nuanced" and close question, court declines to apply judicial estoppel where mortgagor amended chapter 13 schedules after mortgage servicer raised judicial estoppel; bankruptcy court never relied on incomplete schedules during period prior to amendment); Saji v. Residential Credit Solutions, 2017 WL 1407997 (N.D. Cal. Apr. 20, 2017) (no unfair advantage or misleading of bankruptcy court where debtor amended schedules to add wrongful foreclosure claim three-to-four months after events and three-to-four years after chapter 13 petition filed); Nettles v. State Farm Fire & Cas. Co., 2011 WL 2462556 (M.D. Ga. June 17, 2011) (despite delay in amending schedules, debtors' prompt notification to trustee of fire casualty claim rebutted any inference of intent to conceal claim); Kurchack v. Life Ins. Co. of N. Am., 725 F. Supp. 2d 855 (D. Ariz. 2010) (allows debtor to amend schedules to claim exemption for lawsuit proceeds after discharge and after motion to dismiss filed); Roots v. Morehouse Sch. of Medicine, Inc., 2009 WL 4798217 (N.D. Ga. Dec. 8, 2009) (allows post-confirmation amendment to add FLSA claim; dismissal could harm creditors); Mellon v. Nat'l Dairy Holdings, L.P., 2009 WL 653024 (M.D. Ala. Mar. 10, 2009) (delay of eleven months after chapter 13 plan confirmation in amending schedules to include discrimination claim does not trigger judicial estoppel); Snowden v. Fred's Stores of Tennessee, 419 F. Supp. 2d 1367 (M.D. Ala. 2006) (debtor amended schedules after motion to dismiss filed; dismissal of potentially lucrative civil action would harm creditors); Moore v. Cycon Enters., Inc., 2006 WL 2375477 (W.D. Mich. Aug. 16, 2006) (debtor who informed court and trustee of potential claims and later amended her schedules not judicially estopped from bringing TILA and HOEPA claims); Wheeler v. Florida Dep't of Corrections, 2006 WL 2321114 (M.D. Fla. Aug. 9, 2006) (amending schedules after motion to dismiss filed does not preclude denial of estoppel); *In re* Baldwin, 307 B.R. 251 (M.D. Ala. 2004) (judicial estoppel did not apply because debtor was not aware of lender liability claim when bankruptcy filed, and later promptly amended schedules); *In re* Fields, 2013 WL 1136923, at *3 (Bankr. N.D. Ala. Mar. 19, 2013) (no judicial estoppel where debtor amended schedules during pending chapter 13 case to add TILA claim; amendment made after plan confirmation and in response to creditor's raising judicial estoppel); *In re* Rochester, 308 B.R. 596 (Bankr. N.D. Ga. 2004) (debtor allowed to reopen bankruptcy case to add products liability claim as debtor's failure to list claim in original schedules was not intentional or in bad faith); Miller v. Conagra, Inc., 991 So. 2d 445 (La. 2008) (cure of omission permitted; amendment may benefit creditors). *See generally* Just Film, Inc. v. Merchant Serv., Inc., 873 F. Supp. 2d 1171, 1178–1179 (N.D. Cal. 2012) (summarizing decisions on good faith exception to judicial estoppel); Cannata v. Wyndham Worldwide Corp., 798 F. Supp. 2d 1165 (D. Nev. 2011) (discussing various circuits' approaches to allowing amendment when omission from schedules was inadvertent).

202 Spaine v. Cmty. Contacts, Inc., 756 F.3d 542 (7th Cir. 2014) (no presumption of intent to deceive arises where debtor amended schedules and provides some evidence had no subjective intent to mislead); Javery v. Lucent Techs., Inc. Long Term Disability Plan for Mgmt. or LBA Employees, 741 F.3d 686, 698 (6th Cir. 2014) (failure to disclose claim in bankruptcy proceeding may be excused where it occurred by mistake or inadvertence, or where debtor lacked a motive to conceal claim (appropriate to give weight to exempt nature of claim)); Ah Quin v. Cty. of Kauai Dep't of Trans., 733 F.3d 267 (9th Cir. 2013) (where debtor amended schedules to include omitted claim, court must consider evidence as to whether initial omission was result of inadvertence or mistake); Ajaka v. Brooksamerica Mortg. Corp., 453 F.3d 1339 (11th Cir. 2006) (disputed facts regarding debtor's motivation and intent in omitting TILA claim from schedules precluded finding of judicial estoppel through summary judgment); Eubanks v. CBSK Fin. Grp., Inc., 385 F.3d 894 (6th Cir. 2004) (inadvertence and mistake are factors that must be considered in judicial estoppel analysis); Browning v. Levy, 283 F.3d 761, 775 (6th Cir. 2002); Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996); *In re* Riazuddin, 363 B.R. 177, 189 (B.A.P. 10th Cir. 2007) (the third element of the New Hampshire v. Maine test (unfair advantage/detriment to other party) requires an evaluation of the debtor's intent); Ware v. Harvey Auto Credit, L.L.C., WL 2404947, at *2 (N.D. Ill. June 2, 2017) (declining to dismiss TILA claim, court considers debtor's assertion of oversight, amendment of schedules, and claim's relatively low value ($2000)); Access Limousine Serv., Inc. v. Serv. Ins. Agency, L.L.C., 2016 WL 6126267 (D. Md. Oct. 19, 2016) (rejecting use of presumptions and declining to find judicial estoppel without clear evidence of intent to deceive); Balik v. Blitt & Gaines, P.C., 2015 WL 764013 (N.D. Ill. Feb. 21, 2015) (judicial estoppel not applicable to FDCPA claim where nature of distant forum violation substantially clarified by post-bankruptcy U.S. court of appeals decision, but case dismissed on other grounds); Murray v. Kindred Nursing Centers West L.L.C., 2014 WL

particularly true when the debtor amended schedules promptly upon learning of the omission.[203] Nevertheless, amendment may not always prevent application of judicial estoppel.[204] Under a commonly applied test, the omission of a cause of action from bankruptcy schedules is deemed deceitful if the debtor had knowledge of the factual basis for the undisclosed claim and had a motive to conceal it.[205] The motive is considered to be obtaining all the benefits of the discharge order while keeping the ability to pursue a valuable legal claim. The requisite "knowledge" is deemed to be the awareness of general facts associated with the potential claim. For some courts it does not matter that the debtor did not understand how certain facts gave rise to a legal claim.[206] However, other courts

4411044 (D. Me. Sept. 8, 2014) (when applying equitable doctrine of judicial estoppel, court should not consider dismissal without examination of evidence of debtor's intent; intent not presumed solely from debtor's knowledge of facts surrounding legal claim), *aff'd on other grounds*, 789 F.3d 20 (1st Cir. 2015); Bennett v. Flagstar Bank, 2011 WL 6152940 (S.D. Ga. Dec. 8, 2011) (refusing to infer intent merely from fact that debtors knew generally of facts surrounding claim when they omitted it from bankruptcy schedules); Famatiga v. Mortg. Elec. Registration Sys., Inc., 2011 WL 3320480 (E.D. Mich. Aug. 2, 2011) (lender failed to show borrower's bad faith in initial omission of TILA and other consumer claims from bankruptcy schedules); Sovok v. Ducks Unlimited, Inc., 2011 WL 1397970 (M.D. Tenn. Apr. 13, 2011) (debtor's knowledge of number of hours he worked and amount of pay he earned was not the equivalent of debtor's understanding that employer violated FLSA); Fite v. Comtide Nashville, L.L.C., 686 F. Supp. 2d 735, 748 (M.D. Tenn. 2010) (omission was inadvertent where debtor did not understand he had discrimination claim when filled out schedules); Wheeler v. Fla. Dep't of Corrections, 2006 WL 2321114 (M.D. Fla. Aug. 6, 2009) (unsophisticated debtor credibly showed he lacked knowledge of need to list a pending EEOC administrative claim in bankruptcy schedules); Mayes v. Walgreen Co., 2009 WL 1312957 (N.D. Ill. May 11, 2009) (no evidence debtor knew of FMLA claim before bankruptcy discharge); *In re* Baldwin, 307 B.R. 251 (M.D. Ala. 2004) (judicial estoppel did not apply because debtor was not aware of lender liability claim when bankruptcy filed, and later promptly amended schedules); *In re* Arana, 456 B.R. 161 (Bankr. E.D.N.Y. 2011) (Spanish-speaking *pro se* debtors who filed schedules with disreputable bankruptcy petition preparer did not exhibit bad faith in omission of medical malpractice claim from schedules); *In re* Stout, 2009 WL 2912501 (Bankr. E.D. Pa. Apr. 16, 2009) (denying judicial estoppel where evidence insufficient to show debtor knew of TILA rescission claim during bankruptcy case); Dawson v. J.G. Wentworth & Co., 946 F. Supp. 394 (E.D. Pa. 1996) (denying summary judgment because question of material fact existed as to whether debtor, who later amended schedules to include claim, acted in good or bad faith in omitting claims from original schedules); Ass'n Res., Inc. v. Wall, 2 A.3d 873, 892 (Conn. 2010) (corporate CEO made inadvertent mistake and relied on his attorney in omitting legal claim from his bankruptcy schedules). *But see* Geraldo v. Richland Holdings, Inc., 716 Fed. Appx. 728 (9th Cir. 2018) (affirming dismissal of FDCPA claims where debtor had not alleged any facts to show inadvertence or mistake to explain omission from schedules); Guay v. Burack (*In re* Guay), 677 F.3d 10, 20 (1st Cir. 2012) (noting that First Circuit has not adopted the exceptions to application of judicial estoppel for lack of knowledge or absence of motive to conceal); Krystal Cadillac Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 321 (3d Cir. 2003) (rebuttable inference of bad faith arises when averments in pleadings demonstrate knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose); *In re* Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999) (debtor's knowledge of enough information to suggest that it may have a possible cause of action coupled with failure to schedule claim sufficient to support application of judicial estoppel doctrine); Dockery v. Countrywide Home Loans, Inc., 2010 WL 2667376 (W.D. Ky. July 1, 2010) (burden of establishing absence of bad faith on debtor when defendant in subsequent action has shown debtor possessed knowledge of the factual basis of the claims in prior bankruptcy and had motive to conceal them from bankruptcy court).

203 *See, e.g.*, Momoh v. Wells Fargo Bank, 2016 WL 8729939, at *4 (N.D. Cal. July 1, 2016) (although considering it a "more nuanced" and close question, declining to apply judicial estoppel where mortgagor amended chapter 13 schedules only after mortgage servicer raised judicial estoppel; bankruptcy court never relied on incomplete schedule during period prior to amendment).

204 Orkies v. Midland Funding, L.L.C., 2015 WL 796360 (W.D. Ky. Feb. 25, 2015) (judicial estoppel applied to dismiss FDCPA claims despite action to reopen case, amend schedules, and obtain trustee abandonment; court notes "complete absence" of evidence to support debtor's claims of inadvertence and mistake); Schaefer v. First Source Advantage, L.L.C., 2013 WL 509001 (E.D. Mo. Feb. 12, 2013) (judicial estoppel applied to dismiss FDCPA claims despite debtor's reactive amendment of bankruptcy schedules to add claims and satisfy standing requirements; no evidence of good faith error or inadvertence in original omission); Barker v. Asset Acceptance, L.L.C., 874 F. Supp. 2d 1062 (D. Kan. 2012) (judicial estoppel barred chapter 13 debtor from pursuing prepetition FDCPA action despite amending his schedules to add claim in response to creditor's motion raising judicial estoppel). *See also* Anderson v. Seven Falls Co., 696 Fed. Appx. 341 (10th Cir. 2017) (declining to follow Ninth Circuit's *Ah Quin* standard, court does not require consideration of evidence of inadvertence after schedules amended); Moses v. Howard Univ. Hosp., 606 F.3d 789, 800 (D.C. Cir. 2010) (finding debtor's argument that he reopened bankruptcy case, amended schedules and invited trustee to intervene to be "wholly unpersuasive"); Eastman v. Union Pacific Rail Co., 493 F.3d 1151, 1160 (10th Cir. 2007) (reopening bankruptcy case, making creditors whole is "inconsequential"); Robinson v. District of Columbia, 10 F. Supp. 3d 181 (D.D.C. 2014) (because reopening bankruptcy case to schedule omitted debt will have no impact on court's decision to apply judicial estoppel, court may dismiss employment action without allowing reopening). *But see* Paul v. Hewlett Packard Enter. Co., 2017 WL 3668497 (E.D. Mich. Aug. 25, 2017) (rejecting judicial estoppel where debtor sought amendment only after defendant raised judicial estoppel, but debtor presented evidence he had informed bankruptcy counsel of legal claims earlier and bankruptcy counsel neglected to include them in schedules).

205 Marshall v. Honeywell Tech. Sys., Inc., 828 F.3d 923, 932 (D.C. Cir. 2016) (affirming lower court decision that imposed judicial estoppel without considering debtor's affidavit referencing inadvertence); Eastman v. Union Pacific R.R. Co., 493 F.3d 1151, 1157 (10th Cir. 2007); Krystal Cadillac Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 321 (3d Cir. 2003); *In re* Coastal Plains, 179 F.3d 197 (5th Cir. 1999). *Compare* Guay v. Burack (*In re* Guay), 677 F.3d 10, 20 (1st Cir. 2012) (noting that First Circuit has not adopted the exceptions to application of judicial estoppel for lack of knowledge or absence of motive to conceal), *with* Alternative Sys. Concepts, Inc. v. Synopys, Inc., 374 F.3d 23, 35 (1st Cir. 2004) (noting that an exception to judicial estoppel "may be available if the responsible party shows that the new, inconsistent position is the product of information neither known nor readily available to it at the time the initial position was taken.").

206 *Compare* McCauley v. Hunter, 2015 WL 2193805 (N.D. Ill. May 7, 2015) (rejecting argument that postpetition court rulings clarified basis for FDCPA claim; whether borrower aware of claim before discharge not relevant because the operative events occurred prebankruptcy). *with* Meyer v. U.S. Bank, 530 B.R. 767 (W.D Wash. 2015) (change in interpretation of state foreclosure law after debtor filed for bankruptcy relief clarified legal claims that arose from prepetition facts, therefore not appropriate to treat claim as arising prepetition).

appropriately consider the debtor's genuine lack of insight into relevant facts at the time of a bankruptcy filing and find that the debtor's lack of knowledge of the nature of potential legal claims preclude judicial estoppel.[207]

Where the courts differ is in setting the standard for how the consumer can rebut a presumption of intent to deceive by showing mistake, inadvertence, and the absence of bad faith. The standards diverge on whether and when the consumer can present evidence of mistake or inadvertence and how strict the burden of production will be.

Defendants often attempt to raise judicial estoppel at the motion to dismiss stage. Application of judicial estoppel in early stages of a proceeding is inappropriate. If the plaintiff has reopened the bankruptcy case, amended the schedules, and the trustee has abandoned the claim (or the debtor appropriately exempted the claim), the party seeking judicial estoppel should bear the burden of producing evidence that the debtor intentionally misled the court in the initial omission.[208] Under these circumstances, there should be no presumption of an intent to deceive.[209]

Similarly, if the plaintiff has amended the schedules and has standing to pursue the claim, the defendant's burden in moving for summary judgment should be to show the absence of any material factual dispute as to the plaintiff's deceitful subjective intent in making out the initial set of bankruptcy schedules.[210] If the plaintiff's summary judgment record includes factual support for a finding of mistake or inadvertence, the defendant should not prevail in obtaining summary judgment on the basis of judicial estoppel.

Whenever possible, advocates should avoid having to reopen and amend old bankruptcy schedules *after* filing the postbankruptcy lawsuit and in reaction to the defendant's raising judicial estoppel in litigation.[211] The better practice is to correct the omission in the bankruptcy schedules first, then bring the FDCPA action.

13.3.3.4 Alternatives to Amending the Schedules

In response to an assertion of judicial estoppel debtor's counsel should emphasize that strict application of the doctrine provides an undeserved windfall to a defendant and does nothing to promote the interests of bankruptcy creditors.[212]

207 Wilson v. PrimeSource Health Care of Ohio, Inc., 2017 WL 2869341, at *4 (N.D. Ohio July 5, 2017) (no judicial estoppel where debtor did not schedule wage claim because defendant employer had misled her about validity of her claim); Patino v. Franklin Credit Mgmt. Corp., 2017 WL 1246853 (N.D. Cal. Apr. 5, 2017) (mag.; preliminarily declining to apply judicial estoppel to debtor's TILA rescission claim in view of debtor's mental impairment and absence of indicia of bad faith).

208 Williams v. NCB Mgmt. Services, Inc., 2018 WL 3244097 (N. D. Ill. July 3, 2018) (debt collector could not prevail in dismissing FDCPA claim on Rule 12(b)(6) motion relying on judicial estoppel); David v. Wal-Mart Stores, Inc., 2014 WL 5510986 (N.D. Ill. Oct. 24, 2014) (refusing to apply judicial estoppel on Rule 12(b(6) motion); Jackson v. WellSpan Health, 2014 WL 414251, at *6–7 (M.D. Pa. Feb. 4, 2014) (courts should be reluctant to approve judicial estoppel at pleading stage; party to be judicially estopped must be given meaningful opportunity to explain its position); Schreiber v. Ocwen Loan Servicing, L.L.C., 2011 WL 6055425 (M.D. Fla. Oct. 17, 2011) (because judicial estoppel focuses on party's intent in earlier omission of consumer claims from bankruptcy schedules, court will not decide judicial estoppel issue on motion to dismiss), *adopted*, 2011 WL 6055417 (M.D. Fla. Dec. 6, 2011). *But see* Sanchez v. Wells Fargo Bank, 2016 WL 7444915, at *4 (C.D. Cal. May 5, 2016) (suggesting that in responding to motion to dismiss raising judicial estoppel as affirmative defense, plaintiff may have to present some evidence of inadvertence/mistake).

209 Sullivan v. H & M Int'l Transp., Inc., 2015 WL 720988 (N.D. Ill. Feb. 13, 2015) (denying judicial estoppel on motion for judgment on pleadings because defendant failed to establish elements); Thomas v. Indiana Oxygen Co., 32 F. Supp. 3d 983 (S.D. Ind. 2014) (judicial estoppel not properly raised by Rule 12(b)(1) motion); Thompson v. Vill. of Monee, 2014 WL 4175915 (N.D. Ill. Aug. 22, 2014) (defendant must meet burden of showing intent to deceive if debtor reopened bankruptcy and amended schedules); *In re* Simmerman, 463 B.R. 47, 56 (Bankr. S.D. Ohio 2011) (denying motion to dismiss FDCPA claims based on judicial estoppel, "the court cannot determine, based solely on allegations in the complaint, whether any failure to disclose in the prior case was inadvertent or without motive"; but finds FDCPA claims time-barred). *See also* Rogers v. Ford Motor Co., 2015 WL 2097679 (N.D. Ill. May 4, 2015) (fact that debtor filled out her schedules with the assistance of counsel not determinative).

210 Baker v. Interfor U.S. Inc., 2017 WL 3184189 (D. Or. June 15, 2017) (denying judicial estoppel where debtor amended schedules and stated in affidavit that he did not subjectively understand he had a discrimination claim when he initially filled out his bankruptcy schedules); Elhindi v. Cal. Dep't of Corrections & Rehabilitation, 2017 WL 2633400 (E.D. Cal. June 19, 2017) (debtor amended schedules, asserted by affidavit that they did not understand they were required to provide information about legal claim to bankruptcy attorney).

211 White v. Vacation Ownership, Inc., 617 F.3d 472 (6th Cir. 2010) (bad faith where no attempt to amend chapter 13 debtor's schedules until after defendant in ongoing employment discrimination case filed motion to dismiss raising estoppel); Moses v. Howard Univ. Hosp., 606 F.3d 789 (D.C. Cir. 2010) (estoppel applied where employment discrimination case pending before bankruptcy filing and debtor did not reopen case and amend until after motion to dismiss filed); Dockery v. Countrywide Home Loans, Inc., 2010 WL 2667376 (W.D. Ky. July 1, 2010) (estoppel applied to dismiss TILA and other consumer claims despite request to amend schedules after creditor filed motion to dismiss); Tyler v. Fed. Express Corp., 420 F. Supp. 2d 849 (W.D. Tenn. 2005), *aff'd*, 206 Fed. Appx. 500 (6th Cir. 2006) (rejecting amendment after motion to dismiss filed).

212 Slater v. U.S. Steel Corp., 871 F.3d 1174, 1186–1187 (11th Cir. 2017) (en banc); Ah Quin v. Cty. of Kauai Dep't of Taxes, 733 F.3d 267, 275–276 (9th Cir. 2013) (discussing harmful effect of judicial estoppel on administration of bankruptcy cases); Biesek v. Soo Line R. Co., 440 F.3d 410 (7th Cir. 2006) (noting harm to creditors from application of judicial estoppel; allowing trustee to go ahead with claim is more appropriate option); Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004) (approving trustee's standing to reopen bankruptcy case to allow trustee to administer claim is more appropriate remedy than dismissal of action through judicial estoppel); *In re* An-Tze Cheng, 308 B.R. 448, 459 (B.A.P. 9th Cir. 2004), *aff'd*, 160 Fed. Appx. 644 (9th Cir. 2005) ("Commentators are beginning to perceive problems inherent in the nature of bankruptcy as a collective proceeding that may make the remedy [of judicial estoppel] worse than the disease."); Pavelka v. Allstate Prop. & Cas. Ins. Co., 91 F. Supp. 3d 931, 935 (E.D. Mich. Mar. 18, 2015) (judicial estoppel is a "powerful defense" and "should be applied with caution"); United Fire & Cas. Co. v. Thompson, 949 F. Supp. 2d 922 (E.D. Mo. 2013) (rejecting judicial estoppel, noting harm to creditors and windfall to defendants if doctrine applied); Williams v. Republic Recovery Serv., 2010 WL 2195519, at *2 (N.D. Ill. May 27,

A court has options for sanctioning debtors who deliberately misrepresent their financial affairs in bankruptcy schedules.

For example, instead of dismissing a lawsuit for judicial estoppel the court should allow time for the trustee to be substituted as the plaintiff.[213] Judicial estoppel does not apply to a bankruptcy trustee.[214] The trustee may hire the consumer's counsel to prosecute the claim on behalf of the bankruptcy estate.

In a case in which the court finds an intent to deceive, the court may limit the debtor's access to proceeds from a lawsuit. However, such a sanction should be issued only after a finding of intentional misconduct. The bankruptcy court, not the trial court hearing the debt collection case, should make this determination.[215]

In *Law v. Siegel*, the Supreme Court reiterated its admonition against the lower courts' use of equitable principles to deny exemption claims in bankruptcy cases.[216] Specific provisions of the Bankruptcy Code and state law address when a debtor can claim an exemption. Consistent with *Law v. Siegel*, courts must not employ the equitable doctrine of judicial estoppel to deny or limit debtors' exemptions claims.

The federal district court in *Jeziorowski v. Credit Protection Association, L.P.*,[217] formulated an appropriate response to a judicial estoppel claim in an FDCPA action in which the trustee retained an interest in the litigation. The court noted that the debtor had amended his schedules before any judicial estoppel defense had been raised, and found that the debtor's initial failure to schedule the FDCPA claim was inadvertent. After allowing the trustee to be substituted as plaintiff, the court ruled that the debtor was entitled to up to $6000 as his wild-card exemption in the proceeds from the lawsuit. As long as the bankruptcy court approves the arrangement between the trustee and the debtor regarding division of any potential award, the nonbankruptcy court determining the FDCPA claims has no basis to apply judicial estoppel.[218]

2010) (strictly enforced judicial estoppel rule would "needlessly punish those debtors who fail to disclose claims due to mistake, misunderstanding or ignorance of the law"); *In re* Phillips, 2012 WL 1232008 (Bankr. D.N.J. Apr. 12, 2012) (reopening bankruptcy case to allow amendment of schedules regardless of debtor's bad faith in initially failing to schedule claim, noting that amendment best protects interests of creditors); *In re* FV Steel & Wire Co., 349 B.R. 181, 185 (Bankr. E.D. Wis. 2006) (in bankruptcy context judicial estoppel should not be used to work an injustice, particularly where prior position was product of mistake or inadvertence); Robert F. Dugas, *Honing a Blunt Instrument: Refining the Use of Judicial Estoppel in Bankruptcy Nondisclosure Cases*, 59 Vand. L. Rev. 205 (Jan. 2006).

213 United States v. Wygul, 2016 WL 4126583, at *4 (W.D. Tenn. Aug. 2, 2016) (refusing to dismiss fair housing claim on grounds of judicial estoppel where debtor reopened bankruptcy case and substituted trustee); Koku v. Bonewicz, 2015 WL 5965392 (N.D. Ill. Oct. 13, 2015) (as alternative to dismissal with prejudice of FDCPA claim for judicial estoppel, court sets status hearing for trustee to appear).

214 Stephenson v. Malloy, 700 F.3d 265 (6th Cir. 2012) (chapter 7 trustee can pursue prepetition legal claim despite debtor's inadvertent omission of claim from schedules); Reed v. City of Arlington, 650 F.3d 571 (5th Cir. 2011) (en banc) (application of judicial estoppel to bankruptcy trustee is inconsistent with purpose of bankruptcy law to preserve assets for distribution to estate's innocent creditors); Kane v. National Union Fire Ins. Co., 535 F.3d 380 (5th Cir. 2008) (judicial estoppel not applicable to trustee; trustee substituted as party in interest to pursue unscheduled personal injury claim); Biesek v. Soo Line R.R. Co., 440 F.3d 410 (7th Cir. 2006) (trustee is proper party to pursue unlisted claims as representative of creditors); Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004) (chapter 7 trustee has standing to control nondisclosed asset to exclusion of debtor; judicial estoppel might apply to debtor if funds left over after payment to creditors); *In re* Riazuddin, 363 B.R. 177 (B.A.P. 10th Cir. 2007) (judicial estoppel not applicable to trustee); Gecker v. Menard, Inc., 2017 WL 603178 (N.D. Ill. Feb. 14, 2017) (mag.; inquiry into debtor's good faith in failing to disclose claim is irrelevant where trustee is appropriate party to pursue prepetition claim); Copelan v. Techtronics Indus. Co., 95 F. Supp. 3d 1230 (S.D. Cal. 2015) (judicial estoppel inapplicable to trustee who has been substituted as party plaintiff); Lupian v. Cent. Valley Builders, 2014 WL 465445 (S.D. Cal. Feb. 5, 2014) (showing of mistake/inadvertence not necessary for trustee to pursue claim); Thompson v. EarthLink Shared Serv., L.L.C., 956 F. Supp. 2d 1317 (N.D. Ala. 2013) (judicial estoppel not applicable to trustee); Goodman v. Takeda Pharms. N. Am., Inc., 2013 WL 1249756, at *4 (D. Nev. Mar. 26, 2013) (allowing substitution of chapter 7 trustee and rejecting defendant's judicial estoppel claim); *In re* Stiltner, 2013 WL 1176326 (E.D. Tenn. Mar. 20, 2013) (trustee innocent of misconduct, not subject to judicial estoppel); Kotbi v. Hilton Worldwide, Inc., 2012 WL 914951 (S.D.N.Y. Mar. 19, 2012) (judicial estoppel not applicable when trustee asserts standing to pursue debtor's legal claim); Coble v. DeRosia, 823 F. Supp. 2d 1048 (E.D. Cal. 2011) (judicial estoppel not applicable to trustee); Killmeyer v. Oglebay Norton Co., 817 F. Supp. 2d 681 (W.D. Pa. 2011) (judicial estoppel not applicable to a trustee); Frese v. Empire Fin. Servicers, 725 F. Supp. 2d 130 (D.D.C. 2010) (chapter 7 trustee to pursue originally unscheduled prepetition TILA rescission and damages claims unless decides to abandon claims to debtor); *In re* Satterfield, 2010 WL 2928330 (Bankr. N.D. W. Va. July 26, 2010) (once court has substituted trustee as party in interest to pursue debtor's predatory lending claims, lender cannot assert debtor's inconsistent schedules as basis for estoppel against trustee); Hernandez v. Forest Preserve Dist. of Cook Cty., 2010 WL 1292499 (N.D. Ill. Mar. 29, 2010) (in chapter 13, judicial estoppel does not preclude debtor from pursuing claims on behalf of estate). *See also* Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012) (despite application of judicial estoppel to bar debtor's claims because of prior bankruptcy, judicial estoppel cannot be applied to bar governmental agency from enforcement action over same conduct against same party).

215 *See, e.g.*, Metrou v. M.A. Mortenson Co., 781 F.3d 357, 360 (7th Cir. 2015) (reversing trial court that had placed cap on plaintiff's recovery based on amount needed to pay off bankruptcy creditors: "a debtor who errs in good faith, and tries to set things right by surrendering the asset to the Trustee, remains entitled to any surplus after creditors have been paid, just as would have occurred had the claim been disclosed on the bankruptcy schedules"); Herrera-Nevarez v. Ethicon, Inc., 2017 WL 2591989, at *3–4 (N.D. Ill. June 15, 2017) (district court allows trustee to prosecute debtor's lawsuit, adding "[t]o the extent that [debtor's] intent is relevant to the division of any potential award, the bankruptcy judge overseeing the estate can address this issue"); Gecker v. Menard, Inc., 2017 WL 603178 (N.D. Ill. Feb. 14, 2017) (mag.; where trustee is pursuing prepetition claim in district court, bankruptcy court should address impact of any estoppel claims against debtor). *But see In re* Bushberger, 588 B.R. 44, 49 (Bankr. E.D. Wis. 2018) (upon reopening case bankruptcy court determined FDCPA claim was property of estate and allowed debtor to amend schedules, but left question of judicial estoppel to district court where FDCPA action was pending).

216 Law v. Siegel, 571 U.S. 415, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014).

217 2017 WL 1549965 (W.D.N.Y. May 1, 2017).

218 *See* Alward v. Johnston, 199 A.3d 1190 (N.H. 2018) (rejecting judicial estoppel where debtor reopened chapter 7 case, scheduled prepetition

13.3.3.5 Judicial Estoppel Other Than Where Claims Omitted from Schedules

Efforts to impose judicial estoppel based on a past bankruptcy filing appear most often when the consumer omitted a legal claim from the schedule of assets. However, other affirmative statements that the debtor filed of record in the course of a bankruptcy may also lead to judicial estoppel. These statements are readily available on PACER for review by opposing counsel. If the consumer listed a creditor in bankruptcy schedules and described the debt as "undisputed," this may later pose an obstacle to the consumer's claim that a debt collector violated the FDCPA by attempting to collect the same debt because it was allegedly unenforceable.[219]

Basic concepts of claim and issue preclusion apply in the bankruptcy context. Thus, the failure to object to a creditor's proof of claim could have claim preclusion consequences. The bankruptcy court's order confirming a chapter 13 plan is entitled to *res judicata* treatment like any federal court judgment. If the confirmed plan provided for treatment of a prepetition debt in a specific way, the debtor may face judicial estoppel and *res judicata* problems if the debtor later brings a debt collection action that poses a contrary legal theory about the status of the same prebankruptcy debt.[220] However, a plan confirmation order that does not specifically determine the merits of claims, but generally approves payments to classes of creditors, should not bar an FDCPA action.[221] Neither judicial estoppel nor claim preclusion doctrines apply to a bankruptcy court's approval of a creditor's motion for relief from the automatic stay. Relief from stay orders are not conclusive rulings on the merits of a creditor's claim under non-bankruptcy law.[222]

Judicial estoppel also arises in the context of class actions. Defendants opposing class certification motions have raised both standing and judicial estoppel arguments against proposed class representatives. The legal tests applied to a class representative are similar to those that determine whether an individual litigant defeats a judicial estoppel or standing challenge.[223] One district court denied certification of an FDCPA class where the proposed class representative would be subject to a potential judicial estoppel claim.[224] Ultimately, however, the class representative's past participation in a bankruptcy case need not preclude compliance with Rule 23.[225] With

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medical malpractice claim, and trustee and debtor had agreed, subject to bankruptcy court approval, to split any proceeds of action 50/50).

219 Ward v. ANS Servicing, L.L.C., 606 Fed. Appx. 506 (11th Cir. 2015) (debtor stipulated to amount of monthly mortgage payment in bankruptcy filing, judicial estoppel bars FDCPA action asserting creditor should be claiming different amount); Haddad v. Randall S. Miller Assoc. P.C., 587 Fed. Appx. 959 (6th Cir. 2014) (judicial estoppel applied to FDCPA claim asserting attempt to enforce invalid mortgage where in prior bankruptcy schedules debtor "admitted" validity of same mortgage); Perez v. Deutsche Bank Nat'l Trust Co., 2018 WL 4853897 (N.D. Tex. Oct. 5, 2018) (judicial estoppel applied to FDCPA and other consumer claims where in bankruptcy case plaintiff had admitted to default and completed repayment plan, but in postbankruptcy FDCPA claim asserted that no default existed at time of bankruptcy); Jarret v. LVNV Funding, L.L.C., 2016 WL 910189 (W.D. Ky. Mar. 9, 2016) (judicial estoppel barred FDCPA claim because debtor listed challenged debt as "undisputed" in bankruptcy schedules). *But see* Davenport v. Djourabchi, 316 F. Supp. 3d 58 (D. D.C. 2018) (debtor's challenge to proof of claim brought as "contested matter" in bankruptcy court rather than adversary proceeding did not preclude later action for monetary damages arising from the transaction); Hymas v. Deutsche Bank Nat'l Trust Co., 2015 WL 273615 (D. Nev. Jan. 22, 2015) (although plaintiff did not challenge identity of deed of trust creditor in bankruptcy proceedings, this does not preclude a postbankruptcy challenge to authority to foreclose).

220 Covert v. LVNV Funding, L.L.C., 779 F.3d 242 (4th Cir. 2015) (*res judicata* applied to bar plaintiffs' FDCPA and state debt collection law claims asserting unlicensed debt buyer had attempted to collect debts it had no right to collect; plaintiffs had not objected to this creditor's claims in prior chapter 13 cases in which plans were confirmed); Danise v. Saxon Mortg. Services, Inc., 738 Fed. Appx. 47 (3d Cir. 2018) (judicial estoppel bars claims against mortgage servicer related to loan modifications where debtor not only failed to list claims in schedules, but complied with confirmed five-year chapter 13 repayment plan without disputing amounts due); Bullard v. Indymac Bank, 2012 WL 4134839, at *7 (E.D. Mich. Sept. 18, 2012), *aff'd on other grounds*, 539 Fed. Appx. 665 (6th Cir. 2013) (judicial estoppel bars borrower's postbankruptcy challenge to validity of mortgage; borrower aware of claim during pendency of bankruptcy, did not schedule legal claim as asset, and listed property as subject to valid mortgage, eliminating any equity in the property). *But see* Davenport v. Cavalry Investments, 2015 WL 8746384 (N.D. Ill. Dec. 14, 2015) (collateral estoppel did not apply to chapter 13 plan confirmation order where debtor brought FDCPA challenge to proof of claim while bankruptcy case remained open).

221 *In re* Chobra, 582 B.R. 380, 385–386 (Bankr. D. Md. 2018) (debt collection claim filed in bankruptcy court not precluded by general plan confirmation terms applicable to a class of proofs of claim).

222 Garner v. Select Portfolio Servicing, Inc., 2015 WL 5634449 (E.D. Mich. Sept. 25, 2015) (FDCPA claim based on identity of foreclosing party not subject to collateral estoppel arising from bankruptcy court's decision on motion for relief from stay). *See generally* Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 32–33 (1st Cir. 1994). *But see* Capistrano v. Bank of N.Y. Mellon, 2017 WL 1758052, at *4 (E.D. Tex. Apr. 3, 2017), *adopted*, 2017 WL 1739961 (E.D. Tex. May 3, 2017) (debtor's stipulation to validity of debt in consenting to stay relief is basis for judicial estoppel against debtor's later assertion that mortgage lien not enforceable).

223 *See, e.g.*, Williams v. Saxon Mortg. Serv., Inc., 2014 WL 765055, at *9 (E.D. Mich. Feb. 26, 2014) (judicial estoppel precluded named plaintiffs from proceeding as class representatives against lender; bankruptcy trustee could be substituted); *In re* Cmty. Bank of N. Virginia Mortg. Lending, 954 F. Supp. 2d 360 (W.D. Pa. 2013) (dismissing claims of sixteen of forty-three class representatives who had not scheduled TILA claim in bankruptcy cases, declining to dismiss claim of one proposed class representative who had reopened her bankruptcy case and had trustee abandon claim to her); Rosenberg v. Renal Advantage, Inc., 2013 WL 3205426, at *11 (S.D. Cal. June 24, 2013) (party's failure to amend bankruptcy schedules to clarify who had authority to bring claim disqualifies the party as class representative under the adequacy of representation standard of Rule 23). *See also* Stocks v. Doall Co., 340 F. Supp. 3d 789 (E.D. Wis. 2018) (former chapter 13 debtor's receipt of class notice, signing it, and returning it one year before filing for bankruptcy relief did not give her sufficient knowledge to require that she schedule a claim in her bankruptcy case, denying judicial estoppel).

224 Heisler v. Convergent Healthcare Recoveries, Inc., 2018 WL 4635674 (E.D. Wis. Sept. 27, 2018) (mag.; mere existence of judicial estoppel dispute brought into question proposed class representative's ability to meet Rule 23 requirement to be adequate representative of class), *reconsideration denied*, 2108 WL 6326414 (E.D. Wis. Dec. 4, 2018).

225 *In re* Cmty. Bank of N. Va. Mortg. Lending, 954 F. Supp. 2d 360, 382 (W.D. Pa. 2013) (proposed class representative who reopened

respect to absent class members, the mere potential that some of them may face bankruptcy standing or judicial estoppel barriers is not a basis to deny certification of an FDCPA class.[226] In a notice to members of an FDCPA class it may be appropriate to advise them of the potential requirement to disclose their claims in a bankruptcy case.[227]

13.4 Bankruptcy's Effect on Claims Arising During and After a Bankruptcy Case

13.4.1 Claims Arising During a Bankruptcy Case

Debt collection claims may arise after a bankruptcy case is filed, but before a discharge is entered in the case. In chapter 7 cases that time period is about four months and in chapter 13 cases it can be three to five years. For example, a creditor that initiates a lawsuit over a prepetition debt after the debtor has filed for bankruptcy, but before discharge, potentially violates both the automatic stay and the FDCPA. Where the debt collection claims are based on violations of the Bankruptcy Code, courts are divided over whether bankruptcy offers the exclusive remedy or whether FDCPA and state debt collection laws can also be raised.[228]

Assuming that a chapter 7 debtor has a debt collection abuse claim that has arisen during the bankruptcy case, the debtor is free to prosecute that claim. With limited exceptions that are not applicable to claims against debt collectors, the bankruptcy estate in a chapter 7 case is fixed at the time the petition for relief is filed.[229] Property (in this case, legal claims) that the debtor acquires *after* the filing of the petition belong to the debtor, not the bankruptcy estate.[230]

However, while the debtor has the ability to prosecute FDCPA claims that accrue after the filing of the chapter 7 petition, these claims have no effect on the bankruptcy estate. Therefore, the bankruptcy court may not have subject matter jurisdiction over them.[231] Depending on the nature of the claims, the debtor may have to litigate the claims in a non-bankruptcy court.[232]

Treatment of property of the estate during a chapter 13 case varies by jurisdiction. Under one view, all property and earnings acquired during the pendency of the chapter 13 case (unless the case is converted to another chapter) are property of the estate.[233] However, under certain courts' interpretation of the interplay between section 1306 and section 1327 of the Code, unless the bankruptcy plan provides otherwise, property of the bankruptcy estate vests in the debtor when the chapter 13 plan is confirmed. Under this latter view, an FDCPA claim based on events that occurred postpetition and before plan confirmation would cease to be property of the bankruptcy estate once the plan was confirmed. Consequently, the bankruptcy court may not have jurisdiction over such a pre-confirmation claim.[234]

As discussed in § 13.3.3.3, *supra*, several courts have held that chapter 13 debtors have an obligation to amend schedules to add legal claims that accrue after plan confirmation and before conclusion of the chapter 13 case. Particularly in the jurisdictions that take this view, the safest course is to disclose the post-confirmation legal claim and amend the schedules. Because the chapter 13 debtor normally has the right to fully control property of the estate, the debtor should

bankruptcy case and had claim abandoned may proceed as class representative); Just Film, Inc. v. Merchant Serv., Inc. 873 F. Supp. 2d 1171 (N.D. Cal. 2012) (rejecting judicial estoppel and standing challenges where proposed class representative had informed his attorney and trustee of claim during his bankruptcy case and amended schedules after reopening bankruptcy case).

226 Rizzo v. Kohn Law Firm S.C., 2018 WL 3466935 (W.D. Wis. July 18, 2018) (existence of particular number of class members who failed to disclose claim in bankruptcy was purely speculative; presence of large number may be addressed by subclasses, but not issue to be addressed as requirement for class certification).

227 *Id.* at *4.

228 *See* § 13.7, *infra*.

229 *See* 11 U.S.C. § 541(a)(6). *But see* Clementson v. Countrywide Fin. Corp., 2011 WL 1884715 (D. Colo. Jan. 27, 2011), *adopted*, 2011 WL 1884627 (D. Colo. May 18, 2011), *aff'd*, 464 Fed. Appx. 706 (10th Cir. Feb. 7, 2012) (although mortgage servicer's pattern of misconduct continued after debtor filed bankruptcy petition, pattern was rooted in prepetition events and gave rise to unsecured prepetition claim for damages that trustee, not debtor, had standing to pursue).

230 11 U.S.C. § 541(a). National Consumer Law Center, Consumer Bankruptcy Law and Practice § 2.5 (12th ed. 2020), *updated at* www.nclc.org/library.

231 § 13.5, *infra*. *See In re* Rhinesmith, 450 B.R. 630 (Bankr. W.D. Tex. 2011) (bankruptcy court lacked subject matter jurisdiction to consider chapter 7 trustee's FDCPA claims that were based solely on postpetition events involving reaffirmation agreement); *In re* King, 2010 WL 3851434 (Bankr. D. Colo. Sept. 24, 2010) (FDCPA claim based on postpetition actions taken by defendants arose after bankruptcy case was filed and was not property of chapter 7 estate therefore not encompassed by court's limited subject matter jurisdiction); Condor v. Weinstein, Treiger & Riley, P.S., 309 B.R. 124 (Bankr. E.D. Pa. 2004) (bankruptcy court has neither "core" nor "related to" jurisdiction over postpetition violations of FDCPA since chapter 7 bankruptcy estate is not affected); *In re* Goldstein, 201 B.R. 1 (Bankr. D. Me. 1996) (bankruptcy court lacked jurisdiction over chapter 7 debtor's FDCPA claims involving postpetition conduct); *In re* King, 2010 WL 3851434 (Bankr. D. Colo. Sept. 24, 2010) (debtor's FDCPA claim, which was based on postpetition actions taken by defendants, arose after bankruptcy case was filed and was not property of chapter 7 estate).

232 *See* § 13.5, *infra* (discussing bankruptcy court jurisdiction).

233 11 U.S.C. § 1306(a). *See In re* Waldron, 536 F.3d 1239 (11th Cir. 2008); Barbosa v. Soloman, 235 F.3d 31 (1st Cir. 2000).

234 *In re* Renner, 2017 WL 2773526 (Bankr. S.D. Ind. June 26, 2017) (property of estate vested in debtor upon plan confirmation; FDCPA claim accruing after confirmation would have no impact on estate, so no "related to" bankruptcy court jurisdiction); *In re* Schatz, 452 B.R. 544, 553 (Bankr. M.D. Pa. 2011) (no "related to" jurisdiction for bankruptcy court to hear FDCPA claim involving post-filing, pre-confirmation letter). *But see In re* Orchard, 2013 WL 6254037, at *3 (Bankr. D. Or. Dec. 4, 2013) (court had "related to" jurisdiction to consider debtor's FDCPA claims involving post-confirmation violations because award could potentially trigger debtor's duty to amend plan to allow for greater payment to creditors).

have standing to pursue a postpetition cause of action in chapter 13.[235]

13.4.2 Claims Arising After a Bankruptcy Case

Debt collection abuse claims that arise after entry of a discharge order in either a chapter 7 or chapter 13 case are not property of the bankruptcy estate.[236] A bankruptcy discharge order bars collection of discharged debts as personal liabilities of the debtor. Despite the occasional suggestion of creditors to the contrary, the discharge order does not have any broad claim preclusion effect on all potential disputes between the debtor and a creditor.

For example, a discharge order has no effect on an FDCPA claim asserting that a debt collector attempted to foreclose postbankruptcy when state law did not allow a foreclosure sale.[237] Where the abusive debt collection activity violates both the discharge order and federal or state debt collection law, courts are divided on whether bankruptcy offers the exclusive remedy or whether FDCPA and state debt collection laws can also be raised.[238] Even if the FDCPA and state debt collection claims can be raised, the bankruptcy court may not have jurisdiction to hear the claim.[239] The consumer may have to pursue these types of claims in a nonbankruptcy forum.

13.5 Litigating Claims in Bankruptcy Court

13.5.1 Overview

Lawsuits within a bankruptcy case are called "adversary proceedings."[240] Adversary proceedings are initiated by complaint and are governed by rules that closely parallel the Federal Rules of Civil Procedure. Depending on the specific circumstance of the case, the bankruptcy court may be a preferable forum for litigating claims related to abusive debt collection. Not only do bankruptcy judges regularly see the problem of debtors in trouble, but they are also generally more aware of the unfair creditor practices that often take place. In addition, many bankruptcy judges are far more knowledgeable in commercial law, and often consumer law, than the average state court or federal district court judge.

Generally, any case within the district court's bankruptcy jurisdiction that involves the debtor (that is, relating in any way to the bankruptcy or the debtor's property) may be filed in the bankruptcy court in which the bankruptcy case has been filed.[241] The debtor may file the complaint in the bankruptcy court regardless of whether the state or federal courts in that state would otherwise have had "long arm jurisdiction" over the defendant.[242] There is no "minimum contacts" requirement which must be met before an out-of-state defendant can be sued in the forum district's bankruptcy court.[243] Moreover, service of process generally can be made by first class mail.[244] Another benefit of the bankruptcy forum is that most courts hold that, at least as to certain core proceedings (cases arising within a bankruptcy case or under the Bankruptcy Code), a bankruptcy judge may refuse to enforce an arbitration agreement and may stay any pending arbitration proceedings.[245]

Bankruptcy courts are courts of limited jurisdiction. As a result, bankruptcy courts often decline to hear federal or state debt collection claims that do not have an effect on the estate (e.g., those arising after discharge) based on a lack of jurisdiction. Debt collection claims that arose before the bankruptcy filing typically involve a party who has become a creditor in the bankruptcy case. Debtors should be able to characterize claims against these defendants as counterclaims against creditors or challenges to proofs of claim.[246] These are core proceedings and within the bankruptcy court's core statutory jurisdiction.[247]

Debt collection claims that arise after the bankruptcy filing, but before the case is closed, may fall within the bankruptcy courts' "related to" jurisdiction. Because of the length of chapter 13 plans, these "related to" cases are more likely to arise during chapter 13 than chapter 7 cases.[248]

235 11 U.S.C. §§ 1303, 1306(b). *See* Smith v. Rockett, 522 F.3d 1080 (10th Cir. 2008) (chapter 13 filer had standing to bring FDCPA claim in her own name); Crosby v. Monroe County, 394 F.3d 1328 (11th Cir. 2004); Cable v. Ivy Tech State Coll., 200 F.3d 467 (7th Cir. 1999).

236 *See* § 13.2.5, *supra*.

237 Farber v. Brock & Scott, L.L.C., 2016 WL 5867042 (D. Md. Oct. 6, 2016).

238 *See* § 13.7, *infra*.

239 *See* § 13.5, *infra*.

240 For a more detail on litigating in the bankruptcy courts, see National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 14 (12th ed. 2020), *updated at* www.nclc.org/library.

241 *See, e.g., In re* Humes, 496 B.R. 557, 566–567 (Bankr. E.D. Ark. 2013) (in chapter 13 case, bankruptcy court has jurisdiction to hear adversary proceeding raising prepetition FDCPA and related state law claims against creditor as (1) a core proceeding arising "under" the Code (claim seeking to void lien) and (2) a claim arising "in" the bankruptcy case (i.e., a challenge to a proof of claim) and as part of court's "related to" jurisdiction (as potential source of funds to pay higher dividend to creditors)).

242 28 U.S.C. § 1409(c).

243 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 14.3.2 (12th ed. 2020), *updated at* www.nclc.org/library.

244 Fed. R. Bankr. P. 7004(b). An exception to the general right to serve by first class mail applies to insured depository institutions in contested matters or adversary proceeding. Such a defendant must be served by certified mail to an officer of the institution unless certain requirements have been met.

245 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 14.3.2.5 (12th ed. 2020), *updated at* www.nclc.org/library.

246 Washington v. LVNV Funding, L.L.C., 2015 WL 1245741 (N.D. Ala. Mar. 18, 2015) (FDCPA claim arose prepetition and as claim against party that filed proof of claim is core proceeding).

247 28 U.S.C. § 157(b)(2)(C).

248 *In re* Trokie, 590 B.R. 663, 677 (Bankr. M.D. Pa. 2018) (bankruptcy courts have "related to" jurisdiction over FDCPA claims that arise postpetition and before chapter 13 case closes because an award of actual or statutory damages could augment the chapter 13 estate); *In re* Fuhrman, 596 B.R. 342, 350 (Bankr. E.D. Mich. 2018) (retaining "related to" jurisdiction over debtor's FDCPA claims in chapter 13 case); *In re* Robinson, 554 B.R. 800, 806–807 (Bankr. W.D. La. 2016) (FDCPA cause of action raised in chapter 13 case could form basis for

FDCPA claims have the capability of increasing assets of the chapter 13 estate, so the bankruptcy court should exercise jurisdiction over claims arising postpetition and during a chapter 13 case, regardless of whether the defendant is a pre-bankruptcy creditor or engaged in misconduct that violated specific Bankruptcy Code provisions.[249]

FDCPA claims that arise after the filing of the chapter 7 petition, and particularly after the closing of the chapter 7 case, present a more tenuous claim to the bankruptcy court's "related to" jurisdiction.[250] These claims typically involve violations of the discharge order. So while some courts hold that an attempt to collect a debt in violation of the discharge order may give rise to both a contempt claim under the Bankruptcy Code and an FDCPA claim, the bankruptcy court may, nevertheless, refuse to hear the FDCPA claim.[251] This reasoning can lead to the curious result that the bankruptcy court has jurisdiction over contempt proceedings involving its own discharge order, but not over an FDCPA claim based on the same conduct that violated the discharge order.[252]

Finally, under circumstances defined by federal statute, U.S. district courts have the authority to take cases pending in bankruptcy courts and decide them in the district court.[253] This procedure involves a process known as the "withdrawal of the reference." In the federal judicial system, the U.S. districts courts have authority over bankruptcy matters. By statute, the district courts make a general "referral" of bankruptcy matters

increased payments to creditors so that the bankruptcy court may exercise "non-core, but related to" jurisdiction over action); *In re* Lopez, 2015 WL 1207012 (Bankr. S.D. Tex. Mar. 12, 2015) (bankruptcy court has "related to" jurisdiction over debtor's adversary proceeding filed in ongoing chapter 13 case and raising FDCPA claims involving incidents that occurred while bankruptcy pending); *In re* Peed, 2014 WL 2987637 (Bankr. S.D. Ala. July 1, 2014) (finding "related to" jurisdiction for FDCPA claim, distinguishing FDCPA claims raised after close of chapter 7 case from those brought during ongoing chapter 13 cases). *See also In re* Nee, 2015 WL 1727180 (Bankr. W.D. Pa. Apr. 13, 2015) (jurisdiction over FDCPA claims brought by debtor in active chapter 13 case based on 28 U.S.C. § 157(b)(2)(o): "other proceedings affecting . . . the adjustment of the debtor-creditor . . . relationship, other than personal injury or wrongful death claims").

249 *In re* Cawood, 577 B.R. 538 (Bankr. E.D. Tenn. 2017) (bankruptcy court had "related to" jurisdiction over debtor's FDCPA claims involving mortgage servicer's collection actions that occurred after cure in prior chapter 13 case; rejecting view that claim's impact on estate must meet specific substantiality threshold); *In re* Guenot, 2014 WL 67320 (Bankr. D.N.J. Jan. 2, 2014) ("related to" jurisdiction for FDCPA claim established because claim may augment chapter 13 estate).

250 *See* § 13.4.1, *supra*.

251 *In re* Stevenson, 475 B.R. 286 (D. Mass. 2012) (in chapter 7 case bankruptcy court appropriately did not take jurisdiction over FDCPA claims related to postpetition efforts to collect on student loan); Magee v. S. Financial Systems, Inc., 2019 WL 1503919, at *6 (Bankr. S.D. Miss. Apr. 4, 2019) (no "related to" jurisdiction over FDCPA claim based on postpetition service of writ of garnishment in violation of the automatic stay); *In re* Daniels, 591 B.R. 814, 827 (Bankr. N.D. Ga. 2018) (bankruptcy courts do not have "related to" jurisdiction over FDCPA claims accruing postpetition in chapter 7, but noting divided authority on whether bankruptcy courts may nevertheless exercise ancillary (or supplemental) jurisdiction over these claims); *In re* Marshall, 491 B.R. 217, 230 (Bankr. S.D. Ohio 2012) (Bankruptcy Code does not preclude FDCPA claims based on discharge order violations, but court finds no bankruptcy court jurisdiction over the post-discharge FDCPA claims; collecting cases on bankruptcy court jurisdiction over postpetition violations in chapter 7 cases); *In re* Smith, 2012 WL 1565454, at *4 (Bankr. S.D. Ind. May 2, 2012) (FDCPA claims in adversary proceeding, including claims of stay and discharge order violations, brought in re-opened chapter 13 case not "related to" bankruptcy case because estate no longer exists); *In re* Arzuaga, 2012 WL 1120673 (Bankr. D. P.R. Apr. 3, 2012) (FDCPA claim alleging post-chapter-13-discharge misconduct does not impact the bankruptcy estate in any way, precluding bankruptcy court jurisdiction); *In re* Smith, 2012 WL 566246 (Bankr. W.D. Tex. Feb. 12, 2012) (no bankruptcy court jurisdiction to hear FDCPA claims based on actions occurring after discharge; litigation would have no effect on a bankruptcy estate no longer in existence); *In re* Wilkinson, 2012 WL 112945 (Bankr. W.D. Tex. Jan. 12, 2012) (no bankruptcy court jurisdiction over debtor's claims asserting postpetition FDCPA violations); *In re* Frambes, 454 B.R. 437, 443 (Bankr. E.D. Ky. 2011) (FDCPA claims of violation of chapter 7 discharge order did not affect property of estate); *In re* Atwood, 452 B.R. 249 (Bankr. D.N.M. 2011) (bankruptcy court had jurisdiction to hear automatic stay violation but not FDCPA claim arising postpetition); *In re* Rhinesmith, 450 B.R. 630 (Bankr. W.D. Tex. 2011) (FDCPA claims related solely to postpetition activities concerning reaffirmation agreement were not part of chapter 7 estate and court had no jurisdiction to hear them); *In re* Newcomer, 2011 WL 2560269 (Bankr. M.D. Pa. June 28, 2011) (FDCPA and state debt collection law claims based on postpetition actions were claims that vested in debtors under confirmation order, requiring dismissal of claims for lack of bankruptcy court jurisdiction); *In re* Lambert, 438 B.R. 523 (Bankr. M.D. Pa. 2010) (bankruptcy court had jurisdiction to adjudicate violations of automatic stay, but not FDCPA claims); *In re* Wynne, 422 B.R. 763, 770–771 Bankr. M.D. Fla. 2010) (collecting cases on lack of jurisdiction over postpetition claims); *In re* King, 2010 WL 3851434 (Bankr. D. Colo. Sept. 24, 2010) (FDCPA claim based on postpetition actions taken by defendants, arose after bankruptcy case was filed and was not property of chapter 7 estate and not encompassed by court's limited subject matter); *In re* Biege, 417 B.R. 697 (Bankr. M.D. Pa. 2009) (bankruptcy court may not have jurisdiction to hear FDCPA claim based on debt collector's post chapter 13 discharge activities); *In re* Vienneau, 410 B.R. 329 (Bankr. D. Mass. 2009). *But see In re* Burns, 2010 WL 642312, at *3 (Bankr. S.D. Tex. Feb. 18, 2010) (FDCPA and state law claims alleging violations of chapter 7 discharge order were "related to" bankruptcy case). *See also* Caldwell v. Redstone Fed. Credit Union, 2016 WL 4702821 (N.D. Ala. Sept. 8, 2016) (district court withdrew reference to bankruptcy court so that it could decide both FDCPA claim and claim of violation of discharge order; district court could rule on motion for contempt of bankruptcy court order, because bankruptcy court was unit of district court).

252 Dunlap v. Caliber Home Loans, Inc., 2017 WL 3433915 (E.D. Pa. Aug. 10, 2017) (district court retains FDCPA claim based on collection of mortgage debt after discharge, but non-FDCPA claim for violation of discharge order must be brought in bankruptcy court); Schuller v. Ocwen Loan Servicing, L.L.C., 2014 WL 722048 (S.D. Ala. Feb. 26, 2014) (FDCPA claims did not even meet bankruptcy courts' "related to" jurisdiction where case closed and outcome would have no effect on bankruptcy estate; bankruptcy court may decide related stay and discharge order violation claims while district court retains FDCPA claim); *In re* Garcia, 2013 WL 414177 (Bankr. W.D. Tex. Feb. 1, 2013) (assessing damages against debt collector for violation of chapter 7 discharge injunction, dismissing related FDCPA and state debt collection law claims for lack of "related to" bankruptcy court jurisdiction); *In re* Harlan, 402 B.R. 703 (Bankr. W.D. Va. 2009) (FDCPA claim arising from violation of chapter 7 discharge order would have no effect on bankruptcy estate and therefore could not be "related to" bankruptcy case; however, bankruptcy court has subject matter jurisdiction to address discharge order violation).

253 28 U.S.C. § 157(d).

to the specialized bankruptcy courts. In certain instances, this referral may be, and sometimes must be, "withdrawn" and the proceeding sent back to the district court. In these instances, the district court decides the matter itself. One situation that requires withdrawal of the reference is when an essential or material question of federal non-bankruptcy law is involved in the proceeding.[254] The FDCPA is one such federal law that may trigger withdrawal of the reference and require that the district court take over a proceeding initially filed in the bankruptcy court.[255]

13.5.2 The Supreme Court's Decision in Stern v. Marshall

In *Stern v. Marshall*[256] the Supreme Court issued another ruling in a series of decisions construing the bankruptcy courts' authority to adjudicate fully certain types of legal claims raised in the course of a bankruptcy proceeding. Bankruptcy court judges are not "Article III" judges with life tenure, and the Supreme Court has on occasion found that this status imposes a limit on the types of controversies in which they can render final judgments. In *Stern*, the Court held that Article III's requirements barred a bankruptcy court judge from entering a final judgment on a debtor's state law counterclaims when those counterclaims were not necessarily resolved in the bankruptcy claims review process.

At issue in *Stern v. Marshall* was the debtor's state law tort claim filed as a counterclaim against a creditor who had filed a proof of claim in the chapter 11 bankruptcy case.[257] To adjudicate the tort counterclaim it was necessary that the bankruptcy court rule on factual and legal issues that went beyond the enforceability of the creditor's proof of claim against the bankruptcy estate. The debtor's state law counterclaim sought not only to challenge the creditor's proof of claim, but also to augment the funds available to the bankruptcy estate.

A debtor's counterclaim against a creditor who has filed a proof of claim is designated as a "core proceeding" under federal statutes and clearly falls within the designated subject matter jurisdiction of the bankruptcy courts.[258] However, in view of the constitutional limitations on non-Article III judges, the Supreme Court in *Stern* held that the bankruptcy court's authority in the matter extended only to issuance of proposed findings of fact and conclusions of law. A district court judge must then review and approve the proposed findings and conclusions and enter a final judgment, much like the procedures involved in U.S. magistrate decisions. In a later decision the Supreme Court made it clear that as long as the proceedings in the bankruptcy court provide for district court review, the bankruptcy court can decide all aspects of a *Stern* case.[259] The parties may also consent to the bankruptcy court's final adjudication of all aspects of a *Stern* claim.[260]

In re Tolliver[261] was an early bankruptcy court decision construing the impact of *Stern* on an FDCPA claim raised by a bankruptcy debtor. The debtor in *Tolliver* brought an FDCPA claim along with a number of state law claims against a creditor in her chapter 13 case. The *Tolliver* court ruled that *Stern* did not affect its authority to enter a final judgment on the FDCPA claim.[262] The bankruptcy court noted that the Supreme Court had expressly stated that its *Stern* ruling should be narrowly interpreted. The Supreme Court did not refer to any limitations on counterclaims raising federal statutory causes of action, such as claims under the FDCPA.[263]

Most consumer claims related to debt collection practices seek relief beyond merely challenging the enforceability of the creditor's claim. In *Tolliver*, for example, the bankruptcy court ruled that under *Stern* it could not enter a final judgment on some of the debtor's state law statutory and common law claims, including a UDAP claim.[264] Certain contract counterclaims would necessarily be resolved as part of the claims objection process, and the bankruptcy court could still enter a final judgment on these counterclaims. Other claims, such as state UDAP claims seeking punitive damages or penalties, necessarily implicated legal and factual issues beyond those the court would address in evaluating an objection to a proof of claim.[265] For this latter type of claim the bankruptcy would enter proposed findings of fact and conclusions of law.[266]

Whether a debt collection claim fits within the scope of *Stern v. Marshall* depends very much on the nature of the claim. For

254 *Id.*

255 *See, e.g.*, Cole v. MidFirst Bank, 2018 WL 6504433 (N.D. Ala. Dec. 11, 2018) (the need to resolve issues involving interaction of TILA mortgage servicing rules and FDCPA met standard for both mandatory and discretionary withdrawal of reference); Lagrou v. Monterey Fin. Services, L.L.C., 2018 WL 4903259 (E.D. Va. Oct. 9, 2018) (FDCPA claim remaining as only issue in bankruptcy court proceeding was basis for withdrawal of reference).

256 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 14.2.1 (12th ed. 2020), *updated at* www.nclc.org/library.

257 The creditor had filed a defamation claim against the debtor. The debtor brought a counterclaim against the creditor for tortious interference with an expected inheritance. All claims and counterclaims were based on state law.

258 28 U.S.C. § 157(b)(2)(C). The "core proceedings" that bankruptcy judges have jurisdiction to hear and determine include "counterclaims by the estate against persons filing claims against the estate."

259 Executive Benefits Ins. Agency v. Arkison, 573 U.S. 25, 134 S. Ct. 2165, 189 L. Ed. 2d 83 (2014).

260 Wellness Int'l Network, LTD v. Sharif, ___ U.S. ___, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015) (parties' consent to adjudication by bankruptcy court need not be express).

261 464 B.R. 720 (Bankr. E.D. Ky. 2012).

262 *Id.* 464 B.R. at 745.

263 *But see In re* Rinaldi, 2013 WL 655514 (Bankr. E.D. Wis. Feb. 22, 2013) (treating debtors' FDCPA and state law claims together as counterclaims to creditor's proof of claim similar to those in *Stern v. Marshall* and making proposed findings of fact and conclusions of law).

264 *In re* Tolliver, 464 B.R. 720 (Bankr. E.D. Ky. 2012).

265 *In re* Tolliver, 464 B.R. 720, 740 (Bankr. E.D. Ky. 2012). *See also In re* Edwards, 2013 WL 5718565 (Bankr. E.D.N.C. Oct. 21, 2013) (debtor's claims under North Carolina debt collection statute were essentially counterclaims against a creditor who filed a proof of claim; as in *Stern*, these claims could not be resolved through claims resolution process).

266 *See, e.g., In re* Fuhrman, 596 B.R. 342, 350 (Bankr. E.D. Mich. 2018) (bankruptcy court retains jurisdiction to enter proposed findings and conclusions for FDCPA claims).

example, an FDCPA or state debt collection claim raised in bankruptcy court may be treated as a counterclaim filed against a creditor who filed a proof of claim. Under *Stern v. Marshall*, the issue becomes whether this core proceeding requires that the bankruptcy court decide issues beyond the extent and validity of the creditor's proof of claim. In other words, will the process of determining the extent and validity of the creditor's proof of claim "necessarily resolve" the debt collection claims?[267]

Certain debt collection claims satisfy this standard, while others may not. Generally, the greater the overlap between the issues to be resolved in the debt collection action and the issues to be determined in resolving a claim objection, the more likely the bankruptcy court has full authority to enter judgment in all aspects of the debt collection claim.

If the bankruptcy debtor's debt collection claim alleges that the creditor or its debt collector falsely represented "the character, amount, or legal status of any debt,"[268] there could be significant overlap between this debt collection action and an objection to a proof of claim. This overlap is apparent if the debt collection claim asserts that the debt is unenforceable because the underlying transaction is void under state or federal law.[269] In these cases, the bankruptcy court exercises a core bankruptcy function in deciding whether the proof of claim is enforceable. The non-bankruptcy statutory debt collection violation based on attempting to collect an unenforceable debt inevitably requires the same determination as the challenge to the validity of the proof of claim. *Stern v. Marshall* should not limit the bankruptcy court's authority to rule on all aspects of such a proceeding.[270]

At the other end of the spectrum would be a debt collection claim that focused on a debt collector or creditor's harassing conduct. Creditors and debt collectors engage in abusive conduct when the underlying debt is perfectly valid and enforceable. In this latter situation, the bankruptcy court may lack the constitutional authority to enter a final judgment on the harassment issues, even when it has full authority to determine the validity of the same creditor's proof of claim.

The impact of the *Stern* decision may prove to be very limited in the long run. The ruling did not set any new limits on the bankruptcy courts' subject matter jurisdiction to make determinations relevant to consumers' claims. As the Supreme Court made clear in *Executive Benefits Insurance Agency v. Arkinson*,[271] the limitation only affects the bankruptcy court's ability to enter a final judgment, as opposed to proposed findings of fact and conclusions of law, in certain proceedings.[272]

Consistently with *Stern*, the bankruptcy courts have extensive authority to rule on proceedings that fall short of entry of the final judgment. These include rulings on discovery matters and on non-dispositive motions.[273] When the *Stern v. Marshall* limitation applies, the parties may consent to the bankruptcy court's authority to enter a final judgment.[274] As an alternative, the proceeding may be referred directly to the U.S. district court for full adjudication. Courts continue to note that the Supreme Court directed that its ruling be construed narrowly.[275]

13.5.3 Enforcement of Arbitration Clauses in Bankruptcy

Defendants may seek to take debt collection lawsuits away from courts and have them resolved in arbitration. General issues related to the enforcement of contractual arbitration terms are discussed above, at § 11.3, *supra*. Filing a debt collection lawsuit in bankruptcy court does not mean that the defendant will not try to short-circuit the proceeding by demanding arbitration. Many of the same arguments used to limit arbitration outside of bankruptcy apply in bankruptcy as

267 Stern v. Marshall, 564 U.S. 462, 131 S. Ct. 2594, 1617, 180 L. Ed. 2d 475 (2011).

268 *See* 15 U.S.C. § 1692e(2)(A).

269 *See, e.g.*, Buchanan v. Northland Grp., Inc., 776 F.3d 393, 399 (6th Cir. 2015) ("A misrepresentation about the limitations period amounts to a 'straightforward' violation of § 1692e(2)(A)."); Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076 (7th Cir. 2013) (filing time-barred civil debt collection lawsuit violates FDCPA); Cruz v. Int'l Collection Corp., 673 F.3d 991, 997 (9th Cir. 2012); Conner v. Howe, 344 F. Supp. 2d 1164, 1172 (S.D. Ind. 2004) (finance charge exceeded amount allowed under Indiana Unfair Consumer Credit statute, making loan agreement void). *See also In re* Kiskaden, 571 B.R. 226 (E.D. Ky. 2017) (finding that bankruptcy court may render final judgment in disputes involving validity of proof of claim for high-cost loan, but lacks authority to enter final judgment on state and federal debt collection claims arising from same loan).

270 *But see In re* Taylor, 594 B.R. 643, 651 n. 16 (E.D. Va. 2018) (action under state law challenging validity of creditor's claim based on high-cost loan credit agreement would be constitutionally core claim, while state law action that focused on collection activities involving loan would be "statutorily core but constitutionally non-core '*Stern* claim'").

271 573 U.S. 25, 134 S. Ct. 2165, 189 L. Ed. 2d 83 (2014).

272 *See In re* Peed, 2014 WL 2987637 (Bankr. S.D. Ala. July 1, 2014) (applying *Arkinson* and *Stern*, bankruptcy court will hear FDCPA and related state debt collection law claims and make proposed findings and conclusions of law). *See also* Walch v. Columbia Collection Serv., Inc., 2012 WL 40993826, at *8 (D. Or. June 19, 2012) (magistrate refers debt collection claims to bankruptcy court; bankruptcy court to rule on claims of discharge order violation and submit to district court its findings and recommendations on any state law debt collection claims for which bankruptcy court cannot enter judgment under *Stern v. Marshall*). *See generally In re* Agriprocessors, Inc., 479 B.R. 835 (Bankr. N.D. Iowa 2012) (in adversary proceeding seeking to avoid preferential or fraudulent transfers involving creditor that did not file proof of claim, bankruptcy court not required to refer matter to district court, but can prepare own proposed findings and conclusions).

273 *In re* Trevino, 564 B.R. 890, 910 (Bankr. S.D. Tex. 2017) (regardless of its constitutional authority to enter final judgment over debt collection claims, bankruptcy court can rule on procedural motions, including motion to compel discovery); *In re* Murff, 2015 WL 3690994, at *1–2 (Bankr N.D. Ill. June 15, 2015) (in FDCPA proceeding falling within scope of *Stern* bankruptcy court may grant motion to dismiss that does not preclude amendment); *In re* Lopez, 2015 WL 7572097, at *8 (Bankr. S.D. Tex. Nov. 24, 2015) (bankruptcy court can impose discovery sanctions in FDCPA action covered by *Stern*).

274 Wellness Int'l Net., LTD v. Sharif, ___ U.S. ___, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015); *In re* Robinson, 554 B.R. 800, 807 (Bankr W.D. La. 2016) (bankruptcy court can enter final judgment on FDCPA claim where plaintiff consented; here court treated defendant's filing of motion to dismiss as implied consent by defendant to bankruptcy court's full authority to decide action).

275 *See, e.g., In re* Quigley Co., 676 F.3d 45, 52 (2d Cir. 2012).

well.[276] However, bankruptcy raises special concerns that give added weight to the opposition to arbitration.

The bankruptcy courts consider a specific set of policies when they must decide whether to withhold a proceeding from arbitration. These standards are not the same as those that make up the core/non-core distinction or are applied under the *Stern v. Marshall* rule. As discussed above, many debt collection adversary proceedings filed in bankruptcy courts fall under one of the "core proceeding" definitions.[277] *Stern v. Marshall* addresses whether the bankruptcy court may enter a final judgment in such a proceeding, as opposed to issuing proposed findings and conclusions.

However, a defendant's request to take some aspect of a bankruptcy proceeding away from the bankruptcy court and send it to arbitration raises a different issue. The relevant test here is whether referring the matter to arbitration will present an "inherent conflict" with the purposes of the Bankruptcy Code.[278] If a bankruptcy court finds that such a conflict exists, it may exercise discretion to refuse to compel arbitration.[279]

The courts have looked to a common set of concerns in evaluating whether arbitration conflicts with the Code's underlying purposes. These include protection of reorganizing debtors from piecemeal litigation and inconsistent decisions, the centralization of disputes over the debtor's legal obligations, and the efficiency of bankruptcy proceedings.[280] Determining the validity of proofs of claim filed in bankruptcy cases is an essential function of the bankruptcy courts.[281] The bankruptcy system cannot function as a unified structure for resolving the claims against a debtor if proof of claim disputes are farmed out to a myriad of arbitrators. Such a practice would risk inconsistent decisions on multiple issues.[282]

Like determining the validity of proofs of claim, the enforcement of discharge orders goes to the heart of the bankruptcy court's authority. A bankruptcy court can properly refuse to send discharge order violation claims to arbitration.[283] In an action seeking to enforce a state deceptive practices statute against a debt relief business, a bankruptcy court found that referral to arbitration would undermine the bankruptcy court's ability to administer the bankruptcy estate.[284] Similarly, the bankruptcy court should retain jurisdiction to decide questions about the dischargeability of a debt.[285] In *In re Moses*,[286] the district court appropriately addressed the conflict between the bankruptcy courts' role in determining the validity of creditors' proofs of claims and the referral of essential aspects of claims disputes to arbitration. The district court upheld the

276 *See* § 11.3, *supra*.

277 Statutory "core proceedings" include proceedings involving the "allowance or disallowance of claims against the estate" and "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. §§ 157(b)(2)(B), 157(b)(2)(C).

278 Shearson/Am. Express v. McMahon, 482 U.S. 220, 227, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987); National Consumer Law Center, Consumer Arbitration Agreements § 4.3.3 (7th ed. 2015), *updated at* www.nclc.org/library (discussing enforceability of arbitration agreements in bankruptcy).

279 *In re* Thorpe Insulation Co., 671 F.3d 1011, 1021–1022 (9th Cir. 2012); *In re* White Mountain Mining Co, 403 F.3d 164, 169–170 (4th Cir. 2005).

280 *In re* Thorpe Insulation Co., 671 F.3d 1011, 1022 (9th Cir. 2012); *In re* White Mountain Mining Co., 403 F.3d 164, 170 (4th Cir. 2005); *In re* Gandy, 299 F.3d 489, 500 (5th Cir. 2002).

281 May v. Midland Funding, L.L.C., 591 B.R. 712, 721 (Bankr. E.D. Ark. 2018) (refusing to send to arbitration class action under FDCPA challenging improper inclusion of interest charges in proofs of claim, noting that Rule 3001 disclosures and proof of claim process are "unique to bankruptcy"), *later decision* 595 B.R. 894 (Bankr. E.D. Ark. 2019) (enforcing class action waiver contained in arbitration clause as consistent with Federal Arbitration Act and applicable state law). *See also* Ellswick v. Quantum3 Group, L.L.C., 2016 WL 3582586 (Bankr. N.D. Ala. June 24, 2016) (challenge to proof of claim could not have been brought outside of bankruptcy; referring dispute to arbitration would conflict with Bankruptcy Code's purpose of creating central forum to determine claims); *In re* Thomas, 592 B.R. 99, 112 (Bankr. W.D. Va. 2018) (refusing to send class claims of violations of FDCPA and Rule 3001 to arbitration: "[I]t is nonsensical for the Court to order parties to submit to an arbitrator the task of applying and enforcing a procedural apparatus applicable only before this Court. The question of whether an alleged violation of Rule 3001 occurred, and if so whether any relief is appropriate, is not a question of fact or law for arbitration."), *aff'd sub nom.* Midland Funding LLC v. Thomas, 606 B.R. 687 (W.D. Va. 2019).

282 *In re* Thorpe Insulation Co., 671 F.3d 1011, 1023 (9th Cir. 2012) ("Arbitration of a creditor's claim against a debtor, even if conducted expeditiously, prevents the coordinated resolution of debtor-creditor rights and can delay the confirmation of a plan of reorganization."); *In re* White Mountain Mining Co., 403 F.3d 164, 169–170 (4th Cir. 2005) ("Arbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an arbitrator's ruling' rather than the ruling of the bankruptcy judge assigned to hear the debtor's case"); *In re* Gandy, 299 F.3d 489, 499 (5th Cir. 2002) (affirming denial of motion to compel arbitration; court finds that a creditor's filing a proof of claim invokes the "peculiar powers of the bankruptcy court" and a claim dispute "is a core proceeding because it could arise only in the context of bankruptcy"), *In re* United States Lines, 197 F.3d 631, 637 (2d Cir. 1999) (upholding denial of request to refer to arbitration, noting that claim allowance proceeding is one that is "unique to or uniquely affected by the bankruptcy proceedings"); *In re* National Gypsum Co., 118 F.3d 1056, 1067 n.18 (5th Cir. 1997) (enforcement of arbitration in proof of claim disputes would mean "effectively contracting out of a bankruptcy court's power to adjust claims among different classes of creditors"). *See also In re* Jorge, 568 B.R. 25 (Bankr. N.D. Ohio 2017) (refusing to enforce arbitration clause in wireless services contract and allowing debtor to pursue claims in bankruptcy court for violations of automatic stay and discharge order).

283 *In re* Anderson, 884 F.3d 382, 386 (2d Cir. 2018) (enforcement of discharge order "strikes at the heart of the bankruptcy court's unique powers to enforce its own orders"); *In re* Bateman, 585 B.R. 618 (Bankr. M.D. Fla. 2018) (referring discharge violation claim to arbitration would conflict with underlying purpose of Bankruptcy Code). *But see In re* Trevino, 599 B.R. 526, 549 (Bankr. S.D. Tex. 2019) (sending to arbitration claims of violation of discharge order in chapter 13 case, including FDCPA claims).

284 *In re* Erwin, 2018 WL 1614160 (Bankr. E.D.N.C. Mar. 30, 2018) (refusing to send to arbitration both state law deceptive practices claim (non-core proceeding) and related fraudulent transfer claim under Bankruptcy Code (core proceeding) brought to recover funds paid to debt relief agency).

285 *In re* Roth, 594 B.R. 672 (Bankr. S.D. Ind. 2018) (question of dischargeability of student loan goes to core bankruptcy functions of ensuring fresh start and presiding over centralized resolution of claims).

286 2013 WL 53873 (Bankr. E.D.N.C. Jan. 3, 2013).

bankruptcy court's decision to refuse to refer to arbitration a chapter 13 debtor's state law debt collection proceeding.

The debtor's adversary proceeding in *Moses* contained two claims. In the first claim the debtor sought a declaratory judgment that the creditor's proof of claim, based on a high-cost tribal loan, was void and unenforceable as originated in violation of North Carolina interest rate limits. The second count sought damages under the North Carolina's debt collection statute. The state statute authorized a claim against a creditor that attempted to collect an unenforceable debt.

The district court agreed that both claims were inextricably intertwined. Both claims depended entirely upon the invalidity of the underlying debt. Referring either of the claims to arbitration would conflict with the bankruptcy court's key role in deciding upon the validity of claims filed in the bankruptcy court.

In vacating the district court order in *Moses* in part, the Fourth Circuit mistook the facts of record, which clearly showed that both of the debtor's claims focused on the identical issue—the validity of the underlying debt.[287] While agreeing that the bankruptcy court, and not the arbitrator, should decide whether the proof of claim violated North Carolina's usury laws, the court of appeals deemed it appropriate for an arbitrator to decide whether attempting to collect the invalid debt violated the North Carolina Debt Collection Act. In allowing for potentially inconsistent decisions from a bankruptcy and non-bankruptcy forum, the Fourth Circuit failed to recognize the identity of issues raised in both claims.[288] One concurring/dissenting opinion from the panel reflected an accurate understanding of the debtor's claims, holding that neither claim belonged in arbitration.[289]

13.6 FDCPA Attorney Fees and Bankruptcy

In general, attorney fees that are paid either by the bankruptcy estate or by the bankruptcy debtor must be approved by the court. Specifically, Federal Rule of Bankruptcy Procedure 2016 requires an application for compensation whenever an attorney seeks to be compensated or reimbursed from the bankruptcy estate.[290] In addition, Rule 2016 requires disclosure of compensation paid or promised to an attorney for the debtor.[291] Counsel should be prepared to provide contemporaneous time records to support any fee applications. Bankruptcy courts may differ in their procedure for approving fee applications, therefore, counsel are advised to become familiar with any related local rules or customary practice.

In some cases, the trustee, who has not abandoned a prepetition debt collection claim, may retain the debtor's attorney to prosecute the claim. The trustee should file an application to hire debtor's counsel in these circumstances.[292] Compensation for postpetition services will be awarded only to professionals whose employment has been authorized by the bankruptcy court in advance of the work performed. *Nunc pro tunc* applications are generally not approved.[293]

In a chapter 13 case, the debtor's counsel may continue to pursue a prepetition claim without any special application because the debtor retains control over estate property. The court may award reasonable compensation for actual and necessary services rendered by debtor's counsel, as well as reimbursement for expenses.[294] The court is also authorized to award compensation that is less than the amount of compensation requested.[295] Bankruptcy Code section 330(a)(3) sets forth a list of factors to be considered by the court in awarding fees.

Even though debtor's counsel may have entered into a contingency fee arrangement with the debtor prepetition, if the compensation sought exceeds the reasonable value of the services, the bankruptcy court may ignore the agreement and reduce the amount requested. As for prepetition services, where state law affords an attorney a lien on any settlement proceeds or recovery resulting from the representation, bankruptcy courts generally hold that such attorney's liens relate back to the filing of the action and may not be avoided by the trustee.[296]

The existence of an attorney's lien, however, does not preclude court scrutiny of the amount of the fee. Bankruptcy courts retain the authority to review the reasonableness of prepetition fees, though courts differ as to the relevance of prepetition retainer agreements.[297]

Where an FDCPA case filed prepetition in state court or federal district court is not removed to the bankruptcy court, it is not clear whether a fee application pursuant to 15 U.S.C. § 1692k(a)(3) should be decided by the trial court. Particularly

287 Moses v. CashCall, Inc., 781 F.3d 63 (4th Cir. 2015) (per curiam).

288 *See also In re* Taylor, 594 B.R. 643 (E.D. Va. 2018) (bankruptcy court must determine validity of payday loan credit agreement under Virginia law in order to resolve objections to proof of claim, a core bankruptcy court function that could not be referred to arbitration; not ruling on FDCPA claim that debtor withdrew); *In re* Kiskaden, 571 B.R. 226 (E.D. Ky. 2017) (following *Moses* analysis; sending federal and state debt collection claims related to high-cost loan to arbitration while excluding from arbitration challenges to allowance of proof of claim for the high-cost loan).

289 *Id.* 781 F.3d at 73, (Niemeyer, J., concurring and dissenting in part). *See also* Hayes v. Delbert Serv. Corp., 811 F.3d 666 (4th Cir. 2016) (finding unenforceable *Moses* arbitration agreement that purported to preclude application of federal law to borrowers' claims).

290 Fed. R. Bankr. P. 2016(a).

291 Fed. R. Bankr. P. 2016(b).

292 *See* 11 U.S.C. § 327(a); Fed. R. Bankr. P. 2014(a).

293 Such applications may be approved where delay in seeking court approval results from extraordinary circumstances. *See, e.g., In re* Jarvis, 53 F.3d 416 (1st Cir. 1995).

294 11 U.S.C. § 330(a).

295 11 U.S.C. § 330(a)(2).

296 *In re* Albert, 206 B.R. 636 (Bankr. D. Mass. 1997); *In re* Tarricone, Inc., 76 B.R. 53 (Bankr. S.D.N.Y. 1987).

297 *In re* Albert, 206 B.R. 636 (Bankr. D. Mass. 1997) (amount of attorney lien not determined by contingency fee agreement; attorney required to submit contemporaneous time records to establish reasonable value of prepetition services); *In re* 9 Stevens Cafe, Inc., 161 B.R. 96 (Bankr. S.D.N.Y. 1993) (25% of settlement based on contingency arrangement was reasonable compensation); *In re* Robert E. Derecktor, Inc., 152 B.R. 14 (Bankr. D.R.I. 1993) (though reasonableness of fee application must be determined by bankruptcy court, existence of valid prepetition contingency agreement and substantial risks incurred therewith by attorney relevant to court's determination).

where all compensation to the attorney is being sought against the defendant as a result of a fee-shifting statute, a bankruptcy court may defer to a trial court's determination of a reasonable fee, but ultimately the bankruptcy court retains jurisdiction to review any fee award.

Where a trustee does not file an application to hire an attorney and elects to pursue the case rather than abandon it, the consumer's attorney is effectively discharged.[298] If the attorney had been retained on a contingency basis, bankruptcy courts may look to state law in limiting the amount of the attorney's lien for prebankruptcy services based on *quantum meruit* compensation.[299]

In the common situation where the trustee has abandoned the claim and debtor's counsel is free to pursue a prepetition debt collection claim, subsequent fee determinations are generally not subject to bankruptcy court review. The issue may arise, however, as to whether the debtor's obligation to pay for prebankruptcy services has been discharged in bankruptcy. Where the retainer with the debtor provides that the attorney will seek compensation only pursuant to a fee-shifting statute or out of funds paid by the defendant distinct from any damages awarded to the client, there is no obligation of the debtor which is subject to discharge. However, if there is a contingency fee arrangement in which compensation is based on a percentage of the recovery, or which includes the payment of costs or an hourly fee in the event of certain contingencies, the portion of the liability for prebankruptcy services may be discharged unless the attorney can establish the existence of an attorney's lien under state law.[300]

13.7 Federal and State Fair Debt Collection Claims Relating to a Bankruptcy

13.7.1 Overview

Sometimes after a debtor has filed for bankruptcy, debt collectors' actions violate both a provision of the Bankruptcy Code and federal or state debt collection laws. For example, a debt collector's attempt to collect a discharged debt violates the discharge order and may also constitute harassing, oppressive, or abusive conduct under the FDCPA. A debt collector may file a debt collection lawsuit against the debtor after they have filed for bankruptcy, giving rise to both an automatic stay violation and an FDCPA claim.

Alternatively, debt collectors may engage in conduct within a bankruptcy case that does not violate the Bankruptcy Code, but does violate federal or state debt collection laws. For example, the debt collector may contact a bankruptcy debtor who is known to be represented by counsel thereby violating a state law. Or, the debt collector may falsely state the amount or character of its claim when filing a proof of claim.

Courts considering the relationship between bankruptcy and federal and state debt collection law are divided as to whether the Bankruptcy Code provides an exclusive remedy for conduct that violates both the Code and nonbankruptcy debt collection laws. As discussed at § 13.7.3.4, *infra*, a 2017 Supreme Court decision could have, but did not, resolve the split. Courts are also split over whether the Bankruptcy Code preempts state law debt collection claims.

Section 13.7.2, *infra*, discusses the two lines of cases dealing with the relationship between the FDCPA and the Bankruptcy Code when a debt collector's conduct violates provisions of both.[301] The Seventh Circuit in *Randolph v. IMBS, Inc.*,[302] presented persuasive arguments in favor of the viability of actions under the FDCPA and similar statutes against debt collectors that have violated the automatic stay and discharge injunction provided by the Bankruptcy Code. The Second and Third Circuits have adopted similar approaches in rejecting a preclusive role for the Bankruptcy Code over the FDCPA in certain broad areas.[303] In contrast, the Ninth Circuit, in *Walls v. Wells Fargo Bank*,[304] held that the Bankruptcy Code bars a debtor from bringing other causes of action based on the same facts that give rise to a violation of the discharge injunction.

An important source of claims against debt collectors relates to the proof of claims that they submit in the consumer's bankruptcy case. Section 13.7.3, *infra*, considers this topic, particularly in light of a 2017 Supreme Court decision. Finally, § 13.7.4, *infra*, examines the divide among the courts as to whether the Bankruptcy Code preempts state debt collection laws.

13.7.2 Does the FDCPA Apply to Claims Arising Out of a Consumer's Bankruptcy?

13.7.2.1 The Seventh Circuit Decision in *Randolph*

Debt collectors have routinely argued that FDCPA claims are "preempted" by the Bankruptcy Code. According to the debt collectors, a debtor is precluded from pursuing claims under the federal FDCPA for conduct related to bankruptcy, including violations of the automatic stay and discharge injunction.

The Seventh Circuit in *Randolph v. IMBS, Inc.*,[305] correctly rejected the "preemption" characterization when two federal statutes come into play. The *Randolph* court noted that "[o]ne federal statute does not preempt another," and that the proper

298 *In re* Pac. Far East Line, Inc., 654 F.2d 664 (9th Cir. 1981).

299 *In re* Albert, 206 B.R. 636, 641 n.6 (Bankr. D. Mass. 1997).

300 *In re* Hessinger & Assoc., 192 B.R. 211 (N.D. Cal. 1996); *In re* Martin, 197 B.R. 120 (Bankr. D. Colo. 1996) (debtor's obligation based on prepetition retainer agreement with bankruptcy attorney for prepetition services was dischargeable debt).

301 *See* § 13.7.2, *infra*.

302 368 F.3d 726 (7th Cir. 2004).

303 Garfield v. OCWEN Loan Servicing, L.L.C., 811 F.3d 86 (2d Cir. 2016); Simon v. FIA Card Serv., 732 F.3d 259 (3d Cir. 2013).

304 276 F.3d 502 (9th Cir. 2002).

305 368 F.3d 726 (7th Cir. 2004).

question is whether one of the statutes has been expressly or implicitly repealed:

> When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other—and repeal by implication is a rare bird indeed. (citations omitted). It takes either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replaces the other.[306]

Applying this analysis, the *Randolph* court found that although there may be some "operational differences" between the FDCPA and the Bankruptcy Code, there is no "irreconcilable conflict" between the two statutes.[307] To demonstrate its point, the Seventh Circuit created a useful chart comparing the Bankruptcy Code's automatic stay provision with the FDCPA.

	Bankruptcy	FDCPA
Who	Anyone	Debt collector only
Scienter	Willfulness	Strict liability (§ 1692e(2)(A))
Defense	None	Bona fide error plus due care (§ 1692k(c)), or reliance on FTC opinion (§ 1692k(e))
Statutory damages	None	$1000 maximum (§ 1692k(a)(2)(A))
Compensatory damages	Yes	Yes (§ 1692k(a)(1))
Punitive damages	Yes	No
Cap on class recovery	No	Yes (§ 1692k(a)(2)(B)(ii))
Maximum recovery	No	Yes, $500,000 or 1% of net worth, whichever is less (§ 1692k(a)(2)(B)(ii))
Attorney fees to debtor	No	Yes (§ 1692k(a)(3))
Attorney fees to creditor	No	Yes (§ 1692k(a)(3))
Statute of limitations	None (laches defense only)	One year (§ 1692k(d))

By comparing the two statutes, the Seventh Circuit found that they can work together harmoniously. For example, working together the statutes permit a debtor to obtain the more significant remedy of punitive damages when a willful collection action violates both the FDCPA and the bankruptcy automatic stay.[308] Similarly, the FDCPA's preponderance of evidence and strict liability standards, as opposed to the clear and convincing evidence standard for a willful violation of the discharge order, may make the FDCPA the more attractive enforcement option.[309] Significantly, the *Randolph* court concluded that both statutes can be easily enforced and that debt collectors "can comply with both simultaneously."[310]

The Seventh Circuit's *Randolph* decision is consistent with Supreme Court jurisprudence that holds that when two statutes are capable of coexistence both should be regarded as effective.

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent clearly expressed congressional intention to the contrary, to regards each as effective. Morton v. Mancari, 417 U.S. 535, 551 (1974).[311]

In view of the different standards of proof and remedies available under the FDCPA and the Bankruptcy Code, advocates should plead, when possible, violations of both statutes. In a recent case,[312] a bankruptcy debtor brought claims against a debt collector who made collection calls in violation of a bankruptcy discharge order. The bankruptcy court found that the debt collector willfully violated the discharge order and awarded the debtor damages for emotional distress, punitive damages, and attorney fees under the Bankruptcy Code. However, the court denied relief on the debtor's FDCPA's claim arising from the same conduct. According to the court, the number and frequency of calls did not reach the level of severity other courts had found sufficient to violate section 1692d of the FDCPA. The court's assessment of the FDCPA claim is certainly open to question.[313] However, the outcome

306 *Id.* at 730.

307 *See also* Simon v. FIA Card Serv., 732 F.3d 259, 279 (3d Cir. 2013) (no conflict between remedies available for subpoena abuses under bankruptcy rules and remedies for same misconduct available under FDCPA); Arruda v. Sears, Roebuck & Co., 310 F.3d 13 (1st Cir. 2002) (although dismissing FDCPA claim, noting that FDCPA claim could be brought where collector makes false allegations that debtor is obligated to pay debt discharged in bankruptcy); Bessette v. Avco Fin. Serv., Inc. 230 F.3d 439 (1st Cir. 2000) (implicitly finding that civil RICO claim based on discharge violation not in conflict with Bankruptcy Code, but dismissing RICO claim on other grounds).

308 *See In re* Nee, 2015 WL 1727180 (Bankr. W.D. Pa. Apr. 13, 2015) (also comparing complementary forms of relief available under FDCPA and Bankruptcy Code, finding no preemption).

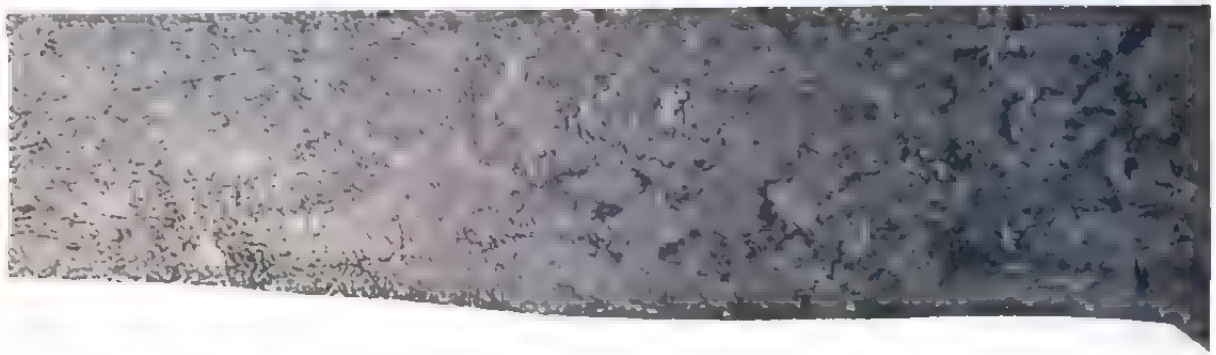
309 Levine v. Bayview Loan Servicing, L.L.C., 926 N.W.2d 49, 54 (Minn. Ct. App. 2019) (lower court's improper dismissal of debtor's bankruptcy-based FDCPA claim "deprived [debtor] of her selected forum and of the availability of the strict-liability provision of the FDCPA").

310 368 F.3d 726, 730 (7th Cir. 2004). *See also* Dougherty v. Wells Fargo Home Loans, Inc., 425 F. Supp. 2d 599 (E.D. Pa. 2006); *In re* Gunter, 334 B.R. 900 (Bankr. S.D. Ohio 2005).

311 Traynor v. Turnage, 485 U.S. 535, 108 S. Ct. 1372, 99 L. Ed. 2d 618 (1988). *See also* Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149 (3d Cir. 1989) (overruling prior decision and requiring arbitration of claim in bankruptcy to give effect to Federal Arbitration Act); Peeples v. Blatt, 2001 WL 921731 (N.D. Ill. Aug. 14, 2001).

312 *In re* Evans, 2019 WL 1212358 (Bankr. S.D. Ala. Mar. 12, 2019).

313 It is not clear whether the debtor brought a claim under section 1692e for misrepresenting the legal status of the debt.



pleading claims under both the FDCPA.

Circuit Decision in *Simon*

tion of the Bankruptcy Code and the
ve debt collection claims related to
ıtic stay, the discharge order, and the
. The Third Circuit addressed a more
e Bankruptcy Code and the FDCPA
vices.[314] Here, the chapter 7 debtors
ılated bankruptcy procedural rules in
ɔena to appear for a deposition.[315] The
ıted Federal Rule of Civil Procedure
ena on the debtors' attorney instead
ıbpoena also omitted certain content
ieral Rule of Bankruptcy Procedure
5 into bankruptcy proceedings. Thus,
of servicer of the subpoena violated

in *Simon* successfully quashed a sub-
ıpliance with Bankruptcy Rule 9016.
ıt an adversary proceeding against the
ıkruptcy court, asserting violations of
to the debtors, the improper subpoena
ke legal action that the attorneys could
the subpoena falsely represented that
ss.[317] The bankruptcy court, and later
hat the Bankruptcy Code and its rules
source of regulation of communica-
and creditors during the pendency of
he lower courts dismissed the FDCPA

ecisions the Third Circuit endorsed the

However, applying the same conflict standard, the court held that enforcement of the FDCPA's initial written communication disclosure requirement under section 1692e(11) did create a direct conflict with the Bankruptcy Code's automatic stay.[320] The court affirmed dismissal of the FDCPA claim asserting this violation.[321]

Most courts that find a dissonance between the Bankruptcy Code and the FDCPA focus upon a perceived redundancy between certain remedies for creditor misconduct available under the Bankruptcy Code and the remedies available under the FDCPA. The Ninth Circuit Bankruptcy Appellate Panel in *In re Chaussee*[322] and the Second Circuit in *Simmons v. Roundup Funding, L.L.C.*[323] pointed to the remedies and sanctions available under Rule 9011 and Bankruptcy Code section 105(a) for debtors who sought relief from abusive proof of claim filings. In the view of these courts, the existence of remedies under bankruptcy laws precluded all nonbankruptcy relief involving the same creditor conduct.

The Third Circuit in *Simon* faced a similar situation. The bankruptcy rules provided specific remedies and procedures for a debtor to challenge abuses in issuance of Rule 2004 subpoenas.[324] The debtor in *Simon* had, in fact, used these procedures and quashed the debt collector's subpoena at issue. However, the Third Circuit found that the availability of remedies under the bankruptcy rules did not preclude the debtor's recourse to further remedies under the FDCPA against the same debt collector conduct. Both the Bankruptcy Code and FDCPA remedies could be applied consistently and without conflict. In articulating its analysis, the court specifically noted its disagreement with the expansive view of bankruptcy preemption adopted by the court in *Simmons*.[325]

13.7.2.3 The Second Circuit Decision in *Garfield*

proofs of claim during a bankruptcy
arising *during* bankruptcy, the court
lied repeal or irreconcilable conflict
· Code and FDCPA claims based on
that violated the discharge injunction.
:ss Code remedy for discharge order
o the Code's remedial provision for
:ic stay, weighed in favor of allowing
ıe FDCPA action asserting a stay vio-
ankruptcy case has closed, the action
Garfield.[329]

ı Circuit Decision in *Walls*

ıth Circuit in *Walls v. Wells Fargo*
a contempt action in the bankruptcy
remedy for violation of the discharge
court based its decision, with respect
the view that a debtor should not be
ivate right of action for a violation of
ıunction, when none exists under the
ing another federal statute. According
o permit a simultaneous claim under
w through the back door what [the
lish through the front door—a pri-
Prior to *Walls*, several circuit courts
d the issue of a private right of action
:harge injunction, however, nowhere
ate that the Bankruptcy Code bars a
ıer causes of action based on the same
: discharge injunction.[333]

Walls to FDCPA claims arising from

absent in the context of the automatic stay.[334] Additionally, under *Walls*, debtors may still be able to assert FDCPA claims for conduct that also violates the discharge injunction, but where the claim is not based on the debt collector's legal authority to collect the debt or the legal status of the debt.[335]

Even under the *Walls* analysis, claims independent of the bankruptcy discharge and not turning on the discharged nature of the debt do not interfere with the Bankruptcy Code's remedial scheme. Thus, claims based on harassment, threats, intimidation, and false representations (other than the status of the discharged debt) should not be precluded by *Walls*.[336]

The discharge order in a chapter 13 case in which the debtor cured a home mortgage default does not discharge the mortgage debt.[337] Debtors who brought their mortgages current in chapter 13 often emerge from bankruptcy with ongoing payment disputes due to servicers' faulty bankruptcy accounting

334 *See* 11 U.S.C. § 362(k); *In re* Tobener, 2009 WL 5215404 (Bankr. N.D. Cal. 2009) (stating *Walls* is easily distinguishable in cases involving the automatic stay because of private right of action). *But see In re* Roman Perez, 527 B.R. 844 (Bankr. D. P.R. 2015) (Bankruptcy Code provides exclusive remedies for stay violations and borrower cannot assert FDCPA claims unless has no other remedy); Wan v. Discover Fin. Serv., 324 B.R. 124 (N.D. Cal. 2005) (applying *Walls* principles to automatic stay with little analysis); *In re* Stoiber, 2008 WL 2473657 (Bankr. D. Or. June 18, 2008) (summarily holding that Bankruptcy Code provides exclusive remedy for violation of both automatic stay and discharge injunction).

335 *See In re* Orchard, 2013 WL 6254037, at *5–6 (Bankr. D. Or. Dec. 4, 2013) (FDCPA claims based on postbankruptcy letter sent directly to represented debtor and that misrepresented charges owed did not involve "bankruptcy-laden" determinations and these claims not precluded by *Walls*); Church v. Onewest Bank, 2011 WL 2444719 (D. Or. Jan. 18, 2011) (FDCPA claims alleging harassment of bank-

practices. The borrower who asserts an FDCPA claim because a mortgage servicer's postbankruptcy collection actions misrepresented the amounts owed can make such a claim without relying on a discharge order.[338] The FDCPA claim is grounded upon the servicer's actions in violation of the contract terms, not a violation of the discharge order.

13.7.2.5 The Second Circuit Decision in *Easterling*

An example of a bankruptcy-related FDCPA claim that did not involve a violation of the discharge order or automatic stay appeared in *Easterling v. Collecto, Inc.*[339] Here, the Second Circuit held that a debt collector violated the FDCPA by sending a debtor, who had completed a chapter 7 case without discharging her student loan debt, a notice stating flatly that the debt was "ineligible for bankruptcy discharge." In fact, the debtor retained the right to seek a hardship discharge of her student loan debt, either through reopening her closed chapter 7 case or by filing a new bankruptcy case and seeking a hardship discharge in the new case. The misrepresentation in the debt collector's communication went to a future effort to discharge the debt, rather than an attempt to collect a discharged debt.

13.7.2.6 *Randolph* Represents the Prevailing View

Outside the Ninth Circuit, lower courts apply the direct conflict analysis articulated by the *Randolph, Simon,* and *Garfield* courts and allow consumers to seek remedies under the FDCPA for debt collectors' bankruptcy-related misconduct.[340] This is particularly true with respect to FDCPA claims based on collection activities that violate the discharge order entered in a bankruptcy case.[341] Violations of the automatic

338 *See* Scally v. Ditech Fin., L.L.C., 2018 WL 2059506 (S.D. Cal. May 3, 2018) (rejecting claim that *Walls* precluded former bankruptcy debtor's state and federal debt collection claims arising in the wake of a chapter 13 case), *later decision* 2018 WL 2059506 (S.D. Cal. May 3, 2018) (refusing to dismiss debtor's third amended FDCPA complaint, because claims not tied explicitly to bankruptcy orders).

339 692 F.3d 229 (2d Cir. 2012).

340 Davis v. Weinstein & Riley, 2013 WL 5428740, at *4 (N.D. Ohio Sept. 26, 2013) ("since the *Randolph* decision, almost all courts outside the [Ninth] circuit to examine the issue have rejected *Walls* favoring *Randolph*"); Gamble v. Fradkin & Weber, P.A., 846 F. Supp. 2d 377 (D. Md. 2012) (rejecting *Walls*' broad preclusion of bankruptcy-related FDCPA claims as an "outlier" decision); Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328 (M.D. Fla. 2010) (following *Randolph*); Vick v. NCO Fin. Sys. Inc., 2010 WL 1330637 (E.D. Tex. Mar. 15, 2010) (Bankruptcy Code does not preclude relief under the FDCPA), *adopted,* 2010 WL 1328830 (E.D. Tex. Mar. 30, 2010); Kline v. Mortg. Elec. Sys., 659 F. Supp. 2d 940 (S.D. Ohio 2009) (Bankruptcy Code did not impliedly repeal the FDCPA; debt collector's seeking illegal late fees and the like outside of bankruptcy violated the FDCPA); Bagwell v. Portfolio Recovery Assoc., 2009 WL 1708227 (E.D. Ark. June 5, 2009) ("Plaintiff is not attempting to hold Defendants in contempt for a violation of the bankruptcy discharge order but, rather, Plaintiff is attempting to establish FDCPA liability based on Defendants' pursuit of a debt which Plaintiff claims is not owed."); Evans v. Midland Funding, L.L.C., 574 F. Supp. 2d 808 (S.D. Ohio 2008) (followed *Randolph*); *In re* Atwood, 452 B.R. 249 (Bankr. N.M. 2011) (adopting *Randolph* position); *In re* Jones, 2011 WL 5025329, at *1 (Bankr. E.D. Va. Oct. 21, 2011) (FCRA case, noting, "[t]he majority of Courts have held that the Bankruptcy Code and the FCRA or the FDCPA are not so irreconcilably in conflict that one displaces the other").

341 Saccameno v. Ocwen Loan Servicing, L.L.C., 372 F. Supp. 3d 609 (N. D. Ill 2019) (sustaining jury award of $500,000 compensatory damages against loan servicer for FDCPA, RESPA, and breach of contract claims based on servicer's collection actions following borrowers' chapter 13 discharge and cure of mortgage default); Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961 (D. Minn. 2019) (summary judgment against law firm on FDCPA claims that firm sought to enforce judgment on student loan debt that had been discharged in bankruptcy); Folkerts v. Seterus, Inc., 2019 WL 1227790 (N.D. Ill. Mar. 15, 2019) (denying servicer debt collector's motion for summary judgment on FDCPA claims of discharge order violations); Holloway v. JTM Capital Mgmt., L.L.C., 2019 WL 1040851 (N.D. Ohio Mar. 5, 2019) (allowing FDCPA claims against debt collector for accessing debtor's credit reporting information for purposes of debt collection after debt discharged in bankruptcy); Murphy v. Stupar, Schuster & Bartell, SC 337 F. Supp. 3d 837 (W.D. Wis. 2018) (attorney's legal mistake in believing improperly filed reaffirmation agreement was valid did not preclude liability under § 1692e(2) for filing complaint to collect on discharged debt); Caldwell v. Redstone Federal Credit Union, 2018 WL 3518466 * 17 (N.D. Ala. July 20, 2018) (distinguishing cases where failure to vacate judgment after bankruptcy discharge with no further actions did not state FDCPA claim, here demand for payment of discharged debt violates FDCPA); Johnson v. Fay Servicing, L.L.C., 2018 WL 5262049* 4 (N.D. Ga. Sept. 19, 2018) (plaintiff stated FDCPA claims based on discharge order violations against foreclosure law firm and mortgage servicer); Dunlap v. Caliber Home Loans, Inc., 2017 WL 3433915 (E.D. Pa. Aug. 10, 2017) (allowing FDCPA claim based on collection of mortgage debt after discharge); Barnhill v. FirstPoint, Inc., 2017 WL 2178439 (M.D.N.C. May 17, 2017) (noting Fourth Circuit has not addressed implied repeal issue, follows *Randolph* and *Garfield* to allow FDCPA claim based on violation of discharge order); Gagnon v. JPMorgan Chase Bank, 563 B.R. 835, 844–846 (N.D. Ill 2017) (potential FDCPA violation where mortgage servicer's post-discharge collection letters did not clearly preclude demand for payment of debt as personal liability); McCamis v. Servis One, Inc., 2016 WL 4063403, at *4 (M.D. Fla. July 29, 2016) (collection of discharged debt); Caldwell v. Redstone Fed. Credit Union, 2016 WL 4702821 (N.D. Ala. Sept. 8, 2016) (rejecting *Walls*, no bankruptcy preclusion for action filed in district court asserting both FDCPA and discharge order violations arising out of attempts to collect discharged credit card debt); Roth v. Nationstar Mortg., L.L.C., 2016 WL 3570991 (M.D. Fla. July 1, 2016) (implied repeal doctrine did not bar FDCPA claim asserting debt collector attempted to collect on deficiency debt discharged in bankruptcy); Grubermann v. Seas & Assoc., 2016 WL 4378975 (N.D. Ill. Aug. 17, 2016) (violation of § 1692e(2)(A) to send collection letter demanding payment of discharged debt); Freeman v. Ocwen Loan Servicing, 2016 WL 3476681 (N.D. Ill. June 27, 2016) (refusing to dismiss FDCPA claims based on mortgage servicer's violation of discharge order); Leahy v. Bayview Loan Servicing, L.L.C., 159 F. Supp. 3d 1294 (M.D. Fla. 2016) (FDCPA claim based on post-discharge debt collection communications by mortgage servicer); Buckley v. Afni, Inc., 133 F. Supp. 3d 1140 (S.D. Ind. Jan. 6, 2016) (post-discharge direct communication to debtor seeking to collect on discharged debt); Hernandez v. Dyck-O'Neal, Inc., 2015 WL 2094263 (M.D. Fla. May 5, 2015) (pursuit of mortgage debt deficiency after discharge is potential FDCPA violation); Donnelly-Tovar v. Select Portfolio Servicing, Inc., 945 F. Supp. 2d 1037 (D. Neb. 2013) (debt collector's postbankruptcy demand for payment of debt on mortgage note could constitute FDCPA violation); *In re* Marshall, 491 B.R. 217

stay also give rise to FDCPA claims.[342] Certain continuing debt collector misconduct violates both the automatic stay and the discharge order, giving rise to FDCPA claims.[343] With the exception of the limitations outlined by the Supreme Court in *Johnson v. Midland Funding, L.L.C.*[344] and discussed in § 13.7.3.3, *infra*, false and deceptive representations made in proofs of claims filed in bankruptcy cases may trigger FDCPA violations.[345] Considerable litigation has focused on the consequences of a debt collector's failure to adjust credit reports to reflect a bankruptcy discharge. A number of courts have held that a debt collector's failure to adjust credit reports to accurately reflect bankruptcy discharges furthers debt collection and violates the FDCPA as an effort to collect a debt that has been discharged in bankruptcy.[346]

13.7.2.7 Claims Against Debt Buyers

FDCPA claims may also lie against debt collectors for purchases of discharged bankruptcy debts. In these cases, it is unclear whether the discharge injunction applies to the debt collector or the debt buyer, particularly where the debt buyer was not a party to the bankruptcy discharge order and had no knowledge of the order.[347]

Courts have held that the selling creditor may be held in contempt for selling discharged bankruptcy claims without advising the purchaser that the debt had been discharged in bankruptcy.[348] If the debt collector for the debt buyer is not subject to the discharge injunction, then, regardless of its knowledge of the bankruptcy,[349] it should be strictly liable under the FDCPA for attempting to collect the discharged

(Bankr. S.D. Ohio 2012) (claim of violation of discharge order and FDCPA claim based on same set of facts do not present irreconcilable conflict, following *Randolph*); Rios v. Bakalar & Assoc., 795 F. Supp. 2d 1368 (S.D. Fla. 2011) (debtor stated valid claim that debt collector violated § 1682e(2) by making false or misleading representations in attempt to collect discharged debt); *In re* Contreras, 2007 WL 273128 (Bankr. S.D. Tex. Jan. 26, 2007) (debt collector's continued collection efforts knowing of the consumers' bankruptcy and discharge violated FDCPA); *In re* Gunter, 334 B.R. 900 (Bankr. S.D. Ohio 2005) (debtor sufficiently stated claim for relief under FDCPA where debt collector repeatedly took steps to collect discharged debt). *See In re* Jackson, 545 B.R. 62, 71 (Bankr. D. Mass. 2016) (not expressly discussing implied repeal but holding debt collector's attempts to enforce personal liability for mortgage debt discharged in chapter 7 violated FDCPA). *See also* Ross v. RJM Acquisitions Funding L.L.C., 480 F.3d 493 (7th Cir. 2007) (collecting debt that has been discharged in bankruptcy violated 15 U.S.C. § 1692e(2)(A)'s prohibition against a debt collector making a false representation of character, amount, or legal status of debt).

342 Plank v. St. Anthony's Medical Ctr., 2019 WL 354871 (E.D. Mo. Jan. 29, 2019) (mag.; noting Eighth Circuit has not yet addressed bankruptcy implied repeal issue, following *Randolph* to allow FDCPA claim asserting stay violation); Vazquez v. USCB Corp., 2018 WL 3352662, at *4 (N.D. Ill. July 9, 2018) (violations of §§ 1692e(2) and 1692e(10) occur because "[a] demand for immediate payment while a debtor is in bankruptcy is 'false' in the sense that it asserts that money is due, although because of an automatic stay in bankruptcy cases, it is not."); *In re* Mogg, 2016 WL 1029396 (S.D. Ill. Mar. 15, 2016) (debtor can bring FDCPA action arising from refusal to dismiss collection action brought in violation of stay); *In re* Nee, 2015 WL 1727180 (Bankr. W.D. Pa. Apr. 13, 2015) (debtor can assert FDCPA claims for stay violations); Davis v. NCO Fin. Sys., Inc., 2014 WL 4954705 (M.D. Fla. Oct. 2, 2014) (following *Randolph* and *Simon*, allowing FDCPA claim for actions that also violate stay); *In re* Peed, 2012 WL 1999485 (Bankr. S.D. Ala. June 4, 2012) (agreeing with *Randolph* that debtor may bring FDCPA claim for stay violation, but dismissing FDCPA claim based only on allegation that servicer's attorney misrepresented facts about debt in motion for relief from stay); *In re* Coleman, 2011 WL 5025499 (Bankr. D.S.C. Oct. 20, 2011) (payday lender violated FDCPA through collection harassment carried out in violation of bankruptcy stay); *See also* Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017) (collection attorneys violated § 1692e(5) when they moved for default judgment and signed garnishment request while automatic stay was in effect). *But see* Toepper v. Law Offices of Richard Snyder, 2018 WL 3059676 (D. Minn. June 20, 2018) (collection attorney's letters to debtor's attorney offering to settle creditor's non-dischargeability challenge did not violate § 1692e or automatic stay).

343 Lamprey v. Wells Fargo Home Mortg., 2017 WL 3470570, at *4 (D. Me. Aug. 11, 2017) (Bankruptcy Code does not preclude debtor's FDCPA claims involving violation of automatic stay and discharge order); Clark v. Brumbaugh & Quandahl, P.C., 731 F. Supp. 2d 915 (D. Neb. 2010) (rejecting *Walls* and following *Randolph*; Bankruptcy Code does not bar FDCPA claim in district court "for a violation allegedly arising from collection efforts initiated after the bankruptcy court entered the automatic stay and discharge injunction").

344 ___ U.S. ___, 137 S. Ct. 1407, ___ L. Ed. 2d ___ (2017).

345 *In re* Robinson, 554 B.R. 800, 810–811 (Bankr. W.D. La. 2016) (Bankruptcy Code would not preclude FDCPA action on time-barred bankruptcy proof of claim, but finding claim for violation not stated in this case); *In re* Trevino, 535 B.R. 110 (Bankr. S.D. Tex. 2015) (no preemption of FDCPA claims based on inflated proof of claim and violation of terms of confirmed chapter 13 plan).

346 *See, e.g.*, Folkerts v. Seterus, Inc., 2019 WL 1227790 (N.D. Ill. Mar. 15, 2019) (denying servicer's motion for summary judgment on borrowers claim that servicer falsely reported mortgage debt as not discharged following bankruptcy); Bradshaw v. Collection Bureau of the Hudson Valley, 2010 WL 11565277, at *8 (N.D. Ala. Mar. 29, 2010) (allowing FDCPA claim over failing to adjust credit report to reflect discharge; noting *Randolph* court failed to cite any irreconcilable conflict between Bankruptcy Code and Fair Credit Reporting Act). *But see* McGee v. Rockford Mercantile Agency, Inc., 2018 WL 1920130 (N.D. Ill. Apr. 24, 2018) (reporting debt "in collection" with past due balance while debtor still under chapter 13 plan and before discharge entered was not inaccurate or misleading under the FDCPA) *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.5.1.4 (12th ed. 2020), *updated at* www.nclc.org/library. (discussing credit reporting consequences of discharge order).

347 *See, e.g., In re* Cultrera, 360 B.R. 28 (Bankr. D. Conn. 2007) (attorney working for collection agency working for creditor did not violate discharge injunction despite attempts to collect discharge debt because he had no knowledge of the injunction); *In re* Franks, 363 B.R. 839 (Bankr. N.D. Ohio 2006) (third party debt buyer with no knowledge of discharge order could not be held in contempt).

348 *See In re* Laboy, 2010 WL 427780 (Bankr. D. P.R. Feb. 2, 2010); *In re* Nassoko, 405 B.R. 515 (Bankr. S.D.N.Y. 2009); *In re* Lafferty, 229 B.R. 707 (Bankr. N.D. Ohio 1998).

349 *See* Turner v. J.D.V.B. & Assoc., Inc., 330 F.3d 991 (7th Cir. 2003) (debt collector's lack of knowledge of bankruptcy not determinate; court must ask "how consumer would perceive the demand letter"); Keisler v. Encore Receivable Mgmt., Inc., 2008 WL 1774173 (S.D. Apr. 17, 2008) (measure of whether statement is false is objective standard that turns not on what debt collector knew, but on how consumer would perceive communication). *But see* Buffington v. Schuman & Schuman, P.C., 2001 WL 34082273 (N.D.N.Y. Feb. 21, 2001) (debt collector who lacked knowledge of bankruptcy discharge did not violate FDCPA).

debt.[350] This should be true even where courts are bound by the *Walls* decision.[351]

Of course, the debt collector also may assert a bona fide error defense to the FDCPA claim. For example, courts have held that held the bona fide error defense applicable where the debt collector searched the public records for bankruptcies.[352]

Unfortunately, other courts, such as the Seventh Circuit in *Hyman v. Tate*,[353] have not required debt collectors to independently verify that the debtor had not filed a bankruptcy.[354] In *Hyman*, the Seventh Circuit found that the debt collector established a bona fide error defense when its procedures designed to avoid contacting debtors who had filed bankruptcy consisted of: (1) reasonably relying upon the creditor not to refer debtors who had filed bankruptcy and (2) immediately ceasing collection activity upon learning of the bankruptcy filing.

13.7.2.8 Common Debt Collector Defenses to FDCPA Claims Based on Discharge Order Violations

Putting aside the spurious statutory conflict reasoning adopted by a few courts, primarily in the Ninth Circuit,[355] a debt collector's attempt to collect a debt that was subject to a bankruptcy court's discharge order is a clear FDCPA violation.[356] However, when consumers raise these discharge violation claims, debt collectors regularly raise certain defenses. These defenses will be addressed briefly here. Debt collectors often include in their notices and letters demanding payment a statement to the effect that, if the debtor has obtained a bankruptcy discharge, the statement is not intended to be for debt collection purposes. When challenged, the debt collector will insist that it sent the notice merely for "informational" purposes. The self-serving boilerplate becomes ambiguous and confusing when viewed with outright demands for payment contained in the same documents or in other communications from the debt collector. The debt collector's spin as to its intent is obviously irrelevant. The proper issue is whether the communication, considered in its full context, could lead the unsophisticated consumer to believe that the debt collector is demanding payment of the debt as a personal liability of the debtor. When viewed in this context, courts routinely find that the boilerplate disclaimers did not insulate the debt collector from FDCPA liability for seeking to collect on a discharged debt.[357] The relevant context encouraging payment might include demands for payment contained in monthly account statements sent to mortgagors after they discharged personal liability on a mortgage debt in chapter 7.[358]

350 *See* Gamble v. Fradkin & Weber, P.A., 846 F. Supp. 2d 377 (D. Md. 2012) (strict liability applies to purchaser of debt discharged in bankruptcy); Wagner v. Ocwen Fed. Bank., 2000 WL 1382222 (N.D. Ill. Aug. 28, 2000) (declining to dismiss claim against debt collector that purchased mortgage after bankruptcy discharge entered).

351 *See* Foresberg v. Fid. Nat'l Credit Serv., Ltd., 2004 WL 3510771 (S.D. Cal. Feb. 26, 2004) (distinguishing *Walls* where debtor brought action against original creditor as opposed to debt purchaser).

352 *See* DeMars v. Plaza Assoc., 2005 WL 1847226 (W.D. Wis. Aug. 3, 2005) (defendant established bona fide error defense where it had checked public records for bankruptcy in the case, but consumer used different middle name/initial in bankruptcy filing; defendant stopped collection once told of bankruptcy).

353 362 F.3d 965 (7th Cir. 2004).

354 Yu v. Kevin B. Wilson Law Offices, 919 F. Supp. 2d 661 (D. Md. 2013) (agreeing with *Hyman v. Tate*, accepting bona fide error defense based on "understanding" among various debt collectors that they would not transfer to each other debts discharged in bankruptcy). *See also* Bynum v. Cavalry Portfolio Serv., L.L.C., 2005 WL 2789199 (N.D. Okla. Sept. 29, 2005) (FDCPA does not require collectors to verify independently that debt was not discharged in bankruptcy order to qualify for bona fide error defense).

355 Walls v. Wells Fargo Bank, 276 F.3d 502 (9th Cir. 2002). *See* § 13.7.2.4, *supra*.

356 *See* § 13.7.2.6, *supra*.

357 *See* Williams v. Rushmore Loan Mgmt. Serv., L.L.C., 2018 WL 1582515, at *10 (D. Conn. Mar. 31, 2018); Lilly v. Bayview Loan Servicing, L.L.C., 2017 WL 4410040 (M.D. Fla. Oct. 4, 2017) (from perspective of least sophisticated consumer debt collection was animating purpose of servicer's statements; the post-discharge statements listed amount due and demanded payment); Gagnon v. JPMorgan Chase Bank, 563 B.R. 835, 846 (N.D. Ill. 2017); Lamprey v. Wells Fargo Home Mortg., 2017 WL 3470570, at *4 (D. Me. Aug. 11, 2017) (same letter conveyed messages at odds with the bankruptcy disclaimers); McWhorter v. Ocwen Loan Servicing, L.L.C., 2017 WL 3315375 (N.D. Ala. Aug. 3, 2017); Whalen v. Specialized Loan Serv., L.L.C., 155 F. Supp. 3d 905 (W.D. Wis. 2016) (evaluating two notices from mortgage servicer containing bankruptcy disclaimers, finding disclaimer in one notice negated debt collection purpose while disclaimer in other notice failed to negate content indicating a collection purpose); Roth v. Nationstar Mortg., L.L.C., 2016 WL 3570991 (M.D. Fla. July 1, 2016); Donnelly-Tovar v. Select Portfolio Servicing, Inc., 945 F. Supp. 2d 1037, 1048 (D. Neb. 2013). But see Tyler v. Fabrizio & Brook, P.C., 2019 WL 1002591 (E.D. Mich. Mar. 3, 2019) (no FDCPA violation where law firm's validation letter contained bankruptcy disclaimer, did not explicitly ask for payment, and did not include a due date, payment coupons, or mailing instructions); Brand v. Caliber Home Loans, Inc., 2018 WL 4898572 (N.D. Ill. Oct. 9, 2018) (bankruptcy disclaimer in servicer's letter negated content indicating it was attempt to collect a debt, implausibly finding that statements in letter referring to pursuit of deficiency action and credit reporting were not false or misleading in view of bankruptcy discharge).

358 Miller v. Carrington Mortg. Services, L.L.C., 2019 WL 2871141 (D. Mass. July 3, 2019) (overall content of monthly statements, including provision of payment coupons with due dates, overrode any effect from bankruptcy disclaimer statement); Folkerts v. Seterus, Inc., 2019 WL 1227790 (N.D. Ill. Mar. 15, 2019) (rejecting servicer's arguments relying on bankruptcy disclaimers in post-discharge statements; statements included content asking for payment); Johnson v. Fay Servicing, L.L.C., 2018 WL 5262078, at *13 (N.D. Ga. July 2, 2018) (mag; summarizing decisions holding that debt collection content of creditor's postbankruptcy notice may override bankruptcy disclaimer content elsewhere in the same document); Sellers v. Rushmore Loan Mgmt. Serv., L.L.C., 2017 WL 1683613, at *6–7 (M.D. Fla. May 3, 2017); Prindle v. Carrington Mortg. Serv., L.L.C., 2016 WL 4369424, at *15 (M.D. Fla. Aug. 16, 2016); Goodin v. Bank of Am., 114 F. Supp. 3d 1197, 1206 (M.D. Fla. 2015). *But see* Thompson v. Ocwen Fin. Corp., 2018 WL 513720 (D. Conn. Jan. 23, 2018) (no debt collection violation where monthly statements pertained to a mortgage for which personal liability had been discharged in bankruptcy; accepting debt collector's "only for informational purposes" argument); Finley v. Nationstar Mortg., 2018 WL 6445691 (E.D. Mich. Dec. 10, 2018) (monthly statements with bankruptcy disclaimer included only information borrower would need to prevent *in rem* enforcement of security

Debt collectors occasionally raise another argument in response to claims that they sought payment on a secured debt after a bankruptcy discharge. After a homeowner obtains a discharge of personal liability on a mortgage note, the debt collector may try to argue that it did not engage in debt collection when it demanded payment on the mortgage debt after the bankruptcy discharge. The debt collector may claim that there was no "debt" left after the discharge and that it was merely threatening to enforce its security interest in the property—an interest that typically survives a bankruptcy. Although some courts have accepted this argument,[359] it ignores the impact of such a notice on the debtor. The unsophisticated consumer does not understand distinctions between "in rem" enforcement and enforcement as a personal liability.[360] The debt collectors are attempting to have it both ways—they typically want to encourage payment and at the same time set in motion the procedures to recover the property through foreclosure.

The bona fide error defense faces a substantial obstacle in the case of a collection activity that violated a bankruptcy discharge order. Many courts have construed the Bankruptcy Code to obligate debt collectors to put in place systems that screen out debts in bankruptcy and discharged debts from their collection efforts.[361] Collectors may not rely on a "the computer did it" defense when they violate key bankruptcy provisions.[362] When faced with a claim that it violated the bankruptcy discharge order or the automatic stay, the debt collector bears the burden to produce the evidence to establish the bona fide error defense.[363] The facts presented to support the bona fide error defense must be viewed in the context of the Bankruptcy Code's own demanding requirements. The standard for a good-faith objectively reasonable error is therefore particularly high when a debt collector violated the automatic stay or the discharge order.[364]

Recently, in *Taggart v. Lorenzen*,[365] the Supreme Court articulated a standard for determining when a party may be sanctioned for contempt of the discharge order entered in a bankruptcy case.[366] After *Taggart*, it may be more difficult to obtain relief under the Bankruptcy Code for a creditor's willful violation of the discharge order in situations where the creditor claims it made a legal mistake. However, because a mistake of law is not a defense to an FDCPA claim, the consumer's FDCPA claim may still be viable when a contempt proceeding under the Bankruptcy Code would be subject to a defense of legal mistake.[367] In bankruptcy discharge cases, the FDCPA' strict liability standard should remain controlling for two reasons. First, Congress made the FDCPA applicable to a defined set of entities, debt collectors, and not to all creditors. Debt collectors are on notice that they must meet the FDCPA's stricter standards of conduct. Second, bankruptcy law places a heightened duty of diligence on institutional creditors to comply with the automatic stay and discharge orders.[368] Therefore, a debt collector's legal mistakes should not shield it from liability for FDCPA claims arising from its violations of the discharge order.

instrument); Cardona v. FCI Lender Serv., Inc., 2017 WL 3531492 3 (N.D. Ill. Aug. 16, 2017) (servicer's postbankruptcy letter contained clear bankruptcy disclaimer and "only reasonable interpretation of the letter, even to an unsophisticated consumer, is that it was intended for informational purposes only, and not an attempt to collect a debt"). *See also* § 4.7.5.2.3, *supra* (discussing interaction between FDCPA and TILA monthly account statements). See generally *In re* Kirby, 599 B.R. 427, 445 (B.A.P. 1st Cir. 2019) (discussing decisions involving postbankruptcy communications containing bankruptcy disclaimers, noting that disclaimers do not insulate debt collector from liability for discharge order violations, and courts must consider "[t]otality of the circumstances presented in the record surrounding the post-discharge communications").

359 *See, e.g.*, Lovegrove v. Brock & Scott, P.L.L.C., 2017 WL 216698 (E.D. Va. Jan. 17, 2017), *aff'd*, 698 Fed. Appx. 159 (4th Cir. 2017) (foreclosure trustee not collecting debt when it sent foreclosure letter to borrower who had discharged personal liability on mortgage debt).

360 *See, e.g.*, Ellison v. Fullett Rosenlund Anderson P.C., 347 F. Supp. 3d 370, 378–379 (N.D. Ill. 2018) (unsophisticated consumers do not necessarily understand Latin phrase "In Rem").

361 *See* § 13.2.4, *supra*; National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.6.4 (12th ed. 2020), *updated at* www.nclc.org/library.

362 *In re* Rijos, 263 B.R. 382, 392 (1st Cir. 2001).

363 § 12.2.9, *supra*. *See, e.g.*, Peterson v. Capital Mgmt. Services, L.P., 2019 WL 2289595 (N.D. Ohio May 29, 2019) (debt collector's mere averment of lack of knowledge of bankruptcy filing insufficient to counter strict liability triggered by demand for payment made while automatic stay in effect).

364 Micks v. Gurstel Law Firm, P.C., 365 F. Supp. 3d 961 (D. Minn. 2019) (rejecting law firm's bona fide error defense, firm did not act under objectively reasonable standard when it enforced judgment entered in violation of discharge order); Folkerts v. Seterus, Inc., 2019 WL 1227790 (N.D. Ill. Mar. 15, 2019) (rejecting servicer's affidavit purporting to support bona fide error defense to discharge order violation where submission did not include documents showing how it applied it purported review procedures to debtor's loan); Vazquez v. USCB Corp., 2018 WL 3352662 (N.D. Ill. July 9, 2018) (neither facts surrounding alleged failure to receive notice of bankruptcy filing, nor nature of debt collector's general procedures for detecting bankruptcy filings could be resolved in favor of debt collector's bona fide error defense in summary judgment context); Eide v. Colltech, Inc., 987 F. Supp. 2d 951 (D. Minn. 2013) (debt collector has burden of producing detailed evidence of effectiveness of its own screening for bankruptcy cases and cannot rely solely on creditor's procedures); Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328 (M.D. Fla. 2010) (conclusory averments of good faith reliance on creditor and absence of specifics about screening process for bankruptcy cases precluded bona fide error defense). *But see* Ross v. RJM Acquisitions Funding L.L.C., 480 F.3d 493 (7th Cir. 2007) (data established accuracy and reliability of creditor's system to prevent referral of bankruptcy cases to debt collector); Hyman v. Tate, 362 F.3d 965, 968 (7th Cir. 2004) (reliance on referring creditor's procedures and prompt correction when bankruptcy cases discovered were reasonable under bona fide error standard); Lawson v. I.C. Sys., Inc., 2019 WL 2501916 (N.D. Ala. June 17, 2019) (debt collector's use of "a third party service like Lexis-Nexis" to verify bankruptcy status of debts referred to it satisfied "bona fide error" standard).

365 ___ U.S. ___, 139 S. Ct. 1795, ___ L. Ed. 2d ___ (2019), discussed in § 13.2.6, *supra*.

366 *See* § 13.2.6, *supra*.

367 The bona fide error defense under the FDCPA applies to a debt collector's factual mistakes and not to the debt collector's legal errors. Murphy v. Stupar, Schuster & Bartell, 337 F. Supp. 3d 837 (W.D. Wis. 2018) (rejecting bona fide error defense that creditor's attorney mistakenly believed that improperly filed reaffirmation agreement was valid).

368 *See* § 13.2.4, *supra*.

Chapter 13 cases can present particular problems after debtors successfully complete a long-term payment plan to cure a prebankruptcy mortgage default. Mortgage servicers' accounting systems often fail to credit payments accurately during chapter 13 cases, leaving debtors facing inflated arrearage claims after the chapter 13 case closes. A Code provision and the Federal Rules of Bankruptcy Procedure have created enforceable rights for borrowers when they face these unexpected arrearage claims after completing their chapter 13 plans.[369] Moreover, a bankruptcy court order confirming a chapter 13 plan is a federal court order enforceable through contempt sanctions.[370] Servicers, foreclosure attorneys, and other debt collections that attempt to collect amounts inconsistent with the sums required to cure the mortgage default under the chapter 13 plan are claiming amounts not lawfully due, and thus violate the FDCPA.[371]

13.7.3 FDCPA and Proof of Claim Abuses

13.7.3.1 Overview of the Bankruptcy Claims Process

The claims process is incorporated into every bankruptcy case to determine how much the debtor owes to each creditor. Proofs of claim are bankruptcy's alternative mechanism to a separate lawsuit by each creditor to collect a debt. In chapter 13 cases and in chapter 7 cases where there will be a distribution of proceeds to creditors, creditors generally must file proofs of claim within ninety days of the first date set for the meeting of creditors under Bankruptcy Code section 341.[372] The expiration of the ninety-day period is referred to as the "bar date" for proofs of claim. However, Federal Rule of Bankruptcy Procedure 3002(a) does not require secured creditors, including mortgage creditors, to file proofs of claim; only "[a]n unsecured creditor or an equity security holder must file a proof of claim."[373]

Unless an objection is filed, a proof of claim in proper form is deemed allowed.[374] An allowed claim generally establishes the amount owed to the creditor and the status of the debt (e.g., general unsecured, priority unsecured, secured).[375] The claim determines how much the creditor will be paid from the bankruptcy estate, either from liquidation of the debtor's nonexempt assets in chapter 7 or from the debtor's income in a chapter 13 case.

13.7.3.2 FDCPA Liability for Creditors' Abuse of the Claims Process

Problems with proofs of claim arise because creditors frequently abuse the process. They may file claims that falsely inflate the amount due. Other creditors may file proofs of claim when no debt is owed or when collection of the debt is barred by the statute of limitations.

Unfortunately, some courts have held that the FDCPA does not provide a remedy for inflated and otherwise improperly filed proofs of claim. For example, in *Simmons v. Roundup Funding, L.L.C.*,[376] the Second Circuit held that the remedy for fraudulent or otherwise defective proofs of claim is available only through the Bankruptcy Code.[377] Of particular concern

369 11 U.S.C. § 524(*i*) and Fed. R. Bank. P. 3002.1(*i*).

370 *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.11 (12th ed. 2020), *updated at* www.nclc.org/library.

371 *In re* Clark, 2018 WL 6266179 (Bankr. N.D. Okla. Nov. 26, 2018) (granting summary judgment for debtors on claims that servicer violated Bankruptcy Code and Rule 3002.1, not reaching debtors' related FDCPA claims that focused on same conduct.

372 *See* Fed. R. Bankr. P. 3002(c). The meeting of creditors is the statutory forum where the debtor must appear and answer questions under oath. *See* 11 U.S.C. §§ 341, 343. In a chapter 13 case, the first date for the meeting of creditors is between twenty and fifty days after the filing of a bankruptcy petition. Fed. R. Bankr. P. 2003(a).

373 Fed. R. Bankr. P. 3002(a).

374 Fed. R. Bankr. P. 6004.

375 Despite the binding effect of a confirmed plan, see 11 U.S.C. § 1327, it may not be sufficient to invalidate a properly filed proof of claim by a creditor. Some courts hold that the only method contemplated for challenging a filed proof of claim is the process of objecting to the claim. Other courts have allowed the provisions of a confirmed plan to govern over an inconsistent claim. *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.11 (12th ed. 2020), *updated at* www.nclc.org/library.

376 622 F.3d 93 (2d Cir. 2010).

377 *See also In re* Chaussee, 399 B.R. 237 (B.A.P. 9th Cir. 2008); Rhodes v. Diamond, 433 Fed. Appx. 78 (3d Cir. 2011) (foreclosure law firm's filing of allegedly inflated proofs of claim cannot give rise to FDCPA causes of action); Walker v. Specialized Loan Servicing, L.L.C., 2018 WL 784416, at *7 (E.D. Cal. Feb. 8, 2018) (Bankruptcy Code precludes FDCPA claims based on stale and inflated proof of claim); Torres v. Cavalry SPV I, L.L.C., 530 B.R. 268 (E.D. Pa. 2015) (filing time-barred proof of claim in bankruptcy case cannot be basis for FDCPA claim); Torres v. Asset Acceptance, L.L.C., 96 F. Supp. 3d 541 (E.D. Pa. 2015) (follows *Simmons*: because Bankruptcy Code provides protections for debtors, they do not need FDCPA remedies); *In re* Ganas, 513 B.R. 394 (Bankr. E.D. Cal. 2014) (applying *Chaussee* preemption analysis to bar debtor's claim under state debt collection statute challenging validity of proof of claim); *In re* Mallard, 2014 WL 988779, at *6 (Bankr. E.D. Ky. Mar. 12, 2014) (rejecting FDCPA challenge to proof of claim, opining that the bankruptcy claims allowance process is "uniquely structured to ensure a fair distribution of estate assets" and "filing a proof of claim is not a form of debt-collection activity"); B-Real, L.L.C. v. Rogers, 405 B.R. 428 (M.D. La. 2009); Middlebrooks v. Interstate Credit Control, Inc., 391 B.R. 434 (D. Minn. 2008); Kibler v. WFS Fin., Inc., 2000 WL 1470655 (C.D. Cal. Sept. 13, 2000); Gray-Mapp v. Sherman, 100 F. Supp. 2d 810 (N.D. Ill. 1999); Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols, Clark, L.L.C., 1999 WL 284788 (N.D. Ill. Apr. 26, 1999); Humes v. LVNV Funding, 496 B.R. 557, 581 (Bankr. E.D. Ark. 2013); *In re* Claudio, 463 B.R. 190, 193 (Bankr. D. Mass. 2012) (filing of bankruptcy proof of claim, "even one that is somehow invalid," could not be basis for FDCPA claim); *In re* Jenkins, 456 B.R. 236 (Bankr. E.D.N.C. 2011) (applying state statute barring actions to enforce stale claims, holding that filing proof of claim in bankruptcy case not an action covered by state statute and cannot support FDCPA claim); *In re* Poteet, 2011 WL 3626696 (Bankr. E.D. Tenn. Aug. 17, 2011) (filing proof of claim in bankruptcy case cannot be basis for FDCPA claim), *In re* McMillen, 2010 WL 5589096 (Bankr. N.D. Ga. Nov. 15, 2010); *In re* Angulo, 2010 WL 1727999 (Bankr. E.D. Pa. Apr. 26, 2010); *In re* Keeler, 440 B.R. 354 (Bankr. E.D. Pa. 2009); *In re* Jacques, 146 B.R. 63 (Bankr. E.D.N.Y. 2009); *In re* Pariseau, 395 B.R. 492 (Bankr. M.D. Fla. 2008); *In re* Williams, 392 B.R. 882 (Bankr. M.D. Fla. 2008); *In re* Simpson, 2008 WL 4216317 (Bankr. N.D. Ala. Aug. 29, 2008); *In re* Rice-Etherly, 336 B.R. 308 (Bankr. E.D. Mich.

to the *Simmons* court was the fact that the debtor had failed to object to the claim in the bankruptcy case. The Second Circuit noted that: "Nothing in either the Bankruptcy Code or the FDCPA suggests that a debtor should be permitted to bypass the procedural safeguards in the Code in favor of asserting potentially more lucrative claims under the FDCPA."[378] With the same result but a different approach, the court *Adair v. Sherman* granted the creditor's motion to dismiss the consumer's FDCPA action on the basis of *res judicata* where the creditor had filed a proof of claim in consumer's chapter 13 bankruptcy and bankruptcy was confirmed without consumer's objection to the claim.[379]

13.7.3.3 Filing a Stale Proof of Claim As an FDCPA Violation—the Supreme Court's *Midland Funding* Decision

Through a "stale" proof of claim filed in a bankruptcy case, a creditor seeks payment from the bankruptcy estate for a debt that can no longer be enforced by a judicial action filed in a non-bankruptcy court due to expiration of a statute of limitations. With the growth of the debt buying industry, abuse of the bankruptcy claim process by filing stale claims has become widespread.

Debt buyers operate on a mass scale. One debt buyer can file proofs of claim in thousands of chapter 13 cases nationwide with ease. If the debtors or trustees file formal objections, the bankruptcy courts routinely strike these stale claims. However, a debt buyer banks on a sufficient number of cases in which no one objects. In these cases the proofs of claim are deemed valid and the debt buyer can receive a stream of income from the debtor's earnings for up to five years.

Not surprisingly, this practice has attracted challenges raising several sections of the FDCPA. Section 1692e of the FDCPA prohibits debt collectors from using false, deceptive, or misleading representations to collect a debt, including false representations about the amount or legal status of a debt.[380] Section 1692f prohibits the use of unfair or unconscionable means to collect or attempt to collect a debt.[381] Prior to the Supreme Court's *Midland Funding*[382] decision, many lower courts allowed FDCPA claims based on debt collectors' filing stale proofs of claim in bankruptcy cases.[383]

In *Phillips v. Asset Acceptance, L.L.C.*,[384] the Seventh Circuit addressed the practice of routinely filing lawsuits in state courts after the expiration of applicable statutes of limitations. Although acknowledging that consumers could raise the statute of limitations as an affirmative defense in each case, the court held that the practice of filing the lawsuits in the first place violated the FDCPA.

The Eleventh Circuit in *Crawford v. LVNV Funding*[385] applied the *Phillips* analysis to bankruptcy proofs of claim and held that filing a stale proof of claim violated the FDCPA. The *Crawford* court noted that proofs of claim served essentially the same function as affirmative collection lawsuits filed in state courts. If neither the debtor nor the trustee objected to a time-barred claim filed in the bankruptcy case, the debt buyer or debt collector would be paid from the debtor's income over several years. The debtor in *Crawford* had not objected to the stale proof of claim and had in fact paid the creditor under the plan for four years. The court did not address the issue of the Bankruptcy Code's implied repeal of the FDCPA in certain bankruptcy-related areas, such as proof of claim disputes.

Although the parties to *Crawford v. LVNV Funding* did not raise the question of whether the Bankruptcy Code precluded FDCPA claims based on filing a stale proof of claim, the Eleventh Circuit in *Johnson v. Midland Funding, L.L.C.* did address the issue.[386] The Eleventh Circuit in *Midland Funding* saw no conflict between the Bankruptcy Code and the FDCPA. The court acknowledged the creditors' contention that the Code gave them the right to file proofs of claim in bankruptcy cases. The FDCPA did not take this right away. Instead, the FDCPA made a certain class of creditors who file proofs of claim, namely debt collectors, subject to potential sanctions if they filed inappropriate claims.

The options facing debt collectors in bankruptcy were not unlike those litigants face generally. Litigants have the right to file lawsuits. However, they may incur sanctions if the lawsuits they file are frivolous.[387] According to the Eleventh Circuit in *Midland Funding*, the FDCPA defined standards to which debt collectors must adhere when they pursue claims inside or outside of bankruptcy.

2006); *In re* Abramson, 313 B.R. 195 (Bankr. W.D. Pa. 2004) (debtor's remedy to attack an allegedly inflated proof of claim is limited to that provided for in the Bankruptcy Code).

378 622 F.3d 93, 97 (2d Cir. 2010) (quoting *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810 (N.D. Ill. 1999)).

379 199 WL 117754 (N.D. Ill. Mar. 1, 1999), *aff'd*, 230 F.3d 890 (7th Cir. 2000). *But see In re* Chobra, 582 B.R. 380, 385–386 (Bankr. D. Md. 2018) (general terms of confirmed plan applicable to class of proofs of claim did not preclude debt collection claim filed in bankruptcy court involving one specific claim).

380 15 U.S.C. § 1692e.

381 15 U.S.C. § 1692f.

382 Johnson v. Midland Funding, L.L.C., ___ U.S. ___, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017).

383 Taylor v. Galaxy Asset Purchasing, L.L.C., 108 F. Supp. 3d 628 (N.D. Ill. 2015); *In re* Warnetta, 2015 WL 8746384 (N.D. Ill. Dec. 14, 2015); *In re* Edwards, 539 B.R. 360 (Bankr. N.D. Ill. 2015); *In re* Feggins, 535 B.R. 862 (Bankr. M.D. Ala. 2015); Avalos v. LVNV Funding, L.L.C. (*In re* Avalos), 531 B.R. 748 (Bankr. N.D. Ill. 2015); *In re* Brimmage, 523 B.R. 134 (N.D. Ill. 2015); Reed v. LVNV Funding, L.L.C., 181 F. Supp. 3d 523 (N.D. Ill. 2015); Patrick v. Worldwide Asset Purchasing II, L.L.C., 2015 WL 627376 (S.D. Ind. Fed. 13, 2015), *adopted*, 2015 WL 1144795 (S.D. Ind. Mar. 12, 2015); Elliot v. Cavalry Investments, L.L.C., 2015 WL 133745 (S.D. Ind. Jan. 9, 2015); Patrick v. Poyd, 39 F. Supp. 3d 1032 (S.D. Ind. 2014); Smith v. Asset Acceptance, L.L.C., 510 B.R. 225 (S.D. Ind. 2013). *See also* Taylor v. Midland Funding, L.L.C., 94 F. Supp. 3d 941 (N.D. Ill. 2015) (denying debt collector motion to dismiss); Washington v. LVNV Funding, L.L.C., 2015 WL 1245741 (N.D. Ala. Mar. 18, 2015) (bankruptcy court has jurisdiction over debtor's FDCPA claim asserting creditor filed stale proof of claim).

384 736 F.3d 1076 (7th Cir. 2013).

385 758 F.3d 1254, 1259 (11th Cir. 2014).

386 Johnson v. Midland Funding, L.L.C., 823 F.3d 1334 (11th Cir. May 24, 2016).

387 *Id.* at 1341.

The Supreme Court reversed the Eleventh Circuit's ruling in *Midland Funding*.[388] In doing so, the Supreme Court did not address the question of whether the Bankruptcy Code precluded FDCPA claims generally when they involved proof of claim abuses. Instead, the court ruled narrowly that the filing of a proof of claim that accurately disclosed the facts related to enforceability of the claim did not violate any provisions of the FDCPA.

The facts of *Midland Funding* are important for understanding the scope of the Supreme Court's ruling. Midland Funding was a debt buyer. In 2014, it filed a proof of claim in Ms. Johnson's chapter 13 case, asserting that it was owed $1879.71 on a credit card debt. The documents that Midland filed with its claim indicated that the last time any charge appeared on Ms. Johnson's account had been in 2003. The relevant Alabama statute of limitations for enforcement of the debt was six years. Ms. Johnson's bankruptcy counsel objected to Midland's proof of claim as stale. The bankruptcy court agreed and disallowed the claim. Ms. Johnson later brought an action in U.S. district court asserting that Midland's action in filing the stale proof of claim had been "false," "deceptive," "misleading," "unconscionable," and "unfair."

In a 5-to-3 decision, the Supreme Court reversed the Eleventh Circuit's ruling that filing the stale claim violated the FDCPA. In rejecting Ms. Johnson's arguments the Supreme Court focused first on the nature of Alabama's statute of limitations.[389] Unlike the statute of limitations law of other states, Alabama law did not extinguish a debt upon expiration of the limitation period for judicial enforcement. In the court's view, this meant that, despite the expiration of the statute of limitations, the debt remained a "claim" under the Bankruptcy Code's broad definition of that term.[390] Since the debt fell within this statutory definition, Midland had the right under the Bankruptcy Code to file the proof of claim.[391]

In holding that knowingly filing a time-barred claim was not misleading, the court placed great weight on its view that "[t]he audience in Chapter 13 bankruptcy cases includes a trustee."[392] In effect, the court went on to assume that the *only* entity impacted by the proof of claim was the trustee. The court noted that the trustee had the sophistication to object to clearly improper claims. The court assumed that the trustees had the resources to object to such claims whenever it would be appropriate.[393]

The Supreme Court went on to determine that filing the patently unenforceable claim was not "unfair" or "unconscionable" under the FDCPA. Here, the court concluded that the bankruptcy claims context differed significantly from that of a civil lawsuit. The court saw the consumer defendant in a civil suit as more vulnerable to a time-barred action than the chapter 13 debtor.[394] Here again, the court pointed out that a "knowledgeable trustee is available" in chapter 13 and suggested that the claims objection process was easier for consumers to navigate than answering a civil lawsuit.[395]

Rather than seeing any unfairness to debtors in forcing them to expend resources to investigate and object to a claim that the debt collector knew would be stricken if objected to, the court considered it unfair to require debt collectors to investigate the statute of limitations applicable to their claims before they filed them.[396] In the court's view, the status of the statute of limitations as an affirmative defense in civil litigation meant that the debtor should bear the burden of investigating and prosecuting this defense to payment of the proof of claim.[397]

The dissent in *Midland Funding* found that filing the stale proof of claim was "unfair" and "unconscionable" under FDCPA § 1692f.[398] The dissent rejected the majority's reliance on trustees to police unfair and deceptive collection practices in the bankruptcy courts. The trustees themselves had filed an amicus brief emphasizing that they lacked the resources to fulfill such a function.[399]

Because claims filed in a bankruptcy case are presumptively valid and enforced in chapter 13, the bankruptcy context makes the debtors more, rather than less, vulnerable to this abusive practice than defendants in civil actions. This is particularly true given the massive scale with which debt collectors can file stale claims and receive payment with impunity in bankruptcy. The dissent also noted the serious problem that occurs in many chapter 13 cases, when the bankruptcy cases are dismissed without a discharge. This happens often, because the debtors cannot make scheduled plan payments over three to five years. In these cases the temporary reinstatement of a payment stream under a chapter 13 plan may revive an expired statute of limitations. When a discharge order is not entered, the consumer is in a worse position than if the bankruptcy case had never been filed.[400]

13.7.3.4 *Midland Funding* Does Not Affect FDCPA Enforcement of Stale Claims Outside of Bankruptcy

Potential FDCPA claims involving efforts to collect on claims barred by a statute of limitations often arise when debt collectors file civil actions in non-bankruptcy courts. The

388 ___ U.S. ___, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017).

389 Since its ruling in *Midland Funding*, the Supreme Court refused to grant certiorari on appeals from three other rulings that had rejected debtors' arguments that filing stale claims in chapter 13 cases violated the FDCPA. Dubois et al. v. Atlas Acquisitions (*In re* Dubois), 834 F.3d 522 (4th Cir. 2016), *cert. denied* ___ U.S. ___, 137 S. Ct. 2158, 198 L. Ed. 2d 231 (2017); Owens v. LVNV Funding, 832 F.3d 726 (7th Cir. 2016), *cert. denied* ___ U.S. ___, 137 S. Ct. 2158, 198 L. Ed. 2d 231 (2017); Nelson v. Midland Credit Mgmt., 828 F.3d 749 (8th Cir. 2016), *cert. denied* ___ U.S. ___, 137 S. Ct. 2158, 198 L. Ed. 2d 231 (2017).

390 11 U.S.C. § 101(5).

391 ___ U.S. ___, 137 S. Ct. 1407, 1412, 197 L. Ed. 2d 790 (2017).

392 *Id.* at 1413.

393 *Id.*

394 *Id.*

395 *Id.*

396 *Id.* at 1415.

397 *Id.*

398 *Id.* at 1418.

399 *Id.* at 1420.

400 *Id.* at 1421.

Midland Funding court acknowledged the decisions holding that the filing of a time-barred collection action in a court was "unfair" under the FDCPA.[401] For purposes of its bankruptcy analysis the court assumed that these FDCPA decisions involving stale civil lawsuits were correct, but noted that this was "a matter this Court itself has not decided and does not now decide."[402]

Thus, outside the context of a bankruptcy proof of claim filed with an accurate disclosure of its unenforceability, the *Midland Funding* decision does not affect other FDCPA claims related to attempted enforcement of time-barred debts. This includes situations where debt collectors misrepresent or conceal facts about the time-barred nature of enforcement in a civil lawsuit. The actionable misrepresentation or concealment may also occur through payment demands not tied to a lawsuit.[403]

13.7.3.5 *Midland Funding* Does Not Address the Bankruptcy Code's Implied Repeal of the FDCPA

Prior to *Midland Funding*, two distinct issues divided the lower courts with respect to the FDCPA and bankruptcy proof of claim abuses. The first was whether filing a stale proof of claim in a chapter 13 case violated the FDCPA, i.e., was this specific conduct "false," "deceptive," "misleading," "unconscionable," or "unfair"?[404] The second issue was, assuming this conduct *did* violate the FDCPA, did the Bankruptcy Code impliedly repeal application of the FDCPA to bankruptcy proof of claim disputes? This latter Bankruptcy Code preclusion issue is highlighted in the dispute between the Seventh Circuit in *Randolph v. IMBS, Inc.*[405] and the Ninth Circuit in *Walls v. Wells Fargo Bank*,[406] discussed in § 13.7.2, *supra*. Had it reached this issue, the *Midland Funding* court could have decided whether the Bankruptcy Code implicitly repealed application of the FDCPA to proof of claim abuses and potentially to other bankruptcy-related issues.

The *Midland Funding* court decided only the first of these two issues: on the facts presented, the debt collector did not violate the FDCPA. The court did not address the second issue, the existence of any broader limits on the FDCPA's role in bankruptcy-related matters. Thus, the ruling does not preclude all consumer claims asserting that a debt collector violated the FDCPA in its handling of a bankruptcy proof of claim. The decision leaves undisturbed the existing divided case on law the viability of FDCPA actions asserting violations of the automatic stay or the discharge order.[407]

This existing case law leans overwhelmingly toward the view that there is no general conflict between the Bankruptcy Code and the FDCPA.[408] Prior to *Midland Funding*, many lower courts had held that the practice of filing stale claims did not violate the FDCPA.[409] However, a number of courts reaching this conclusion recognized at the same time that the Bankruptcy Code did not generally preclude FDCPA actions related to proof of claim abuses.[410]

401 *Id.* at 1413 (citing, *inter alia*, Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076, 1079 (7th Cir. 2013). *See* § 7.4.9.3, *supra*.

402 ___ U.S. ___, 137 S. Ct. 1407, 1413, 197 L. Ed. 2d 790 (2017).

403 *See, e.g.*, Holzman v. Malcolm S. Gerald & Assoc., Inc., 920 F.3d 1264 (11th Cir. 2019) (collection letter seeking settlement of time-barred debt may violate § 1692e without express threat of lawsuit); Tatis v. Allied Interstate, L.L.C., 882 F.3d 422 (3d Cir. 2018) (letter with settlement offer regarding time-barred debt can violate FDCPA); Pantoja v. Portfolio Recovery Assoc., 852 F.3d 679 (7th Cir. 2017) (dunning letter seeking to collect on time-barred debt was misleading and deceptive). *See* § 7.4.9.3, *supra* (discussing FDCPA claims involving time-barred lawsuits and settlement offers).

404 Johnson v. Midland Funding, L.L.C., ___ U.S. ___, 137 S. Ct. 1407, 1411, 197 L. Ed. 2d 790 (2017).

405 368 F.3d 726 (7th Cir. 2004) (no implied repeal or conflict between Bankruptcy Code and FDCPA). *See* §§ 13.7.2, 13.7.3.2, *supra*.

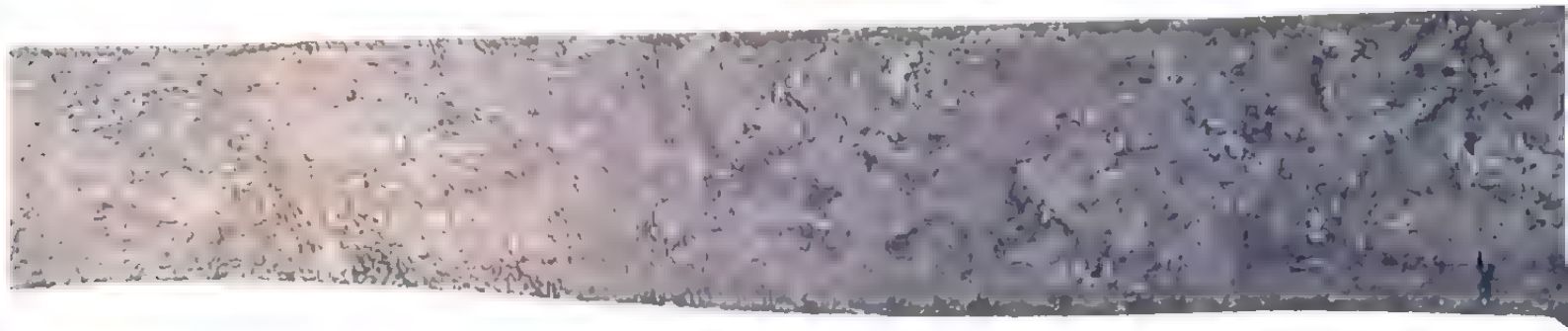
406 276 F.3d 502 (9th Cir. 2002) (Bankruptcy Code precludes FDCPA claim based on discharge order violation); *In re* Chaussee, 399 B.R. 237 (B.A.P. 9th Cir. 2008) (implied repeal of FDCPA as to proof of claim dispute). *See* §§ 13.7.2, 13.7.3.2, *supra*.

407 *See* § 13.7.1, *supra*.

408 *See* § 13.7.2, *supra*.

409 Gatewood v. CP Medical L.L.C., 533 B.R. 905 (B.A.P. 8th Cir. 2015) (filing "accurate" but stale proof of claim not *per se* a false, misleading, deceptive, unfair, or unconscionable debt collection practice); *In re* Glenn, 542 B.R. 833 (Bankr. N.D. Ill. 2016) (filing stale proof of claim not *per se* FDCPA violation); *In re* Perkins, 533 B.R. 242 (Bankr. W.D. Mich. 2015) fundamental differences between context of proof of claim filing and commencement of civil lawsuit); *In re* Dunaway, 531 B.R. 267 (Bankr. W.D. Mo. 2015) (filing proof of claim is act to collect a debt, but no threat to collect improperly from proof of claim with accurate disclosures); LaGrone v. LVNV Funding L.L.C., 525 B.R. 419 (Bankr. N.D. Ill. 2015) (emphasizing debtor attorney's and trustee's roles, less burdensome payment requirements, and ease with which objection to claim can be made), later decision 2015 WL 2330314 (Bankr. N.D. Ill. May 14, 2015); Donaldson v. LVNV Funding, L.L.C., 97 F. Supp. 3d 1033 (S.D. Ind. 2015) (suggesting that because most bankruptcy debtors are represented, a "competent lawyer" standard rather than an unsophisticated consumer standard should apply to evaluate propensity of the conduct to mislead); Carranza v. Midland Funding, L.L.C., 2015 WL 5008462 (E.D. Mo. Aug. 20, 2015) (FDCPA claim over proofs of claim not prohibited generally, but filing stale proof of claim not FDCPA violation); Birtchman v. LVNV Funding, L.L.C., 2015 WL 1825970, at *6 (S.D. Ind. Apr. 22, 2015), *aff'd sub nom.* Owens v. LVNV Funding, L.L.C., 832 F.3d 726 (7th Cir. 2016); Robinson v. eCast Settlement Corp., 2015 WL 494626 (N.D. Ill. Feb. 3, 2015) (time-barred proof of claim not "automatically" improper if it discloses relevant activity dates in accordance with Fed. R. Bankr. P. 3001(c)(3). *See generally In re* Broadrick, 532 B.R. 60, 75 (Bankr. M.D. Tenn. 2015) (appeal pending) (FDCPA not violated when a creditor merely (a) files an accurate proof of claim in a bankruptcy case, (b) when the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the FDCPA other than merely the applicability of a statute of limitations). *See also* Townsend v. Quantum3Group, L.L.C., 535 B.R. 415 (M.D. Fla. 2015) (a proof of claim is like a formal first pleading and does not trigger validation notice requirement); *In re* Brimmage, 523 B.R. 134, 141–142 (Bankr. N.D. Ill. 2015) (filing a proof of claim is specifically exempt by FDCPA § 1692g(d) from validation letter requirement).

410 *In re* Glenn, 542 B.R. 833 (Bankr. N.D. Ill. 2016); *In re* Martel, 539 B.R. 192, 197–198 (Bankr. D. Maine 2015); *In re* Perkins, 533 B.R. 242 (Bankr. W.D. Mich. 2015); *In re* Broadrick, 532 B.R. 60 (Bankr. M.D. Tenn. 2015) (appeal pending); Carranza v. Midland Funding, L.L.C.,



ınd Funding Should Be Limited to :culiar Facts

e Court summarized the facts in *Midland* collector filed a proof of claim with docu- and accurately stated the relevant dates claim was no longer enforceable. The rul- s what happens when the debt collector files e misleading, deceptive, or false with respect mitations.[411]

Funding decision also did not consider :rs can bring claims related to a bankruptcy ıen those claims do not focus exclusively on itations. For example, the ruling does not pre- om asserting a claim that the debt collector CPA when it falsified or misrepresented the a proof of claim[412] or listed as the creditor standing to enforce the claim. There are a presentations and false statements that are not ıe face of a proof of claim form.[413] For example, *uantum3 Group, L.L.C.*,[414] the court allowed an that was based on a mischaracterization con- kruptcy proof of claim for a payday loan. The indicated that the debt was for an open-ended on when, in fact, it was for a closed-end payday ansaction under state law. The improper disclo- ıtially deceptive to a trustee, who would not be alerted to object to the claim as void. The court distinguished this type of deceptive proof of claim from the stale claim involved in *Midland Funding*. The expired statute of limitations accurately disclosed in the *Midland Funding* proof of claim involved an affirmative defense to the claim under state law, while the payday loan transaction concealed by the false proof of claim statement in *Ellswick* was void under state law. There are false and deceptive statements that even the most sophisticated trustees with ample time on their hands cannot detect. The *Midland Funding* court's focus on the straightforward pleading burden for the affirmative defense of the statute of limitations has very limited application.

13.7.3.7 Despite *Midland Funding*, Proof of Claim Abuses May Be Subject to Challenge Under State Law

State law may limit the application of *Midland Funding* as well. This could occur in at least two ways. First, the *Midland Funding* court gave substantial weight to how the expiration of the statute of limitations affected a debt under state law. Under Alabama law the debt continued to exist as an obligation of the debtor after the statute of limitations expired.[415] This enabled the court to assert that the debt remained a "claim" consistent with the Bankruptcy Code's broad definition of the term.[416] However, not all state laws mirror Alabama's in this respect. State law may provide that the expiration of the statute of limitations to file legal actions also extinguishes the underlying debt.[417]

The second area where state law may affect the analysis is in the way a state debt collection law defines violations. Most case law finds that the Bankruptcy Code generally does not preempt state debt collection laws.[418] In the context of bankruptcy proofs of claim, state debt collection laws may define violations in a way that does not lead to any conflict between

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008462 (E.D. Mo. Aug. 20, 2015); *In re* LaGrone, 525 B.R. . N.D. Ill. 2015).

n re Robinson, 554 B.R. 800, 814 (Bankr. W.D. La. 2016) ankruptcy court used same reasoning later adopted by the Court in *Midland Funding* to dismiss FDCPA claims, alleg- ng of a stale but accurate proof of claim, court went on to s Court can envision multiple situations in bankruptcy cases filing of a false, fraudulent or factually inaccurate time-

3.8 Practical Tips in Challenging Proofs of Claim As FDCPA Violations

ıce a stale claim is filed, it is good practice to amend the r's schedules to reflect the debt as "disputed." Scheduling :bt as "undisputed" can leave the debtor open to a poten- stoppel claim.[420]

milarly, the debtor should formally object to the stale of claim. Failing to object to the claim and allowing the .er 13 plan to be confirmed should not preclude an FDCPA n based on the stale claim.[421] However, the decisions on oint are not uniform nationally, and it is best to avoid tion over claim preclusion issues whenever possible.

ankruptcy courts have jurisdiction to hear FDCPA claims .ving stale proofs of claim.[422] However, as discussed in .5.2, *supra*, the Supreme Court's *Stern v. Marshall* deci- may bar bankruptcy courts from entering final judgments ese actions. Absent an agreement by the parties, the bank- cy court may be limited to issuing proposed findings of and conclusions of law, subject to review by the district t.[423]

inally, advocates should keep in mind that Federal Rule of kruptcy Procedure 3001(c) sets out requirements for doc- ntation that a creditor must file with its proof of claim.[424] -compliance with this rule may support a claim that the t collector's tactics are deceptive, misleading, or unfair. For example, the bankruptcy court in *In re* Thomas[425] considered a debt collector's practice of filing proofs of claim that falsely stated that interest and fees were not included in the claimed principal amount. Upon the filing of objections, the debt collector would amend the proofs of claim to correct the false statements, but still refuse to provide documentation to back up the claims. The bankruptcy court held that the alleged practices stated claims for relief under both FDCPA § 1692f and Federal Rule of Bankruptcy Procedure 3001.

The *Midland Funding* court alluded to the potential for sanctions under the bankruptcy equivalent of Rule 11, Federal Rule of Bankruptcy Procedure 9011, when a debt collector intentionally files a stale proof of claim.[426] Violation of Rule 9011 may thus provide some form of relief from the practice.[427]

13.7.4 Preemption of State Debt Collection Laws

The preemption doctrine has its roots in the Supremacy Clause of the U.S. Constitution and is implicated when state law interferes with or is contrary to federal law.[428] The issue of Bankruptcy Code preemption of state fair debt collection claims arises in a group of cases that also focus on whether the Bankruptcy Code itself creates a private right of action to enforce the discharge injunction. The Sixth Circuit first considered the issue in *Pertuso v. Ford Motor Credit Co.*[429] In that case, the court held that the exclusively federal nature of bankruptcy and the pervasive nature of Congress's bankruptcy regulation meant that Congress preempted the field when it comes to redressing wrongs under the Bankruptcy Code.[430]

The Sixth Circuit rejected the debtors' arguments that their unjust enrichment claim and claim for accounting were not inconsistent with the Code and should, therefore, not be preempted. Similarly, the First Circuit and Seventh Circuit dismissed debtors' claims for unjust enrichment finding that

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390 (Bankr. D. Md. 2018) (state debt collector licensing law cannot bar creditor from filing proof of claim subject to debtor's right to challenge claim's enforceability).

See, e.g., In re Perkins, 533 B.R. 242 (Bankr. W.D. Mich. 2015) (court considers debtor's listing debt as undisputed and debt collector's accurate disclosure of age of claim as precluding FDCPA liability).

Crawford v. LVNV Funding, 758 F.3d 1254, 1259 (11th Cir. 2014) (debtor may assert FDCPA claim over stale proof of claim although brought action four years after plan confirmation order, had not objected to the claim before confirmation, and paid on the claim for four years); Davenport v. Cavalry Investments, L.L.C., 2015 WL

the remedies for violations with respect to reaffirmations were preempted.[431]

Conversely, in *Sears, Roebuck & Co. v. O'Brien*,[432] the Eighth Circuit held that Congress did not intend to "exclusively" regulate the bankruptcy area so that there could be no field preemption, and that the state law requirements did not conflict with the Bankruptcy Code. There, the debtor alleged that a creditor violated a state "mini-FDCPA" statute, which prohibits creditor contact with a debtor who is represented by counsel, by sending a copy of a letter soliciting a reaffirmation agreement directly to the debtor.

Other courts have rejected the Bankruptcy Code preemption arguments and held that consumers may assert claims under state debt collection statutes, even when the violations involve conduct toward bankruptcy debtors and involve Bankruptcy Code provisions.[433] For example, in *Barnhill v. FirstPoint, Inc.*[434] the federal district court rejected a debt collector's argument that the Bankruptcy Code preempted a consumer's claim under the North Carolina Collection Agency Act (NCAA).[435] The consumer asserted that the debt collector had attempted to collect on a debt discharged in her chapter 7 bankruptcy.

The court began its analysis by noting that there were two types of possible preemption claims: field preemption and conflict preemption. The debt collector could not specify any express basis for field preemption. The court observed that other courts had consistently recognized that the area of consumer protection was traditionally left to the states to regulate.[436] Therefore, field preemption did not apply. The question of conflict preemption turned on whether the debt collector in this instance could have complied with the state debt collection law and the Bankruptcy Code at the same time. Here, the court noted, "The mere fact that the debt was extinguished by virtue of a bankruptcy does not make compliance with the Bankruptcy's injunction provision and the NCAA impossible."[437]

By refraining from collecting on a debt it had no right to enforce, the debt collector could have complied with the Bankruptcy Code and state law. The bankruptcy proceedings had terminated and enforcement of the state law presented no risk of disruption of the bankruptcy process. There was thus no actual conflict in enforcement of the two laws.

As with FDCPA claims, state debt collection claims that are independent of the Bankruptcy Code violations should remain actionable, even under *Petruso* and similar decisions.[438] Thus, claims based on harassment, threats, intimidation, and false representations (other than the status of the discharged debt) may still be viable.[439] Similarly, debt buyers purchasing discharged debt may also still be liable for state debt collection claims.[440]

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431 Cox v. Zale Delaware, Inc., 239 F.3d 910 (7th Cir. 2001); Bessette v. Avco Fin. Serv., Inc., 230 F.3d 439 (1st Cir. 2000). *See also In re* Chaussee, 399 B.R. 225 (B.A.P. 9th Cir. 2008) (consumer's state law protection claim preempted); Miller v. Carrington Mortg. Services, L.L.C., 2019 WL 2871141 (D. Me. July 3, 2019) (following First Circuit's *Bessette* decision, holding Bankruptcy Code field preemption barred claims under Maine fair debt collection practices statute challenging collection actions as contrary to discharge order); Pereira v. First N. Am. Nat'l Bank, 223 B.R. 28 (N.D. Ga. 1998); *In re* Sharpe, Inc., 135 B.R. 707 (D. Me. 1992) (finding claim under Massachusetts Consumer Protection Act preempted).

432 178 F.3d 962 (8th Cir. 1999).

433 Roth v. Nationstar Mtge., L.L.C., 2016 WL 3570991, at *6 (M.D. Fla. July 1, 2016) (Bankruptcy Code does not preempt debtor's Florida state law debt collection claim asserting that debt collector sought to collect on mortgage deficiency after discharge in bankruptcy; debt collector could comply with both laws); McCamis v. Servis One, Inc., 2016 WL 4063403, at *4 (M.D. Fla. July 29, 2016) (collection of discharged debt violated both FDCPA and Florida debt collection statute); Freeman v. Ocwen Loan Servicing, Inc., 2016 WL 3476681 (N.D. Ill. June 27, 2016) (availability of contempt remedy for violation of bankruptcy discharge order does not preclude borrower's claim under Illinois debt collection statute for mortgagee's collection demands made contrary to discharge order); Hernandez v. Dyck-O'Neal, Inc., 2015 WL 2094263 (M.D. Fla. May 5, 2015) (applying *Randolph* analysis, Bankruptcy Code does not preempt Florida debt collection statute in action asserting filing of deficiency action in violation of bankruptcy stay). *See also* Greenwood Trust Co. v. Smith, 212 B.R. 599 (B.A.P. 8th Cir. 1997) (violations of state statute prohibiting direct communication with debtor represented by counsel); Sturm v. Providian Nat'l Bank, 242 B.R. 599 (S.D. W. Va. 1999); *In re* Johnston, 2007 WL 1166017 (Bankr. N.D. W. Va. Apr. 12, 2007) (Bankruptcy Code did not preempt state law claims for creditor's unlawful communication with a debtor represented by an attorney). *But see In re* Trevino, 535 B.R. 110 (Bankr. S.D. Tex. 2015) (claims under Texas debt collection statute regarding inflated proof of claim were preempted, but related FDCPA claims not preempted); *In re* Ganas, 513 B.R. 394 (Bankr. E.D. Cal. 2014) (applying preemption analysis to bar debtor's action under state debt collection statute brought as challenge to validity of bankruptcy proof of claim).

434 2017 WL 2178439 (M.D.N.C. May 17, 2017).

435 N.C. Gen. Stat. § 58-70-90.

436 2017 WL 2178439, at *4 (M.D.N.C. May 17, 2017).

437 *Id.*

438 Cox v. Zale Del., Inc., 239 F.3d 910 (7th Cir. 2001); Pertuso v. Ford Motor Credit Co., 233 F.3d 417 (6th Cir. 2000).

439 *See, e.g., In re* Bate, 454 B.R. 869 (Bankr. M.D. Fla. 2011) (Florida Consumer Collection Practices Act complements FDCPA in providing relief for bankruptcy debtor); *In re* Baie, 2011 WL 1257148 (Bankr. E.D.N.C. Mar. 30, 2011) (in addition to FDCPA damages, bankruptcy court can award relief under state unfair debt collection statute where state statute provides more expansive civil penalties).

440 *See* § 13.7.2, *supra*.

Chapter 14 Other Federal Claims

14.1 Fraudulent or Defamatory Use of Mails

Debt collection misconduct may violate a number of federal postal laws. The use of the mails for the purpose of executing a scheme or artifice to defraud is mail fraud, a federal crime.[1] The postal laws also prohibit certain deceptive tactics in solicitations sent through the mail,[2] and prohibit the mailing of unordered merchandise[3] and simulated bills.[4] Mail containing false representations made to obtain money or property is made "non-mailable" by the postal laws, which means that it is not to be carried or delivered and is to be disposed of as the United States Postal Service ("Postal Service") directs.[5]

Violations of postal laws are investigated by postal inspectors. Violations may be prosecuted administratively by the Postal Service or civilly or criminally by the Justice Department. In 1983, the Postal Service was given the authority in mail fraud cases to issue cease and desist orders, obtain civil penalties for violation of those orders, and make test purchases from mail order retailers.[6] These two agencies tend to concentrate on issues such as scams and pornography.[7]

The mail fraud statute[8] may apply when a collector uses a fraudulent scheme to collect a debt. This statute has been broadly interpreted to prohibit deceitful statements, half-truths, and the concealment of material facts.[9] It arguably prohibits letters threatening to seize, sell, or garnish the debtor's property, when no such action has or will be taken.

While the federal postal laws do not include their own private cause of action,[10] the Fair Debt Collection Practices Act makes the threat of illegal conduct and criminal debt collection conduct actionable,[11] and some state debt collection statutes specifically incorporate prohibitions established in the federal postal laws.[12] The standards provided in postal laws and regulations also may be persuasive in other contexts, such as tort law and unfair trade practice statutes and regulations, in which standards for collection conduct look to public policy and other laws.[13] Violation of the mail fraud statute is also a predicate offense for a civil RICO claim.[14] In addition, states are free to forbid mailings, which, although they conform to federal requirements, are nonetheless deceptive.[15]

1 18 U.S.C. § 1341.

2 39 U.S.C. §§ 3001(h), 3001(*r*).

3 39 U.S.C. § 3009. *See* § 14.2, *infra*.

4 39 U.S.C. § 3001(d).

5 39 U.S.C. §§ 3001, 3005.

6 Mail Order Consumer Protection Amendments of 1983, Pub. L. No. 98-186, 97 Stat. 1315 (Nov. 30, 1993) (codified in scattered sections of 39 U.S.C. §§ 3001 to 3013).

7 Reports of the activities of the postal inspectors may be found on the Postal Service's website, http://postalinspectors.uspis.gov.

8 18 U.S.C. § 1341.

9 Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967); United States v. Fed. Record Serv. Corp., 1999 U.S. Dist. LEXIS 7719 (S.D.N.Y. May 21, 1999) (creation of false impression of governmental affiliation by means of paper, print styles, format, and language is mail fraud despite printed disclaimer; failure to disclose material fact that defendant's service was available free from Social Security Administration was also violation). *See also* Dynaquest Corp. v. United States Postal Serv., 12 F.3d 1144 (D.C. Cir. 1994) (standard for determining whether representation was false is effect on "ordinary minds"; postal service allowed to "draw on its expert understanding of ordinary consumers"); Delgado v. Ocwen Loan Servicing, 2014 WL 4773991 (E.D.N.Y. Sept. 24, 2014). *See generally* National Consumer Law Center, Federal Deception Law § 7.3.2 (3d ed. 2017), *updated at* www.nclc.org/library (elements of mail fraud).

10 Wisdom v. First Midwest Bank, 167 F.3d 402 (8th Cir. 1999) (no private right of action under mail fraud statute); Byrd v. Sand Canyon Corp., 2010 WL 3942830 (E.D. Cal. Oct. 7, 2010) (no private right of action under § 3005); Miller v. Countrywide Home Loans, 747 F. Supp. 2d 947 (S.D. Ohio 2010) (no private right of action under mail fraud statute); Duncan v. Citibank, 2006 WL 4063021 (D.N.M. June 30, 2006), 2006 WL 4063022 (D.N.M. June 30, 2006) (no private right of action under mail fraud statute); Neild v. Wolpoff & Abramson, L.L.P., 453 F. Supp. 2d 918 (E.D. Va. 2006) (no private right of action under mail fraud statute; declining to decide whether §§ 3001 and 3005 create private right of action, as consumers' allegations of violations insufficient); Gibbs v. SLM Corp., 336 F. Supp. 2d 1 (D. Mass. 2004) (no private right of action under mail fraud statute), *aff'd*, 2005 WL 5493113 (1st Cir. Aug. 23, 2005); Howe v. Reader's Digest Ass'n, Inc., 686 F. Supp. 461 (S.D.N.Y. 1988) (no private right of action under 39 U.S.C. §§ 3001 to 3017 when consumer failed to demonstrate damages or continuing violations).

11 15 U.S.C. §§ 1692d(1), 1692e(5).

12 State debt collection laws are summarized at Appx. D, *infra*.

13 Commonwealth *ex rel.* Corbett v. People's Benefit Services, Inc., 895 A.2d 683 (Pa. Commw. Ct. 2006) (violation of postal law, here § 3001(h), misrepresenting connection with government, stated Pennsylvania UDAP claim; not preempted by postal law). *See also* F.T.C. v. Your Yellow Book, Inc., 2014 WL 4187012 (W.D. Okla. Aug. 21, 2014) (finding likelihood of success on FTC's claim that company violated FTC Act's prohibition of unfair and deceptive acts and practices by mailing invoices that did not include disclaimer that postal service had required as part of an earlier settlement of an investigation of violation of postal laws; noting similarity between requirements of postal statutes and section 5 of F.T.C. Act).

14 *See* § 14.5.2, *infra*; National Consumer Law Center, Federal Deception Law Ch. 7 (3d ed. 2017), *updated at* www.nclc.org/library (full discussion of RICO).

15 *See, e.g.*, Syndicated Publications, Inc. v. Montgomery County, 921 F. Supp. 1442 (D. Md. 1996) (federal mail fraud statute did not preempt county ordinance forbidding unfair and deceptive trade practices; county could enforce its ordinance when solicitation so closely resembled a bill that several consumers paid it by mistake, despite the inclusion of disclaimers required by federal law and postal regulations).

14.2 Collecting for Unordered Merchandise May Be Illegal

A section of the Postal Reorganization Act (PRA)[16] prohibits billing or dunning for unordered, mailed merchandise (unless mailed by a charitable organization soliciting contributions). It provides that the recipient of unordered, mailed merchandise has a right to treat it as a gift.

The intent of this protection was to supersede the law of some states that held a contract to be created by the consumer's acceptance and non-return of unordered, mailed merchandise. Even in states where such schemes did not create binding contracts, consumers were often coerced into paying for unordered merchandise by collection harassment.

The Ninth Circuit has interpreted "merchandise" as "movable articles of value; things that are bought and sold."[17] It therefore held that the statute did not cover a membership in a discount buying program. The membership kits included with the program also did not fall within the definition, as they were incidental to the program, not articles of trade. Courts have also held that an insurance policy or an offer of insurance[18] and an unsolicited offer to extend credit[19] were not "merchandise."

No sanctions, other than the provision that unordered merchandise can be treated as a gift, are explicitly provided by this section to remedy any prohibited billing or dunning for unordered, mailed merchandise. However, in *Kipperman v. Academy Life Insurance Company*,[20] the Ninth Circuit, applying the tests spelled out in *Cort v. Ash*,[21] found an implied right of action to enforce the statute. It held that private parties could seek declaratory relief and restitution, but that allowing private parties to seek injunctive relief would interfere too much with the FTC's enforcement of the statute.

Later Supreme Court decisions have called into question whether *Cort v. Ash* still provides the proper framework for determining whether to imply a private cause of action.[22] In *Wisniewski v. Rodale, Inc.*,[23] the Third Circuit held that, in light of the intervening Supreme Court decisions, there was no implied private right of action under the unordered merchandise statute. One judge dissented, setting forth a detailed analysis and concluding that there is a private right of action even under the most recent Supreme Court decisions.

If there is a private right of action, federal courts will have jurisdiction over it under 28 U.S.C. § 1337, since the unordered merchandise statute regulates interstate commerce.[24] Even if there is no direct private right of action, it is important to note that the Act[25] declares the mailing of, billing for, or dunning for unordered merchandise to be a violation of the Federal Trade Commission Act.[26] Thus, such activity will be actionable under many state unfair and deceptive trade practices statutes.[27]

14.3 Telephone and Email Harassment

14.3.1 Criminal Statutes

The federal Communications Decency Act[28] prohibits the following actions in interstate or foreign communications:

- Making a telephone call or using a telecommunications device, without disclosing the caller's identity and with intent to abuse, threaten, or harass any specific person.[29] This prohibition applies to communications such as e-mail that are transmitted in whole or in part through the Internet.[30]
- Causing the telephone of another to ring repeatedly, with intent to harass any person at the number called.[31]
- Making repeated calls or repeatedly initiating communication with a telecommunications device in which the ensuing conversation or communication serves only to harass any person at the called number or who receives the communication.[32]
- Knowingly permitting any telecommunications facility under the offender's control to be used for any of the above purposes with the intent that it be used for such activity.[33]

The caller or the sender of the telecommunication can be fined in accordance with Title 18 and be imprisoned for up to two

16 39 U.S.C. § 3009. *See generally* Annotation, *Validity, Construction and Application of 39 U.S.C. § 3009, Making It an Unfair Trade Practice to Mail Unordered Merchandise*, 39 A.L.R. Fed. 674 (1979).

17 Sanford v. Memberworks, Inc., 625 F.3d 550 (9th Cir. 2010).

18 Kipperman v. Academy Life Ins. Co., 554 F.2d 377 (9th Cir. 1977).

19 Kashelkar v. Rubin & Rothman, 97 F. Supp. 2d 383 (S.D.N.Y. 2000), *aff'd*, 2001 WL 11047 (2d Cir. Jan. 2, 2001).

20 554 F.2d 377 (9th Cir. 1977). *See also* Lindner v. Readers' Digest Ass'n, 231 Fed. Appx. 663 (9th Cir. 2007) (listing private right of action among remedies available for unordered merchandise violation). *Cf.* UMB Recordings, Inc. v. Augusto, 558 F. Supp. 2d 1055, 1064 (C.D. Cal. 2008) (discussing *Kipperman*). *But cf.* Sanford v. Memberworks, Inc., 625 F.3d 550, 559 n.6 (9th Cir. 2010) (open question whether *Kipperman* still good law; not reached because membership kit for phony buyers' club not merchandise).

21 422 U.S. 66, 9 S. Ct. 2080, 45 L. Ed. 2d 26 (1975).

22 Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

23 510 F.3d 294 (3d Cir. 2007). *Accord* McNair v. Synapse Group, 2008 WL 799863 (D.N.J. Mar. 20, 2008) (no private right of action for unwanted magazine subscription renewals).

24 Kipperman v. Academy Life Ins. Co., 554 F.2d 377 (9th Cir. 1977).

25 39 U.S.C. § 3009(a).

26 15 U.S.C. § 45. *See, e.g.*, F.T.C. v. Instant Response Sys., 2015 WL 1650914 (E.D.N.Y. Apr. 14, 2015) (violation of unordered merchandise statute is *per se* violation of FTC Act).

27 *See* National Consumer Law Center, Federal Deception Law (3d ed. 2017), *updated at* www.nclc.org/library.

28 47 U.S.C. §§ 223(a)(1)(C) to 223(a)(1)(E), 223(a)(2), *as amended by* Pub. L. No. 113-4 (Mar. 7, 2013) (replacing "harass any person at the number called or who receives the communications" with "harass any specific person" and deleting "annoy" following "with intent to").

29 47 U.S.C. § 223(a)(1)(C).

30 47 U.S.C. § 223(h)(1)(C).

31 47 U.S.C. § 223(a)(1)(C).

32 47 U.S.C. § 223(a)(1)(E). *But cf.* Macy v. Bell, 531 S.W.2d 58 (Mo. Ct. App. 1975) (upholding jury's rejection of consumer's state tort counterclaim based on violation of federal standards in light of doubt as to whether calls were "repeated" and when calls had legitimate debt collection purpose so were not made "solely" to harass defendant).

33 47 U.S.C. § 223(a)(2).

years.[34] Statutes duplicating or expanding these criminal prohibitions can be found in nearly every state.

While consumers may not have a private cause of action under these criminal statutes against collectors and creditors,[35] actions that violate these criminal statutes can constitute torts and violations of the FDCPA, TCPA, and state UDAP and debt collection laws.[36]

14.3.2 Protections Under the Telephone Consumer Protection Act

14.3.2.1 Potential Applications to Debt Collection

The Telephone Consumer Protection Act of 1991 (TCPA)[37] amended the Federal Communications Act of 1934. It added a section to protect consumers from invasions of privacy such as automated and prerecorded telephone calls, junk faxes, and telemarketing calls.[38] Since the TCPA has attractive remedies,[39] it can be of significant benefit to debtors to the extent it applies to debt collection.

The first TCPA provision that is relevant to debt collection is a ban on the use of any automatic telephone dialing system or an artificial or prerecorded voice message to make a call without the called party's prior express consent to (1) "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service," or (2) "any service for which the called party is charged for the call."[40] This prohibition is discussed in §§ 14.3.2.2 to 14.3.2.5, *infra*.

A second TCPA provision prohibits any person from calling any residential telephone line using an artificial or prerecorded voice without the prior express consent of the called party.[41] An FCC rule makes this prohibition inapplicable to any call that is made for a commercial purpose as long as the call does not include or introduce an advertisement or constitute telemarketing.[42] The FCC considers debt collection calls to fall within this exception.[43] However, FCC rules announced in late 2020, not yet in effect, put limits on the number of calls that debt collectors can make pursuant to this exception. This numerical restriction, which will be useful to debtors harassed by prerecorded debt collection calls, is discussed in § 14.3.2.6, *infra*.

Other TCPA prohibitions are unlikely to be relevant to debt collection. The TCPA bans the use of automatic telephone dialing systems or artificial or prerecorded voice calls to any emergency line or any guest or patient room of a health care facility,[44] but this prohibition is rarely applicable to debt collection calls. The TCPA places restrictions on transmitting unsolicited advertisements by fax,[45] but the FCC considers debt collection not to be an unsolicited advertisement,[46] and faxes are rarely used in debt collection in any event. The TCPA also provides the basis for the FCC's nationwide do-not-call list rule,[47] but that rule applies only to calls made for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services,[48] so is likewise inapplicable to the typical debt collection call.[49]

Even when the TCPA does not apply, the Fair Debt Collection Practices Act gives the consumer the right to direct a debt collector (as defined in the FDCPA) in writing to cease communication.[50] There is no reason why the exercise of this right would not apply to robocalls. Repeated autodialed or prerecorded calls may also amount to harassment or abuse that is actionable under the FDCPA[51] or state law.[52]

Subsections 14.3.2.2 to 14.3.2.5, *infra*, provide an overview of the TCPA's restrictions on robocalls to cell phones, and § 14.3.2.6, *infra*, examines the statute's restrictions on artificial or prerecorded voice calls. Subsections 14.3.2.7 to 14.3.2.9, *infra*, then survey selected litigation issues: the burden of proof, TCPA remedies, who may sue, jurisdiction and class actions, whether federal courts have supplemental jurisdiction

34 47 U.S.C. § 223(a).

35 *See* Doe v. Egea, 2015 WL 3917112 (S.D. Fla. June 25, 2015) (no private cause of action to enforce § 223(a)); Ashland Hosp. Corp. v. Int'l Bhd. Of Elec. Workers Local 575, 807 F. Supp. 2d 633 (E.D. Ky. 2011) (same); Viola v. A&E Television Networks, 433 F. Supp. 2d 613 (W.D. Pa. 2006) (same); Moore v. Principal Credit Corp., 1998 WL 378387 (N.D. Miss. Mar. 31, 1998) (no private cause of action available for telephone harassment under either state or federal criminal laws).

36 *See* Moore v. Principal Credit Corp., 1998 WL 378387 (N.D. Miss. Mar. 31, 1998) (no private cause of action available for telephone harassment under either state or federal criminal laws, but debtors stated claims under FDCPA and for intentional infliction of emotional distress). *Cf.* 47 U.S.C. § 207 (making violations of 47 U.S.C. § 201 actionable, but only if committed by a common carrier).

37 47 U.S.C. § 227; 47 C.F.R. §§ 64.1200 to 64.1201 (FCC regulations under TCPA).

38 *See* Pub. L. No. 102-243 (1991); S. Rep. 102-178 (1991); 47 U.S.C. § 227(b).

39 *See* § 14.3.2.8, *infra*.

40 47 U.S.C. § 227(b)(1)(A)(iii).

41 47 U.S.C. § 227(b)(1)(B).

42 47 C.F.R. § 64.1200(a)(3)(iii).

43 *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, at ¶ 11 (F.C.C. 2008). *See generally* National Consumer Law Center, Federal Deception Law § 6.4.2 (3d ed. 2017), *updated at* www.nclc.org/library (detailed analysis of this provision).

44 47 U.S.C. § 227(b)(1).

45 47 U.S.C. § 227(d)(1). *See also In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 12 F.C.C. Rcd. 4609 (F.C.C. 1997). *See generally* National Consumer Law Center, Federal Deception Law § 6.8 (3d ed. 2017), *updated at* www.nclc.org/library (detailed analysis of junk fax restrictions).

46 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 21 F.C.C. Rcd. 3787, n.70 (F.C.C. 2006) ("fax regarding collection of a debt that does not contain an advertisement will not be subject to the facsimile advertising rules").

47 47 U.S.C. § 227(c). *See generally* National Consumer Law Center, Federal Deception Law § 6.5 (3d ed. 2017), *updated at* www.nclc.org/library (full discussion of FTC and FCC do-not-call rules).

48 47 C.F.R. §§ 64.1200(c)(2), 64.1200(f)(12) (definition of "telephone solicitation").

49 *See In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, at ¶ 11 (F.C.C. 2008).

50 15 U.S.C. § 1692c. *See* § 5.10, *supra*.

51 *See* Ch. 6, *supra*.

52 *See* Chs. 15, 16, *infra*.

over a collector's counterclaim for the debt, Article III standing, vicarious liability, and other litigation issues.

This section is intended to serve as an introduction to the TCPA for debt collection practitioners, and to facilitate the identification of possible TCPA claims in debt collection cases. The voluminous TCPA decisions and FCC rulings are discussed in depth in in NCLC's Federal Deception Law.[53] That volume also discusses many issues that are not addressed here.

14.3.2.2 Scope of the Prohibition on Autodialed or Prerecorded Calls to Cell Phones

As noted above, the TCPA prohibits the use of any automatic telephone dialing system or artificial or prerecorded voice message in a call to a cell phone, pager, or the like, or when the called party is charged for the call, unless the called party has consented to be called.[54] The phrases "cellular telephone service" and "any service for which the called party is charged for the call" are alternative; it is not necessary that the cellular consumer be charged for the call.[55]

This prohibition is not limited to telemarketing calls; debt collection calls are covered.[56] Indeed, the FCC has noted that robocalls to collect debts "pose a unique concern for consumers":

> Record evidence shows that when consumers complain about debt collection calls, a third of the time they complain that there is no debt to be collected, including that they never owed the debt. More than one of every five complaints is about communications tactics, including frequent or repeated calls; obscene, profane, or other abusive language; and calls made after written requests to stop. And the record contains evidence, also unrebutted by Petitioners, that such calls sometimes lack a means for consumers to ask that they stop, and can even instruct the consumer to hang up if they are not the debtor, or that callers may have a policy to not speak to anyone other than the debtor.[57]

A declaratory ruling issued in 2015 by the FCC permits financial institutions to make three "free to end user" calls to cell phones about fraud, security breaches, and the like, using an autodialer or a prerecorded voice, without consent, subject to certain very specific conditions.[58] Debt collection calls are specifically *excluded* from these allowed calls.[59]

The prohibition against robocalls to cell phones applies to text messages as well as voice messages.[60] It is the placing of the call that is prohibited, even if the called party does not actually receive the call.[61]

53 National Consumer Law Center, Federal Deception Law Ch. 6 (3d ed. 2017), *updated at* www.nclc.org/library.

54 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.1 (3d ed. 2017), *updated at* www.nclc.org/library.

55 See, *e.g.*, Breda v. Cellco P'ship, 934 F.3d 1, 4–5 (1st Cir. 2019); Susinno v. Work Out World, Inc., 862 F.3d 346, 349 (3d Cir. 2017); Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014); Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.1 (3d ed. 2017), *updated at* www.nclc.org/library.

56 Romero v. Dep't Stores Nat'l Bank, 725 Fed. Appx. 537, 539 (9th Cir. 2018) (TCPA "is not limited to telemarketing calls": applies to debt collection calls); Gager v. Dell Fin. Services, L.L.C., 727 F.3d 265 (3d Cir. 2013); Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637, 643 (7th Cir. 2012) (noting FCC's decision not to exempt debt collection industry and applying statute to debt collector); Adams v. Ocwen Loan Servicing, L.L.C., 2018 WL 6488062 (S.D. Fla. Oct. 29, 2018); Cartrette v. Time Warner Cable, Inc., 157 F. Supp. 3d 448, 458–459 (E.D.N.C. 2016); Galbreath v. Time Warner Cable, Inc., 2015 WL 9450593 (E.D.N.C. Dec. 22, 2015); Vandiver v. Global Credit & Collection Corp., 2015 WL 11108884 (E.D. Ark. Mar. 30, 2015); Olney v. Progressive Cas. Ins. Co., 993 F. Supp. 2d 1220 (S.D. Cal. 2014); Morse v. Allied Interstate, L.L.C., 65 F. Supp. 3d 407, 409 (M.D. Pa. 2014); Cabrera v. Gov't Employees Ins. Co., 2014 WL 11881002 (S.D. Fla. Nov. 26, 2014); Brown v. Hosto & Buchan, P.L.L.C., 748 F. Supp. 2d 847 (W.D. Tenn. 2010); Brown v. Enter. Recovery Sys., Inc., 2013 WL 4506582, at *5 (Tex. App. Aug. 22, 2013); *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559 (F.C.C. 2008). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.3.1 (3d ed. 2017), *updated at* www.nclc.org/library.

57 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 79 (F.C.C. 2015), *available at* www.fcc.gov, *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside portions of FCC's 2015 order dealing with ATDS definition and treatment of reassigned cell phone numbers, but otherwise leaving it undisturbed).

58 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 129–134 (F.C.C. 2015), *available at* www.fcc.gov, *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside portions of FCC's 2015 order dealing with ATDS definition and treatment of reassigned cell phone numbers, but otherwise leaving it undisturbed). *See also In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 2020 WL 7873750 (F.C.C. Dec. 30, 2020) (codifying this exemption and its limit of three calls per event over a three-day period at 47 C.F.R. § 64.1200(a)(9)(iii), with effective date to be determined). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.2.2 (3d ed. 2017), *updated at* www.nclc.org/library.

59 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 138 (F.C.C. 2015), *available at* www.fcc.gov, *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside portions of FCC's 2015 order dealing with ATDS definition and treatment of reassigned cell phone numbers, but otherwise leaving it undisturbed).

60 Barr v. Am. Ass'n of Political Consultants, Inc., ___ U.S. ___, 140 S. Ct. 2335, 2344 n.1, 207 L. Ed. 2d 784 (2020) (the robocall restriction "bars both automated voice calls and automated text messages"); Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), *aff'g* 768 F.3d 871 (9th Cir. 2014); *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014, 14115 (F.C.C. 2003); *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 107 (F.C.C. 2015), *available at* www.fcc.gov, *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside portions of FCC's 2015 order dealing with ATDS definition and treatment of reassigned cell phone numbers, but otherwise leaving it undisturbed). *See generally* National Consumer Law Center, Federal Deception Law § 6.7 (3d ed. 2017), *updated at* www.nclc.org/library (more detailed discussion of TCPA's restrictions on text messages).

61 Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637, 638 (7th Cir. 2012) (TCPA "curtails the use of automated dialers and prerecorded messages to cell phones . . . and routing a call to voicemail counts

Manually dialed real-voice calls to cell phones are not prohibited,[62] but advocates should carefully investigate any claim that a call was manually dialed. In addition, even if the cell phone number was manually dialed, the call violates the TCPA if it uses an artificial or prerecorded voice for any part of the call.[63]

14.3.2.3 What Is an Autodialer?

The TCPA prohibits the use of an "automated telephone dialing system" to call a cell phone without prior express consent.[64] It defines this term as "equipment that has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator, and (B) to dial such numbers."[65]

In 2021, in *Facebook, Inc. v. Duguid*,[66] the Supreme Court interpreted this definition. The case involved a security feature that automatically sent a text message to a Facebook account holder's cell phone number each time someone attempted to log in to that account. The plaintiff, who had never even had a Facebook account, received a series of misdirected text messages and was unable to get them to stop, so brought suit under the TCPA.

The consumer did not argue before the Supreme Court that Facebook's system for sending these text messages used a random or sequential number generator. Instead, he argued that the clause "using a random or sequential number generator" modified only the word "produce" in the statutory definition, not the word "store." As a result, he argued that equipment that had the capacity "to store . . . telephone numbers to be called, . . . and (B) to dial such numbers," was an ATDS.

The Supreme Court rejected this argument. The opinion holds that the phrase "using a random or sequential number generator" modifies both verbs that precede it, *i.e.* both "store" and "produce." It rejects the argument that a device that simply stores numbers, without the use of a random or sequential number generator, and then automatically dials them, is an ATDS. The Court concluded that the system Facebook was using did not meet the statutory definition.

Significantly, in *Facebook*, the plaintiff had made no allegation that Facebook's system of selecting, storing, or dialing the telephone number to which to send the unwanted text messages used any random or sequential number generation process. The plaintiff's case and argument relied on the analysis in a Ninth Circuit decision, *Marks v. Crunch San Diego*,[67] which held that the phrase "using a random or sequential number generator" did not apply to the word "store," so a system that simply stored and dialed telephone numbers without using a random or sequential number generator was an ATDS.

Since *Facebook* deals only with the application of the ATDS definition to Facebook's specific system, the opinion does not preclude a determination that the ATDS definition applies to other types of dialers. In particular, it does not address whether predictive dialers—the devices commonly used today for most automated calls—are ATDSs.

Facebook does, however, provide some important guidance in applying the ATDS decision to predictive dialers. In particular, it makes it clear in footnote 7 that a system that generates random or sequential numbers as part of the process of selecting or storing telephone numbers to be dialed is an ATDS. For example, the Court stated that a system that randomly selected numbers, and then used those numbers to select telephone numbers from a list for storage and dialing, was an ATDS.

The Supreme Court's decision leaves at least three avenues to show that a dialer is an ATDS. First, many courts have held that "capacity" encompasses at least the device's current functionalities, whether or not those functionalities were used to make a particular call.[68] It is often possible for an expert

as answering a call"); M.A. v. NRA Grp., L.L.C., 2019 WL 2357767 (E.D.N.Y. June 4, 2019) (unnecessary to show that consumer answered the call or even knew about it); Ammons v. Ally Fin., Inc., 326 F. Supp. 3d 578 (M.D. Tenn. 2018); Bratcher v. Navient Solutions, L.L.C., 2017 WL 9935188, at *3 (M.D. Fla. Aug. 9, 2017); King v. Time Warner Cable, 113 F. Supp. 3d 718, 725–726 (S.D.N.Y. 2015), *vacated and remanded on other grounds*, 894 F.3d 473 (2d Cir. 2018) (addressing definition of autodialer); Warnick v. Dish Network, L.L.C., 2014 WL 12537066, at *15 (D. Colo. Sept. 30, 2014); Castro v. Green Tree Servicing, L.L.C., 959 F. Supp. 2d 698, 720 (S.D.N.Y. 2013) ("[F]or purposes of Plaintiffs' TCPA claim, it is immaterial whether the Plaintiffs picked up all of Defendants' calls or whether several of the calls went unanswered."); Fillichio v. M.R.S. Assoc., 2010 WL 4261442, at *3 (S.D. Fla. Oct. 19, 2010) (The TCPA "does not include [ ] a requirement . . . that the recipient of a call must answer the phone or somehow be aware of the call in order for there to be a violation"). *See also* Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 953–954 (9th Cir. 2009) (holding that "to call" in the TCPA means "to communicate with or *try to get in communication with* a person by telephone"); *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 31 F.C.C. Rcd. 9074, at ¶ 28 (F.C.C. Aug. 11, 2016) (a call is any initiated call; the call need not be completed and need not result in a conversation or voicemail). *See also* First Nat'l Collection Bur., Inc. v. Walker, 348 S.W.3d 329 (Tex. App. 2011) (it is the placing of the call that is prohibited, even if the called party does not actually receive the call). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.3.1 (3d ed. 2017), *updated at* www.nclc.org/library.

62 Boyd v. Gen. Revenue Corp., 5 F. Supp. 3d 940 (M.D. Tenn. 2013).

63 *See* National Consumer Law Center, Federal Deception Law § 6.3.1 (3d ed. 2017), *updated at* www.nclc.org/library.

64 47 U.S.C. § 227(b)(1)(A)(iii). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.2 (3d ed. 2017), *updated at* www.nclc.org/library.

65 47 U.S.C. § 227(a)(1). *See also* 47 C.F.R. § 64.1200(f)(2) (similar definition).

66 ___ U.S. ___, 141 S. Ct. 1163, ___ L. Ed. 2d ___ (2021).

67 Marks v. Crunch San Diego, L.L.C., 904 F.3d 1041 (9th Cir. 2018).

68 *See, e.g.*, Glasser v. Hilton Grand Vacations Co., L.L.C., 948 F.3d 1301, 1312 (11th Cir. 2020) (interpreting the statute to "appl[y] to devices that have the 'capacity' to identify randomly generated numbers" and stating that "it does not require that capacity to be used in every covered call," but finding device not to be an ATDS for other reasons); King v. Time Warner Cable, Inc., 894 F.3d 473, 480–481 (2d Cir. 2018) ("[T]he TCPA applies to calls from a device that can perform the functions of an autodialer, regardless of whether it has actually done so in a particular case . . . [T]he term "capacity" in the TCPA's definition of a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software."); Meyer v. Portfolio Recovery Assoc., 707 F.3d 1036, 1043

witness to show that dialers of the types commonly in use today have the capacity, without additional programming or downloading additional software, to generate random or sequential telephone numbers and dial them or store them for later dialing.

Second, the Supreme Court's description in footnote 7 of an ATDS that used a random or sequential number generator to store numbers to be called shows that the numbers that are randomly or sequentially generated need not be the telephone numbers themselves. Instead, the definition is satisfied if the device generates random or sequential numbers as part of the process of storing or producing the telephone numbers to be dialed. An expert witness with knowledge of dialers and databases is likely to be able to show that dialers in use today use a sequential number generator to store telephone numbers to be called, and to pull them up for dialing.

Third, the term "sequential" in the term "sequential number generator" does not necessarily mean consecutive numerical order or even numerical order. A common definition of "sequence" is any arrangement of a set of numbers in a particular order determined by some rule. With a broad definition along these lines, dialers that use an algorithm to select numbers for dialing will likely meet the ATDS definition.

The definition of ATDS is very technical and is only sketched out here. It is addressed more fully in NCLC's Federal Deception Law § 6.3.2.[69]

It is important to keep in mind that, if a call to a cell phone used an artificial or prerecorded voice, the TCPA's restrictions apply whether or not it was autodialed. In such a case, it is unnecessary to deal with the question whether the call also used an autodialer. The meaning of "artificial or prerecorded voice" is discussed in the next subsection.

14.3.2.4 What is a Prerecorded or Artificial Voice Call?

The TCPA prohibits calls to cell phones and other sensitive numbers without the called party's consent if the call uses an artificial or prerecorded voice.[70] In most cases, the meaning of "artificial or prerecorded voice" should be clear. The statute does not require the entire message to be prerecorded, only that the call use a prerecorded voice.[71] Many debt collection calls begin with a prerecorded message and so violate this provision if they are made to cell phones without consent.[72]

Some callers have begun using "ringless voicemail," a technology that inserts a message into the called party's voicemail without causing the phone to ring. In 2017, a provider petitioned the FCC for a ruling that the robocall restrictions did not apply to ringless voicemail,[73] but it withdrew the petition after consumers and public officials flooded the FCC with negative comments.[74] The technology for delivering ringless voicemail messages to consumers' cell phones is not materially different from that used to send SMS-based text messages to cellular subscribers *en masse*,[75] which the FCC and many courts have held are "calls" to which the TCPA's restrictions on autodialed calls apply.[76] In addition, courts have consistently held that calls resulting in voicemail messages are subject to the TCPA.[77] Accordingly, courts have had no difficulty applying the TCPA's restrictions on prerecorded or artificial voice calls to ringless voicemail.[78]

Some callers are also now using calling systems that allow a live person to play prerecorded audio clips to the called

(9th Cir. 2012); Satterfield v. Simon & Shuster, 569 F.3d 946, 951 (9th Cir. 2009) (reversing grant of summary judgment to advertiser; fact question whether system had capacity to generate random or sequential numbers).

69 National Consumer Law Center, Federal Deception Law § 6.3.2 (3d ed. 2017), *updated at* www.nclc.org/library.

70 47 U.S.C. § 227(b)(1)(A).

71 47 U.S.C. § 227(b)(1)(A) ("it shall be unlawful for any person . . . (A) to make any call . . . using . . . an artificial or prerecorded voice").

72 Lardner v. Diversified Consultants Inc., 17 F. Supp. 3d 1215 (S.D. Fla. 2014).

73 Fed. Commc'ns Comm'n, Public Notice, DA-17-368, Consumer & Governmental Affairs Bureau Seeks Comment on All About the Message, L.L.C. Petition for Declaratory Ruling Under the Telephone Consumer Protection Act of 1991 (Apr. 18, 2017), *available at* https://transition.fcc.gov.

74 *See* Kellie Mitchell Bubeck & Ross B. Hofherr, Now Entering the Ring . . . Are "Ringless Voicemail" Calls Exempt from the TCPA?, 60 DRI for the Def. 70, No. 2 (Feb. 2018) (discussing the history of the petition and suggesting that it was part of a tactic to settle a case that the ringless voicemail provider feared might produce a decision unfavorable to it).

75 *See In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶113, 114 (F.C.C. July 10, 2015) (describing text messaging technology and explaining why TCPA applies to text messaging), *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside portions of FCC's 2015 order dealing with ATDS definition and treatment of reassigned cell phone numbers but leaving this portion of the order undisturbed).

76 *See* § 14.3.2.2, *supra*.

77 *See, e.g.*, Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637, 638 (7th Cir. 2012) (TCPA "curtails the use of automated dialers and prerecorded messages to cell phones . . . and routing a call to voicemail counts as answering a call"); Johnson v. Comodo Grp., Inc., 2020 WL 525898 (D.N.J. Jan. 31, 2020); Wakefield v. ViSalus, Inc., 2019 WL 3945243 (D. Or. Aug. 21, 2019) (caller is liable if prerecorded message is left on voicemail, regardless of whether anyone listens to it); Castro v. Green Tree Servicing L.L.C., 959 F. Supp. 2d 698, 720 (S.D.N.Y. 2013) (for purposes of TCPA liability, it is irrelevant whether call was answered or it went to voicemail).

78 Gurzi v. Penn Credit Corp., 449 F. Supp. 3d 1294 (M.D. Fla. 2020); Caplan v. Budget Van Lines, Inc., 2020 WL 4430966 (D. Nev. July 31, 2020); Schaevitz v. Braman Hyundai, Inc., 437 F. Supp. 3d 1237 (S.D. Fla. 2019); Picton v. Greenway Chrysler-Jeep-Dodge, Inc., 2019 WL 2567971 (M.D. Fla. June 21, 2019) (rejecting argument that ringless voicemails are not subject to the TCPA); Saunders v. Dyck O'Neal, Inc., 319 F. Supp. 3d 907 (W.D. Mich. 2018); Somogyi v. Freedom Mortg. Corp., 2018 WL 3656158 (D.N.J. Aug. 2, 2018) (applying TCPA's restrictions on autodialed and prerecorded calls to ringless voicemail without identifying any issues that would complicate the application of the TCPA to it). *See also* Silbaugh v. Censtar Energy Corp., 2018 WL 4558409 (N.D. Ohio Sept. 21, 2018) (denying motion to dismiss ringless voicemail case for lack of standing; receipt of ringless voicemail is a concrete injury regardless of whether it causes the consumer's phone to ring, as the messages take up space in the consumer's voicemail box, may result in the consumer having to pay a charge, and deplete the phone's battery).

party, choosing snippets that respond to whatever the called party says. Typically, this "robot call" or "soundboard" system allows the live caller to break in to speak with the consumer at any time. Callers have claimed that, since the system allows calls to be interactive—and there is human involvement in selecting the snippets to be played—these calls escape the prohibition.[79] However, it is obvious that these calls use a prerecorded voice and that is the statutory test. Many courts[80] and the FCC[81] have held that these calls are subject to the statutory restrictions. This issue is discussed in greater length in NCLC's Federal Deception Law § 6.3.1b.[82]

14.3.2.5 Exceptions to the Prohibition on Autodialed or Prerecorded Calls to Cell Phones

14.3.2.5.1 Exceptions in the statute and regulation; calls to collect government debts

The statute includes two exceptions to the prohibition against autodialed or artificial/prerecorded voice calls to cell phones: calls made for emergency purposes and calls made with the prior express consent of the called party.[83] A former exception for calls to collect government debt was struck down by the Supreme Court in 2020 as an unconstitutional content-based restriction on speech.[84]

In addition, the statute authorizes the FCC to exempt calls to a cell phone that are not charged to the called party—"free to end user calls"—from the prohibition against autodialed or artificial voice calls, subject to such conditions as the FCC prescribes to protected privacy rights.[85] The FCC has created several exceptions, but none relate to debt collection.[86]

14.3.2.5.2 Prior express consent

The prohibition of autodialed or prerecorded voice calls to cell phones does not apply where the called party has provided "prior express consent."[87]

In a 2008 declaratory ruling, the FCC held that a consumer provides "express consent" to receive debt collection calls on a cell phone by providing the cell phone number to the creditor in connection with the transaction that resulted in the debt.[88] The FCC stated: "Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."[89] This interpretation allows the consumer's consent for the creditor to make calls to transfer over to the debt collector for the credit. This interpretation is questionable, as it treats what at most might be implied consent as the "express consent" required by the statute. However, it has not been successfully challenged, and many courts have followed it.[90]

79 *See* Braver v. Northstar Alarm Services, L.L.C., 2019 WL 3208651 (W.D. Okla. July 16, 2019) (rejecting argument that human intervention in playing audio clips meant that the caller did not use a prerecorded voice), *reconsideration denied*, 2019 WL 5722207 (W.D. Okla. Nov. 5, 2019).

80 *See* Johnson v. Comodo Grp., Inc., 2020 WL 525898, at *8 (D.N.J. Jan. 31, 2020) (prerecorded message violates this prohibition even if it is played by human caller, as long as it is played without called party's prior express consent); Braver v. Northstar Alarm Services, L.L.C., 2019 WL 3208651 (W.D. Okla. July 16, 2019), *reconsideration denied*, 2019 WL 5722207 (W.D. Okla. Nov. 5, 2019); Margulis v. Eagle Health Advisors, L.L.C., 2016 WL 1258640, at *3 (E.D. Mo. Mar. 31, 2016) (refusing to dismiss claim that robot call, starting with prerecorded snippets and then transferring call to a live agent, violated TCPA's restriction on prerecorded calls).

81 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Northstar Alarm Services L.L.C.'s Petition for Expedited Declaratory, 2020 WL 7586053 (F.C.C. Dec. 18, 2020).

82 (3d ed. 2017), *updated at* www.nclc.org/library.

83 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

84 Barr v. Am. Ass'n of Political Consultants, Inc., ___ U.S. ___, 140 S. Ct. 2335, 207 L. Ed. 2d 784 (2020). *See* National Consumer Law Center, Federal Deception Law § 6.2.4.3 (3d ed. 2017), *updated at* www.nclc.org/library (further discussion of this decision and its ramifications).

85 47 U.S.C. § 227(b)(2)(C).

86 47 C.F.R. § 64.1200(a)(2) (loosening restrictions on certain health care messages); *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 129–138, 140–147 (F.C.C. 2015), *available at* www.fcc.gov (creating a narrow exception for certain calls by financial institutions regarding fraud, identity theft, security breaches, and related matters; creating similar exception for health care providers), *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (rejecting health care provider's claim that exception was too narrow; setting aside two other portions of FCC's order, and otherwise leaving it undisturbed). *See also In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 2020 WL 7873750 (F.C.C. Dec. 30, 2020) (codifying these exemption and placing limits on the number of calls that they allow, with effective date to be determined).

87 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.2 (3d ed. 2017), *updated at* www.nclc.org/library.

88 *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, 2008 WL 65485, at ¶¶ 9–10 (F.C.C. 2008).

89 *Id.* ¶ 9.

90 *See, e.g.*, Williams v. Capital One Bank, 682 Fed. Appx. 467 (7th Cir. 2017) (giving cell phone number orally when applying for credit card is consent to receive debt collection calls); Baisden v. Credit Adjustments, 813 F.3d 338, 343–344 (6th Cir. 2016) (patient's provision of cell phone number to hospital, which provided it to anesthesiologist, who then provided it to collection agency, was consent to receive autodialed and prerecorded collection calls, even though consent form only allowed hospital to share "health information"); Chyba v. First Fin. Asset Mgmt., Inc., 671 Fed. Appx. 989 (9th Cir. 2016) (reciting FCC's ruling and affirming summary judgment against consumer); Hill v. Homeward Residential, Inc., 799 F.3d 544 (6th Cir. 2015) (providing cell phone number to creditor, whether at the outset of transaction or later, is consent to receive collection robocalls); Mais v. Gulf Coast Collection Bur., 768 F.3d 1110 (11th Cir. 2014) (finding FCC's ruling incontestable under the Hobbs Act and holding that it applies to collection of medical debt, not just consumer credit; wife's provision of patient's cell phone number to hospital is sufficient consent); Rodriguez v. Premier Bankcard, L.L.C., 2018 WL 4184742, at *5 (N.D. Ohio Aug. 31, 2018) (debtor's provision of phone numbers both at the outset and later is consent to receive collection calls); Stauffer v. Navient Solutions, L.L.C., 241 F. Supp. 3d 517 (M.D. Pa. 2017) (provision of new cell phone number when applying for second student loan is consent to be called to collect earlier loan, when both promissory notes gave permission

Even if providing a cell phone number can be construed as consent to receive certain robocalls, it should not be construed as consent to receive them on any and all topics. Thus, a second question should be whether the consumer consented to the subject matter of the autodialed calls.[91] The FCC has held:

> By "within the scope of consent given, and absent instructions to the contrary," we mean that the call must be closely related to the purpose for which the telephone number was originally provided. For example, if a patient provided his phone number upon admission to a hospital for scheduled surgery, then calls pertaining to that surgery or follow-up procedures for that surgery would be closely related to the purpose for which the telephone number was originally provided.[92]

In a Second Circuit case, *Nigro v. Mercantile Adjustment Bureau, L.L.C.*,[93] a utility company told a man that it needed his cell phone number in order to comply with his request that it disconnect his mother-in-law's utility service after she died. It then made seventy-two robocalls to his number to collect a $68 bill she owed. The court held that the man had not provided his number during the transaction that resulted in the debt owed. Instead, he provided the number long after the debt was incurred, and he was not in any way responsible for the debt. The court reversed the district court's holding that the man had consented to receive the calls by providing his cell phone number.

Consent may also be given by an express provision in a contract.[94] On the other hand, debt collectors and creditors that "capture" incoming numbers[95] or obtain them through

to contact debtor at any future number she supplied); Harrington v. Roundpoint Mortg. Servicing Corp., 290 F. Supp. 3d 1306 (M.D. Fla. 2017) (debtor gave consent by giving copy of construction contract, which listed his cell phone number, to lender that was financing the construction); Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674 (D. Md. 2017); Garrett v. Credit Prot. Ass'n, L.P., 2017 WL 3193759 (M.D. Fla. July 27, 2017) (provision of cell phone number on work order when cable service performed service at consumer's home is consent to be called regarding debt); Ebling v. Clearspring Loan Services, Inc., 106 F. Supp. 3d 1002 (D. Minn. 2015) (providing cell phone number is enough; need not specifically consent to receive automated calls); Ranwick v. Texas Gila, L.L.C., 37 F. Supp. 3d 1053 (D. Minn. 2014); Hart v. Vital Recovery Services, Inc., 2013 WL 12116580, at *3 (N.D. Fla. Dec. 18, 2013); Johnson v. Credit Prot. Ass'n, 2012 WL 5875605 (S.D. Fla. Nov. 20, 2012) (providing cell phone number to creditor at outset of transaction is prior express consent); Conover v. Byl Collections Services, L.L.C., 2012 WL 4363740, at *6 (W.D.N.Y. Sept. 21, 2012) (providing cell phone number on credit application constitutes prior consent to be contacted at the number regarding the debt). *See also* Selby v. LVNV Funding, L.L.C., 2016 WL 6677928 (S.D. Cal. June 22, 2016) (consent given to original creditor can be transferred to buyer of debt and then to collector hired by debt buyer); Stein v. Monterey Fin. Services, Inc., 2015 WL 13654024 (N.D. Ala. Feb. 26, 2015) (noting that provision of telephone number to creditor is consent to be called at that number regarding debt, but suggesting that providing it to debt collector may not be). *Cf.* Daubert v. NRA Grp., L.L.C., 189 F. Supp. 3d 442 (M.D. Pa. 2016) (providing telephone number at time of service is consent to receive calls, but not shown here when defendant collector merely claimed that plaintiff "must have" given his cell phone number to medical provider), *aff'd in relevant part, rev'd in part on other grounds*, 861 F.3d 382 (3d Cir. 2017) (affirming summary judgment for consumer on TCPA claim when collector presented no evidence of consent; reversing summary judgment for defendant collection agency on FDCPA claim). *But cf.* Coniglio v. iQual Corp., No. 8:16:cv-44-T-23TBM (M.D. Fla. Mar. 7, 2017) (denying caller's motion for summary judgment; consumer's agreement that service can disclose cell phone number in connection with application for loan modification is not consent to receive autodialed calls from credit counseling program; since these are not calls regarding debt, FCC's ruling is inapplicable), *available at* www.nclc.org/unreported.

91 *See, e.g.*, Van Patten v. Vertical Fitness Grp., 847 F.3d 1037 (9th Cir. 2017) (providing telephone number is consent to transaction-related contact, not consent to "any and all contact"); Baisden v. Credit Adjustments, Inc., 813 F.3d 338, 343–344 (6th Cir. 2016) (stating that the context in which a debtor provides consent matters, but holding that patient's provision of cell phone number to hospital, which provided it to anesthesiologist, who then provided it to collection agency, was consent to receive autodialed and prerecorded collection calls, even though consent form only allowed hospital to share "health information"); Hill v. Homeward Residential, Inc., 799 F.3d 544, 551 (6th Cir. 2015) (provision of cell phone number to initial creditor is consent to receive collection calls regarding that debt, "not on any topic whatsoever"); Nigro v. Mercantile Adjustment Bureau, L.L.C., 769 F.3d 804 (2d Cir. 2014) (man's provision of his cell phone number to utility company so that it could disconnect his deceased mother-in-law's service was not consent to receive calls about her unpaid bill, because he did not provide phone number in connection with transaction that created the debt). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.2.3 (3d ed. 2017), *updated at* www.nclc.org/library.

92 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 47, n.474 (F.C.C. 2015), *available at* www.fcc.gov, *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling, but leaving this portion undisturbed). *See also* Report and Order, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, 1840, at ¶ 25 (Feb. 15, 2012) ("[One commenter]t argues that its customers may orally provide their wireless phone number as a point of contact and therefore those customers expect *marketing* and service calls. We disagree. Consumers who provide a wireless phone number for a limited purpose—for service calls only—do not necessarily expect to receive telemarketing calls that go beyond the limited purpose for which oral consent regarding service calls may have been granted").

93 769 F.3d 804 (2d Cir. 2014). *See also* Letter from FCC General Counsel to Clerk, Second Circuit Court of Appeals, Nigro v. Mercantile Adjustment Bur., 2014 WL 2959062 (F.C.C. June 30, 2014) ("Although Nigro presumably consented to receive calls regarding the termination of service to the Thomas residence by providing his cell phone number to National Grid in connection with his request to terminate that service, under the ACA Order that consent did not extend to debt collection calls with respect to debts that did not arise 'during the transaction' in which Nigro provided his number.").

94 *See* National Consumer Law Center, Federal Deception Law §§ 6.3.4.2.2, 6.3.4.4 (3d ed. 2017), *updated at* www.nclc.org/library. *See also* § 14.3.2.4.6, *infra* (revocation of contractual consent).

95 Phillips v. Mozes, Inc., 2015 WL 12806594 (N.D. Ala. Jan. 26, 2015) (lack of consent sufficiently alleged when defendant captured plaintiff's cell phone number from text message plaintiff sent and te message itself did not state number); Castro v. Green Tree Servicin 959 F. Supp. 2d 698 (S.D.N.Y. 2013) (placing call from cell phone creditor is not consent); Request of ACA International for Clarificati and Declaratory Ruling, *In re* Rules & Regulations Implementi the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, n.34 (F.C 2008) ("The Commission also noted, however, that if a caller's nu ber is 'captured' by a Caller ID or an ANI device without notice

skip-tracing[96] do not thereby obtain consent allowing them to use automated equipment to call such numbers. Nor does the fact that a creditor has an existing business relationship with a debtor create an exception to the prohibition if the debtor has not given prior express consent to receive calls.[97]

The FCC's separate prohibition on autodialed or artificial voice telemarketing calls to cell phones is stricter and requires not just prior express consent but prior express written consent.[98] Express consent must be in writing, and must include the consumer's signature and a designated telephone number for receiving such calls and messages.[99] However, the FCC has made it clear that these requirements apply only to telemarketing calls.[100] It structured the regulation to provide that either written or oral consent is sufficient for autodialed or prerecorded debt collection calls to cell phones.[101]

In the debt collection context, courts have construed the FCC's 2008 ruling not to make provision of a cell phone number to the original creditor the exclusive means by which a debtor can give prior express consent.[102] Debtors can also provide consent directly to the collector.

14.3.2.5.3 Who may give consent; reassigned numbers

The TCPA provides for substantial recoveries in cases in which a debt collector harasses a "wrong party" with automated calls to a cell phone. Such a non-debtor has standing to bring a TCPA claim.[103] As a result, it is important to determine exactly who provided consent for the calls.

Consent must be given by the person who presently subscribes to or uses the cell phone.[104] However, the FCC has stated that consent may be given by a customary user who is included in a family or business calling plan, even if that person is not the subscriber.[105] In addition, a court held that a person who is not a subscriber or customary user can provide consent if they have authority from the subscriber.[106]

The FCC has also stated that consent can be given by an intermediary.[107] However, an intermediary can only convey

the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.").

96 Meyer v. Portfolio Recovery Assoc., 707 F.3d 1036, 1040 (9th Cir. 2012) (affirming preliminary injunction against autodialing cell phone numbers obtained through skip-tracing); Lardner v. Diversified Consultants Inc., 17 F. Supp. 3d 1215, 1224 (S.D. Fla. 2014).

97 Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014); Gager v. Dell Fin. Services, L.L.C., 727 F.3d 265, 273 (3d Cir. 2013) (exemptions in 47 C.F.R. §§ 64.1200(a)(2)(iii), 64.1200(a)(2)(iv) to calls "made to any person with whom the caller has an established business relationship" and calls "made for a commercial purpose [that do] not include or introduce an unsolicited advertisement or constitute a telephone solicitation" apply only to autodialed calls made to land-lines); Zehala v. Am. Express, 2011 WL 4484297 (S.D. Ohio Sept. 26, 2011) (established business relationship exception inapplicable to calls to cell phones); Bentley v. Bank of Am., 773 F. Supp. 2d 1367, 1374 (S.D. Fla. 2011) (established business relationship insufficient). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.5 (3d ed. 2017), *updated at* www.nclc.org/library.

98 47 C.F.R. § 64.1200(a)(2). *See also* 47 C.F.R. § 64.1200(f)(8) (defining express written consent). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.1 (3d ed. 2017), *updated at* www.nclc.org/library.

99 47 C.F.R. § 64.1200(f)(8), *as amended by, In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, n.68 (F.C.C. Feb. 15, 2012), *later op. at* 27 F.C.C. Rcd. 13031 (F.C.C. Oct. 16, 2012).

100 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, at ¶ 28 (F.C.C. Feb. 15, 2012).

101 47 C.F.R. § 64.1200(a)(2) (requiring express written consent for prerecorded or autodialed advertising and telemarketing calls to cell phones, effective Oct. 16, 2012). *See* Williams v. Capital One Bank, 682 Fed. Appx. 467 (7th Cir. 2017) (consent to receive non-telemarketing calls may be oral, so no signature is necessary).

102 Hill v. Homeward Residential, Inc., 799 F.3d 544, 551 (6th Cir. 2015); Brown v. DirecTV, L.L.C., 330 F.R.D. 260, 269 (C.D. Cal. 2019); Lawrence v. Bayview Loan Servicing, L.L.C., 152 F. Supp. 3d 1376 (S.D. Fla. 2016) (letter sent to loan servicer, listing cell phone number, was consent to receive calls about the debt); Selby v. LVNV Funding, L.L.C., 2016 WL 6677928 (S.D. Cal. June 22, 2016); Haysbert v. Navient Solutions, Inc., 2016 WL 890297, at *8 (C.D. Cal. Mar. 8, 2016); Ebling v. ClearSpring Loan Services, Inc., 106 F. Supp. 3d 1002, 1005 n.3 (D. Minn. 2015). *But cf.* Stein v. Monterey Fin. Services, Inc., 2015 WL 13654024 (N.D. Ala. Feb. 26, 2015) (noting that provision of telephone number to creditor is consent to be called at that number regarding the debt, but suggesting that providing it to debt collector may not be).

103 Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014); Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637, 640 (7th Cir. 2012); Swope v. Credit Mgmt., L.P., 2013 WL 607830 (E.D. Mo. Feb. 19, 2013); Swope v. Credit Mgmt., L.P., 2013 WL 607830 (E.D. Mo. Feb. 19, 2013). *See generally* § 14.3.2.8, *infra;* National Consumer Law Center, Federal Deception Law § 6.3.4.3 (3d ed. 2017), *updated at* www.nclc.org/library.

104 *See, e.g.*, N.L. v. Credit One Bank, 960 F.3d 1164 (9th Cir. 2020); Breslow v. Wells Fargo Bank, 755 F.3d 1265 (11th Cir. 2014); Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014) (only subscriber can give consent; whether someone other than subscriber has authority to consent on behalf of subscriber depends on whether there is agency relationship under common law); Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637 (7th Cir. 2012). *See also In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 72 (F.C.C. 2015), *available at* www.fcc.gov, *appeal resolved,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling, but leaving this portion undisturbed). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.3 (3d ed. 2017), *updated at* www.nclc.org/library.

105 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 75 (F.C.C. 2015), *available at* www.fcc.gov, *appeal resolved,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling, but leaving this portion undisturbed).

106 McCaskill v. Navient Solutions, Inc., 178 F. Supp. 3d 1281 (M.D. Fla. 2016) (applying agency principles; finding no evidence that daughter had authority to consent to collection calls to mother's cell phone). *See also* Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014) (whether someone other than the subscriber has authority to consent on behalf of the subscriber depends on whether there is an agency relationship under common law).

107 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 30, 49 (F.C.C. 2015), *available at* www.fcc.gov, *appeal resolved,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling, but leaving this portion undisturbed). *See* Fober v. Mgmt. & Tech. Consultants, L.L.C., 886 F.3d 789 (9th Cir. 2018) (consent may be obtained through an intermediary; patient's consent that medical provider could disclose her information for purposes of quality

consent that the called party actually granted.[108] Consent to make calls to a landline number that is later ported to a cell phone may satisfy the consent requirement.[109]

Many courts have held that, if the debt collector places automated calls to a cell number that has been reassigned to someone other than the debtor, consent given by the debtor is not effective.[110] In 2015, the FCC confirmed this position in a declaratory ruling, holding that the "called party" is the actual current subscriber or customary user, regardless of whether the caller intended to reach that person.[111] Accordingly, the FCC held that calls to reassigned cell phone numbers without the actual recipient's consent violate the TCPA.[112]

Industry players appealed this declaratory ruling, and in 2018 the D.C. Circuit set aside the portion of the ruling that addressed reassigned numbers. The court agreed that the FCC "could permissibly interpret 'called party' in that provision to refer to the current subscriber,"[113] but held that a portion of the FCC's order that created a one-call safe harbor was arbitrary.[114] As the court could not be sure that, without the safe harbor, the FCC would have adopted the position that "called party" means the person who was reached, the court set aside the FCC's reassigned number ruling and returned the matter to the FCC for further review.[115]

In 2018, the FCC issued an order to establish a comprehensive database to identify reassigned numbers.[116] Its order provides that, once the database is created, a caller will not be liable for violating the prohibition of autodialed or prerecorded calls to cell phones without consent if it proves that 1) the number it called has been reassigned, 2) it had prior express consent from the previous subscriber to that number, and 3) it checked the most recent update to the database, but was given erroneous information that the number had not been reassigned.[117] The creation of the database obviates the need to establish any other sort of safe harbor, so resolves the concern identified by the D.C. Circuit. The database was scheduled to enter beta trials on July 1, 2021.[118]

14.3.2.5.4 Revocation of consent

Many courts have held that consent may be revoked at any time, in any reasonable way.[119] A 2015 FCC ruling reiterates this point specifically:

> [C]onsumers may revoke consent in any manner that clearly expresses a desire not to receive further messages, and . . . callers may not infringe on that ability by designating an exclusive means to revoke.
>
> Consumers have a right to revoke consent, using any reasonable method including orally or in writing. We conclude that callers may not abridge a consumer's right to revoke consent using any reasonable method.[120]

The D.C. Circuit upheld this ruling, including the FCC's conclusion that callers cannot limit how consent can be revoked.[121] The court also held that the FCC was not required to establish standardized revocation procedures.[122]

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improvement was consent to receive patient satisfaction survey calls from third-party contractor); Baisden v. Credit Adjustments, Inc., 813 F.3d 338, 343–346 (6th Cir. 2016) (consent obtained through an intermediary is valid).

108 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 30, 49 (F.C.C. 2015), *available at* www.fcc.gov ("an intermediary can only convey consent that has actually been obtained, and cannot provide consent on behalf of another party"), *appeal resolved,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling, but leaving this portion undisturbed).

109 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 30, 54 (F.C.C. 2015), *available at* www.fcc.gov, *appeal resolved,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling, but leaving this portion undisturbed).

110 *See, e.g.*, N.L. v. Credit One Bank, 960 F.3d 1164 (9th Cir. 2020); Breslow v. Wells Fargo Bank, 755 F.3d 1265 (11th Cir. 2014); Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014); Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637 (7th Cir. 2012). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.3 (3d ed. 2017), *updated at* www.nclc.org/library.

111 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 ¶ 73, 30 F.C.C. Rcd. 7961 (F.C.C. July 10, 2015) ("We find that the 'called party' is the subscriber, i.e., the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan. Both such individuals can give prior express consent to be called at that number. Thus, with the limited exception discussed below, calls to reassigned wireless numbers violate the TCPA when a previous subscriber, not the current subscriber or customary user, provided the prior express consent on which the call is based."), *set aside,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018).

112 *Id.*

113 ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687, 706 (D.C. Cir. 2018).

114 Id. at 708 (citations omitted).

115 Id. at 708.

116 *In re* Advanced Methods to Target and Eliminate Unlawful Robocalls, 2018 WL 6590244 (F.C.C. Dec. 13, 2018) (adding new subsections (*l*) and (m) to 47 C.F.R. § 64.1200).

117 *Id.* ¶¶ 53–58 (describing this safe harbor, which will be codified as 47 C.F.R. § 64.1200(m)).

118 The Reassigned Numbers Database, https://www.reassigned.us.

119 *See, e.g.*, Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1047–1049 (9th Cir. 2017); Schweitzer v. Comenity Bank, 866 F.3d 1273 (11th Cir. 2017) (reiterating that consent can be revoked orally, and holding that it can be partially revoked); Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014); Gager v. Dell Fin. Services, L.L.C., 727 F.3d 265 (3d Cir. 2013). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.4 (3d ed. 2017), *updated at* www.nclc.org/library.

120 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 63, 64 (F.C.C. July 10, 2015), *ruling upheld,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018).

121 ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018).

122 *Id.* at 709.

14.3.2.5.5 *What methods of revoking consent are reasonable?*

The FCC's 2015 declaratory ruling, upheld by the D.C. Circuit,[123] makes clear that any statement in which "the called party clearly express[es] his or her desire not to receive further calls" is sufficient to show revocation.[124] To assess whether any particular means of revocation used by a consumer is reasonable, the FCC stated that it would:

> [L]ook to the totality of the facts and circumstances surrounding that specific situation, including, for example, whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance, and whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens. We caution that callers may not deliberately design systems or operations in ways that make it difficult or impossible to effectuate revocations.[125]

The ruling also gives several examples of methods of revoking consent that are reasonable: "Consumers generally may revoke, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities."[126]

The FCC's ruling also clarifies that revocation may be oral,[127] and many courts have agreed.[128] Earlier decisions that required the consumer to give written notice in accordance with the Fair Debt Collection Practices Act[129] to revoke consent to receive debt collection calls[130] are no longer good law in light of these developments. Of course, written notice by means providing proof of receipt is preferable from the standpoint of proof.

When debt collection calls are involved, notice to the caller that the consumer has filed a bankruptcy petition is revocation of consent to make collection calls.[131] Revocation of consent is also accomplished when a law firm sends a creditor a letter stating that it represents an alleged debtor and that all calls regarding the debt should be directed to it.[132] A series of interactions may amount to revocation of consent.[133] However, a court held that texting a long, wordy revocation request—rather than following the opt-out procedure the seller had created, which involved texting one of a list of short instructions such as "STOP"—was not a reasonable method of revoking consent.[134]

Where a company has a variety of subsidiaries and affiliates, it is important to make sure that the revocation request is communicated to the corporate entity that was making the

123 ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018). See National Consumer Law Center, Federal Deception Law § 6.3.4.4.1 (3d ed. 2017), *updated at* www.nclc.org/library.

124 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 67 (F.C.C. July 10, 2015), *ruling upheld,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (upholding this portion of 2015 declaratory ruling). *See* Mattson v. Quicken Loans, Inc., 2020 WL 6365506, at *4–5 (D. Or. Sept. 2, 2020) (fact question whether consumer who was on nationwide do-not-call list revoked consent to receive telemarketing calls by saying that he was not interested and hanging up); Singer v. Las Vegas Athletic Clubs, 376 F. Supp. 3d 1062, 1072 (D. Nev. 2019) (fact question whether call in which consumer told collector to stop calling, but then appeared to acquiesce to merely a temporary suspension of the calls, amounted to revocation); Brown v. Credit Mgmt., L.P., 131 F. Supp. 3d 1332 (N.D. Ga. 2015) (fact question whether debtor revoked consent by telling collector she felt harassed and hanging up); Reardon v. Uber Technologies, Inc., 115 F. Supp. 3d 1090, 1102 (N.D. Cal. 2015) (applying FCC declaratory ruling; consent can be revoked in any reasonable manner); Morris v. Ocwen Loan Servicing, L.L.C., 2015 WL 5072011 (S.D. Fla. Aug. 24, 2015) (allowing consumer to proceed to trial on question whether revocation of consent set forth in a qualified written request sent to mortgage servicer, and repeated in a telephone call, was effective). *But cf.* Cesaire v. Med. Services, Inc., 2016 WL 6910257 (M.D. Fla. Nov. 23, 2016) ("if you can't give me the information [about the alleged balance], don't call my phone" is not revocation of consent because it is conditional); Goodson v. Designed Receivable Solutions, Inc., 2016 WL 5799321 (C.D. Cal. Sept. 21, 2016) (refusing to construe debtor's statements to collector that she had already paid debt as revocation of consent).

125 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 233 (F.C.C. July 10, 2015), *ruling upheld,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (upholding this portion of 2015 declaratory ruling).

126 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 63, 64 (F.C.C. July 10, 2015), *ruling upheld,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018).

127 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 64, 70 (F.C.C. July 10, 2015), *ruling upheld,* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (upholding this portion of 2015 declaratory ruling).

128 *See, e.g.,* Moriient v. Northwest Collectors, Inc., 666 Fed. Appx. 531 (7th Cir. 2016) (reversing summary judgment against consumer; fact issue whether he orally revoked consent); Osorio v. State Farm Bank, 746 F.3d 1242, 1255 (11th Cir. 2014) ("allowing consent to be revoked orally is consistent with 'the government interest articulated in the legislative history of the Act [that] enable[es] the recipient to contact the caller to stop future calls'"). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.4.2 (3d ed. 2017), *updated at* www.nclc.org/library.

129 15 U.S.C. § 1692c(c).

130 Moore v. Firstsource Advantage, L.L.C., 2011 WL 4345703, at *30–31 (W.D.N.Y. Sept. 15, 2011); Moltz v. Firstsource Advantage, L.L.C., 2011 WL 3360010, at *5 (W.D.N.Y. Aug. 3, 2011); Cunningham v. Credit Mgmt., L.P., 2010 WL 3791104, at *5 (N.D. Tex. Aug. 30, 2010), *adopted,* 2010 WL 3791049 (N.D. Tex. Sept. 27, 2010); Starkey v. Firstsource Advantage, L.L.C., 2010 WL 2541756, at *6 (W.D.N.Y. Mar. 11, 2010), *adopted,* 2010 WL 2541731 (W.D.N.Y. June 21, 2010).

131 *In re* Hammond, 2014 WL 2761260 (Bankr. N.D. Tex. June 18, 2014).

132 Miceli v. Orange Lake Country Club, Inc., 2015 WL 5081621 (M.D. Fla. Aug. 5, 2015).

133 *See, e.g.,* Baldwin v. Monterey Fin. Services, Inc., 2016 WL 5723734 (M.D. Pa. Sept. 30, 2016) (cancellation of contract, refusal to pay, request that caller "destroy any documents containing our personal . . . information," and "talk to my attorney about this" may amount to revocation). *But cf.* Van Patten v. Vertical Fitness Grp., 847 F.3d 1037 (9th Cir. 2017) (merely cancelling gym membership, without clearly expressing a desire not to be called or texted, is not revocation of consent).

134 Viggiano v. Kohl's Dep't Stores, Inc., 2017 WL 5668000 (D.N.J. Nov. 27, 2017). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.4.4.2 (3d ed. 2017), *updated at* www.nclc.org/library.

unwanted calls.[135] One court held that revocation of consent for a debt collector to call about a debt owed to one creditor is not revocation of consent to receive calls from that collector about debts to other creditors that it begins to collect at a later date.[136] Similarly, a court held that revocation of consent when a debt collector called a certain number regarding one person's account did not revoke consent to call regarding the account of a different person who used that same number.[137] A court held that sending a revocation letter to a corporate address that the defendant had never communicated to the plaintiff—and at which it rarely received mail—was not a reasonable method of revoking consent in the absence of proof that the defendant received it.[138]

Several decisions hold that consumers who revoke their consent to text messaging may be sent a final "confirmatory text message" confirming receipt of a recipient's unsubscribe request.[139] The FCC has also adopted this interpretation.[140]

14.3.2.5.6 Revocation of consent that was provided as a term in a contract

Recently, creditors have begun inserting provisions in form agreements purporting to authorize the use of automated equipment to contact consumers at any number furnished by the consumer or otherwise obtained by the creditor. The Third Circuit has held that this consent can be revoked, because "the ability to use an autodialing system to contact a debtor is plainly not an essential term to a credit agreement."[141] By entering into a contractual relationship with a seller, a consumer does not waive the right to revoke consent to receive autodialed or prerecorded cell phone calls.[142] As one court put it:

> [The defendant] has not pointed to any legal authority giving parties permission to contract around the TCPA. If they could, one imagines that every company in the nation—from Dell Financial and State Farm Bank, to every student loan provider, to every catalog sales company—would amend their contracts to require customers to waive every right their customers currently have. The lack of authority suggests that no such race to the bottom is permitted.[143]

However, a 2017 Second Circuit decision, a 2020 Eleventh Circuit decision agreeing with the Second Circuit,[144] and a number of district court decisions[145] erroneously hold that the consumer's consent is irrevocable when it is part of a binding contract.[146] These decisions fail to give appropriate weight to

135 Martinez v. TD Bank USA, 2017 WL 2829601 (D.N.J. June 30, 2017).

136 Michel v. Credit Prot. Ass'n L.P., 2017 WL 3620809 (N.D. Ill. Aug. 23, 2017). *Accord* Perez Alvarez v. Medicredit, Inc., 2018 WL 6430830 (W.D. Tex. Aug. 2, 2018).

137 Brooks v. USAA Sav. Bank, 2019 WL 7188576 (C.D. Cal. Jan. 10, 2019).

138 Wright v. USAA Sav. Bank, 2020 WL 2615441 (E.D. Cal. May 22, 2020).

139 Ibey v. Taco Bell Corp., 2012 WL 2401972 (S.D. Cal. June 18, 2012) (when consumer sent a text message in response to defendant's invitation to complete a survey, then sent "STOP" message requesting that defendant cease sending him text messages, defendant's "single, confirmatory text message did not constitute unsolicited telemarketing" and therefore was not "an invasion of privacy contemplated by Congress in enacting the TCPA"). *Accord* Ryabyshchuk v. Citibank, 2012 WL 5379143 (S.D. Cal. Oct. 30, 2012).

140 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, SoundBite Comme'ns, Inc., Petition for Expedited Declaratory Ruling, FCC 12-143, 27 FCC Rcd 15391 (Nov. 29, 2012) (allowing organizations that send text messages to consumers from whom they have obtained prior express consent to continue practice of sending a final, one-time text to confirm receipt of a consumer's opt-out request).

141 Gager v. Dell Fin. Services, L.L.C., 727 F.3d 265, 273–274 (3d Cir. 2013).

142 *Id.* at 274. Accord, Singer v. Las Vegas Athletic Clubs, 376 F. Supp. 3d 1062, 1072 (D. Nev. 2019); Few v. Receivables Performance Mgmt., L.L.C., 2018 WL 5923765 (N.D. Ala. Nov. 13, 2018) (contractual consent can be revoked, though contract can restrict the means of revocation; probably overruled by Medley v. Dish Network, L.L.C., 958 F.3d 1063 (11th Cir. 2020)); Ammons v. Ally Fin., Inc., 326 F. Supp. 3d 578, 592–595 (M.D. Tenn. 2018) (detailed analysis); Tillman v. Hertz Corp., 2018 WL 4144674 (N.D. Ill. Aug. 29, 2018); Jara v. GC Services L.P., 2018 WL 2276635, at *3 (C.D. Cal. May 17, 2018) (consumers who consented to receive autodialed calls when they signed credit agreements have right to revoke that consent); Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674, 683 (D. Md. 2017) (rejecting argument that a prohibition on later revocation of consent can arise from a "boilerplate consent provision" in a contract); Cartrette v. Time Warner Cable, Inc., 157 F. Supp. 3d 448 (E.D.N.C. 2016); Skinner v. Bluestem Brands, Inc., 2015 WL 4135269 (S.D. Miss. July 8, 2015) (rejecting argument that consumer who consented in the credit agreement to receive autodialed calls to her cell phone has no right to revoke that consent); Berg v. Verizon Wireless, 2013 WL 8446598 (W.D. Wis. June 21, 2013) (rejecting argument that consumer cannot revoke consent because her consent to receive autodialed calls was part of the consideration for the original transaction; "Nothing in this broad language suggests that consumers who consent initially in the context of a contractual relationship should be treated differently under the statute."). *See also* Self Forbes v. Advanced Call Ctr. Techs., L.L.C., 754 Fed. Appx. 520 (9th Cir. 2018) (consumer who had consented to receive calls when she opened her credit card account had the right to revoke consent); Patterson v. Ally Fin., Inc., 2018 WL 647438 (M.D. Fla. Jan. 31, 2018) (creditor cannot by contract limit consumer to written revocation of consent; probably overruled by Medley v. Dish Network, L.L.C., 958 F.3d 1063 (11th Cir. 2020)).

143 Skinner v. Bluestem Brands, Inc., 2015 WL 4135269, at *3 (S.D. Miss. July 8, 2015).

144 Medley v. Dish Network, L.L.C., 958 F.3d 1063 (11th Cir. 2020).

145 Lucoff v. Navient Solutions, L.L.C., 393 F. Supp. 3d 1119 (S.D. Fla. 2019) (interpreting class action settlement—which provided that, if class member did not fully and accurately complete a revocation form, "the request for a revocation will be invalid"—to bar consumer who did not complete a revocation form from ever revoking consent), *aff'd on other grounds*, 981 F.3d 1299 (11th Cir. 2020) (holding that consumer re-consented); Few v. Receivables Performance Mgmt., 2018 WL 3772863 (N.D. Ala. Aug. 9, 2018); Harris v. Navient Solutions, L.L.C., 2018 WL 3748155 (D. Conn. Aug. 7, 2018) (following *Reyes*, which is binding circuit precedent for this court); Barton v. Credit One Fin., 2018 WL 2012876 (N.D. Ohio Apr. 30, 2018) (following *Reyes*). *See also* Rodriguez v. Student Assistance Corp., 2017 WL 11050423 (E.D.N.Y. Nov. 6, 2017) (by accepting compensation as part of class action settlement instead of submitting a revocation request that, according to settlement, would have revoked caller's ability to robocall plaintiff's cell phone, consumer became contractually bound to receive robocalls and cannot unilaterally revoke that consent).

146 Reyes v. Lincoln Auto. Fin. Services, 861 F.3d 51 (2d Cir. 2017).

the FCC's broad 2015 ruling that, "[w]here the consumer gives prior express consent, the consumer may also revoke that consent."[147] The D.C. Circuit's 2018 decision upholding this ruling strengthens the conclusion that consent obtained as a contract term can be revoked. The decision states: "It is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent."[148] Like the FCC's 2015 order, this statement is unambiguous and without qualifications or conditions, so it is further support for the view that a consumer has the right to revoke consent even if consent was provided as part of a contract. Several district courts have explicitly declined to follow the Second Circuit's decision, noting its inconsistency with the FCC's ruling.[149]

If there is a clause that purports to limit the consumer's right to revoke consent, it should be construed against the drafter.[150] A district court decision held that a clause in a credit card agreement by which the consumer agreed to accept autodialed and prerecorded calls, but that was silent about the right to revoke this consent, could not be construed as a waiver of the right to revoke.[151] Where the parties' contract contains an integration clause, a consent provision that was in an earlier credit application will not be part of the consumer's contract with the creditor.[152]

14.3.2.5.7 Partial revocation of consent

A 2017 Eleventh Circuit decision holds that, just as a consumer can provide limited consent to receive robocalls, a consumer can also revoke consent partially.[153] In the case before it, the consumer had attempted to revoke consent to receive debt collection calls during her working hours. The court held that she had the right to do so and remanded for a jury determination of whether her instructions to the creditor were clear enough. The court noted that the creditor had indicated it was technologically feasible (although perhaps more expensive) to program its software to place calls to a consumer only at certain times, and that the creditor was always free to decide just to stop calling if this made more practical and business sense.

147 *In re* Rules & Regulations Implementing the Telephone Consumer Prot. Act of 1991, No. 02-278, Report & Order, 30 F.C.C. Rcd. 7961, at ¶ 62 (F.C.C. July 10, 2015). *See* Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674, 683 (D. Md. 2017) (declining to follow *Reyes*; noting its inconsistency with FCC's ruling).

148 ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687, 708 (D.C. Cir. 2018).

149 Thompson-Harbach v. USAA Fed. Sav. Bank, 2019 WL 148711 (N.D. Iowa Jan. 9, 2019) (disagreeing with *Reyes*; parties cannot preclude revocation of consent by contract, although they can specify a reasonable means of doing so); Ammons v. Ally Fin., Inc., 326 F. Supp. 3d 578, 592–593 (M.D. Tenn. 2018) (detailed analysis); Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674, 683 (D. Md. 2017).

150 *See* Thompson-Harbach v. USAA Fed. Sav. Bank, 2019 WL 148711 (N.D. Iowa Jan. 9, 2019) (construing contractual provision about the manner of revoking consent against the drafter).

151 Rodriguez v. Premier Bankcard, L.L.C., 2018 WL 4184742, at *7–10 (N.D. Ohio Aug. 31, 2018).

152 *See* Ginwright v. Exeter Fin. Co., 280 F. Supp. 3d 674, 683–684 (D. Md. 2017).

153 Schweitzer v. Comenity Bank, 866 F.3d 1273 (11th Cir. 2017).

14.3.2.6 Numerical Restrictions on Prerecorded Debt Collection Calls to Residential Lines

The TCPA prohibits placing a call that uses an artificial or prerecorded voice to a residential telephone line.[154] What constitutes a prerecorded or artificial voice call is discussed in § 14.3.2.4, *supra*.

Because of a series of exceptions, this prohibition applies primarily to telemarketing calls,[155] and does not apply to debt collection calls to residential lines.[156] One case has held that prerecorded debt collection calls erroneously directed to a non-debtor's landline violated the TCPA,[157] but the prevailing view is that all debt collection calls to a landline are exempt.[158]

However, the 2019 TRACED Act[159] requires the FCC to place limits on the number of calls that can be made pursuant

154 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3). *See* Zarder v. NCO Fin. Sys., Inc., 2014 WL 12594194 (W.D. Tex. Jan. 7, 2014) (fact question whether internet phone plan, which allowed access anywhere that subscriber had access to internet, is a "residential line").

155 *See* § 6.4.2, *infra*.

156 47 C.F.R. § 64.1200(a)(3)(iii), (f)(12). *See* Shupe v. JPMorgan Chase Bank, 671 Fed. Appx. 419 (9th Cir. 2016); Larsen v. AR Res., Inc., 2020 WL 1893850 (E.D. Va. Jan. 13, 2020) (recommending summary judgment for defendant), *granting of summary judgment noted by* 453 F. Supp. 3d 849, 851 (E.D. Va. 2020); Schlattmann v. Portfolio Recovery Assoc., L.L.C., 2017 WL 9883338 (E.D. Mo. Feb. 17, 2017); Vandiver v. Glob. Credit & Collection Corp., 2015 WL 11108884 (E.D. Ark. Mar. 30, 2015); Rantz-Kennedy v. Discover Fin. Services, 2013 WL 3167912 (D. Md. June 20, 2013), *aff'd*, 544 Fed. Appx. 183 (4th Cir. 2013); Zehala v. Am. Express, 2011 WL 4484297 (S.D. Ohio Sept. 26, 2011) (prohibition against artificial voice calls to residential lines is inapplicable to debt collection calls); Bentley v. Bank of Am., 773 F. Supp. 2d 1367 (S.D. Fla. 2011) (established business relationship exception allows artificial voice debt collection calls to residential lines). *See also In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559 (F.C.C. Jan. 4, 2008).

157 Watson v. NCO Group, Inc., 462 F Supp. 2d 641 (E.D. Pa. 2006) (holding that debt collection calls to non-debtors do not fall within now-repealed exception for calls to party with whom caller has preexisting business relationship, but also noting that FCC's authority to adopt any exceptions to prohibition, including those that still exist, is limited to calls that will not adversely affect privacy rights, and that collection calls to non-debtor are invasion of privacy, so cannot be exempted pursuant to this authority).

158 Meadows v. Franklin Collection Serv., 414 Fed. Appx. 230 (11th Cir. 2011); Herrera v. AllianceOne Receivable Mgmt., Inc., 170 F. Supp. 3d 1282 (S.D. Cal. 2016); Hoover v. Monarch Recovery Mgmt., Inc., 888 F. Supp. 2d 589 (E.D. Pa. 2012) (prerecorded voice calls to land line are exempt if for debt collection purposes, even if called party is non-debtor, except possibly when invasion of privacy is extreme); Franasiak v. Palisades Collection, L.L.C., 822 F. Supp. 2d 320 (W.D.N.Y. 2011) (artificial voice calls to non-debtor's residential telephone line did not violate TCPA because purpose was debt collection); Spencer v. Ariz. Premium Fin. Co., 2011 WL 4473178 (W.D.N.Y. Sept. 26, 2011) (artificial voice collection call to non-debtor falls within exception for calls for commercial purposes that do not include unsolicited advertisements or amount to telephone solicitations); Anderson v. AFNI, No. 2011 WL 1808779 (E.D. Pa. May 11, 2011) (artificial voice calls to non-debtor's land line are exempt if for debt collection purposes); Santino v. NCO Fin. Sys., Inc., 2011 WL 754874 (W.D.N.Y. Feb. 24, 2011).

159 Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, § 10(a), 133 Stat. 3274 (Dec. 30, 2019).

to these exemptions. At the end of 2020, the FCC announced a final rule that will limit these calls to three per month.[160] In addition, the caller must provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request,[161] and honor any such request.[162] As of mid-2021, this rule had not yet gone into effect, but was awaiting approval by the Office of Management and Budget.[163] In addition, a petition to amend the rule was pending before the FCC.[164]

Once the new rule goes into effect, TCPA remedies will be available for prerecorded or artificial voice debt collection calls that exceed three per month, and for any that are made after a do-not-call request. While the FDCPA also allows consumers to require debt collectors to cease contacting them,[165] most courts have ruled that statutory damages are capped at $1000 per lawsuit, no matter how many wrongful calls the collector made.[166] By contrast, the TCPA allows a separate statutory damage award for each violation.[167] In addition, the FDCPA itself does not provide a numerical cap on the number of calls that a collector can make, and rules published by the Consumer Financial Protection Bureau in 2020 would create a presumption that seven attempted calls per week or one telephone conversation every seven days is not an FDCPA violation.[168] The FCC's rule is an important limitation, in that it means that only three calls per month can be prerecorded or leave prerecorded messages.

14.3.2.7 Burden of Proof Regarding Exceptions

The general rule under the TCPA is that the person making the call has the burden of demonstrating that it falls within an exception to one of the TCPA's prohibitions.[169] Accordingly, the caller has the burden of establishing that it had the prior express consent of the called party to make an autodialed or an artificial or prerecorded call to a cell phone.[170] This is consistent with the general rule that the party claiming the benefit of an exception in a federal statute has the burden of coming forward with at least some evidence of the applicability of the exception.[171]

14.3.2.8 TCPA Remedies

14.3.2.8.1 Private cause of action; relief

The TCPA offers an express private cause of action for actual monetary loss or $500 damages for each violation, whichever is greater.[172] The statutory damage award can be trebled if the court finds that the defendant willfully or knowingly violated the statute or regulations.[173] Since debt collectors who make illegal calls to a debtor's cell phone usually make a series of such calls, the TCPA offers the possibility of a significant award even if actual damages are minimal. The TCPA does not provide for attorney fees, however.[174]

14.3.2.8.2 Who may sue

Generally, courts permit both the subscriber to sue, as well as the person who carries and regularly uses a cell phone, even though that person is not the subscriber.[175] Thus, the person who carries and regularly uses a cell phone may sue, even if someone else is the subscriber.[176] The owner of a cell phone also has standing to sue for calls made while the phone was in the possession of an investigator hired by the owner's attorney.[177] A non-debtor who receives an autodialed or

160 *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 2020 WL 7873750 (F.C.C. Dec. 30, 2020) (creating 47 C.F.R. § 64.1200(a)(3)(iii)).

161 47 C.F.R. § 64.1200(b)(3).

162 47 C.F.R. § 64.1200(a)(3)(iii).

163 *See In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 2020 WL 7873750, ¶ 42 (F.C.C. Dec. 30, 2020) (providing that rule will go into effect six months after OMB approval is published in the Federal Register).

164 Federal Communications Commission, Petition for Reconsideration of Action in Proceedings, 85 Fed. Reg. 18,934 (Apr. 12, 2021).

165 *See* § 5.10, *supra*.

166 *See* § 11.9.8.3, *supra*.

167 *See* National Consumer Law Center, Federal Deception Law § 6.12.2 (3d ed. 2017), *updated at* www.nclc.org/library.

168 CFPB, Final rule, 85 Fed. Reg. 76734 (Nov. 30, 2020) (publishing 12 C.F.R. § 1006.14(a)(2).

169 *See* National Consumer Law Center, Federal Deception Law § 6.11.5 (3d ed. 2017), *updated at* www.nclc.org/library.

170 *In re* Rules & Regulations Implementing the TCPA of 1991, 30 F.C.C. Rcd. 7961, at ¶¶ 13, 47, 58, 70, 85 (F.C.C. 2015), *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 declaratory ruling, but leaving this portion undisturbed); *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, n.68 (F.C.C. 2012) (in dispute, telemarketer has burden to prove that consumer gave written consent for call); Breda v. Cellco P'ship, 934 F.3d 1, 5 n.4 (1st Cir. 2019); Daubert v. NRA Grp., L.L.C., 861 F.3d 382, 390 (3d Cir. 2017); Van Patten v. Vertical Fitness Grp., 847 F.3d 1037 (9th Cir. 2017); Murphy v. DCI Biologicals Orlando, L.L.C., 797 F.3d 1302, 1304–1305 (11th Cir. 2015).

171 Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 128 S. Ct. 2395, 2400, 171 L. Ed. 2d 283 (2008) ("The burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."); FTC v. Morton Salt Co., 334 U.S. 37, 44–45, 68 S. Ct. 822, 92 L. Ed. 1196 (1948).

172 47 U.S.C. § 227(b)(3). *See generally* National Consumer Law Center, Federal Deception Law § 6.9 (3d ed. 2017), *updated at* www.nclc.org/library.

173 47 U.S.C. § 227(b)(3). *See generally* National Consumer Law Center, Federal Deception Law § 6.12.3 (3d ed. 2017), *updated at* www.nclc.org/library (interpretation of requirement of willfulness or knowledge).

174 *See* National Consumer Law Center, Federal Deception Law § 6.12.4 (3d ed. 2017), *updated at* www.nclc.org/library.

175 Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014); Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637, 640 (7th Cir. 2012). *See generally* National Consumer Law Center, Federal Deception Law § 6.3.6 (3d ed. 2017), *updated at* www.nclc.org/library.

176 Fini v. Dish Network, L.L.C., 955 F. Supp. 2d 1288 (M.D. Fla. 2013); Swope v. Credit Mgmt., L.P., 2013 WL 607830 (E.D. Mo. Feb. 19, 2013); Page v. Regions Bank, 917 F. Supp. 2d 1214 (N.D. Ala. 2012); Cellco P'ship v. Wilcrest Health Care Mgmt., 2012 WL 1638056 (D.N.J. May 8, 2012); D.G. v. William W. Siegel & Assoc., 791 F. Supp. 2d 622 (N.D. Ill. 2011).

177 Moore v. Dish Network L.L.C., 57 F. Supp. 3d 639, 648–650 (N.D. W. Va. 2014).

prerecorded cell phone call also has standing to bring a TCPA claim.[178] Someone who casually picks up the phone of another is probably not entitled to sue, however.[179]

14.3.2.9 Litigation Issues

14.3.2.9.1 Jurisdiction and class actions

State and federal courts have concurrent jurisdiction over TCPA suits.[180] Many courts have generally declined to exercise supplemental jurisdiction over defendants' counterclaims against TCPA plaintiffs to collect on the underlying debt.[181] One of the reasons that courts often cite is that exercising jurisdiction over these counterclaims would contradict federal policy concerns against automated telephone calls.[182] However, this view is not universal, and a number of courts have accepted jurisdiction over the defendant's counterclaim on the debt.[183]

TCPA cases are often appropriate for class certification.[184] The Second Circuit has held that a state law prohibiting class actions for statutory damages cannot be applied to a TCPA case in federal court.[185]

178 *See, e.g.*, Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014); Soppet v. Enhanced Recovery Co., L.L.C., 679 F.3d 637, 640 (7th Cir. 2012). *See generally* § 14.3.2.5, *supra*.

179 Leyse v. Bank of Am., 2010 WL 2382400 (S.D.N.Y. June 14, 2010) (roommate who picked up phone of telephone subscriber to whom call was placed does not have right to sue). *See* Kopff v. World Research Group L.L.C., 568 F. Supp. 2d 39 (D.D.C. 2008) (administrative assistant who picks up fax addressed to business does not have claim; business has claim).

180 Mims v. Arrow Fin. Services, L.L.C., ___ U.S. ___, 132 S. Ct. 740, 745, 181 L. Ed. 2d 881 (2012). *See generally* National Consumer Law Center, Federal Deception Law § 6.11.1 (3d ed. 2017), *updated at* www.nclc.org/library (more detailed discussion of jurisdiction).

181 Slaughter v. Reg'l Acceptance Corp., 2020 WL 7342898 (S.D. Ohio Dec. 14, 2020) (concluding that claims are sufficiently related, but declining supplemental jurisdiction because evidence for two claims will be different, and there will not be significant gains in economy or efficiency); Castillo v. J.P. Morgan Chase Bank, 2020 WL 496072 (N.D. Cal. Jan. 30, 2020); Ensz v. Chase Bank, 2019 WL 136982 (N.D. Iowa Jan. 7, 2019); Ammons v. Ally Fin., Inc., 305 F. Supp. 3d 818 (M.D. Tenn. 2018); Haire v. Tampa Truck Driving Sch., Inc., 2018 WL 2763305 (M.D. Fla. June 8, 2018); Tilley v. Ally Fin., Inc., 2018 WL 1535413 (E.D. Mich. Mar. 29, 2018); Watkins v. Synchrony Bank, 2015 WL 5178134 (M.D. Pa. Sept. 4, 2015); Ayres v. Nat'l Mgmt. Corp., 1991 WL 66845 (E.D. Pa. Apr. 25, 1991). *See also* France v. Ditech Fin., L.L.C., 2018 WL 1695405 (M.D. Fla. Apr. 6, 2018) (TCPA claim regarding collection calls for mortgage debt does not arise out of same operative facts as foreclosure, so was not compulsory counterclaim in creditor's prior state court foreclosure case). *See generally* Brief in Support of Plaintiff's Motion to Dismiss Counterclaim (sample brief), *available online as companion material to this treatise*; National Consumer Law Center, Fair Debt Collection § 12.7 (9th ed. 2018), *updated at* www.nclc.org/library (similar issue in FDCPA litigation).

182 *See, e.g.*, Ensz v. Chase Bank, 2019 WL 136982 (N.D. Iowa Jan. 7, 2019).

183 *See, e.g.*, Nalan v. Access Fin., Inc., 2020 WL 6270945 (N.D. Cal. Oct. 23, 2020); Walker v. Westlake Fin. Services, L.L.C., 2020 WL 3268523 (N.D. Ill. June 17, 2020) (accepting jurisdiction over counterclaim where debt arose from contract about which defendant made collection calls, and the contract contains a clause consenting to collection robocalls); Dotson v. Ally Fin. Inc., 2019 WL 5847848 (W.D. Tenn. Nov. 7, 2019) (allowing counterclaim for underlying debt where contract included a clause agreeing to robocalls); Neria v. Dish Network, L.L.C., 2019 WL 8331600 (W.D. Tex. Oct. 28, 2019); Trupp v. Ally Fin., Inc., 2018 WL 2462777 (E.D. Pa. May 31, 2018) (finding counterclaim for debt to relate to underlying transaction that it is compulsory; accepting supplemental jurisdiction); Miller v. 3G Collect, L.L.C., 302 F.R.D. 333 (E.D. Pa. 2014) (counterclaim was compulsory); Horton v. Calvary Portfolio Services, L.L.C., 301 F.R.D. 547 (S.D. Cal. 2014) (counterclaim for breach of contract was compulsory).

184 *See, e.g.*, Meyer v. Portfolio Recovery Assoc., 707 F.3d 1036 (9th Cir. 2012) (allowing provisional class certification and noting that respondent to TCPA suit failed to show that express consent was given prior to any of the calls being placed); Knapper v. Cox Commc'ns, Inc., 329 F. Supp. 3d 238 (D. Ariz. Feb. 6, 2019) (certifying class; plaintiffs' proposed methods of identifying consumers who received wrong number debt collection calls is sufficient); West v. Cal. Services Bur., Inc., 323 F.R.D 295 (N.D. Cal. 2017) (calls to wrong numbers can be identified on class-wide basis by using reverse number look-up service); Caldera v. Am. Med. Collection Agency, 320 F.R.D. 513 (C.D. Cal. 2017) (certifying class; person who is not intended recipient of call can represent class that includes intended recipients when claim is that defendant robocalled numbers based on skip-tracing rather than consent); McMillion v. Rash Curtis & Assoc., 2017 WL 3895764 (N.D. Cal. Sept. 6, 2017) (certifying class of persons whose telephone numbers were obtained by skip-tracing); Johnson v. Ally Fin., Inc., 2017 WL 3433689 (M.D. Pa. Aug. 10, 2017) (refusing to strike class action allegations; class consisting of all persons who received an autodialed call from defendant when defendant does not have business record of prior express consent is ascertainable and not a fail-safe class); Allard v. SCI Direct, Inc., 2017 WL 3236448 (M.D. Tenn. July 31, 2017); Johnson v. Navient Solutions, Inc., 315 F.R.D. 501 (S.D. Ind. 2016) (certifying class); Manno v. Healthcare Revenue Recovery Group, L.L.C., 289 F.R.D. 674 (S.D. Fla. 2013); Lo v. Oxnard European Motors, L.L.C., 2012 WL 1932283 (S.D. Cal. May 29, 2012); Mitchem v. Illinois Collection Serv., 271 F.R.D. 617 (N.D. Ill. 2011); Balbarin v. N. Star Capital Acquisition, L.L.C., 2011 U.S. Dist. LEXIS 686 (N.D. Ill. Jan. 5, 2011), *later op. at* 2011 WL 211013 (N.D. Ill. Jan. 21, 2011), *later op. at* 2011 U.S. Dist. LEXIS 58761 (N.D. Ill. June 1, 2011). *But cf.* Lanteri v. Credit Prot. Ass'n L.P., 2018 WL 4625657 (S.D. Ind. Sept. 26, 2018) (certifying class of persons who continued to receive text messages after texting "STOP," but denying certification of class of debtors in bankruptcy who received debt collection text messages while automatic stay was in effect because of difficulty in identifying them); Selby v. LVNV Funding, L.L.C., 2016 WL 6677928 (S.D. Cal. June 22, 2016) (individual fact questions regarding whether debtors gave prior express consent to receive collection calls preclude class certification); Balthazor v. Cent. Credit Services, 2012 WL 6725872, at *3–4 (S.D. Fla. Dec. 27, 2012) (question whether called parties had given prior express consent is individual issue that prevents class certification); Hicks v. Client Services, 2008 WL 5479111 (S.D. Fla. Dec. 11, 2008) (denying class certification of TCPA claim because of individual fact questions regarding express consumer consent to receive autodialed calls, but certifying class on FDCPA claim), *later op. at* 257 F.R.D. 699 (S.D. Fla. 2009) (denying motion to decertify FDCPA class and finding that class action is superior method of adjudicating FDCPA claims when individual claims would result in *de minimis* recoveries). *See generally* National Consumer Law Center, Federal Deception Law § 6.12.5 (3d ed. 2017), *updated at* www.nclc.org/library (more detailed discussion of TCPA class actions).

185 Bank v. Independence Energy Group L.L.C., 736 F.3d 660 (2d Cir. 2013). *See generally* National Consumer Law Center, Federal Deception Law § 6.12.5 (3d ed. 2017), *updated at* www.nclc.org/library.

14.3.2.9.2 Article III standing

Any attorney bringing a TCPA case in federal court must be prepared to rebut a claim that the court lacks Article III standing over the claim. This section briefly discusses these issues, which are developed in detail in NCLC's Federal Deception Law.[186]

Article III, section 2, of the United States Constitution limits the judicial power of federal courts to cases and controversies. To qualify as a case or controversy, a plaintiff in federal court must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.[187] To establish an injury in fact, a plaintiff must have suffered an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[188]

When the injury is intangible, the Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins*[189] summarizes two approaches to meet the requirement of concreteness. First, courts should consider "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[190] As the Court noted, "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure. *See, e.g.*, Restatement (First) of Torts §§ 569 (libel), 570 (slander per se) (1938)."[191] Many decisions since *Spokeo* have applied this approach to hold that TCPA plaintiffs have Article III standing because the invasion of privacy caused by unwanted calls is closely related to the harm made actionable by the common law tort of invasion of privacy.[192] In 2021, the Supreme Court gave strong support to this conclusion in *TransUnion L.L.C. v. Ramirez*, which specifically cites intrusion upon seclusion as a type of intangible harm that is concrete.[193] This decision provides strong support for the many lower court decisions holding that, because of the analogy to common law invasion of privacy claims, federal courts have Article III jurisdiction to hear claims that unwanted calls violate the TCPA.

Second, *Spokeo* holds that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[194] It "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[195] The Supreme Court's 2021 *Ramirez* decision throws into some confusion the question of how much weight courts should give to the judgment of Congress.[196] However, at a minimum it is clear that, where the harm is an invasion of privacy that is actionable at common law, the clear and unequivocal judgment of Congress that private suits should be allowed is strong additional support for the view that courts have Article III jurisdiction to hear such claims.

Unwanted calls also intrude upon and occupy the user's cell phone, which is closely analogous to the common law tort of trespass to chattels, and which Congress also identified as one of the harms the TCPA was intended to address.[197] They also cause nuisance, inconvenience, distraction, and waste of time, which Congress also identified as one of the reasons for the TCPA.[198]

The overwhelming majority of decisions since *Spokeo* have held that unwanted robocalls cause particularized and concrete harm, so a plaintiff asserting a TCPA claim has Article III standing.[199] However, the application of *Spokeo* and *Ramirez* is still being developed by the courts, and advocates should be prepared to plead and prove the concrete harms caused by any robocalls, and to brief the issue carefully.

14.3.2.9.3 Liability of creditors for debt collectors' violations; corporate officers and individuals

Creditors are liable for improper autodialed or prerecorded calls to cell phones by their debt collectors.[200] In a 2008

186 National Consumer Law Center, Federal Deception Law § 6.10 (3d ed. 2017), *updated at* www.nclc.org/library.

187 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

188 *Id.* 136 S. Ct. at 1540.

189 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016).

190 *Id.*

191 *Id.*

192 *See* National Consumer Law Center, Federal Deception Law §§ 6.10.3.2.1, 6.10.3.5 (3d ed. 2017), *updated at* www.nclc.org/library.

193 ___ U.S. ___, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021).

194 Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

195 *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (J. Kennedy, concurring)).

196 *See* National Consumer Law Center, Practice Implications of June 25 Supreme Court Ramirez Decision (June 30, 2021), *available at* https://library.nclc.org.

197 *See* National Consumer Law Center, Federal Deception Law § 6.10.3.3 (3d ed. 2017), *updated at* www.nclc.org/library.

198 *See* National Consumer Law Center, Federal Deception Law § 6.10.3.4 (3d ed. 2017), *updated at* www.nclc.org/library.

199 *See, e.g.*, Glasser v. Hilton Grand Vacations Co., L.L.C., 948 F.3d 1301, 1305–1306 (11th Cir. 2020) (receipt of more than one telemarketing call); Cordoba v. DirecTV, L.L.C., 942 F.3d 1259 (11th Cir. 2019) (receipt of more than one unwanted telemarketing call in violation of TCPA—here, the internal do-not-call list requirement—is concrete injury); Golan v. FreeEasts.com, 930 F.3d 950 (8th Cir. 2019) (plaintiffs who received two answering machine messages from telemarketer have standing); Krakauer v. Dish Network, L.L.C., 925 F.3d 643 (4th Cir. 2019); Melito v. Experian Mktg. Solutions, Inc., 923 F.3d 85, 93–94 (2d Cir. 2019) (receipt of unwanted text messages is concrete harm and no additional harm need be shown); Romero v. Dep't Stores Nat'l Bank, 725 Fed. Appx. 537 (9th Cir. 2018); Manuel v. NRA Grp. L.L.C., 722 Fed. Appx. 141 (3d Cir. 2018); Susinno v. Work Out World, Inc., 862 F.3d 346 (3d Cir. 2017); Van Patten v. Vertical Fitness Grp., 847 F.3d 1037 (9th Cir. 2017). ***But see*** Grigorian v. FCA US L.L.C., 838 Fed. Appx. 390 (11th Cir. 2020) (finding receipt of single ringless voicemail not to be concrete injury where it wasted plaintiff's time, but did not render her device unusable for any period of time; stating in note 27 that analysis might be different if she had received multiple voicemails); Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019) (concluding that consumer who received just single text message lacked standing; discussed in more detail in text of this subsection). *See generally* National Consumer Law Center, Federal Deception Law § 6.10.3.5 (3d ed. 2017), *updated at* www.nclc.org/library (additional decisions from lower courts).

200 *See generally* National Consumer Law Center, Federal Deception Law § 6.9.2 (3d ed. 2017), *updated at* www.nclc.org/library.

ruling, the FCC determined that: "[A] creditor on whose behalf an autodialed or prerecorded message call is made to a wireless number bears the responsibility for any violation of the Commission's rules. Calls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call."[201]

Even if the FCC had not issued this ruling, as a general rule creditors would still be liable based on common law agency principles for the TCPA violations of the debt collectors they hire.[202] A 2013 Declaratory Ruling by the FCC, while dealing only with telemarketers' TCPA violations, recognizes that it is appropriate to apply common law agency principles to hold parties vicariously liable under federal statutes, including the TCPA.[203] In a 2016 decision, the Supreme Court specifically approved of the FCC's position.[204]

The FCC did not address joint venture liability in its 2013 ruling. However, joint venture liability is entirely consistent with the common law agency principles it articulated in that ruling.[205] A parent company may be liable for the acts of its subsidiary if the parent company is so dominant that the subsidiary's corporate form is little more than a legal fiction.[206] Vicarious liability can also extend to subcontractors who hire entities that violate the TCPA.[207] On the other hand, some courts have concluded that aiding and abetting liability is not available as a general rule under federal statutes, including the TCPA.[208]

Many courts have also applied the general rule that corporate officers or other individuals can be liable if they personally participate in wrongful conduct.[209]

14.3.2.9.4 Statute of limitations and other defenses

Most courts have held that TCPA claims are governed by the general four-year statute of limitations for claims under federal statutes.[210] Since the statute of limitations for a TCPA claim is set by statute, laches is not a defense.[211]

201 In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, FCC Release 07-232, 2008 WL 65485, at ¶ 10 (Jan. 4, 2008). *See* Beammert v. Credit One Bank, 271 F. Supp. 3d 1043 (W.D. Wis. 2017) (creditor is liable for debt collector's call even if consumer does not plead agency relationship); Harrington v. RoundPoint Mortg. Servicing Corp., 163 F. Supp. 3d 1240 (M.D. Fla. 2016) (deferring to FCC's ruling); Hartley-Culp v. Green Tree Servicing, L.L.C., 52 F. Supp. 3d 700 (M.D. Pa. 2014); Martin v. Cellco P'ship, 2012 WL 5048854 (N.D. Ill. Oct. 18, 2012) (rejecting Verizon's claim that "it cannot be held liable for automated dunning calls placed by Vantage and Chase to Plaintiff's cell phone," relying on the FCC ruling); *In re* The Joint Petition Filed by DISH Network, L.L.C., the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, F.C.C. 13-54, CG Docket No. 11-50, at ¶ 38 (F.C.C. May 9, 2013) (reiterating 2008 conclusion that creditors are liable for autodialed or prerecorded calls made on their behalf by collectors to wireless numbers). *But see* Petri v. Mercy Health, 2016 WL 7048893 (E.D. Mo. Dec. 5, 2016) (holding creditor not liable for debt collector's violations because collector was independent contractor; court appears to be unaware of FCC's 2008 ruling); Strauss v. CBE Grp., Inc., 173 F. Supp. 3d 1302 (S.D. Fla. 2016) (applying agency law to determine whether creditor is vicariously liable for collector's calls; court appears to be unaware of FCC's 2008 ruling).

202 *See, e.g.*, Eldridge v. Cabela's Inc., 2017 WL 4364205 (W.D. Ky. Sept. 29, 2017) (applying agency principles to debt collection robocalls; finding allegations sufficient that retailer gave actual implied agency to bank that was wholly-owned subsidiary and that issued and collected on store credit cards; ratification also sufficiently alleged); Lawrence v. Am. Med. Collection Agency, 2015 WL 12762024 (M.D. Fla. Nov. 16, 2015) (applying common law agency principles to debt collection robocalls; fact question whether call center was debt collector's agent).

203 In the Matter of The Joint Petition Filed by DISH Network, L.L.C., the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, 2013 WL 1934349 (F.C.C. May 9, 2013).

204 Campbell-Ewald Co. v. Gomez, ___ U.S. ___, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016) ("[T]he Federal Communications Commission has ruled that, under federal common-law principles of agency, there is vicarious liability for TCPA violations." (citing *In re Joint Petition Filed by Dish Network, L.L.C.*, 28 F.C.C. Rcd. 6574 (F.C.C. 2013)) "The Ninth Circuit deferred to that ruling, 768 F.3d, at 878, and we have no cause to question it.").

205 *See generally* National Consumer Law Center, Federal Deception Law § 6.9.2.7 (3d ed. 2017), *updated at* www.nclc.org/library.

206 *See* Zarichny v. Complete Payment Recovery Services, Inc., 80 F. Supp. 3d 610 (E.D. Pa. 2015) (articulating this test, but finding allegations insufficient; company not liable for autodialed prerecorded debt collection calls made by its debt collection subsidiary on behalf of a third party creditor).

207 *See, e.g.*, Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014) (third-party marketing consultant, here a government contractor, can be liable on agency principles if an entity to which it outsources the work violates the TCPA), *aff'd*, ___U.S. ___, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

208 Clark v. Avatar Technologies, 2014 WL 309079 (S.D. Tex. Jan. 28, 2014); Baltimore-Washington Tel. Co. v. Hot Leads Co., 584 F. Supp. 2d 736, 738 (D. Md. 2008). *See generally* National Consumer Law Center, Federal Deception Law § 6.9.2.7 (3d ed. 2017), *updated at* www.nclc.org/library.

209 Jackson Five Star Catering, Inc. v. Beason, 2013 WL 5966340 (E.D. Mich. Nov. 8, 2013); Brennan v. Nat'l Action Fin. Services, Inc., 2012 WL 3888218 (E.D. Mich. Sept. 7, 2012); Baltimore-Washington Tel. Co. v. Hot Leads Co., 584 F. Supp. 2d 736 (D. Md. 2008) (dismissing civil conspiracy claim, but noting that individual officers could still be liable jointly and severally for violating TCPA's prohibition of "war dialing"); Texas v. Am. Blast Fax, Inc., 164 F. Supp. 2d 892 (W.D. Tex. 2001); Weber v. U.S. Sterling Sec., Inc., 924 A.2d 816 (Conn. 2007) (while principals of limited liability company cannot be held liable for junk faxes solely because of their position with the company, they can be held liable for their own wrongful acts); Covington & Burling v. Int'l Mktg. & Research, Inc., 2003 WL 21384825 (D.C. Super. Ct. Apr. 17, 2003), *as amended on reconsideration by* 2003 D.C. Super. LEXIS 28 (D.C. Super. Ct. May 17, 2003). *See generally* National Consumer Law Center, Federal Deception Law § 6.9.2.7 (3d ed. 2017), *updated at* www.nclc.org/library.

210 28 U.S.C. § 1658(a). *See, e.g.*, Bank v. Independence Energy Grp., L.L.C., 736 F.3d 660 (2d Cir. 2013). *See generally* National Consumer Law Center, Federal Deception Law § 6.11.6 (3d ed. 2017), *updated at* www.nclc.org/library.

211 Suzanne Degnan, D.M.D., P.C. v. Dentis USA Corp., 2017 WL 2021085 (E.D. Mo. May 12, 2017).

Neither good faith, nor the maintenance of reasonable procedures to avoid violations, is a defense to a claim involving the TCPA's restrictions on robocalls.[212]

14.3.2.9.5 Other litigation issues

NCLC's Federal Deception Law[213] includes detailed discussion of other TCPA litigation issues, including:

- Pleading;[214]
- Investigation and discovery;[215]
- Arbitration clauses;[216]
- Evidence and trial issues;[217]
- Liability of federal contractors;[218]
- Recovery from the defendant's insurance policy;[219]
- Government enforcement;[220] and
- Parallel claims under state statutes.[221]

14.3.3 Caller ID and Debt Collection

14.3.3.1 Generally

Caller ID is a service that allows a subscriber to view the telephone numbers, including unlisted numbers, that are associated with incoming telephone calls.[222] Caller ID issues related to debt collection can arise in at least two different ways.

First, debt collectors when calling consumers or third parties may "spoof" or falsify caller ID information to encourage those called to answer the phone. Spoofing is widespread, and only specifically illegal under certain circumstances.

Second, debt collectors may use Caller ID to capture a consumer's phone number when the consumer initiates the call to the collector, even though the consumer does not want to disclose the calling number to the collector. The collector then turns around and contacts that consumer on that number.

This section addresses both of these situations. It examines FDCPA and Truth in Caller ID Act claims for a debt collector's spoofing. It also provides advice for consumers about the risks of debt collectors using Caller ID to capture the consumer's phone number when the consumer calls the collector, even when the consumer uses call blocking.

14.3.3.2 Spoofing and The Truth in Caller ID Act

The Truth in Caller ID Act of 2009[223] amended the Telephone Consumer Protection Act to make it unlawful for any person to transmit misleading or inaccurate caller ID information with the intent to defraud, cause harm, or wrongfully obtain anything of value. The FCC has adopted Truth in Caller ID Act regulations,[224] which closely follow the requirements of the Act itself.

The Truth in Caller ID Act is an attempt to prevent spoofing (that is, the falsification of caller ID information), address fraudulent phone calls, credit card fraud, and identity theft, and protect legitimate use of caller ID.[225] Violations center upon whether the person or entity transmitting or displaying the incorrect caller identification information had ill intent or meant to cause harm.[226] Harm is to be broadly construed to include financial, physical, and emotional harm, and harassment.[227]

The Act's prohibitions apply to "any person within the United States,"[228] so there can be no question that the Act applies to third-party debt collectors, debt buyers, creditors, and any other individual who may manipulate caller ID information. Exemptions are limited to authorized actions of law enforcement agencies, including protective and intelligence activities, and court orders.[229]

The Act provides that violators are subject to civil forfeiture penalties, fines, and imprisonment.[230] States can bring actions as *parens patriae* for their residents to enforce the statute.[231] The Act does not provide for a private cause of action against the party that manipulates caller ID information,[232] and cases

212 Berman v. Freedom Fin. Network, 400 F. Supp. 3d 964, 979 (N.D. Cal. 2019) (good faith is not defense); Denova v. Ocwen Loan Servicing, L.L.C., 2018 WL 1832901, at *5–6 (M.D. Fla. Jan. 25, 2018) (these are not defenses to claim of violation of § 227(b)); O'Shea v. Am. Solar Sol., Inc., 2016 WL 11620998 (S.D. Cal. Nov. 7, 2016).

213 National Consumer Law Center, Federal Deception Law § 6.11.3 (3d ed. 2017), *updated at* www.nclc.org/library.

214 *Id.*

215 National Consumer Law Center, Federal Deception Law § 6.11.5 (3d ed. 2017), *updated at* www.nclc.org/library.

216 National Consumer Law Center, Federal Deception Law § 6.11.2 (3d ed. 2017), *updated at* www.nclc.org/library.

217 National Consumer Law Center, Federal Deception Law § 6.11.5a (3d ed. 2017), *updated at* www.nclc.org/library.

218 National Consumer Law Center, Federal Deception Law § 6.9.2.8 (3d ed. 2017), *updated at* www.nclc.org/library.

219 National Consumer Law Center, Federal Deception Law § 6.11.7 (3d ed. 2017), *updated at* www.nclc.org/library.

220 National Consumer Law Center, Federal Deception Law § 6.13 (3d ed. 2017), *updated at* www.nclc.org/library.

221 National Consumer Law Center, Federal Deception Law § 6.12.6 (3d ed. 2017), *updated at* www.nclc.org/library.

222 Nat'l Ass'n of Consumer Agency Administrators, *Caller ID: Whose Privacy Needs Protection?*, 43 NACAA News 1 (Mar. 1990).

223 47 U.S.C. § 227(e).

224 47 C.F.R. § 64.1604, *added by* 76 Fed. Reg. 43,196 (July 20, 2011).

225 *See* 156 Cong. Rec. H8376, H378 (Dec. 15, 2010). *See also* Teltech Sys., Inc. v. Bryant, 702 F.3d 232 (5th Cir. 2012) (holding that Truth in Caller ID Act pre-empts Mississippi's similar but more protective state statute, which would outlaw "nonharmful" spoofing, because Congress intended to protect legitimate spoofing practices that could be beneficial, not harmful).

226 Implementation of the Truth in Caller ID Act, 76 Fed. Reg. 43,196, at ¶ 5 (July 20, 2011).

227 76 Fed. Reg. 43,196 at ¶ 10 (July 20, 2011).

228 47 U.S.C. § 227(e)(1).

229 76 Fed. Reg. 43,196 at ¶¶ 11–12 (July 20, 2011).

230 47 U.S.C.§ 227(e)(5).

231 47 U.S.C. § 227(e)(6)(A).

232 *See* Dobronski v. Selectquote Ins. Services, 462 F. Supp. 3d 784 (E.D. Mich. 2020) (no private cause of action for caller ID spoofing); McDermet v. John C. Heath, Attorney at Law, P.L.L.C., 2018 WL 627371 (D. Mass. Jan. 30, 2018) (no private cause of action for caller ID spoofing in violation of Truth in Caller ID Act); Meyer v. Capital All. Grp., 2017 WL 5138316 (S.D. Cal. Nov. 6, 2017) (finding no private

claiming violations under the FDCPA for misleading caller-ID information have been mixed.[233]

One weakness in the Truth in Caller ID Act protections is that debt collectors—and many other industry callers—typically purchase the right to display thousands of telephone numbers in their caller-ID. This practice allows a caller to place a call from a call center in one state, but manipulate the caller-ID that appears on the consumer's telephone as a local number, thus making it appear that the number is from someone in the consumer's neighborhood.[234] As the caller actually owns the telephone number which appears on the consumer's caller-ID, the callers are generally successful when they argue that there is no deception involved.[235]

14.3.3.3 FDCPA and Other Claims for Falsifying Caller ID Information

Section 1692d(6) of the Fair Debt Collection Practices Act (FDCPA) prohibits "the placement of telephone calls without meaningful disclosure of the caller's identity." Meaningful disclosure has been defined as including the caller's name, the collection company's name, and the nature of the caller's business.[236] A federal court found a FDCPA § 1692d(6) violation where the debt collector transmitted the name "Jennifer Smith" to the recipient's caller ID device to lure the recipient to answer the phone, where no Jennifer Smith worked for the debt collector.[237] Other courts have also found that the deliberate display of an incorrect name on the caller-ID violates this section.[238]

On the other hand, several courts have found no violation where the collector merely blocked any information from displaying on the consumer's caller ID device.[239] These courts require for a violation that the caller ID information be false instead of just blank, as long as the collector later properly identifies itself once the consumer answers the phone. The converse may not be true: a debt collector cannot avoid identifying itself when the consumer answers the phone even if the caller ID information identified the collector.[240] Federal courts have also found no FDCPA violation where the collector caused local numbers to be displayed on the consumer's caller-ID, even though the collector was not calling from a local place.[241] However, at least one court has held that an allegation that a caller deliberately making phone calls that circumvent call-blocking devices and transmit misleading or inaccurate caller information to make it appear that the call originates locally states a claim under the state UDAP statute.[242] The case involved a company that was using UDAP statutes may also provide an avenue to hold a company liable for selling a Caller ID spoofing program to a caller who uses it to make abusive calls, although the First Circuit has rejected such a claim.[243]

14.3.3.4 Consumers' Ability to Keep Their Phone Numbers Private

Caller ID technology is particularly troublesome for consumers who wish to preserve the privacy of their telephone numbers and locations. Consumers may wish to keep their phone numbers private from creditors and collection agencies

cause of action to enforce § 64.1601(e)); Free Conferencing Corp. v. Comcast Corp., 2016 WL 7637664 (C.D. Cal. May 31, 2016) (finding no private cause of action to enforce Truth in Caller ID Act); Clark v. Avatar Techs. Phl, Inc., 2014 WL 1342033, at *3 (S.D. Tex. Apr. 3, 2014) (finding no private right of action to enforce TCIA; only United States can exact forfeiture penalty). See also National Consumer Law Center, Federal Deception Law § 6.6.5 (3d ed. 2017), *updated at* www.nclc.org/library.

233 *See* § 14.3.3.3, *infra*.

234 How Caller ID Works: Common Questions and Answers, https://www.onsip.com; What Is Caller ID And How Does It Work?, https://calleridreputation.com.

235 Bien v. Stellar Recovery, Inc., 2015 WL 5554670, at *2–3 (D.R.I. Sept. 21, 2015) (dismissing claim against collector after its calls used Rhode Island area code to be displayed on consumer's caller-ID when call was not actually initiated within Rhode Island); Scheffler v. Integrity Fin. Partners, Inc., 2013 WL 9768539, at *4 (D. Minn. Oct. 28, 2013), Elliott v. GC Services, L.P., 2011 WL 5975671, at *3 (M.D. Fla. Nov. 28, 2011) (granting summary judgment motion for defendant on § 1692e(10) claim because there was no FDCPA violation when debt collector allowed its own "800" phone number to appear on consumer's caller-ID, even though that was not number from which collector placed call); Carman v. CBE Grp., Inc., 782 F. Supp. 2d 1223, 1233–1234 (D. Kan. 2011) ("Although plaintiff complains that her caller ID did not reveal CBE's identity or name, there is no evidence that CBE blocked this information or made any attempt to deceive her. In this case, the only information conveyed on plaintiff's caller ID display was CBE's phone numbers, which were entirely accurate.").

236 Wood v. GC Services, L.P., 2012 WL 987761 (M.D. Fla. Jan. 26, 2012), *adopted in relevant part, rejected in part on other grounds by* 2012 WL 995207 (M.D. Fla. Mar. 23, 2012).

237 Knoll v. Allied Interstate, Inc., 502 F. Supp. 2d 943 (D. Minn. 2007).

238 Sohns v. Bramacint, L.L.C., 2010 WL 3926264, at *3 (D. Minn. Oct. 1, 2010) (debt collector liable for violations of §§ 1692d through 1692f for displaying name of consumer's mother-in-law on caller-ID).

239 *See* Genaw v. NCO Fin. Sys., Inc., 2013 WL 1876792, at *2 (N.D. Tex. May 6, 2013); Glover v. Client Services, Inc., 2007 WL 2902209, at *3 (W.D. Mich. Oct. 2, 2007) (granting motion to dismiss; debt collector did not violate FDCPA by blocking Caller ID, so that consumer's phone display stated that caller's identity was "not available"). *Cf.* Udell v. Kansas Counselors, Inc., 313 F. Supp. 2d 1135, 1143 (D. Kan. 2004) (if the debt collector used some form of caller identification blocking device, there might be violation of FDCPA).

240 *See* Tedeschi v. Kasen Credit Corp., 2014 WL 1491173, at *5 (D. Conn. Apr. 15, 2014) (debtor's testimony that collector refused to identify herself, although he saw KCC's telephone number on his telephone caller ID, will establish violation of § 1692d(6) if believed by jury).

241 Bermudez v. Diversified Consultants Inc., 2019 WL 415569 (E.D. Pa. Feb. 1, 2019) (dismissing consumer's case because § 1692e manifests intent of Congress to protect consumers from being misled about nature of who debt collector on phone is, not merely where that debt collector is calling from); Mendoza v. Diversified Consultants, Inc., 2019 WL 2524117, at *5 (E.D. Pa. June 18, 2019) (defendant was not providing false information in violation of FDCPA when it used telephone numbers with plaintiff's area code to contact plaintiff).

242 Spiegel v. Carlson, 2016 WL 5477529, at *6 (N.D. Ill. Sept. 29, 2016) (denying defendant's motion for judgment on pleadings).

243 Walsh v. TelTech Sys., Inc., 821 F.3d 155, 157 (1st Cir. 2016) (no claim is available under Massachusetts UDAP against supplier of prepaid minutes-based calling service, named SpoofCard, that allows customers to disguise phone number from which they place calls).

to avoid repeated or harassing phone calls. Such consumers may unwittingly give debt collectors their telephone numbers by simply calling the collector from a phone without a caller ID block.

FCC regulations require interstate carriers to give calling parties a free, uniform method of blocking caller ID.[244] With "per-call blocking," a caller who wishes to conceal their number dials *67 before dialing the recipient's phone number. FCC rules require interstate carriers to advise customers of this option and to honor the request for privacy.[245]

Under the per-call blocking option, *67 must be dialed before each call to activate the blocking of the caller's name or number. Telephone companies may also offer "per-line blocking," which prevents the caller's number from appearing on caller ID devices for every call made from a particular phone line.[246] If a caller with per-line blocking wishes to share their calling number or name with a call recipient, *82 should be dialed before each such call.

Consumers should contact their local telephone company or state utility commission[247] for current information regarding caller ID and line blocking. While wireless phone service rates generally cannot be regulated by state commissions, aspects of per-call blocking and per-line blocking not addressed by the FCC may be considered "services" left to regulation by the states.[248]

Call blocking is not foolproof; there are ways in which the debt collector can "unmask" the number from which a consumer has called, even if the consumer opts to block caller ID. The FCC has noted its concern with the practice of unmasking caller ID numbers which have been blocked, but has declined to rule on this issue due to lack of support in the record.[249]

Consumers also should be aware of another major loophole regarding their ability to mask their phone numbers. Unlisted numbers, line blocking, or *67 will not protect the privacy of callers who dial an 800, 888, 887, 866, or 855 number.[250] These three-digit codes indicate that the number is toll-free to the caller: the called party pays for the call. Carriers may provide the telephone number of the caller to the toll-free number subscriber for billing purposes, a service known as automatic number identification (ANI).[251]

FCC rules require carriers offering ANI to restrict, by contract or tariff, their ANI customers' re-use or sale of the numbers, but the scope of the restriction is not clear.[252] Callers' phone numbers may be used by ANI customers (the call recipients) to perform "services that are the subject of the originating telephone subscribers' call" or "transactions" or to make an offer of a product or service "directly related to" the products or services which the calling-party has previously obtained from the called-party.[253]

A service that Western Union set up by which collection agencies and creditors could capitalize on this privacy loophole has been held to amount to debt collection, subjecting Western Union to the Fair Debt Collection Practices Act.[254] Under its scheme, Western Union sent a message asking the consumer to call it. Then, Western Union used caller ID technology to obtain the consumer's unlisted telephone number for its client, the collection agency or creditor. The Ninth Circuit agreed with FTC staff that the Fair Debt Collection Practices Act applied to this activity, which amounted to an indirect attempt to collect a debt.[255] The court also noted Western Union's probable violation of the Federal Communications Commission regulations governing automatic number identification.[256]

Consumers who wish to preserve the privacy of their personal phone numbers should use a phone other than their personal phone for calls to creditors' toll-free numbers. If a consumer's call to a creditor or collector's toll-free number is followed by dunning phone calls to the consumer's unpublished number, the consumer's attorney should consider whether the

244 47 C.F.R. §§ 64.1600 to 64.1603.

245 47 C.F.R. §§ 64.1601, 64.1603.

246 *See, e.g.*, 66 Pa. Cons. Stat. Ann. § 2906(b) (no charge permitted for per-call blocking and charge may be approved for per-line blocking in certain conditions by state utility commission); 16 Tex. Admin. Code § 26.123(b) (free per-call blocking and free line-blocking in certain circumstances).

247 The website for the National Association of Regulatory Utility Commissioners has a link to the state utility commissions' websites at www.naruc.org.

248 47 U.S.C. § 332(c)(3) (generally prohibiting states from regulating wireless rates, but without prohibiting regulation of other terms and conditions of service); 16 Tex. Admin. Code § 26.123 (Texas caller ID regulations apply to wireless, except for requirement of free blocking service).

249 76 Fed. Reg. 43,196 at ¶ 32 (July 20, 2011) (leaving issue of caller ID unmasking open for possible future rulemaking).

250 *See* 47 C.F.R. § 64.1602(a)(1), 64.1602(a)(2) (person subscribing to ANI services can use the interstate call's telephone number in a number of ways).

251 47 C.F.R. § 64.1600 (defining ANI as "refer[ring] to the delivery of the calling party's billing number by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users").

252 47 C.F.R. § 64.1602.

253 47 C.F.R. §§ 64.1602(a)(1), 64.1602(b)(2).

254 Romine v. Diversified Collection Services, Inc., 155 F.3d 1142 (9th Cir. 1998). *Accord* Udis v. Universal Communications Co., 56 P.3d 1177 (Colo. Ct. App. 2002) (business that sent telegram-like messages to individuals so that it could capture phone numbers, without consumers' knowledge or consent, when special number was dialed to retrieve a message, was collection agency under state fair debt collection law). *But see* Lockemy v. Comprehensive Collection Services, Inc., 1998 WL 832655 (N.D. Ill. Nov. 20, 1998) (distinguishing *Romine*; defendant not debt collector when it did not request debtors receiving its "Priority Gram" to contact it and did not obtain information from debtors).

255 LeVine, FTC Informal Staff Letter (Mar. 20, 1998) ("Telewire Electronic Message" sent to consumer-debtors serves collection function); Stanley, FTC Informal Staff Letter (Sept. 13, 1996) ("Telegram Notification" sent to consumer-debtors serves collection function). *See also* Bergstrom, FTC Informal Staff Letter (Nov. 17, 1995) (to extent that letter which proposes to obtain alleged debtors' telephone numbers to pass on to collection agencies serves collection function, albeit indirectly, company sending letter would be covered by FDCPA); §§ 1.5, 4.7.3, *supra*.

256 Romine v. Diversified Collection Services, Inc., 155 F.3d 1142, 1148–1149 (9th Cir. 1998).

creditor, collector, or telephone company has violated the FCC rules governing automatic number identification.[257]

14.3.4 Protection from Electronic Messaging Harassment

The Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act)[258] prohibits materially false or materially misleading headers in certain email messages."[259] It requires the sender of an unsolicited commercial email message to provide consumers a way to opt out of future messages.[260] CAN-SPAM also authorizes the FCC to adopt rules to protect consumers from unwanted "mobile service commercial messages,"[261] and an FCC CAN-SPAM rule restricts messages sent to wireless devices without express prior authorization.[262]

These provisions, though, have little relevance to debt collectors. The CAN-SPAM Act provides a private right of action for Internet service providers, but not for consumers, for violation of these provisions.[263]

Just as significant, CAN-SPAM applies only to "commercial electronic mail messages." The FTC has indicated[264] that emails from third-party debt collectors are likely to be "transactional or relationship messages," which are specifically excluded from the definition of commercial electronic mail.[265] When it adopted its CAN-SPAM rule, the FCC also indicated that "messages from a person or entity with whom the recipient has previously agreed to enter into a transaction and that concern a debt owed for that transaction" would fall into the exemption for "transactional or relationship messages."[266] While this FCC ruling exempts creditors' emails, the FCC did not explicitly exempt emails from creditors' third-party collectors. It is thus unclear whether the FCC agrees with the FTC that emails from third-party collectors are exempt from CAN-SPAM.

In late 2020[267] and early 2021,[268] the CFPB issued new FDCPA rules pursuant to the authority granted it by the Dodd-Frank Act.[269] These rules will be effective on November 30, 2021, and will allow debt collectors to send validation notices[270] and debt collection messages[271] by electronic methods.

The rules are problematic in many respects. For example, they allow electronic communications, but establish only weak protections against phishing, misdirected messages, and messages sent to work email addresses that employers can see. The electronic communication provisions of the rules are addressed in detail in earlier chapters of this book, primarily Chapters 5 and 9, *supra*.

14.4 Truth in Lending Act Disclosures

14.4.1 Are TILA Disclosures Required When Collector Enters Into a Repayment Agreement with the Debtor?

The Truth in Lending Act (TILA) may require a debt collector to give the consumer a new TILA disclosure statement if the two agree on a new debt payment schedule (known as a "workout agreement") and the amount financed or the finance charges are increased. Under TILA regulations, a TILA disclosure statement must be provided to the consumer before consummation of a written, pre-litigation[272] workout agreement that allows the consumer to pay the obligation, if the new agreement satisfies and replaces the old obligation and if *additional* credit is advanced or the APR is increased.[273] Additional credit does not include amounts already accrued plus insurance premiums.[274] Nor does additional credit include capitalization of earned, unpaid interest as part of a workout or loan modification, even though this raises the modified loan amount.[275] If a debt collector fails to provide a required TILA disclosure statement, the debt collector is subject to TILA civil liability of twice the finance charge and attorney fees.[276]

TILA disclosures are required only if the workout agreement meets the general TILA definition of a consumer credit transaction.[277] First, the transaction must involve credit, defined as the right granted by a creditor to defer payment

257 *See* 47 C.F.R. §§ 64.1600 to 64.1604.

258 Pub. L. No. 108-187 (2003); 15 U.S.C. §§ 7701 to 7713; 18 U.S.C. § 1037. *See also* Rules & Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 69 Fed. Reg. 55,765 (Sept. 16, 2004) (final rule); Rules & Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 69 Fed. Reg. 16,873 (Mar. 31, 2004) (proposed rule).

259 15 U.S.C. § 7704(a)(1).

260 15 U.S.C. § 7704(a)(3)

261 15 U.S.C. § 7712.

262 47 C.F.R. § 64.3100.

263 15 U.S.C. § 7706(g)(1). *See* National Consumer Law Center, Federal Deception Law § 6.14.2.2 (3d ed. 2017), *updated at* www.nclc.org/library.

264 73 Fed. Reg. 29,654, 29,663 (May 21, 2008).

265 15 U.S.C. §§ 7702(2)(B), 7702(17).

266 69 Fed. Reg. 55,765, 55,774 (Sept. 16, 2004).

267 CFPB, Debt Collection Practices (Regulation F), Final Rule; Official Interpretation, 85 Fed. Reg. 76,734 (Nov. 30, 2020).

268 CFPB, Debt Collection Practices (Regulation F), Final Rule; Official Interpretation, 86 Fed. Reg. 5766 (Jan. 19, 2021).

269 15 U.S.C. 1692*l*(d).

270 12 C.F.R. § 1006.42.

271 12 C.F.R. §§ 1006.6(e), 1006.22(f), (g).

272 *See* 12 C.F.R. § 1026.20(a)(3) (excluding agreements involving court proceedings); Official Comments § 1026.20(a)(3)-1 (noting that this exclusion applies to "settlement agreements" and "post-judgment agreements").

273 The new amount financed may include earned finance charges and charges for continuation of credit insurance without triggering the new disclosure requirement. 12 C.F.R. § 1026.20(a)(4) [§ 226.20(a)(4)]. *See generally* National Consumer Law Center, Truth in Lending § 5.15.7 (10th ed. 2019), *updated at* www.nclc.org/library.

274 12 C.F.R. § 1026.20(a)(4); Official Interpretations § 1026.20(a)(4)-1.

275 National Consumer Law Center, Truth in Lending § 5.15.7 (10th ed. 2019), *updated at* www.nclc.org/library.

276 *See* National Consumer Law Center, Truth in Lending Ch. 11 (10th ed. 2019), *updated at* www.nclc.org/library.

277 12 C.F.R. §§ 1026.2(a)(17) [§ 226.2(a)(17)] (definition of "creditor"), 1026.2(a)(14) (definition of "credit"). *See* National Consumer Law

of debt or to incur debt and defer its payment.[278] Where the consumer has the right to pay over time, a transaction can be a credit transaction even though no charge is imposed for the right to defer payments.[279] Second, the credit must be extended by a creditor, defined as one who regularly extends consumer credit that is subject to a finance charge or payable by written agreement in more than four installments.[280] This means that the debt collector must meet these creditor standards if the workout agreement is in the name of the debt collector, and not the original creditor or an assignee that owned the loan prior to its acquisition by the debt collector. If the debt collector does not own the loan and is merely collecting on behalf of a creditor or assignee, the workout agreement should be in the name of that entity.[281]

No disclosures are required if the installment payment agreement is informal, for example, over the telephone, even if confirmed by letter from one of the parties, or evidenced only by a letter and coupon payment forms.[282] Nor are disclosures required if the workout agreement does not involve additional credit or an increased APR.[283]

Where the original transaction was a cash transaction, if the consumer later enters into a payment agreement that gives the consumer the right to defer payment of the debt[284] and involves either a finance charge or a written agreement for more than four installments, TILA applies and disclosures are required.[285] If the debt is still structured as an account receivable that is due in full, however, the imposition of late charges does not make it a credit transaction subject to TILA, as long as the late charges are for actual unanticipated late payments.[286] Even the fact that the seller imposes interest on the outstanding balance does not make the transaction qualify as credit if the consumer does not have the *right* to defer payment.[287]

14.4.2 Collector's Liability for Originator's TILA Violation

Even if the collector does not enter into a new repayment agreement with the debtor that requires TILA disclosures, it may have liability under TILA if the original creditor violated the Act. If ownership of the obligation is transferred to the collector, it will be liable for damages as an assignee for TILA violations that are apparent on the face of the contract and other documents assigned.[288] If the loan is secured by the consumer's principal dwelling, the debt collector as assignee can be liable for rescission regardless of whether the TILA violations are apparent on the face of the contract and other documents assigned.[289] The Truth in Lending Act also protects credit card and open-end credit consumers from collections during a dispute over the amount owed on their accounts.[290] These issues are discussed at length in NCLC's Truth in Lending.[291]

14.5 Extortionate Collection Methods and Other RICO Violations

14.5.1 Advantages and Disadvantages of RICO Claims

Unlawful debt collection may violate the federal Racketeering Influenced and Corrupt Organizations Act (RICO).[292] RICO does not prohibit unlawful debt collection

Center, Truth in Lending § 2.2.4.1 (10th ed. 2019), *updated at* www.nclc.org/library.

278 15 U.S.C. § 1602(f); Reg. Z § 1026.2(a)(14) [§ 226.2(a)(14)].

279 Pollice v. Nat'l Tax Funding, 225 F.3d 379, 409 (3d Cir. 2000).

280 15 U.S.C. § 1602(g); 12 C.F.R. § 1026.2(a)(17)(i), (iv) [§ 226.2(a)(17)(i), (iv)].

281 Creditor and assignee liability for their own TILA violations are discussed in National Consumer Law Center, Truth in Lending §§ 11.3, 11.6.10, 12.3 (10th ed. 2019), *updated at* www.nclc.org/library. *See also* § 14.4.2, *infra*.

282 12 C.F.R. § 1026.2(a)(17)(i)(A) [§ 226.2(a)(17)(i)(A)]; Official Interpretations of Reg. Z § 1026.2(a)(17)(i)-1(i)(A) [§ 226.2(a)(17)(i)-1(i)(A)].

283 Official Interpretations of Reg. Z § 1026.20(a)(4)-1 [§ 226.20(a)(4)-1]; National Consumer Law Center, Truth in Lending § 5.15.7 (10th ed. 2019), *updated at* www.nclc.org/library (compiling cases on this point).

284 *See* Reg. Z, 12 C.F.R. § 1026.2(a)(14) [§ 226.2(a)(14)] (definition of "credit"). *See also* National Consumer Law Center, Collection Actions Ch. 9 (4th ed. 2017), *updated at* www.nclc.org/library (discussion of similar issue in context of medical bill payment plans); National Consumer Law Center, Consumer Credit Regulation § 7.5.2.3 (2d ed. 2015), *updated at* www.nclc.org/library (discussion of distinction between forbearance and detention in usury context).

285 Pollice v. Nat'l Tax Funding, 225 F.3d 379, 409 (3d Cir. 2000) (consumer credit transactions arose when consumers entered into payment plans for existing obligations).

286 Reg. Z, 12 C.F.R. § 1026.4(c)(2) [§ 226.4(c)(2)]; Official Interpretations of Reg. Z § 1026.4(c)(2)-1 [§ 226.4(c)(2)-1].

287 Riethman v. Berry, 287 F.3d 274 (3d Cir. 2002); Bright v. Ball Mem'l Hosp., 616 F.2d 328 (7th Cir. 1980); Ysasi v. Nucentrix Broadband Networks, 205 F. Supp. 2d 683 (S.D. Tex. 2002) (imposition of late charge on delinquent lease payments does not create extension of credit); Finnegan v. Univ. of Rochester Med. Ctr., 21 F. Supp. 2d 223 (W.D.N.Y. 1998); Finnegan v. Univ. of Rochester Med. Ctr., 21 F. Supp. 2d 223 (W.D.N.Y. 1998); Iowa Supreme Court Bd. of Prof'l Ethics v. McKittrick, 683 N.W.2d 554 (Iowa 2004) (attorney who imposed finance charge of 1.5% per month did not extend credit under TILA); Rogers Mortuary, Inc. v. White, 594 P.2d 351 (N.M. Ct. App. 1979); Porter v. Hill, 838 P.2d 45 (Or. 1992) (late payment charge of 1.5% per month on unpaid bill not finance charge and TILA disclosures not required when amount was due in full upon billing). *See also* Pollice v. Nat'l Tax Funding, 225 F.3d 379 (3d Cir. 2000) (discussion of distinction between detention and forbearance in usury context); National Consumer Law Center, Consumer Credit Regulation § 7.5.2.3 (2d ed. 2015), *updated at* www.nclc.org/library (discussion of distinction between detention and forbearance in usury law).

288 National Consumer Law Center, Truth in Lending § 12.3.2 (10th ed. 2019), *updated at* www.nclc.org/library.

289 National Consumer Law Center, Truth in Lending § 12.3.3 (10th ed. 2019), *updated at* www.nclc.org/library.

290 National Consumer Law Center, Truth in Lending § 7.9.6.4 (10th ed. 2019), *updated at* www.nclc.org/library.

291 National Consumer Law Center, Truth in Lending (10th ed. 2019), *updated at* www.nclc.org/library.

292 18 U.S.C. §§ 1961 to 1968. *See generally* National Consumer Law Center, Federal Deception Law Ch. 7 (3d ed. 2017), *updated at* www.nclc.org/library.

itself, but rather targets those who use such debt collection or other specified criminal acts to relate to an "enterprise"[293] in a forbidden manner.

The power of RICO arises from its civil remedies provision, which allows victims to recover treble damages, attorney fees, and costs from the violator.[294] However, RICO is complex and drafting a RICO complaint is challenging. This discussion should be viewed as an introduction to the application of the federal RICO statute to debt collection, and advocates should refer to the much more thorough discussion of a RICO claim in NCLC's Federal Deception Law.[295]

14.5.2 *Qualifying Conduct—Collection of an Unlawful Debt or Pattern of Racketeering Activity*

14.5.2.1 Generally

RICO prohibits persons from using either of two different kinds of qualifying conduct to relate to an enterprise in a prohibited manner. These two kinds of preliminary conduct are "collection of an unlawful debt" and a "pattern of racketeering activity."[296] The next two subsections discuss these preliminary requirements for any RICO claim. The other main elements of a RICO claim are outlined in § 14.5.3, *infra*.

14.5.2.2 Collection of an Unlawful Debt

RICO defines "unlawful debt" to include debts from unlawful gambling and debts that arise from a loan that is both unenforceable under a usury law and bears a rate at twice the enforceable rate.[297] A defendant need only collect one unlawful debt to meet this initial element of RICO.[298] Although a plaintiff must show that a usurious debt was incurred "in connection with . . . the business of lending money," an entity that lends money only incidentally to its core business can qualify.[299] A number of borrowers have successfully alleged that their loans were unlawful debts for purposes of a RICO claim against an overreaching lender.[300] However, a plaintiff

293 18 U.S.C. § 1962(c).

294 18 U.S.C. § 1964(c).

295 National Consumer Law Center, Federal Deception Law Ch. 7 (3d ed. 2017), *updated at* www.nclc.org/library.

296 18 U.S.C. §§ 1962(a), 1962(b), 1962(c). In addition, RICO prohibits the conspiracy to violate any of these subsections. 18 U.S.C. § 1962(d).

297 The full definition of "unlawful debt" is as follows:

> "[U]nlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. § 1961(6).

298 National Consumer Law Center, Federal Deception Law § 7.3.4 (3d ed. 2017), *updated at* www.nclc.org/library.

299 *See* Dibello v. Alpha Centurion Sec., Inc., 2015 WL 1344642, at *1 (E.D. Pa. Mar. 23, 2015) (denying defendant's motion for summary judgment on RICO claim that alleged that employer, a security guard company, authorized "advances" to employees that required 20% premium in addition to repayment). *See also* Parm v. Nat'l Bank of Cal., 2015 WL 11605748, at *25 (N.D. Ga. May 20, 2015) (processing of ACH Network transaction qualifies as "collect[ing]" a debt, but RICO claim fails on other grounds), *aff'd on other grounds*, 835 F.3d 1331 (11th Cir. 2016).

300 *See, e.g.*, Goldenstein v. Repossessors Inc., 815 F.3d 142, 149 (3d Cir. 2016) (concluding that RICO's prohibition on "collection of unlawful debt" encompassed repossession company's repossession of collateral for usurious loan); MacDonald v. CashCall, Inc., 2017 WL 1536427, at *1–2 (D.N.J. Apr. 28, 2017) (refusing to dismiss complaint where plaintiff alleged that payday lender charged APR of 116.73%, which was more than twice the New Jersey state law limit of 16%; declining to enforce loan agreement's choice-of-law provision in favor of New Jersey law), *aff'd*, 883 F.3d 220 (3d Cir. 2018); Bynon v. Mansfield, 2016 WL 4089169, at *5 (E.D. Pa. Aug. 1, 2016) (debt bearing interest rate of 182.02% supported RICO claim against both individual lenders and those who repossessed plaintiff's truck to satisfy debt, applying Pennsylvania's rate law); Parm v. Nat'l Bank of Cal., 2015 WL 11605748, at *25 (N.D. Ga. May 20, 2015) (allegations of payday loan of $1000 bearing annual interest rate of 233.71% sufficiently pleaded collection of unlawful debt), *aff'd on other grounds*, 835 F.3d 1331 (11th Cir. 2016), *dismissed on other grounds on remand*, 242 F. Supp. 3d 1321 (N.D. Ga. 2017); Gingras v. Rosette, 2016 WL 2932163, at *36 (D. Vt. May 18, 2016) (debts bearing interest rates ranging from 198% to 376% supported RICO claim as rates exceeded twice Vermont's enforceable rate); Gregoria v. Total Asset Recovery, Inc., 2015 WL 115501, at *4–5 (E.D. Pa. Jan. 7, 2015) (interest rate of 126%, which would be unenforceable under state's usury laws, supported RICO claim); Dillon v. BMO Harris Bank, 16 F. Supp. 3d 605, 618 (M.D.N.C. 2014) (refusing to dismiss RICO claim against banks that allegedly facilitated through Automated Clearing House Network collection of Internet banks' usurious payday loans); Brock v. Thomas, 782 F. Supp. 2d 133, 142 (E.D. Pa. 2011) (denying defendants' motion to dismiss RICO claim that alleged that they misrepresented sale as home improvement loan, and then stripped plaintiff's equity from property); Proctor v. Metro. Money Store Corp., 645 F. Supp. 2d 464, 481–482 (D. Md. 2009) (allowing homeowners' class action RICO claim for collection of unlawful debt to proceed; construing foreclosure rescue arrangement as creating equitable mortgage and characterizing rent as interest that exceeded twice Maryland's usury limit); Dowling v. Select Portfolio Servicing, Inc., 2006 WL 571895, at *4–5 (S.D. Ohio Mar. 7, 2006) (refusing to dismiss RICO conspiracy claim against two attorneys who sought to collect fraudulent debts on behalf of mortgage servicer); Cook v. Easy Money of Ky., Inc., 196 F. Supp. 2d 508, 514–515 (W.D. Ky. 2001) (consumers sufficiently alleged that owners of check cashing service had collected unlawful debt); Hamilton v. York, 987 F. Supp. 953, 957–958 (E.D. Ky. 1997) (refusing to dismiss RICO claim based on check cashing service's charges); Starks v. Rent-A-Ctr., 1994 WL 577974, at *6–8 (D. Minn. May 16, 1990) (rent-to-own transaction), *aff'd on other grounds*, 58 F.3d 358 (8th Cir. 1995); *In re* Eyler, 2008 WL 4833096, at *4–5 (Bankr. D. Md. Oct. 28, 2008) (amended proposed findings of fact and conclusions of law) (concluding that foreclosure rescue transaction imposed an interest rate usurious under Maryland law; recommending treble damages of more than $253,000). *See also* Ralston v. Zats, 2000 WL 1781590, at *6–7 (E.D. Pa. Nov. 9, 2000) (approving settlement of class action that asserted FDCPA and RICO claims, among others, against defendants alleged to have falsely induced plaintiffs to agree to confession of judgment provisions);

cannot base a RICO claim on violation of a law that prescribes the method of collecting interest or the kind of property that can be received for a loan, as opposed to the rate itself.[301] In addition, one court held that charging twice the amount of permitted "points" on a loan did not qualify as collection of an unlawful debt, as long as the *overall* interest rate did not exceed twice the legal rate.[302]

14.5.2.3 Pattern of Racketeering Activity

The second, alternative type of qualifying activity is a "pattern of racketeering activity." "Racketeering activity," the core requirement of this type of qualifying conduct, comprises any of nine state criminal offenses or any of a longer list of specified federal offenses.[303] Of these, mail fraud and wire fraud are the two most commonly invoked predicate offenses.[304]

Violating the federal loansharking statute[305] is another predicate act that might appear in a creditor-borrower relationship. Where a creditor, as part of extending or collecting a debt, threatens to use overreaching means to collect on the debt, it may violate the federal loansharking statute, which is a RICO predicate act.[306] That statute prohibits extortionate extensions of credit, defined as those made with the understanding that failure to repay "could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person."[307] It further prohibits collecting a debt with the implicit or explicit threat to use violence or other criminal means to cause such harm.[308]

One court liberally read collection letters sent to a plaintiff to find that they could suggest the threat of criminal means to collect the debt, and that the plaintiff thereby stated a class action RICO claim based on loansharking against a consumer lender.[309] Another court sustained a RICO claim by a plaintiff who claimed that a bank threatened to jail his wife and call in the FBI unless he mortgaged his farm to secure an overdrawn account of his wife's employer.[310] Wrongfully debiting a consumer's bank account by electronic means may amount to wire fraud and, if part of a pattern, satisfy this element of a RICO claim.[311]

In contrast to collection of an unlawful debt, when one event alone can satisfy the element, a plaintiff must show that a defendant committed not just one act of racketeering activity, but a "pattern of racketeering activity" to qualify through that alternative.[312] The meaning of "pattern," which RICO defines to mean "at least two acts of racketeering activity" conducted no more than ten years apart,[313] has given rise to its own complicated body of jurisprudence.[314] Borrowers have successfully alleged patterns of mail and wire fraud against overreaching debt collectors.[315]

Henry v. Cash Today, Inc., 199 F.R.D. 566, 573 (S.D. Tex. 2000) (certifying class of plaintiffs who brought RICO and other claims against payday lenders that allegedly used prohibited debt collection methods, fraud, and threats of criminal prosecution in seeking repayment of usurious loans). *But see* Nolen v. Nucentrix Broadband Networks Inc., 293 F.3d 926, 929 (5th Cir. 2002) (cable provider's late fees were not interest under state law and therefore state usury laws did not apply and debt was not unlawful under RICO); Kwon v. Santander Consumer U.S.A., 2016 WL 6518578, at *5 (E.D.N.Y. Oct. 6, 2016) (dismissing claim alleging that plaintiff had been charged usurious rate of 25%, as this was less than twice New York's legal rate of 16%); Betts v. Advance Am., 213 F.R.D. 466, 482–483 (M.D. Fla. 2003) (dismissing RICO claim; check cashing service was not subject to state usury laws, so plaintiff's debt was not unlawful); Rivera v. AT&T Corp., 141 F. Supp. 2d 719, 724–725 (S.D. Tex. 2001) (cable provider's late fees are not interest under state usury law, so cannot give rise to RICO violation based on collection of unlawful debt); *In re* MasterCard Int'l Inc., Internet Gambling Litig., 132 F. Supp. 2d 468, 483 (E.D. La. 2001) (dismissing gamblers' suit against credit card companies and issuing banks based on charges incurred on Internet gambling sites on grounds that they did not allege usury and defendants' activities did not violate state or federal law), *aff'd*, 313 F.3d 257 (5th Cir. 2002).

301 Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 667 (9th Cir. 1988).

302 Reidy v. Meritor Sav., 1989 WL 132673, at *1 (D.C. Cir. Nov. 3, 1989). *See also* Johnson v. Fleet Fin., Inc., 785 F. Supp. 1003, 1010–1011 (S.D Ga. 1992) (dismissing federal and state RICO claims by mortgagors against lenders because, although first month's interest rate exceeded permitted percentage, interest calculated over life of loan did not).

303 18 U.S.C. § 1961(1).

304 18 U.S.C. §§ 1341, 1343.

305 18 U.S.C. §§ 891 to 894.

306 18 U.S.C. § 1961(1).

307 18 U.S.C. §§ 891(6), 892.

308 18 U.S.C. §§ 891(7), 894.

309 Brown v. C.I.L., Inc., 1996 WL 164294 (N.D. Ill. Jan. 28, 1996) (statements examined by court included: "We can be reached at . . . any time should you wish to repay your debt in full without any damge [sic] to you or your credit"; "My 'ass' is being hung out to dry by you and I would like you to be man enough to tell me why? After you begged for us to loan you money, not once! but twice! My good Friends are interested to [sic]!"; and "Your attitude about this money you begged for is almost unbelievable. Our people in Mr. Carpenter's Office are watching with great interest. Stop being a coward, Big Man!"), *adopted*, 1996 WL 164294 (N.D. Ill. Apr. 1, 1996).

310 Ford v. Citizens & S. Nat'l Bank, 700 F. Supp. 1121 (N.D. Ga. 1988) (allegations of blackmail sufficed to meet statute's requirement of "the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person").

311 *See, e.g.*, Aghaeepour v. N. Leasing Systems, Inc., 2015 WL 7758894 (S.D.N.Y. Dec. 1, 2015). *See also* United States v. Cusino, 694 F.2d 185 (9th Cir. 1982) (affirming mail fraud conviction of defendant who received wire transfers from persons he persuaded to invest in fraudulent invention); United States v. Butler, 704 F. Supp. 1338, 1343 (E.D. Va. 1989) (upholding mail fraud conviction against defendant who instructed potential investors to use wire transfers to make their investments).

312 18 U.S.C. §§ 1961, 1962(a), 1962(b), 1962(c).

313 18 U.S.C. § 1961(5).

314 *See, e.g.*, H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). *See also* Edwards v. First Nat'l Bank, Bartlesville, Okla., 872 F.2d 347, 352 (10th Cir. 1989) (borrowers failed to show pattern of racketeering based on two banks' alleged threats to send them to jail on three separate occasions if they did not repay loans). *See generally* National Consumer Law Center, Federal Deception Law § 7.3.3 (3d ed. 2017), *updated at* www.nclc.org/library.

315 *See, e.g.*, Calabrese v. CSC Holdings, Inc., 283 F. Supp. 2d 797, 811 (E.D.N.Y. 2003) (denying motion to dismiss RICO claims by consumers against cable company and law firm that demanded payment based on alleged use of pirated cable equipment).

14.5.3 RICO's Substantive Prohibitions

Once a plaintiff has shown that a defendant has either collected an unlawful debt or committed a pattern of racketeering activity, the plaintiff must show that the defendant used that conduct to relate to an "enterprise"[316] in a manner that violates one of RICO's three substantive provisions.[317] The provision most commonly employed by civil RICO suits prohibits a person who is employed by or associated with an enterprise from using either the collection of an unlawful debt or a pattern of racketeering activity to conduct the affairs of an enterprise.[318] A drawback of this provision is that it requires a plaintiff to allege an "enterprise" that is distinct from the defendant "person."[319]

RICO also prohibits two other combinations of unlawful debt collection or pattern of racketeering activity in relation to an enterprise. A person who receives income from such conduct may not use or invest that income to acquire an interest in, establish, or operate an enterprise.[320] Nor may a person use such conduct to acquire or maintain an interest in or control of an enterprise.[321] RICO also provides a claim against any person who conspires to violate any of the three substantive provisions.[322]

14.5.4 RICO and Debt Collection

RICO has been applied to a variety of forms of illegal debt collection. For instance, one suit against a group of debt collectors alleged that they falsely induced the plaintiffs to sign confessions of judgment, executed those confessions without notice or hearing, gathered data from the plaintiffs through pretext phone calls that they then used to pursue the confessions, and padded the debt accounts with unlawful charges.[323] The plaintiffs filed claims under RICO, the Fair Debt Collection Practices Act, and a state deceptive trade practices act, among others. The court approved a class-wide settlement and attorney fees. Another court upheld a RICO complaint that alleged similar tactics by a debt collection lawsuit mill.[324] A debt collector can also run afoul of RICO by seeking to obtain collection costs not permitted by the debtor's contract.[325]

Another court refused to dismiss RICO claims alleging that a debt buying company and related entities conspired to fraudulently secure default judgments against the plaintiffs.[326] Other successful claims have targeted disguised payday loans,[327] attempts to collect discharged debts,[328] deceptive letters issued to collect dishonored checks,[329] and threats by debt collectors.[330]

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316 *See* 18 U.S.C. § 1961(4) (defining enterprise to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"). *See also* National Consumer Law Center, Federal Deception Law § 7.5 (3d ed. 2017), *updated at* www.nclc.org/library.

317 18 U.S.C. §§ 1962(a), 1962(b), 1962(c). In addition, 18 U.S.C. § 1962(d) prohibits conspiring to violate one of the three substantive sections.

318 18 U.S.C. § 1962(c) ("It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.").

319 Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001). *See generally* National Consumer Law Center, Federal Deception Law § 7.4.4 (3d ed. 2017), *updated at* www.nclc.org/library.

320 The complete provision reads as follows:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. § 1962(a).

321 The complete provision reads as follows:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b).

322 18 U.S.C. §§ 1962(d), 1964(c). *See* National Consumer Law Center, Federal Deception Law § 7.5.5 (3d ed. 2017), *updated at* www.nclc.org/library.

323 Ralston v. Zats, 2000 WL 1781590, at *6–7 (E.D. Pa. Nov. 9, 2000).

324 Mayfield v. Asta Funding, Inc., 2015 WL 1501100, at *7–10 (S.D.N.Y. Mar. 31, 2015).

325 *See* Bible v. United Student Aid Funds, 799 F.3d 633, 656–660 (7th Cir. 2015) (reversing dismissal of RICO claim brought by student loan borrower against guaranty agency that she alleged assessed collection costs not permitted by terms of her rehabilitation agreement).

326 *See* Sykes v. Mel Harris & Assoc., 757 F. Supp. 2d 413, 427 (S.D.N.Y. 2010), *aff'd*, 780 F.3d 70 (7th Cir. 2015).

327 Henry v. Cash Today, Inc., 199 F.R.D. 566, 573 (S.D. Tex. 2000) (certifying class of plaintiffs on RICO and other claims against payday lenders that allegedly used prohibited debt collection methods, fraud, and threats of criminal prosecution in seeking repayment of usurious loans). *See also* Cook v. Easy Money of Ky., Inc., 196 F. Supp. 2d 508, 514–515 (W.D. Ky. 2001) (refusing to dismiss § 1962(a) and (c) claims against check cashing service that made short-term "roll over" loans).

328 Dowling v. Select Portfolio Servicing, Inc., 2006 WL 571895, at *4–5 (S.D. Ohio Mar. 7, 2006) (refusing to dismiss RICO conspiracy claim against attorneys who sought to collect debt that had been discharged in bankruptcy); Kim v. Fayazi, 1998 WL 729753, at *4 (N.D. Ill. Oct. 14, 1998) (denying motions to dismiss RICO claims arising from alleged scheme to trick plaintiff into repaying previously discharged credit card debts).

329 Smith v. Levine Leichtman Capital Partners, Inc., 723 F. Supp. 2d 1205, 1215–1216 (N.D. Cal. 2010) (finding plaintiffs alleged pattern of racketeering based on acts of mail fraud).

330 Brown v. C.I.L., Inc., 1996 WL 164294, at *5 (N.D. Ill. Mar. 29, 1996) (denying motion to dismiss RICO claim against company that made

However, RICO claims require proof of a number of elements, including injury caused by the specific substantive violation.[331] If the plaintiff frames the claim around qualifying conduct other than collection of an unlawful debt, the plaintiff must present evidence that the creditor or debt collector committed not just one predicate offense, but engaged in a pattern of such offenses.[332]

14.5.5 State Racketeering and Civil Theft Statutes

A number of states have civil RICO statutes that, like federal RICO, offer multiple damages and attorney fees. Many state civil RICO statutes require a simpler set of elements than federal RICO, and some include specific consumer protection crimes as predicate offenses.[333] Civil theft laws in some states have been applied to wrongful seizure of an alleged debtor's property and might be applicable to wrongful seizures of wages or bank account funds as well.[334] State RICO and civil theft statutes are analyzed in another NCLC treatise.[335]

14.6 The Fair Credit Reporting Act

14.6.1 Overview

Reporting a debt to a credit bureau—known as a "consumer reporting agency" or CRA under the Fair Credit Reporting Act[336]—is a "powerful tool designed, in part, to wrench compliance with payment terms."[337] The collection industry has acknowledged this sentiment,[338] and the CFPB noted that "furnishing information to the [nationwide CRAs] can provide an incentive for borrowers or debtors to meet their repayment obligations."[339] Even Congress mandated that defaults on student loans be reported to CRAs as a means of encouraging debt repayment.[340]

In some instances, a collector will only report a debt to a nationwide CRA and engage in no other collection activity, a practice known as passive collection or "parking the debt." Here the collector furnishes negative information to the CRAs without ever attempting to contact the consumer about the debt, waiting until the consumer discovers the negative information.[341]

The CFPB noted that passive collection is more likely with small debts, such as medical or telecommunications debt, where mail or telephone collection is not cost effective.[342] In fact, the final FDCPA rule that the CFPB issued in January 2021, which takes effect on November 30, 2021, requires debt

loans at 231% to 283% APRs and used threats of criminal prosecution and veiled threats of bodily harm in attempting to collect).

331 *See, e.g.*, Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169–1170 (3d Cir. 1987) (consumer failed to state extortion claim under RICO by failing to allege injury to his business or property); Howe v. Reader's Digest Ass'n, Inc., 686 F. Supp. 461, 465–466 (S.D.N.Y. 1988) (dismissing RICO claim for failure to allege injury to consumer's business or property).

332 *See* § 14.5.2.3, *supra*.

333 *See* Watson v. State, 509 S.E.2d 87, 90–92 (Ga. Ct. App. 1998) (affirming state RICO conviction of payday lender who used bad check prosecutions to collect; predicate offenses were perjuries, swearing that checks had been written for "merchandise"); Dorr v. Sacred Heart Hosp., 597 N.W.2d 462, 476–477 (Wis. Ct. App. 1999) (reversing summary judgment in favor of hospital on claim that it violated state RICO statute by filing lien against patient's personal injury settlement for bill that patient did not owe).

334 *See* National Consumer Law Center, Federal Deception Law § 8.8 (3d ed. 2017), *updated at* www.nclc.org/library.

335 *See* National Consumer Law Center, Federal Deception Law Ch. 8 (3d ed. 2017), *updated at* www.nclc.org/library.

336 15 U.S.C. §§ 1681 to 1681x.

337 Rivera v. Bank One, 145 F.R.D. 614 (D. P.R. 1993). *Accord* Edeh v. Midland Credit Mgmt., Inc., 748 F. Supp. 2d 1030, 1035 (D. Minn. 2010) ("threatening to report and reporting debts to CRAs is one of the most commonly-used arrows in the debt collector's quiver"), *aff'd on other grounds*, 413 Fed. Appx. 925 (8th Cir. Mar. 17, 2011); Blanks v. Ford Motor Credit, 2005 WL 43981, at *3 (N.D. Tex. Jan. 7, 2005) (communicating information to credit reporting agency is communication in connection with collection of the debt); Akalwadi v. Risk Mgmt. Alternatives, Inc., 336 F. Supp. 2d 492, 503 n.4 (D. Md. 2004) (reporting debt is "in connection with" debt collection); Sullivan v. Equifax, 2002 WL 799856, at *15 (E.D. Pa. Apr. 19, 2002) (reporting debt is powerful collection tool); Ditty v. CheckRite, Ltd., 973 F. Supp. 1320, 1331 (D. Utah 1997) (reporting bad check information to others is designed to give collector additional leverage over debtor); *In re* Sommersdorf, 139 B.R. 700, 701 (Bankr. S.D. Ohio 1991) ("[P]lacing of a notation on an obligor's credit report . . . most certainly must be done in an effort to effect collection of the account. . . . Such a notation on a credit report is, in fact, just the type of creditor shenanigans intended to be prohibited by the automatic stay."). *See also* Cass, FTC Informal Staff Letter, 1997 WL 33791232, at *1 (Dec. 23, 1997) (reporting to credit bureau is "collection activity" that must cease until § 1692g(b) verification is provided: "the reality is that debt collectors use the reporting mechanism as a tool to persuade consumers to pay, just like dunning letters and telephone calls"). *Compare* McIvor v. Credit Control Services, Inc., 773 F.3d 909 (8th Cir. 2014) (requiring under some circumstances specific allegation and proof that credit reporting by debt collector is debt collection: "Certainly, communication between a debt collector and a consumer reporting agency may at times be in connection with debt collection. . . . McIvor makes a much broader argument, however. She contends that *any* communication about a debt from a debt collector to a consumer reporting agency is *always* intended to facilitate collection. We decline to draw such a sweeping conclusion.").

338 *See* Jones, Are You Properly Reporting Bankruptcies to Credit Bureaus? (July 29, 2015), *available at* www.insidearm.com (stating that "collection agencies . . . report collection items to the bureaus . . . [as an] aid in your collection efforts"). *See also* Rozanne M. Anderson, Ontario Systems, 5 Tips to End the Credit Reporting Nightmare—and Reduce All Those Costly Disputes 6, 15 (2013) ("reporting data to a CRA regarding a consumer's account is considered a collection activity," and "[c]redit reporting remains an extremely valuable collections tool"), *available at* www.insidearm.com.

339 CFPB, Consumer Credit Reports: A Study of Medical and Non-Medical Collections 35 (Dec. 2014), *available at* www.consumerfinance.gov.

340 20 U.S.C. § 1080a. *See* Seamans v. Temple Univ., 744 F.3d 853, 863 (3d Cir. 2014) (Congress permitted unpaid student loans to be reported to CRAs beyond usual FCRA obsolescence period based on its determination that "'reporting of defaulted education loans to credit bureaus is an effective tool' . . . providing great motivation for a borrower to repay even very old education loans").

341 *See* § 1.4.2, *supra*.

342 CFPB, Consumer Credit Reports: A Study of Medical and Non-Medical Collections 36 (Dec. 2014), *available at* www.consumerfinance.gov.

collectors to disclose the existence of the debt to consumers before reporting it to a CRA.[343]

Given the frequent use of credit reporting as a tool in debt collection, the Fair Credit Reporting Act (FCRA)[344] is an important resource for attorneys representing debtors. Asserting claims under the FCRA should be considered whenever a CRA publishes a credit report that contains inaccurate or incomplete information which itself was furnished by a debt collector or creditor.

Congress recognized the central role that credit reporting plays in the debt collection process by including in the FDCPA four separate provisions directly linking credit reporting to, and facilitating and regulating credit reporting as, debt collection. First, by excluding contacts with "a consumer reporting agency if otherwise permitted by law" from its general prohibition against third-party communications, the FDCPA authorizes debt collectors to report consumer debts to CRAs.[345] Second, the FDCPA prohibits a debt collector from publishing so-called "shame lists" or otherwise publicizing consumers' debts unless done in compliance with the FCRA.[346] Third, the FDCPA makes it a *per se* violation for a debt collector to report to any person, including a CRA, "credit information which is known or should be known to be false, including the failure to communicate that a disputed debt is disputed."[347] A claim under this provision typically should be pleaded in conjunction with most debt collector FCRA violations. And fourth is the FDCPA prohibition against using any "false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by [the FCRA]".[348] These FDCPA provisions are all discussed in detail in Chapters 5 through 10, *supra*.

Because credit reporting can be such an effective collection device, collectors frequently misuse it.[349] Not surprisingly, debt collectors and debt buyers generate an enormously disproportionate number of the disputes received by the nationwide CRAs, accounting for nearly 40% of all credit reporting disputes, even though they only supply 13% of the tradelines.[350] Of consumers who participated in an FTC study, 26% found material inaccuracies in their credit reports.[351] Additionally, the CFPB issued a bulletin warning debt buyers and third-party debt collectors against making material misrepresentations to persuade consumers to pay debts in collection.[352] Some of these misrepresentations include statements about how payment will improve credit scores or improve creditworthiness.[353]

Part of any comprehensive case preparation therefore entails reviewing the consumer's credit reports. Consumers have the right under the FCRA to know the contents of the files maintained on them by a credit bureau.[354] Various options are available to consumers to exercise that right, including receiving a free credit report disclosure annually.[355]

There are four primary ways in which the FCRA potentially applies in the debt collection context. First and principally, a debt collector or creditor who has furnished information to a credit bureau must conduct a "reasonable investigation" of its accuracy and completeness after the consumer initiates the FCRA's formal dispute process with the credit bureau.[356] Second, debt collectors and creditors, like everyone else, face FCRA liability if they access a credit report without a permissible purpose or under false pretenses.[357] Third, the FCRA imposes special duties on collectors and those who furnish information to consumer reporting agencies in cases of debts arising from fraud or identity theft.[358] And fourth, debt collectors may occasionally meet the FCRA's definition of a

343 CFPB, Final Rule, Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766, 5783–5785 (Jan. 19, 2021). *See generally* § 8.12, *supra*.

344 15 U.S.C. §§ 1681 to 1681x.

345 15 U.S.C. § 1692c(b). *See* § 5.7, *supra*.

346 15 U.S.C. § 1692d(3). *See* § 6.5, *supra*.

347 15 U.S.C. § 1692e(8). *See* §§ 7.2.9, *supra*, 14.6.6.2, *infra*.

348 15 U.S.C. § 1692e(16). *See* § 7.2.16, *supra*.

349 *See, e.g.*, Abdelfattah v. Carrington Mortg. Serv. L.L.C., 2013 WL 495358 (N.D. Ca. Feb. 7, 2013) (sustaining claim for punitive damages when furnisher allegedly refused to correct false credit reporting information concerning debt unless consumer paid additional money that was not owing); Greene v. Capital One Bank, 2008 WL 1858882, at *4 (D. Utah Apr. 23, 2008) ("[i]t is certainly not beyond belief that a furnisher of information might use the false tradeline as a club in negotiating down a judgment, as may have happened in this case").

350 CFPB, Key Dimensions and Processes in the U.S. Credit Reporting System: A Review of How the Nation's Largest Credit Bureaus Manage Consumer Data 14, 29 (2012), *available at* www.consumerfinance.gov.

351 Fed. Trade Comm'n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (2012), *available at* www.ftc.gov. *See also* Mary Spector, Where the FCRA Meets the FDCPA: The Impact of Unfair Collection Practices on the Credit Report, 20 Geo. J. on Poverty L. & Pol'y 485, 486 (2013), *available at* www.ssrn.com.

352 CFPB, Representations Regarding Effect of Debt Payments on Credit Reports and Scores, CFPB Bulletin 2013-08 (July 10, 2013), *available at* www.consumerfinance.gov. *See also* National Consumer Law Center, Fair Credit Reporting § 5.2.3.4a.3 (9th ed. 2017), *updated at* www.nclc.org/library.

353 *Id. But see* Johnson v. Enhanced Recovery Co., L.L.C., 961 F.3d 975 (7th Cir. 2020) (consumer failed to produce evidence that dunning letter violated § 1692e by stating that account that had already been reported to credit bureaus "may be reported" and that payment of offered settlement amount would stop collection, arguing that this implied future reporting and that there would be no credit reporting if consumer paid by deadline specified for settlement); Larkin v. Fin. Sys. of Green Bay, Inc., 982 F.3d 1060 (7th Cir. 2020) (case dismissed for lack of standing, since neither risk of harm or alleged harm was pleaded when consumers claimed that collection letters stating that the creditor was "interested in preserving a good credit rating" and urging them "to be worthy of the faith put in you by your creditor" violated §§ 1692e and 1692f).

354 15 U.S.C. § 1681g.

355 *See* National Consumer Law Center, Fair Credit Reporting § 3.3.2 (9th ed. 2017), *updated at* www.nclc.org/library.

The three nationwide consumer reporting agencies have established a "centralized source," required by the FCRA, where consumers can obtain their free annual credit report online: www.annualcreditreport.com. *See* National Consumer Law Center, Fair Credit Reporting § 3.4.2.1 (9th ed. 2017), *updated at* www.nclc.org/library.

356 *See* § 14.6.2.3.2, *infra*.

357 *See* § 14.6.3, *infra*.

358 *See* § 14.6.4, *infra*.

"consumer reporting agency" and will be liable if they fail to comply with the host of special rules then applicable to them.[359]

This section presents only an outline of these four uses of the FCRA, a topic that is covered in depth in another treatise in this series.[360] After discussing these four uses of the FCRA, this section discusses the application of the FDCPA and other debt collection laws to credit reporting issues and concludes with recommendations for resolving credit reporting issues when settling a debt case.

14.6.2 Accuracy of Credit Reports; Furnisher's Duty of Investigation

14.6.2.1 Generally

Providing accurate information is the hallmark of the FCRA.[361] The accuracy standard in the FCRA is stringent, requiring more than just technical accuracy and measured instead by the FCRA's own *sui generis* benchmark of "maximum possible accuracy."[362]

The FCRA imposes on creditors, collectors, and others who furnish information to consumer reporting agencies (referred to as "furnishers" in FCRA case law) the obligation to report only accurate information.[363] Direct enforcement of this obligation is limited to designated public officials.[364] However, the FCRA's primary mechanism that ensures the accuracy of credit reports and that is privately enforceable against furnishers is the formal reinvestigation process that must be initiated by the consumer with the consumer reporting agencies. Furnishers must investigate the information that they have previously reported if a consumer disputes that information with the CRA by challenging its accuracy or completeness.[365] A furnisher who fails to fulfill its obligations in that reinvestigation process can be liable to the consumer under the FCRA.[366]

This FCRA obligation to report only accurate information is also privately enforceable under the FDCPA when the furnisher is a debt collector, even without a prior dispute by the debtor. Debt collectors are subject to the prohibitions in FDCPA § 1692e(8) against reporting to a CRA information that is known or should be known to be false or failing to communicate that a disputed debt is disputed.[367] Combining FDCPA damages for this section 1692e(8) violation with the available FCRA remedies can provide substantial redress for consumers aggrieved by unlawful debt collector credit reporting.

14.6.2.2 Common Types of Inaccuracy by Debt Collectors

Information reported by debt collectors can be uniquely unreliable, particularly tradelines reported by debt buyers, who purchase portfolios of defaulted debt and have neither first-hand knowledge of the accuracy of the information they provide, nor the documentation to support it.[368]

While there is no limit on the types of inaccuracy disputes that arise in the context of debt collection and credit reporting, two categories of inaccuracies are particularly common. First, debt collectors or creditors often report an incorrect history or inaccurate current status of the debt. One example is misidentifying the legal obligor to force certain individuals (spouses or authorized users, for example) to pay debts that they do not legally owe.[369] Another common abuse occurs when collectors ignore the special rules designed to make certain that debts are tracked and identified as a single obligation as they are transferred from holder to holder.[370]

Second, debt collectors often engage in the abusive tactic of "re-aging" a debt by failing to report the initial date of delinquency or charge-off of the debt, as expressly required by the FCRA.[371] As a result of this omission, the credit bureau is left with the false assumption that the initial date of delinquency or charge-off is the recent date when the account was assigned to the collector, rather than the applicable date that typically occurred months or years earlier when the debt was in the hands of the original creditor. Misreporting in this manner means that the debt will be included in credit reports long after it has become legally obsolete and therefore no longer reportable (seven-and-a-half years after delinquency for most information, ten years for bankruptcy).[372] A re-aged debt may also skew the consumer's credit score since most

359 *See* § 14.6.5, *infra*.

360 National Consumer Law Center, Fair Credit Reporting (9th ed. 2017), *updated at* www.nclc.org/library.

361 *See* National Consumer Law Center, Fair Credit Reporting Ch. 4 (9th ed. 2017), *updated at* www.nclc.org/library.

362 *See* National Consumer Law Center, Fair Credit Reporting § 4.2.4 (9th ed. 2017), *updated at* www.nclc.org/library.

363 15 U.S.C. § 1681s-2(a)(1).

364 15 U.S.C. §§ 1681s-2(c), 1681s-2(d). *See* National Consumer Law Center, Fair Credit Reporting § 6.1.2 (9th ed. 2017), *updated at* www.nclc.org/library.

365 15 U.S.C. § 1681*i*. *See* National Consumer Law Center, Fair Credit Reporting § 4.5 (9th ed. 2017), *updated at* www.nclc.org/library.

366 *See* § 14.6.2.3, *infra*. 15 U.S.C. §§ 1681s-2(b), 1681n (generally creating cause of action for willful noncompliance), 1681o (generally creating cause of action for negligent noncompliance). *See* National Consumer Law Center, Fair Credit Reporting § 6.10 and Ch. 11 (9th ed. 2017), *updated at* www.nclc.org/library.

367 *See* § 7.2.8, *supra*.

368 CFPB, Supplementary Information to Final Rule, Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766, 5783–5785 (Jan. 19, 2021). The CFPB has proposed extending the effective date of this rule to January 29, 2022. 86 Fed. Reg. 20,334 (Apr. 19, 2021). *See* § 1.3.4, *supra*.

369 *See, e.g.*, Johnson v. MBNA Am. Bank, 357 F.3d 426 (4th Cir. 2004) (affirming jury verdict for consumer against credit card company that failed to comply with FCRA's reasonable investigation standard when consumer showed that company continued to reject her claim that she was only authorized user, and not obligor as company was reporting, on her bankrupt ex-husband's credit card account).

370 *See* National Consumer Law Center, Fair Credit Reporting §§ 6.3.3.5, 6.3.3.9 (9th ed. 2017), *updated at* www.nclc.org/library.

371 *See* National Consumer Law Center, Fair Credit Reporting § 5.2.3.4a (9th ed. 2017), *updated at* www.nclc.org/library.

372 15 U.S.C. §§ 1681c(a)(4), 1681c(c). *See* National Consumer Law Center, Fair Credit Reporting § 5.2.3 (9th ed. 2017), *updated at* www.nclc.org/library.

credit scoring systems assign a higher negative weight the more recent the adverse item of information.[373] This purposeful misrepresentation of the date of charge-off to fall within the seven-year obsolescence period resurrects long dormant and nearly worthless debts with the simple act of false credit reporting.

In response to this re-aging problem, Congress amended the FCRA in 2003 to provide explicit rules regarding the date of an account's delinquency for reporting purposes. The FCRA now specifies how debt collectors should designate the date to ensure that the date of delinquency precedes the date the creditor placed the account for collection.[374] If no date can be determined by these procedures, then the furnisher must establish and follow reasonable procedures to ensure that the date reported precedes the date on which the account is placed for collection, charged to profit or loss, or subjected to any similar action.[375]

Unfortunately, these rules have not ended the unlawful re-aging of debts. The abuse may be continuing because this new date designation requirement is one of the several FCRA reporting duties that do not provide for private enforcement.[376] Nevertheless, the resulting inaccuracy, as any other inaccuracy, may be challenged through the formal FCRA dispute process and may also be an FDCPA violation.

14.6.2.3 Creditors' and Collectors' Liability for Making Inaccurate Reports to Credit Bureau

14.6.2.3.1 Notice of the dispute

To initiate the FCRA's formal reinvestigation process, the consumer must send a notice of dispute to the consumer reporting agency informing the agency that an item of information is inaccurate or incomplete.[377] Taking this step can be an effective method to force a debt collector or creditor to correct its errors. It is also the essential first step for a claim against the furnisher under the FCRA.[378]

The dispute should be detailed and specific and should include supporting documentation when available. A dispute that provides only conclusory or vague allegations will rarely be effective either to resolve the issue or to establish the grounds for successful litigation. Practical advice to enhance a consumer's dispute is set forth in another treatise in this series, which practitioners are advised to consult and follow.[379]

Because information about a consumer often is included in the files of multiple consumer reporting agencies, resolving an error in the files of just one CRA may not be sufficient.[380] Once the information appears on the credit report with one CRA, consumers should order their report from all other nationwide consumer reporting agencies (that is, Equifax, Experian, and TransUnion), and send the same written dispute letter to all agencies that report the disputed information.

While not required by the FCRA, it is prudent for the consumer to send the furnisher a courtesy copy of the dispute letter that the consumer sent to the CRA. Notifying the creditor or collector directly increases the likelihood of clearing up the record. It also strengthens the consumer's case under the FCRA against the furnisher who ignores both the CRA's request that it investigate the debt and the consumer's dispute letter.[381]

Where that furnisher is also a debt collector, sending a courtesy copy of the dispute letter is also an opportunity for the consumer to invoke the FDCPA's formal cease communication mechanism.[382] The consumer should include a cover letter that states that the consumer refuses to pay the disputed debt. This statement will mean that the collector must discontinue virtually all further collection communications with the consumer.[383] Sending the collector a copy of the dispute letter will also require the collector to inform the credit bureau under section 1692e(8) that the debt is disputed, as required by the FDCPA.[384] This requirement, together with the cessation of collection communications and the furnisher's obligation to participate in the FCRA formal dispute reinvestigation process, can be an effective solution for many consumers.[385]

14.6.2.3.2 Furnisher's duty to conduct a reasonable investigation

After a consumer reporting agency notifies a furnisher that an item of information the furnisher provided is disputed, the furnisher must conduct its own investigation into the accuracy

373 *See* National Consumer Law Center, Fair Credit Reporting § 16.5.2.1 (9th ed. 2017), *updated at* www.nclc.org/library.

374 15 U.S.C. § 1681s-2(a)(5). *See* National Consumer Law Center, Fair Credit Reporting § 5.2.3.4.6 (9th ed. 2017), *updated at* www.nclc.org/library.

375 15 U.S.C. § 1681s-2(a)(5). *See* National Consumer Law Center, Fair Credit Reporting §§ 5.2.3.4.6, 6.7 (9th ed. 2017), *updated at* www.nclc.org/library.

376 15 U.S.C. §§ 1681s-2(a), 1681s-2(c)(1).

377 *See* National Consumer Law Center, Fair Credit Reporting § 4.5 (9th ed. 2017), *updated at* www.nclc.org/library.

378 *See* National Consumer Law Center, Fair Credit Reporting § 4.5 (9th ed. 2017), *updated at* www.nclc.org/library.

379 *See* National Consumer Law Center, Fair Credit Reporting § 4.5.2.4 (discussing practical tips in making a dispute), § 11.3 (discussing case selection) (9th ed. 2017), *updated at* www.nclc.org/library.

380 This predicament unfortunately exists even though the FCRA is designed so that a furnisher must report any correction made by one CRA to the other credit bureaus to whom the same information has been furnished. *See* National Consumer Law Center, Fair Credit Reporting § 6.10.6.4 (9th ed. 2017), *updated at* www.nclc.org/library.

381 *See* National Consumer Law Center, Fair Credit Reporting § 6.10.4.2 (9th ed. 2017), *updated at* www.nclc.org/library.

382 15 U.S.C. § 1692c(c).

383 *See* § 5.10, *supra*.

384 *See* § 7.2.8, *supra*.

385 The 2003 amendments to the FCRA also contain a provision that allows a consumer to lodge a direct dispute with the furnisher of the information that is being disputed. 15 U.S.C. § 1681s-2(a)(8). However, there is no private enforcement allowed when the furnisher breaches these duties. *See* National Consumer Law Center, Fair Credit Reporting § 6.5.2 (9th ed. 2017), *updated at* www.nclc.org/library.

and completeness of that information and must promptly report back to the CRA.[386] The FCRA does not specify the standard for the investigation, but the federal courts uniformly have held that the furnisher must conduct a "reasonable investigation."[387] The investigation's adequacy is a question of fact for jury determination.[388] A furnisher's failure to conduct an investigation or inadequate investigation is actionable under the general standards that allow private enforcement for negligent or willful noncompliance with the FCRA.[389]

The furnisher's investigation must be a good faith effort to provide accurate information, not simply a *pro forma* exercise. The investigation's exact nature depends on how the dispute is framed and what information is available to the furnisher. At a minimum, the furnisher must consider information sent by the CRA and evaluate any inconsistencies with its own initial report. In addition, information received directly from the consumer must be checked against the creditor's or collector's internal records.[390] Sometimes a creditor's own records will be inconsistent and require reevaluation.

Many debt collectors, particularly buyers of bad debt portfolios, have neither first-hand knowledge of the accuracy of the information they furnish, nor the documentation to support it, and therefore do not have the capability to access that type of information.[391] Instead, these furnishers frequently engage in the circular and now-discredited "data conformity" charade wherein the debt buyer simply confirms that the disputed information in the CRA computer accurately reflects the information in the furnisher's computer that generated the disputed report in the first place.[392]

Since debt buyers rely on the representations made by the original creditor who sold the portfolio to determine the amount owed and the identity of the alleged debtor, the debt buyer may need to obtain more information from the original creditor when investigating a dispute by a consumer.[393] For example, the Eleventh Circuit indicated "when a furnisher does not already possess evidence establishing that an item of disputed information is true, [15 U.S.C.] § 1681s-2(b) requires the furnisher to seek out and obtain such evidence before reporting the information as 'verified'."[394] Even then, merely asking the creditor to confirm the information may not be sufficient.[395] In a consent order, the FTC confirmed that a debt collector must refer to relevant original account records when necessary to investigate the merits of a formal FCRA dispute.[396] Thus, a collection agency, assignee, or purchaser of an obligation cannot, for example, merely rely on the balance due as transmitted to it by the original creditor when the truth of that information is the subject of the dispute, but must verify the debt with the original account records in its or the original creditor's possession. If no original records exist, the information must be deleted.[397]

14.6.2.3.3 Reinvestigation time limits

The CRA's reinvestigation must be completed within thirty days of receipt of the consumer's formal dispute, with one fifteen-day extension allowed if, during the original thirty days, the consumer forwards additional relevant information. Furnishers thus have to act quickly enough to permit the CRA to meet its deadline, normally having to reinvestigate and respond to the CRA within fifteen to twenty days of their receipt of the notice of the dispute.[398]

At the end of the reinvestigation period, disputed information must be deleted if it cannot be verified, or corrected or modified in light of the reinvestigation. The agency may not extend the period to accommodate its procedures or because it has not received a response from the furnisher of the information. If the reinvestigation is not completed in time, the disputed information must be deleted.[399]

386 15 U.S.C. §§ 1681s-2(b)(2), 1681i(a)(1).

387 *See, e.g.*, Gorman v. Wolpoff & Abramson, L.L.P., 584 F.3d 1147 (9th Cir. 2009); Johnson v. MBNA Am. Bank, 357 F.3d 426, 431 (4th Cir. 2004). *See* National Consumer Law Center, Fair Credit Reporting § 6.10 (9th ed. 2017), *updated at* www.nclc.org/library.

388 National Consumer Law Center, Fair Credit Reporting § 6.10.4.4 (9th ed. 2017), *updated at* www.nclc.org/library.

389 15 U.S.C. §§ 1681n, 1681o. *See* Johnson v. MBNA Am. Bank, 357 F.3d 426, 431 (4th Cir. 2004); Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057 (9th Cir. 2002). *See generally* National Consumer Law Center, Fair Credit Reporting § 6.10.4 (9th ed. 2017), *updated at* www.nclc.org/library.

390 Johnson v. MBNA Am. Bank, 357 F.3d 426, 431 (4th Cir. 2004); Alabran v. Capital One Bank, 2005 WL 3338663 (E.D. Va. 2005); Bruce v. First U.S.A. Bank, 103 F. Supp. 2d 1135 (E.D. Mo. 2000). *See* National Consumer Law Center, Fair Credit Reporting § 6.10 (9th ed. 2017), *updated at* www.nclc.org/library.

391 *See* § 1.3.4, *supra*.

392 *See* National Consumer Law Center, Fair Credit Reporting §§ 6.10.3 to 6.10.4 (9th ed. 2017), *updated at* www.nclc.org/library.

393 *See* National Consumer Law Center, Fair Credit Reporting § 6.13.2 (9th ed. 2017), *updated at* www.nclc.org/library.

394 Hinkle v. Midland Credit Mgmt., Inc., 827 F.3d 1295 (11th Cir. 2016) (reversing summary judgment for furnisher/buyer of "junk debts" and reinstating both negligence and willfulness claims where furnisher's investigation of consumer's dispute that she was mistakenly identified as debtor with similar name was limited to simply confirming the very information in its records that was being challenged).

395 *See* Carlisle v. Nat'l Commercial Services, Inc., 2015 WL 4092817 (N.D. Ga. July 7, 2015) (furnisher/debt collector's investigation, comprised of simply confirming with original creditor that amount claimed to be owed was accurately stated, was insufficient where consumer's dispute showed that creditor had provided conflicting amounts; reasonable investigation would require furnisher to, "at a minimum, obtain an explanation for the differing amounts [the creditor] reported to the consumer or some other information showing that [the creditor] researched the actual dispute presented").

396 Consent Decree, United States v. Performance Capital Mgmt. (Bankr. C.D. Cal. Aug. 24, 2000), *available at* www.ftc.gov.

397 *Id. See* National Consumer Law Center, Fair Credit Reporting § 6.10.4 (9th ed. 2017), *updated at* www.nclc.org/library.

398 *See* National Consumer Law Center, Fair Credit Reporting § 6.10.6.5 (9th ed. 2017), *updated at* www.nclc.org/library.

399 *See* National Consumer Law Center, Fair Credit Reporting § 4.5.5 (9th ed. 2017), *updated at* www.nclc.org/library.

14.6.2.3.4 Prohibition against re-reporting inaccurate information

One persistent problem that has plagued the credit reporting system for decades is the reinsertion in a consumer's file of information that has previously been deleted.[400] Congress has responded to this phenomenon by placing separate prophylactic duties on both the furnishers of such information and the CRAs.

As part of their reinvestigation duties, furnishers must modify, delete, or block inaccurate, incomplete, or unverifiable information and must "permanently" prevent that information from being re-reported.[401] This provision is part of 15 U.S.C. § 1681s-2(b), which consumers may enforce through a private cause of action.

If information that is deleted by the consumer reporting agency is later reinserted into the consumer's file, the CRA must notify the consumer of the reinsertion.[402] Furthermore, the CRA may not reinsert any previously deleted information unless the furnisher certifies that it is accurate and complete.[403]

14.6.3 Improperly Acquiring Credit Reports

Sometimes a question arises whether a debt collector or creditor has improperly acquired a credit report from a consumer reporting agency. The FCRA enumerates specific purposes for which a consumer report may be acquired; obtaining a credit report for any purpose other than those specified is prohibited.[404] A user of a credit report may be liable for failing to certify its purpose for obtaining the report, for obtaining a report without a permissible purpose, or for obtaining a report under false pretenses.[405]

A consumer report generally may be used in collecting a credit account or judgment or reviewing an existing account.[406] Thus, the use of a consumer report for "skip tracing," in which information is sought and used to locate a debtor to facilitate the collection of an existing consumer debt, is permitted.[407] Similarly, debt collectors have a permissible purpose for receiving a consumer report for use in a lawsuit to enforce an existing consumer debt.[408]

However, a collector is limited to accessing or using a consumer report for debt collection—whether skip tracing, direct collection, or otherwise—only when the debt arises from a credit transaction or, if not a credit-based obligation, has already been reduced to judgment. An attempt to collect or establish a non-credit-based debt, such as an inchoate claim that a consumer simply owes money, is not a lawful basis to access the consumer's credit report.[409]

Of course, a collector goes beyond these permissible purposes by obtaining a credit report on any person who is not obligated to pay the debt, for example, a relative of the debtor who is not liable on the account.[410]

The FCRA private remedies are available whenever a user violates any of these provisions.[411]

14.6.4 Special Duties Where Debt Arises from Fraud or Identity Theft

The FCRA gives consumers the right to require consumer reporting agencies to block information that resulted from fraud, including identity theft.[412] Once properly notified by the consumer of the fraud, the CRA must also promptly notify the furnishers of the information, including debt collectors.[413] That debt collector or other person then may not sell or transfer the debt, except as a repurchase to a prior assignor, and may not place it for further collection.[414] This ban does not apply to securitizations of loan portfolios, however.[415]

Whether these furnisher duties are privately enforceable under the FCRA is currently an unresolved question that has split the federal courts.[416] However, a debt collector who violates this provision of the FCRA, even if not subject to enforcement under that law, may still be liable under the FDCPA for taking any action that is otherwise prohibited by law.[417]

The FCRA preempts states from regulating the conduct required by these provisions.[418] On the other hand, when the FCRA provides an exception from the applicability of these

400 *See* National Consumer Law Center, Fair Credit Reporting § 4.7 (9th ed. 2017), *updated at* www.nclc.org/library.

401 15 U.S.C. § 1681s-2(b)(1)(E)(iii). *See* National Consumer Law Center, Fair Credit Reporting § 6.10.5 (9th ed. 2017), *updated at* www.nclc.org/library.

402 *See* National Consumer Law Center, Fair Credit Reporting §§ 4.7.2.4, 8.10.2 (9th ed. 2017), *updated at* www.nclc.org/library.

403 *See* National Consumer Law Center, Fair Credit Reporting § 4.7.2.3 (9th ed. 2017), *updated at* www.nclc.org/library.

404 15 U.S.C. § 1681b. *See* National Consumer Law Center, Fair Credit Reporting Ch. 7 (9th ed. 2017), *updated at* www.nclc.org/library.

405 *See* 15 U.S.C. §§ 1681b(f), 1681q; National Consumer Law Center, Fair Credit Reporting Ch. 7 (9th ed. 2017), *updated at* www.nclc.org/library.

406 15 U.S.C. § 1681b(a)(3)(A). *See* National Consumer Law Center, Fair Credit Reporting § 7.2.3 (9th ed. 2017), *updated at* www.nclc.org/library.

407 *See* National Consumer Law Center, Fair Credit Reporting § 7.2.3.4.1 (9th ed. 2017), *updated at* www.nclc.org/library.

408 *Id.* However, a party has no permissible purpose to access or use a consumer report in connection with civil litigation generally. *See* National Consumer Law Center, Fair Credit Reporting § 7.4.4 (9th ed. 2017), *updated at* www.nclc.org/library.

409 *See* National Consumer Law Center, Fair Credit Reporting § 7.2.3.4.1, 7.2.3.4.3 (9th ed. 2017), *updated at* www.nclc.org/library.

410 *See* National Consumer Law Center, Fair Credit Reporting §§ 7.2.3.4.1, 7.2.3.4.3, and 7.4.6 (9th ed. 2017), *updated at* www.nclc.org/library.

411 *See* National Consumer Law Center, Fair Credit Reporting § 7.7 (9th ed. 2017), *updated at* www.nclc.org/library.

412 15 U.S.C. § 1681c-2(a). *See* National Consumer Law Center, Fair Credit Reporting § 9.2.4.1 (9th ed. 2017), *updated at* www.nclc.org/library.

413 15 U.S.C. § 1681c-2(b).

414 15 U.S.C. § 1681m(f). *See* National Consumer Law Center, Fair Credit Reporting § 9.2.4.2 (9th ed. 2017), *updated at* www.nclc.org/library.

415 15 U.S.C. § 1681m(f)(3)(B).

416 *See* National Consumer Law Center, Fair Credit Reporting § 8.2.6.5 (9th ed. 2017), *updated at* www.nclc.org/library.

417 *See* § 7.2.5, *supra*.

418 15 U.S.C. §§ 1681t(b)(5)(C), 1681t(b)(5)(F).

duties, the preemption rule is necessarily also exempted. Accordingly, because the ban on sale, transfer, or further collection does not apply to securitizing loan portfolios, the FCRA does not preempt available state laws to remedy any resulting misconduct, such as a potential UDAP violation for securitizing a known identity theft debt.

The FCRA also imposes notification responsibilities on debt collectors once a consumer provides notice that a debt may be fraudulent or may have resulted from identity theft.[419] Once so notified, the debt collector must then notify the creditor of that allegation and must provide the consumer with all information about the debt to which the consumer would be entitled if the consumer were in fact the liable party.[420] This provision requires the collector to provide verification to the fraud victim who allegedly owes the debt and to comply with the FDCPA's other debt validation provisions.[421]

14.6.5 Creditors and Collectors As Consumer Reporting Agencies

A collection agency or creditor will meet the definition of consumer reporting agency if it regularly furnishes information, beyond its own transactions or experiences with consumers, to third parties for use in connection with consumers' transactions.[422] But merely reporting its own experience with the consumer will not make it a consumer reporting agency.[423]

The business model of the typical debt collector or creditor usually does not include reporting beyond its own experiences with consumers, and thus it would not be considered a consumer reporting agency. However, certain check guarantee companies that both collect dishonored checks and provide merchants with instant check pre-approval are an example of an FDCPA "debt collector"[424] that is also an FCRA "consumer reporting agency."[425] If a collection agency or creditor meets this definition, it will have to comply with all the requirements that the FCRA imposes on consumer reporting agencies, including:

- Exclusion of obsolete information from credit reports;[426]
- Maintenance of reasonable procedures to ensure maximum possible accuracy of the information it reports[427] and to ensure that credit reports are provided only for permissible purposes;[428]
- Disclosure of the credit report to the consumer upon request, along with a written summary of the consumer's rights;[429] and
- Reinvestigation of disputed items.[430]

Creditors or collectors who do not consider themselves to be consumer reporting agencies are unlikely to have in place the necessary systems to comply with these many duties.

14.6.6 FDCPA and Other Prohibitions Relating to Credit Reports

14.6.6.1 Publicizing Indebtedness; Deceptive Implication That a Collector Is a Credit Bureau

The FDCPA prohibits a debt collector from publicizing consumers' indebtedness unless done in compliance with the FCRA.[431] Also, a debt collector may not use a name that deceptively implies that the collector is a consumer reporting agency, for example, a name with the words "credit bureau."[432] More broadly, it prohibits the use of any "false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by [the FCRA]".[433]

14.6.6.2 Disputed Debts and the Verification Process

A debt collector who receives a written dispute during the thirty-day verification period after its initial communication with the consumer must cease all collection activity until it provides the required verification.[434] Since reporting the debt to a CRA is collection activity, it may be that the debt cannot be reported to a credit bureau until after the requested verification is provided.[435] Even after verification is provided, the debt remains known to the collector to be disputed. Therefore, the collector must disclose in all subsequent communications to the credit bureau that the debt is disputed in accordance with FDCPA's specific credit reporting provision, section 1692e(8).[436]

419 *See* National Consumer Law Center, Fair Credit Reporting § 9.2.3.2 (9th ed. 2017), *updated at* www.nclc.org/library.

420 15 U.S.C. § 1681m(g).

421 15 U.S.C. § 1692g. *See* § 9.8, *supra*.

422 FTC Staff Summary of the FCRA, § 603(f), item 4I, *available at* www.fca.gov, *reproduced in* National Consumer Law Center, Fair Credit Reporting Appx. D (9th ed. 2017), *updated at* www.nclc.org/library. *See* National Consumer Law Center, Fair Credit Reporting § 2.5 (9th ed. 2017), *updated at* www.nclc.org/library. *Cf.* Cotto v. Jenny, 721 F. Supp. 5 (D. Mass. 1989) (landlord reporting service that prepared reports relative to tenant's tardiness in rental payments is "consumer reporting agency" and thus subject to Act).

423 National Consumer Law Center, Fair Credit Reporting § 2.4.2 (9th ed. 2017), *updated at* www.nclc.org/library.

424 *See* § 4.7, *supra*.

425 *See* National Consumer Law Center, Fair Credit Reporting § 2.3.6.3.2 (9th ed. 2017), *updated at* www.nclc.org/library.

426 15 U.S.C. § 1681c.

427 15 U.S.C. § 1681e(b).

428 15 U.S.C. §§ 1681b, 1681e(a).

429 15 U.S.C. § 1681g.

430 15 U.S.C. § 1681*i*.

431 15 U.S.C. § 1692d(3). *See* §§ 5.7, 6.5, *supra*.

432 15 U.S.C. § 1692e(16). *See* § 7.2.16, *supra*.

433 15 U.S.C. § 1692e(16). *See* § 7.2.16, *supra*.

434 *See* § 9.11.3, *supra*.

435 *See* Cass, FTC Informal Staff Letter, 1997 WL 33791232, at *1 (Dec. 23, 1997) (reporting to a credit bureau is "collection activity" that must cease until § 1692g(b) verification is provided). Although FTC informal staff opinion letters are not authoritative, courts might look to them for guidance. *See* National Consumer Law Center, Fair Credit Reporting § 1.3.3.2 (9th ed. 2017), *updated at* www.nclc.org/library. Additionally, the FTC still engages in enforcement actions against unfair debt collection activity under the FDCPA. *See, e.g.*, FTC Letter to CFPB (Feb. 19, 2021), *available at* https://www.ftc.gov.

436 15 U.S.C. § 1692e(8). *See* § 7.2.8, *supra*.

14.6.6.3 Threatening to Report Debt

False threats to report the consumer to a CRA are, like all false threats, prohibited by the FDCPA[437] and sometimes by state debt collection statutes[438] or consumer protection acts.[439] A lawyer who reports a client's nonpayment of a fee to a CRA may be in violation of the confidentiality requirements of the rules of professional conduct.[440]

It is a simple matter for a consumer to determine whether a collector has followed through on a threat to report a delinquency. The FCRA gives a consumer the right to be informed of most of the contents of their file at a consumer reporting agency, and the right to know who sent and received the information.[441] The three nationwide CRAs have established a "centralized source," required by the FCRA, where consumers can obtain their free annual credit report online.[442] Using this disclosure right, a consumer can verify whether the collector has made a report to a credit bureau as threatened as well as determine which debt collectors or creditors have reported information that needs to be disputed.

14.6.7 Negotiating a Debt Settlement Covering Credit Reporting

Consumers resolving their debt obligations need to consider the impact on their credit reports. In some situations, such as a settlement of collection litigation through a stipulated agreement entered in the collection court or other formal action entered into the court record, subsequent credit reporting must accurately track the official record.[443] Other situations, such as a settlement that is not part of a formal record or that acknowledges that previous reporting of the debt was inaccurate or incomplete, will require special attention.

To clear a previously negative report and make it nonderogatory or positive, the furnisher can submit to the CRAs a UDF (Universal Data Form) to correct the reporting and remove all derogatory data. Generally, the furnisher should report:

- Account Status as Paid and Closed, which is Account Status Code 13;
- Payment Rating should be 0, reflecting a current account;
- Payment History should not reflect any Past Due payment history if none otherwise exists;
- No Date of First Delinquency if one otherwise does not exist; and
- Current Balance should be $0.

Another option that may be available to consumers when negotiating a settlement with debt collectors or debt buyers is to simply delete the entire account or "tradeline."[444] This requires the debt collector or debt buyer who is furnishing information about a debt to request the removal of any mention of the account from a consumer's credit report from the consumer reporting agencies.[445]

Unfortunately, simply trying to say in plain English that, for example, the furnisher will report the debt as paid or agrees to delete the tradeline is typically not sufficient. A thorough discussion of this topic, including reproduction of sample settlement language necessary to effectuate an enforceable tradeline deletion, is provided in NCLC's Fair Credit Reporting.[446]

14.7 Payments to Debt Collectors

14.7.1 Overview

Consumers sometimes run into problems in connection with payments to debt collectors. The collector may have initiated a payment that the consumer did not authorize or expect. The collector may be repeatedly submitting a bounced payment, triggering nonsufficient funds fees. Or the consumer may wish to stop recurring payments. In addition to the specific FDCPA rules governing post-dated checks,[447] other laws give consumers rights.

The consumer protection laws governing payments vary depending on the type of payment and type of account the payment is taken from. Payments law is covered in detail in NCLC's Consumer Banking and Payments Law.[448] Credit card payments are covered in NCLC's Truth in Lending,[449] but credit card networks may prohibit debt collectors from accepting credit card payments.[450]

Most payments (other than credit card payments) fall into two categories: checks or electronic fund transfers. Checks (including remotely created checks, also known as telechecks)

437 *See* §§ 7.2.4, 7.2.5, *supra*.

438 *See* § 16.2, *infra*.

439 *See* § 16.3, *infra*. *See also* Massachusetts Lawyers Weekly No. 24-003-00 (opinion of Mass. Bar Assoc. Comm. on Prof'l Ethics that it is unethical for attorney to report to credit reporting agency that client has failed to pay fee).

440 Mass. Bar Assoc. Comm. on Prof'l Ethics, Op-3 (2000), *available at* www.massbar.org.

441 15 U.S.C. § 1681g. *See* National Consumer Law Center, Fair Credit Reporting Ch. 3 (9th ed. 2017), *updated at* www.nclc.org/library.

442 www.annualcreditreport.com. *See* National Consumer Law Center, Fair Credit Reporting § 3.3.2 (9th ed. 2017), *updated at* www.nclc.org/library.

443 *See, e.g.*, Dennis v. BEH-1, L.L.C., 520 F.3d 1066, 1070–1071 (9th Cir. 2008) (CRA is liable for failing to correct its report of judgment against consumer, when court records showed that case had been dismissed).

444 *See* National Consumer Law Center, Fair Credit Reporting § 14.6.4.2.3 (9th ed. 2017), *updated at* www.nclc.org/library.

445 *See* National Consumer Law Center, Fair Credit Reporting §§ 6.4.2.7, 14.6.4.2.3 (9th ed. 2017), *updated at* www.nclc.org/library.

446 *See* National Consumer Law Center, Fair Credit Reporting § 14.6.4, Appx. K (9th ed. 2017), *updated at* www.nclc.org/library.

447 *See* § 8.4, *infra*.

448 National Consumer Law Center, Consumer Banking and Payments Law (6th ed. 2018), *updated at* www.nclc.org/library.

449 National Consumer Law Center, Truth in Lending § 7.9 (protections against credit card errors), § 7.10 (protections against unauthorized charges), § 7.11 (right to assert claims and defenses) (10th ed. 2019), *updated at* www.nclc.org/library.

450 *See* National Consumer Law Center, Consumer Banking and Payments Law §§ 5.3.1.3.4, 5.3.9 (6th ed. 2018), *updated at* www.nclc.org/library.

are covered by the Uniform Commercial Code,[451] which also covers checks re-presented through the Automated Clearing House (ACH) system. Electronic fund transfers (EFTs) are covered by the Electronic Fund Transfer Act.[452] EFTs include a growing list of electronic payment methods, including ACH payments, debit and prepaid cards, and person-to-person (p2p) transfers such as Zelle or Venmo.[453]

14.7.2 Checks and Electronic Fund Transfers; the Role of NACHA Rules

Check payments to debt collectors are most likely to pose problems for consumers when collectors obtain the consumer's bank account and routing number and use that information to create a remotely created check. The UCC defines an authorized "signature" quite broadly to include a mark by a person authorized by the drawer.[454] That authorization may come in a written agreement or may be oral (i.e., on a telephone call with the debt collector).[455] If the consumer did not authorize the creation of a remotely created check, the consumer's right to contest it is the same as for other forged signatures.[456]

Electronic fund transfers of all types must be authorized; if not, the consumer has the right to contest it as unauthorized.[457] The EFTA requires disclosures (which should include payment authorizations) to be clear and readily understandable;[458] authorizations that are buried in fine print or that result in payments the consumer does not expect may not meet that standard. The EFTA does not otherwise have detailed authorization requirements[459] except for recurring preauthorized transfers.[460] The EFTA also requires advance notice when a preauthorized transfer will vary in amount from the previous transfer or the authorized amount.[461]

The rules of the National Automated Clearinghouse Association (NACHA) have more detailed authorization requirements for ACH payments, whether one-time or recurring, including clear and readily understandable information about the amount and timing of the debits. Authorization requirements vary depending on how the authorization is obtained (i.e., on the internet or by telephone).[462]

The EFTA protects consumers against unauthorized transfers and errors and sets out timing requirements for consumers and duties for financial institutions to resolve errors and limit consumer liability.[463] NACHA has similar rules.

The UCC gives consumers the right to stop payment on a check.[464] The EFTA does not provide a stop payment right for one-time EFTs, but it does give consumers the right to order the bank to stop recurring preauthorized transfers.[465] The EFTA also implies, but does not explicitly detail, the right to revoke the payee's (i.e., the debt collector's) authorization for recurring transfers.[466]

NACHA rules provide a right to stop one-time ACH payments scheduled in advance, ACH transactions based on checks, and recurring transfers.[467] NACHA rules also explicitly give consumers the right to revoke a payee's authorization for both recurring and single-entry debits scheduled to occur in advance, except for check conversions.[468] The right to revoke authorization and how to exercise it must be set forth in the authorization itself, and an authorization that lacks that information is unauthorized.[469]

If a check bounces, the UCC does not have rules concerning the number of times a bounced check may re-submitted, though general rules regarding check processing and final payment deadlines should apply.[470] But bounced checks are usually re-represented electronically through the ACH system.[471] These electronically re-presented checks (called RCK entries in NACHA terminology) are not considered to be EFTs, and instead are governed by the UCC[472] and by NACHA rules.[473]

451 *See* National Consumer Law Center, Consumer Banking and Payments Law Ch. 3 (6th ed. 2018), *updated at* www.nclc.org/library.

452 *See* National Consumer Law Center, Consumer Banking and Payments Law Ch. 5 (6th ed. 2018), *updated at* www.nclc.org/library.

453 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.1.5.3 (6th ed. 2018), *updated at* www.nclc.org/library.

454 *See* National Consumer Law Center, Consumer Banking and Payments Law § 3.13.2 (6th ed. 2018), *updated at* www.nclc.org/library.

455 Unlike debt collectors, debt relief services are prohibited by the FTC's Telemarketing Sales Rule from obtaining authorization for a remotely created check in telephone transactions. *See* National Consumer Law Center, Consumer Banking and Payments Law § 3.13.2.2 (6th ed. 2018), *updated at* www.nclc.org/library.

456 *See* National Consumer Law Center, Consumer Banking and Payments Law § 3.7.2.2 (6th ed. 2018), *updated at* www.nclc.org/library.

457 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.5 (6th ed. 2018), *updated at* www.nclc.org/library.

458 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.3.1.1 (6th ed. 2018), *updated at* www.nclc.org/library.

459 Instead, the EFTA defines "unauthorized transfers" and gives consumers protection against them. *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.5.2 (6th ed. 2018), *updated at* www.nclc.org/library.

460 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.9.2 (6th ed. 2018), *updated at* www.nclc.org/library.

461 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.9.3 (6th ed. 2018), *updated at* www.nclc.org/library.

462 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.3 (6th ed. 2018), *updated at* www.nclc.org/library.

463 *See* National Consumer Law Center, Consumer Banking and Payments Law §§ 5.5, 5.6 (6th ed. 2018), *updated at* www.nclc.org/library.

464 *See id.*

465 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.9.4 (6th ed. 2018), *updated at* www.nclc.org/library.

466 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.9.4.2 (6th ed. 2018), *updated at* www.nclc.org/library.

467 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.3.7.2 (6th ed. 2018), *updated at* www.nclc.org/library.

468 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.3.7.2.3 (6th ed. 2018), *updated at* www.nclc.org/library.

469 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.3.1.2 (6th ed. 2018), *updated at* www.nclc.org/library.

470 *See* National Consumer Law Center, Consumer Banking and Payments Law § 3.8.5 (6th ed. 2018), *updated at* www.nclc.org/library.

471 *See id.*

472 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.1.5.3.3.3 (6th ed. 2018), *updated at* www.nclc.org/library.

473 *See* National Consumer Law Center, Consumer Banking and Payments Law §§ 5.3.5, 5.13 (6th ed. 2018), *updated at* www.nclc.org/library.

NACHA rules allow RCKs, as well as bounced ACH payments, to be re-presented only twice more after the original presentment.[474] NACHA rules also prohibit dividing the check or original ACH payment into smaller amounts for reprocessing.[475]

If a check or EFT bounces, debt collectors may attempt to collect a returned item fee. If a remotely created check is used to collect the fee, then the UCC rules governing authorized signatures apply. If, more typically, the ACH system is used, then EFTA and NACHA rules and authorization requirements regarding returned item fees apply.[476]

All of these rules are addressed in detail in NCLC's Consumer Banking and Payments Law.[477]

14.8 Discriminatory Collection Tactics Based on Race, Other Prohibited Categories

Collection tactics may involve invidious discrimination. Such tactics could include the use of derogatory race or gender epithets in a collection call, or differential policies regarding renegotiation of credit terms. Generally speaking, the party attempting to collect a debt will either be the creditor or a third-party debt collector. The Equal Credit Opportunity Act (ECOA)[478] forbids discrimination by creditors, while the FDCPA covers debt collectors. Although the FDCPA does not contain any provisions specifically forbidding discrimination, discrimination should be actionable as "abuse"[479] or an "unfair or unconscionable"[480] means of collecting a debt. Some provisions of the Civil Rights Act may also apply, and if the debtor's home is at risk, the Fair Housing Act may be applicable.[481]

The ECOA provides that it "shall be unlawful for any creditor to discriminate against any applicant, *with respect to any aspect* of a credit transaction" on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or exercise of rights under the Consumer Credit Protection Act.[482] Although the primary focus of the ECOA is discriminatory treatment during the application and credit extension stages of a credit transaction, this broad language also prohibits discriminatory collection tactics by a creditor.[483] Regulations promulgated under the ECOA provide that the term "credit transaction" means "every aspect of an applicant's dealing with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to . . . collection procedures)."[484] This language means that the consumer is protected by the ECOA "throughout the life of the credit account, from the initial request to the final payment or a collection action."[485]

The terms "creditor" and "applicant" are similarly broad, although not without limits. According to the regulations, an applicant is "any person who requests or who has received an extension of credit from a creditor," including "any person who is or may become contractually liable regarding an extension of credit."[486] To qualify as a creditor under the ECOA, a party must be involved in some way in the decision to extend credit or in setting the terms of the credit.[487] Therefore, an assignee of the original creditor may not be covered, unless it was involved in the initial extension of credit or its activities constitute the extension of new credit. An offer to modify the terms of an existing debt qualifies as an extension of credit.[488]

Defendants engaged in collecting debts may argue that they are somehow protected by the FRB's definition of "adverse action," which excludes "any action or forbearance relating to an account taken in connection with inactivity, default, or delinquency as to that account."[489] This definition applies, however, *only* to the question of whether the creditor must give the consumer a notice of adverse action,[490] a duty that is separate from the general duty not to discriminate with respect to any aspect of a credit transaction.[491]

474 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.13.2 (6th ed. 2018), *updated at* www.nclc.org/library.

475 *See* National Consumer Law Center, Consumer Banking and Payments Law § 5.13.3 (6th ed. 2018), *updated at* www.nclc.org/library.

476 *See* National Consumer Law Center, Consumer Banking and Payments Law §§ 5.1.5.3.3.3, 5.3.6 (6th ed. 2018), *updated at* www.nclc.org/library.

477 National Consumer Law Center, Consumer Banking and Payments Law (6th ed. 2018), *updated at* www.nclc.org/library.

478 15 U.S.C. § 1691.

479 15 U.S.C. § 1692d, *discussed at* § 6.2, *supra*.

480 15 U.S.C. § 1692f, *discussed at* § 8.3.6, *supra*.

481 42 U.S.C. § 3604(a) (making it illegal to "make unavailable or deny" housing on the basis of a discriminatory factor), § 3605 (forbidding discrimination in the terms of a "residential real estate-related transaction"). *See* Harper v. Union Sav. Ass'n, 429 F. Supp. 1254 (N.D. Ohio 1977) (FHA covers foreclosure activity); Lindsey v. Modern Am. Mortg. Corp., 383 F. Supp. 293 (N.D. Tex. 1974) (same). *But see* Estate of Davis v. Wells Fargo Bank, 633 F.3d 529 (7th Cir. 2011) (unsubstantiated claim of racial discrimination insufficient to support FHA claim); Moore v. Fed. Deposit Ins. Corp., 2009 WL 4405538 (N.D. Ill. Nov. 30, 2009) (allegations involving "post-default action," such as repeatedly ignoring requests for information, workout and documentation, do not state § 3605 claim because plaintiffs were "not attempting to engage in a residential real estate transaction as the term is defined in the FHA").

482 15 U.S.C. § 1691a (emphasis added).

483 Sharp v. Chartwell Fin. Services Ltd., 2000 WL 283095 (N.D. Ill. Mar. 6, 2000) (collector's use of racial and gender-based epithets during collection phone calls held actionable). *See generally* National Consumer Law Center, Credit Discrimination § 9.2.4 (6th ed. 2013), *updated at* www.nclc.org/library.

484 Reg. B, 12 C.F.R. § 1002.2(m).

485 Fed. Deposit Ins. Corp. v. Allen, 1988 WL 361044 (W.D. Okla. Nov. 3, 1988).

486 Reg. B, 12 C.F.R. § 1002.2(e) [§ 202.2(e)]. *See* Estate of Davis v. Wells Fargo Bank, 633 F.3d 529 (7th Cir. 2011) (reversing dismissal of ECOA claim which held that plaintiff was not "applicant," but finding harmless error due to insufficient proof on merits).

487 15 U.S.C. § 1691a(e) ("The term 'creditor' means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.").

488 *See* Estate of Davis v. Wells Fargo Bank, 639 F.3d 529 (7th Cir. 2011).

489 Reg. B, 12 C.F.R. § 1002.2(c)(2)(ii).

490 *See* 15 U.S.C. § 1691(d); Reg. B, 12 C.F.R. § 1002.9.

491 *See* 15 U.S.C. § 1691(a). *But see* Lewis v. ACB Bus. Services, 135 F.3d 389 (6th Cir. 1998) (confusing definition of "adverse action" with general prohibition against discrimination and ruling that creditor was not

Because the ECOA includes marital status and sex as protected classes, there may also be ECOA liability when a creditor or collector attempts to collect a debt from a spouse whose alleged liability is based solely on a family expense statute by which one spouse is automatically responsible for certain expenses such as medical bills incurred by the other. One court[492] has suggested that such liability would be contrary to the ECOA's rule that a person has the right to obtain credit separately from their spouse.[493] Attempting to collect a debt against a spouse without any explicit assumption of joint liability may also violate the FDCPA[494] and may be deceptive.[495]

Actions may be brought under the ECOA for both disparate treatment (differential treatment *because of* membership in a protected group) and disparate impact (the use of some facially neutral factor or policy that results in a discriminatory effect on a protected group).[496] Discrimination in the debt collection context is related to the developing body of law on reverse redlining, where the issue is not exclusion from access to credit, but rather targeting certain populations for negative credit treatment.[497]

The ECOA provides a private action for actual and punitive damages, attorney fees to a successful plaintiff, and federal court jurisdiction.[498] The statute of limitations for ECOA claims is five years.[499]

The sections of the Civil Rights Acts that apply to nongovernmental actions may also provide remedies if discriminatory collection tactics have been used.[500] By virtue of the 1991 amendments, 42 U.S.C. § 1981 applies to all aspects of the contractual relationship, including "performance, modification, and termination of contracts." The amendments also make it clear that section 1981 bars both public and private discrimination.[501] The Civil Rights Act can apply regardless of whether the defendant meets the statutory definitions of "debt collector" or "creditor" under the statutes discussed above. However, unlike the ECOA, disparate impact theories are not available under the Civil Rights Act, so it will be necessary to show disparate treatment.[502]

14.9 Federal Credit Repair Organizations Act

14.9.1 Overview

The federal Credit Repair Organizations Act (CROA)[503] is discussed in detail in NCLC's Fair Credit Reporting.[504] It may apply to debt buyers or debt collectors in two circumstances. First, as discussed in the next section, some courts have held that a debt collector may meet CROA's definition of "credit repair organization" if it states, in a collection letter or otherwise, that payment of a debt will improve the consumer's credit rating. An entity that meets the definition of "credit repair organization" is subject to disclosure requirements, specific restrictions on its contracts, and a prohibition against accepting payment from a consumer until the promised credit repair services are fully performed.[505]

liable under ECOA for filing collection suit allegedly in retaliation for consumer's FDCPA suit; in alternate holding, consumer failed to show causal connection between FDCPA suit and collection suit).

492 Edwards v. McCormick, 136 F. Supp. 2d 795 (S.D. Ohio Mar. 30, 2001).

493 15 U.S.C. § 1691(a)(1); 12 C.F.R. § 1002.7(d)(1) [§ 202.7(d)(1)]. *See generally* National Consumer Law Center, Credit Discrimination § 9.3 (7th ed. 2018), *updated at* www.nclc.org/library.

494 Edwards v. McCormick, 136 F. Supp. 2d 795 (S.D. Ohio Mar. 30, 2001) (finding it unnecessary to decide issue, but commenting favorably that ECOA would preempt any state liability theory holding spouse responsible for debt where spouse had not signed as financially responsible party). *See also* CMRE Fin. Services, Inc. v. Parton, 109 Cal. Rptr. 3d 139 (Cal. Ct. App. 2010) (remanding for consideration of good faith defense under FDCPA when creditor continued collection actions after non-debtor spouse notified creditor of separation and pending divorce from debtor). *But cf.* Lester E. Cox Med. Ctrs. v. Huntsman, 2003 WL 22004998 (W.D. Mo. Aug. 5, 2003) (husband liable for wife's medical bill under necessaries doctrine; not Fair Debt Collection Practices Act violation to dun him for bill), *aff'd* 408 F.3d 989 (8th Cir. 2005).

495 *See* Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (finding deception under state UDAP law where collector brought action against debtor's spouse where spouse had no legal obligation to pay debt).

496 *See* S. Rep. No. 94-589, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 406. *See also* Official Staff Commentary to Reg. B, 12 C.F.R. § 1002.6(a)-2; Golden v. City of Columbus, 404 F.3d 950, 963 (6th Cir. 2005); Miller v. Am. Exp. Co., 688 F.2d 1235 (9th Cir. 1982). *See also* Palmer v. Homecomings Fin., L.L.C., 677 F. Supp. 2d 233 (D.D.C. 2010); Rodriguez v. SLM Corp., 2009 WL 598252, at *3 (D. Conn. Mar. 6, 2009) (refusing to dismiss disparate impact claim under ECOA when lender allegedly charged minority borrowers higher interest rates and fees than similarly situated Caucasians on private student loans). *See generally* National Consumer Law Center, Credit Discrimination Ch. 4 (7th ed. 2018), *updated at* www.nclc.org/library.

497 *See generally* National Consumer Law Center, Credit Discrimination Ch. 8 (7th ed. 2018), *updated at* www.nclc.org/library (discussion of reverse redlining).

498 15 U.S.C. § 1691e. *See* National Consumer Law Center, Credit Discrimination § 11.8 (7th ed. 2018), *updated at* www.nclc.org/library.

499 15 U.S.C. § 1691e(f), *as amended by* the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, §§ 1085(7), 1100H (2010). *See also* 75 Fed. Reg. 57,252 (Sept. 20, 2010) (setting effective date of the amendment (the "designated transfer date")). *See generally* National Consumer Law Center, Credit Discrimination § 11.8.1 (7th ed. 2018), *updated at* www.nclc.org/library.

500 *See, e.g.*, 42 U.S.C. §§ 1981, 1982, 1985.

Some debt collection tactics that utilize the courts or public officials constitute state action, potentially giving rise to a claim under 42 U.S.C. § 1983 as well. *See* § 14.11, *Infra*.

501 42 U.S.C. § 1981(c).

502 *See, e.g.*, Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982); Roy v. Bd. of County Comm'rs, 607 F. Supp. 2d 1297, 1308–1309 (N.D. Fla. 2009). *But see* NAACP v. Ameriquest Mortg. Co., 635 F. Supp. 2d 1096, 1104 (C.D. Cal. 2009) (refusing to dismiss disparate impact claim under section 1982 in reverse redlining case; relying on *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980), which was not disparate impact case). *See* National Consumer Law Center, Credit Discrimination § 4.3 (7th ed. 2018), *updated at* www.nclc.org/library.

503 15 U.S.C. §§ 1679 to 1679j.

504 National Consumer Law Center, Fair Credit Reporting Ch. 17 (9th ed. 2018), *updated at* www.nclc.org/library.

505 15 U.S.C. §§ 1679b(a), 1679b(b).

Second, as discussed in § 14.9.4, *infra*, the Act prohibits anyone—regardless of whether that person meets the definition of "credit repair organization"—from engaging in certain deceptive practices. A debt collector might violate these prohibitions if it made deceptive statements about how a credit repair organization could help the debtor, or encouraged the debtor to make misstatements to another creditor as a way of obtaining funds to pay off the debt. Where it applies, CROA offers distinct advantages over the Fair Debt Collection Practices Act as a basis for suit against debt collectors. It allows punitive damages without a cap in either an individual action or a class action.[506] It also allows minimum damages in the amount of all payments made to the defendant, without regard to actual damages.[507] Significantly, an entity that is excluded from the FDCPA because it acquired the debt before it went into default can still meet the CROA definition of "credit repair organization."

Creditors who use deceptive tactics in collecting their own debts can be sued under UDAP statutes or special debt collection laws in most states,[508] but the CROA offers certain advantages that these statutes may not have. There is no explicit exception for attorneys, and courts have held that attorneys are credit repair organizations if they meet the elements of the definition.[509]

14.9.2 Whether Creditors and Collectors Are "Credit Repair Organizations"

The statute defines "credit repair organization" as any person who uses any instrumentality of interstate commerce or the mails to perform or offer to perform any service, for a fee or other valuable consideration, for the express or implied purpose of—

> (i) improving any consumer's credit record, credit history, or credit rating; or
> (ii) providing advice and assistance to any consumer with regard to any activity or service described in clause (i).[510]

Simply advertising or claiming to provide credit repair services is sufficient, even if the organization does not actually perform the services.[511] Whether the organization actually performs any services is irrelevant.[512] The definition of credit repair organization has three exceptions:

- It does not include any depository institution or credit union, or their subsidiaries or affiliates.[513]
- The definition does not include non-profit organizations that are exempt from taxation under section 501(c)(3) of the Internal Revenue Code.[514] To qualify for this exception, an organization must both have tax-exempt status and be operating in fact as a non-profit organization.[515] Courts have rejected attempts by sham non-profits to claim this exemption.[516]
- The definition does not include an originating creditor's restructuring of a consumer's debt to it.[517]

This last exception, however, applies only to entities that meet the Truth in Lending Act's definition of "creditor":

> [A] person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in

506 The FDCPA has a statutory damages cap of $1000 in individual actions and $500,000 or 1% of net worth in class actions. 15 U.S.C. § 1692k(a)(2). *See* §§ 11.9, 11.11.3, *supra*.

507 15 U.S.C. § 1679g. *See* National Consumer Law Center, Fair Credit Reporting § 17.2.8 (9th ed. 2018), *updated at* www.nclc.org/library.

508 *See* Ch. 16, *infra*.

509 *See* Rannis v. Fair Credit Lawyers, Inc., 380 Fed. Appx. 646 (9th Cir. 2010) (attorney who advertised "Improve Your Credit Score Now!" is credit repair organization; no exemption for non-litigation activities performed within attorney-client relationship); Iosello v. Lexington Law Firm, 2003 WL 21920237 (N.D. Ill. Aug. 7, 2003); *In re* Disciplinary Action Against McCray, 755 N.W.2d 835 (N.D. 2008) (law firm that acted as front for credit repair operation is credit repair organization). *See also* Fed. Trade Comm'n v. Gill, 265 F.3d 944 (9th Cir. 2001) (applying CROA to attorney who allowed credit repair operative to work out of his office). *See generally* National Consumer Law Center, Fair Credit Reporting § 17.2.2.5 (9th ed. 2018), *updated at* www.nclc.org/library.

510 15 U.S.C. § 1679a(3)(A).

511 Zimmerman v. Cambridge Credit Counseling Corp., 529 F. Supp. 2d 254, 275 n.20 (D. Mass. 2008); Hillis v. Equifax Consumer Services, Inc., 237 F.R.D. 491, 509 (N.D. Ga. 2006) (defendant's representation that "Score Power" was "service" is sufficient, but CROA does not cover services that offer only prospective credit advice to consumers); Asmar v. Benchmark Literacy Group, Inc., 2005 WL 2562965 (E.D. Mich. Oct. 11, 2005) (for-profit entity that sells credit repair services is credit repair organization even if actual services are performed by non-profit affiliate, and even if it shares fee with that affiliate); Browning v. Yahoo!, Inc., 2004 WL 2496183 (N.D. Cal. Nov. 4, 2004) (denial of motion to dismiss) (company that represented that it could provide credit services can be credit repair organization, even though another entity actually provided services); Parker v. 1-800 Bar None, 2002 WL 215530 (N.D. Ill. Feb. 12, 2002) (company that provided no credit repair services itself, but just referred consumer to another organization, is covered); Sannes v. Jeff Wyler Chevrolet, Inc., 1999 WL 33313134 (S.D. Ohio Mar. 31, 1999); *In re* Nat'l Credit Mgmt. Group, L.L.C., 21 F. Supp. 2d 424 (D.N.J. 1998). *See* Parker v. 1-800 Bar None, 2002 WL 215530 (N.D. Ill. Feb. 12, 1002).

512 Zimmerman v. Cambridge Credit Counseling Corp., 529 F. Supp. 2d 254 (D. Mass. 2008); Asmar v. Benchmark Literacy Group, Inc., 2005 WL 2562965 (E.D. Mich. Oct. 11, 2005) (for-profit entity that sells credit repair services is credit repair organization, even if actual services are performed by non-profit affiliate, and even if it shares fee with that affiliate).

513 15 U.S.C. § 1679a(3)(B)(iii).

514 15 U.S.C. § 1679a(3)(B)(i).

515 Zimmerman v. Cambridge Credit Counseling Corp., 409 F.3d 473 (1st Cir. 2005) (IRS determination is not dispositive); Baker v. Family Credit Counseling Corp., 440 F. Supp. 2d 392 (E.D. Pa. 2006) (allowing CROA claims to proceed against § 501(c)(3) organizations that allegedly funneled money to related for-profit corporations); Polacsek v. Debticated Consumer Counseling, Inc., 413 F. Supp. 2d 539, 550 (D. Md. 2005).

516 *See, e.g.*, Polacsek v. Debticated Consumer Counseling, Inc., 413 F. Supp. 2d 539, 550 (D. Md. 2005).

517 15 U.S.C. § 1679a(3)(B)(ii). *See* Spencer v. Arizona Premium Fin. Co., 2011 WL 4473178 (W.D.N.Y. Sept. 26, 2011) (creditor collecting debt it originated falls within this exemption).

> more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.[518]

A company that purchases or is assigned a debt from the entity to which it was originally owed will not fall into this exception, even if it is restructuring the debt. Thus, if a debt buyer represents to the consumer that it will improve the consumer's credit rating if the consumer pays the debt, it may be a credit repair organization.[519] Even an originating creditor may be a credit repair organization if it falls outside the Truth in Lending definition of "creditor", because it does not extend credit "regularly" or because the debt is not payable in more than four installments or subject to a finance charge.

Several courts have held that debt collectors may be credit repair organizations if they promise improvement of the debtor's credit record in return for payment of the debt. In *Bigalke v. Creditrust Corp.*,[520] a company that had purchased a delinquent debt sent the debtor a letter falsely representing that, if the debtor settled the debt, the company would "completely remove the entire outstanding balance from your credit report." The court held that this letter constituted the use of an instrumentality of interstate commerce to offer to provide the debtor a service which purported to improve the consumer's credit record.

As for the requirement that the service be offered "in return for the payment of money or other valuable consideration,"[521] the court considered this criterion satisfied by the demand for payment of the debt.[522] The court noted that whether or not the original creditor might fall within the exception for workouts, this exception was not available to an entity that had purchased the debt.[523]

However, several courts have held that any benefit to the debtor from paying the debt is incidental and does not make the collection agency a credit repair organization.[524] Ultimately, whether a collection agency meets the definition of credit repair organization should depend on the details of the defendant's offer to the consumer.

A debt collector that has not purchased a debt should also be considered a credit repair organization as defined by the Act when offering improvement of the debtor's credit rating in return for a payment on the debt.[525] Debt collectors may try to take advantage of the exception for creditors who arrange workouts by arguing that the debt collector is merely acting as an agent of the original creditor to try to restructure the debt, and thus falls within the exception set forth at 15 U.S.C. § 1679(a)(3)(B)(ii). Discovery of the agreement between the creditor and the debt collector may determine if the debt collector really is given the authority of an agent to restructure the debt on behalf of the creditor. Most debt collectors merely seek repayment, rather than restructuring the debt. Also check whether the current holder of the debt is itself an assignee of

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518 15 U.S.C. § 1602(f).

519 *See* Bigalke v. Creditrust Corp., 162 F. Supp. 2d 996 (N.D. Ill. 2001).

520 162 F. Supp. 2d 996 (N.D. Ill. 2001). *See also* Kennedy v. CompuCredit Holdings Corp., 9 F. Supp. 3d 1314 (M.D. Fla. 2014) (refusing to dismiss claim that debt collector which offered to give debtor fresh start by issuing her new credit card if she made payments on debt was credit repair organization). *But see* Kielty v. Midland Credit Mgmt., Inc., 2015 WL 400584 (S.D. Cal. Jan. 28, 2015) (encouraging repayment of debt by stating that repayment will improve credit score does not make debt collector a credit repair organization), *aff'd*, 690 Fed. Appx. 941 (9th Cir. 2017); White v. Fin. Credit Corp., 2001 WL 1665386 (N.D. Ill. Dec. 27, 2001) (debt collector's reference to improving consumer report did not make it credit repair organization). *But cf.* Dauval v. Preferred Collection and Mgmt. Serv., Inc., 2012 WL 5928622 (M.D. Fla. Nov. 26, 2012) (finding that "Act today by contacting our office to resolve this outstanding debt and restore your credit by having us inform the credit reporting agencies of your positive action" is representation that collector could provide services for express or implied purpose of improving debtor's credit rating, but dismissing CROA claim because payment of debt was not compensation for credit repair services); Spencer v. Ariz. Premium Fin. Co., 2011 WL 4473178 (W.D.N.Y. Sept. 26, 2011) (creditor collecting its own debt is not credit repair organization, despite stating that payment of debt would repair consumer's credit).

521 15 U.S.C. § 1679a(3)(A).

522 Bigalke v. Creditrust Corp., 162 F. Supp. 2d 996, 998 (N.D. Ill. 2001). *Accord* Kennedy v. CompuCredit Holdings Corp., 9 F. Supp. 3d 1314, 1320 (M.D. Fla. 2014) (refusing to dismiss claim that debt collector which offered to give debtor a fresh start by issuing her a new credit card if she made payments on an otherwise uncollectible debt was a credit repair organization, and that debtor's payments on the debt met the requirement of payment of money or other valuable consideration). *But see* Kielty v. Midland Credit Mgmt., Inc., 2015 WL 400584 (S.D. Cal. Jan. 28, 2015) (must be additional fee for credit repair services, not just repayment of debt), *aff'd*, 690 Fed. Appx. 941 (9th Cir. 2017); Dauval v. Preferred Collection and Mgmt. Serv., Inc., 2012 WL 5928622 (M.D. Fla. Nov. 26, 2012) (offering to improve consumer's credit rating for no compensation other than payment of the debt owed is insufficient); Oslan v. Collection Bureau, 2001 WL 34355648 (E.D. Pa. Dec. 13, 2001) (debt collector is covered only if receives or solicits payment beyond repayment of debt).

523 15 U.S.C. § 1679a(3)(B)(ii). *See generally* § 17.2.2.3.3, *supra*.

524 *See* Walston v. Nationwide Credit, Inc., 2019 WL 4139002, at *4 (N.D. Ill. Aug. 30, 2019) (collection agency that offered credit card application if consumer paid debt was not credit repair organization; defendant was providing service to creditor, potential incidental effect on consumers' credit history did not make defendant a credit repair organization); Kielty v. Midland Credit Mgmt., Inc., 2015 WL 400584, at *4 (S.D. Cal. Jan. 28, 2015) (debt collector not credit repair organization, because improvement of debtor's credit score was only "indirect, collateral effect" of paying debt), *aff'd*, 690 Fed. Appx. 941 (9th Cir. 2017); Holmes v. TRS Recovery Services, Inc., 2007 WL 9783242, at *10 (M.D. Tenn. Nov. 14, 2007) ("Although it may well be that the defendants represented that the payment of the debt and the fee would have the collateral effect of positively impacting the plaintiff's future ability to write checks to merchants who are customers of the defendants, courts have held that ancillary credit effects do not render an entity a credit repair organization."). See also Plattner v. Edge Solutions, Inc., 422 F. Supp. 2d 969, 975 (N.D. Ill. 2006) (debt settlement company not a credit repair organization; actions that "have the effect of improving credit scores" do not "necessarily transform[] an entity into a credit repair organization subject to the requirements and prohibitions of the CROA").

525 *See* Nielsen v. United Creditors Alliance Corp., 1999 WL 674740 (N.D. Ill. Aug. 23, 1999) (denying motion to dismiss claim that debt collector was covered by CROA).

the original creditor; since an assignee of the original credit does not fall within the exemption, its agent will not be able to claim the exemption either.[526]

14.9.3 Substantive Restrictions on Credit Repair Organizations

A collector or creditor that meets the CROA's definition of "credit repair organization" must make certain disclosures and include certain terms, such as a right to cancel any contract the consumer enters into with the organization.[527] It may not charge or receive any payment for its services from the consumer until the service is fully performed.[528]

14.9.4 Substantive Prohibitions Applicable to Any "Person"

The Act also includes four prohibitions of various deceptive tactics.[529] These prohibitions are applicable to "any person," whether or not the person meets the definition of "credit repair organization."[530]

First, no person may make or advise a consumer to make an untrue or misleading statement about the consumer's creditworthiness, credit standing, or credit capacity to any credit reporting agency or any existing or potential creditor.[531] A collection agency or creditor might violate this prohibition if it urged a consumer to make misstatements in order to obtain credit to pay off the debt.

Second, no person may help or advise a consumer to conceal or alter the consumer's identity as a way of hiding the consumer's credit record from a credit reporting agency or an actual or potential creditor.[532] This prohibition might also apply to a collection agency or creditor that handled a consumer's application for credit from a third party in order to pay off the debt.

Third, no person may make any untrue or misleading statement about the services of a credit repair agency.[533] This prohibition is not confined to deception regarding the organization's credit repair services. Deception about any aspect of the organization's services appears to be a violation. An untrue or misleading representation about the organization's services is a violation whether or not it is made for the purpose of inducing consumers to buy the services.[534] A debt collector that qualifies as a credit repair organization might violate this prohibition if it makes false statements about its ability to improve the consumer's credit record if the consumer pays the debt.[535]

Fourth, no person may engage in fraud or deception in connection with the offer or sale of the services of a credit repair agency.[536] This prohibition will apply to a debt collector that qualifies as a credit repair organization and makes representations about its own services, or to one that makes false representations while referring a consumer to a credit repair organization.

14.9.5 Private Remedies

If a creditor or collector is covered by the CROA, it is liable for violations with respect to any person in the sum of:

- The greater of actual damages or the amount paid to the organization;
- Such additional punitive damages as the court may allow; and
- Costs and reasonable attorney fees.[537]

In addition, although of less relevance in the collections context, a contract with a credit repair agency that does not comply with the CROA is void.[538] Consumers may not waive any protection provided by the Act.[539]

Liability is not confined to credit repair organizations, but applies to "any person" who fails to comply with the Act. Thus, other entities that are directly or indirectly involved in deception may also be liable.[540]

526 *See* National Consumer Law Center, Fair Credit Reporting § 17.2.2.3.3 (9th ed. 2018), *updated at* www.nclc.org/library.

527 15 U.S.C. § 1679b(b). National Consumer Law Center, Fair Credit Reporting §§ 17.2.3, 17.2.4, 17.2.5 (9th ed. 2017), *updated at* www.nclc.org/library.

528 15 U.S.C. § 1679(b). *See* National Consumer Law Center, Fair Credit Reporting § 17.2.6 (9th ed. 2017), *updated at* www.nclc.org/library.

529 15 U.S.C. § 1679b(a).

530 15 U.S.C. § 1679b(a). *See* National Consumer Law Center, Fair Credit Reporting § 17.2.7.1 (9th ed. 2017), *updated at* www.nclc.org/library (full discussion of applicability of these prohibitions to any person and the conflicting judicial decisions on the question).

531 15 U.S.C. § 1679b(a)(1). *See* Ware v. Indymac Bank, 534 F. Supp. 2d 835 (N.D. Ill. 2008) (refusing to dismiss claim that mortgage broker violated CROA by falsifying borrower's income and assets on credit application); Martinez v. Freedom Mortgage Team, Inc., 527 F. Supp. 2d 827 (N.D. Ill. 2007) (same as *Ware*). *See generally* National Consumer Law Center, Fair Credit Reporting § 17.2.7.2 (9th ed. 2017), *updated at* www.nclc.org/library.

532 15 U.S.C. § 1679b(a)(2). *See* National Consumer Law Center, Fair Credit Reporting § 17.2.7.3 (9th ed. 2017), *updated at* www.nclc.org/library.

533 15 U.S.C. § 1679b(a)(3). *See* National Consumer Law Center, Fair Credit Reporting § 17.2.7.4 (9th ed. 2017), *updated at* www.nclc.org/library.

534 Fed. Trade Comm'n v. Gill, 265 F.3d 944 (9th Cir. 2001).

535 Nielsen v. United Creditors Alliance Corp., 1999 WL 674740 (N.D. Ill. Aug. 23, 1999) (denying motion to dismiss). *See also* Bigalke v. Creditrust Corp., 162 F. Supp. 2d 996 (N.D. Ill. 2001) (denial of motion to dismiss) (debt collector that sent similar letter was credit repair organization), *later op. at* 2001 WL 1098047 (N.D. Ill. Sept. 11, 2001) (certifying class). *But cf.* White v. Fin. Credit Corp., 2001 WL 1665386 (N.D. Ill. Dec. 27, 2001) (statement that payment would improve debtor's credit report was not untrue or misleading).

536 15 U.S.C. § 1679b(a)(4). *See* National Consumer Law Center, Fair Credit Reporting § 17.2.7.5 (9th ed. 2017), *updated at* www.nclc.org/library.

537 15 U.S.C. § 1679g(a). *See* National Consumer Law Center, Fair Credit Reporting § 17.2.8 (9th ed. 2017), *updated at* www.nclc.org/library.

538 15 U.S.C. § 1679f(c).

539 15 U.S.C. § 1679f(a). *See* National Consumer Law Center, Fair Credit Reporting § 17.2.9 (9th ed. 2017), *updated at* www.nclc.org/library.

540 Zimmerman v. Puccio, 613 F.3d 60 (1st Cir. 2010); Vance v. Nat'l Benefit Ass'n, 1999 WL 731764 (N.D. Ill. Aug. 26, 1999). *See also* Fed.

Any person may sue a credit repair organization, as long as the credit repair organization has violated a requirement relating to the person suing.[541] A district court held that consumers who had received a misleading letter from a debt collector that met the definition of a credit repair organization could recover without showing actual damages or that they were actually misled.[542] But, in light of the U.S. Supreme Court's decision in *TransUnion L.L.C. v. Ramirez*,[543] practitioners should plead the details of any concrete injury.

The CROA explicitly contemplates class actions.[544] The ease of establishing liability for damages makes class actions particularly attractive under this statute.

In awarding punitive damages, CROA requires courts to consider the frequency, persistence, and nature of the noncompliance, the extent to which the violation was intentional, and, in a class action, the number of consumers adversely affected.[545] In class actions, the punitive damages may be the aggregate of the amount which the court may allow for each named plaintiff, plus an aggregate amount for other class members without regard to any minimum individual recovery.[546]

Unlike the private enforcement provisions of other titles of the Consumer Credit Protection Act,[547] the Credit Repair Organization Act does not contain a specific grant of jurisdiction in the federal district courts. To date, courts have not viewed this with concern, but have exercised federal question jurisdiction over CROA claims.[548]

The Supreme Court has rejected the view that the Act's unusually strong prohibition of waivers means that the right to sue in court cannot be waived and that arbitration clauses are void.[549] However, a number of other grounds may exist to challenge an arbitration clause.[550]

The statute of limitations for an action under the Credit Repair Organizations Act is five years from the occurrence of the violation.[551] Where the violation relates to the organization's material and willful failure to disclose, the five-year period begins to run when the consumer discovers the misrepresentation.[552]

14.10 Collection of Taxes by Private Debt Collection Agencies

14.10.1 Requirement that IRS Engage Private Collectors

14.10.1.1 Scope of requirement

The Internal Revenue Service is required by section 6306 of the Internal Revenue Code (IRC) to outsource the collection of certain federal tax debts to private collection agencies (PCAs). The IRS must enter into one or more "qualified tax collection contracts" with PCAs for the collection of "inactive tax receivables."[553] The IRS is required to contract with at least one of the PCAs on a list of companies designated by the Treasury Department for the collection of federal debts.[554]

Inactive tax receivables are any tax debts in the IRS' "potentially collectible inventory" that meet at least one of these criteria:[555]

- The tax debt has been removed from active inventory by the IRS for lack of resources or inability to locate the taxpayer;
- More than one-third of the applicable statute of limitations has lapsed and the tax debt has not been assigned to an IRS employee for collection; or
- Of tax debts assigned to an IRS employee for collection, more than one year has passed without an interaction with the taxpayer or a third party for purposes of collection.

14.10.1.2 Exemptions

Certain taxpayers are statutorily exempt from the program. Exemptions include:

- Taxpayers who are deceased;
- Minors;
- Victims of tax-related identity theft;
- Individuals whose income substantially consists wholly of disability or Supplemental Security Income (SSI) benefits;
- Individuals with adjusted gross income which does not exceed 200 percent of the poverty level or those in a designated combat zone; and
- Debts that are already in certain types of administrative proceedings, including a pending or active offer-in-compromise or installment agreement; classified as an innocent spouse

Trade Comm'n v. Gill, 265 F.3d 944 (9th Cir. 2001) (affirming $1.3 million restitution award against attorney who allowed credit repair operator to work out of his offices and under his supervision). *See generally* National Consumer Law Center, Fair Credit Reporting § 17.2.8.3 (9th ed. 2017), *updated at* www.nclc.org/library.

541 15 U.S.C. § 1679g(a) (violation must be "with respect to" plaintiff). *But cf.* Hillis v. Equifax Consumer Services, Inc., 237 F.R.D. 491, 498–499 (N.D. Ga. 2006) (questioning standing when consumer may not have seen misrepresentations).

542 Bigalke v. Creditrust Corp., 2001 WL 1098047 (N.D. Ill. Sept. 11, 2001).

543 ___ U.S. ___, 141 S. Ct. 2190, ___ L. Ed. 2d ___ (2021). *See* § 11.15, *supra*.

544 15 U.S.C. § 1679g(a)(2)(B).

545 15 U.S.C. § 1679g(b).

546 15 U.S.C. § 1679g(2)(B).

547 Title I, Truth in Lending Act, 15 U.S.C. §§ 1601 to 1667e; Title IV, Fair Credit Reporting Act, 15 U.S.C. §§ 1681 to 1681t; Title VII, Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 to 1691f; Title VIII, Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 to 1692p; Title IX, Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 to 1693r.

548 *See* National Consumer Law Center, Fair Credit Reporting § 17.2.8.8 (9th ed. 2017), *updated at* www.nclc.org/library.

549 CompuCredit Corp. v. Greenwood, 565 U.S. 95, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012).

550 *See* National Consumer Law Center, Fair Credit Reporting § 17.2.8.4 (9th ed. 2017), *updated at* www.nclc.org/library.

551 15 U.S.C. § 1679*i*.

552 *Id.*

553 26 U.S.C. § 6306(c).

554 26 U.S.C. § 6306(h) (cross-referencing 31 U.S.C. § 3711(g)).

555 26 U.S.C. § 6306(c)(2).

case; or under examination, litigation, criminal investigation, levy or appeal.[556]

In 2019, the Taxpayer First Act[557] added the exemptions for low-income taxpayers and taxpayers with disability and SSI benefits from the PCA program. Previously, an IRS analysis had found that 79% of cases that were likely to be referred to PCAs involved taxpayers with incomes below 250% of the federal poverty level.[558]

The IRS had also previously agreed in principle not to assign to private collection agencies the accounts of taxpayers who receive Social Security Disability Insurance and SSI, but had failed to follow through on that promise,[559] necessitating the passage of the Taxpayer First Act. Despite passage of the Act, the Treasury Inspector General for Tax Administration (TIGTA) expressed concern in a recent report that, even after IRS altered its methodology to identify low-income taxpayers, some low-income taxpayers will still be assigned to PCAs.[560]

The statute also permits the IRS to establish procedures for taxpayers in federally declared disaster zones to seek exemption from the program.[561] The limited procedures established have not protected disaster survivors from collection efforts.[562]

14.10.1.3 Scope of collection activities

Section 6306 defines a "qualified tax collection contract" as a contract under which PCAs perform a very limited set of activities:

- Locating and contacting taxpayers;
- Requesting full payment;
- If full payment is not forthcoming, offering installment agreements not to exceed five years; and
- Obtaining specific financial information about the taxpayer if so directed by the IRS.[563]

Despite this limited set of authorized collection activities, the IRS entered contracts that permit PCAs to set up installment agreements lasting up to *seven* years, and also to request *one* voluntary payment from taxpayers before returning their case to IRS if the taxpayer does not fully pay or enter into an installment agreement.[564] In fiscal year 2019, the IRS began allowing PCAs to seek unstructured payments and take commissions that were not explicitly authorized by the statute or the collection contract.[565] Query whether allowing PCAs to offer payment plans or so-called voluntary payments violates section 6306 and thus is actionable. Between August 2019 and May 2020, 7704 taxpayers were placed into these supposedly voluntary payment plans. Of these taxpayers, 54% had made no payments at all and 20% had made only one payment, which means about 75% of these taxpayers did not end up paying according to their agreements. TIGTA noted in a recent report that "[c]ontinuing to allow PCAs to accept unstructured payments without a review of a taxpayer's financial situation increases the likelihood that these taxpayers will be put into a financial hardship situation and will eventually default."[566]

14.10.2 History of IRS Private Debt Collection Program

The IRS had previously conducted two pilot programs that placed federal tax debts with PCAs, in 1996–1997 and in 2006–2009. The 1996–1997 pilot resulted in a $17 million net loss to the government,[567] while the 2006–2009 program resulted in a net loss of almost $4.5 million.[568] The 2006–2009 program led to a number of complaints and concerns about PCAs using abusive tactics, failing to safeguard the confidentiality of taxpayer information, and lacking sufficient background in tax remedies and options for taxpayers.[569]

556 26 U.S.C. § 6306(d).

557 *See* H.R.3151, Sec. 1205, the Taxpayer First Act, *available at* https://www.congress.gov.

558 Letter from Nina Olson, National Taxpayer Advocate, to Senate Committee on Finance and House Ways & Means Committee 8 (May 13, 2014), *available at* http://taxpayeradvocate.irs.gov (regarding use of private collection agencies (PCAs) to collect delinquent federal tax debts).

559 National Taxpayer Advocate, FY 2019 Objectives Report to Congress, vol. 1, 62 (June 27, 2018).

560 Fiscal Year 2021 Biannual Independent Assessment of Private Collection Agency Performance 19, *available at* https://www.treasury.gov.

561 26 U.S.C. § 6306(*i*).

562 *See* Letter from Senators Elizabeth Warren, Richard Blumenthal, Bernard Sanders, and Bill Nelson to Acting IRS Commissioner David Kautter (Mar. 22, 2018), *available at* https://www.warren.senate.gov (requesting information regarding IRS implementation of private debt collection program provision meant to protect taxpayers impacted by federally declared disasters); Treasury Inspector General for Tax Administration, Private Debt Collection Was Implemented Despite Resource Challenges; However, Internal Support and Taxpayer Protections Are Limited, Reference No. 2018-30-052, at 18 (Sept. 5, 2018).

563 26 U.S.C. § 6306(b)(1).

564 National Taxpayer Advocate, 2017 Annual Report to Congress, vol. 1, 19 (Dec. 27, 2017).

565 Fiscal Year 2021 Independent Assessment of Private Collection Agency Performance 16, *available at* https://www.treasury.gov.

566 *Id.* at 15.

567 Gov't Accountability Office, Internal Revenue Service: Issues Affecting IRS' Private Debt Collection Pilot, GAO/GGD-97-129R, at 1 (July 1997), *available at* http://www.gao.gov.

568 Letter from Nina Olson, National Taxpayer Advocate, to Senate Committee on Finance and House Ways & Means Committee 15 (May 13, 2014), *available at* http://taxpayeradvocate.irs.gov (regarding the use of private collection agencies (PCAs) to collect delinquent federal tax debts).

569 *See, e.g.*, Press Release, Internal Revenue Serv., IR-2009-019, IRS Conducts Extensive Review, Decides Not to Renew Private Debt Collection Contracts (Mar. 5, 2009), *available at* www.irs.gov; *Internal Revenue Service's Use of Private Debt Collection Companies to Collect Federal Income Taxes: Hearing Before the House Comm. on Ways and Means*, 110th Cong. (2007) (testimony of Kevin Brown, acting Commissioner of Internal Revenue; testimony of Nina Olson, National Taxpayer Advocate); National Treasury Employees Union, Ways and Means Committee Hearing Highlights Deep Flaws in IRS Private Tax Collection Program (May 29, 2007); National Taxpayer Advocate, FY 2006 Annual Report to Congress (Dec. 31, 2006).

In 2009, the IRS terminated the program by not renewing the contracts for private debt collection.[570] However, legislation mandating the IRS re-institute the private debt collection program was passed in December 2015.[571]

The IRS began placing tax debts with PCAs in April 2017.[572] The IRS selected four companies to collect federal tax debts,[573] one of which (Pioneer Credit Recovery) had its contract to collect student loans terminated in 2015 by the U.S. Department of Education because it provided inaccurate information to student loan borrowers.[574] Pioneer was also sued by the Consumer Financial Protection Bureau for deceiving student loan borrowers with false statements about the credit reporting consequences of loan rehabilitation and forgiveness of collection fees.[575]

The IRS appears to have ramped up the PDC program in 2020. Since 2017, the IRS has assigned 3.28 million taxpayer accounts to PCAs, with a value of $30.1 billion. As of May 2020, PCAs had collected $498.4 million in commissionable payments—with 45% of that amount collected in the first two-thirds of 2020.[576]

14.10.3 Protection for Taxpayer Rights

Any contract between the IRS and a PCA must prohibit the PCA from committing any act or omission that IRS employees are prohibited from committing in the performance of similar duties.[577] These prohibitions include communicating at inconvenient times and places; contacting represented debtors (with certain exceptions); calling the debtor at work if the PCA knows the debtor's employer prohibits such calls; and various other types of harassment and abuse.[578]

In addition, section 6306 provides that "[t]he provisions of the Fair Debt Collection Practices Act shall apply to any qualified tax collection contract."[579] While the law says that the FDCPA shall apply to the *contract*, the legislative history shows that Congress meant by this language that provisions of the FDCPA "apply to the private debt collection company."[580] Thus, the FDCPA applies to PCA of federal tax debts, despite the fact that the FDCPA normally does not apply to such debts.[581]

The FDCPA also does not normally apply to business debts.[582] However, the IRS will be assigning business tax accounts to PCAs under section 6306. Thus, section 6306 arguably applies the FDCPA to the collection of business tax debts assigned to PCAs under qualified tax collection contracts.[583]

There is an exception to the extent that the FDCPA is superseded by the following: (1) section 6304 of the IRC, which establishes the prohibitions discussed above that are very similar to the FDCPA; (2) section 7602(c) of the IRC, governing required notice to taxpayers when the IRS contacts third parties; and (3) "any other provision" of the IRC.[584]

Taxpayers are effectively prohibited from complaining directly to the IRS about PCA behavior in collecting federal tax debts.[585] Instead, they must contact either the Treasury Inspector General for Tax Administration's Office of Investigations or the PCA itself to lodge a complaint.[586]

However, taxpayers are not obligated to talk to a PCA. Taxpayers have the right to demand in writing that their tax debt account be recalled from the PCA and returned to the IRS immediately.[587]

The IRS is permitted to pay PCAs up to twenty-five percent of the amount of tax debt collected and retain up to an additional twenty-five percent to fund internal collection efforts.[588] However, another protection is that the full amount collected from a taxpayer must be credited toward the taxpayer's tax debt; in other words, collection fees will not be deducted from the amount paid by the taxpayer.[589]

14.10.4 Remedies for Violations by Private Collectors

The Internal Revenue Code (IRC) includes a civil remedy against a debt collector who recklessly, intentionally, or negligently disregards any provision of the tax code or any regulation under it.[590] The taxpayer has the right to bring suit in federal court for "actual, direct economic damages," with a cap of $1,000,000 ($100,000 in the case of negligence), plus

570 Press Release, Internal Revenue Serv., IR-2009-019, IRS Conducts Extensive Review, Decides Not to Renew Private Debt Collection Contracts (Mar. 5, 2009), *available at* www.irs.gov.

571 Pub. L. No. 114-94, § 32102,129 Stat. 1312, 1733–1736 (2015).

572 Internal Revenue Service, Private Debt Collection (Sept. 26, 2016), *available at* https://www.irs.gov.

573 Press Release, IRS, Private Collection of Some Overdue Federal Taxes Starts in April; Those Affected Will Hear First From IRS; IRS Will Still Handle Most Tax Debts (Apr. 4, 2017), *available at* https://www.irs.gov.

574 Press Release, U.S. Department of Education to End Contracts with Several Private Collection Agencies (Feb. 27, 2015), *available at* http://www.ed.gov. *See generally* National Consumer Law Center, Student Loan Law §§ 8.2.2.1, 8.4.1 (6th ed. 2019), *updated at* www.nclc.org/library.

75 Complaint, CFPB v. Navient Corp., Navient Solutions, Inc., and Pioneer Credit Recovery, Inc., Case 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017), *available at* www.consumerfinance.gov.

6 Fiscal Year 2021 Biannual Independent Assessment of Private Collection Agency Performance 2, *available at* https://www.treasury.gov.

7 26 U.S.C. § 6306(b)(2).

: 26 U.S.C. § 6304. *See* National Consumer Law Center, Collection Actions § 10.2.14.11 (4th ed. 2017), *updated at* www.nclc.org/library.

26 U.S.C. § 6306(g).

580 Conference Rep. No. 108-755 (2004).

581 *See* § 4.6.1, *supra*.

582 *See* § 4.6.1, *supra* (consumer, not commercial debts, covered by FDCPA).

583 26 U.S.C. § 6306(g).

584 26 U.S.C. § 6306(g), *cross-referencing* 26 U.S.C. §§ 6304, 7602(c).

585 Treasury Inspector General for Tax Administration, Private Debt Collection Was Implemented Despite Resource Challenges; However, Internal Support and Taxpayer Protections Are Limited, Reference No. 2018-30-052, at 23–24. (Sept. 5, 2018).

586 *Id.*

587 Internal Revenue Service, Private Collection Agency (PCA) Policy and Procedures Guide, § 12.14 (Apr. 4, 2017), *available at* https://epic.org.

588 26 U.S.C. § 6306(e).

589 26 U.S.C. § 6306(e).

590 26 U.S.C. §§ 7433A, 7433(a).

costs.[591] Unlike suits when the misdeeds are committed by IRS employees, the plaintiff need not exhaust administrative remedies. However, the law insulates the IRS from liability for any misconduct by the PCA, permitting suit to be brought against the PCA only, not against the United States.[592]

The private remedies of the FDCPA also apply to PCAs when collecting tax debts. Section 6306 makes the FDCPA applicable to the private debt collection program.[593] There is an exception to the extent that the FDCPA is superseded by, *inter alia*, "any other provision" of the IRC,[594] which would include the civil remedy discussed above. Although section 7433 provides that "such civil action shall be the exclusive remedy for recovering damages resulting from such actions,"[595] the private collection statute specifically refers to section 7433A of the IRC to establish a civil remedy.[596] Section 7433A is clear that "[s]uch civil action shall not be an exclusive remedy with respect to such person."[597] Thus, a taxpayer harmed by the unlawful debt collection activities of PCAs may seek remedies not only under the IRC, but also under the FDCPA. This is important because the IRC civil remedy provision does not provide for strict liability, statutory damages, or attorney fees.[598] PCAs should also be liable for common law torts committed in the course of collecting tax debts.

14.11 Constitutional Torts

14.11.1 Overview

Occasionally state or local officials are involved in debt collection abuse. This can occur either because the state itself is the creditor or because a private creditor manages to enlist an official's aid in collecting the debt. Where officials are involved, they and the private parties with whom they act may be subject to liability under 42 U.S.C. § 1983.

A section 1983 claim requires a showing that the plaintiff was denied a federally secured right by a defendant acting under color of state law.[599] Pleading a section 1983 claim will enable the litigant to file suit in federal court, but it will also entitle the defendant to remove a state court case to federal court.

If there are pending or completed state court proceedings, a suit in federal court may be complicated by the *Rooker-Feldman* doctrine, the *Younger* abstention doctrine, or the Anti-Injunction Act. These issues are discussed other treatises in this series.[600] Constitutional challenges to state judgment execution procedures are discussed in NCLC's Collection Actions.[601]

14.11.2 State Action

14.11.2.1 Government Officials As State Actors

The first question is whether there is sufficient state action to make section 1983 applicable. State officials are state actors when they are exercising power possessed by virtue of state law and made possible by their state authority.[602] Abuse of authority by a state official is state action, even if it is illegal under state law.[603]

Accordingly, courts apply section 1983 to creditors' remedies that are accomplished through the court system.[604] By

591 26 U.S.C. § 7433, *incorporated by reference in* 26 U.S.C. § 7433A(a).

592 26 U.S.C. §§ 7433A(b)(1), 7433A(b)(4). *See also* 26 U.S.C. § 6306(f) (no federal liability for acts or omissions of private tax collectors).

593 26 U.S.C. § 6306(g). *See* § 14.10.3, *supra*.

594 26 U.S.C. § 6306(g), *cross-referencing* 26 U.S.C. §§ 6304, 7602(c).

595 26 U.S.C. § 7433(a).

596 26 U.S.C. § 6306(k)(1).

597 26 U.S.C. § 7433A(b)(3).

598 26 U.S.C. § 7433(b).

599 *See* § 14.11.2, *infra*.

600 National Consumer Law Center, Truth in Lending § 11.4.2 (10th ed. 2019), *updated at* www.nclc.org/library; National Consumer Law Center, Foreclosures and Mortgage Servicing § 10.6 (5th ed. 2014), *updated at* www.nclc.org/library.

601 National Consumer Law Center, Collection Actions § 13.5 (4th ed. 2017), *updated at* www.nclc.org/library.

602 Abbott v. Latshaw, 164 F.3d 141, 146 (3d Cir. 1998); Rankin v. Smithburger, 2013 WL 3550894 (W.D Pa. July 11, 2013) (constable, who identified self as constable while removing and destroying property and prematurely evicting tenant from property owned by his wife, was state actor); Rodriguez v. Due Process of Michigan, Inc., 2008 WL 4449651 (E.D. Mich. Sept. 30, 2008) (status as state actor is determined by function within system, not terms of employment; private process servers who contracted with court were state actors where judge had power to supervise them and Michigan law allows only deputies or court officers to serve process). *See also* Sanchez v. Crump, 184 F. Supp. 2d 649 (E.D. Mich. 2002) (state officials who use their authority to further their own interests are state actors, but not shown here as to off-duty police officer's request that different police department issue an arrest warrant). *But cf.* Kochan v. Kowalski, 2020 WL 4700984 (W.D.N.Y. 2019) (county employees' use of their work e-mail to demand that website host remove their names from site was not act under color of state law, as they were not exercising any power conferred on them under state law); George W. v. United States Dep't of Educ., 149 F. Supp. 2d 1195 (E.D. Cal. 2000) (student loan guarantee agency not state actor; it did not perform public function and nexus to federal government was not close enough).

603 Lugar v. Edmondson Oil Co., 457 U.S. 922, 929, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982); Collins v. Womancare, 878 F.2d 1145 (9th Cir. 1989); McDonough v. Toles, 2020 WL 4481961 (D. Minn. Aug. 4, 2020) (off-duty police officer "explicitly invoked his authority as a police officer" when he announced he was police while beating and dragging bar patron); Doe v. County of San Diego, 445 F. Supp. 3d 957 (S.D. Cal. 2020) (corrections officer, who was being prosecuted for off-duty sexual conduct with a minor, used county database to access victim's personal information; action was under color of state law because officer had access to database only because of his employment); Rankin v. Smithburger, 2013 WL 3550894 (W.D. Pa. July 11, 2013) (constable, who identified himself as constable while removing and destroying property, and prematurely evicting tenant from property owned by his wife, was state actor).

604 Lugar v. Edmondson Oil Co., 457 U.S. 922, 933, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982); *In re* Foust, 310 F.3d 849 (5th Cir. 2002) (*ex parte* writ of replevin was denial of due process, where no showing that pre-seizure hearing was infeasible); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994); New v. Gemini Capital Group, 859 F. Supp. 2d 990 (S.D. Iowa May 2, 2012) (judgment creditor's use of state bank account garnishment procedure is state action). *See also* Owens v. Swan, 962 F. Supp. 1436 (D. Utah 1997) (judgment creditor's attorneys' entry into debtor's residence pursuant to judicially-issued

contrast, creditors' remedies that are created by state statute, but are carried out without court supervision, are generally held not to be state action.[605] Examples are non-judicial mortgage foreclosure[606] and self-help repossession that is accomplished without involvement of law enforcement officials.[607] Whether enforcement of statutory liens involves state action is discussed in another NCLC publication.[608]

14.11.2.2 Private Parties

With respect to private parties, the existence of state action depends on whether the conduct causing the deprivation of the federal right is "fairly attributable" to the state.[609] Willful participation in joint activity with the state or its agents is sufficient to make a private party a state actor.[610]

The circumstances in which a private party can be a state actor include: a symbiotic relationship with the state,[611] performance of a public function,[612] compulsion by the state, a close nexus between the state and the challenged conduct, and joint participation or conspiracy with state officials. The courts usually boil these circumstances down into three[613] or four[614] categories. However, they vary in which of the circumstances they assign to which category.

A private party who invokes a state collection procedure that is challenged as unconstitutional is a state actor.[615] But, in the absence of allegations that the state procedure is unconstitutional, merely invoking the procedure does not make a party a state actor.[616] Further, a private party who misuses a

writ of assistance and with the aid of county sheriffs satisfies state action requirement). *See generally* National Consumer Law Center, Collection Actions § 13.5 (4th ed. 2017), *updated at* www.nclc.org/library (discussion of constitutional issues in judgment execution).

605 Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1979). *See also* Rapid Circuits, Inc. v. Sun Nat'l Bank, 2011 WL 1666919, at *22–23 (E.D. Pa. May 3, 2011) (use of U.C.C. self-help procedure for seizure of accounts receivable in which creditor had security interest did not make creditor state actor).

606 *See generally* National Consumer Law Center, Foreclosures and Mortgage Servicing § 8.7 (5th ed. 2014), *updated at* www.nclc.org/library.

607 *See* National Consumer Law Center, Repossessions § 6.3.6.3 (9th ed. 2017), *updated at* www.nclc.org/library.

608 National Consumer Law Center, Repossessions § 15.13.1 (9th ed. 2017), *updated at* www.nclc.org/library.

609 Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

610 *Id.*, 457 U.S. at 941. *See also* Cahoo v. SAS Inst., Inc., 322 F. Supp. 3d 772 (E.D. Mich. 2018) (software company and consultant were state actors when they designed and administered severely flawed fraud detection system for state unemployment insurance program; high rate of false positives and robo-adjudications that failed to provide constitutionally adequate notice and hearing), *aff'd in part, rev'd in part on other grounds*, 912 F.3d 877 (6th Cir. 2019) (affirming holding that individual state employees did not have qualified immunity for due process violations, but reversing denial of qualified immunity on Fourth Amendment claim).

611 *See, e.g.*, Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., 956 F.3d 1228 (10th Cir. 2020) (for symbiotic relationship, must show "substantial, intimate, long-term relationship" and mutual dependency; not shown by single false report with no evidence of prior relationship); Flennory v. Lichte, 2006 WL 3063489 (D. Or. Oct. 25, 2006) ("profitable symbiotic relationship" sufficiently alleged where police ordered tow on questionable grounds, tow service demanded $500 in cash and refused to let owner access cash inside car, and notices failed to comply with state statute). *But cf.* Garcia v. Dykstra, 260 Fed. Appx. 887 (6th Cir. 2008) (peripheral involvement of police insufficient to show symbiotic relationship where private individuals who removed tools from storage locker acted on their independent initiative).

612 *See, e.g.*, Fuller v. Carilion Clinic, 382 F. Supp. 3d 475 (W.D. Va. 2019) (private security guards who had, pursuant to state law and their memorandum of understanding with local police, the same powers of arrest as sworn officers, were acting under color of state law; distinguishing security guards who may make only citizens' arrests); Brown v. Transurban USA, Inc., 144 F. Supp. 3d 809 (E.D. Va. 2015) (private operator of high-occupancy toll lanes was state actor because prosecuting traffic infractions and enforcing traffic laws is a function traditionally reserved to the state); Cahoo v. SAS Inst., Inc., 322 F. Supp. 3d 772 (E.D. Mich. 2018) (administering the unemployment insurance program is a traditional function of the state; private software firm that designed and administered fraud detection system is state actor), *aff'd in part, rev'd in part on other grounds*, ___ F.3d ___, 2019 WL 92221 (6th Cir. Jan. 3, 2019) (affirming holding that individual state employees did not have qualified immunity for due process violations, but reversing denial of qualified immunity on Fourth Amendment claim); Smith v. Detroit Entertainment L.L.C., 338 F. Supp. 2d 775 (E.D. Mich. 2004) (private security guards who detain consumer may meet public function test, depending on how closely their regulation and powers match those traditionally vested in police departments). *But cf.* Benzeman v. Citibank, 622 Fed. Appx. 16 (2d Cir. 2015) (sending out restraining notices to freeze bank accounts is not function generally reserved to state).

613 Revis v. Meldrum, 489 F.3d 273, 289 (6th Cir. 2007) (identifying three tests for state action, public function test, state compulsion test, and symbiotic relationship or nexus test). *See also* McGugan v. Aldana-Bernier, 2012 WL 1514777 (E.D.N.Y. Apr. 30, 2012) (three categories are state compulsion, public function, close nexus; holding that private hospital and physicians not state actors when involuntarily committing patient pursuant to N.Y. Mental Health law).

614 Rodriguez v. Plymouth Ambulance Serv., 577 F.3d 816, 823–824 (7th Cir. 2009) (identifying four tests, symbiotic relationship text, state command and encouragement test, joint participation doctrine, and public function test); Anderson v. Suiters, 499 F.3d 1228 (10th Cir. 2007) (listing four tests, but only three match Seventh Circuit's list).

615 Lugar v. Edmondson Oil Co., 457 U.S. 922, 933, 941–942, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) ("private use of the challenged state procedures with the help of state officials constitutes state action"); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) (obtaining entry of confessed judgment did not involve state enough, but obtaining execution upon it made private parties state actors); New v. Gemini Capital Group, 859 F. Supp. 2d 990 (S.D. Iowa May 2, 2012) (creditor who used Iowa's unconstitutional bank garnishment procedure was state actor; following state procedure does not shield creditor from § 1983 damages where procedure is unconstitutional); Van Buren v. Cave, 2008 WL 4664227 (M.D. La. Oct. 21, 2008); McCarthy v. Wachovia Bank, 2008 WL 5145602 (E.D.N.Y. Dec. 4, 2008) (bank might be state actor if it implemented unconstitutional garnishment procedure); Doyle v. Schultz, 97 F. Supp. 2d 763 (W.D. La. 2000) (private party and her attorney who invoked unconstitutional execution procedure through clerk of court were state actors).

616 Davis v. Deutsche Bank Nat'l Trust Co., 737 Fed. Appx. 379 (10th Cir. 2018) (invoking state foreclosure procedure, not shown to be unconstitutional, did not make bank state actor); Moore v. Weber, 2011 WL 3607037 (E.D. Mich. Aug. 16, 2011) (law firm not state actor when it obtained writ to seize judgment debtor's property, and caused writ to be served by state-actor process servers who used improper methods); DiPietro v. N.J. Family Support Payment Ctr., 2009 WL 1635568 (D.N.J. June 10, 2009) (filing lawsuit does not turn private citizen into

constitutional state procedure—for example, by making misstatements when seeking a judicial remedy—is not a state actor,[617] although such a party may be liable for malicious prosecution or abuse of process.[618] Some courts have applied these principles to hold that a garnishee that violates a garnishment order by freezing or turning over more than the order requires is not acting under of state law, because the wrongful conduct cannot be attributed to any governmental decision or policy.[619]

Since a garnishee is typically compelled under penalty of contempt to comply with the garnishment order, it should be considered a state actor under the "state compulsion" test.[620] However, several courts have held, generally without much analysis, that a garnishee does not become a state actor by obeying a garnishment order.[621]

A private party's joint participation with state officials to seize disputed property is sufficient to make the private party a state actor.[622] A conspiracy between a private party and a

state actor; court does not mention any allegation that state procedures were unconstitutional), *aff'd*, 375 Fed. Appx. 202 (3d Cir. 2010); Hurd v. Maine, 2005 WL 217038 (D. Me. 2005) (private attorney representing debt collector in court not acting under color of state law); Zeppieri v. New Haven Provision Co., 163 F. Supp. 2d 126 (D. Conn. 2001) (creditor, collection agency, and counsel seeking to collect judgment debt by constitutional bank execution procedure were not state actors).

617 Lugar v. Edmondson Oil Co., 457 U.S. 922, 941, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) ("private misuse of a state statute does not describe conduct that can be attributed to the State"); Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., 956 F.3d 1228 (10th Cir. 2020) (law firm falsely informed Attorney General that opposing party had made a threat; no showing of either shared unconstitutional purpose or symbiotic relationship); Partin v. Davis, 675 Fed. Appx. 575 (6th Cir. 2017) (use of valid procedure, even in bad faith, here obtaining writ of execution with knowledge that pending motion for reconsideration made this improper, not action under color of state law); Wilson v. Warren County Illinois, 830 F.3d 44 (7th Cir. 2016) (no state action if private party deceives state official; here, handing sheriff pile of papers and falsely stating that it included court order authorizing seizure of property); Benzeman v. Citibank, 622 Fed. Appx. 16 (2d Cir. 2015) (misuse of state procedure for restraining bank accounts is not state action, attorneys who did so are not state actors); Mbaku v. Bank of Am., 2015 WL 1651596 (10th Cir. June 15, 2015) (mortgage lender that uses Colorado's public trustee foreclosure process is not state actor); Revis v. Meldrum, 489 F.3d 273 (6th Cir. 2007) (private party's malicious application for writ of execution, for example by overstating amount owed, is not state action in absence of challenge to constitutionality of state procedure); Seattle Fishing Services, L.L.C. v. Bergen Indus. & Fishing Co., 242 Fed. Appx. 436 (9th Cir. 2007) (private misuse of valid state statute, here garnishment procedure, not action under color of state law); Yanaki v. Iomed, Inc., 415 F.3d 1204 (10th Cir. 2005) (private parties' search of home with police pursuant to *ex parte* writ that state court granted in violation of state law is not state action in absence of allegation of conspiracy or unconstitutionality of state law); Hill v. Langer, 86 Fed. Appx. 163 (6th Cir. 2004) (private party's improper use of procedure for executing on eviction judgment does not make it a state actor); Grey-Ziegelbauer v. Eighth St. Auto, 2020 WL 374482 (D. Wis. Jan. 23, 2020) (no shared unconstitutional goal; sheriff who was deceived by false theft report did not agree to unconstitutional deprivation of property); Anderson v. J.R.'s Auto Sales of Union City, 2018 WL 2976436 (W.D. Tenn. June 13, 2018) (not state action for private parties to report falsely that car was stolen, leading to plaintiff's arrest); Johnson v. DiPaolo, 2016 WL 6568067 (N.D. Ill. Nov. 24, 2016) (foreclosure purchaser not state actor; used lawful eviction procedure, but mistakenly named wrong occupant); McCarthy v. Wachovia Bank, 2008 WL 5145602 (E.D.N.Y. Dec. 4, 2008) (bank is not state actor if it violated state law by freezing bank account in response to garnishment order); Christensen v. Arizona Cent. Credit Union, 2008 WL 4853414 (D. Ariz. Nov. 10, 2008) (creditor's attorneys who filed garnishment against account containing only exempt Social Security funds merely misused state procedure so were not acting under color of state law); Fleming-Dudley v. Legal Investigations, Inc., 2007 WL 952026 (N.D. Ill. Mar. 22, 2007) (private actor's felonious impersonation of police officer not action under color of state law); Webb v. Webb, 415 F. Supp. 2d 678 (S.D. Miss. 2006) (party's forgery of signature on court papers is not state action in absence of conspiracy with state officials); Bilal v. Chase Manhattan Mortgage Co., 2006 WL 1650008 (N.D. Ill. June 13, 2006) (mortgage company that illegally removed property and excluded homeowner following judicial sale not acting under color of state law); Buzzanco v. Lord Corp., 173 F. Supp. 2d 376, 381–383 (W.D. Pa. 2001) (private party's misuse of state procedure by exceeding scope of authorized seizure is not state action); Pourny v. Maui Police Dep't, 127 F. Supp. 2d 1129 (D. Haw. 2000) (judgment creditor who misuses state procedure by taking property not allowed by writ of execution is not state actor).

618 *See, e.g.*, Rapid Circuits, Inc. v. Sun Nat'l Bank, 2011 WL 1666919 (E.D. Pa. May 3, 2011) (debtor stated various tort claims, but no § 1983 claim, arising from creditor's misuse of state procedure allowing seizure of accounts receivable); Obi v. Chase Home Fin., L.L.C., 2010 WL 4810609 (N.D. Ill. Nov. 19 2010) (tenant, who failed to state § 1983 claim against landlord's lender and property service who wrongfully removed his personal property, stated state claims for trespass, conversion, trespass to chattels and intentional infliction of emotional distress). *See generally* § 15.6, *infra*.

619 London v. RBS Citizens, 600 F.3d 742 (7th Cir. 2010) (bank that froze exempt funds in response to state court order directing freeze of only non-exempt funds was not acting under color of state law); Soltan v. Accor N. Am., Inc., 2010 WL 187477 (D. Minn. Jan. 11, 2010) (no action under color of state law; consumer alleged that payroll company failed to comply with valid state garnishment statute). *See also* Matthews v. Homecoming Fin. Network, 2005 WL 2387688 (N.D. Ill. Sept. 26, 2005) (mortgage holder not "acting in concert" with state when it locked out consumer and removed property *in violation* of state court order setting later date to take possession).

620 Mayers v. New York Cmty. Bancorp, 2005 WL 2105810 (E.D.N.Y. Aug. 31, 2005). *See also* Chatman v. Arrowhead Credit Union, 2016 WL 896683 (Cal. App. Mar. 9 2016) (unpublished) (if credit union froze or turned over exempt Social Security funds in response to order of state taxing authorities, it is state actor and will be liable if state procedures violated federal law; state law shielding entities that comply with tax levies cannot authorize violations of federal law).

621 Sykes v. Bank of Am., 723 F.3d 399 (2d Cir. 2013) (bank that froze exempt SSI funds in compliance with restraining notice issued by state agency was not acting under color of state law); Keenan v. First California Bank, 488 Fed. Appx. 190 (9th Cir. 2012) (bank not acting under color of state law when it responded to state tax authorities' garnishment by turning over exempt Social Security funds); Moore v. Branch Banking & Trust Co., 2010 WL 4962909 (W.D. Ky. Dec. 1, 2010) (bank that froze and disbursed funds in compliance with court order was not state actor); Walton v. U.S. Bank, 2010 WL 3928507 (D. Utah Oct. 4, 2010) (bank that complied with state court writ of garnishment not acting under color of state law); Christensen v. Arizona Cent. Credit Union, 2008 WL 4853414 (D. Ariz. Nov. 10, 2008) (credit union that complied with state garnishment order by freezing exempt funds did not act under color of state law even if its actions were compelled by state law).

622 Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–942, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). *See also* Reed v. Sell, 2017 WL 4584191 (N.D. W. Va. Oct. 13, 2017) (allegation that foreclosure purchaser, who

state official is sufficient joint participation, and makes the private party a state actor, even if the procedure itself is not unconstitutional.[623] In evaluating allegations of a conspiracy, the Sixth Circuit has applied the elements of the tort of civil conspiracy: 1) a single plan existed; 2) the conspirators shared a conspiratorial objective to deprive the plaintiffs of their constitutional rights; and 3) an overt act was committed.[624] Specific factual allegations may be necessary to make an allegation of conspiracy or concerted action plausible.[625]

Even without a conspiracy, joint action with state officials can make a private party a state actor.[626] However, merely furnishing information to law enforcement officials, even if the information is false, is generally held not to make a private party a state actor.[627]

had not obtained eviction order, called in police officer who unlawfully threatened to arrest former homeowner, sufficiently alleges state action). *But cf.* Rowell v. King, 234 Fed. Appx. 821 (10th Cir. 2007) (finding allegations of joint action and conspiracy insufficient even though private process server arrived with police to execute on judgment, and then called in judgment creditor to assist in removal of property in violation of state law).

623 Revis v. Meldrum, 489 F.3d 273, 290 (6th Cir. 2007); Ballard v. Wall, 413 F.3d 510, 519 (5th Cir. 2005) (conspiracy or at least joint participation sufficiently alleged where judge, at request of judgment creditor, jailed judgment debtor for failure to comply with information subpoena and refused to release him unless he paid judgment); Rankin v. Smithburger, 2013 WL 3550894 (W.D Pa. July 11, 2013) (conspiracy sufficiently alleged where "landlord wife and constable husband conspired to use the latter's state power" to remove and destroy property and prematurely evicted tenant from property owned by wife); Niemeyer v. Williams, 2008 WL 906051 (C.D. Ill. Mar. 31, 2008) (refusing to dismiss claim that creditors conspired with police to obtain possession of impounded cars without giving debtor car owners notice or opportunity for hearing); Buchanan v. Williams, 434 F. Supp. 2d 521 (M.D. Tenn. 2006) (conspiracy sufficiently alleged where judgment creditor, a former deputy sheriff, conspired with sheriff's department in execution on property of judgment debtor, who was his former girlfriend); Owens v. Swan, 962 F. Supp. 1436 (D. Utah 1997) (judgment creditors' attorneys' entry into judgment debtor's residence pursuant to judicially issued writ of assistance and with the aid of county sheriffs satisfies state action requirement); Greenberg v. Pryszlak, 46 A.3d 591 (N.J. Super. Ct. App. Div. 2012) (creditor, after consumer stopped payment on check during dispute over defective service, contacted state trooper, who arrested consumer without warrant; fact issue as to conspiracy where creditor had used police to collect other disputed debts). *But cf.* Conklin v. Anthou, 495 Fed. Appx. 257 (3d Cir. 2012) ("usual attorney-client relationship" cannot give rise to conspiracy claim); Christman v. Walsh, 416 Fed. Appx. 841 (11th Cir. 2011) (judgment debtors arrested, without the hearing required by Florida law, after failure to immediately pay debt; *ex parte* discussions by creditor's lawyer with judge not sufficient to show joint action or agreement; unsupported allegation that creditor's lawyer used his influence as city council member to cause immediate arrest not sufficient to show that he "invoked his state authority"); Bowers v. Great W. Bank of S. Dakota, 2013 WL 3199733 (D. Ariz. June 24, 2013) (conspiracy not sufficiently alleged where judgment creditor used valid state procedure, and sheriff served facially valid writ); Moore v. Weber, 2011 WL 3607037 (E.D. Mich. Aug. 16, 2011) (no joint participation; agreement not shown; at most, law firm was aware of complaints about improper conduct by state-actor process server it employed to seize judgment debtor's property); Rafter v. Bank of Am., 2009 WL 691929 (S.D.N.Y. Mar. 12, 2009) (bank that made erroneous reports to police and prosecuted customer not state actor in absence of evidence of agreement with city detective to violate customer's rights); Downeast Ventures v. Washington County, 2005 WL 3409483 (D. Me. Dec. 12, 2005) (magistrate's recommendation) (refusing to dismiss § 1983 claim where debtor alleged that creditors paid court-appointed receiver to favor them and conspired with sheriff to enter private property and seize property not pledged as collateral), *adopted*, 2006 WL 377976 (D. Me. Feb. 16, 2006), *later op. at* 2007 WL 1745633 (D. Me. June 13, 2007) (finding no conspiracy on the facts between creditors and receiver, where creditors did not tell receiver what items to seize, and receiver used independent judgment), *adopted*, 2007 WL 2386319 (D. Me. Aug. 17, 2007).

624 Revis v. Meldrum, 489 F.3d 273, 290 (6th Cir. 2007). *See also* Abbott v. Latshaw, 164 F.3d 141, 148 (3d Cir. 1998) (allegations that constable seized van at request of private party, and that they acted jointly in recovering it, are sufficient); Meyer v. Degan, 2009 WL 3157386 (D. Neb. Sept. 25, 2009) (fact issues as to conspiracy where off-duty deputy participated in repossession as "personal favor" to supervisor who was friend of creditor); Gerhart v. Commonwealth, 2009 WL 2581715 (E.D. Pa. Aug. 13, 2009) (meeting of minds sufficiently alleged between landowner and state troopers to remove plaintiff's manufactured home without court order or warrant).

625 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

626 *See, e.g.*, Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989); Pourny v. Maui Police Dep't, 127 F. Supp. 2d 1129, 1150–1151 (D. Haw. 2000) (joint action can be shown even if private party did not call police, if there was substantial degree of cooperation once they arrived on scene). *See also* Boles v. County of Montgomery, 2014 WL 582259 (N.D.N.Y. Feb. 13, 2014) (fact issue whether officers actively assisted); OPW Fueling Components v. Works, 2007 WL 1406956 (S.D. Ohio May 9, 2007) (refusing to dismiss claim that private parties became state actors by conducting investigation, presenting information to police, attending during execution of search warrant, and testifying at hearings). *But cf.* Livnjak v. Right Residential II-Fund2, L.L.C., 2016 WL 4734404 (N.D. Ill. Sept. 12, 2016) (landlord's mishandling of evicted tenant's property not action under color of state law; after eviction order issued, deputies accompanied landlord to premises, ascertained that no one was home and left; no agreement as to handling of personal property); Mitchell v. Cannon, 2009 WL 824202 (D.S.C. Mar. 26, 2009) (seemingly requiring evidence of conspiracy in order to establish joint action; proof that officer lied and ordered car moved to assist repossession insufficient where repossessor had already left scene), *aff'd per curiam*, 367 Fed. Appx. 390 (4th Cir. 2010).

627 Wilson v. Warren County Illinois, 830 F.3d 44 (7th Cir. 2016) (no joint action if private party deceives state official; here, handing sheriff pile of papers and falsely stating that it included court order authorizing seizure of property); Gibson v. Regions Fin. Corp., 557 F.3d 842 (8th Cir. 2009) (joint action not shown; floor plan lender complained that car dealer had sold vehicles out of trust; officer made independent decision to get search warrant for dealer's home); Collins v. Womancare, 878 F.2d 1145, 1155 (9th Cir. 1989); Fleeger v. Bell, 95 F. Supp. 2d 1126 (D. Nev. 2000) (mere reporting of nonpayment of casino markers to prosecutor is not joint action), *aff'd*, 23 Fed. Appx. 741 (9th Cir. 2001); Wallace v. Noel, 2009 WL 5174175 (Ohio Ct. App. Dec. 31, 2009) (joint action not shown; manufactured home community manager made arguably false complaint, police officer made minimal investigation and used own judgment). *See also* Ginsberg v. Healey Car & Truck Leasing, 189 F.3d 268 (2d Cir. 1999) (calling officer to scene to prevent disturbance did not make private party state actor where officer exercised independent judgment about how to respond to call); Johnson v. DiPaolo, 2016 WL 6568067 (N.D. Ill. Nov. 24, 2016) (joint action not shown; foreclosure purchaser used lawful eviction procedure, but mistakenly named wrong occupant).

14.11.2.3 The State As Creditor

When the state is the creditor, its seizure of the debtor's property, through intercept or other means, without adequate notice and an opportunity to be heard may deprive the debtor of due process.[628] The same is true as to imprisonment of a consumer for failure to pay a fine without an opportunity to show the inability to pay.[629]

Thus, many decisions apply due process protections to tax sales,[630] towing or impoundment of vehicles to collect parking tickets,[631] and the state's withdrawal of funds from an inmate's account to pay the costs of prosecution or other debts owed to the state.[632] Municipalities that sell utility service are subject to due process and equal protection requirements when collecting debts or denying or terminating service.[633] The Eighth Circuit has held that whether the state's status as creditor satisfies the state action requirement may depend on whether it is acting in a commercial (traditionally private) capacity or a sovereign (governmental) capacity.[634]

14.11.3 What Protections Due Process Requires

If there is state action, the Fourteenth Amendment prohibits the deprivation of liberty or property without due process of law. Even a mere possessory interest in property invokes procedural due process protections.[635] However, there must be an actual deprivation of liberty or property before due process rights attach.[636]

The essential elements of due process are notice and a reasonable opportunity to be heard.[637] Providing notice of an alleged debt only after penalties for nonpayment have been imposed may deny the debtor due process.[638] An officer who

628 Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (if notice is returned undeliverable, due process requires additional efforts before state or municipal tax seizure of real property); Williams v. Conner, 522 F. Supp. 2d 92 (D.D.C. 2007) (fact issue—whether government followed own procedures to notify farmer of deficiency after foreclosure—precludes summary judgment on farmer's due process claim); Tackett v. Vill. of Carey, Ohio, 2007 WL 1500892 (N.D. Ohio May 18, 2007) (ordinance allowing liens for nuisance abatement denied due process; notice was adequate but opportunity for hearing was not); Special Assets L.L.C. v. Chase Home Fin., L.L.C., 991 So. 2d 668 (Ala. 2007) (due process requires notice to readily identifiable mortgagee before foreclosure of liens for fire service assessments); Crownover v. Keel, 357 P.3d 470 (Okla. 2015) (notice of tax sale sent to address provided when owner purchased property, but was returned undeliverable; due process required reasonable efforts to locate owner, such as sending notice to address on check for most recent payment). *See also* Flowers v. Flowers, 799 N.E.2d 1183 (Ind. Ct. App. 2003) (wage assignment procedure denied due process where prosecutor who was enforcing child support order failed to comply with facially valid statute; notice was inadequate, and "administrative review" without presence of child support obligor not an adequate hearing); Coleman v. Victoria Cnty., 385 S.W.3d 608 (Tex. App. 2012) (county failed to provide former landowners with constitutionally adequate notice that excess proceeds of tax sales were about to escheat to state).

629 *See* National Consumer Law Center, Collection Actions § 11.2.2 (4th ed. 2017), *updated at* www.nclc.org/library.

630 *See* National Consumer Law Center, Foreclosures and Mortgage Servicing § 14.3.4 (5th ed. 2014), *updated at* www.nclc.org/library.

631 *See* National Consumer Law Center, Repossessions § 15.13.3 (9th ed. 2017), *updated at* www.nclc.org/library.

632 *See, e.g.*, Bell v. Beightler, 2003 WL 116146 (Ohio Ct. App. Jan. 14, 2003) (upholding procedures for garnishment of prison inmate's account to pay debt owed to state; administrative hearing on exemptions is sufficient); Harrel v. State, 286 S.W.3d 315 (Tex. 2009) (prisoner has property interest in inmate trust account; due process requires notice and opportunity to be heard, but may occur after funds are withdrawn); *In re* Braswell, 310 S.W.3d 165 (Tex. App. 2010) (procedure for withdrawing funds from prisoner's account for court costs and court-appointed attorney fees was sufficient; prisoner received notice, and there is no evidence he was denied opportunity to contest the amount). *But see* Albritton v. Snead, 2015 WL 5793708 (E.D. Va. Oct. 2, 2015) (Virginia provides adequate post-deprivation remedy for improper garnishment of inmate account for child support); Sayers v. Powell, 2015 WL 3766205 (W.D. Va. June 16, 2015) (no violation of due process to freeze inmate account, containing exempt veterans' benefits, pending court decision on family support; benefits may be reached for this purpose); Sprouse v. Sanford, 2008 WL 203022 (D.S.C. Jan. 22, 2008) (no protected property interest in inmate trust accounts; even if there were, prison grievance process is adequate due process). *But cf.* Clark v. Wilson, 625 F.3d 686 (10th Cir. 2010) (questioning whether prisoner has protected property interest in funds in prison account; issue is whether freezing funds in response to state court garnishment order imposes "atypical and significant hardship" compared to usual hardships of prison life); Gist v. Anderson, 2013 WL 6909470 (W.D. Okla. Dec. 30, 2013) (denying as-applied challenge to Oklahoma statute placing a six-month hold on prisoners' recoveries in tort or contract, and providing that funds should be seized for fines, court costs, restitution, etc.).

633 *See generally* National Consumer Law Center, Access to Utility Service § 3.5 (6th ed. 2018), *updated at* www.nclc.org/library.

634 *See* Arcoren v. Peters, 829 F.2d 671 (8th Cir. 1987) (FmHA foreclosure involves federal government acting in commercial rather than sovereign capacity). *See generally* National Consumer Law Center, Collection Actions § 10.2.14 (4th ed. 2017), *updated at* www.nclc.org/library (discussion of suits against federal defendants).

635 Fuentes v. Shevin, 407 U.S. 67, 87, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). *See generally* National Consumer Law Center, Repossessions § 6.3.6 (9th ed. 2017), *updated at* www.nclc.org/library.

636 Hurdleston v. New Century Fin. Services, Inc., 629 F. Supp. 2d 434 (D.N.J. 2009) (deprivation of federally protected right not shown; even if notice of postjudgment execution was constitutionally infirm, no assets were actually seized or frozen; sheriff inspected debtor's apartment and checked his bank balance, but concluded assets were not worth executing upon). *Cf.* Gary v. Badger Process Services, Inc., 2017 WL 5356487 (E.D. Wis. Nov. 13, 2017) (due process claim fails because consumer, who found papers on doorstep, and appeared in court, can show no harm resulting from alleged bad service).

637 Matthews v. Eldridge, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *See generally* National Consumer Law Center, Repossessions §§ 5.4.1.1 to 5.4.1.2 (9th ed. 2017), *updated at* www.nclc.org/library (special requirements for prejudgment seizure or garnishment); National Consumer Law Center, Collection Actions § 13.5 (4th ed. 2017), *updated at* www.nclc.org/library (due process requirements when creditor seeks garnishment or attachment).

638 *See* Brown v. Transurban USA, Inc., 144 F. Supp. 3d 809 (E.D. Va. 2015) (allowing due process claim to go forward; notice to drivers whose EZ-Pass payments were declined was long delayed, causing drivers to accumulate huge balances due to penalties for nonpayment). *See also* Brite Fin. Services, L.L.C. v. Bobby's Towing Serv., L.L.C., 461 F. Supp. 3d 549 (E.D. Mich. 2020) (statutory procedure that resulted in 7-day delay in notifying owners or lienholders of hearing procedure, during which storage charges accrued, denied due process);

assists in the seizure of property without an independent judicial determination of the parties' rights deprives the debtor of due process.[639] Creditors' remedies that are accomplished through the court system may also provide inadequate due process protections, subjecting both the officials and the private actors to potential section 1983 liability.[640] However, a violation of a state law protection that does not affect notice, and an opportunity to be heard does not deprive a debtor of due process.[641]

One issue that occasionally arises is whether post-deprivation remedies, such as the right to bring a tort suit, satisfy due process requirements. As pre-deprivation remedies are not feasible for random, unpredictable, unauthorized conduct by state officials, several U.S. Supreme Court cases hold that due process only requires the state to provide post-deprivation remedies in such situations.[642]

The Fourteenth Amendment protects liberty as well as property, so seizure of the person in connection with debt collection can be addressed through section 1983 if state action is involved. For example, a section 1983 claim was held to exist against a police officer and bank official in *Lessman v. McCormick*,[643] where a policeman arrested the consumer, using a void arrest warrant for a parking ticket. The consumer paid the fine, but was required to remain at the police station until the bank officer arrived. The bank officer told the consumer that the parking violation arrest had resulted from the consumer's failure to respond to the bank's

Cahoo v. SAS Inst., Inc., ___ F.3d ___, 2019 WL 92221 (6th Cir. Jan. 3, 2019) (plaintiffs adequately pleaded due process violations by allegation state officials' use of severely flawed computerized fraud detection program that terminated unemployment benefits, garnished wages, and intercepted tax refunds without pre-deprivation notice; many claimants received notice of right to appeal only after appeal period passed). *But cf.* Augustin v. City of Philadelphia, 897 F.3d 142 (3d Cir. 2018) (municipal gas company's procedure for holding landlords liable for tenants' unpaid bills provided due process, even though long delays permitted tenants to run up large balances without landlords' knowledge).

639 *See* National Consumer Law Center, Repossessions § 6.3.6 (9th ed. 2017), *updated at* www.nclc.org/library.

640 *See* National Consumer Law Center, Collection Actions § 13.5 (4th ed. 2017), *updated at* www.nclc.org/library.

641 *See, e.g.*, DKCLM Ltd. v. County of Milwaukee, 794 F.3d 713 (7th Cir. 2015) (violation of state law requirement that sheriff complete eviction within ten days after receiving writ did not deny due process or make seizure unreasonable); Levy v. San Joaquin County Dep't of Child Support Services, 2013 WL 1891402 (N.D. Cal. May 6, 2013) (obtaining court order in wrong county not due process violation where obligor not deprived of notice or opportunity for hearing); Pabnke v. Anderson Moving & Storage, 393 F. Supp. 2d 892 (D. Minn. 2005) (failure to abide by twenty-four-hour waiting period required by state eviction procedure not federal due process violation where tenant received notice and hearing); Bonecutter v. Discover Bank, 953 N.E.2d 1165 (Ind. Ct. App. 2011) (failure to attach required itemized statement to small claims claim on account did not deny due process, where information was provided during discovery and consumer had full opportunity to present his defenses). *See also* Lee v. City of Norfolk, 706 S.E.2d 330 (Va. 2011) (notice was constitutionally adequate where building owner actually received it, and was informed that his property was a nuisance, even though notice cited wrong building code section, and misstated appeals period). *Cf.* Hicks v. Cadle Co., 809 F. Supp. 2d 742 (N.D. Ohio 2011) (failure to provide notice of right to hearing and to identify exempt property, in writ of execution served on judgment debtor, did not deny due process where no funds were seized, and debtor had actual notice through electronic filing system and full opportunity to challenge writs).

642 Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 1094, 82 L. Ed. 2d 393 (1984); Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 393 (1981). *See also* J.P. Silverton Indus., L.P. v. Sohm, 243 Fed. Appx. 82 (6th Cir. 2007) (state provided adequate post-deprivation remedy for allegedly improper sale of real estate; post-sale hearing available); Partin v. Davis, 675 Fed. Appx. 575 (6th Cir. 2017) (availability state tort claims and a motion to dissolve the writ are adequate post-deprivation remedies for judgment creditor's misuse of state postjudgment execution procedure); Reed v. Sell, 2017 WL 4584191 (N.D. W. Va. Oct. 13, 2017) (post-deprivation remedy sufficient for random and unauthorized action; police officer assisted foreclosure purchaser by threatening unlawful arrest of former homeowner); Greenberg v. Caesar's Entertainment Corp., 2016 WL 1106885 (E.D. Pa. Mar. 21, 2016) (state tort claim was adequate post-deprivation remedy where state police used threat of arrest to coerce repayment of disputed debt to casino), *aff'd*, 694 Fed. Appx. 877 (3d Cir. 2017); Johnson v. Marcum, 2014 WL 6474478 (W.D. Ky. Nov. 19, 2014) (post-deprivation remedies adequate where police assisted manufactured home park landlord's removal of home); Tift v. Snohomish County, 764 F. Supp. 2d 1247 (W.D. Wash. Jan. 24, 2011) (opportunity to present list of exempt property to sheriff after seizure is sufficient remedy for failure to comply with statute giving debtor opportunity to identify exempt property at time of seizure); Niemeyer v. Williams, 2008 WL 906051 (C.D. Ill. Mar. 31, 2008) (fact issue whether practice of turning seized vehicles over to lien holders before owners had opportunity to offer defense to seizure was random and unauthorized or was an unwritten policy); Wilson v. Hunter, 2008 WL 294964 (S.D. Ind. Jan. 31, 2008) (state breach of contract action adequate remedy for allegedly improper garnishment to recover overpayment of salary by school district); Buchanan v. Williams, 434 F. Supp. 2d 521 (M.D. Tenn. 2006) (allowing Fourth Amendment claim but not due process claim to proceed, as state provided adequate remedies if deputy sheriff's execution upon debtor's personal property exceeded his state law authority); Sheppard v. Welch, 2006 WL 3134869 (S.D. Ind. Oct. 31, 2006) (child support garnishment of wages and bank account without the notice required by state statute not § 1983 violation; deprivation was random and unauthorized, and state provided adequate post-deprivation remedy); Jones v. City of St. Louis, 285 F. Supp. 2d 1212 (E.D. Mo. 2003) (state replevin action was adequate remedy when municipality dismissed tickets, but private towing company refused to release car or valuable tools therein; no showing of custom or practice by municipality); Nicholson v. Moates, 135 F. Supp. 2d 1185 (M.D. Ala. 2001) (deputies and ex-husband allegedly altered court order allowing husband to retrieve personal property, ransacked house, and intimidated occupants; no § 1983 claim where available state procedures, here, a suit for wrongful attachment and for writ of mandamus, were sufficient to provide due process, even if they offered less relief than § 1983). *But cf.* D.C.F.S. U.S.A. v. Dist. of Columbia, 803 F. Supp. 2d 29 (D.D.C. 2011) (post-deprivation remedy not adequate where impounded motor vehicle was sold without notice to secured creditor whose name and address were easily ascertainable; post-deprivation remedies not adequate if pre-deprivation notice is practicable); Cox v. Yellowstone County, 795 F. Supp. 2d 1128 (D. Mont. 2011) (post-deprivation declaratory judgment action not sufficient where lien statute provided notice but no hearing; prejudgment remedy must provide pre-deprivation hearing unless this is impractical).

643 591 F.2d 605 (10th Cir. 1979).

collection letters regarding a debt to the bank. Under these facts, the court held that there were sufficient allegations to support an inference that the arrest was an abuse of power, violating section 1983.[644]

14.11.4 Fourth Amendment Claims

The Fourth Amendment right to be free from unreasonable searches and seizures applies in the civil as well as the criminal context and can be the basis of a section 1983 complaint where the state actors have either seized property or intruded upon private property.[645] If a consumer abandons personal property, or turns it over to a creditor, in response to an officer's threat of unlawful arrest, this is a seizure.[646] If state officials enter a home or its immediate surroundings to search for and seize goods, the Fourth Amendment and analogous state provisions require a warrant, issued by a neutral magistrate upon a showing of probable cause to believe that nonexempt goods will be found on the premises, identifying the place to be searched and the things to be seized.[647] The

644 *See also* Ballard v. Wall, 413 F.3d 510 (5th Cir. 2005) (judgment debtor stated due process claim against collection attorneys who procured bench warrant for his arrest for being late to judgment debtor hearing and then informed him that he would be released only by paying $10,000 judgment in cash).

645 Soldal v. Cook County, Illinois, 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992); Revis v. Meldrum, 489 F.3d 273 (6th Cir. 2007) (state's exercise of physical control over residence, resulting in eviction, may violate Fourth and Fourteenth Amendments; here, writ of execution for judgment debt did not authorize eviction without use of state's eviction procedure); *In re* Foust, 310 F.3d 849 (5th Cir. 2002) (closure of store and seizure of contents; premises locked up for longer than reasonable period to inventory contents and seize collateral); Davis v. Bayless, 70 F.3d 367 (5th Cir. 1995) (warrantless entry onto judgment debtor's girlfriend's property to search for assets of judgment debtor states Fourth Amendment claim; existence of post-deprivation state law remedies irrelevant); Loveless v. McCorkle, 2018 WL 4509608 (S.D. Ind. Sept. 20, 2018) (opening closed garage door to access inner door is sufficient to support Fourth Amendment claim); Cahoo v. SAS Inst., Inc., 322 F. Supp. 3d 772 (E.D. Mich. 2018) (denying motion to dismiss claim that termination of unemployment benefits, garnishment of wages, and interception of tax refunds, based on severely flawed automated fraud detection system, was unreasonable seizure of property in violation of Fourth Amendment), *aff'd in part, rev'd in part on other grounds*, ___ F.3d ___, 2019 WL 92221 (6th Cir. Jan. 3, 2019) (affirming holding that individual state employees did not have qualified immunity for due process violations, but reversing denial of qualified immunity on Fourth Amendment claim on ground that it was not clearly established that amendment applies to a seizure that does not violate privacy interests); Middaugh v. City of Three Rivers, 2015 WL 505793 (W.D. Mich. Feb. 6, 2015) (active assistance and unreasonable seizure shown where, during family dispute over ownership of car, police drove one claimant to where car was located and stood by while claimant drove car away); Foster v. City of Philadelphia, 2014 WL 5821278 (E.D. Pa. Nov. 10, 2014) (landlord and police misused abandoned vehicle statute to remove customers' cars from working garage); Baker v. Ghidotti, 2014 WL 1289566 (N.D. Ill. Mar. 28, 2014) (entry of homeowner's home and detention of homeowner's children at gunpoint while trying to persuade homeowner to disclose location of debtor's car); Rankin v. Smithburger, 2013 WL 3550894 (W.D. Pa. July 11, 2013) (tenants stated Fourth Amendment claim for loss and destruction of property during illegal eviction); McCarthy v. Wachovia Bank, 2008 WL 5145602 (E.D.N.Y. Dec. 4, 2008) (fact issues whether use of New York procedure to freeze bank account was unreasonable seizure in violation of Fourth Amendment); Buchanan v. Williams, 434 F. Supp. 2d 521 (M.D. Tenn. 2006) (deputy sheriff may have violated Fourth Amendment if his execution upon debtor's personal property exceeded his state law authority); Pruitt v. Pernell, 360 F. Supp. 2d 738 (E.D.N.C. 2005) (business owner stated claim against police chief who decided, without benefit of court order, who had better claim to disputed property and sent officers to enforce private party's seizure), *aff'd*, 173 Fed. Appx. 298 (4th Cir. 2006); Greenberg v. Pryszlak, 46 A.3d 591 (N.J. Super. Ct. App. Div. 2012) (after consumer stopped payment on check during dispute over defective service, creditor persuaded state trooper to make warrantless arrest). *See also* Downeast Ventures v. McShane Group, Inc., 2007 WL 1745633 (D. Me. June 13, 2007) (Fourth Amendment applies to civil seizures, but search by court-appointed receiver was reasonable), *adopted*, 2007 WL 2386319 (D. Me. Aug. 17, 2007); *In re* Draper, 2007 WL 564035 (D. Ariz. Feb. 20, 2007) (bankruptcy trustee sought court order permitting high bidder at sale to make "walk-through" inspection of debtor's house; Fourth Amendment applicable, but search is reasonable); *In re* Bursztyn, 366 B.R. 353 (Bankr. D.N.J. 2007) (Fourth Amendment applies to search by bankruptcy trustee, but search reasonable where trustee presented evidence that debtor was concealing assets). *Cf.* Tift v. Snohomish County, 764 F. Supp. 2d 1247 (W.D. Wash. Jan. 24, 2011) (in civil matter, Fourth Amendment standards of reasonableness less stringent than in criminal; raid on debtor's home to execute judgment not unreasonable even though it occurred before dawn and deputy sheriffs were accompanied by judgment creditor's lawyer). *But cf.* Niemeyer v. Williams, 2008 WL 906051 (C.D. Ill. Mar. 31, 2008) (Fourth Amendment claim is available only for illegal seizure of property, not for illegal retention of property that was legally seized); Greenberg v. Caesar's Entertainment Corp., 2016 WL 1106885 (E.D. Pa. Mar. 21, 2016) (threat of arrest was seizure, but not unreasonable where officers had arguable probable cause to believe that casino patron was guilty of larceny of property paid by mistake, here a disputed overpayment), *aff'd*, 694 Fed. Appx. 877 (3d Cir. 2017); Foreign Car Ctr., Inc. v. Essex Process Serv., Inc., 821 N.E.2d 483 (Mass. App. Ct. 2005) (no civil rights violation where police prevented judgment debtor from interfering with seizure pursuant to valid writ).

646 Pierce v. Clayton County Ga., 7217 Fed. Appx. 866 (11th Cir. 2017) (turning car over to police in response to wrongful threat is seizure); McDuffie v. Loney, 2017 WL 6039949 (N.D. Ill. Dec. 6, 2017) (parting with property in response to threat of arrest is seizure; here, unreasonable because two hours was clearly insufficient to allow removal of equipment from foreclosed house); Reed v. Sell, 2017 WL 4584191 (N.D. W. Va. Oct. 13, 2017) (unreasonable seizure shown if former homeowner abandoned valuable personal property in response to unlawful threat of arrest).

647 Dorwart v. Caraway, 966 P.2d 1121 (Mont. 1998) (postjudgment warrant of execution procedure violated Fourth Amendment and analogous state constitutional provision because no neutral magistrate found probable cause that the execution was unsatisfied and that nonexempt goods could be found on the premises and warrant failed to describe place to be searched and things to be seized). *See also* Harvey v. Plains Township Police Dep't, 421 F.3d 185 (3d Cir. 2005) (tenant stated Fourth Amendment claim where police ordered landlord to unlock door for tenant's former boyfriend, who had neither tenant's consent to entry nor court order allowing him to retrieve property), *appeal after remand*, 635 F.3d 606 (3d Cir. 2011) (instruction that jury could find for plaintiff tenant only if police "ordered" landlord to open door was plain error; state action issue requires consideration of totality of circumstances; here landlord testified she would not have opened door without "okay" from police); Gerhart v.

requirements for a reasonable search become less strict as the distance from the house increases.[648] A Fourth Amendment seizure of property occurs when there is some meaningful interference with an individual's possessory interest in property.[649] Even if the initial seizure is lawful, for example because of an emergency, some courts hold that the state may violate the Fourth Amendment if it retains the property past that point.[650]

The Fourth Amendment is also implicated if a debtor is detained[651] or officers use excessive force[652] in connection with debt collection. Even if a court order is valid, the method of enforcing it may be unreasonable within the meaning of the Fourth Amendment if, for example, the officer uses excessive force or conducts an unreasonably broad search.[653]

Commonwealth, 2009 WL 2581715 (E.D. Pa. Aug. 13, 2009) (allegation that police seized plaintiff's manufactured home at behest of landowner, but without warrant or court order, states Fourth Amendment claim); Bernstein v. Roberts, 405 F. Supp. 2d 34 (D.D.C. 2005) (judgment debtor stated claim for Fourth Amendment violation against officers who entered her home on expired warrant to execute upon personal property); McDonald v. Keahey, 301 So. 3d 823 (Ala. App. 2019) (fact issue whether driveway bounded on one side by back wall of house is within the curtilage of dwelling; if it is, removal of "inoperable"—here, drivable but with expired registration—vehicles requires either a warrant or a pre-seizure administrative hearing; seizure was unreasonable because consumer had no pre-seizure opportunity to contest code officer's unilateral decision). *But cf.* Owens v. Swan, 962 F. Supp. 1436 (D. Utah 1997) (entry into judgment debtors' home to inventory their property not Fourth Amendment violation where conducted pursuant to writ). *See generally* National Consumer Law Center, Repossessions §§ 5.4.1.3, 13.7 (9th ed. 2017), *updated at* www.nclc.org/library.

648 Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed.2d 495 (2013) (criminal case; "when it comes to the Fourth Amendment, the home is first among equals . . . we . . . regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself' for Fourth Amendment purposes"); Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) (warrant not required to search open fields, even if privately owned); McDonald v. Keahey, 301 So. 3d 823 (Ala. Ct. App. 2019) (fact issue whether rear driveway, bounded by wall of house, was within curtilage).

649 Soldal v. Cook County, Illinois, 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) (seizure of manufactured home); Revis v. Meldrum, 489 F.3d 273 (6th Cir. 2007) (homeowner's possession of residential premises is possessory interest protected by Fourteenth Amendment; state's exercise of physical control over residence in connection with execution upon judgment debt, resulting in eviction, may violate Fourth and Fourteenth amendments); Dixon v. Lowery, 302 F.3d 857 (8th Cir. 2001) (possessory interest is protected even if disputed); Hollandsworth v. City and County of Honolulu, 2020 WL 5753197 (D. Haw. Sept. 25, 2020) (dispute over ownership of horse; stand-by police officer's unilateral determination of ownership, and assertion of authority to allow defendant to repossess horse, was unreasonable seizure); Hyman v. Morris, 320 F. Supp. 3d 707 (W.D. Pa. 2018) (consumer who was delinquent on car loan had possessory interest sufficient to support Fourth Amendment claim).

650 *See, e.g.*, Ordonez v. Stanley, 2020 WL 7380461 (C.D. Cal. Oct. 16, 2020) (right to seize or hold property without warrant ends when exigency that required seizure ends; when car was seized because driver was unlicensed, seizure became unreasonable when police refused to allow driver to call licensed family member to retrieve it, but instead impounded it for 30 days with no right to retrieve it). *But see* Brite Fin. Services, L.L.C. v. Bobby's Towing Serv., L.L.C., 461 F. Supp. 3d 549 (E.D. Mich. 2020) (continued possession of properly seized property does not violate Fourth Amendment).

651 *See, e.g.*, Brees v. Courtesy Ford, 2002 WL 2017065 (9th Cir. Aug. 28, 2002) (consumer stated claim for Fourth Amendment violation where deputies compelled him to stand outside in the rain, in his nightclothes, during unlawful self-help repossession); Boles v. County of Montgomery, 2014 WL 582259 (N.D.N.Y. Feb. 13, 2014) (fact issues as to Fourth Amendment false arrest and malicious prosecution claims); Fuciarelli v. Good, 2016 WL 4529822 (D. Ariz. Aug. 30, 2016) (arrest without probable cause shown; police had no right to forcibly detain landlord while they tried to determine whether his action in denying evicted tenant's wife access to the premises was unlawful); Meyer v. Degan, 2009 WL 3157386 (D. Neb. Sept. 25, 2009) (allowing debtor to proceed to trial on Fourth Amendment claim based on her arrest when she called police to complain of break-in by creditor ex-boyfriend and off-duty deputy); McFarland v. Bob Saks Toyota, 466 F. Supp. 2d 855 (E.D. Mich. 2006) (denying summary judgment on Fourth Amendment claim because of disputed facts where car buyer alleged that when he returned to dealership to hand over title to trade-in, police took him into office, told him he was not free to leave, interrogated him about discrepancies in paperwork, and finally ordered him to transfer his belongings to trade-in and leave new car with dealer); Goard v. Crown Auto, Inc., 170 F. Supp. 3d 915 (W.D. Va. 2016) (threat of arrest, which caused consumer to turn over keys, when repossessors' paperwork did not include court order, was unreasonable seizure). *See also* Kimball v. Town of Provincetown, 158 F. Supp. 3d 7 (D. Mass. 2016) (unreasonable seizure of person sufficiently alleged; while evicted commercial tenants were packing up their belongings, police demanded immediate return of specified file folder, causing tenants to stop what they were doing and spend hours searching already packed boxes; show of authority to which tenants submitted was a seizure). *But cf.* Carlyle v. Roth, 2018 WL 1640481 (S.D. Ill. Apr. 5, 2018) (dismissing claim by consumer who was arrested after county treasurer neglected to inform court that debt was no longer owed to county; claim alleged, at worst, only simple negligence); Anderson v. City of Oak Park, 2014 WL 4415956 (E.D. Mich. Sept. 8, 2014) (officers had probable cause to arrest car owner who was subject of misdemeanor warrants; repossession went forward after car owner's arrest). *See generally* National Consumer Law Center, Repossessions § 6.3.6.4 (9th ed. 2017), *updated at* www.nclc.org/library.

652 *See, e.g.*, Frobel v. County of Broome, 419 F. Supp. 2d 212 (N.D.N.Y. 2005) (excessive force when attempting to collect judgment debt).

653 *See, e.g.*, Cochram v. Gilliam, 656 F.3d 300 (6th Cir. 2011) (sheriff assisted with seizure of tenant's personal property, but court order authorized only eviction); Revis v. Meldrum, 489 F.3d 273, 290 (6th Cir. 2007) (seizure of judgment debtor's residence violated Fourth Amendment where writ authorized officers only to give notice that property was subject to sale); Falk v. Perez, 973 F. Supp. 2d 850 (N.D. Ill. 2013) (denying quasi-judicial immunity to deputy who acted beyond scope of court order; order specified eviction of former owner, but deputy evicted lawful tenant and prevented her from reclaiming personal property); Rankin v. Smithburger, 2013 WL 3550894 (W.D. Pa. July 11, 2013) (even if court order gave right to immediate possession of real property, destruction of tenant's personal property was unreasonable); Tift v. Snohomish County, 764 F. Supp. 2d 1247 (W.D. Wash. Jan. 24, 2011) (excessive force sufficiently alleged; pre-dawn raid on home to execute on judgment, debtor alleged that deputies slammed his face into door); Siwka v. Smart Recovery Serv., L.L.C., 2010 WL 4791370 (E.D. Mich. Oct. 28, 2010) (excessive force sufficiently alleged; officers physically restrained consumers and threatened them with taser; offense, if any was petty, no danger to public

14.11.5 Immunity; Municipal Liability

State officials can claim immunity from liability under section 1983 if their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[654] In addition, some actors such as judicial

was shown, and officers had contributed to situation that gave rise to confrontation), *adopted*, 2010 WL 4788495 (E.D. Mich. Nov. 17, 2010); Buchanan v. Williams, 434 F. Supp. 2d 521 (M.D. Tenn. 2006) (seizure of vehicle from location not authorized by writ was unreasonable; if officer knew car was in wrong county, Fourth Amendment violation shown); Thomas v. Sheahan, 370 F. Supp. 2d 704 (N.D. Ill. 2005) (during an eviction sheriff approached house with battering ram, ordered tenant's children out of house at gunpoint, told them to sit in their van, threatened arrest if they moved, and conducted extensive search of house, despite lack of probable cause for protective sweep; tenants stated Fourth Amendment claim for both arrest and unreasonable search); Frobel v. County of Broome, 419 F. Supp. 2d 212 (N.D.N.Y. 2005) (consumer stated Fourth Amendment claim against sheriff collecting valid judgment debt where she alleged he physically attacked and injured her).

654 Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

Immune: Clark v. Wilson, 625 F.3d 686 (10th Cir. 2010) (law not well established as to garnishment of prisoner's account); Allin v. City of Springfield, 845 F.3d 858 (7th Cir. 2017) (officer acted reasonably in allowing claimant to take disputed motorcycle; was shown title certificate and carried out title search to confirm its validity); Revis v. Meldrum, 489 F.3d 273 (6th Cir. 2007) (qualified immunity for sheriff who evicted judgment debtor; language of writ was unclear, and sheriff consulted county attorney who gave incorrect advice); Miarka v. City of Gulf Shores, 2017 WL 3612867 (S.D. Ala. July 31, 2017) (granting immunity to officers who allowed plaintiff's ex-wife to ransack his business; officers relied on facially valid state court order that violated bankruptcy stay), *adopted*, 2017 WL 3612863 (S.D. Ala. Aug. 22, 2017); McBride v. City of Westbrook, 2015 WL 5178068 (D. Me. Sept. 4, 2015) (police assisted at eviction of tenant and co-tenant; landlord had paperwork for tenant but not co-tenant); Flah v. City of Maple Grove, 2015 WL 7303546 (D. Minn. Nov. 19, 2015) (qualified immunity for officers who pointed gun at debtor after repossessor had falsely informed them that debtor said she had gun); Chaney v. Stewart, 2015 WL 1538021 (D. Vt. Apr. 7, 2015) ("gray area" as to whether removal of terminated inn employee from room he had been permitted to occupy was eviction within meaning of state landlord-tenant law); Burns v. Buckner, 2010 WL 1994927 (M.D. Ala. May 18, 2010) (law not clearly established; issue whether repeated contempt petitions seeking to collect child support arrears from exempt SSI were "other legal process" forbidden by Social Security Act); Verdi v. Kirby, 2009 WL 112713 (M.D. Ga. Jan. 16, 2009) (sheriff who serves writ has same absolute judicial immunity as judge who issued writ; qualified immunity as to method of service, where no showing that established right violated); Downeast Ventures, Ltd. v. Washington County, 2007 WL 1745630 (D. Me. June 13, 2007) (qualified immunity for deputies who assisted receiver who searched pursuant to court order, where their actions were "objectively reasonable"), *adopted*, 2007 WL 2386318 (D. Me. Aug. 17, 2007); Tomassi v. Sheehan, 2016 WL 4768826 (E.D.N.Y. Aug. 23, 2016) (qualified immunity for officers who carried out eviction that had been stayed by last-minute bankruptcy filing; officers checked with bankruptcy court and did not learn of stay), *adopted*, 2016 WL 4767539 (E.D.N.Y. Sept. 13, 2016); Zeppieri v. New Haven Provision Co., 163 F. Supp. 2d 126 (D. Conn. 2001) (qualified immunity for sheriff's deputy serving bank execution that reached judgment debtor's exempt Social Security benefits, where conduct was objectively reasonable and there was no deprivation of clearly established right).

Not immune: Carter v. Butts County Georgia, 821 F.3d 1310 (11th Cir. 2016) (deputy arrested property service employees for burglary at his foreclosed former home; deputy could not reasonably believe that their presence was unauthorized, because he had failed to use various legitimate means of challenging the eviction or reclaiming personal property); Pierce v. Clayton County Georgia, 7217 Fed. Appx. 866 (11th Cir. 2017) (police had actual knowledge of clerical error that caused car to be listed as stolen); Zoretic v. Darge, 832 F.3d 639 (7th Cir. 2016) (eviction based on order that reasonable officer would know was invalid); Cochram v. Gilliam, 656 F.3d 300 (6th Cir. 2011) (discussing when right is clearly established; sufficiently alleged here, where sheriff assisted with seizure of tenant's personal property, but court order authorized only eviction); Garcia v. Dykstra, 260 Fed. Appx. 887 (6th Cir. 2008) (not reasonable for police officer who opened storage locker to believe that man who purported to give consent had authority to do so); Dixon v. Lowery, 302 F.3d 857 (8th Cir. 2001) (genuine issue of fact regarding qualified immunity where police who helped buyer of real property evict seller knew that they should not evict without court order); Audio Odyssey, Ltd. v. Brenton First Nat'l Bank, 245 F.3d 721 (8th Cir. 2001), *reaff'd upon reh'g en banc*, 286 F.3d 498 (8th Cir. 2002) (sheriff's deputies knew or should have known that replevin writ specifying certain inventory and fixtures did not authorize seizure of real property); Abbott v. Latshaw, 164 F.3d 141 (3d Cir. 1998) (constable and police officer who helped ex-wife take van from husband not immune); Hollandsworth v. City and County of Honolulu, 2020 WL 5753197 (D. Haw. Sept. 25, 2020) (at scene of dispute over horse, stand-by police officer decided which claimant owned it and exerted his authority to allow her to take it; law was well-established that officer's unilateral determination of disputants' rights did not comport with due process); Ordonez v. Stanley, 2020 WL 7380461 (C.D. Cal. Oct. 16, 2020) (law governing warrantless seizures was well established; denying immunity to officers who refused to release car, stopped because driver was unlicensed, to licensed family member or owner); Wilson v. Brown Chrysler Dodge Jeep Ram, L.L.C., 2018 WL 700828 (W.D. La. Feb. 1, 2018) (deliberate concealment of exculpatory evidence, here evidence of valid sale of allegedly stolen car, violated well-established law); Cahoo v. SAS Inst., Inc., 322 F. Supp. 3d 772 (E.D. Mich. 2018) (denying qualified immunity to state employees who implemented fraud detection program known to have high error rate, and constitutionally inadequate notice and hearing procedure); Middaugh v. City of Three Rivers, 2015 WL 505793 (W.D. Mich. Feb. 6, 2015) (police who actively assisted at taking of car during family dispute should have known that matter was civil and ownership unclear); Boyer v. Mark Peterson and Bryan Campbell, 221 F. Supp. 3d 94 (W.D. Mich. 2016) (officer was clearly wrong to rely on estranged wife's consent to enter former marital home; officer knew that couple was in process of divorcing, husband occupied the home, and wife required an appointment to enter); Clopton v. City of Plymouth, 2017 WL 29660 (D. Minn. Jan. 3, 2017) (denying immunity where officers' actions went well beyond standby, and made repossession possible); Hyman v. Morris, 320 F. Supp. 3d 707 (W.D. Pa. 2018) (law is well-established that assisting at private repossession is state action); Foster v. City of Philadelphia, 2014 WL 5821278 (E.D. Pa. Nov. 10, 2014) (towing large numbers of customers' cars from working garage during landlord-tenant dispute was "unprecedented" use of abandoned vehicle statute); Anderson v. City of Oak Park, 2014 WL 4415956 (E.D. Mich. Sept. 8, 2014) (active assistance at repossession; repossessor showed only letter from dealer, not court order); Callon v. Cox, 2012 WL 314880 (S.D. Ind. Jan. 25, 2012) (qualified immunity not available to town officials who failed to recall body attachment after being shown proof that court costs and been paid). *See also In re* Foust, 310 F.3d 849 (5th Cir. 2002) (absolute immunity for serving facially valid writ, qualified immunity for method of enforcement, and qualified immunity for deputies where law not clearly established).

officials have absolute immunity.[655] Private parties cannot claim qualified good faith immunity,[656] but some courts have allowed them to raise good faith as an affirmative defense.[657]

Municipalities and other local governmental bodies enjoy the immunity from suit that a state enjoys, but th will not be liable on a *respondeat superior* basis for the of law enforcement and other local officials.[658] These l local government will be liable only if their "official was to allow the acts or practices on which the constit claim is based.[659]

14.12 Other Federal Restrictions on Debt Collection

Antitrust laws may also limit collection practices. Tl agreement by members of an association of wholesale p distributors to refuse to extend credit to each other's quent merchants violated federal antitrust laws.[660]

655 Conklin v. Anthou, 495 Fed. Appx. 257 (3d Cir. 2012) (quasi-judicial immunity for sheriff who carried out facially valid court order for foreclosure sale); Wilcox v. Magill, 468 Fed. Appx. 849 (10th Cir. 2012) (quasi-judicial immunity for officers serving facially valid writ, but lost if officers exceed scope of writ, here by shipping seized property to out-of-state creditor); Moss v. Kopp, 559 F.3d 1155 (10th Cir. 2009) (officials executing facially valid court order have quasi-judicial immunity as long as they act within scope of their jurisdiction and as prescribed by order, and judge issuing it had judicial immunity); J.P. Silverton Indus., L.P. v. Sohm, 243 Fed. Appx. 82 (6th Cir. 2007) (absolute quasi-judicial immunity for master commissioner who auctioned property pursuant to court order); Ballard v. Wall, 413 F.3d 510, 519 (5th Cir. 2005) (jailing of judgment debtor who failed to appear for debtor's examination was judicial in nature, so judge is immune); *In re* Foust, 310 F.3d 849 (5th Cir. 2002) (absolute immunity for serving facially valid writ). *But see* Caliste v. Cantrell, 2017 WL 6344152 (E.D. La. Dec. 12, 2017) (absolute immunity only for judge acting in adjudicatory capacity; denying immunity on § 1983 claim seeking injunction against judge who, in addition to setting bail in individual cases, was administrator of the bail program).

656 Wyatt v. Cole, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992).

657 *See* Diamond v. Pennsylvania State Education Ass'n., 972 F.3d 262 (3d Cir. 2020) (allowing defense to unions that collected fair share fees, "private defendants should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity"; note that this defense turns on subjective state of mind, not the more demanding objective standard of reasonable belief that governs qualified immunity); Janus v. Am. Fed'n of State, County and Municipal Employees, 942 F.3d 352 (7th Cir. 2019) (allowing good faith defense, but not qualified immunity, to union that followed existing law and Supreme Court precedent in deducting "fair share fees" from non-members' wages); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994); Tarantino v. Syputo, 2006 WL 1530030 (N.D. Cal. June 2, 2006) (no qualified immunity for private tow company, but good faith defense made out where company was called by, and acted only at direction of, municipal officials), *aff'd*, 270 Fed. Appx. 675 (9th Cir. 2008); Todman v. Mayor and City Council of Baltimore, 2020 WL 5653256 (D. Md. Sept. 23, 2020) (defense is available only to party who acts reasonably and in good faith; not shown where landlord orally agreed that tenants could move out on specified date, then used unconstitutional pr to lock them out and seize their property two days before that

658 Monell v. Dep't of Social Services, 436 U.S. 658, 691–695, 9 2018, 56 L. Ed. 2d 611 (1978).

659 Monell v. Dep't of Social Services, 436 U.S. 658, 691–695, 9 2018, 56 L. Ed. 2d 611 (1978). *See also, In re* Foust, 310 F.3d Cir. 2002) (remanding to determine whether county had adopte of locking up premises in replevin cases in "deliberate indiff to occupants' constitutional rights); Johnson v. City of Evanst F.3d 560 (7th Cir. 2001). *See generally* National Consumer Law Repossessions § 13.7.3.3 (9th ed. 2017), *updated at* www.n library (more extensive discussion of this issue).

660 United States v. Philadelphia Produce Credit & Collection Antitrust & Trade Reg. Rep. (BNA) 16 (E.D. Pa. 1983). *See ge* National Consumer Law Center, Federal Deception Law § 11.1 2017), *updated at* www.nclc.org/library (application of state a eral antitrust laws to consumer issues).

Chapter 15 Tort Remedies

15.1 Introduction

15.1.1 Overview

The oldest legal approach to debt collection abuse is an action in tort. There are distinct advantages and disadvantages to a tort approach to remedying abusive debt collection conduct. One major advantage in most states is the availability of punitive or exemplary damages for tortious conduct that is malicious or reckless.[1] Another major advantage is that tort claims are available against creditors and their agents who may not be subject to the Fair Debt Collection Practices Act (FDCPA) or some states' consumer protection statutes.

The major disadvantage of tort claims is that many states require the debt collector's conduct to be considerably more offensive than is required under consumer protection statutes. Class actions for collection torts are also rare, although it is sometimes possible to obtain certification of a class action where the challenged conduct involves a uniform practice.[2]

The main tort theories that may be available to a harassed debtor are:

- Intentional or negligent infliction of emotional distress (or mental anguish) (§ 15.2, *infra*);
- Invasion of privacy (§ 15.3, *infra*);
- Intentional interference with employment or other contractual relationships (§ 15.4, *infra*);
- Defamation (§ 15.5, *infra*);
- Malicious prosecution (§ 15.6.2, *infra*); and
- Abuse of process (§ 15.6.3, *infra*).

Intentional infliction of emotional distress and invasion-of-privacy claims are well-suited to challenge debt collection harassment, but may be unavailable or poorly developed in some jurisdictions. Defamation and malicious prosecution claims are appropriate for a somewhat narrower subset of debt collection abuses, but may be overburdened with technical requirements. Abuse of process and interference with employment or other contractual relationships are viable claims in certain particular debt collection contexts.

Because of the number of local variations in the acceptance, development, and definition of various torts, this chapter is restricted to cataloging only the most significant distinctions in the tort law of the various jurisdictions in the context of debt collection. This chapter attempts to identify the most widely accepted elements of each tort, to delineate the major variations, and to present cases illustrating the application of the tort to abusive collection of consumer debts. After examining each of the main debt collection torts in some detail, the

1 *See, e.g.*, Williams v. Rodenberg, L.L.P., 2018 WL 5801889 (D. Minn. Nov. 6, 2018) (plaintiff seeking to add claim for punitive damages sufficiently alleged deliberate disregard of his rights by collector's attorney; repeated garnishment of non-debtor's wages, continuing after attorneys had actual knowledge that he was not the judgment debtor); Davis v. Creditors Interchange Receivable Mgmt., L.L.C., 585 F. Supp. 2d 968 (N.D. Ohio 2008) (false threats of arrest and garnishment, workplace and family contacts, repeated calls to consumers known to be represented sufficient to state claim for punitive damages); Miele v. Sid Bailey, Inc., 192 B.R. 611 (S.D.N.Y. 1996) (punitive damages of $60,000 (about five times actual damages, FDCPA statutory damages, and attorney fees) permissible where collector hounded plaintiff for discharged debt and reported it to credit reporting agency); Ariguzo v. Kmart Corp., 1999 WL 775777 (Ohio Ct. App. Sept. 30, 1999) (upholding $58,000 compensatory and $350,000 punitive damages for intentional infliction of emotional distress and defamation where, after being shown receipt for goods consumer was seeking to exchange, store personnel forced her into office, dumped out her purse, and sent theft report to collection agency, which sent her harassing letters); Household Credit Serv. v. Driscol, 989 S.W.2d 72 (Tex. App. 1998) ($250,000 exemplary damages for repeated abusive calls regarding credit card debt); Ellis County State Bank v. Keever, 936 S.W.2d 683 (Tex. App. 1996) (upholding punitive damages of $1 million (nine times actual damages) where bank had debtor arrested on charges of concealing collateral in effort to collect debt that had been discharged in bankruptcy, and bank officers gave false grand jury testimony). *See also* May v. Nationstar Mortg., L.L.C., 852 Fed. 3d 806 (8th Cir. 2018) (Mo. law; affirming award of $400,000 punitive damages, an 8-to-1 ratio to compensatory damages of $50,000, against lender that was aware of its error in calculating amount due after mortgage paid down in ch. 13 plan, yet stonewalled consumer's attempts to correct error, engaged in harsh collection attempts, and wrongfully attempted to foreclose); Hayfield v. Home Depot, 168 F. Supp. 2d 436 (E.D. Pa. 2001) (consumer alleged sufficient facts to support punitive damages award where retailer vigorously prosecuted criminal bad check charges despite lack of probable cause); Harold McLaughlin Reliable Truck Brokers v. Cox, 922 S.W.2d 327 (Ark. 1996) (punitive damages appropriate in malicious prosecution case); Rahaman v. Weber, 2005 WL 89413 (Minn. Ct. App. Jan. 19, 2005) (consumer should have been allowed to add claim for punitive damages where lawyers levied on bank account after being notified that the funds were exempt, and seized larger sum than authorized); Cooper v. Cooper, 783 A.2d 430 (Vt. 2001) (evidence of malice supported punitive damages where ex-husband's parents sought to foreclose mortgage on wife's property during acrimonious divorce). *See generally* § 2.6.2.1, *supra*; National Consumer Law Center, Repossessions § 13.6.11 (9th ed. 2017), *updated at* www.nclc.org/library (punitive damages for conversion and other repossession torts); National Consumer Law Center, Automobile Fraud § 8.11 (6th ed. 2018), *updated at* www.nclc.org/library (punitive damages for fraud; constitutional and statutory limits on punitive damages).

2 *See, e.g.*, Barquis v. Merchants Collection Ass'n, 496 P.2d 817 (Cal. 1972) (class action challenging practice of filing suit in improper venues); Charlie Thomas Courtesy Leasing Co. v. Taylor, 44 S.W.3d 684 (Tex. App. 2001) (class action proper against defendant who swore out complaints for theft of services under $20, the threshold level below which district attorney did not screen complaints, then used threat of arrest to coerce payment of much larger sums by consumers who disputed bills). *But cf.* Fuhrman v. California Satellite Sys., 231 Cal. Rptr. 113 (Cal. Ct. App. 1986) (class action for intentional infliction of mental distress particularly inappropriate because of individual questions of damages).

chapter concludes with a discussion of other debt collection torts, negligence claims against collection attorneys, and the tort liability of principals and officers.[3]

15.1.2 Preemption

15.1.2.1 FDCPA and State Debt Collection Statutes Do Not Preempt Tort Claims

The Fair Debt Collection Practices Act contains broad non-preemption language, stating that the Act does not "annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any state with respect to debt collection, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency."[4] This language makes it clear that the FDCPA is intended only to set minimum standards; states are free to provide greater protection to the consumer. The non-preemption language protects common law causes of action[5] as well as statutory claims.[6] State debt collection statutes also do not preempt common law claims.[7]

15.1.2.2 Preemption by Federal Banking Laws, Higher Education Act, and the Bankruptcy Code

Federal banking laws—the National Bank Act (NBA) and the Home Owners Loan Act (HOLA)—may preempt state tort claims that challenge loan terms as unfair or violative of state law.[8] However, the federal preemption regulations explicitly preserve state tort law as long as it is not inconsistent with the powers granted to banks,[9] and a tort claim that alleges collection harassment or deception is likely to escape preemption.[10] The Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in 2010, significantly narrowed the preemptive scope of federal banking laws, making preemption of state debt collection tort claims even less likely than before.[11] Preemption of state law by federal banking laws and regulations is discussed in detail in NCLC's *Mortgage Lending*.[12]

The Higher Education Act does not preempt state tort claims alleging misconduct by private collectors of student loans, as the Act and its regulations do not mandate workplace harassment or other extreme behavior.[13]

Preemption problems may arise if the debt collection conduct relates to a bankruptcy case. This issue is discussed in Chapter 13, *supra*.

3 *See* §§ 15.7 to 15.9, *infra*.

4 15 U.S.C. § 1692n. *See* § 11.16.1, *supra*.

5 Desmond v. Phillips & Cohen Assoc., Ltd., 724 F. Supp. 2d 562 (W.D. Pa. 2010); Heidelberger v. Am. Express Travel-Related Serv., 2007 WL 4404027 (E.D. Ark. Dec. 13, 2007) (state negligence and outrage claims not preempted); Albright v. Allied Int'l Credit Corp., 2003 WL 22350928 (C.D. Cal. Aug. 25, 2003) (FDCPA does not preempt state tort law claims and is not inconsistent with them); Joseph v. J.J. MacIntyre Cos., L.L.C., 238 F. Supp. 2d 1158, 1169–1170 (N.D. Cal. 2002) (FDCPA does not preempt invasion-of-privacy claim); Virgil v. Reorganized M.W. Co., 156 F. Supp. 2d 624 (S.D. Miss. 2001), *repudiating* Thrasher v. Cardholder Serv., 74 F. Supp. 2d 691 (S.D. Miss. 1999) (earlier decision by same judge); Binion v. Franklin Collection Serv., Inc., 147 F. Supp. 2d 519 (S.D. Miss. 2001); Williams v. Northcut & Edwards, 1999 U.S. Dist. LEXIS 12980 (S.D. Ohio July 7, 1999) (Ohio common law action for invasion of privacy not preempted by FDCPA).

6 Hage v. Gen. Serv. Bureau, 2002 WL 1796575 (D. Neb. Aug. 5, 2002) (consumer protection statute not preempted by FDCPA).

7 Bailey v. Branch Banking & Trust Co., 2011 WL 2517253 (S.D. W. Va. June 23, 2011) (West Virginia consumer act expands, and does not replace, common law liability; consumer may bring statutory and common law claims arising from same set of facts). *See also* Pemberton v. U.S. Bank, 2012 WL 37113 (S.D. W. Va. Jan. 5, 2012) (common law claims can be asserted as long as they could exist separate from the statute and can be based on the same facts as the statutory claims); Daniels v. JP Morgan Chase & Co., 2011 WL 2489938 (S.D. W. Va. June 21, 2011) (common law claims must be actionable apart from statutory claim).

8 *See, e.g.*, Ayala v. World Sav. Bank, 616 F. Supp. 2d 1007 (C.D. Cal. 2009) (state law claims of negligence and negligent infliction of emotional distress, arising from allegedly predatory loan, were preempted by Home Owners Loan Act because they challenged the terms of the credit). *See generally* National Consumer Law Center, Mortgage Lending Ch. 5 (3d ed. 2019), *updated at* www.nclc.org/library.

9 12 C.F.R. §§ 7.4007(c)(2), 7.4008(e)(2), 34.4(b)(2).

10 Sovereign Bank v. Sturgis, 863 F. Supp. 2d 75 (D. Mass. 2012) (claims of intentional infliction of emotional distress and tortious interference with contract are not preempted where they do not seek to enforce substantive lending regulations that would themselves be preempted); Tuck v. Wells Fargo Home Mortg., 2012 WL 2906738 (N.D. Cal. July 13, 2012) (state tort claims of intentional infliction of emotional distress, fraud, and elder abuse, arising from mishandling of older homeowner's loan modification, were not preempted by Home Owners Loan Act); Ahmed v. Wells Fargo Bank & Co., 2011 WL 1751415 (N.D. Cal. May 9, 2011) (tort claims not barred by Home Owners Loan Act; alleged false statement that foreclosure sale had been cancelled violated general duty not to misrepresent facts, not some duty specific to loan procedure, such as duty to disclose rates or fees); Poskin v. T.D. Banknorth, 687 F. Supp. 2d 530 (W.D. Pa. 2009) (wrongful use of civil proceedings claim, alleging that bank brought foreclosure and quiet title actions despite knowledge that loan was invalid, not preempted by National Bank Act); Ayala v. World Sav. Bank, 616 F. Supp. 2d 1007 (C.D. Cal. 2009) (Home Owners Loan Act does not preempt slander of title claim alleging that lender caused groundless notice of default to be recorded against the property).

11 *See* National Consumer Law Center, Mortgage Lending Ch. 5 (3d ed. 2019), *updated at* www.nclc.org/library; National Consumer Law Center, Consumer Credit Regulation Ch. 3 (2d ed. 2015), *updated at* www.nclc.org/library.

12 National Consumer Law Center, Mortgage Lending Ch. 5 (3d ed. 2019), *updated at* www.nclc.org/library.

13 Murungi v. Texas Guaranteed Sallie Mae, 646 F. Supp. 2d 804 (E.D. La. 2009). *Cf.* Snuffer v. Great Lakes Educational Loan Serv., Inc., 2015 WL 1275455 (S.D. W. Va. Mar. 19, 2015) (HEA preempts sections of state act forbidding contact with represented debtor, but not those forbidding threatening or fraudulent debt collection conduct). *But cf.* Hunt v. Sallie Mae, Inc., 2011 WL 2847428 (E.D. Mich. July 19, 2011) (state statutory and tort claims alleging telephone harassment expressly preempted by HEA provision requiring diligent collection efforts). *See generally* National Consumer Law Center, Student Loan Law § 14.2.4 (6th ed. 2019), *updated at* www.nclc.org/library (Higher Education Act preemption of state debt collection law claims).

15.1.3 Privilege

15.1.3.1 Privilege for Statements Made in Judicial Proceedings

Issues of privilege arise in many collection tort suits. According to the *Restatement (Second) of Torts*,[14] statements made in the course of a judicial proceeding are absolutely privileged in cases alleging defamation,[15] slander of title or trade libel,[16] and invasion of privacy.[17] Some courts have declined to extend this privilege beyond these torts.[18] However, other courts have extended it to the other torts discussed in this chapter, except malicious prosecution.[19] In California, the litigation

14 Restatement (Second) of Torts §§ 587 to 588 (1977).

15 *See, e.g.*, MSK EyEs, Ltd. v. Wells Fargo Bank, 546 F.3d 533, 542 (8th Cir. 2008) (Minn. law); Gargiulo v. Forster & Garbus, Esqs., 651 F. Supp. 2d 188 (S.D.N.Y. 2009); Bernegger v. Washington Mut., 2008 WL 597811 (E.D. Wis. Mar. 3, 2008) (absolute privilege for witnesses' relevant statements in pleadings, affidavits, or testimony, here in foreclosure and bankruptcy proceedings); Connor v. Instant Cash Advance, 2003 WL 446378 (S.D. Ind. Feb. 20, 2003) (Indiana's litigation privilege is absolute and bars lender's libel counterclaim based on complaint in consumer's suit); Srein v. Nat'l Legal Research Group, 2002 WL 31819638 (E.D. Pa. Dec. 16, 2002) (privilege protects statements in legal research materials); Henry v. Cisco Sys., 2001 WL 1104651 (E.D. La. Sept. 19, 2001) (Del. law; statements made in bankruptcy memorandum are privileged), *aff'd*, 106 Fed. Appx. 235 (5th Cir. 2004); Havilah Real Prop. Services v. VLK, L.L.C., 108 A.3d 334 (D.C. 2015) (noting that privilege is absolute in defamation actions); Prather v. Providian Nat'l Bank, 2006 WL 1868335 (Ky. Ct. App. July 6, 2006) (litigation privilege bars defamation claim arising from statements made in collection action); Rogers v. Ash Grove Cement Co., 799 So. 2d 841 (La. Ct. App. 2001) (litigation privilege protects statements made by creditor's lawyers with probable cause and without malice); Norman v. Borison, 17 A.3d 697 (Md. 2011) (Maryland judicial proceedings privilege broad enough to protect giving copy of complaint to media before filing, publicizing filed complaint on Internet, and discussing case with reporter); Havens-Tobias v. Eagle, 2003 WL 1601461 (Ohio Ct. App. Mar. 28, 2003) (litigation privilege bars defamation action based on statements made in pleadings and in negotiations with consumer's attorney); Montemayor v. Ortiz, 208 S.W.3d 627 (Tex. App. 2006) (litigation privilege bars defamation claims based on statements made in obtaining a receivership). *See also* Willis & Linnen Co. v. Linnen, 837 N.E.2d 1263 (Ohio Ct. App. 2005) (lawyer has absolute immunity against defamation claim based on statements reasonably related to judicial proceeding). *But see* Lentini v. Northwest La. Legal Serv., Inc., 841 So. 2d 1017 (La. Ct. App. 2003) (allowing defamation action to go forward alleging statements made in FDCPA and RICO class action complaint; attorney's allegations in pleadings are privileged only if material, made with probable cause, and without malice).

16 Restatement (Second) of Torts § 635 (1977) (the *Restatement* classifies these torts as "injurious falsehood"). *See, e.g.*, Nemo Dev., Inc. v. Cmty. Nat'l Bank, 2006 WL 839449 (D. Kan. Jan. 4, 2006) (absolute privilege bars slander of title action arising from allegedly false statements in pleadings in foreclosure action).

17 Restatement (Second) of Torts § 652F (1977). *See* White v. Midland Funding, L.L.C., 2015 WL 5084232 (N.D. Ala. Aug. 27, 2015) (privilege bars invasion-of-privacy claim alleging that debt buyer knowingly filed meritless lawsuit); Ferrell v. Midland Funding, L.L.C., 2015 WL 2450615 (N.D. Ala. May 22, 2015) (Alabama litigation privilege bars invasion-of-privacy claim against debt buyer that knowingly filed meritless lawsuit); Hagberg v. California Fed. Bank, 81 P.3d 244 (Cal. 2004) (applying statutory privilege to invasion-of-privacy claim; report to police absolutely privileged unless malicious prosecution shown); Webb v. Louw, 2003 WL 22017840 (Cal. Ct. App. Aug. 27, 2003) (litigation privilege bars claim for common law invasion of privacy, but not for violation of electronic privacy statute); McGrew v. Heinold Commodities, Inc., 497 N.E.2d 424 (Ill. App. Ct. 1986) (applying absolute privilege for legal proceedings in invasion-of-privacy (false-light) case). *See also* Smith v. A.B. Bonded Locksmith, 757 N.E.2d 1242 (Ohio Ct. App. 2001) (public officials had statutory immunity from claims of negligent invasion-of-privacy claim for breaking into plaintiff's home pursuant to court order; finding it unnecessary to decide whether they also had absolute judicial or quasi-judicial immunity). *But see* Franklin Collection Agency v. Kyle, 955 So. 2d 284, 292 (Miss. 2007) (declining to extend litigation privilege to invasion of privacy; filing papers in court that include confidential medical information, without first seeking protection from the court, may be actionable).

18 *See, e.g.*, Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006) (in most states, defendant is not entitled to absolute immunity from claims of malicious prosecution, abuse of process, or wrongful garnishment, but has defenses of probable cause and lack of malice); Osinubepi-Alao v. Plainview Fin. Serv., Ltd., 44 F. Supp. 3d 84 (D.D.C. 2014) (litigation privilege applies only to defamation); Sykes v. Mel Harris & Assoc., 757 F. Supp. 2d 413 (S.D.N.Y. 2010) (privilege "wholly inapplicable" to claims other than defamation); Havilah Real Prop. Services v. VLK, L.L.C., 108 A.3d 334 (D.C. 2015) (no absolute privilege, but only conditional privilege, for tortious interference claim); Morrison v. Morrison, 663 S.E.2d 714 (Ga. 2008) (statutory privilege, Ga. Code Ann. § 51-5-8, for certain statements made in judicial proceedings, is explicitly limited to defamation); Cumberland Contractors v. State Bank and Trust Co., 755 S.E.2d 511 (Ga. Ct. App. 2014) (invasion-of-privacy claim not barred by privilege); Renton v. Watson, 739 S.E.2d 19 (Ga. Ct. App. 2013) (intentional infliction of emotional distress claim not barred by privilege). *See also* Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 662 (S.D. Ohio 2004) (litigation privilege does not bar UDAP claim alleging false statements by creditor in affidavit filed in collection action); Deuell v. Texas Right to Life Committee, 508 S.W. 3d 679 (Tex. App. 2016) (litigation privilege, which extends to statements made preliminary to and in contemplation of legal proceedings, applies to any claim seeking *reputational* damages; rejecting claim of privilege where plaintiff candidate sought *pecuniary* damages for tortious interference with contract after his opponent's threat to sue caused radio station to withdraw advertising for which candidate had paid).

19 *ALABAMA:* Knowles v. Am. Home Mort. Servicing, Inc., 2012 WL 2357752 (N.D. Ala. June 18, 2012) (applies broadly to all torts). *See also* D.A.R. v. R.E.L., 2018 WL 4266697 (Ala. Sept. 7, 2018) (complaints to bar discipline authorities are absolutely privileged, even in action for malicious prosecution or abuse of process).

CONNECTICUT: Simms v. Seaman, 69 A.3d 880, 884 (Conn. 2013) (litigation privilege applies to fraud and intentional infliction of emotional distress but not to abuse of process, malicious prosecution, or vexation); Rioux v. Barry, 927 A.2d 304 (Conn. 2007) (litigation privilege applies to tortious interference with contract but not to tort of vexatious litigation); Petyan v. Ellis, 510 A.2d 1337, 1342–1343 (Conn. 1986) (absolute privilege for judicial proceedings bars intentional infliction of emotional distress claim based on statements employer made on form used in unemployment hearing). *See also* Heim v. California Fed. Bank, 828 A.2d 129 (Conn. App. Ct. 2003) (immunity bars intentional infliction of emotional distress claim if based on statements made in judicial proceedings, otherwise not). *But cf.* Mozzochi v. Beck, 529 A.2d 171 (Conn. 1987) (denying absolute immunity for abuse of process claim against attorney).

FLORIDA: Kodsi v. Branch Banking & Trust Co., 2018 WL 830117 (S.D. Fla. Feb. 12, 2018) (garnishment of non-debtor wife's bank account for husband's individual debt; Florida litigation privilege does not bar claims of malicious prosecution and wrongful garnishment

but does bar abuse of process); Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell v. U.S. Fire Ins. Co., 639 So. 2d 606 (Fla. 1994) (absolute immunity applies to any act occurring during a judicial proceeding, even if defamatory or otherwise tortious, so long as the act has some relation to the proceeding).

IDAHO: Taylor v. McNichols, 243 P.3d 642, 658 (Idaho 2010) (litigation privilege is absolute and generally protects attorney from liability to opposing party for acts or communication when the attorney is acting as a representative and not for his or her own interests; here, privilege bars claims for civil conspiracy and tortious interference with contract).

ILLINOIS: Rosales v. Weltman, Weinberg & Reis Co., 2017 WL 1436957 (N.D. Ill. Apr. 24, 2017) (privilege bars every state cause of action for wrongful filing of a lawsuit except malicious prosecution or abuse of process; here, dismissing UDAP claim).

KENTUCKY: Heavrin v. Nelson, 384 F.3d 199 (6th Cir. 2004) (Ky. law) (absolute privilege for legal proceedings bars claims of fraud and outrage based on false proofs of claim in bankruptcy case and false testimony in criminal trial).

MAINE: Hoffman v. Connecticut, 2009 WL 2366001 (D. Me. July 29, 2009) (Maine's absolute privilege for witnesses' statements applies broadly to all torts), *modified on other grounds and adopted by* 671 F. Supp. 2d 166 (D. Me. 2009).

MARYLAND: State Farm Mut. Auto. Ins. Co. v. Slade Healthcare, Inc., 381 F. Supp. 3d 536 (D. Md. 2019) ("Absolute privilege is a broad defense to tort claims;" here, tortious interference with contract).

MASSACHUSETTS: Corellas v. Viveiros, 572 N.E.2d 7 (Mass. 1991) (intentional infliction of emotional distress claim must fail because statements made to police during investigation were absolutely privileged); Sullivan v. Birmingham, 416 N.E.2d 528 (Mass. App. Ct. 1981) (absolute privilege bars liability for intentional infliction of emotional distress based on allegations in complaints).

MICHIGAN: Celley v. Stevens, 2004 WL 134000 (Mich. Ct. App. Jan. 27, 2004) (litigation privilege bars defamation and intentional infliction of emotional distress claims alleging false report to police; would not bar malicious prosecution claim).

NEW JERSEY: Giles v. Phelan, Hallinan & Schmieg, L.L.P., 901 F. Supp. 2d 509 (D.N.J. 2012) (negligent or intentional infliction of emotional distress, fraud, negligent misrepresentation, malicious interference with economic advantage, negligence, abuse of process, invasion of privacy, and civil conspiracy); Rickenbach v. Wells Fargo Bank, 635 F. Supp. 2d 389 (D.N.J. 2009) (applies to defamation, negligence, breach of confidentiality, abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, civil conspiracy, interference with contractual or advantageous business relations, and fraud; protects statements made during settlement negotiations, witness interviews, and pre-trial demand letters).

OHIO: Willis & Linnen Co. v. Linnen, 837 N.E.2d 1263 (Ohio Ct. App. 2005) (lawyers' absolute immunity may bar malicious prosecution or abuse of process if specific statement on which claim was based was reasonably related to judicial proceeding).

OKLAHOMA: Kirchstein v. Haynes, 788 P.2d 941 (Okla. 1990) (when claim for intentional infliction of emotional distress is based on same factual underpinnings as defamation claim to which the privilege applies, it is also barred). *See also* Stricklen v. O.I.P.M., L.L.C., 394 P.3d 290 (Okla. Civ. App. 2016) (perjury in affidavit of service is protected by litigation privilege).

OREGON: Mantia v. Hansen, 79 P.3d 404 (Or. Ct. App. 2003) (judicial action privilege bars tortious interference with contract action alleging the filing of baseless lawsuit unless plaintiff can show all elements of malicious prosecution); Franson v. Radich, 735 P.2d 632 (Or. Ct. App. 1987) (litigation privilege bars action for intentional infliction of mental distress).

PENNSYLVANIA: Pelagatti v. Cohen, 536 A.2d 1337 (Pa. Super. Ct. 1987) (absolute privilege prevents intentional interference with contractual relations claim, but may be exceeded by disseminating statement to the press).

TENNESSEE: Vanderbilt Univ. *ex rel.* Vanderbilt Univ. Health Benefit Plan v. Pesak, 2011 WL 4001115, at *13 (M.D. Tenn. Sept. 8, 2012) (intentional infliction of emotional distress claim will not lie for adverse party's litigation activities).

WASHINGTON: Jeckle v. Crotty, 85 P.3d 931 (Wash. Ct. App. 2004) (judicial action privilege bars intentional infliction of emotional distress, civil conspiracy, and tortious interference claims against adverse party's lawyer for recruiting clients and preparing and trying case).

WISCONSIN: Bernegger v. Washington Mut., 2008 WL 597811 (E.D. Wis. Mar. 3, 2008) (deliberate and negligent misrepresentation claims fail; absolute privilege for witnesses' relevant statements in pleadings, affidavits, and testimony).

privilege is codified[20] and extends to all torts except malicious prosecution.[21] However, it specifies a number of exceptions,

20 Cal. Civ. Code § 47 (West). *See also* Cal. Civ. Code § 2924(d) (defining certain non-judicial foreclosure notices and procedures as privileged communications).

21 Rusheen v. Cohen, 128 P.3d 713, 718 (Cal. 2006); Hagberg v. California Fed. Bank, 81 P.3d 244 (Cal. 2004) (absolute privilege for reports to police; note that as of 2021 Cal. Civil Code § 47(d) denies the privilege for knowingly or recklessly false reports); Silberg v. Anderson, 786 P.2d 365 (Cal. 1990). *See also* Huy Thanh Vo v. Nelson & Kennard, 931 F. Supp. 2d 1080 (E.D. Cal. 2013) (privilege bars negligence and libel claims against law firm that took default judgment against debtor's non-debtor brother and resisted efforts to correct problem after learning of the mistake); Yates v. Allied Int'l Credit Corp., 578 F. Supp. 2d 1251 (S.D. Cal. 2008) (litigation privilege protects reports to police, even if false and malicious; malicious prosecution exception applies only if prosecution reaches arraignment stage; legislatively overruled effective Jan. 1, 2021); Guillory v. WFS Fin., 2007 WL 879017 (N.D. Cal. Mar. 21, 2007) (litigation privilege bars intentional infliction of emotional distress claim based on suit for deficiency following wrongful repossession); Flores v. Emmerich & Fike, 416 F. Supp. 2d 885 (E.D. Cal. 2006); Howard v. County of Los Angeles, 2019 WL 313478 (Cal. Ct. App. Jan. 24, 2019) (broad privilege protected collection agency, seeking to collect red light camera ticket from identity theft victim, even though agency threatened to take legal actions, here wage and bank account garnishment, that were not authorized by collector's contract with department of motor vehicles); Trapp v. Naiman, 159 Cal. Rptr. 3d 462 (Cal. Ct. App. 2013) (privilege bars negligence and abuse-of-process claims arising from repeated filing of eviction actions with knowledge that foreclosure was invalid, regardless of bad motive); G.R v. Intelligator, 110 Cal. Rptr. 3d 559 (Cal. Ct. App. 2010) (privilege not lost by violation of court rule—here, introduction of unredacted credit report); Eskenazi v. Devitt, 2010 WL 2848567 (Cal. Ct. App. July 21, 2010) (privilege shielded attorney who caused private investigator to hack into adverse party's bank computers to obtain confidential information); Farrar v. RDK Collection Serv., 2008 WL 4741077 (Cal. Ct. App. Oct. 30, 2008) (litigation privilege protected entire collection procedure, from letter warning that collector would advise creditor to pursue its legal rights through default judgment obtained by falsified proof of service); Smith v. Levine, 2006 WL 3704622 (Cal. Ct. App. Dec. 18, 2006) (litigation privilege bars abuse-of-process and conversion claims arising from levy on bank account containing separate property of non-debtor and refusal to return the funds). *But see* Rouse v. Law Offices of Rory Clark, 465 F. Supp. 2d 1031 (S.D. Cal. 2006) (litigation privilege did not protect law firm that vigorously pursued collection activity against debtor's similarly named non-debtor son, because son was stranger to debt collection litigation and law firm never had grounds to invoke legal process against him or his property). *But cf.* Herrera v. AllianceOne Receivables Mgmt., Inc., 2015 WL 3796123 (S.D. Cal. June 18, 2015) (privilege lost when collection efforts continued after court order holding current plaintiff—whose

including one effective January 1, 2021, for knowingly or recklessly false reports to law enforcement regarding suspected criminal activity.[22] Some jurisdictions also recognize a privilege to publish matters of public record, such as court proceedings, provided the publication is a "fair and substantially accurate account of the public record or proceeding."[23]

In deciding whether a cause of action is barred by privilege, the Connecticut Supreme Court asks whether the cause of action has "built-in safeguards against the use of litigation as a weapon to chill the vigorous advocacy expected in an adversarial system of justice."[24] Applying this test, the court held that there is no litigation privilege for the torts of abuse of process, malicious prosecution, and vexation because the elements of those claims require balancing of the need to protect the justice system with the need to protect the injured party. On the other hand, the court held that the litigation privilege applies to fraud and intentional infliction of emotional distress.

The privilege for statements made in a judicial proceeding may protect not only pleadings and testimony, but also statements made to a bankruptcy trustee, in a proof of claim, or at a meeting of unsecured creditors in a bankruptcy proceeding,[25] in discovery responses,[26] during settlement negotiations,[27] in an application for a prejudgment remedy,[28] in a legal advertisement of a foreclosure,[29] or while investigating a potential claim or interviewing prospective witnesses or parties.[30] However, the Maine Supreme Court has held that an affidavit that states falsely that the affiant personally appeared before the notary is not privileged as testimony because it cannot be considered by the trial court.[31] "Judicial proceedings" may include quasi-judicial or administrative proceedings.[32]

name was similar to debtor's—not liable; continuing to pursue innocent party does not further goals of litigation, and allowing privilege here would encourage contemptuous conduct); Johnson v. JP Morgan Chase Bank, 536 F. Supp. 2d 1207 (E.D. Cal. 2008) (debt buyer carried on with lawsuit and garnishment after being informed by original creditor that debt arose from "fraudulent transaction"; privilege barred litigation-related intentional infliction of emotional distress and defamation claims but not defamation claims that arose from statements in "non-litigation context"—that is, the buying and selling of debt). *See generally* § 16.1.3, *infra* (effect of litigation privilege on statutory claims).

22 2020 Cal. Legis. Serv. Ch. 327, § 2 (A.B. 1775), effective Jan. 1, 2021.

23 Vaile v. Willick, 2008 WL 2754975 (W.D. Va. July 14, 2008) (jury question whether letter stating that ex-husband had been found guilty of kidnapping and felony non-support, and enclosing copy of actual decision, had so substantially departed from the record as to lose privilege, where he had only been held civilly liable in case arising from removal of children from ex-wife's custody); Curto v. New York Law Journal, 40 N.Y.S.3d 841 (N.Y. App. Div. 2016) (absolute privilege for newspaper article which, viewed as a whole, was a substantially accurate report of federal court's decision denying collector's summary judgment motion; consumer claimed that referring to her as debtor was defamatory because she did not owe the debt); McNamara v. Koehler, 429 P.3d 6 (Wash. Ct. App. 2018) (Washington's fair report privilege protects websites, web pages, and blogs, as well as traditional news media; here applying to law firm's website touting its work in various pending cases).

24 Simms v. Seaman, 69 A.3d 880, 884 (Conn. 2013).

25 *See* Heavrin v. Nelson, 384 F.3d 199 (6th Cir. 2004) (Ky. law; absolute privilege for legal proceedings bars claims of fraud and outrage based on false proofs of claim in bankruptcy case); Quality Botanical Ingredients, Inc. v. Triarco Indus., Inc., 249 B.R. 619 (Bankr. D.N.J. 2000) (meeting convened by trustee to form an official committee of unsecured creditors); Edelman, Combs & Latturner v. Hinshaw & Culbertson, 788 N.E.2d 740 (Ill. App. Ct. 2003) (publication to bankruptcy trustee in effort to reopen case); Oakley v. Nolan, 2007 WL 1650045 (Ohio Ct. App. May 25, 2007) (absolute litigation privilege bars defamation and invasion-of-privacy claims based on creditor's letter to bankruptcy trustee alleging business dealings by debtor that could affect the estate). *See also* Eckerle v. Katz & Korin, P.C., 81 N.E.3d 272 (Ind. Ct. App. 2017) (statements in document filed in bankruptcy cases were relevant to the case, so privilege applies).

26 *See* Bodram v. Coombs, 2016 WL 3248518 (W.D. Ky. June 10, 2016) (deposition testimony is privileged, even if perjured); Bartsch v. Regents of the Univ., 2006 WL 302554 (Cal. Ct. App. Feb. 8, 2006) (response to interrogatories privileged).

27 Ogbin v. Fein, Such, Kahn & Shephard, P.C., 414 Fed. Appx. 456 (3d Cir. 2011) (payoff letters sent during negotiations in course of foreclosure proceeding); Sengchanthalangsy v. Accelerated Recovery Specialists, Inc., 473 F. Supp. 2d 1083 (S.D. Cal. 2007) (litigation privilege bars fraud, negligence and UDAP claims based on perjured affidavit given to consumer's lawyer in response to demand for debt verification during settlement negotiations); Havens-Tobias v. Eagle, 2003 WL 1601461 (Ohio Ct. App. Mar. 28, 2003) (litigation privilege bars defamation action based on statements made in pleadings and in negotiations with consumer's attorney).

28 Hoffman v. Connecticut, 2009 WL 2366001 (D. Me. July 29, 2009) (affidavit in support of *ex parte* real estate attachment), *modified on other grounds and adopted by* 671 F. Supp. 2d 166 (D. Me. Sept. 18, 2009).

29 *See* Hayes v. Self-Help Credit Union, 2014 WL 4198412, at *7 (M.D.N.C. Aug. 22, 2014) (absolute privilege for statements made during non-judicial foreclosure); Natividad v. Wells Fargo Bank, 2013 WL 2299601 (N.D. Cal. May 24, 2013) (California's statutory litigation privilege applies to notices used in non-judicial foreclosure); Frascogna v. Wells Fargo Bank, 2009 WL 2843284 (S.D. Miss. Aug. 31, 2009) (publication and posting of notice of foreclosure sale); Larkins v. The Bank, 2005 WL 1278877 (N.D. Fla. May 10, 2005); Cal. Civ. Code § 2924(d) (West) (defining certain non-judicial foreclosure notices and procedures as privileged communications, protected by statutory privilege). *See generally* § 15.1.3.2, *infra* (whether common interest privilege protects statements made in non-judicial foreclosure).

30 Hawkins v. Kiely, 2008 WL 4104486 (D. Me. Aug. 31, 2008) (defendant, an individual who gave an affidavit—later filed in bankruptcy court—to his employer about alleged wrongdoing by plaintiffs, is a witness entitled to absolute judicial privilege); Jones v. Palmquist, 2006 WL 1756827 (Cal. Ct. App. June 28, 2006) (email circulated among realtors, seeking information about unethical behavior by certain realtor for "group complaint" to state real estate board, is privileged); Kirchstein v. Haynes, 788 P.2d 941 (Okla. 1990) (obtaining affidavits to support application for delayed birth certificate); Jeckle v. Crotty, 85 P.3d 931 (Wash. Ct. App. 2004) (locating potential plaintiffs). *But see* Arko Plumbing Corp. v. Rudd, 230 So. 3d 520 (Fla. Ct. App. 2017) (absolute litigation privilege does not apply outside courtroom or formal discovery process; qualified privilege for "informal investigation;" remanding to resolve issue of malice where attorney hacked into company computer containing confidential business information).

31 Bradbury v. GMAC Mortg., L.L.C., 58 A.3d 1054 (Me. 2012).

32 *See* D.A.R. v. R.E.L., 2018 WL 4266697 (Ala. Sept. 7, 2018) (complaint to bar discipline authorities are absolutely privileged, even in action fo malicious prosecution or abuse of process); Jones v. Palmquist, 200 WL 1756827 (Cal. Ct. App. June 28, 2006) (complaint to state re estate board alleging misconduct by regulated person is privileged Rioux v. Barry, 927 A.2d 304 (Conn. 2007) (state police internal affai investigation). *See also* Truman v. Browne, 788 A.2d 168 (Me. 200

Some courts hold that pre-litigation demands are absolutely privileged,[33] but others grant a privilege only if the demand is made "with a good faith belief in a legally viable claim, and in serious contemplation of litigation,"[34] and others deny it altogether.[35] Reports of suspected criminal behavior, made to the proper authorities, may also be protected by a qualified[36] or absolute[37] privilege. In California the privilege extends to non-communicative acts, like a post-judgment levy, if the gravamen of the act is communicative,[38]

(limited "public interest" privilege for complaints to administrative agency). *But see* Patriot Group, L.L.C. v. Edmands, 136 N.E.3d 386 (Mass. App. Ct. 2019) (burden is on party claiming privilege to show that administrative proceeding is sufficiently "quasi-judicial" to support application of the privilege, i.e., whether it provides sufficient procedural safeguards to prevent abuse; defendant here failed to show that IRS or SEC proceedings in response to whistleblower complaints do so).

33 *See, e.g.*, Lakeside Lumber Products, Inc. v. Meyers, 2017 WL 1174316 (Ariz. Ct. App. Mar. 30, 2016) (absolute litigation privilege protected letter written to debtor's customer by creditor's attorney, six days before filing suit, advising customer to withhold payments to debtor in anticipation of garnishment and attachment proceedings in the near future); Farrar v. RDK Collection Serv., 2008 WL 4741077 (Cal. Ct. App. Oct. 30, 2008) (litigation privilege protected entire collection procedure, from letter warning that collector would advise creditor to pursue its legal rights through default judgment obtained by falsified proof of service); Jonas v. Delallo, 2012 WL 6846396 (Conn. Super. Ct. 2012) (protects communications before or during action that have "some relation" to the proceeding; here, condo association's communication with owner's mortgage lender, causing it to pay debt hotly disputed by owner);. Burton v. NCNB Nat'l Bank, 355 S.E.2d 800 (N.C. Ct. App. 1987) (allegedly defamatory letter from creditor's lawyer to debtor's lawyer, threatening debtor with criminal prosecution, is absolutely privileged as part of civil litigation process);.

34 *See* Davis v. Hollins Law, 942 F. Supp. 2d 1004 (E.D. Cal. 2013) (dunning voicemail not protected; fact that collection action might ensue after calls or letters failed does not show that litigation was under serious consideration); Bohannon-Hingston v. Brachfield Law Group, 2011 WL 6211756 (E.D. Cal. Dec. 14, 2011) (barrage of workplace calls, starting six months before filing of successful collection action, was not "in the course of any official proceeding"); Action Apartment Ass'n, Inc. v. City of Santa Monica, 163 P.3d 89, 102 (Cal. 2007) (municipal ordinance forbidding eviction notices that lack a basis in fact is not fully preempted by litigation privilege; fact question whether action is actually contemplated in good faith; if it is not, privilege does not apply); Olivares v. Pineda, 253 Cal. Rptr. 3d 213 (Cal. Ct. App. 2019) ("pre-litigation" demand, here an eviction notice, not privileged if it is "merely a negotiating tactic and not a serious proposal made in good faith contemplation of going to court . . . no public policy supports extending a privilege to persons who attempt to profit from hollow threats of litigation;" whether litigation is contemplated in good faith is fact question); Malin v. Singer, 159 Cal. Rptr. 3d 292 (Cal. Ct. App. 2013) (demand letters, which warned that going to trial would disclose sexual misconduct by company officers, were protected by California's statutory litigation privilege, which applies if demand relates to litigation that is contemplated in good faith and under serious consideration; accusations were related to contemplated conversion action because they alleged that defendant misused company money and property). *See also* A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc., 41 Cal. Rptr. 3d 1 (Cal. Ct. App. 2006) (privilege protects "preparatory communications" only if litigation is "under serious consideration," but one threat to "pursue all legal remedies" is insufficient).

35 *See* Westgate Resorts, Ltd. v. Sussman, 387 F. Supp. 3d 1318 (M.D. Fla. 2019) (declining to extend Florida privilege to pre-suit communications not required by law); Ellis v. Kay-Kibbery, 581 F. Supp. 2d 861 (W.D. Mich. 2008) (Michigan's absolute quasi-judicial privilege does not protect statements made before proceeding initiated, even if made in contemplation of litigation; here, telling potential plaintiff about potential defendant's misconduct). *See also* North Star Capital Acquisitions v. Krig, L.L.C., 611 F. Supp. 2d 1324 (M.D. Fla. 2009) (privilege did not bar abuse-of-process and statutory debt collection claims arising from inclusion of misleading "settlement offer" with complaint, as this is more akin to debt collection rather than a settlement negotiation).

36 *See, e.g.*, Hall v. District of Columbia, 867 F.3d 138 (D.D.C. 2017) (qualified privilege can be lost by bad faith; here restaurant workers who caused customer's arrest should have known that customer who temporarily exited building after paying undisputed amount of bill, leaving behind her credit card, various belongings, and the other members of her party, did not intend to walk out on bill; also knew that amount left after payment was well below the threshold for felony theft); *In re* BFW Liquidation, L.L.C., 471 B.R. 652 (Bankr. N.D. Ala. 2012) (conditional privilege, lost by malice; fact issue here where store swore out bad check complaint against identity theft victim); Carney v. Patino, 2018 WL 5629638 (Ind. Ct. App. Oct. 30, 2018) (qualified privilege for good faith reports to law enforcement lost by malice; complaining witness, who had shown hostility to current plaintiff, lied to police); Ali v. Home Health Care, L.L.C., 53 N.E.3d 420 (Ind. Ct. App. 2016) (qualified public interest privilege protects employer who shared results of internal investigation with police investigating complaint that employee stole from client); Truman v. Browne, 788 A.2d 168 (Me. 2001) (qualified "public interest" privilege for complaints to law enforcement or regulatory agency); Michaels v. MVP Health Care, Inc., 91 N.Y.S.3d 567 (N.Y. App. Div. 2018) (privilege for reports to the Division of Financial Services or to law enforcement is lost by bad faith or fraud; sufficiently alleged here where health plan allegedly gave wrong advice to insurance broker about eligibility for certain plans, then made complaint resulting in criminal prosecution when he followed that advice); Robert B. James, DDS, Inc. v. Elkins, 553 S.W.3d 596 (Tex. App. 2018) (qualified privilege lost by malice; inadequate investigation is not sufficient but reckless disregard for truth shown here); Funk v. Lincoln-Lancaster County Crime Stoppers, 885 N.W.2d 1 (Neb. 2016) (qualified privilege lost where officer failed to investigate obvious problems with bank's complaint; reasonably prudent officer would have done so); San Antonio Credit Union v. O'Connor, 115 S.W.3d 82 (Tex. App. 2003) (qualified privilege applies to statements made in seeking criminal complaint, lost by malice). *See also* Corellas v. Viveiros, 572 N.E.2d 7 (Mass. 1991) (spontaneous initial report to police conditionally privileged; reports to police during ongoing investigation, here the interrogation of a suspect, are absolutely privileged; intentional infliction of emotional distress and defamation claims barred).

37 *See* Stoutt v. Baco Popular, 320 F.3d 26 (1st Cir. 2003) (federal anti-money-laundering act provides absolute immunity to financial institution that reports possible criminal activity to law enforcement, even if report is knowingly false and malicious); Yates v. Allied Int'l Credit Corp., 578 F. Supp. 2d 1251 (S.D. Cal. 2008) (absolute privilege; exception for malicious prosecution claim applies only if prosecution reached arraignment stage); Hagberg v. California Fed. Bank, 81 P.3d 244 (Cal. 2004) (statutory privilege protects statements made outside courtroom, here a report to police); Celley v. Stevens, 2004 WL 134000 (Mich. Ct. App. Jan. 27, 2004) (litigation privilege bars defamation and intentional infliction of emotional distress claims alleging false report to police; would not bar malicious prosecution claim, but it fails on other grounds). *See also* Sherner v. Nat'l Loss Control Serv. Group, 124 P.3d 150 (Mont. 2005) (insurance investigator's report of suspected insurance fraud is privileged).

38 Rusheen v. Cohen, 128 P.3d 713 (Cal. 2006) (absolute immunity applies to postjudgment levy if gravamen of action is communicative)

but in other states the privilege may not extend to non-communicative acts.[39]

The privilege applies only to matters that have some relation to a current or proposed judicial proceeding.[40] It will be exceeded, for example, by distributing copies of pleadings containing false information to persons having no relationship to the litigation.[41] It may not apply to acts taken after the conclusion of the judicial proceedings.[42] The privilege, whether statutory or common law, may be overridden by a more specific statute regarding, for example, debt collection[43] or the

Tucker v. Heritage Custom Estates Ass'n, 2017 WL 6460154 (Cal. Ct. App. Dec. 19, 2017) (California's litigation privilege bars abuse of process claim arising from judgment creditor's seizure of property grossly exceeding amount owed on judgment; directing sheriff to serve writ and seize property is communicative); Trapp v. Naiman, 159 Cal. Rptr. 3d 462 (Cal. Ct. App. 2013) (filing repeated eviction actions following invalid foreclosure was communicative act, protected regardless of bad motive). *See also* Bosnich v. Chase Bank, 2011 WL 1790106 (C.D. Cal. May 9, 2011) (absolute litigation privilege protects all common law tort claims arising from attempts to collect a judgment); Smith v. Fireside Thrift Co., 2007 WL 2729329 (N.D. Cal. Sept. 18, 2007) (falsifying proof of service, obtaining default judgment, and garnishing wages protected by litigation privilege; dismissing abuse-of-process claim); Chiu v. Creditors Trade Ass'n, 2007 WL 1509328 (Cal. Ct. App. May 24, 2007) (litigation privilege bars claims based on conspiracy to obtain default judgments by filing false affidavits of service); Sood v. C.M. Int'l Trading Corp., 2006 WL 711231 (Cal. Ct. App. Mar. 22, 2006) (litigation privilege bars abuse-of-process claim arising from levy on judgment debtor's bank account at time when judgment automatically stayed by pending appeal); Chung v. Bank of Am., 2004 WL 1938272 (Cal. Ct. App. Aug. 26, 2004) (bank's levy on direct-deposited Social Security funds protected by litigation privilege). *But cf.* Guiccone v. J.P. Morgan Chase Bank, 2015 WL 1968114 (N.D. Cal. May 1, 2015) (privilege applies only if statements are "the actual source of the harm" and not simply "part of the course of conduct leading to the injury"); Olivares v. Pineda, 253 Cal. Rptr. 3d 213 (Cal. Ct. App. 2019) (misapplication of security deposit is not communicative); Chen v. Berenjian, 245 Cal. Rptr. 3d 378 (Cal. Ct. App. 2019) (distinguishing *Rusheen*; fraudulent transfer by use of sham lawsuit was not communicative).

39 Bethea v. Wells Fargo Bank, 2011 WL 2650580 (D. Kan. July 6, 2011) (although contents of notice of sheriff's sale are privileged, its filing for improper purpose is not; here to gain leverage over homeowners who were in compliance with forbearance agreement); Tilley v. Anixter, Inc., 2004 WL 1146687 (D. Conn. May 4, 2004) (privilege would bar intentional infliction of emotional distress claim based on statements made in divorce proceeding, but husband's employer's falsification of pay records to reduce child support award may be unprotected non-verbal conduct); Heim v. California Fed. Bank, 828 A.2d 129 (Conn. App. Ct. 2003) (litigation privilege only protects statements, not actions). *See also* Phillips v. Messerli & Kramer, P.A., 2008 WL 5050127 (D. Minn. Nov. 20, 2008) (does not shield wrongful levy on funds of non-party, non-debtor spouse).

40 State Farm Mut. Automobile Ins. Co. v. Slade Healthcare, Inc., 381 F. Supp. 3d 536 (D. Md. 2019) (privilege extends to statements "connected contextually to a pending or ongoing proceeding," here claim denial letters informing claimants that insurer was suing their providers for allegedly fraudulent billing); Dickinson Frozen Foods, Inc. v. J.R. Simplot Co., 434 P.3d 1275 (Idaho 2019) (construing "reasonably related" standard; here extending privilege to defamatory statements about non-party company that was owned by a party); Eckerle v. Katz and Korin, P.C., 81 N.E.3d 272 (Ind. Ct. App. 2017) (statements in document filed in bankruptcy cases were relevant to the case, so privilege applies).

41 *See* Prowley v. Hemar Ins. Co. of Am., 2010 WL 1848222 (S.D.N.Y. May 7, 2010) (privilege lost if statement is "so obviously not pertinent [to the litigation] and so needlessly defamatory as to warrant the inference of express malice"); Hoffman v. Connecticut, 2009 WL 2366001 (D. Me. July 29, 2009) (statements in application for real estate attachment were privileged, but not communications to construction lender, business associates, and community at large), *modified on other grounds and adopted by* 671 F. Supp. 2d 166 (D. Me. 2009); Flamm v. Sarner & Assoc., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (litigation privilege did not protect statements to consumer's employer, who was stranger to debt-collection litigation; qualified privilege for reporting of legal proceedings lost when collector embellished the facts by calling consumer a thief); Assoc. Fin. Serv. Co. v. Bowman, Heintz, Boscia & Vician, P.C., 2001 U.S. Dist. LEXIS 7874 (S.D. Ind. Apr. 25, 2001); Field v. U-Haul Co. of E. Bay, 2004 WL 2005739 (Cal. Ct. App. Sept. 8, 2004) (privilege would protect complaint to police, but not remarks at scene addressed to plaintiff and overheard by bystanders having no interest in case); Edelman, Combs & Latturner v. Hinshaw & Culbertson, 788 N.E.2d 740 (Ill. App. Ct. 2003) (litigation privilege protects accusation of improper litigation practices published to bankruptcy trustee in effort to reopen case, but not publication to attorneys and unknown third party unconnected to case); First Nat'l Bank of Mo. v. Ricon, Inc., 311 S.W.3d 857 (Mo. Ct. App. 2010) (filing of *lis pendens* absolutely privileged if reasonably related to the action filed; not shown here where filing not authorized by law); Reszka v. Collins, 25 N.Y.S.3d 457 (N.Y. App. Div. 2016) (litigation privilege does not shield statements made at press conference called by defendant after filing meritless action); Mantia v. Hansen, 79 P.3d 404 (Or. Ct. App. 2003); Bochetto v. Gibson, 860 A.2d 67 (Pa. 2004) (no privilege for distributing copies of pleading to reporter). *But see* Pincus v. Pincus, 127 N.E.3d 393 (Ohio App. Ct. 2018) (privilege protected attorney who provided copies of complaint, alleged to contain defamatory material, to the media; complaint is a public record); Norman v. Borison, 17 A.3d 697 (Md. 2011) (Maryland judicial proceedings privilege broad enough to cover giving copy of complaint to media before filing, publicizing filed complaint on Internet, and discussing case with reporter; statements were relevant because they might alert potential class members to the existence of the action); Landry's, Inc. v. Animal Legal Defense Fund, 2018 WL 5075116 (Tex. App. Oct. 18, 2018) (judicial proceedings privilege extended to press release and public statements publicizing the litigation). *But cf.* Dickinson Frozen Foods, Inc. v. J.R. Simplot Co., 434 P.3d 1275 (Idaho 2019) (sending copy of complaint to entity that was creditor of company that plaintiff co-owned with defendant is protected by litigation privilege).

42 Hammer v. Residential Credit Solutions, 2015 WL 7776807 (N.D. Ill. Dec. 3, 2015) (no privilege for actions that "are inconsistent with, fail to recognize, or contravene, a final court order," here collection attempts that continued after foreclosure was dismissed because borrower was in compliance with valid loan modification); Monroe v. Citimortgage, Inc., 2007 WL 2071284 (M.D. Fla. July 19, 2007) (litigation privilege does not apply to "payoff letters," sent after final foreclosure judgment and not required for prosecution, defense, or appeal of foreclosure action).

43 *See, e.g.*, Barany-Snyder v. Weiner, 2007 WL 210411, at *9 (N.D. Ohio Jan. 24, 2007) (litigation immunity is inconsistent with FDCPA's coverage of lawyers' conduct in litigation), *aff'd*, 539 F.3d 327 (6th Cir. 2008). *But see* Heavrin v. Nelson, 384 F.3d 199, 203 (6th Cir. 2004) (Ky. Rev. Stat. Ann. § 446.070 (West), which provides a private right of action to anyone injured by violation of a criminal statute, does not abrogate the litigation privilege; no private right of action for perjury in a legal proceeding). *See generally* § 16.1.3, *infra*.

handling of confidential information in litigation.[44] Since the privilege is absolute, there is some authority that it must be narrowly applied.[45]

Additional impediments to negligence and other claims against the opposing party's attorney for litigation misconduct are discussed in § 15.8, *infra*.

15.1.3.2 Common Interest Privilege

Another privilege, the common interest privilege, shields statements made to someone who has a legitimate interest in the information,[46] such as a credit reporting agency[47] or a spouse.[48] A creditor's provision of information about the debt to a collector may be protected by this privilege.[49] The *Restatement* applies this privilege only to defamation and invasion of privacy.[50]

One court has defined the elements of the privilege as: (1) good faith; (2) an interest in the subject by the speaker or a subject in which the speaker has a duty to speak; (3) a corresponding interest or duty in the listener or reader; (4) a proper occasion; and (5) publication in a proper manner.[51] Good faith means with a good motive and not for the purpose of harming the subject. If the other four elements are present, some courts will presume good faith.[52] The duty mentioned as the second element need not be a legal requirement, but it may be moral, social, or political.[53]

44 *See, e.g., In re* Ortiz, 430 B.R. 523 (Bankr. E.D. Wis. 2010) (Wisconsin health care privacy statute, which specifically regulates handling of confidential medical information in legal proceedings, overrides more general judicial proceedings privilege); Doe v. Williams McCarthy, L.L.P., 92 N.E.3d 607 (Ill. App. Ct. 2017) (absolute litigation privilege bars claims of invasion of privacy and intentional infliction of emotional distress arising from disclosure of mental health information, but not claims of violation of HIPAA and state mental health privacy statute; concluding that legislature intended statute to apply in litigation); Renzi v. Morrison, 618 N.E.2d 794 (Ill. App. Ct. 1993) (statute's creation of damages remedy for revealing confidential mental health information overrides witness's absolute immunity at common law); Wynn v. Earin, 181 P.3d 806 (Wash. 2008) (witness immunity does not apply to information disclosed in violation of state statute).

45 *See, e.g.*, Stein v. Krislov, 999 N.E.2d 345 (Ill. App. 2013) (because the privilege provides complete immunity, its scope is narrow; does not apply under circumstances for which there are no safeguards against abuse of the privilege, i.e., where the authorities do not have the ability to discipline the attorney and strike from the record any statements exceeding the bounds of permissible conduct; denying privilege to attorney who was not representing any client in a class action, who wrote letter to judge accusing class counsel of exaggerating and falsifying its qualifications); Edelman, Combs & Latturner v. Hinshaw & Culbertson, 788 N.E.2d 740 (Ill. App. Ct. 2003) (because litigation privilege is absolute, it is narrowly applied; privilege protected accusation of improper litigation practices published to bankruptcy trustee in effort to reopen case, but not publication to attorneys and unknown third party unconnected with case).

46 *See, e.g.*, Wilson v. Am. Gen. Fin. Co., 2013 WL 967161 (W.D. Pa. Mar. 12, 2013) (company's response to complaint to Better Business Bureau is privileged; BBB required its members to respond to complaints); Shields v. U.S. Bank, 2006 WL 3791320 (D. Kan. Dec. 22, 2006) (bank's reports of delinquency in response to queries by potential lenders are protected); Cohen v. Beachside Two—I Homeowners' Ass'n, 2006 WL 1795140 (D. Minn. June 29, 2006) (extending privilege to statements in minutes circulated by board of condominium association about owner's delinquent assessments), *aff'd as modified*, 272 Fed. Appx. 534 (8th Cir. 2008); Hulse v. Ocwen Fed. Bank, 195 F. Supp. 2d 1188 (D. Or. 2002) (lender's statements during non-judicial foreclosure proceeding were privileged when made in good faith to protect its interests and without reason to know of falsity); Addington v. Wal-Mart Stores, 105 S.W.3d 369 (Ark. Ct. App. 2003) (statements made to fellow employees and law enforcement during theft investigation are privileged); Saye v. Deloitte & Touche, L.L.P., 670 S.E.2d 818 (Ga. Ct. App. 2008) (statements by independent auditor to client); Ali v. Home Health Care, L.L.C., 53 N.E.3d 420 (Ind. Ct. App. 2016) (common interest privilege protected employer's sharing of results of internal investigation with insurance company investigating claim that employee stole from client); Lindenmuth v. McCreer, 165 A.3d 544 (Md. Spec. Ct. App. 2017) (qualified privilege protected supervisor's communication to management of employee A's concern about plaintiff employee B, who appeared stressed and carried a gun; once common interest is shown, burden is on plaintiff to show malice; evidence of "contentious" relationship between supervisor and employee B was not sufficient to defeat privilege). *See also* Selby v. O'Dea, 90 N.E.3d 1144 (Ill. App. Ct. 2017) (common interest privilege protects communications among parties and counsel on the same side of a lawsuit; note that attorney client privilege was waived when information was shared with third party).

47 *See, e.g.*, Woods v. Asset Res., 2006 WL 3782704 (E.D. Cal. Dec. 21, 2006) (creditor's report to credit reporting agency covered by qualified common interest privilege; defeated by showing of malice); County Vanlines, Inc. v. Experian Info. Solutions, Inc., 317 F. Supp. 2d 383 (S.D.N.Y. 2004) (qualified privilege to report to credit reporting agency), *aff'd*, 2005 WL 3117211 (2d Cir. Nov. 22, 2005). *See generally* § 15.1.4, *infra* (immunity under FCRA).

48 *See, e.g.*, Doe v. TCF Bank Ill., 707 N.E.2d 220 (Ill. App. Ct. 1999) (disclosure of debt to consumer's spouse was privileged because she had a "proper interest," as debt would affect her rights in case of divorce or separation and she could be liable under family expense statute).

49 Witherwax v. Transcare, 801 N.Y.S.2d 782 (N.Y. Sup. Ct. 2005) (creditor's communication to collector protected by common interest privilege). *But cf.* Tourgeman v. Collins Fin. Serv., Inc., 2009 WL 6527758 (S.D. Cal. Nov. 23, 2009) (right to reveal information in order to collect a debt is narrow privilege that presupposes existence of debt; no protection for creditor who sold debt to debt buyer after it was fully paid).

50 Restatement (Second) of Torts §§ 594 to 596, 598, 652G (1977).

51 Falic v. Legg, Mason, Wood, Walker, Inc., 347 F. Supp. 2d 1260 (S.D. Fla. 2004). *See also* Wilson v. Am. Gen. Fin. Co., 2013 WL 967161 (W.D. Pa. Mar. 12, 2013) (predicting that Pa. Supreme Court will adopt *Restatement* definition of privilege); Prof'l Recovery Serv., Inc. v. Gen. Elec. Capital Corp., 642 F. Supp. 2d 391 (D.N.J. 2009) ("(1) appropriateness of the occasion, (2) legitimacy of the interest protected or promoted and (3) pertinence of the information to the recipient"; shown where collector's ex-employee informed collector's client that collector's employees were stealing and selling confidential consumer information and violating debt collection statutes); Blair v. Supportkids, Inc., 222 F. Supp. 2d 1038, 1043 (N.D. Ill. 2002).

52 Falic v. Legg, Mason, Wood, Walker, Inc., 347 F. Supp. 2d 1260, 1264 (S.D. Fla. 2004).

53 Falic v. Legg, Mason, Wood, Walker, Inc., 347 F. Supp. 2d 1260 (S.D. Fla. 2004). *See also* Blair v. Supportkids, Inc., 222 F. Supp. 2d 1038, 1043 (N.D. Ill. 2002).

This qualified privilege can be lost if it is exceeded[54] or abused.[55]

15.1.3.3 Anti-SLAPP Statutes

A closely related problem is "anti-SLAPP" statutes.[56] These are intended to curb Strategic Lawsuits Against Public Participation (SLAPP suits), such as a meritless, but vigorously pursued lawsuit filed by a big developer to cripple a neighborhood group's environmental or zoning challenge. Anti-SLAPP statutes typically apply to "petitioning activity" or to communication on matters of public interest, and require plaintiffs to make a strong showing of a prima facie case at an early stage.[57]

The highest court in Massachusetts held that the filing of a lawsuit is petitioning activity, so the state anti-SLAPP law applies to an abuse of process claim.[58] California courts have likewise construed "petitioning activity" to cover any lawsuit and any report of allegedly criminal activity, so every malicious prosecution or abuse-of-process claim is subject to a "special motion to strike" under the statute.[59] However, in 2003, the state legislature, concluding that there had been a "disturbing abuse" of the anti-SLAPP law,[60] adopted an amendment making it inapplicable to certain consumer fraud and public interest cases.[61] The Washington Supreme Court struck down its anti-SLAPP statute on the ground that its authorization of summary dismissal of non-frivolous claims violated the right to trial by jury guaranteed by the state constitution.[62]

15.1.4 Immunity Under the Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) provides limited immunity from claims "in the nature of defamation, invasion of privacy, or negligence" for furnishing and reporting credit information.[63] If the defendant furnished false information with malice or willful intent to injure the consumer, however,

54 Warren v. Fed. Nat'l Mortg. Ass'n, 932 F.3d 378 (5th Cir. 2019) (Tex. law) (qualified privilege may be lost by malice or over-distribution; not shown here where errors in investigative report were at worst negligent, and no showing of improper distribution); Goldsmith v. HSW Fin. Recovery, Inc., 757 F. Supp. 2d 95 (D.N.H. 2010) (privilege and FCRA preemption defenses fail, where false information communicated to others besides CRAs, here household members during collection calls); Edelman, Combs & Latturner v. Hinshaw & Culbertson, 788 N.E.2d 740 (Ill. App. Ct. 2003) (qualified common interest privilege did not protect accusations of litigation misconduct published to lawyers unconnected with case); Biddle v. Warren Gen. Hosp., 715 N.E.2d 518 (Ohio 1999) (hospital exceeded privilege when it forwarded all its patient registration forms to its law firm, to screen for those potentially eligible for public benefits, whom law firm would then offer to represent); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126 (S.C. 1999) (fact question whether lender exceeded privilege by revealing borrower's problems to prospective buyer of borrower's property in explaining why buyer's loan application was unrealistic; question whether lender could have explained problem without revealing specific information). *See also* Bikkina v. Mahadevan, 193 Cal. Rptr. 3d 499 (Cal. Ct. App. 2015) (scholarly communication among scientists may be protected by common interest privilege, but malice shown and privilege lost when accuser continued a campaign of harassment after university's investigations repeatedly showed accusations to be meritless).

55 *See* Perez v. Wells Fargo Bank, 929 F. Supp. 2d 988 (N.D. Cal. 2013) (Mag. decision) (qualified common interest privilege for trustee of deed of trust can be lost by malice;" fact issue here as to knowing falsity); Belsito Communications, Inc. v. Dell, Inc., 2013 WL 4860585 (S.D.N.Y. Sept. 12, 2013) (qualified privilege lost by knowing falsehood; after being informed that bill had been sent to obsolete address, and conceding its mistake, creditor charged off and reported debt, seriously damaging small business); Mireles v. Wells Fargo Bank, 845 F. Supp. 2d 1034 C.D. Cal. 2012) (deed of trust trustee, in non-judicial foreclosure, is protected only by qualified common interest privilege, which can be lost by malice); Prof'l Recovery Serv., Inc. v. Gen. Elec. Capital Corp., 642 F. Supp. 2d 391 (D.N.J. 2009) (burden on plaintiff to show that privilege abused); Shields v. U.S. Bank, 2006 WL 3791320 (D. Kan. Dec. 22, 2006) (privilege protected bank's reports of delinquency in response to queries by potential lenders where plaintiff alleged bank error, but not knowing falsehood or reckless disregard); Wal-Mart Stores v. Lee, 74 S.W.3d 634 (Ark. 2002) (excessive publication, malice, and lack of reasonable grounds for belief); Saye v. Deloitte & Touche, L.L.P., 670 S.E.2d 818 (Ga. Ct. App. 2008) (all privileges except judicial are conditional under Ga. Code Ann. § 51-5-9); Watson v. Telecheck Serv., Inc., 2010 WL 3450349 (Tex. App. Sept. 3, 2010) (burden is on party claiming privilege to show lack of malice, defined as knowing falsehood or reckless disregard for truth; fact issue whether check guarantee service knew of consumer's reason for stopping payment on check); San Antonio Credit Union v. O'Connor, 115 S.W.3d 82 (Tex. App. 2003) (common interest privilege does not protect homeowners who accused contractor of felony misappropriation of funds but should have known of non-criminal reasons for contractor's inability to pay subcontractors).

56 *See, e.g.*, Cal. Civ. Proc. Code § 425.16 (West); Ga. Code Ann. § 9-11-11.1; 7 Guam Code Ann. §§ 17101 to 17109; Haw. Rev. Stat. §§ 634F-1 to 634F-4; Ind. Code §§ 34-7-7-1 to 34-7-7-10; La. Code Civ. Proc. Ann. art. 971; Me. Stat. tit. 14, § 556; Md. Code Ann., Cts. & Jud. Proc. § 5-807 (West); Mass. Gen. Laws ch. 231, § 59H; Minn. Stat §§ 554.01 to 554.06; Neb. Rev. Stat. §§ 25-21,241 to 25-21,246; N.Y. C.P.L.R. 3211(g) (McKinney); N.Y. Civ. Rights Law §§ 70-a, 76-a (McKinney); Tenn. Code Ann. §§ 4-21-1001 to 4-21-1004; Utah Code Ann. §§ 78B-6-1401 to 78B-6-1405 (West).

57 *See generally* National Consumer Law Center, The Practice of Consumer Law § 23.8 (2d ed. 2006).

58 477 Harrison Ave., L.L.C. v. JACE Boston, L.L.C., 134 N.E.3d 91, 99 (Mass. 2019).

59 Jarrow Formulas, Inc. v. LaMarche, 74 P.3d 737 (Cal. 2003). *See also* Graham-Sult v. Clainos, 756 F.3d 724 (9th Cir. 2014) (granting anti-SLAPP motion to dismiss breach of fiduciary duty claim arising from executor's knowingly false statements to court and heirs); Mello v. Great Seneca Fin. Corp., 526 F. Supp. 2d 1024 (C.D. Cal. 2007) (lawsuit was petitioning activity but at least minimal merit shown: litigation privilege did not protect activity forbidden by debt collection act, here lawsuit on time-barred debt); Drum v. Bleau, Fox & Assoc., 132 Cal. Rptr. 2d 602 (Cal. Ct. App. 2003) (assuming without deciding that garnishment is petitioning activity to which SLAPP law applies), *disapproved of on other grounds*, Rusheen v. Cohen, 128 P.3d 713 (Cal. 2006). *But cf.* Rouse v. Law Offices of Rory Clark, 465 F. Supp. 2d 1031 (S.D. Cal. 2006) (denying anti-SLAPP motion where law firm vigorously pursued collection actions against debtor's similarly named non-debtor son, despite proof that son was not debtor; private controversy not a matter of public interest, and litigation privilege inapplicable where son was stranger to debt collection litigation).

60 Cal. Civ. Proc. Code § 425.17(a) (West).

61 Cal. Civ. Proc. Code §§ 425.17(b), 425.17(c) (West).

62 Davis v. Cox, 351 P.3d 862 (Wash. 2015).

63 15 U.S.C. § 1681h(e).

this immunity does not apply.[64] Moreover, this immunity applies only if the consumer's case is based on information that was disclosed to the consumer pursuant to one of three FCRA disclosure requirements,[65] or disclosed by certain users of the consumer's report. The scope of this immunity and its interplay with a provision of the FCRA that preempts certain state laws have been the subject of conflicting judicial interpretations that are discussed in detail in another treatise in this series.[66]

15.1.5 Identity Theft

Victims of identity theft, an increasingly common crime, are often vigorously dunned for debts they do not owe, despite their efforts to clear their records.[67] Their credit is often ruined by false reports to credit reporting agencies, and they may even be subject to criminal prosecution. These consumers may have several tort causes of action available to them.

Given the frequency of this crime, a key question is what investigation a reasonable creditor should make before dunning a consumer, referring a claim to a collector, reporting a debt to a credit reporting agency, or instituting a criminal prosecution.[68] Failure to conduct a reasonable investigation will be probative on the issues of malice, recklessness, lack of probable cause, and reckless disregard for truth—elements of several of the causes of action discussed in this chapter.

A consumer may also have a cause of action against the creditor for having allowed the thief to get away with the deception,[69] or against the entity that failed to safeguard the personal information the thief used.[70] Suits against credit reporting agencies for making negative credit reports because of identity theft raise issues of immunity under the FCRA that are discussed in another treatise in this series.[71]

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64 *Id.* *See* § 15.5, *infra*.

65 15 U.S.C. § 1681h(e) (referring to 15 U.S.C. §§ 1681g, 1681h, 1681m).

66 National Consumer Law Center, Fair Credit Reporting §§ 6.11, 10.4 (9th ed. 2017), *updated at* www.nclc.org/library.

67 *See generally* National Consumer Law Center, Fair Credit Reporting Ch. 9 (9th ed. 2017), *updated at* www.nclc.org/library (full analysis of claims and remedies regarding identity theft).

68 *See* Reid v. LVNV Funding, 2016 WL 247571 (D. Utah Jan. 20, 2016) (thief opened credit card account using plaintiff's Social Security number; collection firm garnished plaintiff's wages, told employer she was using an alias, refused to investigate even when presented with extensive documentation; granting summary judgment against debt buyer and collection firm on claims for negligence, intrusion on seclusion, and FDCPA violations); Edmonds v. Beneficial Miss., Inc., 2005 WL 2361913 (S.D. Miss. Sept. 13, 2005) (identity theft victim stated claim for negligence, but not malicious prosecution, against lender that sent "live check" which was intercepted and cashed by thief; when consumer stated he never cashed check, lender investigated and substantiated theft, but failed to inform collection lawyers, who obtained default judgment and garnished theft victim's wages), *aff'd*, 212 Fed. Appx. 334 (5th Cir. 2007); Whitesides v. Equifax Credit Info. Serv., 125 F. Supp. 2d 807 (W.D. La. 2000) (allowing defamation, negligence, and FCRA claims to go forward against card issuer that continued to report negative information and failed to delete misinformation after being informed of identity theft); Arcaro v. Silva and Silva Enters. Corp., 91 Cal. Rptr. 2d 433 (Cal. Ct. App. 1999) (affirming malicious prosecution judgment where creditor proceeded with collection suit in the face of evidence that consumer's signature was forged); Nicholl v. Great Atl. & Pac. Tea Co., 517 S.E.2d 561 (Ga. Ct. App. 1999) (malice and lack of probable cause shown where store's investigation inadequate and it did not follow its own standard procedure before criminally prosecuting identity theft victim). *See also* Dornbecker v. Ameritech Corp., 99 F. Supp. 2d 918 (N.D. Ill. 2000) (defamation); Gill v. Kostroff, 82 F. Supp. 2d 1354 (M.D. Fla. 2000) (malicious prosecution claim; fact question whether suit was brought without probable cause where it was unclear what information creditor had when it sued identity theft victim). *But cf.* Farren v. RJM Acquisition Funding, 2005 WL 1799413 (E.D. Pa. July 26, 2005) (denying identity theft victim's tort claims because malice not sufficiently alleged, where procedures used by purchaser of debt were reasonable and problem resulted from "isolated human error").

69 *See, e.g.*, Wolfe v. MBNA Am. Bank, 485 F. Supp. 2d 874 (W.D. Tenn. 2007) (identity theft is foreseeable, and card issuers have duty to take reasonable and cost-effective measures to verify application information; issuing card without verification and pursuing victim after being informed of theft were unfair within meaning of UDAP statute). *But see* Crawford v. Time Warner Cable, Inc., 2013 WL 4604032 (E.D. Mich. Aug. 29, 2013) (creditor owed no duty to non-customer whose personal information was used by thief to open an account); Watson v. Trans Union Credit Bureau, 2005 WL 995687 (D. Me. Apr. 28, 2005) (FCRA preemption bars negligence claim against creditor that allowed thief to open account in consumer's name and persistently re-reported deleted information, despite notice of theft); Stevens v. First Interstate Bank, 999 P.2d 551 (Or. Ct. App. 2000) (bank-depositor relationship did not create duty that would give rise to liability for negligent infliction of emotional distress where bank negligently hired thief who stole depositors' identity); Huggins v. Citibank, 585 S.E.2d 275 (S.C. 2003) (no cause of action for negligent enablement of imposter fraud because card issuer owes no duty to potential victims). *But cf.* Yelder v. Credit Bureau of Montgomery, 131 F. Supp. 2d 1275 (M.D. Ala. 2001) (denying negligence claim where consumer failed to show violation of the standard of care for issuers of preapproved credit cards; wantonness claims fail on facts). *See generally* National Consumer Law Center, Fair Credit Reporting § 9.5.2 (9th ed. 2017), *updated at* www.nclc.org/library.

70 Jones v. Commerce Bancorp, 2006 WL 1409492 (S.D.N.Y. May 23, 2006) (identity theft victim stated claim for negligence and breach of fiduciary duty against bank that failed to observe privacy policy), *later decision at* 2006 WL 2642153 (S.D.N.Y. Sept. 15, 2006) (granting summary judgment for bank; recognizing fiduciary duty to safeguard personal information, but consumer failed to show connection between theft of her identity and security breach by bank); Daly v. Metro. Life Ins. Co., 782 N.Y.S.2d 530 (N.Y. Sup. Ct. 2004) (insurance company had fiduciary duty to safeguard policyholder's personal information, which was stolen by identity thief). *See also* Kuhn v. Capital One Fin. Corp., 855 N.E.2d 790 (Mass. App. Ct. 2006) (allowing cardholder to proceed with discovery to establish that card issuer was responsible for security breach that led to identity theft). *But see* Farley v. Williams, 2005 WL 3579060 (W.D.N.Y. Dec. 30, 2005) (consumer sued bank whose dishonest employee stole her identity; no private right of action for breach of Gramm-Leach-Bliley Act's privacy requirements); Jones v. Dep't of Motor Vehicles, 2002 WL 538893 (Cal. Ct. App. Apr. 11, 2002) (Department of Motor Vehicles has no duty to protect against identity theft caused by issuance of duplicate license to identity thief; denying claims of negligence and invasion of privacy). *See generally* National Consumer Law Center, Fair Credit Reporting Ch. 9, § 18.5 (9th ed. 2017) (identity theft; common law protection of financial information), *updated at* www.nclc.org/library.

71 *See* National Consumer Law Center, Fair Credit Reporting §§ 6.1.2, 10.4 (9th ed. 2017), *updated at* www.nclc.org/library.

15.2 Intentional or Negligent Infliction of Emotional Distress

15.2.1 *Elements of Intentional Infliction of Emotional Distress*

The tort of intentional infliction of emotional distress is particularly applicable to cases involving harassing collection practices.[72] The tort recognizes a right to tranquility and protects against invasions of that right. To be actionable, the creditor's conduct generally must be:

- Intentional[73] or reckless;[74]
- Outrageous or unreasonable;[75]
- Undertaken without a legal privilege;[76] and
- The proximate cause of severe mental distress.[77]

Some jurisdictions recognize essentially the same cause of action under a different name, such as "outrage."[78]

Some states expand or vary the elements of this tort[79] or decline to recognize it.[80] In addition, some courts regard intentional infliction of emotional distress as a "gap filler" tort, which will not be available if any other statutory or common law cause of action is available.[81]

72 *See generally* Joel E. Smith, Annotation, *Recovery by Debtor, Under Tort of Intentional Infliction of Emotional Distress, for Damages Resulting from Debt Collection Methods*, 87 A.L.R.3d 201 (1978).

73 *See, e.g.*, Woltring v. Specialized Loan Serv., L.L.C., 56 F. Supp. 3d 947 (E.D. Wis. 2014) (must show that conduct was intended to cause severe distress; sufficiently alleged where servicer, who had been stonewalling attempts to pay off mortgage, sent representative to home during preparations for son's wedding, who loudly informed homeowner about the foreclosure, in the presence of the whole wedding party); *In re* Eastman, 419 B.R. 711, 732 (Bankr. W.D. Tex. 2009) (must show that defendant intended to cause severe emotional distress or that it was the primary risk of defendant's action); Supervalu, Inc. v. Johnson, 666 S.E.2d 335 (Va. 2008) (plaintiff must show that conduct was "directed intentionally towards the affected individual"; intent to cause economic damage to plaintiff's one-man business insufficient).

74 *See, e.g.*, Prephan v. NCO Fin. Sys., 2011 WL 2579817 (N.D. Ohio June 29, 2011) (allegation that collector "knew or should have known" that conduct would cause severe distress is sufficient); Alves v. Verizon, 2010 WL 2989988 (D.N.J. July 27, 2010) (recklessness shown where local telephone company failed for months to fix equipment problem that caused long distance carrier to bill and harass customer for calls made by another customer); Zito v. Leasecomm Corp., 2004 WL 2211650 (S.D.N.Y. Sept. 30, 2004) (recklessness sufficient; scammers should have known that severe emotional distress might result); Lewis v. First Nat'l Bank, 645 F. Supp. 1499 (W.D. Va. 1986), *aff'd*, 818 F.2d 861 (4th Cir. 1987); DeGolyer v. Greentree Servicing, L.L.C., 662 S.E.2d 141 (Ga. Ct. App. 2008) (foreclosing on wrong tract, after being informed of mistake; intentional or reckless conduct sufficiently alleged); Bowman v. Heller, 651 N.E.2d 369 (Mass. 1995) (non-debt collection case recognizing claim for reckless infliction of emotional distress); McGanty v. Staudenraus, 901 P.2d 841 (Or. 1995) (employment-related case; defendant need not have intended to inflict emotional distress if he or she intended outrageous conduct and knew or should have known that severe emotional distress would result). *But cf.* Smith-Tyler v. Bank of Am., 992 F. Supp. 2d 1277 (N.D. Ga. 2014) ("sloppy" business practices, here resulting in foreclosure action on debt which had been fully paid, not sufficient without actual knowledge); Ahmed v. Wells Fargo Bank & Co., 2011 WL 1751415 (N.D. Cal. May 9, 2011) (statement that lender "should have known" its misconduct would cause severe distress insufficient to allege recklessness).

75 *See* § 15.2.3, *infra*.

76 *See* § 15.1.3, *supra*.

77 *See* § 15.2.2, *infra*.

78 Wilson v. Univ. of Ala. Healthcare Found., P.C., ___ So. 3d ___, 2017 WL 6397654 (Ala. Dec. 15, 2017) (tort of outrage not limited to three situations recognized in previous decisions); Cordes v. Outdoor Living Ctr., Inc., 781 S.W.2d 31 (Ark. 1989) (debt collection; tort of outrage composed of same elements as intentional infliction of emotional distress, not easily established); Deason v. Farmers & Merchants Bank, 771 S.W.2d 749 (Ark. 1989) (reciting elements for tort of outrage); Cadle Co. v. Hobbs, 673 So. 2d 1363 (La. Ct. App. 1996) ("unreasonable coercion" to collect debt, whether or not justly due is actionable as tort of outrage; offensive telephone calls to debtor's workplace, negatively affecting debtor's job performance and mental and physical wellbeing, stated claim); Geran v. Xerox Education Serv., Inc., 2015 WL 2392375 (Mo. Ct. App. May 19, 2015) (claim fails because borrower failed to allege that servicer's sole motive for mishandling repayment plan was to cause emotional distress). *See also* Yelder v. Credit Bureau of Montgomery, 131 F. Supp. 2d 1275 (M.D. Ala. 2001) (Alabama recognizes tort of wantonness, conduct carried on with reckless or conscious disregard of rights or safety of others). *See generally* Annotation, *Modern Status of Intentional Infliction of Emotional Distress as Independent Tort; Outrage*, 38 A.L.R.4th 998 (1985).

79 *See* Cent. Mo. Elec. Coop. v. Balke, 119 S.W.3d 627 (Mo. Ct. App. 2003) (adding to intent element that infliction of emotional distress is tortious only if "defendant's sole intent in acting was to cause mental distress"; not shown where defendant's purpose was to collect debt).

80 Rodriguez v. Due Process of Mich., Inc., 2008 WL 4449651 (E.D. Mich. Sept. 30, 2008) (Michigan does not recognize cause of action for infliction of emotional distress). *Cf.* Costine v. BAC Home Loans, 946 F. Supp. 2d 1224, 1236 (N.D. Ala. 2013) (stating that this tort is a very limited cause of action that is available only in the most egregious circumstances; misapplication of payments or mishandling of loan modification not outrageous).

81 *See* Chau v. Donovan, 357 F. Supp. 3d 276 (S.D.N.Y. 2019) (intentional infliction of emotional distress claim will not lie for behavior "subsumed within" some other tort, but claim goes forward because plaintiff alleged outrageous conduct in addition to sexual battery); Warr v. Liberatore, 270 F. Supp. 3d 637 (W.D.N.Y. 2017) (intentional infliction of emotional distress claim will not lie for conduct that "falls within the ambit of traditional tort recovery"); Shaw v. Handy, 588 S.W.3d 459 (Ky. 2019) (intentional infliction of emotional distress claim may not be based on actions that constitute a "traditional tort," here assault and battery); State *ex rel.* Halsey v. Phillips, 576 S.W.3d 177 (Mo. 2019) (intentional infliction of emotional distress or negligent infliction of emotional distress claim will not lie for actions that support claim for assault and battery, but here allowing claim to go forward because defendant's behavior was outrageous even without considering the unwanted touching); Thaxton v. Beneficial Mortg. Co., 145 P.3d 124 (Okla. Civ. App. 2006) (barring intentional infliction of emotional distress claim based on failure to release mortgage where Oklahoma statute prescribed penalty for this failure); Warner Bros. Entertainment, Inc. v. Jones, 538 S.W.3d 781 (Tex. App. 2017) (dismissing intentional infliction of emotional distress claim based on same facts as defamation); Galindo v. Snoddy, 415 S.W.3d 905 (Tex. App. 2013). *See also* Haguewood v. Gannett River States Publ'g Corp., 2007 WL 1728700 (S.D. Miss. June 13, 2007) (intentional infliction of emotional distress claim cannot be used to circumvent requirements of defamation law; claim fails where based on same facts that failed to state claim for defamation or false light); Lund v. Merrick, 2012 WL 3635327 (Cal. Ct. App. Aug. 24, 2012) (intentional infliction of emotional distress claim may not be used as end run around requirements of other tort; claim based on false statements must fail where defamation claim is barred by common interest privilege). *But cf.* Shkreli v. JP Morgan Chase Bank, 2015 WL 1408840 (S.D.N.Y. Mar. 27, 2015) (although

Because severe emotional distress, one element of the cause of action, may occur at a later point in time than the outrageous conduct, some decisions hold that the statute of limitations begins to run when the injury occurs.[82]

15.2.2 What Constitutes Severe Mental Distress

To be actionable under the tort of intentional infliction of emotional distress, the plaintiff's distress must be so severe that no reasonable person could be expected to endure it.[83] Severe emotional distress is shown when it interferes with the plaintiff's ability to attend to daily matters, such as working.[84] Seeking professional treatment and a manifestation of physical symptoms can weigh in the plaintiff's favor but are not required in every jurisdiction.[85] Courts also consider the outrageousness of the defendant's conduct[86] and the duration of the plaintiff's suffering.[87] Fear of financial problems may not be sufficient,[88] but financial distress that leads to other forms of distress can be actionable.[89]

A plaintiff's suffering is compensable only if it is reasonable and justified under the circumstances,[90] but a defendant is responsible for exacerbating a preexisting condition of which it has knowledge.[91] Even if the debtor's emotional distress meets the jurisdiction's standard of severity, it is compensable

intentional infliction of emotional distress is a disfavored gap-filler tort in New York, no "hard and fast rule" bars such a claim when facts will also support other claim, here false imprisonment).

82 Johnson v. ADT Sec. Sys., Inc., 1999 WL 1940046 (W.D.N.C. Mar. 10, 1999) (cause of action accrues on date of injury, not date of diagnosis); Ruff v. Reeves Bros., 468 S.E.2d 592 (N.C. Ct. App. 1996) (where plaintiff was subjected to long course of harassment, cause of action accrued and statute of limitations began to run on day she collapsed and required medical treatment).

83 Blue v. Johnson & Migliaccio, 2010 WL 4641666 (D. Or. Nov. 4, 2010) (fear that calls to terminally ill non-debtor father would hasten father's death); CitiFinancial Mortg. Co. v. Frasure, 2008 WL 2199496 (N.D. Okla. May 23, 2008), *aff'd on other grounds*, 327 Fed. Appx. 49 (10th Cir. 2009); Campbell v. Triad Fin. Corp., 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007); Matthews v. Homecoming Fin. Network, 2005 WL 2387688 (N.D. Ill. Sept. 26, 2005); Harris v. Americredit Fin. Serv., Inc., 2005 WL 2180477 (W.D. Va. Sept. 9, 2005); Caputo v. Prof'l Recovery Serv., 261 F. Supp. 2d 1249 (D. Kan. 2003); Chen v. Mayflower Transit, Inc., 2002 WL 1632412 (N.D. Ill. July 22, 2002); *In re* Payano de la Rosa, 2010 WL 1711131 (Bankr. D. Md. Apr. 26, 2010); Zulaswski v. Stancil, 2006 WL 2089470 (Conn. Super. Ct. July 14, 2006); Ratcliff v. Boydell, 674 So. 2d 272 (La. Ct. App. 1996). *But cf.* Smith v. AFS Acceptance, L.L.C., 77 U.C.C. Rep. Serv. 2d 794 (N.D. Ill. 2012) (allegation of "stress, anxiety and emotional distress" resulting from violent repossession sufficient to state claim at motion to dismiss stage).

84 *See, e.g.*, CitiFinancial Mortg. Co. v. Frasure, 2008 WL 2199496 (N.D. Okla. May 23, 2008) (severe distress shown where plaintiff stayed up all night worrying and had to miss church), *aff'd on other grounds*, 327 Fed. Appx. 49 (10th Cir. 2009); Hicks v. Cadle Co., 2008 WL 2900934 (D. Colo. July 23, 2008) (upholding arbitrator's finding of severe emotional distress where plaintiff suffered significant loss of sleep and delayed starting family); Perk v. Worden, 475 F. Supp. 2d 565 (E.D. Va. 2007) (nervousness, loss of sleep, withdrawal from activities and inability to concentrate at work are sufficient); Chen v. Mayflower Transit, Inc., 2002 WL 1632412 (N.D. Ill. July 22, 2002) (headaches, upset stomach, and emotional symptoms, documented by doctor's report, sufficient to raise issue of severe distress); Cady v. Marcella, 729 N.E.2d 1125 (Mass. App. Ct. 2000) (hysterical crying, inability to concentrate on work, and humiliation were sufficient), Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) ($5 million for panic attacks, high blood pressure, severe shingles, insomnia, and mental anguish in frail, older, non-English-speaking consumer subjected to false threat of immediate jail and civil trial for debt on which her name was forged), *vacated on other grounds*, 2003 Tex. LEXIS 50 (Tex. Apr. 24, 2003) (vacating decision pursuant to parties' settlement). *See also* Rogers v. Louisville Land Co., 367 S.W.3d 196 (Tenn. 2012) ("serious mental injury" requires showing of "significant impairment in . . . daily life, resulting from defendant's extreme and outrageous conduct"). *But cf.* Moore v. Beneficial Nat'l Bank, 876 F. Supp. 1247 (M.D. Ala. 1995) (plaintiff's humiliation at being denied store credit card and compelled to return the clothes she had intended to purchase to rack insufficient); *In re* Payano de la Rosa, 2010 WL 1711131 (Bankr. D. Md. Apr. 26, 2010) (consumers were terrified when repossession man broke into garage and yelled and threatened them, but severe distress not shown; no allegation that consumer was "unable, even temporarily, to carry on to some degree with the daily routine of her life"); Hamilton v. Ford Motor Credit Co., 502 A.2d 1057 (Md. Ct. Spec. App. 1986) (embarrassment, upset, and difficulty sleeping insufficient where plaintiff was not unable to attend to necessary matters); Buckley v. Trenton Sav. Fund Soc'y, 544 A.2d 857 (N.J. 1988) (embarrassment, lost sleep, headaches, nervous tension, loss of friendship and embarrassment with children not severe where bank wrongfully dishonored two support checks); Haefka v. W.W. Extended Care, 2001 WL 1509200 (Ohio Ct. App. Nov. 28, 2001) (severe distress not shown where plaintiff was "upset" but neither missed work nor sought medical treatment); Shockley v. Crosby, 2004 WL 2113052 (Tenn. Ct. App. Sept. 21, 2004) (feeling weak-kneed when defendant pointed gun at plaintiff not sufficient to allege severe distress); Blanche v. First Nationwide Mortg. Co., 74 S.W.3d 444 (Tex. App. 2002) (humiliation and embarrassment over false information in credit report not severe distress).

85 *See* § 15.2.3, *supra*.

86 *See* § 15.2.4, *supra*.

87 CitiFinancial Mortg. Co. v. Frasure, 2008 WL 2199496 (N.D. Okla. May 23, 2008), *aff'd on other grounds*, 327 Fed. Appx. 49 (10th Cir. 2009); Chen v. Mayflower Transit, Inc., 2002 WL 1632412 (N.D. Ill. July 22, 2002); Shockley v. Crosby, 2004 WL 2113052 (Tenn. Ct. App. Sept. 21, 2004).

88 Whitley v. Taylor Bean & Whitaker Mortg. Group, 607 F. Supp. 2d 885 (N.D. Ill. 2009) (allegations of "fear of losing their home, fear of financial insecurity in retirement and fear of the future" insufficient).

89 Lacey v. Ocwen Loan Servicing, L.L.C., 2014 WL 2885471 (D. Kan. June 25, 2014) (servicer's demand for $3300 inspection fee, which was not owed, was large enough to support claim for extreme and outrageous conduct, where borrower suffered "heart attack-like" symptoms and was hospitalized); Matthews v. Homecoming Fin. Network, 2005 WL 2387688 (N.D. Ill. Sept. 26, 2005) (severe distress shown where consumer was wrongfully locked out by foreclosing creditor, was homeless for several months, and was forced to live apart from wife and children for additional period).

90 McCauley v. Ocwen Fed. Bank, 2010 WL 760438 (D. Minn. Feb. 26, 2010) (no liability for distress "exaggerated in comparison to that which a reasonable man would experience under the circumstances, unless the exaggerated distress results from a particular susceptibility to such distress of which the defendant had knowledge"; knowledge not shown here).

91 *Id.*; Caputo v. Prof'l Recovery Serv., 261 F. Supp. 2d 1249 (D. Kan. 2003) (false threats of arrest and property seizure directed to consumer known to be disabled veteran who suffered from post-traumatic stress disorder).

only if the debtor can show that it was proximately caused by the defendant's actions.[92]

15.2.3 Whether Physical Injury or Other Non-Emotional Injury Is Required

The novelty of the tort of intentional infliction of emotional distress is its allowance, in most jurisdictions, of recovery for emotional distress unaccompanied by physical impact or injury.[93] Fearing trivial or feigned claims, however, courts in a minority of jurisdictions have refused to grant relief for the intentional infliction of purely emotional injury. In these states the mental distress must be accompanied by a physical impact or physical injury to the debtor.[94] Physical symptoms of stress may serve this purpose, however.[95] Other states allow recovery without physical impact, but require medical evidence of the mental distress,[96] or require the plaintiff to have sought medical treatment for the mental distress.[97] Even where it is not an element of the claim, seeking medical treatment may be an important factor in establishing that the plaintiff's mental distress was severe.[98]

15.2.4 What Constitutes Actionable Conduct

In nearly all jurisdictions, outrageousness and emotional distress are required elements of a claim of intentional infliction

92 Messer v. First Fin. Fed. Credit Union of Maryland, 2012 WL 3104604 (E.D. Pa. July 30, 2012) (causation is insufficiently proximate where long chain of events led to debtor's development of stress-related illness two months after wrongful repossession); Campbell v. Triad Fin. Corp., 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007) (severe distress not shown; one plaintiff alleged depression and the other three-day hospitalization, but plaintiffs had other problems and needed expert evidence to establish causation).

93 *See, e.g.*, Shugart v. Ocwen Loan Servicing, 747 F. Supp. 2d 938 (S.D. Ohio 2010) ("severe humiliation, distress and anxiety" sufficiently alleges severe distress, at least at the motion to dismiss stage); North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111 (D. Mass. 2007) (proof of physical injury required for negligent, but not for intentional, infliction of emotional distress); Caputo v. Prof'l Recovery Serv., 261 F. Supp. 2d 1249, 1267 (D. Kan. 2003) (finding psychological deterioration sufficient to support claim; denying collector's motion for summary judgment); Rogers v. Louisville Land Co., 367 S.W.3d 196 (Tenn. 2012) ("serious mental injury" is sufficient for intentional or negligent infliction of emotional distress).

94 *See, e.g.*, Di Loreto v. Costigian, 600 F. Supp. 2d 671 (E.D. Pa. 2009) (intentional infliction claim fails because Pennsylvania requires showing of some physical harm), *aff'd on other grounds*, 351 Fed. Appx. 747 (3d Cir. 2009); Seibel v. Soc'y Lease Inc., 969 F. Supp. 713 (M.D. Fla. 1997) (physical impact necessary element of intentional infliction of emotional distress claim, but exception where physical injury results); First Fed. Sav. & Loan Ass'n v. Stone, 467 N.E.2d 1226 (Ind. Ct. App. 1984) (no recovery of damages for mental or emotional suffering absent physical injury). *See also* McDonald v. Bennett, 674 F.2d 1080 (5th Cir. 1982) (Texas law does not allow mental anguish damages for common law claim of unreasonable collection efforts without proof of physical injury).

95 *See* Chen v. Mayflower Transit, Inc., 2002 WL 1632412 (N.D. Ill. July 22, 2002) (headache, upset stomach, emotional symptoms documented by doctor's report sufficient to raise question of severe distress); Sullivan v. Boston Gas Co., 605 N.E.2d 805 (Mass. 1993) (headaches, diarrhea, and similar symptoms meet physical harm requirement); Cady v. Marcella, 729 N.E.2d 1125 (Mass. App. Ct. 2000) (hysterical crying and inability to concentrate on work); Crews v. Provident Fin. Co., 157 S.E.2d 381 (N.C. 1967) (worsening of heart condition satisfies physical injury requirement); Okocha v. Fehrenbacher, 655 N.E.2d 744 (Ohio Ct. App. 1995) (emotional distress manifested by depression, back pain, and chemical dependency sufficient); Bennett v. City Nat'l Bank & Trust Co., 549 P.2d 393 (Okla. Civ. App. 1975) (nervousness, shock, and sleeplessness caused by abusive debt collection calls are sufficient physical injury); Duty v. Gen. Fin. Co., 273 S.W.2d 64 (Tex. 1954) (mental anguish alone is insufficient, but allowing case to proceed where plaintiffs alleged headaches, loss of sleep, nervousness, instability, upset stomach, diminished capacity to do housework, and loss of work, credit rating, and employment).

96 Hucker v. Wells Fargo Bank, 2016 WL 5678341 (E.D.N.C. Sept. 30, 2016) (must show severe and disabling emotional or mental condition which may be generally recognized and diagnosed by trained professionals); Douyon v. N.Y. Med. Health Care, P.C., 894 F. Supp. 2d 245, 266–267 (E.D.N.Y. 2012) (for intentional infliction of emotional distress, severe distress must be shown by medical evidence); Lynk v. Chase Home Fin., L.L.C., 644 F. Supp. 2d 868 (E.D. Mich. 2009) (severe distress not sufficiently alleged; no "health effects or medical treatment"); Estevez v. City of Philadelphia, 2007 WL 707358 (E.D. Pa. Mar. 7, 2007) (medical evidence required); Barbee v. Wal-Mart Stores, 2004 WL 239763 (Tenn. Ct. App. Nov. 18, 2003) (some medical evidence required for intentional or negligent infliction claim). *See also* Brown v. Bosniak, 2003 WL 21209460 (N.D. Tex. May 19, 2003) (weight gain and loss of effectiveness of blood pressure medication not sufficient to show severe distress where consumer never consulted health professional). *But see* Honaker v. Smith, 256 F.3d 477 (7th Cir. 2001) (Ill. law; where conduct is extremely outrageous, here burning down house to drive away unpopular resident, severe distress will be presumed and no medical evidence required).

97 Lowe v. Surpas Res. Corp., 253 F. Supp. 2d 1209, 1245 (D. Kan. 2003) (sick older woman's distress not severe enough where she did not consult physician or experience physical symptoms beyond crying, shaking, and loss of sleep); Carlson v. SCI Iowa Funeral Serv., Inc., 674 N.W.2d 682 (Iowa Ct. App. 2003) (table) (consumers who sought medical treatment for sleeplessness and depression stated claim; those who did not seek treatment did not state claim). *But see* Hicks v. Cadle Co., 2008 WL 2900934 (D. Colo. July 23, 2008), *rev'd in part on other grounds*, 355 Fed. Appx. 186 (10th Cir. 2009); Cady v. Marcella, 729 N.E.2d 1125 (Mass. App. Ct. 2000) (medical testimony not needed to prove severe distress); Bennett v. City Nat'l Bank & Trust Co., 549 P.2d 393 (Okla. Civ. App. 1975).

98 *See, e.g.*, McGinnis v. Am. Home Mortg. Servicing, Inc., 817 F.3d 1241 (11th Cir. 2016) (Ga. Law; giving weight to testimony of clinical psychologist, in decision awarding substantial actual and punitive damages for intentional infliction of emotional distress by mortgage servicer); Woltring v. Specialized Loan Serv., L.L.C., 56 F. Supp. 3d 947 (E.D. Wis. 2014) (plaintiff hospitalized for stress-induced high blood pressure and Bell's palsy); Alves v. Verizon, 2010 WL 2989988 (D.N.J. July 27, 2010) (severe distress shown; evidence of medical treatment for anxiety-related problems at time when consumer was trying to correct errors that caused her to be abusively dunned for calls made by another customer); Herman v. Nat'l Enter. Sys., Inc., 2009 WL 1874202 (W.D.N.Y. June 29, 2009) (testimony of family and treating physicians sufficient to show severe distress); Brown v. Bosniak, 2003 WL 21209460 (N.D. Tex. May 19, 2003) (credible death threat was outrageous conduct, but severe distress not shown where plaintiff failed to consult health professional); Ryan v. Ford Motor Co., 939 N.E.2d 891 (Ohio Ct. App. 2010) (severe distress not shown where no medical or lay testimony presented as to effects of stress resulting from confrontation with repossessor).

of emotional distress,[99] although some courts describe the standard for proscribed conduct as "unreasonable."[100] Some courts hold that as the outrageousness of the conduct increases, the need for additional evidence of severe distress decreases; if the conduct is highly outrageous, this may suffice to prove severe distress.[101]

When determining what conduct is actionable, courts often look to the *Restatement of Torts* for guidance. Courts denying consumer claims often cite the *Restatement*'s standard that the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[102] On the other hand, courts permitting recovery find support in the language of the *Restatement* as well: liability attaches if the claim is not "fictitious or trivial," and if the conduct exceeded "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[103] Courts permitting recovery also look to abuse of position by collectors[104] and the peculiar susceptibility of the consumer,[105]

99 *But see* Maloney v. Home & Inv. Ctr., Inc., 994 P.2d 1124 (Mont. 2000) (outrageousness not required); Sacco v. High Country Press, 896 P.2d 411 (Mont. 1995) (outrageousness not required).

100 *See, e.g.*, Black v. Aegis Consumer Funding Group, Inc., 2001 WL 228062 (S.D. Ala. Feb. 8, 2001); Chedester v. Stecker, 643 P.2d 532 (Haw. 1982) ("unreasonable" conduct must be equated with "outrageous" conduct); Hairford v. Centurytel, Inc., 2003 WL 22244793 (La. Ct. App. Oct. 1, 2003) ("improper and unreasonable so as to be intentionally coercive"). *But see* Dick v. Mercantile-Safe Deposit & Trust Co., 492 A.2d 674 (Md. Ct. Spec. App. 1985) ("unreasonable" conduct not sufficient; actionable conduct must be complete denial of debtor's dignity as a person). *See generally* Michael M. Greenfield, *Coercive Collection Tactics*, 1972 Wash. U. L.Q. 1, 24 n.60.

101 Honaker v. Smith, 256 F.3d 477 (7th Cir. 2001) (Ill. law; burning down house to drive away unwanted resident is so outrageous that severe distress will be presumed); Weinstein v. Prudential Prop. & Cas. Ins. Co., 233 P.3d 1221 (Idaho 2010) (outrageousness of conduct is probative of severity of distress; need not show physical injury, psychological disorder, or interference with daily activities; here, insurer's three-year refusal to pay injured child's undisputed medical bills resulted in harassment, humiliation, and liens on house). *See also* Rogers v. Louisville Land Co., 367 S.W.3d 196 (Tenn. 2012) (outrageousness of conduct may be probative of severe distress).

102 Restatement (Second) of Torts § 46 cmt. d (1965). *See, e.g.*, Flamm v. Sarner & Assoc., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (collector's conduct "odious" but not outrageous; made scene at consumer's workplace and told employer consumer was a thief); Gable v. Curtis, 673 N.E.2d 805 (Ind. Ct. App. 1996) (seven phone calls in one hour, one of which arguably threatened physical force, were not sufficiently outrageous); Champlin v. Washington Trust Co., 478 A.2d 985 (R.I. 1984) (bank acted reasonably in making telephone call to debtor shortly after debtor's father's death, suggesting assignment to the bank of debtor's interest in father's estate to pay debt; call was neither abusive nor threatening); Citibank v. Hauff, 668 N.W.2d 528 (S.D. 2003) (series of harassing but not obscene phone calls, in effort to collect debt not owed were mere indignities, etc. within *Restatement* definition); S.S. by and through Shaffer v. IHC Health Services, Inc., 417 P.3d 603 (Utah 2018) (filing lien on child accident victim's tort recovery instead of billing Medicaid not sufficiently outrageous). *But see* Turman v. Cent. Billing Bureau Inc., 568 P.2d 1382 (Or. 1977) (legal standard requiring conduct "utterly intolerable in a civilized community" would exclude too much conduct that should be actionable).

103 Restatement (Second) of Torts § 46 (1965).

104 *Id.* at cmt. e, illus. e.8; Severson v. Chase Manhattan Mortg. Co., 2013 WL 1688026 (D. Or. Mar. 8, 2013) (giving weight to lenders' position of power; lenders dunned and brought foreclosure action, with knowledge that alleged default resulted from their accounting errors), *adopted*, 2013 WL 1702163 (D. Or. Apr.18, 2013); Reed v. BAC Home Loans Servicing, L.L.C., 2012 WL 1579340 (W.D. Mich. May 4, 2012) (egregious mishandling of loan modification application; noting that holder of defaulted mortgage is in position of power); Chaconas v. JP Morgan Chase Bank, 713 F. Supp. 2d 1180 (S.D. Cal. May 10, 2010) (phone harassment of older, represented consumers; giving weight to collector's abuse of position of power); CitiFinancial Mortg. Co. v. Frasure, 2008 WL 2199496 (N.D. Okla. May 23, 2008) (persistent attempts to foreclose on home in which creditor had no security interest was "extreme abuse" of creditor's position of power; conduct was outrageous), *aff'd on other grounds*, 327 Fed. Appx. 49 (10th Cir. 2009); Matthews v. Homecoming Fin. Network, 2005 WL 2387688 (N.D. Ill. Sept. 26, 2005) (abuse of position significant to finding of outrageousness; foreclosing creditor locked family out of their home before date set by foreclosure order); Chen v. Mayflower Transit, Inc., 2002 WL 1632412 (N.D. Ill. July 22, 2002) (mover had control over consumer's essential household goods and time-sensitive bar review materials); Bundren v. Superior Court, 193 Cal. Rptr. 671 (Cal. Ct. App. 1983) (creditor was hospital; debtor was in-patient recovering from surgery); Hairford v. Centurytel, Inc., 856 So. 2d 139 (La. Ct. App. 2003) (phone company threatened to cut off older man's phone service for debt not owed); Margita v. Diamond Mortg. Corp., 406 N.W.2d 268 (Mich. Ct. App. 1987) (creditor was mortgage lender with great power to affect borrowers' credit ratings). *See also* Wilson v. Houston Funeral Home, 50 Cal. Rptr. 2d 169 (Cal. Ct. App. 1996) (creditor was funeral director; debtor was widow of deceased); Symonds v. Mercury Sav. & Loan Ass'n, 275 Cal. Rptr. 871 (Cal. Ct. App. 1990) (creditor was bank holding all of debtor's funds); Mauri v. Smith, 901 P.2d 247 (Or. Ct. App. 1995) (police abused special position), *aff'd in part and rev'd in part on other grounds*, 929 P.2d 307 (Or. 1996).

105 *See* MacDermid v. Discover Fin. Serv., 488 F.3d 721 (6th Cir. 2007) (Tenn. Law; creditor knew of consumer's severe bipolar disorder); Adanna Jiagbogu v. Bank of Am., 2016 WL 7626429 (C.D. Cal. 2016) (outrageous if bank froze account in error, then refused to release limited amount of funds for medical expenses of consumer known to be seriously ill); Sharp v. Ally Fin., Inc., 328 F. Supp. 3d 81 (W.D.N.Y. 2018) (denying summary judgment to creditor on intentional infliction of emotional distress claim alleging that it made hundreds of calls to debtor who was dying of cancer, threatening to repossess car he needed to get to chemotherapy appointments); Hamlett v. Santander Consumer, USA, Inc., 931 F. Supp. 2d 451 (E.D.N.Y. 2013) (numerous calls, with threats of criminal prosecution, to cell phone of debtor's non-debtor family member, who was known to suffer from mental disabilities); Severson v. Chase Manhattan Mortg. Co., 2013 WL 1688026 (D. Or. Mar. 8, 2013) (lenders vigorously dunned for alleged debt that they knew resulted from their accounting errors, with knowledge that one borrower was seriously ill), *adopted*, 2013 WL 1702163 (D. Or. Apr.18, 2013); Client Funding Solutions, Inc. v. Crim, 2012 WL 3017984 (N.D. Ill. July 23, 2012) (withholding settlement proceeds needed for medical bills and everyday living, to coerce accident victim to settle with litigation lender); Strom v. Nat'l Enter. Sys., 2011 WL 1233118 (W.D.N.Y. Mar. 30, 2011) (fact question whether threat to freeze disabled debtor's SSDI funds, after being told debtor suffered from brain cancer and could not work, was sufficiently outrageous); Chaconas v. JP Morgan Chase Bank, 713 F. Supp. 2d 1180 (S.D. Cal. May 10, 2010) (phone harassment; giving weight to creditor's knowledge of consumers' advanced age and frail health); Kincaid v. Sturdevant, 437 F. Supp. 2d 1219 (D. Kan. 2006) (landlord's knowledge of tenant's fragility highly significant on issues of outrageous conduct and severe distress); Matthews v. Homecoming Fin. Network, 2005 WL 2387688 (N.D. Ill. Sept. 26, 2005) (consumer vulnerability significant to finding of outrageousness; foreclosing creditor locked family out of their home before

factors mentioned in the *Restatement* as relevant to the issue of the outrageousness of the collector's conduct.

Courts also follow the *Restatement* in holding that it is not outrageous to demand one's legal rights in a permissible way, even if this is certain to result in emotional distress.[106] Thus, a collector is entitled to take reasonable steps necessary to collect a debt.[107] The collector can legally notify the debtor of the status

date set by foreclosure order); Evans v. Chase Manhattan Mortg. Co., 2005 WL 555411 (D.D.C. Mar. 9, 2005) (creditor's lawyers unreasonably delayed handing over surplus from foreclosure sale, even though they knew dying borrower was being hounded by purchasers to vacate house, and needed the money to obtain new home); Caputo v. Prof'l Recovery Serv., 261 F. Supp. 2d 1249 (D. Kan. 2003) (false threats of arrest and property seizure directed to consumer known to be disabled veteran; otherwise reasonable conduct becomes outrageous if collector knows of consumer's disability); Black v. Aegis Consumer Funding Group, Inc., 2001 WL 228062 (S.D. Ala. Feb. 8, 2001) (vicious harassment continued after consumer hospitalized for depression and anxiety); Symonds v. Mercury Sav. & Loan Ass'n, 275 Cal. Rptr. 871 (Cal. Ct. App. 1990) (bank knew of consumer's advanced age, ill health, and precarious financial situation); Bundren v. Superior Court, 193 Cal. Rptr. 671 (Cal. Ct. App. 1983) (hospital aware of susceptibility of patient recovering from surgery after machete attack); Dawson v. Assoc. Fin. Serv. Co., 529 P.2d 104 (Kan. 1974) (whether collection efforts were tortious is jury question in light of debtor's multiple sclerosis and known susceptibility to mental distress); Wilkins v. Ondrovich, 691 N.E.2d 1122 (Ohio Ct. App. 1997) (realtors were selling house for newly divorced woman, whom they knew to "have a tender emotional threshold"); Turman v. Cent. Billing Bureau Inc. 568 P.2d 1382 (Or. 1977) (affirming verdict against collection agency that repeatedly made abusive and threatening calls to blind consumer); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (older, non-English speaking woman with a history of anxiety disorders), *vacated on other grounds*, 2003 Tex. LEXIS 50 (Tex. Apr. 24, 2003) (vacating decision pursuant to parties' settlement). *But see* Combs v. NCO Fin. Sys., 2011 WL 1288686 (E.D. Pa. Apr. 5, 2011) (multiple daily calls to debtors' home, continuing after wife informed collector debtor was dying; calls to widow continued after collector notified of death, including calls on day of funeral, not sufficiently outrageous), *order entered by* 2011 WL 1288699 (E.D. Pa. Apr. 5, 2011). *But cf.* Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034 (9th Cir. 2011) (Ariz. law; allegation that subprime lenders and servicer targeted vulnerable consumers for unaffordable loans, and misrepresented terms and conditions of the loans, not sufficiently outrageous to support intentional infliction of emotional distress claim).

106 *See* Mehta v. Wells Fargo Bank, 737 F. Supp. 2d 1185 (S.D. Cal. 2010) (where verbal promise to refrain from foreclosure during loan modification negotiations was unenforceable, lender was exercising its legal rights when it foreclosed; outrageous conduct not shown); Ramirez v. Barclays Capital Mortg., 2010 WL 2605696 (E.D. Cal. June 26, 2010) (debt collection by its nature causes distress; refusal to enter into loan modification not actionable absent conduct "outside that generally accepted in debt collection and/or the foreclosure process"); United States v. Bloom, 925 F. Supp. 426 (E.D. La. 1996) (enforcement of medical school loan, after bureaucratic misunderstandings had interfered with debtor's fulfillment of commitment to serve in medically under-served area, was permissible), *aff'd*, 112 F.3d 200 (5th Cir. 1997); Janossy v. Washington Mut. Bank, 2002 WL 31031636 (Cal. Ct. App. Sept. 12, 2002) (qualified privilege to cause some distress); Yu v. Signet Bank, 82 Cal. Rptr. 2d 304 (Cal. Ct. App. 1999) (filing actions in distant forum in violation of California law, obtaining default judgments, and garnishing debtors' wages is assertion of legal rights in pursuit of one's own economic interests and not outrageous); Heim v. California Fed. Bank, 828 A.2d 129 (Conn. App. Ct. 2003) (filing lawsuit, even for wrong reason, not outrageous); Beasley v. Agricredit Acceptance Corp., 480 S.E.2d 257 (Ga. Ct. App. 1997) (creditor had legal right under contract to refuse to release insurance proceeds and ultimately to foreclose, even though without the money debtor could not repair machinery and make payments); Knysak v. Shelter Life Ins. Co., 652 N.E.2d 832 (Ill. App. Ct. 1995) (not outrageous for health insurer to refuse payment for plaintiff's wife's last illness where it reasonably believed preexisting condition exclusion applied); Sec. Nat'l Bank v. Wald, 536 N.W.2d 924 (N.D. 1995) (bank was merely exercising its legal rights by refusing to release insurance proceeds so that debtor could harvest crops after combine, in which bank had security interest, was destroyed by fire); Ed Schory & Sons v. Francis, 662 N.E.2d 1074 (Ohio 1996) (no liability for strictly enforcing contract); Cent. Mo. Elec. Coop. v. Balke, 119 S.W.3d 627 (Mo. Ct. App. 2003) (intentional infliction requires showing that "defendant's sole intent in acting was to cause mental distress"; not shown where defendant's purpose was to collect debt); Giacchino v. Estate of Stalkup, 908 P.2d 983 (Wyo. 1995) (claim for negligent infliction of emotional distress must fail if repossession was lawful).

107 *See, e.g.*, Swartz v. City Mortg., Inc., 911 F. Supp. 2d 916 (D. Haw. 2012) (foreclosure, threats of foreclosure or denial of loan modification not outrageous); Gibbons v. Bank of Am. Corp., 2012 WL 94569 (D. Md. Jan. 11, 2012) (bank attempting to recover funds stolen by husband simply insisted on its legal rights in a legal way when it froze bank accounts and attempted to take house); Quinteros v. Aurora Loan Serv., 740 F. Supp. 2d 1163 (E.D. Cal. Sept. 30, 2010) (foreclosing on a home, even after promise to hold off during negotiations, not outrageous); Wilson v. JP Morgan Chase Bank, 2010 WL 2574032 (E.D. Cal. June 25, 2010) (consumer who alleged only "normal debt collection practices" failed to state claim for infliction of emotional distress); Archundia v. Chase Home Fin., L.L.C., 2009 WL 1796295 (S.D. Cal. June 23, 2009) (action against assignee of predatory mortgage; "assertion of an economic interest pursued in good faith, such as debt collection pursued through reasonable means, is privileged, even if it causes emotional distress"); Jones v. Alltell Ohio L.P., 2007 WL 1731321 (N.D. Ohio June 14, 2007) (attempts to collect from identity theft victim not outrageous; creditor who did not know of theft had right to use reasonable means to collect); Garner v. Academy Collection Serv., Inc., 2005 WL 643680 (N.D. Ga. Mar. 11, 2005) (even though collector was dunning for debt not owed, "standard collection techniques" not outrageous); Lewis v. First Nat'l Bank, 645 F. Supp. 1499 (W.D. Va. 1986) (institution of criminal proceedings with probable cause not outrageous as a matter of law), *aff'd*, 818 F.2d 861 (4th Cir. 1987); Wade v. Ford Motor Credit Corp., 455 F. Supp. 147 (E.D. Mo. 1978) (no impropriety in monthly calls regarding late payments); Myles v. Screentech, Inc., 98 So. 3d 563 (Ala. Civ. App. 2012) (creditor who initiated criminal prosecution after inadequate, but good-faith, investigation simply insisted upon its legal rights in a legal way); Janossy v. Washington Mut. Bank, 2002 WL 31031636 (Cal. Ct. App. Sept. 12, 2002) (not "beyond the bounds of decency" to apply mortgage funds to taxes even though homeowners were eligible for tax deferment or to make phone calls and send form letters); Tomash v. John Deere Indus. Equip. Co., 399 N.W.2d 387 (Iowa 1987) (criminal theft charges for selling collateral not outrageous); Derouen v. Malahmeh, 61 So. 3d 693 (La. Ct. App. 2011) (vendor/mortgagee's statement that "I guess we'll just have to kick your ass out" was an "accurate, albeit colorful" description of mortgagee's rights upon default; not outrageous); Leonard v. Pioneer Fin. Co., 568 S.W.2d 937 (Mo. Ct. App. 1978) (creditor entitled to inflict some worry and concern when collecting legitimate debts); Sears & Roebuck Co. v. Swaykus, 2002 WL 31859516 (Ohio Ct. App. Dec. 11, 2002) (not outrageous to file lawsuit); Steinbock v. Ferry County Pub. Util. Dist. No. 1, 269 P.3d 275 (Wash. Ct. App. 2011) (sudden termination of utility service that was permitted by contract was within provider's rights and could not be outrageous); Jackson v. Peoples Fed. Credit Union, 604 P.2d 1025 (Wash. Ct. App. 1979) (blocking consumer's car in a parking lot was not unreasonable; car was collateral for debt). *See also* Mathis v. Omnium Worldwide, 2006 WL 1582301 (D. Or. June 4,

of the debt, remind the debtor to pay, and warn the debtor of the legal consequences of default, including a poor credit rating, if the threat is moderate in tone. A few of these cases have held contacts with the debtor's employer not unlawful,[108] but this conclusion is questionable in light of the restrictions in the Fair Debt Collection Practices Act and state debt collection statutes.

The *Restatement*'s definition of actionable conduct in this area is a very conservative one, which takes no position on how the legal standards should develop.[109] At least one court[110] has criticized the *Restatement*'s handling of the subject. The evolving standards of impermissible debt collection conduct expressed in the Fair Debt Collection Practices Act, Federal Trade Commission decisions, state statutes, and case law should be helpful in defining what conduct is so unreasonable or outrageous as to be tortious.[111]

The reasonableness of the creditor's contacts depends upon their number, their tone or manner (polite, abusive, threatening, deceptive), the extent of their injurious impact upon the consumer, and the impact the creditor intended them to cause. A single contact may be unreasonable if it is deceptive,[112] untimely, abusive, obscene, or unduly prolonged, or if the creditor knows that the debtor is represented by counsel, disputes the bill, is particularly susceptible to stress, or has requested that the contacts be stopped.[113] A series of otherwise reasonable contacts may become unreasonable if a great number are made within too short a period of time or continue over an extended period of time, injuring or oppressing the consumer.[114] Attempts to collect debts that are either disputed or not owed[115] and

2006) (attempt to collect deceased consumer's credit card debt not outrageous; one letter and six or eight phone calls over fourteen months, to consumer's former residence, occupied by consumer's widow and daughter); *In re* Jacques, 416 B.R. 63 (Bankr. E.D.N.Y. 2009) (filing proof of claim for allegedly uncollectible debt); Stockett v. Beneficial Fin. Co., 269 So. 2d 735 (Fla. Dist. Ct. App. 1972) (no cause of action against lender for making threatening telephone calls and sending letter concerning debt to accommodation maker's employer); Prather v. Providian Nat'l Bank, 2006 WL 1868335 (Ky. Ct. App. July 6, 2006) (instituting collection action, even in bad faith, not sufficient to show outrageous conduct); Lachenmaier v. First Bank Sys., Inc., 803 P.2d 614 (Mont. 1990) (not "beyond all possible bounds of decency" to exercise legal right to foreclose); Citibank v. Hauff, 668 N.W.2d 528 (S.D. 2003) (creditor had arguable, though unsuccessful, claim where debt resulted from ex-husband's unauthorized use of credit card; harassing phone calls not actionable). *But see* Smith v. AFS Acceptance, L.L.C., 77 U.C.C. Rep. Serv. 2d 794 (N.D. Ill. 2012) (legitimate objective does not give defendant "carte blanche to pursue that objective by outrageous means"; here repo men towed car with debtor inside).

108 Stockett v. Beneficial Fin. Co., 269 So. 2d 735 (Fla. Dist. Ct. App. 1972) (no cause of action against lender for sending letter concerning debt to accommodation maker's employer); Leonard v. Pioneer Fin. Co., 568 S.W.2d 937 (Mo. Ct. App. 1978) (calls and visits to debtor's employer and former employer in attempt to reach debtors not oppressive).

109 Restatement (Second) of Torts § 46 cmt. c (1965).

110 Turman v. Cent. Billing Bureau, Inc., 568 P.2d 1382, 1384 (Or. 1977) (characterizing the *Restatement* as "composed of inconsistent generalities"; rejecting its "utterly intolerable in a civilized community" standard as "exclud[ing] much conduct that to us should be classified as actionable").

111 Richards v. United Collections Bureau, 46 Conn. L. Rptr. 161 (Super. Ct. 2008) (giving weight to FDCPA violation in finding conduct outrageous; collector told consumer it would take her house and she could save it only by going to specified loan broker; consumer did and received unaffordable subprime loan). *But cf.* Hamilton v. Ford Motor Credit Co., 502 A.2d 1057 (Md. Ct. Spec. App. 1986) (no tort claim proven although creditor liable under state debt collection statute).

112 *See, e.g.*, McHugh v. Check Investors Inc., 2003 WL 21283288 (W.D. Va. May 21, 2003) (threat of arrest for bad check debt not owed caused panic in consumer with young child); Carney v. Rotkin, Schmerin & McIntyre, 254 Cal. Rptr. 478 (Cal. Ct. App. 1988) (law firm's false representation in single letter and call to seventy-four-year-old debtor that court had issued a bench warrant for her arrest sufficiently outrageous).

113 *See, e.g.*, Mitchell v. Surety Acceptance Corp., 838 F. Supp. 497 (D. Colo. 1993) (cause of action based on single telephone call stated where collector laughed at consumer's request to investigate forgery after consumer stated she was under much stress, suffered from multiple sclerosis, and was feeling like life was not worth living after continued misidentification); Fox v. Haskell, 2014 WL 1564299 (Conn. Super. Ct. Mar. 7, 2014) (single message demanding payment of debt not owed, left with workplace receptionist, was outrageous). *But see* Walker v. Asset Acceptance, L.L.C., 2012 WL 2839807 (D.N.J. July 10, 2012) (one "insulting and profane" voicemail message sufficient to allege violation of FDCPA, but not outrageous conduct).

114 Sharp v. Ally Fin., Inc., 328 F. Supp. 3d 81 (W.D.N.Y. 2018) (denying summary judgment to creditor on intentional infliction of emotional distress claim where its collection efforts may have amounted to planned campaign of harassment of consumer known to be dying of cancer); Ratcliff v. Boydell, 674 So. 2d 272 (La. Ct. App. 1996) (frivolous lawsuits over six years, sending process server to plaintiff's home and workplace even though she was represented by counsel, defendant's knowledge of plaintiff's sensitivity, and his intention to cause distress constituted extreme and outrageous conduct); Margita v. Diamond Mortg. Corp., 406 N.W.2d 268 (Mich. Ct. App. 1987) (cause of action stated by repeated abusive phone calls, letters, and threats of foreclosure even though borrowers repeatedly showed creditor they were current); Long v. Beneficial Fin. Co., 330 N.Y.S.2d 664 (N.Y. App. Div. 1972) (cause of action stated where collector regularly contacted consumer at her job, phoned her landlord, relatives, and neighbors, and visited her home, causing mental distress, heart attack, and job loss); Southwestern Bell Tel. Co. v. Wilson, 768 S.W.2d 755 (Tex. App. 1988) (upholding $2,457,789.24 award for threats by two attorneys, a constable, and a deputy to visit debtor's workplace, which induced angina, plus 500 phone calls). *But see* Kornea v. J.S.D. Mgmt., Inc., 366 F. Supp. 3d 660 (E.D. Pa. 2019) (offensive, undesirable, or annoying phone calls and letters, without more, are not so extreme as to support intentional infliction of emotional distress claim). *But cf.* Harris v. Am. Gen. Fin., Inc., 2005 WL 1593673 (D. Kan. July 6, 2005) (allegation of seventeen calls within one week insufficient; must describe content of calls); Lincoln First Bank v. Baker (*In re* Baker), 18 B.R. 243 (Bankr. W.D.N.Y. 1982) (100 phone calls, letters, intimidating visits at work, threats to call police, and suit not outrageous over two-year period where instability and diarrhea could have resulted from other troubles).

115 *See, e.g.*, McGinnis v. Am. Home Mortg. Servicing, Inc., 817 F.3d 1241 (11th Cir. 2016) (Ga. law; upholding $6000 in compensatory damages and $500,000 in emotional distress damages against servicer that "belligerently" pursued foreclosure for "relatively small sum," despite actual knowledge that it was not owed); Pleznac v. Equity Residential Mgmt., L.L.C., 320 F. Supp. 3d 99 (D.D.C. 2018) (refusing to dismiss intentional infliction of emotional distress claim alleging that landlord retaliated against tenant for disputing debts by denying services and repairs, demanding sums not owed, and otherwise harassing her); Kerfoot v. FNF Servicing, Inc., 2013 WL 5797662 (M.D. Ga. Oct. 25, 2013) (attempt to collect loan known to be fraudulent; servicer threatened foreclosure even though it knew that lender had purported to refinance a loan but never paid it off); Severson v. Chase Manhattan Mortg. Co., 2013 WL 1688026 (D. Or. Mar. 8, 2013) (allowing plaintiffs

harassment of parties other than the debtor[116] are treated with less tolerance by most courts.

The following examples of misconduct and resulting injury are illustrative of the tort of intentional infliction of emotional distress as it applies to debt collection harassment:

- Harsh words, vulgarity, threats, racial epithets, or other grossly offensive language;[117]

to go to trial on intentional infliction claim alleging vigorous dunning for alleged debt that resulted from lender's accounting errors), *adopted*, 2013 WL 1702163 (D. Or. Apr. 18, 2013); Baldin v. Wells Fargo Bank, 2013 WL 794086 (D. Or. Feb. 12, 2013) (refusing to dismiss intentional infliction claim alleging harassing calls and inaccurate credit reporting of delinquency created by mishandling of escrow and refusal of timely payments), *adopted*, 2013 WL 796712 (D. Or. Mar. 4, 2013); Alves v. Verizon, 2010 WL 2989988 (D.N.J. July 27, 2010) (defendant local phone company's persistent failure to fix equipment problem resulted in defendant long-distance company's prolonged and abusive dunning of consumer for another customer's debt); Llewellyn v. Shearson Fin. Network, Inc., 622 F. Supp. 2d 1062 (D. Colo. 2009) (refusing to dismiss claim of outrageous conduct for credit reports and initiation of foreclosure based on debt that was not owed); CitiFinancial Mortg. Co. v. Frasure, 2008 WL 2199496 (N.D. Okla. May 23, 2008) (giving weight to absence of valid debt on questions of outrageousness and severe distress), *aff'd on other grounds*, 327 Fed. Appx. 49 (10th Cir. 2009); Rivera v. Corporate Receivables, Inc., 2006 WL 2992738 (D. Conn. Oct. 20, 2006) (multiple calls, threats of jail, to co-signer on disputed debt); Holtman v. Citifinancial Mortg. Co., 2006 WL 1699589 (D. Conn. June 19, 2006) (claim stated by allegation of debt collection harassment at time when mortgage payments were current); Zito v. Leasecomm Corp., 2004 WL 2211650 (S.D.N.Y. Sept. 30, 2004) ("non-cancelable" leases for worthless commercial products); Mitchell v. Surety Acceptance Corp., 838 F. Supp. 497 (D. Colo. 1993) (plaintiff, not liable on debt incurred by identity thief, alleged defendant failed to correct libelous statements made about her, harassed, ridiculed and tormented her, and refused to verify her story with police); Bowden v. Spiegel, Inc., 216 P.2d 571 (Cal. Ct. App. 1950) (allegations of abusive collection tactics where debt not owed); Hairford v. Centurytel, Inc., 856 So. 2d 139 (La. Ct. App. 2003) (harassment of older consumer for debt not owed); Cady v. Marcella, 729 N.E.2d 1125 (Mass. App. Ct. 2000) (seizing half a modular home in January to coerce payment of a debt owed not by consumers but by contractor who was installing home); Margita v. Diamond Mortg. Corp., 406 N.W.2d 268 (Mich. Ct. App. 1987) (harassing and threatening efforts to collect mortgage payments not due); Moorhead v. J.C. Penney Co., 555 S.W.2d 713 (Tenn. 1977) (repeated attempts to collect debt not owed); Reeves v. Melton, 518 P.2d 57 (Okla. Civ. App. 1973) (creditor threatened to kill dogs of alleged debtor who had in fact paid in full); Searle v. Harrah's Entertainment, Inc., 2010 WL 3928632 (Tenn. Ct. App. Oct. 6, 2010) (creditor lied and threatened arrest to compel debtor to pay same debt twice). *See also* Bur. of Credit Control v. Scott, 345 N.E.2d 37 (Ill. App. Ct. 1976) (claim stated by allegation of abusive calls to consumer who had informed collection agency that she was on public assistance and could not pay a $220 hospital bill, and calls to her parents and her workplace). *But see* Kansas City Laser, Inc. v. MCI Telecomms. Corp., 252 Fed. Appx. 100 (8th Cir. 2007) (Mo. law; threatened loss of phone service to small business to coerce payment of debt not owed, causing physical illness to sole stockholder, not outrageous under Missouri's strict standards); Dawkins v. Sears Roebuck & Co., 109 F.3d 241 (5th Cir. 1997) (Miss. law; not outrageous to continue to report debt as delinquent after learning that debt resulted from unauthorized use of credit card); Anthony v. G.E. Capital Retail Bank, 2015 WL 10846141 (S.D.N.Y. Sept. 30, 2015) (not outrageous; after identity theft victim caused unauthorized card to be cancelled and debts removed from his credit report, card issuer, without authorization, issued new card in his name, transferred balance from fraudulent card, dunned, and reported the debts); Golden v. FNF Servicing, 2015 WL 5302703 (M.D. Ga. Sept. 10, 2015) (persistent collection attempts after being informed that loan was fraudulent not sufficiently outrageous); Smith v. Wachovia, 2009 WL 1948829 (N.D. Cal. July 6, 2009) (wrongful initiation of non-judicial foreclosure not outrageous); Jones v. Alltell Ohio L.P., 2007 WL 1731321 (N.D. Ohio June 14, 2007) (attempts to collect from identity theft victim not outrageous; creditor who did not know of theft had right to use reasonable means to collect); Garner v. Academy Collection Serv., Inc., 2005 WL 643680 (N.D. Ga. Mar. 11, 2005) (even though collector was dunning for debt not owed, "standard collection techniques" not outrageous); Moore v. Beneficial Nat'l Bank USA, 876 F. Supp. 1247, 1261–1262 (M.D. Ala. 1995) (false report to credit agency not sufficiently outrageous); Peasley v. Telecheck, Inc., 637 P.2d 437 (Kan. Ct. App. 1981) (maintaining debtor's name on bad check list long after it knew no bad checks written and threatening to keep name there to force payment of disputed bill was not "extreme and outrageous"); Beecy v. Pucciarelli, 441 N.E.2d 1035 (Mass. 1982) (not actionable to file collection suit after consumer informed law firm that she was not the debtor, nor to fail to dismiss suit immediately after being told a second time). *Cf.* Harper Cos. v. Scott, Royce, Harris, Bryan, Barra & Jorgenson, P.A., 656 So. 2d 627 (Fla. Dist. Ct. App. 1995) (judgment creditor told sheriff to levy on property, the stock of a consignment shop, that creditor knew did not belong to judgment debtor; not sufficiently outrageous); Taylor v. Gelfand, 505 S.E.2d 222 (Ga. Ct. App. 1998) (freezing of bank account because of creditor's lawyer's apparently good-faith belief that debtor owed $1200 rather than $80).

116 *See, e.g.*, Amelina v. Manufacturers & Traders Trust Co., 2016 WL 3982483 (S.D. Cal. July 21, 2016) (denying motion to dismiss intentional infliction of emotional distress claim against property service that attempted to force entry and made threats which terrified debtor's children, who were home in care of older sibling); Gordon v. Bank of N.Y. Mellon Corp., 964 F. Supp. 2d 937 (N.D. Ind. 2013) (refusing to dismiss intentional infliction claim against lender that caused property service to break into wrong person's home, steal personal property, and leave the house open to vandals); Hamlett v. Santander Consumer, USA, Inc., 931 F. Supp. 2d 451 (E.D.N.Y. 2013) (refusing to dismiss intentional infliction claim alleging numerous calls, with threats of criminal prosecution, to cell phone of debtor's non-debtor family member, who was known to suffer from mental disabilities); Valero v. Bryant, LaFayette & Assoc., 2011 WL 1438436 (E.D. Cal. Apr. 14, 2011) (calls to family members; collector "yelled at" debtor's seriously ill non-debtor father); Blue v. Johnson & Migliaccio, 2010 WL 4641666 (D. Or. Nov. 4, 2010) (call to terminally ill non-debtor father); Herman v. Nat'l Enter. Sys., Inc., 2009 WL 1874202 (W.D.N.Y. June 29, 2009) (five months of abusive phone calls to debtor-soldier's non-debtor mother while debtor was fighting in Iraq; false threats of criminal prosecution); Hicks v. Cadle Co., 2008 WL 2900934 (D. Colo. July 23, 2008) (confirming arbitrator's award of damages for harassment, lawsuit, and false accusations of crime directed at person not liable on debt), *rev'd in part on other grounds*, 355 Fed. Appx. 186 (10th Cir. 2009); Pulver v. Avco Fin. Serv., 227 Cal. Rptr. 491 (Cal. Ct. App. 1986) (creditor harassed and threatened sister of debtor, knowing sister not liable for debt); George v. Jordan Marsh Co., 268 N.E.2d 915 (Mass. 1971) (harassment of debtor's mother is actionable); Bennet v. City Nat'l Bank & Trust Co., 549 P.2d 393 (Okla. Civ. App. 1975) (creditor threatened to ruin debtor's mother's credit). *But see* Bast v. Ford Motor Credit Corp., 631 F.2d 508 (7th Cir. 1980) (Ill. law; creditor did not act outrageously by insulting debtor's non-debtor parents and calling hospitalized seriously ill parent); Guest v. Provident Funding Ass'n, 2013 WL 1003524 (S.D. Ohio Mar. 13, 2013) (very persistent attempts, including lawsuits and credit reporting, to collect from non-debtor not outrageous). *See generally* Allan E. Korpela, Annotation, *Recovery for Emotional Distress or its Physical Consequences Caused by Attempts to Collect Debt Owed by Third Party*, 46 A.L.R.3d 772 (1972).

117 Moore v. Greene, 431 F.2d 584 (9th Cir. 1970) (Cal. law; barrage of offensive and insulting remarks); Symonds v. Mercury Sav. & Loan

- Impersonation[118] and other deception;[119]
- Abusive contacts with third parties that humiliate the debtor;[120]

Ass'n, 275 Cal. Rptr. 871 (Cal. Ct. App. 1990) (daily threatening calls to older, financially precarious consumer to collect overdrafts that may have resulted from bank's negligence); Chedester v. Stecker, 643 P.2d 532 (Haw. 1982) (jury question where homeowners' association called resident a freeloader, threatened to cut off his water supply, and falsely claimed he had never paid a membership fee); Barnett v. Collection Serv. Co., 242 N.W. 25 (Iowa 1932) (upholding jury verdict based on coarse, disparaging letters threatening suit over a $28.75 fuel bill and threat to consumer's employment); Venes v. Prof'l Serv. Bureau, Inc., 353 N.W.2d 671 (Minn. Ct. App. 1984) (collection agency's abusive calls, warning to debtor to "stay out of Minnesota if you know what's good for you and your family," and attempting to collect interest not owed, satisfied elements of intentional infliction of emotional distress); Callarama v. Assoc. Discount Corp., 329 N.Y.S.2d 711 (N.Y. Sup. Ct. 1972) (threatening, harassing, and obscene statements that caused heart attack and severe mental distress were actionable); Crews v. Provident Fin. Co., 157 S.E.2d 381 (N.C. 1967) (jury question where collector visited older consumer's home and used harsh words, vulgarity, and threats even though she had brought her account current); Turman v. Cent. Billing Bureau, 568 P.2d 1382 (Or. 1977) (upholding verdict against collector that threatened blind debtor with loss of job and home due to $46 debt, swore at her, and called her "scum" and "deadbeat"; plaintiff hospitalized for anxiety and stress); Mauri v. Smith, 901 P.2d 247 (Or. Ct. App. 1995) (upholding verdict against process server who intruded into home and flung racist insults at debtor and debtor's parents, and against police officers who allowed him to enter and stood by during his abuse), *aff'd in part, rev'd in part on other grounds*, 929 P.2d 307 (Or. 1996). *See also* Cadle Co. v. Hobbs, 673 So. 2d 1363 (La. Ct. App. 1996) (grossly offensive calls to plaintiff's workplace, including threats and racial epithets, is actionable as tort of "unreasonable tactics" in debt collection, which includes elements of invasion of privacy and infliction of emotional distress). *But see* Walker v. Asset Acceptance, L.L.C., 2012 WL 2839807 (D.N.J. July 10, 2012) (one "insulting and profane" voicemail message sufficient to allege violation of FDCPA, but not outrageous conduct); Woods v. Seeger, Ross & Aguirre, L.L.C., 2012 WL 1811628 (S.D.N.Y. May 18, 2012) (calls with false threat and third-party contacts sufficient to support FDCPA violation but not outrageous conduct); Murungi v. Texas Guaranteed, 693 F. Supp. 2d 597 (E.D. La. 2010) ("obnoxious" calls to workplace not outrageous), *aff'd*, 2010 WL 3736227 (5th Cir. Sept. 16, 2010); Book v. Mortg. Elec. Registration Sys., 608 F. Supp. 2d 277 (D. Conn. 2009) ("distressing or hurtful" and arguably threatening communications by purchaser at foreclosure sale to former owner did not exceed "all bounds tolerated by decent society"); Costa v. Nat'l Action Fin. Serv., 634 F. Supp. 2d 1069 (E.D. Cal. 2007) (denying claim where collector was gratuitously rude, but consumer, who was trying to find out how to contact collector's boss to complain, initiated some of the calls); Jolly v. Academy Collection Serv., 400 F. Supp. 2d 851, 866–867 (M.D.N.C. 2005) (several calls to debtor at work, including cursing and belittling language, not outrageous); Green Tree Acceptance, Inc. v. Standridge, 565 So. 2d 38 (Ala. 1990) (threatening, abusive, and insulting language and wrongful threat to repossess manufactured home insufficiently outrageous); Midas Muffler Shop v. Ellison, 650 P.2d 496 (Ariz. Ct. App. 1982) (calling consumers who had fully paid their debt "lying thieves or sponges," threatening to "sue your asses," and sending six letters in three months not outrageous); Cook v. Covington Credit of Ga., Inc., 660 S.E.2d 855 (Ga. Ct. App. 2008) (threatening language and racial epithet during workplace confrontation with debtor who could not be reached by phone insufficient); Smith v. Standard Oil, 567 S.W.2d 412 (Mo. Ct. App. 1978) (collection calls and inoffensive collection letters not outrageous, even though one call contained two "hells" and a "damn"); Breeden v. League Serv. Corp., 575 P.2d 1375 (Okla. 1978) (collection efforts that included cursing at debtor and calling her liar and deadbeat not outrageous).

118 *See, e.g.*, Hartung v. J.D. Byrider, Inc., 2009 WL 1876690 (E.D. Cal. June 26, 2009) (creditor misrepresented self as debtor's father to gain access to debtor's T-Mobile account, obtained personal information, and transmitted abusive phone calls and text messages to debtor); Harrington v. CACV of Colo., L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007) (knowingly lying to court to obtain default judgment would be outrageous); Fleming-Dudley v. Legal Investigations, Inc., 2007 WL 952026 (N.D. Ill. Mar. 22, 2007) (impersonating a law enforcement officer is outrageous); Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. Dist. Ct. App. 1979) (allegations that collector, posing as nurse, called consumer's mother, falsely stated that consumer's children had been in a serious accident, and requested consumer's current addresses stated claim); Mauri v. Smith, 901 P.2d 247 (Or. Ct. App. 1995) (citing process server's misrepresentation of himself as police officer as factor in upholding verdict), *aff'd in part, rev'd in part on other grounds*, 929 P.2d 307 (Or. 1996). *But see* Hutchens v. West Asset Mgmt., Inc., 2013 WL 1337178 (S.D. W. Va. Mar. 29, 2013) (falsely claiming to be sheriff's officer, and false threats of arrest, in effort to collect debt that had already been settled, not outrageous). *But cf.* Colton v. Ford Motor Credit Co., 1986 WL 8538 (Ohio Ct. App. July 30, 1986) (creditor who impersonated doctor and told consumer that consumer's son was admitted seriously injured to a hospital was not liable as the ruse to locate car did not cause serious emotional distress).

119 Valero v. Bryant, LaFayette & Assoc., 2011 WL 1438436 (E.D. Cal. Apr. 14, 2011) (collector claimed to have file of debtor's personal information, which it would sell at auction in twenty-four hours); Perk v. Worden, 475 F. Supp. 2d 565 (E.D. Va. 2007) (counsel allegedly lied to consumers about change of court date, then appeared on scheduled date and got default judgment); Miniscalco v. Gordon, 916 F. Supp. 478 (E.D. Pa. 1996) (allegations that constable altered court document in order to seize personal rather than corporate property).

120 Woltring v. Specialized Loan Serv., L.L.C., 56 F. Supp. 3d 947 (E.D. Wis. 2014) (loudly disclosing impending foreclosure in presence of homeowners' son's wedding party); Herman v. Nat'l Enter. Sys., Inc., 2009 WL 1874202 (W.D.N.Y. June 29, 2009) (five months of abusive phone calls to debtor-soldier's non-debtor mother while debtor was fighting in Iraq; false threats of criminal prosecution; unauthorized debits from checking account); North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111 (D. Mass. 2007) (pattern of conduct toward third parties intended to drive victim out of business is outrageous conduct); Zito v. Leasecomm Corp., 2004 WL 2211650 (S.D.N.Y. Sept. 30, 2004) (false threats of jail, contact with parents and spouses, infiltration of websites with misleading messages and personal attacks); Black v. Aegis Consumer Funding Group, Inc., 2001 WL 228062 (S.D. Ala. Feb. 8, 2001) (campaign of harassment that included telling six-year-old his mommy was going to jail, scaring teenage babysitter with threat to break into garage, and calling consumer's parents and threatening to put lien on their home); Bowden v. Spiegel, Inc., 216 P.2d 571 (Cal. Ct. App. 1950) (threatening phone call at 11:00 p.m. about disputed debt to debtor's neighbor, causing debtor to be called to that house and humiliated before others, resulting in extended illness); Duty v. Gen. Fin. Co., 273 S.W.2d 64 (Tex. 1954); United Fin. & Thrift Corp. v. Bain, 393 S.W.2d 429 (Tex. App. 1965) (calls to neighbors and other abuses). *But see* Rolle v. Law Office of Samuel Streeter, 2010 WL 729022 (D. Ariz. Mar. 2, 2010) (denying claim against collector who contacted debtor's commanding officer, resulting in loss of security clearance and permanent damage to military career); Flamm v. Sarner & Assoc., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (collector's conduct "odious" but not outrageous; made scene at consumer's workplace and told employer consumer was a thief). *But cf.* Meyer v. Nat'l Farmers Union Prop. & Cas. Co., 957 F. Supp. 1492 (D. Wyo. 1997) (commenting truthfully, during call audible

- Unjustified criminal prosecution, or false threats of criminal prosecution;[121]
- Threats to unlawfully freeze, seize, or garnish essential funds;[122]
- Excessively repeated collection calls;[123]

to others, that person owed a debt perhaps "boorish" but not outrageous), *aff'd*, 162 F.3d 1264 (10th Cir. 1998).

121 Hamlett v. Santander Consumer, USA, Inc., 931 F. Supp. 2d 451 (E.D.N.Y. Mar. 19, 2013) (numerous calls, with threats of criminal prosecution); Hicks v. Cadle Co., 2008 WL 2900934 (D. Colo. July 23, 2008) (harassment, lawsuit, and false accusations of crime directed at person not liable on debt), *rev'd in part on other grounds*, 355 Fed. Appx. 186 (10th Cir. 2009); Robertson v. Horton Bros. Recovery, Inc., 2007 WL 2009703 (D. Del. July 3, 2007) (early morning confrontation at consumer's home, false threats of arrest, numerous rude phone calls, harassment of consumer and co-workers at work); Rivera v. Corporate Receivables, Inc., 2006 WL 2992738 (D. Conn. Oct. 20, 2006) (multiple calls, threats of jail, to co-signer on disputed debt); Zito v. Leasecomm Corp., 2004 WL 2211650 (S.D.N.Y. Sept. 30, 2004) (false threats of jail and other abuses); Caputo v. Prof'l Recovery Serv., 261 F. Supp. 2d 1249 (D. Kan. 2003) (false threats of arrest and property seizure directed to consumer known to be disabled veteran); McHugh v. Check Investors Inc., 2003 WL 21283288 (W.D. Va. May 21, 2003) (threat of arrest for bad check debt not owed caused panic in consumer with young child); Black v. Aegis Consumer Funding Group, Inc., 2001 WL 228062 (S.D. Ala. Feb. 8, 2001) (campaign of harassment that included telling a six-year-old his mommy was going to jail); Fleming v. U-Haul, Inc., 541 S.E.2d 75 (Ga. Ct. App. 2000) (reversing summary judgment for defendant truck rental company that prosecuted consumer for theft where consumer made repeated calls for road service after rented truck broke down, and abandoned it only after waiting nearly two hours); Ariguzo v. K-mart Corp., 1999 WL 775777 (Ohio Ct. App. Sept. 30, 1999) (affirming compensatory and punitive damage awards on intentional infliction and other tort claims; after being shown receipt for goods consumer intended to exchange, store personnel forced her into office, dumped out her purse, and sent theft report to collection agency which sent her harassing letters); Searle v. Harrah's Entertainment, Inc., 2010 WL 3928632 (Tenn. Ct. App. Oct. 6, 2010) (affirming judgment where creditor threatened bad check prosecution on check that had already cleared); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (affirming $5 million actual damage award for suing older, non-English speaking identity theft victim and telling her that she would be sent to jail), *vacated on other grounds*, 2003 Tex. LEXIS 50 (Tex. Apr. 24, 2003) (vacating decision pursuant to parties' settlement). *But see* MacDermid v. Discover Fin. Serv., 342 Fed. Appx. 138 (6th Cir. 2009) (Tenn. law; threats of criminal prosecution not outrageous where consumer's conduct fit description of a crime); Gibson v. Rosenthal, Stein & Assoc., 2013 WL 3367255 (N.D. Ga. July 3, 2013) (threats of jail, in effort to collect debt not owed, not outrageous); Hutchens v. West Asset Mgmt., Inc., 2013 WL 1337178 (S.D. W. Va. Mar. 29, 2013) (falsely claiming to be sheriff's officer, and false threats of arrest, in effort to collect debt that had already been settled, not outrageous); Latimore v. Gateway Retrieval, L.L.C., 2013 WL 791258 (N.D. Ga. Feb. 1, 2013) (false threats of arrest in calls seeking to collect payday loan were not sufficiently outrageous), *adopted*, 2013 WL 791308 (N.D. Ga. Mar. 4, 2013); Daviscourt v. Columbia State Bank, 2008 WL 113899 (D. Colo. Jan. 9, 2008) (obtaining bench warrant for failure to appear at debtor's examination when consumers about to file bankruptcy not outrageous under strict Colorado standard); Leavitt v. Bank of Cairo & Moberly, 2006 WL 1479502 (E.D. Mo. May 23, 2006) (bank officers called on consumer at home and demanded that she replace funds so that law enforcement would not become involved; not outrageous where they did not know of her unusual vulnerability and their conduct was not intended solely to cause emotional distress); Harrison v. McMahon, 2004 WL 1171391 (D. Conn. May 24, 2004) (having debtor arrested on unfounded bad check charge insufficient); Silver v. Sears, Roebuck & Co., 2000 WL 33682675 (E.D.N.C. July 31, 2000) (creditor's failure to inform court that insufficient funds check had been paid, resulting in arrest and night in jail, was insufficient); Ross v. Creel Printing & Publ'g Co., 122 Cal. Rptr. 2d 787 (Cal. Ct. App. 2002) (threat of criminal prosecution over insufficient funds check; violation of attorney disciplinary rule not sufficient to show outrageous conduct); Cornelius v. Auto Analyst, Inc., 476 S.E.2d 9 (Ga. Ct. App. 1996) (one letter in which collector threatened arrest of debtor not outrageous); Am. Credit Card Processing Co. v. Fairchild, 810 N.Y.S.2d 874 (N.Y. Sup. Ct. 2006) (false threats of arrest and "rash, crude, callous, unprofessional and improper" language in attempt to collect commercial debt not outrageous); Burton v. NCNB Nat'l Bank, 355 S.E.2d 800 (N.C. Ct. App. 1987) (lawyer's letter considering criminal prosecution for false financial statement not outrageous). *But cf.* Lewis v. First Nat'l Bank, 645 F. Supp. 1499 (W.D. Va. 1986) (institution of criminal proceedings with probable cause not outrageous as a matter of law), *aff'd*, 818 F.2d 861 (4th Cir. 1987).

122 Strom v. Nat'l Enter. Sys., 2011 WL 1233118 (W.D.N.Y. Mar. 30, 2011) (threat to freeze exempt SSDI funds, debtor's only source of income, after being told debtor suffered from brain cancer and could not work). *See also* Jiagbogu v. Bank of Am., 2016 WL 7626429 (C.D. Cal. 2016) (erroneously freezing account, then refusing to release limited sum for medical expenses of consumer known to be seriously ill; finding allegations of wrongful conduct sufficient, but requiring more specific allegations of extreme emotional distress).

123 Hamlett v. Santander Consumer, USA, Inc., 931 F. Supp. 2d 451 (E.D.N.Y. 2013) (numerous calls, with threats of criminal prosecution, to debtor and to cell phone of debtor's non-debtor family member, who was known to suffer from mental disabilities); Elkins v. Diversified Collection Serv., Inc., 2013 WL 3754830 (S.D. W. Va. July 15, 2013) (telephone harassment of represented consumer, and filing of false 1099 resulting in government debt collection attempts, were outrageous); Bohannon-Hingston v. Brachfield Law Group, 2011 WL 6211756 (E.D. Cal. Dec. 14, 2011) (allowing intentional infliction of emotional distress claim based on repeated collection calls to workplace, including call to manager in which creditor disclosed debtor's personal information, to go to trial); Prephan v. NCO Fin. Sys., 2011 WL 2579817 (N.D. Ohio June 29, 2011) (daily phone calls; collector refused requests to verify disputed debt or cease contact); Chaconas v. JP Morgan Chase Bank, 713 F. Supp. 2d 1180 (S.D. Cal. 2010) (300 calls to older consumers, after receipt of cease contact demand and contact information for lawyer, plus third-party contacts); Herman v. Nat'l Enter. Sys., Inc., 2009 WL 1874202 (W.D.N.Y. June 29, 2009) (five months of abusive phone calls to debtor-soldier's non-debtor mother while debtor was fighting in Iraq; false threats of criminal prosecution; unauthorized debits from checking account); Black v. Aegis Consumer Funding Group, Inc., 2001 WL 228062 (S.D. Ala. Feb. 8, 2001) (campaign of harassment that included threatening calls at all hours, continuing after consumer was hospitalized for depression and anxiety); Meads v. Citicorp Credit Serv., Inc., 686 F. Supp. 330 (S.D. Ga. 1988) (phone calls more than once a week over four-month period, even after debtor informed collector of medical problems); Rugg v. McCarty, 476 P.2d 753 (Colo. 1970) (claim stated; repeated calls and letters about $45 debt and letter to employer about garnishment despite lack of judgment); Hairford v. Centurytel, Inc., 856 So. 2d 139 (La. Ct. App. 2003) (persistent dunning of older consumer for debt not owed, refusal to cooperate in efforts to correct situation, threat to cut off phone service, and attempt to draft bank account); Duty v. Gen. Fin. Co., 273 S.W.2d 64 (Tex. 1954) (collector's threats of job loss and credit blacklisting, harassment by phone at home and at work, phone calls to consumer's friends, relatives, and employers, late night telegrams, letters, and insults); United Fin. & Thrift Corp. v. Bain, 393 S.W.2d 429 (Tex. App. 1965) (daily phone calls and visits, some at early or late hours, trespass, harsh language, threats of repossession, and calls to neighbors). *But see* Ferrell v. Santander Consumer USA, Inc., 859 F. Supp. 2d 812 (S.D. W. Va. 2012) (large number of calls not

- Stalking, physical threats, and other acts likely to put the debtor or others in fear of physical injury or property damage;[124] and
- Accessing or disclosing confidential information.[125]

Non-verbal actions[126] such as breaking into a home[127] or wrongful repossession[128] can also be the basis for a claim.

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sufficient, must show calls at inappropriate hours, or inappropriate language); Blackburn v. Consumer Portfolio Serv., Inc., 2012 WL 2089514 (S.D. W. Va. June 8, 2012) (high volume of calls, sufficient to support state debt collection act claim, not sufficient for intentional infliction of emotional distress; must allege calls at inappropriate hours, or abusive or threatening language); Combs v. NCO Fin. Sys., 2011 WL 1288686 (E.D. Pa. Apr. 5, 2011) (multiple daily calls after debtor's wife informed collector debtor was terminally ill, continuing after widow informed collector of his death, not "ultra-extreme" enough to meet predicted Pennsylvania standard), *order entered by* 2011 WL 1288699 (E.D. Pa. Apr. 5, 2011); Lyon v. Chase Bank USA, 2009 WL 2170518 (D. Or. Apr. 27, 2009) (collection calls in violation of state statute, false credit report, stonewalling of consumer's efforts to resolve billing dispute not outrageous), *later decision reversed on other grounds*, 656 F.3d 877 (9th Cir. 2011) (reversing denial of claim under state debt collection statute and refusal to award actual damages and other relief on FCBA claim); Reno v. Supportkids, Inc., 2004 WL 828150 (D. Minn. Apr. 13, 2004) (private child support collector's numerous dunning calls, including threat of arrest, and placement of lien for grossly exaggerated sum on home of ex-husband and his current wife insufficient); Basnight v. Diamond Developers, 146 F. Supp. 2d 754 (M.D.N.C. 2001) (phone calls in unfriendly tone on Sunday, after being informed consumer observed the Sabbath, insufficient); Pub. Fin. Corp. v. Davis, 360 N.E.2d 765 (Ill. 1976) (repeated phone calls and visits to consumer who informed creditor she was on public assistance, unable to pay, and in vulnerable health, inducing her to write check on promise it would not be processed and then telling acquaintance she wrote bad check, and phoning her at hospital where she was visiting her sick daughter not outrageous); Hamilton v. Ford Motor Credit Co., 502 A.2d 1057 (Md. Ct. Spec. App. 1986) (persistent calls threatening debtor with lawsuit, bad credit record, and attachment of property offensive but not outrageous); Citibank v. Hauff, 668 N.W.2d 528 (S.D. 2003) (series of harassing but not obscene phone calls in effort to collect debt not owed were mere indignities). *But see* Kornea v. J.S.D. Mgmt., Inc., 366 F. Supp. 3d 660 (E.D. Pa. 2019) (offensive, undesirable, or annoying phone calls and letters, without more, are not so extreme as to support intentional infliction of emotional distress claim). *But cf.* Weiss v. Collection Ctr., Inc., 667 N.W.2d 567 (N.D. 2003) (one call and four letters, one of which contained implied threat to seize car for $255 medical bill, not outrageous).

124 Amelina v. Manufacturers & Traders Trust Co., 2016 WL 3982483 (S.D. Cal. July 21, 2016) (property service attempted to force entry and made threats which terrified debtor's children, who were home in care of older sibling); Brown v. Bosniak, 2003 WL 21209460 (N.D. Tex. May 19, 2003) (threat of death or grievous injury—"I have people that can take care of you, and they will"—is outrageous conduct, but severe distress not shown); Bates v. Big State Indus. Supply, 1999 WL 1009206 (D. Or. Oct. 14, 1999), *later op. at* 1999 U.S. Dist. LEXIS 17246 (D. Or. Nov. 2, 1999) (sixty phone calls, obscene language, and threats to harm debtor's baby); Reeves v. Melton, 518 P.2d 57 (Okla. Civ. App. 1973) (creditor threatened to kill dogs of alleged debtor who had in fact paid in full); Lawrence v. Stanford, 655 S.W.2d 927 (Tenn. 1983) (alleged threat to kill children's dog unless mother paid veterinarian's bill). *But see* Bob Blake Builders, Inc. v. Gramling, 18 P.3d 859 (Colo. App. 2001) (in telephone dispute over contract for installation of modular home, builder made momentary and quickly retracted threat to rip down house). *But cf.* McGinity v. Tracphone Wireless, Inc., 5 F. Supp. 3d 1337 (M.D. Fla. 2014) (demand for money, backed up by death threats, not sufficient where person making threats appeared to be outside the country).

125 Gaylor v. Hobdy, 2003 WL 23024802 (Cal. Ct. App. Dec. 30, 2003) (reversing dismissal of intentional infliction claims against attorney who disclosed privileged information in course of lawsuit over fees). *Cf.* Wiggins v. Waltz, 1999 WL 777859 (Ohio Ct. App. Sept. 30, 1999) (psychiatrist falsely told former patient that he had lost his notes at a copy shop near the school where she worked, knowing patient was very concerned about confidentiality; conduct was outrageous, but severe distress not shown). *But see* Conboy v. AT&T Corp., 241 F.3d 242 (2d Cir. 2001) (N.Y. law; phone company provided confidential customer information to credit card issuer that handled former AT&T credit cards, which used this information to harass non-debtor consumers in effort to locate their adult daughter-in-law; not outrageous); Jones v. Commerce Bancorp, 2006 WL 1409492 (S.D.N.Y. May 23, 2006), *later decision at* 2006 WL 2642153 (S.D.N.Y. Sept. 15, 2006) (bank's alleged failure to safeguard personal identifying information not outrageous); Franklin Collection Agency v. Kyle, 955 So. 2d 284 (Miss. 2007) (disclosure of private medical information, beyond what was necessary to support open account claim, not outrageous).

126 *See, e.g.*, Wilkinson v. United States, 2007 WL 3544062 (D.N.D. Nov. 9, 2007) (Bureau of Indian Affairs leased out Indian farmers' land, in egregious violation of law, after farmers defaulted on Farm Service loan), *rev'd in part on other grounds*, 564 F.3d 927 (8th Cir. 2009). *See also* Fredette v. Allied Van Lines, 66 F.3d 369 (1st Cir. 1995) (delays in transporting manufactured home and installing it on site, and withholding of personal property due to dispute about storage charges, supported intentional infliction claim, although just barely; severe distress shown where plaintiff lost job due to depression).

127 Day v. Wilmington Savs. Fund Soc., 2018 WL 4469326 (M.D. Pa. Sept. 18, 2018) (refusing to dismiss intentional infliction of emotional distress claim against mortgage servicer's property preservation company that broke into plaintiff's home, locked her out, and damaged her personal property); Amelina v. Manufacturers & Traders Trust Co., 2016 WL 3982483 (S.D. Cal. July 21, 2016) (property service attempted to force entry and made threats which terrified debtor's children, who were home in care of older sibling); Gordon v. Bank of New York Mellon Corp., 964 F. Supp. 2d 937 (N.D. Ind. 2013) (refusing to dismiss intentional infliction claim against lender that caused property service to break into wrong home, steal personal property, and leave the house open to vandals); Flippin v. Aurora Bank, 2012 WL 3260449 (N.D. Ill. Aug. 8, 2012) (refusing to dismiss intentional infliction claim against lender's property service that entered obviously-occupied property, changed locks, turned off water, and removed valuable property at a time when no order of possession had been entered); Obi v. Chase Home Fin., 2010 WL 4810609 (N.D. Ill. Nov. 19 2010) (denying motion to dismiss intentional infliction claim against lender that caused property service to break into condo, seize tenant's property, and lock out tenant); Johnson v. Rent-a-Center East, Inc., 2007 WL 2493101 (W.D. Okla. Aug. 29, 2007) (breaking into home to repossess refrigerator). *See also* Rheuport v. Ferguson, 819 F.2d 1459 (8th Cir. 1987) (Iowa law; manufactured home park and constable's removal of tenant's belongings to an unsafe place, cutting telephone wires, shouting insults was outrageous); Matthews v. Homecoming Fin. Network, 2005 WL 2387688 (N.D. Ill. Sept. 26, 2005) (foreclosing creditor locked out consumers before date set by foreclosure order and refused to allow them to retrieve personal property). *But see* Steed v. Fed. Nat'l Mortg. Co., 689 S.E.2d 843 (Ga. Ct. App. 2009) (after foreclosure, but while eviction action was on appeal, someone entered house, "snooped around" and changed locks; consumers were able to reenter same day; not outrageous); Fusaro v. First Family Mortg. Corp., 897 P.2d 123 (Kan. 1995) (mortgage holder sent contractor to winterize house it was foreclosing on; contractor threw out bags containing cherished personal possessions, allegedly thinking they were trash, resulting in a worsening of a preexisting mental condition; not outrageous).

128 *See* National Consumer Law Center, Repossessions § 13.6.6 (9th ed. 2017), *updated at* www.nclc.org/library.

Many tort claims have been asserted in cases arising from the mishandling and foreclosure of subprime home mortgages. Courts have allowed intentional infliction of emotional distress claims to proceed where the facts were particularly outrageous.[129] However, many courts have dismissed intentional infliction of emotional distress claims at an early stage,[130] and

129 *See, e.g.*, McGinnis v. Am. Home Mortg. Servicing, Inc., 817 F.3d 1241 (11th Cir. 2016) (Ga. law; upholding intentional infliction of emotional distress verdict against servicer that "belligerently" pursued foreclosure for "relatively small sum," despite actual knowledge that debt was not owed); Ryan-Beedy v. Bank of N.Y. Mellon, 263 F. Supp. 3d 1101 (E.D. Cal. 2018) (wrongful foreclosure will support a claim; shown here if consumer was persuaded to dismiss Chapter 13 bankruptcy by false promises of loan modification); Edgerton v. Nationstar Mortg., L.L.C., 2018 WL 7680610 (E.D. Mich. Dec. 31, 2018) (denying motion to dismiss intentional infliction of emotional distress claim; finding servicer's mishandling of loan modification attempt sufficiently severe), *adopted*, 2019 WL 1011108 (E.D. Mich. Mar. 4, 2019); Galima v. Ass'n of Apartment Owners of Palm Court, 2018 WL 6841818 (D. Haw. Dec. 31, 2018) (egregious mishandling of condo association lien foreclosure, while owner, an active duty servicemember, was known to be deployed on a ship); Amelina v. Manufacturers & Traders Trust Co., 2016 WL 3982483 (S.D. Cal. July 21, 2016) (property service attempted to force entry and made threats which terrified debtor's children, who were home in care of older sibling); Buttermore v. Loans, 2016 WL 308875 (W.D. Pa. Jan. 25, 2016) (repeated foreclosures when consumer known not to be in default are outrageous); Woltring v. Specialized Loan Serv., L.L.C., 56 F. Supp. 3d 947 (E.D. Wis. 2014) (stonewalling attempts to pay off mortgage, then loudly announcing foreclosure in presence of homeowners' son's wedding party); Howard v. CitiMortgage, Inc., 2014 WL 6802550 (S.D. Miss. Dec. 14, 2014) (must show "intentional bad faith conduct"; egregious mishandling of mortgage servicing, continuing after servicer knew of errors, was sufficient to state intentional infliction of emotional distress claim); Lucero v. Cenlar, 2014 WL 4925489 (W.D. Wash. Sept. 30, 2014) (servicer, apparently in retaliation for a lawsuit, "turned a routine mortgage case into a vendetta," by demanding wildly varying payments, sometimes three times the usual payment; reasonable jury could find this to be beyond the bounds of decency), *as amended by* 2014 WL 1202660 (W.D. Wash. Oct. 3, 2014), *later decision*, 2015 WL 5014047 (W.D. Wash. Aug. 25, 2015) (denying defendant's motion for summary judgment on claims of intentional infliction of emotional distress and breach of covenant of good faith and fair dealing); Reed v. BAC Home Loans Servicing, L.L.C., 2012 WL 1579340 (W.D. Mich. May 4, 2012) (intentional infliction of emotional distress will rarely lie in a mortgage situation, but this egregious mishandling of loan modification attempt could be outrageous enough); Rey v. Countrywide Home Loans, Inc., 2012 WL 253137 (D. Haw. Jan. 26, 2012) (foreclosure or denial of loan modification resulting in foreclosure is usually not outrageous, but claim stated by allegations of failure to credit timely payments, refusal to provide information needed to seek workout, false statement that lender would not foreclose, wrongful foreclosure); Smith v. J.P. Morgan Chase Bank, 2011 WL 5373969 (D. Nev. Nov. 4 2011) (refusing to dismiss wrongful death and intentional and negligent infliction of emotional distress claims; debtor-husband committed suicide while lender was egregiously mishandling loan modification, harassing borrowers, and bringing arguably wrongful foreclosure); Bonilla v. America's Servicing Co., 2011 WL 3882280 (S.D. Tex. Sept. 2, 2011) (real estate broker ordered family to leave home by certain date and told children the family would have to pack up and move, at time when foreclosure sale had been cancelled because a TRO was in effect); Stone v. Washington Mut. Bank, 2011 WL 3678838 (N.D. Ill. Aug. 19, 2011) (allegation that defendant filed fraudulent foreclosure actions sufficient to allege outrageous conduct); Matthews v. Homecomings Fin. Network, 2005 WL 2387688 (N.D. Ill. Sept. 26, 2005) (family locked out of home before date set by foreclosure order); Ragland v. U.S. Bank, 147 Cal. Rptr. 3d 41 (Cal. Ct. App. 2012) (wrongful foreclosure would support intentional infliction of emotional distress claim); Reynolds v. CB & T, 805 S.E.2d 472 (Ga. Ct. App. 2017) (intentional wrongful foreclosure will support claim; shown here if bank's false promises to convert construction loan to long-term mortgage induced consumer to spend own money to complete construction, enabling bank to foreclose on finished home instead of construction site); Mbigi v. Wells Fargo Home Mortg., 785 S.E.2d 8 (Ga. Ct. App. 2016) (intentional wrongful foreclosure can support claim; here, servicer "engineered" default by falsely telling borrower it could not accept payments while modification was in progress and sending notices to address known to be wrong). *See also* Galima v. Ass'n of Apt. Owners of Palm Court, 2017 WL 1240181 (D. Haw. Mar. 30, 2017) (foreclosure usually does not support intentional infliction of emotional distress claim, but egregious conduct sufficiently alleged when, at time of foreclosure, short sale was nearing completion, and borrowers had offered reasonable payment plan that would pay off arrearage); Falcy v. CitiMortgage, Inc., 2014 WL 2702651 (D. Or. June 13, 2014) (denying motion to dismiss intentional infliction of emotional distress claim; after deed in lieu of foreclosure, lender released borrower from further liability, then continued collection efforts and reporting of debt even after counsel drew its attention to the release); Ying Chang v. Citimortgage, Inc., 2013 WL 5939985 (D. Or. Nov. 2, 2013) (after denying loan modification application, lender placed borrower in modification that required higher monthly payments and began withdrawing them from bank account; when borrower cancelled automatic withdrawals, lender refused payments in original amount and began vigorous collection efforts).

130 *See, e.g.*, Dowers v. Nationstar Mortg., L.L.C., 852 F.3d 964 (9th Cir. 2017) (Nev. law; affirming dismissal of intentional infliction of emotional distress claim against servicer; threatening to foreclose without possessing original loan documents, contacting homeowners after their attorney told it not to, and delaying rescission of previously-recorded notice of default not sufficiently outrageous); Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034 (9th Cir. 2011) (Ariz. law; allegation that subprime lenders and servicer targeted vulnerable consumers for unaffordable loans, and misrepresented terms and conditions of the loans, not sufficiently outrageous to support intentional infliction of emotional distress claim); Hernandez v. Wells Fargo & Co., 2019 WL 3017657 (N.D. Cal. July 10, 2019) (mishandling of loan modification in violation of consent decree; plaintiff third-party beneficiaries had no standing to enforce the decree, and failure to oversee compliance was not outrageous); Carson v. Ocwen Loan Servicing, 2017 WL 1183960 (D. Me. Mar. 29, 2017) (stubborn refusal to correct coding error, and refusal to recognize loan modification, although "not to be condoned" are not outrageous enough to support claim); Hummel v. Northwest Tr. Serv., Inc., 2016 WL 3093255 (W.D. Wash. Mar. 23, 2016) (threat of foreclosure not outrageous because it threatens only "financial well-being"; must show physical threats or "emotional abuse"); DeHart v. HomeEq Serv. Corp., 47 F. Supp. 3d 246 (E.D. Pa. 2014) (noting that standard for intentional infliction of emotional distress in mortgage cases is very stringent; not shown here where house was sold after mortgage had been brought current, but sale was cancelled and borrowers remained in home); Montgomery v. CitiMortgage, Inc., 955 F. Supp. 2d 640 (S.D. Miss. 2013) (mishandling of loan modification insufficiently outrageous); Wallace v. Manley Deas Kochalski, L.L.C., 2013 WL 3338687 (W.D. Ky. July 2, 2013) (filing a foreclosure action during dispute over property taxes and payment amount not outrageous); Akar v. Fed. Nat'l Mortg. Ass'n, 843 F. Supp. 2d 154 (D. Mass. 2012) (dismissing intentional infliction claim where alleged outrageousness was pursuit of foreclosure without justification, but creditor had right to foreclose); Tatten v. Bank of Am. Corp., 912 F. Supp. 2d 1032 (D. Colo. 2012) (false representations during failed loan modification attempt not outrageous); Tann v. Chase Home Fin., L.L.C., 2012 WL 3553880 (E.D. Mich. Aug. 17, 2012) (rejection of timely trial payment, even if unjustified, not extreme or outrageous); Sanchez v. One West Bank, 2012 WL

a few courts have gone so far as to hold that an intentional infliction of emotional distress claim will never lie for mortgage foreclosure.[131]

When a claim is allowed to go to a jury[132] and outrageous conduct is shown, five to six digit monetary recoveries, including punitive damages, are frequent.[133] However it is not unusual to see large jury verdicts in these types of cases overturned by trial and appellate judges on the ground that the collector's conduct, while abusive, is not sufficiently outrageous to state a cause of action or go to the jury.[134] Great care should be taken to determine the standard applied in intentional infliction of emotional distress cases by particular states to avoid such a reversal.

15.2.5 *Negligent Infliction of Emotional Distress*

Many states recognize negligent infliction of emotional distress as an independent cause of action,[135] although some

2929749 (N.D. Ill. July 18, 2012) (going ahead with foreclosure while accepting trial payments and advising borrowers to keep making payments while awaiting loan modification documents); Foxx v. Ocwen Loan Servicing, L.L.C., 2012 WL 2048252 (M.D. Fla. June 6, 2012) (initiation of foreclosure after refusal of loan modification payments not outrageous); Haynes v. Navy Fed. Credit Union, 825 F. Supp. 2d 285 (D.D.C. 2011) (mishandling of payments, collection harassment, inaccurate reporting, fear of foreclosure not sufficient); Enriquez v. Countrywide Home Loans, 814 F. Supp. 2d 1042 (D. Haw. 2011) (in general, default and foreclosure proceedings not outrageous, so denial of loan modification cannot be outrageous; but dismissing with leave to amend where consumer alleged unaffordable subprime loan); James v. Bank of Am., 2015 WL 2261692 (Ga. App. May 15, 2015) (borrowers who stated claims for breach of contract and wrongful foreclosure failed to state claim for intentional infliction of emotional distress); Jaffri v. JP Morgan Chase Bank, 26 N.E.3d 635 (Ind. App. Feb. 13, 2015) (mishandling of loan modification not extreme and outrageous); Lyons v. U.S. Bank, 336 P.3d 1142 (Wash. 2014) (carrying on with foreclosure after loan had been brought current, resulting in loss to home-based business, was not outrageous). *See also In re* Lacey, 480 B.R. 13 (Bankr. D. Mass. 2012) (failure to offer HAMP modifications or to conduct foreclosure sale fairly and openly not outrageous); Hays v. Citimortgage, 2012 WL 1319413, *adopted*, 2012 WL 1314105 (D. Minn. Apr. 17, 2012) (D. Minn. Mar. 29, 2012) (during redemption period, when family still had right to occupy foreclosed home, lender's agents broke into home, leaving door unlocked and unlockable; valuable property disappeared; outrageous conduct not sufficiently alleged).

131 Shumake v. Caliber Home Loans, 2017 WL 1362681 (C.D. Cal. Jan. 6, 2017) (foreclosure can never support claim); Cingolani v. BAC Home Loans Servicing, L.P., 2012 WL 3029829 (E.D. Mich. July 25, 2012) (intentional infliction of emotional distress claim will not lie for breach of contract or mishandling of foreclosure); Palestini v. Homecomings Fin. L.L.C., 2010 WL 3339459 (S.D. Cal. Aug. 23, 2010) (lender's and servicer's conduct in foreclosing mortgage is absolutely privileged). *See also* Perez v. J.P. Morgan Bank, 2016 WL 816752 (D.N.J. Feb. 29, 2016) (economic loss doctrine bars claims alleging mishandling of mortgage, because claims were rooted in the contractual relationship between homeowner and lender).

132 Meads v. Citicorp Credit Serv., Inc., 686 F. Supp. 330 (S.D. Ga. 1988) (question of whether collection behavior was tortious is particularly suitable for a jury and inappropriate for summary judgment).

133 *See* Black v. Aegis Consumer Funding Group, Inc., 2001 WL 228062 (S.D. Ala. Feb. 8, 2001) (punitive damages justified by high degree of recklessness and outrageousness where vicious harassment continued after consumer hospitalized for depression and anxiety); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (affirming $5 million actual damages award for suing older, non-English speaking identity theft victim and telling her that she would be sent to jail, but reversing $10 million punitive damages award for failure to establish creditor's ratification of agent's conduct), *vacated on other grounds*, 2003 Tex. LEXIS 50 (Tex. Apr. 24, 2003) (vacating decision pursuant to parties' settlement).

134 *See, e.g.*, Midas Muffler Shop v. Ellison, 650 P.2d 496 (Ariz. Ct. App. 1982) (setting aside $2500 jury verdict); Ford Motor Credit Co. v. Diffey, 378 So. 2d 1032 (La. Ct. App. 1979) (reversing lower court's award of $1000); Hamilton v. Ford Motor Credit Co., 502 A.2d 1057 (Md. Ct. Spec. App. 1986) (setting aside $52,551 jury verdict). *See also* Buckley v. Trenton Sav. Fund Soc'y, 544 A.2d 857 (N.J. 1988) (overturning $25,000 jury verdict).

135 *ALASKA*: Nome Commercial Co. v. Nat'l Bank of Alaska, 948 P.2d 443 (Alaska 1997) (negligent infliction of emotional distress requires a preexisting duty or physical injury; duty not shown in contractual relationship between bank and consumer).

CONNECTICUT: Davis v. Hunt Leibert Jacobson, P.C., 2014 WL 5798585 (D. Conn. Nov. 7, 2014) (simple breach of contract not enough, but sufficiently alleged here where defendant reopened foreclosure without proper notice when service member homeowner was deployed abroad, and ordered wife and family to move out when they were not required to do so); Holtman v. Citifinancial Mortg. Co., 2006 WL 1699589 (D. Conn. June 19, 2006) (consumers stated negligent infliction of emotional distress claim where they alleged debt collection harassment at time when payments current); Desardouin v. United Parcel Serv., Inc. 285 F. Supp. 2d 153 (D. Conn. 2003) (defendant knew or should have known refusal to accept payments and hostile remarks in presence of plaintiff's customers involved unreasonable risk of causing emotional distress, which might lead to illness or bodily harm); Merrill Lynch Interfunding Inc. v. Argenti, 2000 WL 490739 (S.D.N.Y. Apr. 26, 2000) (Conn. law; negligent infliction of emotional distress does not require showing of physical injury if defendant's conduct involved unreasonable risk of causing emotional distress that might result in illness or bodily harm, but not shown here), *aff'd*, 242 F.3d 366 (2d Cir. 2001); Woodcrest Condo. Ass'n v. Ruby, 2012 WL 432558 (Conn. Super. Ct. Jan. 19, 2012) (foreseeability element more specific than in general negligence; must be foreseeable that breach of duty would result in distress sufficient to result in illness or bodily harm). *Cf.* Sorenson v. MBI, Inc., 2019 WL 3231762 (D. Conn. July 18, 2019) (must show negligence foreseeably resulting in distress sufficient to cause physical or mental illness; not shown here with repeated billing for debt that was fully paid).

HAWAII: Pourny v. Maui Police Dep't, 127 F. Supp. 2d 1129 (D. Haw. 2000) (negligent infliction of emotional distress depends on whether reasonable man would be able to cope with defendant's actions and whether distress reasonably foreseeable; fact issue where police officer dragged debtor across floor and threw him into police car because he protested process server's wrongful seizure of exempt property); Goran Pleho, L.L.C. v. Lacey, 439 P.3d 176 (Haw. 2019) (spelling out elements); Chedester v. Stecker, 643 P.2d 532 (Haw. 1982) (negligent infliction actionable if there is physical injury to property or person).

IDAHO: Wright v. Ada County, 2016 WL 3679935 (Idaho July 7, 2016) (Idaho elements are (1) legally recognized duty, (2) breach, (3) causal connection between defendant's conduct and breach, and (4) actual loss or damage).

KANSAS: Burdett v. Harrah's Kan. Casino Corp., 311 F. Supp. 2d 1166, 1178–1180 (D. Kan. 2004) (widow of gambling addict, who killed himself allegedly as a result of oppressive debt collection attempts by casino, stated claim for negligent infliction of emotional distress on late husband; plaintiff must show immediate physical injury that was direct and proximate result of emotional distress caused by the negligent conduct).

decline to recognize this tort.[136] In the alternative, some states allow such a claim to be pursued as a type of negligence, with the usual elements of duty, foreseeability, and causation.[137] Some courts allow recovery for negligent infliction of

MAINE: Campbell v. Machias Sav. Bank, 865 F. Supp. 26, 36 (D. Me. 1994) (claim of negligent infliction of emotional distress does not require that defendant be found liable for underlying tort).

MASSACHUSETTS: Sullivan v. Boston Gas Co., 605 N.E.2d 805 (Mass. 1993) (reciting elements).

MONTANA: Henrickson v. State, 84 P.3d 38 (Mont. 2004) (must show serious or severe distress as foreseeable consequence of negligent act or omission; physical symptoms of post-traumatic stress sufficient); Maloney v. Home & Inv. Ctr., Inc., 994 P.2d 1124 (Mont. 2000) (elements of negligent infliction of emotional distress are serious or severe emotional distress as reasonably foreseeable consequence of defendant's negligent act or omission; outrageous conduct need not be shown); Sacco v. High Country Indep. Press, 896 P.2d 411 (Mont. 1995) (recognizing independent cause of action if plaintiff suffers severe emotional distress as a reasonably foreseeable result of defendant's negligent act or omission; employer's misinformation caused former employee to be charged with larceny).

NEVADA: Smith v. J.P. Morgan Chase Bank, 2011 WL 5373969 (D. Nev. Nov. 4 2011) (refusing to dismiss negligent infliction of emotional distress claim; debtor-husband committed suicide during time when lender was egregiously mishandling loan modification, harassing borrowers, and bringing arguably wrongful foreclosure action).

NEW YORK: United States *ex rel.* Rubar v. Hayner Hoyt Corp., 306 F. Supp. 3d 478 (N.D.N.Y. 2018) (negligent infliction of emotional distress claim must be based on duty specific to the plaintiff, not general duty to society); Warr v. Liberatore, 270 F. Supp. 3d 637 (W.D.N.Y. 2017) (negligent infliction of emotional distress claim will not lie for intentional conduct); *In re* Jacques, 416 B.R. 63 (Bankr. E.D.N.Y. 2009) (claim of negligent infliction of emotional distress requires extreme and outrageous conduct that threatened or caused plaintiff to fear for physical safety; filing of untimely proof of claim in bankruptcy case insufficient).

NORTH CAROLINA: Polanco v. HSBC Bank, 2019 WL 2590964 (W.D.N.C. June 21, 2019) (negligent conduct that will foreseeably result in, and does cause severe and disabling mental or emotional condition which may be generally recognized and diagnosed by professionals who are trained to do so; here negligent mishandling of loan application resulting in anxiety and depression); Basnight v. Diamond Developers, 146 F. Supp. 2d 754 (M.D.N.C. 2001) (elements are negligent conduct, reasonable foreseeability of severe emotional distress, and severe emotional distress, but collection calls in unfriendly tone at inconvenient times not sufficient); Silver v. Sears, Roebuck & Co., 2000 WL 33682675 (E.D.N.C. July 31, 2000) (negligence in failing to inform court that check had been paid, foreseeably resulting in consumer's arrest and severe emotional distress). *Cf.* Williams v. HomeEq Servicing Corp., 646 S.E.2d 381 (N.C. Ct. App. 2007) (must show severe and disabling distress; consumer's uncorroborated testimony as to mild depression and disturbed sleep not sufficient).

PENNSYLVANIA: Toney v. Chester County Hosp., 36 A.3d 83 (Pa. 2011) (allowing recovery for emotional distress caused by negligent breach of contract or fiduciary duty absent physical injury or impact, but only if there is a special relationship where it is foreseeable that a breach of the relevant duty would result in severe emotional harm).

RHODE ISLAND: Gross v. Pare, 185 A.3d 1242 (R.I. 2018) (Rhode Island recognizes a cause of action for negligent infliction of emotional distress only in zone of danger or bystander cases).

SOUTH DAKOTA: Wells Fargo Bank v. Fonder, 868 N.W.2d 409 (S.D. 2015) (allowing claim to go forward where homeowners, relying on false representation that home was not in flood zone, failed to obtain insurance on house that was subsequently destroyed by flood).

WEST VIRGINIA: Marlin v. Bill Rich Constr., Inc., 482 S.E.2d 620 (W. Va. 1996) (adopting "traditional negligence" test for negligent infliction of emotional distress; foreseeability and severity of emotional distress must be judged by "reasonable person" standard, but need not show resulting physical injury).

136 *See, e.g.*, Kennedy v. Hankey Group, 2010 WL 1664087, at *4 (D. Md. Apr. 27, 2010) (Maryland does not recognize cause of action for negligent infliction of emotional distress, but emotional distress damages may be awarded in negligence action); Hamilton v. Ford Motor Credit Co., 502 A.2d 1057, 1065–1066 (Md. Ct. Spec. App. 1986) (no action for negligent infliction of mental distress). *Cf.* Lapides v. Trabbic, 758 A.2d 1114, 1121–1122 (Md. Ct. Spec. App. 2000) (no cause of action for "unintended emotional distress negligently inflicted by conduct not itself tortious"); Smith v. Tilton, 3 S.W.3d 77 (Tex. App. 1999) (Texas does not recognize a cause of action for negligent infliction of emotional distress).

137 *CALIFORNIA*: Burgess v. Superior Court, 831 P.2d 1197, 1200 (Cal. 1992) (negligently causing emotional distress is not an independent tort, but the tort of negligence, with the usual elements of duty, breach, causation, and damages); Carney v. Rotkin, Schmerin & McIntyre, 254 Cal. Rptr. 478 (Cal. Ct. App. 1988) (claim is a negligence claim with the usual elements; sufficient facts alleged where lawyer falsely informed seventy-four-year-old judgment debtor that bench warrant had been issued for her arrest). *See also* Amelina v. Manufacturers & Traders Trust Co., 2016 WL 3982483 (S.D. Cal. July 21, 2016) (no duty of care unless lender or servicer exceeds the scope of a "normal lending relationship," shown here where property service attempted to force entry and made threats which terrified debtor's children); Mueller v. Bank of Am., 2012 WL 3134243 (S.D. Cal. Aug. 1, 2012) (where bank had no duty to offer any loan modification, and did not step outside usual role of money lender, no negligent infliction of emotional distress claim for mishandling of application for special forbearance by victim of domestic abuse); Mehta v. Wells Fargo Bank, 737 F. Supp. 2d 1185 (S.D. Cal. 2010) (negligent infliction of emotional distress is a form of negligence, but financial institution owed no duty of care to borrower); Roybal v. Equifax, 2008 WL 4532447 (E.D. Cal. Oct. 9, 2008) (California does not recognize tort of negligent infliction of emotional distress, but where consumers stated claim for negligence, emotional distress damages were available). *Cf.* Chaconas v. JP Morgan Chase Bank, 713 F. Supp. 2d 1180 (S.D. Cal. May 10, 2010) (violation of duty that does not risk physical injury, here state debt collection statute, will not support negligent infliction of emotional distress claim); Yu v. Signet Bank, 82 Cal. Rptr. 2d 304 (Cal. Ct. App. 1999) (denying negligent infliction of emotional distress claim; filing in distant forum was not "negligence of type which will cause highly unusual as well as predictable emotional distress"), *appeal after remand*, 126 Cal. Rptr. 2d 516 (Cal. Ct. App. 2003); Sutherland v. Barclay's Am./Mortg. Corp., 61 Cal. Rptr. 2d 614 (Cal. Ct. App. 1997) (no negligent infliction of emotional distress claim for mortgage's company's "inept" and "incompetent" handling of payment moratorium after earthquake; borrower's claim was, in effect, a breach-of-contract claim, for which emotional distress damages could not be recovered).

ILLINOIS: Sindles v. Saxon Mortg. Serv., Inc., 2012 WL 1899401, at *7 (N.D. Ill. May 22, 2012) (listing elements as duty, breach, and injury proximately caused by the breach; independent duty rule requires showing that defendant breached duty that did not arise from contract; because covenant of good faith and fair dealing is part of all contracts, breach will not support a negligent infliction of emotional distress claim).

MISSISSIPPI: Stewart v. GMAC Mortg., L.L.C., 2011 WL 1296887 (S.D. Miss. Mar. 31, 2011) (usual elements of negligence, plus physical injury or demonstrable physical or mental harm, reasonably foreseeable by defendant); Anderson v. Litton Loan Servicing, 2010 WL 445593 (S.D. Miss. Feb. 1, 2010) (elements of negligence plus physical manifestation of harm); Fouché v. Shapiro & Massey, L.L.P., 575 F. Supp. 2d 776 (S.D. Miss. 2008) (consumer failed to state claim for negligence; cannot show proximate cause of emotional distress because

emotional distress only if the plaintiff suffered a physical impact[138] or physical injury,[139] was unreasonably endangered or put in fear of physical injury,[140] sought professional treatment,[141] or was particularly vulnerable.[142] Other courts require a showing of more severe distress when there is no personal

debtor suffered disabling injury, major financial problems, and a long and hard-fought foreclosure action at same time as alleged negligence).

NEW JERSEY: Billings v. TD Bank, 2013 WL 3989572 (D.N.J. Aug. 1, 2013) (usual elements; foreseeability is key issue here; not foreseeable that bank's error in recording credit card applicant's address would lead to "genuine and substantial emotional distress or mental harm to average person").

TENNESSEE: Rogers v. Louisville Land Co., 367 S.W.3d 196 (Tenn. 2012) (usual elements plus serious mental injury); Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996) (usual elements of negligence plus severe emotional injury).

138 *See, e.g.*, Chen v. Mayflower Transit, Inc., 2002 WL 1632412 (N.D. Ill. July 22, 2002) (applying impact rule to bar negligent infliction of emotional distress claim, but noting that recent Illinois cases had been less than clear on this issue); Saice v. MidAmerica Bank, 1999 U.S. Dist. LEXIS 20845 (D. Minn. Sept. 20, 1999) (no cause of action for negligent infliction of emotional distress unless there is physical impact or presence in the zone of danger of physical impact). *See generally* Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996) (good overview of various approaches to physical impact requirements).

139 *See, e.g.*, Malverty v. Equifax Info. Services, L.L.C., 407 F. Supp. 3d 1257 (M.D. Fla. 2019) (high blood pressure and exacerbation of existing heart condition not sufficient); Klein v. Just Energy Group, Inc., 2015 WL 3407837 (W.D. Pa. May 27, 2015) (negligence claim fails; emotional distress insufficient in the absence of physical impact, physical injury, presence in zone of danger, or special relationship); Davis v. Bank of Am. Corp., 2012 WL 3637903 (D. Ariz. Aug. 23, 2012) (physical injury or "long-term physical illness or mental disturbance"); Middleton v. Rogers Ltd., 804 F. Supp. 2d 632 (S.D. Ohio 2011) (must show physical injury or that plaintiff was bystander); Simon v. Bank of Am., 2010 WL 2609436 (D. Nev. June 23, 2010) (must show "physical manifestation of harm"; limited exceptions to this requirement do not include deceptive trade practices); North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111 (D. Mass. 2007) (proof of physical injury required for negligent, but not for intentional, infliction of emotional distress claim); Burdett v. Harrah's Kan. Casino Corp., 311 F. Supp. 2d 1166 (D. Kan. 2004) (widow of gambling addict, who killed himself allegedly as a result of oppressive debt collection attempts by casino, stated claim for negligent infliction of emotional distress on late husband), *related decision at* 294 F. Supp. 2d 1215 (D. Kan. 2003) (widow failed to state claim for negligent infliction of emotional distress on herself, because physical injury not alleged); Zito v. Leasecomm Corp., 2004 WL 2211650 (S.D.N.Y. Sept. 30, 2004) (denying claim where no allegation of "physical symptoms sufficient to demonstrate physical harm manifested by objective symptomology"); Henry v. Fleet Boston, 2003 WL 22401247 (D.N.H. Oct. 20, 2003) (denying negligent infliction claim because physical injury not shown; multiple banking errors thwarted consumer's efforts to pay credit card bill on time); Chapman v. Ontra, Inc., 1997 U.S. Dist. LEXIS 8331 (N.D. Ill. June 3, 1997) (dismissing claim based on debt collection letters in absence of allegation of physical impact or injury); Yu v. Signet Bank, 82 Cal. Rptr. 2d 304 (Cal. Ct. App. 1999) (must show physical injury; unlawful debt collection, for example, filing in distant forum, was not "negligence of type which will cause highly unusual as well as predictable emotional distress"); Chedester v. Stecker, 643 P.2d 532 (Haw. 1982) (negligence not actionable for emotional distress without physical injury to property or a person); Wright v. Ada County, 2016 WL 3679935 (Idaho July 7, 2016) (recovery for emotional injury requires showing of "physical manifestation"); Dill v. Barnett Funeral Home, 83 P.3d 1270 (Kan. Ct. App. 2004) (table) (negligent infliction of emotional distress claim requires showing of "demonstrable" physical injury or impact; headaches, insomnia, nightmares, or even depression insufficient if professional help not sought); Sullivan v. Boston Gas Co., 605 N.E.2d 805 (Mass. 1993) (must be enough medically verifiable symptoms, for example, tension headaches, depression, and diarrhea, to corroborate claim); Franklin Collection Agency v. Kyle, 955 So. 2d 284 (Miss. 2007) (denying negligent infliction of emotional distress claim based on disclosure of private medical information during debt collection, because physical injury not alleged); Henrickson v. State, 84 P.3d 38 (Mont. 2004) (physical symptoms of post-traumatic stress sufficient to show "serious or severe distress" element of negligent infliction); Okocha v. Fehrenbacher, 655 N.E.2d 744 (Ohio Ct. App. 1995) (emotional distress manifested by depression, back pain, chemical dependency, and alcoholism sufficient); First Nat'l Bank v. Drier, 574 N.W.2d 597 (S.D. 1998) (must show "manifestation of physical symptoms"; diagnosed severe mental illness is insufficient). *Cf.* Lui Ciro, Inc. v. Ciro, Inc., 895 F. Supp. 1365 (D. Haw. 1995) (must be some physical injury to property or a person); Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736 (Miss. 1999) (no need to show physical impact to recover emotional distress damages for negligent conduct, but must show demonstrable mental or physical injury; worry and loss of sleep insufficient). *But see* Palestini v. Homecomings Fin., L.L.C., 2010 WL 3339459 (S.D. Cal. Aug. 23, 2010) (need not show physical injury, but must show serious mental distress); Marlin v. Bill Rich Constr., Inc., 482 S.E.2d 620 (W. Va. 1996) (no need to show physical injury, but it can be further evidence of serious distress).

140 Colorado Capital Invs., Inc. v. Owens, 304 Fed. Appx. 906 (2d Cir. 2008) (New York law requires showing that defendant endangered plaintiff's physical safety or caused plaintiff to fear for his or her physical safety, or that there are special circumstances that raise a likelihood of genuine and serious mental distress); Kansas City Laser, Inc. v. MCI Telecomms. Corp., 252 Fed. Appx. 100 (8th Cir. 2007) (Mo. law; must show presence in "zone of danger" and reasonable fear of physical injury; economic damage to small business, even though resulting stress caused physical illness of owner, insufficient); Varnado v. Midland Funding, L.L.C., 43 F. Supp. 3d 985 (N.D. Cal. 2014) (debt collection misconduct will not support negligent infliction of emotional distress claim if there is no threat of physical injury); Hutchens v. West Asset Mgmt., Inc., 2013 WL 1337178 (S.D. W. Va. Mar. 29, 2013) (negligent infliction of emotional distress claim fails because false threats of arrest did not put consumers in fear for their physical safety); E.B. v. Liberation Publications, 777 N.Y.S.2d 133 (N.Y. App. Div. 2004) (physical injury not required but must show breach of duty that either unreasonably endangers or causes plaintiff to fear for physical safety); Gross v. Pare, 185 A.3d 1242 (R.I. 2018) (Rhode Island recognizes a cause of action for negligent infliction of emotional distress only in zone of danger or bystander cases). *See also* Schweihs v. Chase Home Fin., 41 N.E.3d 1011 (Ill. Ct. App. 2015) (must show that plaintiff was "direct victim"—that is, suffered a physical impact or was within the zone of danger; not shown here where lender's property service prematurely broke into occupied house while owner was inside).

141 Smith v. CitiMortgage, Inc., 2009 WL 1976513 (S.D. Miss. July 7, 2009) (must be medically cognizable and require treatment by medical profession); Dill v. Barnett Funeral Home, 83 P.3d 1270 (Kan. Ct. App. 2004) (table) (negligent infliction of emotional distress claim requires showing of "demonstrable" physical injury or impact; headaches, insomnia, nightmares, or even depression insufficient if professional help not sought).

142 *See, e.g.*, Reedy v. White Consol. Indus., Inc., 890 F. Supp. 1417 (N.D. Iowa 1995) (company encouraged or required injured employee to continue medical treatment while it quietly assembled evidence to deny workers' compensation coverage; plaintiff's "peculiar susceptibility" by reason of physical or mental condition was one factor to be considered, but "major outrage" was still required).

injury.[143] Some courts accept lay evidence of emotional distress,[144] but others require medical testimony.[145]

Some states allow recovery if the defendant stood in a contractual or fiduciary relationship to the plaintiff, which created a special duty to refrain from causing emotional harm.[146] In many jurisdictions, a simple debtor-creditor relationship will not in itself create such a confidential relationship,[147] although the cases reflect some ambivalence on this point.[148] Acting as an escrow agent may be sufficient to create a special relationship.[149]

143 *See, e.g.*, Swartz v. City Mortg., Inc., 911 F. Supp. 2d 916 (D. Haw. 2012) (in the absence of physical injury to person or property, must show that the negligent conduct caused mental illness).

144 Thornton v. Garcini, 928 N.E.2d 804 (Ill. 2010) (jury may find "based on personal experience" that distress would result; expert testimony unnecessary); Williams v. HomeEq Servicing Corp., 646 S.E.2d 381 (N.C. Ct. App. 2007) (negligent infliction of emotional distress claim requires showing of severe and disabling distress; lay testimony may suffice, but consumer's uncorroborated testimony as to mild depression and disturbed sleep insufficient).

145 Montgomery v. CitiMortgage, Inc., 955 F. Supp. 2d 640 (S.D. Miss. 2013) (negligent infliction of emotional distress claim requires medical evidence that demonstrable mental or physical harm was caused by defendants' actions; not shown here); Carlson v. SCI Iowa Funeral Serv., Inc., 674 N.W.2d 682 (Iowa Ct. App. 2003) (medical evidence required; consumers who saw health professionals for sleeplessness and depression stated claim, but not those who did not); Miller v. Willbanks, 8 S.W.3d 607 (Tenn. 1999) (medical or other expert testimony is necessary to prove severe emotional injury for negligent (although not intentional) infliction claim).

146 *See* Lesesne v. District of Columbia, 146 F. Supp. 3d 190 (D.D.C. 2015) (narrowly defining special relationship needed to support negligent infliction of emotional distress claim; fiduciary relation not sufficient if object of the relationship is financial, legal, or commercial; purpose of relationship must be "care for another's emotional wellbeing"); Grimaldi v. Bank of Am., 2013 WL 1050549 (M.D. Pa. Mar. 14, 2013) (lender-borrower relationship insufficient); DeStefano v. Childrens Nat'l Med. Ctr., 121 A.3d 59 (D.C. Ct. App. 2015) (special relationship of medical center with patient and family limited to provision of medical care; claim fails where personal injury resulted from negligent maintenance of parking garage); Carlson v. SCI Iowa Funeral Serv., Inc., 674 N.W.2d 682 (Iowa Ct. App. 2003) (negligent infliction of emotional distress claim may arise if contract involves deeply emotional matter; special relationship with funeral home; damages available for negligent infliction, but severe distress requires proof of medical treatment); Oceanic Inn, Inc. v. Sloan's Cove, L.L.C., 133 A.3d 1021 (Me. 2016) (articulating Maine's criteria for fiduciary relationship; not shown in commercial real estate dealings among family members disputing an inheritance); Toney v. Chester County Hosp., 36 A.3d 83 (Pa. 2011) (allowing recovery for emotional distress caused by negligent breach of contract or fiduciary duty, without physical injury or impact, if there is a special relationship where it is foreseeable that breach will result in severe emotional harm). *See also* Chizmar v. Mackie, 896 P.2d 196 (Alaska 1995) (negligent infliction of emotional distress claim generally requires physical injury except where, as here, distress is foreseeable result of breach of preexisting contractual or fiduciary duty, such as physician-patient relationship); Wilson v. Houston Funeral Home, 50 Cal. Rptr. 2d 169 (Cal. Ct. App. 1996) (funeral director had special relationship with widow; taking her and relatives to bank instead of cemetery so director could try to cash check breached implied covenant to provide dignified burial service). *Cf.* Fogg v. Ocwen Loan Serv., L.L.C., 2015 WL 1565229 (D. Me. Apr. 8, 2015) (negligent infliction of emotional distress claim fails because mortgage servicer owed no special duty to borrower); Land v. Green Tree Serv., L.L.C., 2014 WL 5527854 (D.S.C. Oct. 31, 2014) (servicer had no special duty to borrowers; after foreclosure was settled, property service twice confronted homeowner, known to be in fragile health, telling him eviction was imminent; after second confrontation, homeowner died of heart attack). *But see* Lawrence v. Grinde, 534 N.W.2d 414 (Iowa 1995) (although attorney-client relationship is fiduciary, it is not "so coupled with matters of mental concern or with the sensibilities of the party to whom the duty is owed" that breach will necessarily or reasonably result in mental anguish).

147 *See, e.g.*, Keenan v. Wells Fargo Bank, 246 F. Supp. 3d 518 (D. Mass. 2017) (lender does not owe duty of care to borrower); McDevitt v. Wells Fargo Bank, 946 F. Supp. 2d 160 (D.D.C. 2013) (granting summary judgment to lender on negligent infliction of emotional distress claim alleging misapplication of mortgage payment, as this is no more than breach of contract); Swartz v. City Mortg., Inc., 911 F. Supp. 2d 916 (D. Haw. 2012) (negligence element of negligent infliction of emotional distress not proven; lenders owe no non-contractual duty to borrowers); Mehta v. Wells Fargo Bank, 737 F. Supp. 2d 1185 (S.D. Cal. 2010); Quinteros v. Aurora Loan Serv., 740 F. Supp. 2d 1163 (E.D. Cal. Sept. 30, 2010) (no special duty owed to borrower by lender); Foster v. Argent Mortg. Co., 2010 WL 1136807 (E.D. Mich. Jan. 25, 2010), *adopted in relevant part, rejected in part on other grounds by* 2010 WL 1136804 (E.D. Mich. Mar. 24, 2010); Watts v. Decision One Mortg. Co., L.L.C., 2009 WL 2044595 (S.D. Cal. July 13, 2009) (lender and servicer owe no special duty to consumer, unlike mortgage broker, who is fiduciary); Nome Commercial Co. v. Nat'l Bank of Alaska, 948 P.2d 443 (Alaska 1997) (contract between bank and customer not sufficiently personal or laden with emotion); Sheen v. Wells Fargo Bank, 250 Cal. Rptr. 3d 677 (Cal. Ct. App. 2019) (no special duty to borrower in loan modification; noting conflict of authority on this issue), *review granted by* 451 P.3d 777 (Cal. 2019); Oceanic Inn, Inc. v. Sloan's Cove, L.L.C., 133 A.3d 1021 (Me. 2016) (refusing to adopt a general rule imposing fiduciary duty on foreclosing mortagees); Ed Schory & Sons v. Francis, 662 N.E.2d 1074 (Ohio 1996) (commercial debtor/creditor relationship not special or fiduciary so as to give rise to duty to refrain from causing emotional distress). *See also* Davis v. MCI Communications Serv., 421 F. Supp. 2d 1178 (E.D. Mo. 2006) (no special relationship between consumer and long-distance company that cut off service for making expensive calls); *In re* Prince, 414 B.R. 285 (Bankr. M.D. Tenn. 2009) (must show some duty independent of contract), *rev'd in part on other grounds*, 2010 WL 841273 (M.D. Tenn. Mar. 4, 2010).

148 Amelina v. Manufacturers & Traders Trust Co., 2016 WL 3982483 (S.D. Cal. July 21, 2016) (no duty of care unless lender exceeds the scope of a "normal lending relationship"; shown here where property service attempted to force entry and made threats that terrified debtor's children); Dougherty v. Bank of Am., 177 F. Supp. 3d 1230 (E.D. Cal. 2016) (lender or servicer's relationship with debtor usually does not create duty of care, but this must be determined on a case by case basis; foreseeability of harm and close connection between defendant's conduct and the harm weigh in favor of finding a duty here, where servicers strung borrowers along with false promises that unaffordable modification could be made feasible by state home-saver program, but never took necessary steps to enable homeowners to participate in the program); Stanton v. Ocwen Loan Servicing, 2010 WL 3824640, at *5–6 (D. Utah Sept. 28, 2010) (denying motion to dismiss negligent infliction claim where lender made long series of reassurances that it would not foreclose during modification negotiations, but then foreclosed, without mentioning any need to show a special relationship); Stevens v. First Interstate Bank, 999 P.2d 551 (Or. Ct. App. 2000) (in absence of physical injury, plaintiff must show that relation to defendant gave rise to some legally protected interest beyond general obligation to take reasonable care not to cause a risk of foreseeable harm; bank-depositor relationship not sufficient, but debtor-creditor might be).

149 Hamilton v. Fed. Home Loan Mortg. Corp., 2015 WL 144562 (D. Me. Jan. 12, 2015) (allowing negligent infliction of emotional distress claim to go forward; when lender created escrow account, it became a

Courts recognize that the ability to pressure debtors to meet their obligations is a necessary adjunct of the debtor-creditor relationship, but they also recognize the difference in power and the potential for abuse inherent in the relationship.[150]

15.2.6 Recovery of Emotional Distress Damages for Other Collection Torts

Emotional distress damages may also be available for other debt-related causes of action.[151] Courts are more likely to find emotional distress damages available if the cause of action sounds in tort rather than in contract[152] and if the defendant's

fiduciary). *But see* James v. GMAC Mortg., L.L.C., 772 F. Supp. 2d 307, 323–324 (D. Me. 2011) (no special relationship between borrower and escrow agent).

150 *See* Milton v. Illinois Bell Tel. Co., 427 N.E.2d 829 (Ill. App. Ct. 1981) (creditor must be given some latitude to pursue reasonable methods of collecting debts, but may abuse its position; debtor is protected from oppressive and outrageous conduct).

151 *Contract Law and Uniform Commercial Code*: *See* National Consumer Law Center, Consumer Warranty Law § 10.5.3.3 (5th ed. 2015), *updated at* www.nclc.org/library; National Consumer Law Center, Repossessions § 13.2.3.2 (9th ed. 2017), *updated at* www.nclc.org/library.

Fair Credit Reporting Act: *See* National Consumer Law Center, Fair Credit Reporting § 12.5.2.3 (9th ed. 2017), *updated at* www.nclc.org/library.

Fair Debt Collection Practices Act: *See* §§ 2.6.2.2.2, 11.8.1 to 11.8.7, *supra*.

Real Estate Settlement Procedures Act: *See* National Consumer Law Center, Mortgage Servicing and Loan Modifications § 3.12.2 (2019), *updated at* www.nclc.org/library.

State Debt Collection Statutes: *See* § 16.2.5.2, *infra*.

State Tort Actions: *See, e.g.*, Fiori v. Truck Drivers, Local 170, 354 F.3d 84 (1st Cir. 2004) (Mass. law; emotional distress damages available for libel); Washington v. CitiMortgage, Inc., 2011 WL 1871228 (E.D. Va. May 16, 2011) (fraud; damages for emotional distress, unaccompanied by physical injury, if there exists a cause of action "independently of such harm"); Manno v. Am. Gen. Fin. Co., 439 F. Supp. 2d 418 (E.D. Pa. 2006) (damages for libel may include humiliation and mental anguish); Hayfield v. Home Depot, 168 F. Supp. 2d 436 (E.D. Pa. 2001) (in malicious prosecution action, emotional distress damages available without showing of physical injury or out-of-pocket costs); Yu v. Signet Bank/Virginia, 126 Cal. Rptr. 2d 516 (Cal. Ct. App. 2002) (emotional distress damages available for abuse of process, even if misconduct, here distant forum abuse, not outrageous enough to support intentional infliction of emotional distress claim) (Cal. Ct. App. 2003); JCM Constr. Co. v. Orleans Parish Sch. Bd., 860 So. 2d 610 (La. Ct. App. 2003) ($100,000 emotional distress damages for malicious prosecution supported by evidence, where baseless lawsuit resulted in destruction of one-man construction company); Cmty. Bank v. Courtney, 884 So. 2d 767 (Miss. 2004) (conversion of heavy equipment; emotional distress damages require either showing of intentionally tortious conduct or "garden variety" negligence accompanied by "demonstrable mental or physical injury"); Wilson v. Gen. Motors Acceptance Corp., 883 So. 2d 56 (Miss. 2004) (physical manifestation of injury or demonstrable physical harm required for emotional distress damages for ordinary negligence, but not where defendant's actions are outrageous); Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736 (Miss. 1999) (must show demonstrable physical or mental injury that was reasonably foreseeable to recover emotional distress damages for negligence; worry and loss of sleep insufficient); Holm v. Wells Fargo Home Mortg. Co., 2016 WL 1579383 (Mo. Ct. App. Apr. 19, 2016) (affirming $200,000 emotional distress damages for wrongful foreclosure; medical testimony not required where the loss of a home was sufficient to make the existence of emotional distress "readily understandable"); Fix v. State Bank of Roscoe, 807 N.W.2d 612 (S.D. 2011) (emotional distress damages for abuse of process do not require showing of "extreme and disabling" distress); Tranum v. Broadway, 283 S.W.3d 403 (Tex. App. 2008) (affirming $250,000 mental anguish damages for slander *per se* based on false accusation of crime, as mental anguish is presumed, but reversing award of mental anguish damages for malicious prosecution because plaintiff's worry, concerned about what people would think of him, and consultation with physician not sufficient to show "substantial disruption of daily routine or a high degree of mental pain and distress"); EMC Mortg. Co. v. Jones, 252 S.W.3d 857 (Tex. App. 2008) (allowing damages for past but not future mental anguish in tort claim for unreasonable collection methods; evidence of insomnia and depression severe enough to require prescription medication, but no evidence that problems would continue). *But see* Jacobini v. J.P. Morgan Chase, 2012 WL 252437 (M.D. Fla. Jan. 26, 2012) (emotional distress damages not available on trespass claim). *But cf.* Blanche v. First Nationwide Mortg. Co., 74 S.W.3d 444 (Tex. App. 2002) (no emotional distress damages for negligence where plaintiffs did not allege malice, intent, or serious bodily injury, where no special relationship existed between the parties, and where the injuries were not so severe that mental anguish was a foreseeable result in action resulting from an inaccurate credit report). *See generally* Joel E. Smith, Annotation, *Recovery of Damages for Mental Anguish, Distress, Suffering, or the Like in Action for Wrongful Attachment, Garnishment, Sequestration or Execution*, 83 A.L.R.3d 598 (1978).

Unfair and Deceptive Acts and Practices (UDAP): *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.3.3.9 (9th ed. 2016), *updated at* www.nclc.org/library.

Violation of Bankruptcy Automatic Stay or Discharge Injunction: *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.6.2 (12th ed. 2020), *updated at* www.nclc.org/library.

Other: 42 Pa. Cons. Stat. § 8353(5) (emotional distress damages recoverable for wrongful use of civil proceedings, a statutory tort which combines elements of malicious prosecution and abuse of process); McCarter v. Bankers Trust Co., 543 S.E.2d 755 (Ga. Ct. App. 2000) (emotional distress damages available for wrongful foreclosure claim, but plaintiff must prove elements of intentional infliction of emotional distress); Cooper v. Cooper, 783 A.2d 430 (Vt. 2001) (in action for violation of fiduciary duty by wrongful foreclosure, plaintiff need not allege elements of intentional or negligent infliction of emotional distress to obtain damages for emotional distress).

See generally § 2.6.2, *supra*.

152 *See* DeHart v. HomeEq Serv. Corp., 47 F. Supp. 3d 246 (E.D. Pa. 2014) (damages for emotional distress awardable in breach-of-contract action only if defendant's misconduct was outrageous enough to support intentional infliction of emotional distress claim; not shown here with mishandling of mortgage); Mills v. Equicredit Corp., 344 F. Supp. 2d 1071 (E.D. Mich. 2004) (emotional distress damages not available for breach of contract; tort claim, here intentional infliction of emotional distress, arising from breach of contract must allege breach of some duty independent of the contract), *aff'd*, 172 Fed. Appx. 652 (6th Cir. 2006); Sutherland v. Barclay's Am./Mortg. Corp., 61 Cal. Rptr. 2d 614 (Cal. Ct. App. 1997) (no negligent infliction of emotional distress claim for mortgage's company's "inept" and "incompetent" handling of payment moratorium after earthquake; borrower's claim was, in effect, a breach-of-contract claim for which emotional distress damages are unavailable); LaMothe v. Auto Club Ins. Ass'n, 543 N.W.2d 42 (Mich. Ct. App. 1995) (no emotional distress damages for breach of contract unless there was tortious action independent of the breach of contract); UMLIC VP L.L.C. v. T.& M. Sales & Envtl. Sys., Inc., 176 S.W.3d 595 (Tex. App. 2005) (in absence of "special relationship," cause of action for improper conduct of foreclosure sale was contractual; damages for emotional distress or loss of business reputation not available). *But see* Hammer v. Residential Credit Solutions, Inc., 2014 WL 4477948

actions were intentional.[153] The standard of proof to recover emotional distress damages for other torts may be less stringent than for a claim of intentional or negligent infliction of emotional distress.[154]

15.3 Invasion of Privacy

15.3.1 Overview

The right to privacy is recognized in some form in almost all jurisdictions.[155] Various statutes and regulations protect consumers' privacy, either generally or with respect to specific information, such as banking, health care, or receipt of public benefits.[156] Protection of confidential information is also required by the rules governing lawyers and health care professionals, among others.[157] The FDCPA and state debt collection statutes protect some privacy interests—for example, by limiting third party[158] and employment contacts[159] by debt collectors. The right to privacy has also received some constitutional protection.[160]

With a few exceptions,[161] most states also recognize a cause of action in tort for invasion of privacy.[162] A suit alleging an invasion of the right to privacy generally does not require a showing of either severe harm or physical harm to the plaintiff.[163] While

(N.D. Ill. Sept. 11, 2014) (emotional distress damages may be available if breach of contract is wanton or reckless and caused bodily harm, or if defendant had reason to know when the contract was made that its breach would cause more than pecuniary loss; here servicer's egregious breach of loan modification contract, with evidence of pecuniary losses and "steady decline in health"); Sinclair v. Donovan, 2011 WL 5326093 (S.D. Ohio Nov. 4, 2011) (emotional distress damages for breach of contract if the breach either causes physical injury or "is of such a kind that serious emotional disturbance was a particularly likely result"); Wilson v. Houston Funeral Home, 50 Cal. Rptr. 2d 169 (Cal. Ct. App. 1996) (allowing emotional distress damages against funeral director whose acts amounted to breach of contract's implied covenant to provide a dignified burial service). *See generally* National Consumer Law Center, Consumer Warranty Law § 10.5.3.3 (5th ed. 2015), *updated at* www.nclc.org/library (emotional distress damages for warranty claims).

153 Osbourne v. Capital City Mortg. Corp., 667 A.2d 1321 (D.C. 1995) (breach of contract and UDAP counts alleged for bank's misrepresentation of loan payoff amount and various accounting errors and excessive charges, which sabotaged consumers' efforts to refinance the loan; if misrepresentation intentional, consumers may recover for emotional distress alone; if negligent, they may not); Cmty. Bank v. Courtney, 884 So. 2d 767 (Miss. 2004) (emotional distress damages require either showing of intentionally tortious conduct or "garden variety" negligence accompanied by "demonstrable mental or physical injury"); Fix v. State Bank of Roscoe, 807 N.W.2d 612 (S.D. 2011) (emotional distress damages for intentional tort, other than intentional infliction of emotional distress, do not require showing of "extreme and disabling" distress); Johnson v. Marcel, 465 S.E.2d 815 (Va. 1996) (emotional distress damages available where landlord's trespass was "deliberate and accompanied by aggravating circumstances," here, tearing the phone out of the wall and making loud scenes at night).

154 *See, e.g.*, Yu v. Signet Bank/Virginia, 126 Cal. Rptr. 2d 516 (Cal. Ct. App. 2002) (emotional distress damages available for abuse of process, even if misconduct, here distant forum abuse, not outrageous enough to support intentional infliction of emotional distress claim) (Cal. Ct. App. 2003).

155 Eli A. Meltz, *No Harm, No Foul? Attempted Invasion of Privacy and the Tort of Intrusion upon Seclusion*, 83 Fordham L. Rev. 3431, 3440 (May 2015) (state-by-state survey; "vast majority" of states recognize intrusion upon seclusion as a tort).

156 *See* National Consumer Law Center, Fair Credit Reporting § 18.4.2 (9th ed. 2017), *updated at* www.nclc.org/library.

157 *See* Gaylor v. Hobdy, 2003 WL 23024802 (Cal. Ct. App. Dec. 30, 2003) (client stated claims for breach of fiduciary duty and intentional infliction of emotional distress against attorney who disclosed privileged information in course of fee dispute); *In re* Huffman, 983 P.2d 534 (Or. 1999) (two-year suspension of attorney for misconduct during attempt to collect fee, including revelation of client secrets).

158 *See* § 5.7, *supra*.

159 *See* § 5.6, *supra*.

160 *See* Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (right to keep pornography in home without state seizure); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (right to buy and use contraceptives); Tourgeman v. Collins Fin. Serv., Inc., 2009 WL 6527758 (S.D. Cal. Nov. 23, 2009) (California's constitutional right to privacy covers personal financial information; communicating information by selling debt to debt buyer after it was fully paid violated reasonable expectations of privacy).

161 Hamlett v. Santander Consumer, USA, Inc., 931 F. Supp. 2d 451 (E.D.N.Y. 2013) (New York does not recognize claim for intrusion on seclusion); Adams v. Martinsville DuPont Credit Union, 573 F. Supp. 2d 103 (D.D.C. 2008) (Virginia recognizes only misappropriation of name or likeness); Arthur v. Corporate Receivables, Inc., 2008 WL 4153683 (E.D.N.Y. Sept. 5, 2008) (New York "has no common law of privacy"); Jones v. Commerce Bank, 2006 WL 2642153 (S.D.N.Y. Sept. 15, 2006) (New York allows invasion-of-privacy action only for misuse of name or likeness for advertising purposes).

162 *See, e.g.*, Gomez v. Foster & Garbus, L.L.P., 2019 WL 5418090 (D.N.J. Oct. 22, 2019) (New Jersey recognizes all four torts, and applies *Restatement* definitions; freezing or levying a bank account with knowledge of mistaken identity would support claim of intrusion on seclusion); Land v. Green Tree Serv., L.L.C., 2014 WL 5527854, at *6 (D.S.C. Oct. 31, 2014) (S.C. recognizes wrongful appropriation of personalty, publicizing of private affairs, and intrusion into private affairs); Brandt v. I.C. Sys., Inc., 2010 WL 582051 (M.D. Fla. Feb. 19, 2010) (Florida recognizes intrusion-on-seclusion claim arising from harassing debt collection calls); Browning v. AT&T Corp., 682 F. Supp. 2d 832 (N.D. Ill. 2009) (Illinois recognizes all four forms of invasion of privacy); Rodgers v. McCullough, 296 F. Supp. 2d 895 (W.D. Tenn. 2003) (Tennessee recognizes all four privacy subtorts); Parnoff v. Aquarion Water Co., 204 A.3d 717 (Conn. Ct. App. 2019) (Connecticut recognizes all four privacy torts; noting lack of authority on definition of intrusion and applying *Restatement* standard, but holding that water company's entry on rural land to inspect hydrant and investigate theft was neither unreasonable nor offensive); Lawlor v. N. Am. Corp., 983 N.E.2d 414 (Ill. 2012) (recognizing tort of intrusion on seclusion); Barner v. Krohle, 2006 WL 3028766 (Ohio Ct. App. Oct. 26, 2006) (Ohio recognizes all four subtorts); Howard v. Aspen Way Enterprises, 406 P.3d 1271 (Wyo. 2017) (Wyoming recognizes tort of intrusion on seclusion, using Restatement definition; listing states that recognize tort). *Cf.* Krasnor v. Spaulding Law Office, 675 F. Supp. 2d 208 (D. Mass. 2009) (noting cases suggesting that Massachusetts recognizes cause of action for intrusion on seclusion). *See generally* Eli A. Meltz, *No Harm, No Foul? Attempted Invasion of Privacy and the Tort of Intrusion upon Seclusion*, 83 Fordham L. Rev. 3431, 3440 (May 2015) (state-by-state survey; "vast majority" of states recognize intrusion upon seclusion as a tort).

163 *See, e.g.*, Panahiasl v. Gurney, 2007 WL 738642 (N.D. Cal. Mar. 8, 2007) (continuous abusive debt collection calls, resulting in emotional distress, sufficient to show intrusion on seclusion); Pulla v. Amoco Oil Co., 882 F. Supp. 836 (S.D. Iowa 1994) (while defendant's actions must be highly offensive to a reasonable person, resulting injury need not be severe), *aff'd in part, rev'd in part on other grounds*, 72 F.3d 648

invasion of privacy is an intentional tort,[164] malice usually need not be pleaded except to support punitive damages.[165]

The key element of this tort is unreasonable conduct that would be offensive (or "highly offensive" in some states) to a person of ordinary sensibilities.[166] Whether an invasion is highly offensive may depend upon whether the plaintiff has a reasonable expectation of privacy in the place or subject matter involved.[167] Courts generally recognize that creditors have a right to use reasonable means to collect their debts, but they balance this right against the consumer's right to privacy.[168] Courts require that conduct, in order to be tortious,

(8th Cir. 1995); Welker v. Southern Baptist Hosp. of Fla., Inc., 864 So. 2d 1178 (Fla. Dist. Ct. App. 2004) (invasion of privacy a recognized exception to impact rule, because emotional distress reasonably foreseeable and causation "relatively straightforward"), *decision quashed and remanded on other grounds*, 908 So. 2d 317 (Fla. 2005); Fischer v. Hooper, 732 A.2d 396 (N.H. 1999) (invasion of privacy does not require a showing of severe distress, only "emotional distress or personal humiliation . . . of a kind that normally results from such an invasion and . . . is normal and reasonable in its extent"; expert testimony not required). *But see* Dobson v. Sprint Nextel Corp., 2014 WL 553314 (D. Nev. Feb. 10, 2014) (for false-light claim, must show physical injuries, physical impact, or emotional distress that causes physical injury or illness). *But cf.* Isgett v. North Star Location Services, L.L.C., 2015 WL 4072094 (D.S.C. July 2, 2015) (must show "serious mental or physical injury or humiliation"); Minter v. AAA Cook County Consolidation, 2004 WL 1630781 (N.D. Ill. July 19, 2004) (claim of intrusion on seclusion requires proof of "anguish and suffering" that is "actual injury in the form of . . . medical care, an inability to sleep or work, or a loss of reputation and integrity in the community"; anger, frustration, and embarrassment resulting from alleged misuse of credit report were insufficient).

164 *See* Gamble v. Fradkin & Weber, P.A., 846 F. Supp. 2d 377 (D. Md. 2012) (showing of intent required; claim fails because no allegation that debt buyer's attorney actually knew that debt had been discharged in bankruptcy); Mirfendereski v. Rakestraw, 2011 WL 3584325 (S.D. Ohio Aug. 15, 2011) (negligence not sufficient; here, collection letter sent to similarly named, non-debtor brother). *See also* Cable v. Allied Interstate, Inc., 2012 WL 5966542 (M.D. Pa. Nov. 29, 2012) (intrusion on seclusion is an intentional tort, but collector's failure to correct its telephone system, which erroneously routed return calls from angry debtors to plaintiff's home number for over a year after being notified may amount to intent). *But see* Smith v. A.B. Bonded Locksmith, 757 N.E.2d 1242 (Ohio Ct. App. 2001) (can be either intentional or negligent).

165 Restatement (Second) of Torts §§ 652B (requiring that intrusion on seclusion be intentional, but without requiring malice), 652C (listing no state of mind requirement for tort of appropriation of name or likeness), 652E (requiring showing of knowledge or recklessness for false-light tort) (1977). *But see* Boese v. Paramount Pictures Corp., 952 F. Supp. 550 (N.D. Ill. 1996) (actual malice is element of false-light claim in Illinois); Barrett v. Fonorow, 799 N.E.2d 916 (Ill. App. Ct. 2003) (actual malice is element). *But cf.* Hahn v. Satullo, 806 N.E.2d 567 (Ohio Ct. App. 2004) (showing of malice necessary to overcome immunity of attorney for acts performed while representing third party).

166 *See, e.g.*, Herrera v. AllianceOne Receivables, Inc., 2016 WL 7048318 (S.D. Cal. Dec. 15, 2016) (vigorous collection efforts continued after collector knew of court order holding that plaintiff, whose name was similar to that of real debtor, was not liable for the debt); Reid v. LVNV Funding, 2016 WL 247571 (D. Utah Jan. 20, 2016) (highly offensive conduct alleged: after thief opened credit card account using plaintiff's Social Security number, collector told plaintiff's employer that she was using an alias, obtained her employment records, demanded large amounts of personal information from her, and refused to investigate or release garnishment); Barton v. Ocwen Loan Servicing, L.L.C., 2012 WL 4449860 (D. Minn. Sept. 26, 2012) (fact question whether accessing credit report without valid purpose was highly offensive; issue whether loan servicer reasonably believed its action was permissible); Quinlan v. CitiMortgage, Inc., 2012 WL 2401380 (E.D. Cal. June 22, 2012) (whether calls and letters are highly offensive is fact-sensitive; here giving weight to fact that debt was allegedly not owed, and that consumers were put in fear of losing their home); Duncan v. JP Morgan Chase Bank, 2011 WL 5359698 (S.D. W. Va. Nov. 4, 2011) (fact issue whether numerous calls after request to cease contact were highly offensive); Jones v. U.S. Child Support Recovery, 961 F. Supp. 1518 (D. Utah 1997) (intrusion must be substantial and highly offensive to reasonable person); Nation v. Dep't of Correction, 158 P.3d 953, 964 (Idaho 2007) (public disclosure of private facts); Froelich v. Adair, 516 P.2d 993, 998 (Kan. 1973) (intrusion on seclusion); Swarthout v. Mut. Serv. Life Ins. Co., 632 N.W.2d 741 (Minn. Ct. App. 2001) (fact issue whether conduct highly offensive: insurance company altered release, enabling it to obtain information from several medical providers although consumer authorized contact with only one doctor); State v. Eighth Judicial Dist. Court, 42 P.3d 233, 240 (Nev. 2002) (public disclosure of private facts); Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1008 (N.H. 2003) (intrusion on seclusion); Munley v. ISC Fin. House, Inc., 584 P.2d 1336 (Okla. 1978) (must be "highly offensive to a reasonable person"); Rodriguez v. Wal-Mart Stores, Inc., 52 S.W.3d 814 (Tex. App. 2001) (store's unintentional submission of wrong name to district attorney for bad check prosecution due to flaws in its system for handling business checks not highly offensive, so invasion of privacy not shown), *rev'd in part on other grounds*, 92 S.W.3d 502 (Tex. 2002). *See also* Semper v. JBC Legal Group, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005) (fact issue whether reporting as undisputed a sharply disputed bad check claim was "highly offensive"); Farrar v. Centerpoint Energy Resources Corp., 269 So. 3d 1149 (La. Ct. App. 2019) (applying balancing test; potential for abuse of receiver-transmitter installed on gas meter was not sufficient to outweigh cost savings to utility). *See generally* Jeffrey F. Ghent, Annotation, *Unsolicited Mailing, Distribution, House Call, or Telephone Call As Invasion of Privacy*, 56 A.L.R.3d 457 (1974); J. L. Litwin, Annotation, *Public Disclosure of Person's Indebtedness As Invasion of Privacy*, 33 A.L.R.3d 154 (1970).

167 Safari Club Int'l v. Rudolph, 862 F.3d 1113 (9th Cir. 2017) (invasion of privacy sufficiently alleged; false friend surreptitiously recorded conversation in restaurant; "privacy is relative . . . one can harbor an objectively reasonable expectation of privacy in a public location"); Luis v. Zang, 833 F.3d 619 (6th Cir. 2016) (installing spyware on computer in violation of state and federal statutes; reasonable expectation of privacy and wrongful intrusion sufficiently alleged).

168 *See, e.g.*, Peterson v. Aaron's, Inc., 2017 WL 4390260 (N.D. Ga. Oct. 3, 2017) (use of software to locate or disable leased computer after theft or non-payment would be reasonable, but accessing user's data was not; fact issue whether accessing law firm's files was highly offensive); Bell v. Bank of Am., 2017 WL 380930 (M.D. Ga. Jan. 26, 2017) (in absence of physical intrusion, Georgia allows cause of action only for "a course of hounding" or "unreasonable surveillance . . . which is intended to frighten or torment the subject, not surveillance reasonably limited and designed to obtain information needed for a legitimate purpose; ascertaining debtor's new cell phone number was not unreasonable); Gamble v. Midland Funding, 2013 WL 979202 (N.D. Ala. Mar. 7, 2013) (fact issue whether harassment and baseless lawsuit for debt not owed went beyond "reasonable measures"); Pariscoff v. JPMorgan Chase Bank, 2013 WL 3776589 (S.D. Ohio July 16, 2013) (issue is whether calls are "unreasonable action in pursuing the debtor," measured by the effect on a person of ordinary sensibilities; fact issue here as to number and pattern of calls); Puttner v. Debt Consultants of Am., 2009 WL 1604570 (S.D. Cal. June 4, 2009) (dismissing with leave to amend because of failure to allege that number and content of calls was sufficiently offensive to overcome creditor's limited privilege to attempt collection); Poltrock v. N.J. Auto. Accounts Mgmt., Co., 2008 WL 5416396, at *4–7 (D.N.J. Dec. 22, 2008) (balancing creditor's interest

transgress "reasonable bounds."[169] Indeed, most successful cases involve conduct that a sympathetic person would consider outrageous.

Some courts recognize a privilege defense for legal proceedings.[170] For invasion-of-privacy claims involving credit reporting agencies, a provision of the Fair Credit Reporting Act may require proof of malice or willful intent to injure the consumer, if the disclosure giving rise to the claim falls within one of four designated categories.[171] The application of the invasion-of-privacy tort in the credit reporting context is discussed in more detail in NCLC's *Fair Credit Reporting*.[172]

Invasion of privacy encompasses not just one tort, but a complex of four distinct torts: intrusion upon seclusion, publicity placing a person in a false light, publicity given to private life, and appropriation of name or likeness.[173] The first three of these torts are likely to be applicable to collection abuses and are discussed in more detail in the next subsections.

15.3.2 *Intrusion Upon the Debtor's Right to Seclusion*

The tort known as intrusion upon the right to seclusion occurs in the debt collection context under the following circumstances:

- The collector intrudes upon the debtor's privacy;
- The intrusion is highly offensive under the reasonable person standard;
- The intrusion is without, or in excess of, privilege; and
- The intrusion is effected through speech, writing, or conduct.[174]

Publication is not an element of the tort of intrusion upon the right to seclusion.[175] The courts balance the creditor's

in speedy and orderly collection of debt with debtor's privacy interest; debtor has no invasion-of-privacy claim against former employer who contacted third parties listed in his employment file while attempting to collect debt); Lowe v. Surpas Res. Corp., 253 F. Supp. 2d 1209 (D. Kan. 2003) (intrusion on seclusion difficult to prove in debt collection because collector has right to take "reasonable steps"); Parish Nat'l Bank v. Lane, 397 So. 2d 1282 (La. 1981) (court may allow judgment creditor's entry upon debtor's home site for an appraisal to determine if any property there is non-exempt; not an unreasonable invasion of debtor's privacy); Hairford v. Centurytel, Inc., 856 So. 2d 139 (La. Ct. App. 2003) ("[w]hether or not a debt is justly due, the debtor has a right to be free from unreasonable violations of his right to privacy in his personal affairs"; conduct is actionable if creditor "coerces the debtor or seriously abridges the obligor's right to privacy"); Household Fin. Corp. v. Bridge, 250 A.2d 878, 884 (Md. 1969) ("the question of how far a creditor may go to collect his debt must be decided on the individual facts of each case, but usually on the ground of reasonableness"); Havens-Tobias v. Eagle, 2003 WL 1601461 (Ohio Ct. App. Mar. 28, 2003) (negotiating with consumers' attorney and filing a lawsuit fell far short of "campaign of harassment" needed to support intrusion-on-seclusion claim); Cook v. Carrigan & Mains Funeral Home, Inc., 607 N.E.2d 466 (Ohio Ct. App. 1992) (judgment creditor who, pursuant to statute, obtained court order for examination of debtor and who confined his inquiries to the scope of the statute was not subject to action for invasion of privacy). *See also* Contreras v. Portfolio Recovery Assoc., 2017 WL 2964012 (N.D. Cal. July 12, 2017) (noting collector's privilege to make calls; whether telephone harassment that is sufficient to violate FDCPA and Rosenthal Act also amounts to intrusion on seclusion depends on facts; fact question for trial where collector made 383 mostly unanswered collection calls, including calls to debtor's minor children, despite repeated requests to stop).

169 May v. Nationstar Mortg., L.L.C., 852 F.3d 806 (8th Cir. 2018) (Mo. Law; affirming award of $400,000 punitive damages; where compensatory damages were $50,000 against lender who was aware of its error in calculating amount due after mortgage paid down in chapter 13 plan, but stonewalled consumer's attempts to correct error, engaged in harsh collection attempts, and wrongfully attempted to foreclose); Schwartz-Earp v. Advanced Call Ctr. Tech., Inc., 2016 WL 899149 (N.D. Cal. Mar. 9, 2016) (because creditor has qualified privilege to seek payment, claim based on phone calls must show "outrageous and unreasonable means" that "go beyond all reasonable bounds of decency"; 134 calls, as many as five per day, not sufficient); Shuler v. Ingram & Assoc., 710 F. Supp. 2d 1213 (N.D. Ala. 2010) (must show activity that "exceeds the bounds of reasonableness"; number, frequency and content of calls here not sufficient to state a claim), *aff'd*, 441 Fed. Appx. 712 (11th Cir. 2011); Lowe v. Surpas Res. Corp., 253 F. Supp. 2d 1209, 1237–1239 (D. Kan. 2003); Hairford v. Centurytel, Inc., 2003 WL 22244793 (La. Ct. App. Oct. 1, 2003) ("improper and unreasonable so as to be considered intentionally coercive"); Ellis v. Safety Ins. Co., 672 N.E.2d 979 (Mass. App. Ct. 1996) (invasion of privacy must be unreasonable and either serious or substantial; allegations that insurance adjuster followed claimant and her mother and made numerous phone calls to them at home and at work, some of which included offensive racial remarks, created jury question). *See also* Isgett v. North Star Location Services, L.L.C., 2015 WL 4072094 (D.S.C. July 2, 2015) (showing of "a blatant and shocking disregard of [plaintiff's] rights" is necessary; sufficiently alleged here by relentless phone calls from six different numbers, multiple daily calls to home and cell phone, including robocalls in violation of TCPA). *Cf.* Malverty v. Equifax Info. Services, L.L.C., 407 F. Supp. 3d 1257 (M.D. Fla. 2019) (not offensive to repeatedly report that live consumer is deceased).

170 Restatement (Second) of Torts §§ 652F, 652G (1977) (absolute and conditional privileges in defamation cases also apply to invasion of privacy). *See* § 15.1.3.1, *supra*.

171 15 U.S.C. § 1681h(e) *See generally* National Consumer Law Center, Fair Credit Reporting §§ 6.11, 10.4, 10.5.3, 18.3 (9th ed. 2017), *updated at* www.nclc.org/library.

This provision differs from the Fair Credit Reporting Act's preemption provision, 15 U.S.C. § 1681t, which is the subject of conflicting court interpretations and is discussed in detail in National Consumer Law Center, Fair Credit Reporting § 10.7 (9th ed. 2017), *updated at* www.nclc.org/library.

172 National Consumer Law Center, Fair Credit Reporting § 18.3 (9th ed. 2017), *updated at* www.nclc.org/library.

173 Dan B. Dobbs, Paul T. Hayden, and Eileen M. Bubeck, The Law of Torts vol. 3, ch. 45, § 578, at 354 (2d ed. 2011); Restatement (Second) of Torts § 652A (1977). *See generally* National Consumer Law Center, Fair Credit Reporting § 18.3.5 (9th ed. 2017), *updated at* www.nclc.org/library (application of tort of appropriation of name or likeness in credit reporting context).

174 *See* Restatement (Second) of Torts §§ 652A (setting forth elements), 652F, 652G (privileges) (1977).

175 Restatement (Second) of Torts § 652B cmt. a (1977). *See In re* Trans Union Corp., Privacy Litig., 326 F. Supp. 2d 893 (N.D. Ill. 2004) (gist of intrusion on seclusion is intrusion, not publicity; not shown where company accessed its own data to prepare and sell mailing lists); Fisher v. Hyundai Motor Fin. Co., 2002 WL 47968 (N.D. Ill. Jan. 11, 2002) (unreasonable contacts with co-workers, employer, and credit union not intrusion on seclusion; injury must result from the intrusion, not the publication). *See also* Trundle v. Homeside Lending, Inc., 162 F. Supp. 2d 396 (D. Md. 2001) (publicizing negative credit information

right to collect the debt against the consumer's expectation of freedom from collection efforts. This tort overlaps with other invasion-of-privacy torts.

The following cases illustrate actionable intrusions:

- Repeated[176] or particularly offensive[177] calls;

not intrusion on seclusion where it was obtained from public records, not from a source in which consumer expected privacy); Sofka v. Thal, 662 S.W.2d 502 (Mo. 1983). *But see* Sampaio v. I.C. Sys., Inc., 2009 WL 6800161 (S.D. Fla. Sept. 14, 2009) (Florida recognizes invasion-of-privacy claim only for physical invasion or widespread publicity). *But cf.* Craig v. Andrew Aaron & Assoc., 947 F. Supp. 208 (D.S.C. 1996) (where intrusion on seclusion, here offensive phone calls at home, was unaccompanied by the publication of embarrassing facts, claimant must show serious mental or physical injury or humiliation; allegations of distress and humiliation were insufficient).

176 *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp., 249 F.3d 389 (5th Cir. 2001) (Tex. law; cause of action for invasion of privacy available to challenge frequent and abusive debt collection calls); Doe v. Siddeiqui, 2018 WL 3956292 (N.D. Tex. Aug. 17, 2018) (repeated phone calls may be sufficient to support intrusion on seclusion claim); Diehl v. Money Source, Inc., 2018 WL 2995721 (S.D. Ala. June 13, 2018) (unreasonable debt collection efforts, including phone calls, will support claim for intrusion on seclusion); O'Dell v. USAA Fed. Sav. Bank, 2018 WL 1701973 (S.D. W. Va. Apr. 5, 2018) (must show numerous calls in short time frame or calls at inappropriate hours); Hartley v. 21st Mortg. Corp., 2017 WL 4322430 (W.D. W. Va. Sept. 28, 2017) (refusing to dismiss invasion of privacy claim against creditor that made over 300 calls, seeking to collect debt not owed); Messina v. Green Tree Servicing, L.L.C., 210 F. Supp. 3d 992 (N.D. Ill. 2016) (jury question whether making 158 calls over four months is highly offensive); Baldwin v. Monterey Fin. Services, Inc., 2016 WL 5723734 (M.D. Pa. Sept. 30, 2016) (jury question whether making 86 collection calls and sending three emails over 166 days is invasion of privacy); Isgett v. North Star Location Services, L.L.C., 2015 WL 4072094 (D.S.C. July 2, 2015) (refusing to dismiss claim alleging relentless phone calls from six different numbers, multiple daily calls to home and cell phone, including robocalls in violation of TCPA); McFaul v. Bank of Am., 2014 WL 232601 (N.D. Cal. Jan. 20, 2014) (numerous calls threatening foreclosure for debt that had been fully paid off may amount to actionable intrusion on seclusion even without allegations of yelling, cursing, or bullying); Corson v. Accounts Receivable Mgmt., Inc., 2013 WL 4047577 (D.N.J. Aug. 9, 2013) (two months of daily phone calls to non-debtor, seeking location information for relative who did not live with plaintiff, offensive enough to support claim); Pariscoff v. JPMorgan Chase Bank, 2013 WL 3776589 (S.D. Ohio July 16, 2013) (issue is whether calls are "unreasonable action in pursuing the debtor," measured by the effect on a person of ordinary sensibilities; fact issue here as to number and pattern of calls); Beal v. Wyndham Vacation Resorts, Inc., 956 F. Supp. 2d 962 (W.D. Wis. 2013) (100 phone calls after being told to cease contact are highly offensive); Humphrey v. U.S. Bank, NA, 2012 WL 3686272 (N.D. Okla. Aug. 24, 2012) (*Restatement* standard: twenty-five to thirty calls per day, over a period of months, for hotly disputed debt, sufficient to allege "a course of hounding"); Shupe v. J.P. Morgan Chase Bank, 2012 WL 1344786 (D. Ariz. Apr. 18, 2012) (need not show extreme and outrageous conduct; 100 phone calls sufficient to state claim for highly offensive conduct); Zirena v. Capital One Bank, 2012 WL 843489 (S.D. Fla. Feb. 2, 2012) (100 phone calls in one month to non-debtor's cell phone were highly offensive; not clear whether simple wrong number or identity theft); Smith v. J.P. Morgan Chase Bank, 2011 WL 5373969 (D. Nev. Nov. 4 2011) (telephone harassment of borrowers by lender that was egregiously mishandling loan modification); Duncan v. JP Morgan Chase Bank, 2011 WL 5359698 (S.D. W. Va. Nov. 4, 2011) (fact issue whether numerous calls after request to cease contact were highly offensive; giving phone number to creditor not blanket permission to call whenever it chose); Gray v. Chase Bank, 2011 WL 4716232 (S.D. W. Va. Oct. 7, 2011) (fact issue whether 594 calls, only four of which resulted in conversation, were highly offensive; giving phone number to creditor does not waive right to privacy); Sewell v. Allied Interstate, Inc., 2011 WL 32209 (E.D. Tenn. Jan. 5, 2011) (harassing calls at home; also employer contact); Basset v. IC Sys., Inc., 715 F. Supp. 2d 803, 814 (N.D. Ill. 2010) (series of 31 collection calls not unauthorized where consumer owed debt and did not make written demand to stop, so no invasion of privacy); Brandt v. I.C. Sys., Inc., 2010 WL 582051 (M.D. Fla. Feb. 19, 2010) (Florida recognizes intrusion-on-seclusion claim arising from harassing debt collection calls; fact issue here as to number and pattern); Krasnor v. Spaulding Law Office, 675 F. Supp. 2d 208 (D. Mass. 2009) (harassing calls and false threats); Fausto v. Credigy Serv. Corp., 598 F. Supp. 2d 1049 (N.D. Cal. 2009) (number and content of phone calls, for debt allegedly not owed, sufficient to raise fact issue as to offensiveness); Campbell v. Triad Fin. Corp., 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007) (numerous phone calls, including accusation of crime, and one nighttime visit sufficient to state claim for intrusion on seclusion); Panahiasl v. Gurney, 2007 WL 738642 (N.D. Cal. Mar. 8, 2007) (continuous abusive debt collection calls, resulting in emotional distress, sufficient to show intrusion on seclusion); Joseph v. J.J. MacIntyre Cos., L.L.C., 281 F. Supp. 2d 1156 (N.D. Cal. 2003) (numerous calls on same day to sick older consumer); Norris v. Moskin Stores, Inc., 132 So. 2d 321 (Ala. 1961); Hairford v. Centurytel, Inc., 856 So. 2d 139 (La. Ct. App. 2003) (numerous calls, threats to cut off phone service of older consumer for debt not owed); Housh v. Peth, 133 N.E.2d 340 (Ohio 1956). *Cf.* Charvat v. NMP, L.L.C., 656 F.3d 440, 452–453 (6th Cir. 2011) (Ohio law; repeated telemarketing calls, especially after do-not-call request, may be invasion of privacy). *But see* Baemmert v. Credit One Bank, 2017 WL 4804365 (W.D. Wis. Oct. 24, 2017) (invasion of privacy claim will not lie for harassing phone calls; physical intrusion must be shown); Ferguson v. Innovate Loan Servicing Co., 2019 WL 4804272 (N.D. Ga. Aug. 7, 2017) (telephone harassment can never support an intrusion on seclusion claim; must show surveillance or physical trespass), *adopted*, 2019 WL 8277249 (N.D. Ga. Sept. 4, 2019); Benedict v. State Farm Bank, 709 S.E.2d 314 (Ga. Ct. App. 2011) (more than 100 harassing calls insufficient; must show physical intrusion or surveillance; calls might suffice if they became "a substantial burden on [plaintiff's] existence). *But cf.* Jones v. Option One Mortg., 466 Fed. Appx. 449 (6th Cir. 2012) (multiple calls per day not invasion of privacy under Ohio law where landlord had multiple delinquent loans for multiple properties); Petri v. Valarity, L.L.C., 2015 WL 7253061 (E.D. Mo. Nov. 17, 2015) (confounding the elements of intrusion upon seclusion with those of public disclosure of private facts; repeated telephone calls insufficient); Smith v. Capital One Fin. Corp., 2012 WL 3138024 (N.D. Cal. Aug. 1, 2012) (twelve calls to home over considerable period of time, one with bad language, not sufficient to allege pattern of harassment); McEndree v. Rash, Curtis & Assoc., 2012 WL 1640465 (E.D. Cal. Mar. 9, 2012) (calls to cell phone with caller ID, which were refused by debtor, not highly offensive); Carlson v. First Revenue Assurance, 2002 WL 31866305 (D. Minn. Dec. 19, 2002) (six letters in five months and one threat to investigate assets not highly offensive), *aff'd on other grounds*, 359 F.3d 1015 (8th Cir. 2004); Shuler v. Ingram & Assoc., 710 F. Supp. 2d 1213 (N.D. Ala. 2010) (series of calls not invasion of privacy where callers accurately described collection remedies and it was debtor who made unreasonable demands and used profanity), *aff'd*, 441 Fed. Appx. 712 (11th Cir. 2011); Oppenheim v. IC Sys., Inc., 695 F. Supp. 2d 1303 (M.D. Fla. 2010) (applying intentional infliction of emotional distress standard to find telephone harassment insufficient to state claim), *aff'd on other grounds*, 2010 WL 4940015 (11th Cir. Dec. 7, 2010); Robinson v. Managed Accounts Receivable, Inc., 654 F. Supp. 2d 1051 (C.D. Cal. 2009) (one collection call and one phone message at home insufficient); Fabio v. Credit Bureau, 210 F.R.D. 688 (D. Minn. 2002) (single telephone call from debt collector in which

- Intrusive visits to the debtor's home;[178]
- Contacts with a debtor who is represented by an attorney[179] or has requested that the contacts cease;[180]

collector used offensive language not highly offensive); Mlynek v. Household Fin. Corp., 2000 WL 1310666 (N.D. Ill. Sept. 11, 2000) (one angry phone call to consumer's home and rude response to consumer's calls not sufficient; unwanted calls must be persistent); Windsor v. Gen. Motors Acceptance Corp., 323 So. 2d 350 (Ala. 1975) (calling and visiting debtor at home fifteen to twenty times over two-year period not actionable intrusion); Woods v. SunTrust Bank, 81 So. 3d 357 (Ala. Civ. App. 2011) (numerous phone calls to home of sick, older debtors, taken by their caregivers and relayed to their daughter, did not invade daughter's privacy); Sofka v. Thal, 662 S.W.2d 502 (Mo. 1983) (eight polite telephone calls over several months to collect $142.99 not unreasonable intrusion upon seclusion; not sufficient to allege that calls awakened debtor). *See generally* Restatement (Second) of Torts § 652B, cmt. d (debt collection calls amount to invasion of privacy "when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence").

177 *See, e.g.*, Dorris v. Accounts Receivable Mgmt., Inc., 2013 WL 1209629 (D. Md. Mar. 22, 2013) (calls may support claim either by number or by "vicious quality"; obscene language and name-calling in single call were sufficient). *See also* Winberry v. United Collection Bureau, Inc., 697 F. Supp. 2d 1279 (M.D. Ala. 2010) (fact issue whether thirty-three calls in one month, using "coarse language" and threats, with knowledge that debtor was injured and unable to work, were highly offensive); Summit Loans, Inc. v. Pecola, 288 A.2d 114 (Md. 1972) (repeated, abusive phone calls, aggravated by threats of harm to children). *But see* Gibson v. Rosenthal, Stein & Assoc., 2013 WL 3367255 (N.D. Ga. July 3, 2013) (threatening call, here false threat of arrest, not sufficient, must show either "physical intrusion analogous to trespass [or] surveillance or monitoring of [p]laintiff's activities"); Hutchens v. West Asset Mgmt., Inc., 2013 WL 1337178 (S.D. W. Va. Mar. 29, 2013) (falsely claiming to be sheriff's officer and false threats of arrest in effort to collect debt that had already been settled, not highly offensive enough to support intrusion-on-seclusion claim); Neeley v. Wells Fargo Fin., Inc., 2012 WL 5949106 (M.D. Fla. Nov. 28, 2012) (rude and belligerent calls, some at inconvenient hours or at work, continuing after consumer known to be represented, not offensive enough); Household Fin. Corp. v. Bridge, 250 A.2d 878 (Md. 1969) (reversing damages award where only contacts with consumer were sporadic calls over eleven months and a false threat of jail that was dispelled by counsel).

178 *See, e.g.*, Musenge v. SmartWay of the Carolinas, Inc., 2018 WL 4440718 (W.D.N.C. Sept. 17, 2018) (pounding on door and twisting knob; also sent unwanted texts and confronted consumer at work); Robertson v. Horton Bros. Recovery, Inc., 2007 WL 2009703 (D. Del. July 3, 2007) (early morning confrontation at consumer's home, false threats of arrest, numerous rude phone calls); Osborne v. Minnesota Recovery Bureau, 59 U.C.C. Rep. Serv. 2d 879 (D. Minn. 2006) (claim stated where repossessors entered on residential property at night, after being turned away during day, and shone flashlight into garage, causing consumer to fear attack by burglars); Holland v. GMAC Mortg. Co., 2006 WL 1133224 (D. Kan. Apr. 26, 2006) (where delinquency was result of lender's error, frequent phone calls, notes on door, and creditor's employee sitting in car watching house were highly offensive); Wal-Mart Stores v. Lee, 74 S.W.3d 634 (Ark. 2002) (upholding verdict against employer who made extremely lengthy and intrusive search of employee's home for stolen merchandise without valid consent); Mauri v. Smith, 929 P.2d 307 (Or. 1996) (jury question whether entering apartment without residents' consent was invasion of privacy). *But see* Laccinole v. Assad, 2016 WL 868511 (D.R.I. Mar. 7, 2016) (action that takes place in public, even close to plaintiff's home, cannot be intrusion on seclusion; claim fails where process server knocked on door, showed a badge, and demanded that debtor come out); Rodriguez v. Due Process of Mich., Inc., 2008 WL 4449651 (E.D. Mich. Sept. 30, 2008) (no intrusion-on-seclusion claim arising from process servers' misconduct at consumer's home, because no discovery of secret or private matter); *In re* Residential Capital, L.L.C., 2016 WL 797901 (Bankr. S.D.N.Y. Feb. 29, 2016) (no intrusion on seclusion where property service photographers shouted and harassed family sitting on outside balcony; balcony was not private place); Windsor v. Gen. Motors Acceptance Corp., 323 So. 2d 350 (Ala. 1975) (calling and visiting debtor at home fifteen to twenty times over two-year period not actionable intrusion); Harris v. Carbonneau, 685 A.2d 296 (Vt. 1996) (allegation that process server entered house "wrongfully" and "against plaintiff's wishes" insufficient). *But cf.* Land v. Green Tree Serv., L.L.C., 2014 WL 5527854, at *6–7 (D.S.C. Oct. 31, 2014) (inspecting and photographing home for foreclosure purposes insufficient); Beal v. Wyndham Vacation Resorts, Inc., 956 F. Supp. 2d 962 (W.D. Wis. 2013) (simply serving process at debtor's home cannot support invasion-of-privacy claim); Shorter v. Retail Credit Co., 251 F. Supp. 329 (D.S.C. 1966) (no invasion of privacy by collector ignoring plaintiff's "no trespassing" sign, approaching plaintiff's house, questioning plaintiff regarding age, occupation, size of family, and fire insurance but causing no serious injury; collector did not reveal his identity until he was about to leave).

179 Rabal v. Huntington Nat'l Bank, 2015 WL 3540660 (S.D. W. Va. June 4, 2015) (harassing calls to represented debtor sufficient, but just barely, for state claim of intrusion on seclusion); Wrenn v. Bank of Am. Home Loans, L.P., 2013 WL 369611 (S.D. W. Va. Jan. 30, 2013) (continued phone calls to home and work, after being informed of counsel's contact information, sufficient to support claims for intrusion on seclusion); Ramsour v. JP Morgan Chase Bank, 2012 WL 6004230 (S.D. Cal. Nov. 30, 2012) (seventy calls after being told to communicate only with counsel, sufficient to raise fact issue as to intrusion on seclusion); Desmond v. Phillips & Cohen Assoc., Ltd., 2010 WL 2710540 (W.D. Pa. July 8, 2010) (polite and non-deceptive calls and letters in attempt to collect deceased wife's credit card debt, continuing after recent widower asked for time to grieve and referred collectors to his attorney; issue whether "whole course of conduct" was highly offensive); Simmons v. Countrywide Home Loans, Inc., 2010 WL 2635220 (S.D. Cal. June 29, 2010) (allegation of repeated and continuous phone calls to represented consumers, resulting in "great mental and physical pain" sufficient to state claim for intrusion on seclusion); Chaconas v. JP Morgan Chase Bank, 713 F. Supp. 2d 1180 (S.D. Cal. May 10, 2010) (300 calls to older, represented debtors, plus written correspondence and unauthorized third-party contact); Thompson v. Chase Bank, 2010 WL 1329061 (S.D. Cal. Mar. 30, 2010) (259 calls, up to ten or twelve per day, after receipt of attorney's cease contact letter).

180 Varnado v. Midland Funding, L.L.C., 43 F. Supp. 3d 985 (N.D. Cal. 2014) (three to five calls per day for disputed debt, continuing after written demand to cease contact; use of automated dialer and spoofing to evade caller ID); Erickson v. Messerli & Kramer, P.A., 2011 WL 1869044 (D. Minn. May 16, 2011) (phone calls to home continued after debtors provided contact information for counsel and orally requested that collector cease contact); Campbell v. Triad Fin. Corp., 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007) (calls at home and at work, continued after receipt of attorney's letter); Burkhalter v. Lindquist & Trudeau, Inc., 2005 WL 1983809 (E.D. Mo. Aug. 16, 2005) (claim stated by allegation of "systematic and continuous" communications to plaintiff's home after repeated no-contact requests); Household Credit Serv. v. Driscol, 989 S.W.2d 72 (Tex. App. 1998) (upholding $11,000,000 verdict with *remittur* of $1,000,000, for frequent calls at work and home, including vulgar language and threats, despite debtor's and employer's repeated requests that the calls cease). *But see* Hamberg v. JP Morgan Chase Bank, 2010 WL 2523947 (S.D. Cal. June 22, 2010) (allegation that collector continued contact after written request to cease communication and interrupted debtor with "intimidating language" stated claim for state debt collection act violation but not intrusion on seclusion).

- Calls or visits to the debtor at work,[181] in a hospital,[182] and in other places where collection efforts are or may become inappropriate;[183]
- Contacts with the debtor's employer;[184]
- Contacts with other third parties;[185]
- Collection attempts against victims of identity theft or other non-debtors,[186] or against debtors who are not in default;[187]

181 *See, e.g.*, Bohannon-Hingston v. Brachfield Law Group, 2011 WL 6211756 (E.D. Cal. Dec. 14, 2011) (frequent calls to workplace, conversation with manager in which personal information was disclosed, number of calls made it necessary for debtor to disclose her problem to boss and co-workers to explain why she received so many calls); Robinson v. Managed Accounts Receivable, Inc., 654 F. Supp. 2d 1051 (C.D. Cal. 2009) (repeated calls to workplace, here a military base, with actual knowledge that employer prohibited calls); Reyes v. Saxon Mortg. Co., 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009) (multiple calls per day at home, work, and on cell phones); Campbell v. Triad Fin. Corp., 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007) (calls at home and at work, continued after receipt of attorney's letter); Robertson v. Horton Bros. Recovery, Inc., 2007 WL 2009703 (D. Del. July 3, 2007) (harassment of consumer and co-workers at work); Purcell v. Universal Bank, 2003 WL 1962376 (E.D. Pa. Apr. 28, 2003) (close question whether collection calls to cardholder's small business, resulting from negligent failure to credit payment, were highly offensive); Fisher v. Quality Hyundai Motor Fin. Co., 2002 WL 47968 (N.D. Ill. Jan. 8, 2002) (threats and harassment in person and over telephone states claim); Pittman v. J.J. MacIntyre Co., 969 F. Supp. 609 (D. Nev. 1997) (collector's repeated calls to consumer's workplace stated claim); Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443 (D. Nev. 1994) (repeated and disruptive calls to consumer at work stated claim and supported punitive damages); Jacksonville State Bank v. Barnwell, 481 So. 2d 863 (Ala. 1985) (upholding $10,000 jury verdict for, *inter alia*, harassing phone calls, some at work after a request to stop, and loud offensive language causing job reprimands); Fernandez v. United Acceptance Corp., 610 P.2d 461 (Ariz. Ct. App. 1980) (numerous telephone calls to debtor's place of employment plus groundless threat to repossess family car); Housh v. Peth, 133 N.E.2d 340 (Ohio 1956) (affirming verdict for consumer based on general campaign of harassment at home and work); King v. Cashland, Inc., 2000 WL 1232768 (Ohio Ct. App. Sept. 1, 2000) (reversing summary judgment on invasion-of-privacy claim to creditor who sent calls and faxes to debtor's employer). *But cf.* Chlanda v. Wymard, 1995 WL 17917574 (S.D. Ohio Sept. 5, 1995) (one call on message machine at work, which employee of debtor retrieved, not actionable intrusion); Ford Motor Credit Co. v. Diffey, 378 So. 2d 1032 (La. Ct. App. 1979) (creditor who telephoned debtor at work and went to her workplace on her lunch hour was not coercive; creditor did not intrude on employment situation); Montgomery Ward v. Shope, 286 N.W.2d 806 (S.D. 1979) (no actionable intrusion where creditor had no way to contact debtor except at work; "collection efforts were commensurate with the circumstances").

182 *See, e.g.*, Carey v. Statewide Fin. Co., 223 A.2d 405 (Conn. Cir. Ct. 1966) (repeated calls to home and hospital about debt not owed by consumer stated cause of action).

183 *See, e.g.*, K-Mart Corp. v. Weston, 530 So. 2d 736 (Ala. 1988) (store employee told customer in front of others that check could not be honored due to prior bad check, which store knew had not been dishonored due to fault of consumer).

184 *See, e.g.*, Reid v. LVNV Funding, 2016 WL 247571 (D. Utah Jan. 20, 2016) (after thief opened credit card account using plaintiff's Social Security number, collector informed plaintiff's employer that she owed a judgment debt and was using an alias); Bohannon-Hingston v. Brachfield Law Group, 2011 WL 6211756 (E.D. Cal. Dec. 14, 2011) (frequent calls to workplace and conversation with manager in which personal information was disclosed); Weakley v. Redline Recovery Serv., 723 F. Supp. 2d 1341 (S.D. Cal. 2010) (collector, who had contact information for debtor, repeatedly contacted debtor-marine's superior officers, discussed debt, described debtor as dishonest, and was rude to officers), *clarified*, 2010 WL 3033801 (S.D. Cal. Aug. 2, 2010); Davis v. Creditors' Interchange Receivable Mgmt., L.L.C., 585 F. Supp. 2d 968 (N.D. Ohio 2008) (false threats of arrest and garnishment, workplace and family contacts, and repeated calls to consumers known to be represented sufficient); Booty v. Am. Fin. Corp., 224 So. 2d 512 (La. Ct. App. 1969) (creditor's ten telephone calls and several letters to offices of debtor's employer plus threats to debtor to see him fired from every available job). *But see* Sparks v. Phillips Cohen & Assoc., Ltd., 641 F. Supp. 2d 1234 (S.D. Ala. 2008) (single phone call to debtor's employer's unlisted home number, and "rude and obnoxious" response when employer complained to collector, not highly offensive); Turner v. Gov't Employees Fin. Corp., 351 F. Supp. 181 (W.D. Pa. 1972) (one communication to employer not unreasonable intrusion); Hart v. Gen. Motors Acceptance Corp., 437 So. 2d 1255 (Ala. 1983) (intrusion to enlist employer's help to collect debt not actionable, even though debtor lost job as a result); Household Fin. Corp. v. Bridge, 250 A.2d 878 (Md. 1969) (two calls to employer did not transgress reasonable bounds).

185 Diehl v. Money Source, Inc., 2018 WL 2995721 (S.D. Ala. June 13, 2018) (denying summary judgment to creditor; calls to non-debtor ex-husband, for debt that was arguably not delinquent may amount to invasion of privacy); Jones v. U.S. Child Support Recovery, 961 F. Supp. 1518 (D. Utah 1997) (publishing "wanted" poster to obligor's employer and close relatives, plus other harassment); Norris v. Moskin Stores, Inc., 132 So. 2d 321 (Ala. 1961) (female collector sought debtor's whereabouts by telephoning his wife and sister-in-law without identifying herself except as "Doris" and insinuating that she had extramarital relationship with debtor); Fernandez v. United Acceptance Corp., 610 P.2d 461 (Ariz. Ct. App. 1980) (numerous calls to workplace and neighbors and threat to repossess car without right to do so constituted invasion of privacy; court does not specify whether this conduct amounted to intrusion on seclusion or some other subtort). *But see* Windsor v. Gen. Motors Acceptance Corp., 323 So. 2d 350 (Ala. 1975) (four to six phone calls and visits to consumer's mother causing hospitalization not unreasonable); F.B.C. v. MDWise, Inc., 122 N.E.3d 834 (Ind. App. Ct. 2019) (intrusion on seclusion claim requires showing of physical intrusion; dismissing claim against insurer that disclosed intimate medical information to patient's spouse); Munley v. ISC Fin. House, Inc., 584 P.2d 1336 (Okla. 1978) (one telephone call, four to six attempted visits, and inquiries to neighbor, landlord, and employer were not "highly offensive to a reasonable person").

186 *See, e.g.*, Gomez v. Foster & Garbus, L.L.P., 2019 WL 5418090 (D.N.J. Oct. 22, 2019) (levying bank account of non-debtor, with knowledge of mistaken identity); N.L. by Mother Lemos v. Credit One Bank, 2018 WL 5880796 (E.D. Cal. Nov. 8, 2018) (highly offensive conduct sufficiently alleged; repeated calls to debtor's former phone number, which had been reassigned to a ten-year-old); Mulder v. Wells Fargo Bank, 2018 WL 3750627 (W.D. Pa. July 10, 2018) (thirty-five wrong-number calls after being told recipient was not the debtor); Hartley v. 21st Mortg. Corp., 2017 WL 4322430 (W.D. W. Va. Sept. 28, 2017) (debt had been discharged in bankruptcy, and encumbered property awarded to ex-wife); Sudhir v. PHH Mortg. Corp., 2017 WL 3142114 (N.D. Cal. July 25, 2017) (allowing business owner to add invasion of privacy claim regarding two or three harassing calls per day for debt not owed); Herrera v. AllianceOne Receivables, Inc., 2016 WL 7048318 (S.D. Cal. Dec. 15, 2016) (number of calls not dispositive; collector's actual knowledge of court order holding that recipient, whose name was similar to that of actual debtor, was not liable for debt made conduct highly offensive); Gallegos v. LVNV Funding, L.L.C., 169 F. Supp. 3d 1235 (D. Utah 2016) (fact issues whether intrusion was intentional or highly offensive; debt buyer twice obtained default judgment against debtor's same-named non-debtor son, after having been informed that information received from creditor was incomplete and inaccurate); Reid v. LVNV Funding, 2016 WL 247571 (D. Utah Jan. 20, 2016) (collector contacted employer and garnished wages of identity theft

- Accessing personal or confidential information;[188] and
- Other "campaigns of harassment" that involve repeated and abusive contacts.[189]

Debtors do not waive the right to be free from overly frequent telephone calls by giving their telephone number to the creditor[190] or by signing contract clauses to that effect.[191]

victim; refused to investigate even after being shown extensive documentation that plaintiff was not the debtor); Masuda v. Citibank, 38 F. Supp. 3d 1130 (N.D. Cal. 2014) (300 calls to cell phone of non-debtor despite requests to stop; high number of calls to person known to be non-debtor sufficient to support "highly offensive" element); Corson v. Accounts Receivable Mgmt., Inc., 2013 WL 4047577 (D.N.J. Aug. 9, 2013) (two months of daily phone calls to non-debtor, seeking location information for relative who did not live with plaintiff, offensive enough to support claim); Ramsour v. J.P. Morgan Chase Bank, 2011 WL 3739377 (S.D. Cal. Aug. 23, 2011) (after bank's collection action was dismissed with prejudice, because alleged debtor was fraud victim, bank sold debt to debt buyer who made daily phone calls to elderly plaintiff); Diaz v. D.I. Recovery Co., 486 F. Supp. 2d 474 (E.D. Pa. 2007) (allegation of one phone call to non-debtor, threatening immediate seizure of all her belongings if she did not pay boyfriend's debt, was sufficient to state claim); Stafford v. Cross Country Bank, 262 F. Supp. 2d 776 (W.D. Ky. 2003) (dunning of identity theft victim by bank that had issued card to thief); Lowe v. Surpas Res. Corp., 253 F. Supp. 2d 1209 (D. Kan. 2003) (threatening and harassing calls to sick older identity theft victim, continuing after being informed of dispute); Bauer v. Ford Motor Credit Co., 149 F. Supp. 2d 1106 (D. Minn. 2001) (creditor's actions continued after creditor was repeatedly informed that he was dunning the wrong person). *But cf.* Bourne v. Mapother & Mapother, PSC, 998 F. Supp. 2d 495 (S.D. W. Va. 2014) (twenty-seven auto-dialed calls to wrong number, at reasonable hours and about once per week, only one of which was answered, not highly offensive); Mirfendereski v. Rakestraw, 2011 WL 3584325 (S.D. Ohio Aug. 15, 2011) (negligently sending one polite collection letter to debtor's similarly named non-debtor brother not highly offensive); Beckstrom v. Direct Merchant's Credit Card Bank, 2005 WL 1869107 (D. Minn. Aug. 5, 2005) (collector's actions neither unreasonable nor highly offensive where it reasonably relied on information from card issuer but dunned father for son's debt); Haefka v. W.W. Extended Care, 2001 WL 1509200 (Ohio Ct. App. Nov. 28, 2001) (conduct of nursing home that sent monthly billing statements for four years to non-obligated granddaughter of deceased patient who had been listed as "contact" was not highly offensive).

187 Diehl v. Money Source, Inc., 2018 WL 2995721 (S.D. Ala. June 13, 2018) (phone harassment at time when there was a problem with misapplied payments sufficient to state RESPA and breach of contract claims); Rowland v. J.P. Morgan Chase Bank, 2014 WL 992005 (N.D. Cal. Mar. 12, 2014) (repeated calls and home visits, with threat of foreclosure, when lender knew or should have known that loan modification was in place and borrower was current).

188 *See, e.g.*, Luis v. Zang, 833 F.3d 619 (6th Cir. 2016) (Ohio law; installing spyware on computer in violation of state and federal statutes; reasonable expectation of privacy and wrongful intrusion sufficiently alleged); Peterson v. Aaron's, Inc., 2017 WL 4390260 (N.D. Ga. Oct. 3, 2017) (using software intended to locate or disable computer in case of theft or non-payment to access lessee law firm's private data); Reid v. LVNV Funding, L.L.C., 2015 WL 926146 (D. Utah Mar. 4, 2015) (refusing to dismiss invasion-of-privacy claim based on collector's accessing personal employment information when garnishing wages for debt incurred by identity thief who used plaintiff's Social Security number); Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (improperly accessing bank records); Capitol Records, Inc. v. Weed, 2008 WL 1820667 (D. Ariz. Apr. 27, 2008) (accessing hard disk and copying files without authorization is highly offensive; fact issue whether right to privacy waived by file-sharing); Rodgers v. McCullough, 296 F. Supp. 2d 895 (W.D. Tenn. 2003) (jury question whether conduct highly offensive where lawyer representing father in child custody matter improperly obtained mother's credit report in attempt to show she was irresponsible, untruthful, and financially unstable); Smith v. Bob Smith Chevrolet, 275 F. Supp. 2d 808 (W.D. Ky. 2003) (unable to rule as matter of law that accessing credit report for improper purpose not highly offensive); Pulla v. Amoco Oil Co., 882 F. Supp. 836 (S.D. Iowa 1994) (employer gained access to employee's credit card records, copied them, and put them in plaintiff's personnel file), *aff'd in part, rev'd in part on other grounds*, 72 F.3d 648 (8th Cir. 1995); Russell v. Am. Real Estate Co., 89 S.W.3d 204 (Tex. App. 2002) (tenants of foreclosed property stated claim against new owner who "rummaged" through locked space and handled personal items including clothing, family photos, and personal care items). *But cf.* Daniel v. DTE Energy, 2013 WL 4502151 (E.D. Mich. Aug. 22, 2013) (obtaining information by lawful, authorized means, here discovery in an ongoing lawsuit, cannot be highly offensive); Robinson v. TSYS Total Debt Mgmt., Inc., 447 F. Supp. 2d 502 (D. Md. 2006) (judgment creditor obtained "likelihood of collection score" from credit reporting agency; not offensive because FCRA permits this use); Korotki v. Attorney Serv. Corp., 931 F. Supp. 1269 (D. Md. 1996) (no invasion of privacy where creditor's lawyer obtained copy of credit report to get address for serving legal papers, as permitted by state and federal law), *aff'd*, 131 F.3d 135 (4th Cir. Dec. 5, 1997) (table).

189 Quinlan v. CitiMortgage, Inc., 2012 WL 2401380 (E.D. Cal. June 22, 2012) (refusing to dismiss claim that collectors' numerous letters were intrusion upon seclusion; giving weight to fact that debt was allegedly not owed and that consumers were put in fear of losing their home); Durette v. Wells Fargo Bank, 2007 WL 869726 (S.D. Ohio Mar. 20, 2007) (campaign of harassment and false credit report, following holder's failure to credit consumer's payments to previous holder); Black v. Aegis Consumer Funding Group, Inc., 2001 WL 228062 (S.D. Ala. Feb. 8, 2001) (campaign of harassment that amounted to stalking, even after consumer hospitalized for anxiety and depression); Hairford v. Centurytel, Inc., 856 So. 2d 139 (La. Ct. App. 2003) (numerous phone calls, attempt to draft bank account, threats to cut off phone service of older consumer, failure to cooperate in efforts to resolve dispute; debt not owed); King v. Cashland, Inc., 2000 WL 1232768 (Ohio Ct. App. Sept. 1, 2000) (reversing summary judgment on invasion-of-privacy claim for creditor who, *inter alia*, contacted debtor's sister, friend, employer, and landlord). *See also* Gersh v. Anglin, 353 F. Supp. 3d 958 (D. Mont. 2018) (unleashing "troll storm" by internet publication of person's contact information, urging recipients to harass that person). *But cf.* Howard v. Asset Acceptance, L.L.C., 2013 WL 1760299 (E.D. Ky. Apr. 24, 2013) (mailing collection letters to debtor's home is not intrusion on seclusion); Baker v. Sentry Credit, Inc., 2012 WL 220243 (S.D. Ohio Jan. 25, 2012) (eight letters attempting to collect disputed deficiency on car loan not a campaign of harassment, nor was turning debt over to second collection agency after first agency sent it back when it learned that debt was disputed); Flores v. Quick Collect, 2007 WL 2769003 (D. Or. Sept. 18, 2007) (several phone calls, writ of garnishment, and seeking debtor exam in wrong county not sufficient to state claim for intrusion on seclusion). *See generally* National Consumer Law Center, Fair Credit Reporting § 18.3.4 (9th ed. 2017), *updated at* www.nclc.org/library (application of this tort in credit reporting context).

190 Duncan v. JP Morgan Chase Bank, 2011 WL 5359698 (S.D. W. Va. Nov. 4, 2011) (giving phone number to creditor not blanket permission to call whenever it chose); Gray v. Chase Bank, 2011 WL 4716232 (S.D. W. Va. Oct. 7, 2011) (giving phone number to creditor does not waive right to privacy). *But cf.* Cherkaoui v. Santander Consumer USA, Inc., 32 F. Supp. 3d 811 (S.D. Tex. 2014) (calls to cell phone not unreasonable, where consumer gave cell number on credit application and never told creditor not to call that number).

191 Singer v. Las Vegas Athletic Clubs, 376 F. Supp. 3d 1062 (D. Nev. Mar. 25, 2019) (initial consent to receive phone calls does not bar claims arising from unreasonable volume or frequency); King v. Cashland, Inc.,

15.3.3 Holding Up to False Light

The essence of the tort of placing a person in a false light is the false attribution to the debtor of an undesirable or negative character.[192] This tort is recognized in most jurisdictions,[193] but there are some exceptions.[194] While similar to defamation,[195] false light claims avoid several requirements of defamation actions, such as pleading special damages. On the other hand, while truth is an affirmative defense in a defamation claim, falsity is an element of a false light claim, so the plaintiff must make an affirmative showing of falsity.[196] Both torts may be pleaded in the same action.

In order to satisfy all the elements of this subtort, an attribution by a collector must have the following characteristics:

- It must be unreasonable;[197]
- It must be published by speech, writing, or conduct, and in some jurisdictions must be publicized more widely;[198]
- It must allege an untrue, offensive fact;[199]

2000 WL 1232768 (Ohio Ct. App. Sept. 1, 2000) (contract clause waiving any right to assert privacy claims is void as against public policy as to a creditor who uses abusive and harassing debt collection methods).

192 *See* Restatement (Second) of Torts § 652E (1977) (listing elements).

193 Talley v. Time, Inc., 923 F.3d 878 (10th Cir. 2019) (Oklahoma recognizes the tort of false light, but requires a showing of actual malice—either knowing falsehood, or reckless disregard as to the falsity of the published matter); Donnachie v. Frank S. Falzone & Assoc., 2010 WL 3191981 (M.D. Pa. Aug. 11, 2010) (Pennsylvania recognizes "false light" tort); Haguewood v. Gannett River States Publ'g Corp., 2007 WL 1728700 (S.D. Miss. June 13, 2007) (Mississippi recognizes "false light" tort; public disclosure of false and offensive facts about plaintiff; truth a complete defense); Carson v. Lynch Multimedia Corp., 123 F. Supp. 2d 1254 (D. Kan. 2000) (Kansas recognizes tort where defendant's publicity places plaintiff before the public in a false light highly offensive to a reasonable man; plaintiff need not specifically plead emotional distress); Field v. U-Haul Co. of E. Bay, 2004 WL 2005739 (Cal. Ct. App. Sept. 8, 2004) (plaintiff stated claims for both defamation and false light; U-Haul came to pick up overdue truck accompanied by police officer and stated publicly that the officer "is there to arrest you," even though officer was present only to assist in gaining entrance to gated condominium complex); Denver Publ'g Co. v. Bueno, 54 P.3d 893 (Colo. 2002); Barrett v. Fonorow, 799 N.E.2d 916 (Ill. App. Ct. 2003) (elements are placing plaintiff in a false light "before the public" that would be highly offensive to reasonable person, and actual malice); Welling v. Weinfeld, 866 N.E.2d 1051 (Ohio 2007) (elements are "(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed"); West v. Media Gen. Convergence, Inc., 53 S.W.3d 640 (Tex. 2001) (recognizing the tort); SIRQ, Inc. v. The Layton Companies, Inc., 379 P.3d 1237 (Utah 2016) (recognized in Utah; noting overlap with defamation); Benson v. AJR, Inc., 599 S.E.2d 747 (W. Va. 2004). *Cf.* Smith v. Humane Soc'y of the United States, 519 S.W.3d 789 (Mo. 2017) (Missouri will not recognize false light claim where, as here, plaintiff states a claim for defamation, but might recognize claim for falsely attributing to a person some opinion or utterance, or using a person's picture to illustrate as story that has no bearing on plaintiff).

194 Jurisdictions that do not recognize the tort of false light include Florida, Massachusetts, New York, South Carolina, Texas, and Virginia. *See* Amrak Productions, Inc. v. Morton, 410 F.3d 69, 73 (1st Cir. 2005) (Mass. law); Johnson v. Sawyer, 47 F.3d 716, 732 n.34 (5th Cir. 1995) (Tex. law); Brighton v. McIntosh, 2011 WL 3585982 (S.D.N.Y. July 28, 2011) (misuse of name or image is actionable only if for purposes of "advertising or trade," so setting up fake website with debtor's name and information not actionable); Falwell v. Penthouse Int'l, Ltd., 521 F. Supp. 1204, 1206 (W.D. Va. 1981); Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098 (Fla. 2008) (the tort would be duplicative of defamation by implication but without protection for free flow of information); Cruz v. Latin News Impacto Newspaper, 627 N.Y.S.2d 388 (N.Y. App. Div. 1995); Brown v. Pearson, 483 S.E.2d 477, 484 (S.C. Ct. App. 1997).

195 Seaquist v. Caldier, 438 P.3d 606 (Wash. App. Ct. 2019) (contrasting the two causes of action; defamation compensates for harm to reputation, false light for mental suffering).

196 Rice v. Seterus, Inc., 2018 WL 513345 (N.D. Ala. Jan. 23, 2018) (burden of proof of falsity is on plaintiff); Regions Bank v. Plott, 897 So. 2d 239 (Ala. 2004); Restatement (Second) of Torts § 652E, cmt. b (comparison of the elements of defamation and false light).

197 Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. Ct. 1997) (false light requires proof of "such a major misrepresentation of . . . character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man"; newspaper article reporting creditor's disappointment in district attorney's failure to follow up on criminal charges was insufficient).

198 *See* Rice v. Seterus, Inc., 2018 WL 513345 (N.D. Ala. Jan. 23, 2018) (disclosure to credit bureau and insurance company not sufficient; foreclosure notice published in newspaper could be sufficient but not sufficiently alleged here); McCleary v. DLJ Mortg. Capital, Inc., 2017 WL 4542054 (S.D. Ala. Oct. 11 2017) (noting conflict of authority on the question whether reports to credit bureaus are sufficient publicity to support false light claim; concluding that they are not); Jackson v. Bank of N.Y. Mellon, 2016 WL 4942085 (S.D. Ala. July 19, 2016) (statements to credit bureaus and insurance carrier not sufficient); Neil v. Nesbit, 2014 WL 4897315 (N.D. Ill. Sept. 27, 2014) (may be publication either to general public or to small group with special relationship to plaintiff, here co-workers, supervisor, and tenant); Phillips v. Ocwen Loan Servicing, L.L.C., 2013 WL 4854760 (N.D. Ga. Sept. 11, 2013) (publication of foreclosure notice is sufficient); Donnachie v. Frank S. Falzone & Assoc., 2010 WL 3191981 (M.D. Pa. Aug. 11, 2010) (widespread publicity required; publication to one family member insufficient); L-S Indus., Inc. v. Matlack, 641 F. Supp. 2d 680 (E.D. Tenn. 2009) (letter and three email messages to business contacts insufficient to make information public knowledge); Brown v. O'Bannon, 84 F. Supp. 2d 1176 (D. Colo. Feb. 16, 2000) (publicity, not just publication, necessary for false-light invasion-of-privacy claim); *In re* Lansaw, 2015 WL 224093 (Bankr. W.D. Pa. Jan. 14, 2014) (posting a sign at entrance to business premises, visible to customers, employees, and passersby was sufficient publicity); Regions Bank v. Plott, 897 So. 2d 239 (Ala. 2004) (returning one check, stamped with a message, to each of two banks is insufficient); Lee Ching v. Dung, 446 P.3d 1016 (Haw. App. Ct. 2019) (posting information that clearly identifies plaintiff on shared Facebook page will support claim; yelling insults where neighbors can hear will not), *reversed in part on other grounds*, 477 P.3d 856, 872 (Haw. 2020) (no error in intermediate appellate court's ruling on false light claim); Barrett v. Fonorow, 799 N.E.2d 916 (Ill. App. Ct. 2003) (must be communicated to "so many persons that the matter must be regarded as substantially certain to become one of public knowledge"); Benson v. AJR, Inc., 599 S.E.2d 747 (W. Va. 2004) (widespread publicity is element; publication to three persons within same company insufficient); Marleau v. Truck Ins. Exch., 37 P.3d 148 (Or. 2001) (falsely telling lender that borrower was not paying debts not sufficient publicity).

199 *See* Dougherty v. Harvey, 317 F. Supp. 3d 1287 (N.D. Ga. 2018) (must show false but non-defamatory statement; dismissing false light claim that duplicates defamation claim); Phillips v. Ocwen Loan Servicing, L.L.C., 2013 WL 4854760 (N.D. Ga. Sept. 11, 2013) (publication of foreclosure notice when debtor not in default is sufficiently offensive to support claim); Knechtel v. Choicepoint, Inc., 2009 WL 4123275 (D.N.J. Nov. 23, 2009) (denying motion to dismiss; attributing to consumer judgment against another person with same last name could be

- It must be about the debtor; and
- It must be objectionable under the reasonable person standard.

The following cases illustrate the false light tort:

- A cause of action was stated by a plaintiff who alleged that a creditor had included the plaintiff's name on a sign in a store window and in a list in a newspaper of "undisputed" claims for sale, when in fact the debt was disputed by the plaintiff;[200]
- Publication of false information in a credit report may state a claim,[201] unless the claim is barred by the FCRA's preemption provisions;[202]
- A plaintiff was awarded damages for his impaired credit, mental anguish, humiliation, and embarrassment caused when a store accidentally issued a credit card in his name to his brother and then served him with suit at his job after being informed of the error;[203] and
- Police officers stated a cause of action against collectors who had impersonated them while threatening and intimidating debtors.[204]

15.3.4 Public Disclosure of Private Facts

The tort of invasion of privacy involving public disclosure of true but private facts may apply to a disclosure by a debt collector if the disclosure meets the following criteria:

- It is published;
- It is about the debtor;
- It discloses a true but private fact;[205]
- It is of a kind or is expressed in a manner that is offensive under the reasonable person standard; and
- It causes the debtor harm.[206]

The principal advantage of alleging this form of invasion of privacy is that it applies when false light and defamation claims will not, because the truth of the matter disclosed is immaterial.

In the debt collection context, liability for this tort vindicates the right to be free from unreasonable disclosure of private financial or personal affairs. Reasonableness is usually measured in terms of two variables: the size of the group that receives the publication and the degree of offensiveness of the facts published. The burden of justifying publication becomes progressively heavier as the audience grows larger and as the offensiveness of the publication increases.

One court has held that the facts revealed must be "intimate" or "highly objectionable to a person of ordinary sensibilities" and of no "legitimate concern to the public."[207] The plaintiff

highly offensive); Henson v. CSC Credit Serv., 830 F. Supp. 1204 (S.D. Ind. 1993) (dismissing claim because consumer failed to allege that collector's statements about him were false), *aff'd in part, rev'd in part on other grounds*, 29 F.3d 280 (7th Cir. 1994); *In re* Lansaw, 2015 WL 224093 (Bankr. W.D. Pa. Jan. 14, 2014) (posting sign stating that business was being evicted for nonpayment of rent would be highly offensive, if false); Regions Bank v. Plott, 897 So. 2d 239 (Ala. 2004) (messages bank stamped on checks it returned were not false, so no false light claim); SIRQ, Inc. v. The Layton Companies, Inc., 379 P.3d 1237 (Utah 2016). *But see* Funk v. Lincoln-Lancaster County Crime Stoppers, 885 N.W.2d 1 (Neb. 2016) (if claim arises from false statement, only cause of action is defamation, not false light).

200 Tollefson v. Price, 430 P.2d 990 (Or. 1967). *See also* Wal-Mart Stores v. Lee, 74 S.W.3d 634 (Ark. 2002) (affirming verdict for employee where employer displayed allegedly stolen goods on front lawn in presence of neighbors and media and stated that employee was thief).

201 *See, e.g.*, Champion v. Global Credit Card Serv., 2012 WL 3542225 (N.D. Ala. Aug. 15, 2012) (malicious or reckless report to credit bureau sufficient to allege publicity, considering the wide variety of uses for which credit reports are sought); Knechtel v. Choicepoint, Inc., 2009 WL 4123275, at *6 (D.N.J. Nov. 23, 2009) (publication in credit reports sufficient); Cross v. Receivables Mgmt. Solutions, Inc., 2006 WL 446083 (D. Colo. Feb. 21, 2006) (false light claim may go forward where collectors persistently reported and dunned on disputed debt); Semper v. JBC Legal Group, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005) (report to credit reporting agency was publicity sufficient to support false light claim; report was accessed by six creditors, and was available to others). *But see* Brignola v. Home Properties, L.P., 2013 WL 1795336 (E.D. Pa. Apr. 26, 2013) (report to credit bureau not sufficient publicity to support false light claim); Gagliardi v. Experian Info. Solutions, Inc., 2009 WL 365647 (W.D. Pa. Feb. 12, 2009) (reporting to three credit bureaus is insufficient publicity), *aff'd on other grounds*, 357 Fed. Appx. 413 (3d Cir. 2009); *In re* BFW Liquidation, L.L.C., 471 B.R. 652 (Bankr. N.D. Ala. 2012) (reports to credit bureau and law enforcement not sufficient publicity).

202 *See, e.g.*, Abusaab v. Equifax Info. Serv., L.L.C., 2006 WL 1214782 (E.D. Pa. May 4, 2006) (denying summary judgment where credit reporting agency persistently reported reversed judgment as "satisfied"; allegations of willfulness sufficient to avoid Fair Credit Reporting Act preemption at summary judgment stage). *See generally* National Consumer Law Center, Fair Credit Reporting § 10.4 (9th ed. 2017), *updated at* www.nclc.org/library.

203 Montgomery Ward v. Larragoite, 467 P.2d 399 (N.M. 1970).

204 Nolfi v. Melson, 2000 WL 839971 (Conn. Super. Ct. June 12, 2000).

205 *See* McMullen v. McHughes Law Firm, 454 S.W.3d 200 (Ark. 2015) (claim fails where plaintiff alleged that information disclosed was false; must show disclosure of true, but private, facts).

206 Restatement (Second) of Torts § 652D (1977) (listing elements). *But see* Clark v. Nationwide Credit, Inc., 2008 WL 4601582 (S.D. Ind. Oct. 16, 2008) (Indiana does not recognize tort claim for disclosure of private facts).

207 Johnson v. Sawyer, 47 F.3d 716, 731–732 (5th Cir. 1995) (Internal Revenue Service's issuance of press release including full name, address, and job title of executive who pleaded guilty to tax evasion insufficient to state claim because information not "intimate," even though some of it was illegally released from tax returns). *See also* Miller v. Davis, 653 Fed. Appx. 448 (6th Cir. 2016) (Ohio law; affirming summary judgment for defendants; couple's private financial information was of interest to the public when they were indicted and tried for elder abuse); Pawlaczyk v. Besser Credit Union, 2014 WL 5425576 (E.D. Mich. Oct. 22, 2014) (fact that plaintiff is no longer employed by defendant is not private); Maddox v. Martin Co., L.L.C., 2006 WL 1308211 (S.D. Ohio May 11, 2006) (disclosure of non-debtor's Social Security number to other family members, in message on household answering machine, not highly offensive); Clearwater Court L.P. v. MacInnes, 2006 WL 2811807 (Cal. Ct. App. Oct. 3, 2006) (revealing that developer had been involved in embezzlement scandal—as victim—was offensive because it could interfere with his ability to obtain investors); Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371 (Colo. 1997) (elements include facts of no legitimate concern to the public and reckless disregard for the private nature of the facts); Busse v. Motorola, Inc., 813 N.E.2d 1013 (Ill. App. Ct. 2004) (no tort unless

may also need to show that the facts were private—that is, they had not been previously published.[208]

Most courts have held that widespread "publicity" is required for a cause of action to arise.[209] Thus, informing other creditors,[210] a credit reporting agency,[211] or a few family members[212] of a debtor's delinquency is generally not actionable as this tort. But if information is made available to the public at large it will constitute publicity even if very few people actually receive it—for example, a late-night radio broadcast or a

"the matter intruded on was private"; not shown here where cell phone company disclosed information including names, ages, Social Security number, and usage patterns for use in epidemiological study of cell phone safety); Franklin Collection Agency v. Kyle, 955 So. 2d 284 (Miss. 2007) (itemized medical bill; issue whether medical details exceeded what was necessary to support claim for open account); Barner v. Krohle, 2006 WL 3028766 (Ohio Ct. App. Oct. 26, 2006) (fact that condominium owner was not paying fees was not private or intimate where by-laws required that payment information be available to all owners); Huntington Ctr. Assoc. v. Schwartz, Warren & Ramirez, L.L.C., 2000 WL 1376524 (Ohio Ct. App. Sept. 26, 2000) (no invasion of privacy where existence of judgment and financial arrangements made when partnership split up were not information about anyone's private life, and revelation would not be highly offensive to normal person); Pontbriand v. Sundlun, 699 A.2d 856 (R.I. 1997) (information about one's bank balance is "private fact," but remanding for determination whether governor's release to the media of list of persons having bank balances of more than $100,000, in effort to prove that his costly bank bailout bill was not a favor to large political contributors, would be offensive to a reasonable person); Judge v. Saltz Plastic Surgery, P.C., 367 P.3d 1006 (Utah 2016) (adopting *Restatement* definition; discussing legitimate interest to the public).

208 Brignola v. Home Properties, L.P., 2013 WL 1795336 (E.D. Pa. Apr. 26, 2013) (no showing that facts reported to credit bureau, here deceased father's debt reported as debt of son, were private); Tenorio v. Reliable Collection Agency, Inc., 2003 WL 23150110 (D. N. Mar. I. Dec. 31, 2003) (no disclosure of private facts where collector's clerk queried amount of check consumer was writing at counter, as consumer's presence at counter already revealed he was debtor); McCorkle v. McCorkle, 811 So. 2d 258 (Miss. Ct. App. 2001); Barner v. Krohle, 2006 WL 3028766 (Ohio Ct. App. Oct. 26, 2006) (no disclosure of private facts because condominium owner had already told others of his decision to withhold disputed payments); Huntington Ctr. Assoc. v. Schwartz, Warren & Ramirez, L.L.C., 2000 WL 1376524 (Ohio Ct. App. Sept. 26, 2000) (no invasion of privacy where information was matter of public record); Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. Ct. 1997) (existence of a lawsuit is a public, not private, fact; notifying creditors that plaintiff was about to receive a substantial settlement was not actionable, as they had a legitimate interest in this information); Judge v. Saltz Plastic Surgery, P.C., 367 P.3d 1006 (Utah 2016) (fact issues whether plastic surgery patient, who had consented to use of photographs for educational purposes and been interviewed for television show, had placed information before the public).

209 Pawlaczyk v. Besser Credit Union, 2014 WL 5425576 (E.D. Mich. Oct. 22, 2014) (former employer's email to management of other credit unions was not publicity); Stokes v. Barnhart, 257 F. Supp. 2d 288 (D. Me. 2003) (publication to individual or small group can never support claim); Tenorio v. Reliable Collection Agency, Inc., 2003 WL 23150110 (D. N. Mar. I. Dec. 31, 2003) (no publicity where only collector's employees heard conversation about the debt); Davenport v. Farmers' Ins. Group, 2003 WL 21975843 (D. Minn. Aug. 12, 2003) (insurer's disclosure of credit report to a few insurance agents not sufficient), *aff'd in part, rev'd in part on other grounds*, 378 F.3d 839 (8th Cir. 2004); Challen v. Town & Country Charge, 545 F. Supp. 1014 (N.D. Ill. 1982) (one letter to consumer's employer enlisting employer's aid in collecting debt is not publicity); *In re* Residential Capital, L.L.C., 2016 WL 797901 (Bankr. S.D.N.Y. Feb. 29, 2016) (disclosure of delinquency to near neighbors not publicity; property service photographers shouted at and heckled family members); Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371 (Colo. 1997) (disclosure must be to general public rather than one individual or a few); Robins v. Conseco Fin. Loan Co., 656 N.W.2d 241 (Minn. Ct. App. 2003) (disclosure of confidential credit information to one person not publicity; distinguishing case of revealing affair to spouse because of "delicacy" of that situation); Balke v. Ream, 33 S.W.3d 589 (Mo. Ct. App. 2000) (publicity not shown where party shared unlawfully recorded telephone conversation only with his attorney); Wilkinson v. Methodist, Richard Young Hosp., 612 N.W.2d 213 (Neb. 2000) (after father refused to pay or file an insurance claim for treatment of his runaway daughter, hospital accessed information from father's previous hospitalization and used it to file the insurance claim; no invasion of privacy because publication to insurance company, hospital employees, and daughter's mother was not publicity); Cullum v. Gov't Employees Fin. Corp., 517 S.W.2d 317 (Tex. App. 1974) (one letter to debtor's employer not publication). *But see* Biddle v. Warren Gen. Hosp., 715 N.E.2d 518 (Ohio 1999) (unauthorized disclosure of non-public medical information is tortious; publicity not required).

210 Salter v. AmSouth Bank, 487 So. 2d 927, 930 (Ala. Civ. App. 1985). *See also* Regions Bank v. Kaplan, 2013 WL 1193831 (M.D. Fla. Mar. 22, 2013) (fraud alert in secured online database, accessible to financial institutions and law enforcement, not sufficient publication to the general public), *on reconsideration*, 2015 WL 1456697 (M.D. Fla. Mar. 30, 2015); Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. Ct. 1997) (informing creditors that debtor was about to receive a substantial settlement was not actionable; creditors had a legitimate interest in the funds); Swinton Creek Nursery v. Edisto Farm Credit, 483 S.E.2d 789 (S.C. Ct. App. 1997) (no invasion of privacy where commercial lender revealed to prospective buyer of borrower's business that the business was under financial duress; publication to an individual or small group was not publicity), *aff'd in part and rev'd in part on other grounds*, 514 S.E.2d 126 (S.C. 1999). *See generally* National Consumer Law Center, Fair Credit Reporting §§ 18.3.2, 18.3.3 (9th ed. 2017), *updated at* www.nclc.org/library (application of the tort of public disclosure of private facts to credit reporting).

211 Blair v. Bank of Am., 2012 WL 860411 (D. Or. Mar. 13, 2012) (disclosure to debt collector and credit bureau not publicity); Blakey v. Victory Equip. Sales, 576 S.E.2d 288 (Ga. Ct. App. 2002) (report to credit reporting agency not sufficient publicity). *See also* National Consumer Law Center, Fair Credit Reporting § 18.3.2 (9th ed. 2017), *updated at* www.nclc.org/library (immunity for disclosures made pursuant to certain FCRA provisions).

212 Sapia v. Regency Motors, 276 F.3d 747 (5th Cir. 2002) (La. law; car dealer did not act unreasonably by asking buyer's father to return car and disclosing that buyer, who was away on business, had failed to secure financing); Morin v. Nationwide Fed. Credit Union, 2008 WL 5157740 (D. Conn. Dec. 8, 2008) (publicity not shown where lender discussed debt only with borrower's daughter, who was co-maker of one note); Campbell v. Triad Fin. Corp., 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007) (calls to friends and family not sufficient publicity); Jones v. U.S. Child Support Recovery, 961 F. Supp. 1518 (D. Utah 1997) (distribution of wanted poster, describing child support obligor as deadbeat, to obligor's employer, mother, and siblings is insufficient publicity). *See also* Doe v. TCF Bank Ill., 707 N.E.2d 220 (Ill. App. Ct. 1999) (disclosure to individual or small group may be actionable if there is "special relationship" with plaintiff, but disclosure of financial information to wife was permissible because of her possible liability under family expenses statute, and effect of husband's debt on her rights in case of divorce or separation); Vogel v. W.T. Grant Co., 327 A.2d 133 (Pa. 1974) (contacting three relatives and employer not unreasonable publicity).

Facebook page viewed by just a few people.[213] When the group receiving the publication is small but the collector's conduct is particularly outrageous, however, courts tend to interpret the publication requirement more loosely.[214] Liability for this subtort can be based on oral communications.[215]

Unless the disclosure is aggravated by wider publicity, abuse, or blatant coercion, some older decisions have held that an employer has a "privilege" to learn of the debts of an employee.[216] These courts ignore the enormous coercive effect that an employer contact has on a debtor,[217] and a number of courts allow such claims.[218] Congress's policy (evidenced by the FDCPA) of not permitting employer contacts by collection agencies[219] may persuade more courts to reach this result.

Other examples of public disclosures of private facts in the debt collection context that have been found actionable include:

- Publishing lists of debtors ("deadbeat" lists);[220] and
- Disclosure of non-public medical information.[221]

213 Pinero v. Jackson Hewitt Tax Serv. Inc., 594 F. Supp. 2d 710 (E.D. La. 2009) (genuine issue of fact whether copies of tax returns, thrown unshredded into dumpster, were "made public"); *In re* McKenzie, 2010 WL 917262 (Bankr. S.D. Miss. Mar. 10, 2010) (attaching private medical and financial information to proof of claim in bankruptcy sufficient to show publicity); Yath v. Fairview Clinics, N.P., 767 N.W.2d 34 (Minn. Ct. App. 2009) (Facebook page). *But see In re* Ricker, 2012 WL 2562760 (Bankr. E.D. Tenn. June 29, 2012) (filing of unredacted Social Security number with proof of claim; filings are accessible to the public upon payment of a fee, but claim fails because no evidence that any person actually tried to access the information or that debtor suffered any damage); *In re* Carter, 411 B.R. 730 (Bankr. M.D. Fla. 2009) (attaching personal medical information to proof of claim in bankruptcy not publicity; claim is public record, but no evidence anyone viewed file before information redacted).

214 *See, e.g.*, Finley v. Kelly, 384 F. Supp. 3d 898 (M.D. Tenn. 2019) (Tennessee recognizes this tort, but has not clearly defined publicity; predicting that revelation to a small but important group, here family and friends, will be sufficient); Browning v. AT&T Corp., 682 F. Supp. 2d 832 (N.D. Ill. 2009) (revealing information to business acquaintances and a friend; publication to small group is sufficient if there is a special relationship); Parks v. Rainbow Rentals, Inc., 2008 WL 2325154 (W.D. Ky. June 4, 2008) (publication to small group such as fellow employees or club members sufficient if revelation would be embarrassing; posting computer printout with name, Social Security number, and amount allegedly due on outside of home, visible to passersby, was publicity); Wagner v. City of Holyoke, 241 F. Supp. 2d 78 (D. Mass. 2003) (publication of personal medical information to co-workers without need to know); Purcell v. Universal Bank, 2003 WL 1962376 (E.D. Pa. Apr. 28, 2003) (collection calls to cardholder's small business caused gossip within small company and small town); Sacco v. Eagle Fin. Corp., 234 So. 2d 406 (Fla. Dist. Ct. App. 1970) (yelling and banging on debtor's door presented jury question); Boudreaux v. Allstate Fin. Corp., 217 So. 2d 439 (La. Ct. App. 1968) (creditor explained debtor's financial problems to a neighbor in course of offensive telephone collection campaign); Biederman's, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959) (embarrassing visits to workplace); Karch v. BayBank, 794 A.2d 763 (N.H. 2002) (publicity does not depend on number of people told; disclosure of illegally intercepted phone conversation to co-workers, resulting in hostility, sufficient to state a claim). *See also* Pachowicz v. Ledoux, 666 N.W.2d 88 (Wis. Ct. App. 2003) (publicity sufficiently alleged with disclosure to one notorious gossip).

215 *See, e.g.*, Ignat v. Yum! Brands, Inc., 154 Cal. Rptr. 3d 275 (Cal. Ct. App. 2013). *But see* Midwest Glass Co. v. Stanford Dev. Co., 339 N.E.2d 274 (Ill. App. Ct. 1975) (in actions involving debt collection, invasion of privacy cannot be based merely on oral communications).

216 *See, e.g.*, Yoder v. Smith, 112 N.W.2d 862 (Iowa 1962); Passman v. Commercial Credit Plan, Inc., 220 So. 2d 758 (La. Ct. App. 1969) (judgment creditor warning employer of garnishment proceedings); Vogel v. W.T. Grant Co., 327 A.2d 133 (Pa. 1974) (contacting three relatives and employer not unreasonable publicity). *See also* Hart v. Gen. Motors Acceptance Corp., 437 So. 2d 1255 (Ala. 1983) (not unreasonable for creditor to seek employer's help in collecting debt; debtor later lost job); Windsor v. Gen. Motors Acceptance Corp., 323 So. 2d 350 (Ala. 1975) (reporting repossession of car to police and consumer's employer not unreasonable); Timperley v. Chase Collection Serv., 77 Cal. Rptr. 782 (Cal. Ct. App. 1969) (limited right to reveal existence of debt encompasses contacting employer).

217 *See* Hawley v. Prof'l Credit Bureau, Inc., 76 N.W.2d 835, 839 (Mich. 1956) (Smith, J., dissenting).

218 Sewell v. Allied Interstate, Inc., 2011 WL 32209 (E.D. Tenn. Jan. 5, 2011); Pack v. Wise, 155 So. 2d 909 (La. Ct. App. 1963) (awarding damages against creditor that showed consumer's employer a letter from consumer's attorney requesting that creditor desist from further contacts regarding disputed debt, which led employer to fire consumer). *See also* Weakley v. Redline Recovery Serv., 723 F. Supp. 2d 1341 (S.D. Cal. 2010) (debtor stated claim for common law invasion of privacy against collector who, despite having debtor-marine's contact information, repeatedly contacted his superior officers and described debtor as dishonest), *clarified*, 2010 WL 3033801 (S.D. Cal. Aug. 2, 2010); Gen. Fin. Corp. v. Davis, 191 S.E.2d 865 (Ga. Ct. App. 1972) (unreasonable employer contacts actionable, but not shown here); Pachowicz v. Ledoux, 666 N.W.2d 88 (Wis. Ct. App. 2003) (disclosure to employer actionable because revelation can be "as devastating as widespread publicity").

219 *See* §§ 5.6, 5.7, *supra*.

220 Trammell v. Citizens News Co., 148 S.W.2d 708 (Ky. 1941) (notice posted in store and published in newspaper); Brents v. Morgan, 299 S.W. 967 (Ky. 1927) (five by eight foot sign listing debtors in a store window); Mason v. Williams Discount Ctr., Inc., 639 S.W.2d 836 (Mo. Ct. App. 1982) (listing plaintiff's name under a list headed "NO CHECKS" in plain view of customers at checkout counter states claim). *But cf.* City Stores Co. v. Henderson, 156 S.E.2d 818 (Ga. Ct. App. 1967) (although other customers may have heard store clerk ask debtor to return credit card, not tortious).

221 Wagner v. City of Holyoke, 241 F. Supp. 2d 78 (D. Mass. 2003) (under Massachusetts privacy statute, massive publicity not required; publication of personal medical information to co-workers was sufficient); *In re* McKenzie, 2010 WL 917262 (Bankr. S.D. Miss. Mar. 10, 2010) (attaching private medical information to proof of claim in bankruptcy); Franklin Collection Agency v. Kyle, 955 So. 2d 284 (Miss. 2007) (itemized medical bill; issue whether medical details exceeded what was necessary to support claim for open account); McCorkle v. McCorkle, 811 So. 2d 258 (Miss. Ct. App. 2001) (confidential Veterans Administration medical and claims records unlawfully obtained and widely publicized in course of family financial dispute); Biddle v. Warren Gen. Hosp., 698 N.E.2d 1007 (Ohio 1999) (patients stated claim against hospital and law firm, where hospital passed all patient registration forms to law firm, which sought out patients eligible for SSI or other benefits and offered to represent them in applying for these benefits). *But cf. In re* Mallard, 2014 WL 988779 (Bankr. E.D. Ky. Mar. 12, 2014) (publicity not sufficiently alleged; proof of claim for medical bill disclosed HIV diagnosis, but court promptly restricted access to it).

15.4 Intentional Interference with Contractual Relationships or Prospective Economic Relations

15.4.1 Overview

Two closely related torts that may occur in the debt collection context are tortious interference with a contract and tortious interference with prospective economic relations. Because the law is protective of existing contracts, the former cause of action is better developed and easier to prove.

Both torts require a showing of wrongful conduct which is intended to, and does, cause the loss of present or prospective business relations. A substantially higher degree of wrongfulness is required for interference with prospective relations.[222]

In determining whether a creditor's actions were improper, courts may look to "recognized standards of business ethics and business customs and practices."[223] The consumer will generally need to prove that the creditor's action either lacked any legitimate purpose[224] or was independently tortious or

222 Matter of Dallas Roadster, Ltd., 846 F.3d 112 (5th Cir. 2017) (Tex. law; for interference with business expectancy must show independently tortious or unlawful act); Thimjon Farms P'ship v. Int'l Bank and Trust, 837 N.W.2d (N.D. 2013) (articulating elements of the two torts); Ordonez v. Saxon Mortg. Serv., Inc., 2009 WL 395488 (E.D. Cal. Feb. 17, 2009); Vinas v. Chubb Corp., 499 F. Supp. 2d 427 (S.D.N.Y. 2007) (claim stated for interference with contract, with fact issues as to economic justification, but no claim for prospective relations, which requires showing of "extreme and unfair" wrongful means or action solely out of malice); Gen. Elec. Capital Corp. v. Commercial Serv. Group, 485 F. Supp. 2d 1015 (N.D. Iowa 2007) (wrongfulness must be shown for either tort, but different in degree; balancing test for interference with contract; must show "sole or predominant purpose to injure or financially destroy" another for interference with prospective relations); Farm Credit Midsouth, PCA v. Bollinger, 548 S.W.3d 164 (Ark. Ct. App. 2018) (justification defense will receive greater recognition in cases involving prospective relations); White Plains Coat & Apron Co. v. Cintas, Corp., 867 N.E.2d 381 (N.Y. 2007) (articulating criteria for the two torts; law is more protective of existing contracts); Carvel Corp. v. Noonan, 785 N.Y.S.2d 359 (N.Y. 2004) (both are torts, but different elements; if interference results in breach of contract, interferer is liable even if behavior was lawful; if only nonbinding economic relation, must show crime or independent tort, or conduct the sole purpose of which is inflicting harm on plaintiff). *See also* Duradrill, L.L.C. Dynmax Drilling Tools, Inc. 516 S.W.3d 147 (Tex. App. 2017) (complex commercial case; articulating the elements of the two causes of action). *But cf.* Hamann v. Carpenter, 937 F.3d 86, 92 (1st Cir. 2019) (Mass. has not consistently distinguished between the two torts). *See generally* Restatement (Second) of Torts §§ 766, 766A, 766B (1979).

223 Saglioccolo v. Eagle Ins. Co., 112 F.3d 226 (6th Cir. 1997) (remanding for fact finding regarding industry custom where insurance company, in effort to collect disputed debt for premiums, refused to issue "tort letter" stating there were no claims against insured cab driver, who needed it to sell his New York City medallion); Parvez v. Bigelman, 2005 WL 3479824 (Mich. Ct. App. Dec. 20, 2005) (no tortious interference where action taken for proper business reasons; notices to debtor's account debtors to pay creditor who had security interest in accounts receivable were limited in scope and permitted by Uniform Commercial Code); C.R. England v. Swift Transp. Co., 437 P.3d 343 (Utah 2019) (use of improper means is an element of the claim; must show that act was contrary to a statute, regulation, common law rule, or established standard of a trade or profession). *See also* Janvrin v. Continental Resources, Inc., 934 F.3d 845 (8th Cir. 2019) (S.D. law) (relying on *Restatement* factors and upholding jury's determination that interference was improper).

224 *See* 16 Casa Duse, L.L.C. v. Merkin, 791 F.3d 247 (2d Cir. 2015) (N.Y. law) (must show either independently wrongful or tortious means, or conduct "for the sole purpose of inflicting economic harm on the plaintiff"; harassment with meritless litigation may be sufficient, but not shown here where stubbornly pursued and unsuccessful claim was not "frivolous, objectively unreasonable, or patently meritless"); Winding v. Cal-Western Reconveyance Corp., 2011 WL 221321 (E.D. Cal. Jan. 24, 2011) (wrongful interference not shown where debtor's tenant broke lease after lender posted notice required by foreclosure law); Tredit Tire & Wheel Co. v. Regency Conversions, L.L.C., 636 F. Supp. 2d 598 (E.D. Mich. 2009) (must show intentional doing of act wrongful in itself or act that is lawful but unjustified in law and done with malice for purpose of invading plaintiff's contractual rights or business relationship); Thomas v. Wakulla Bank, 2009 WL 1410289 (M.D. Ga. May 18, 2009) (actions of secured creditor exercising its contractual rights cannot be "wrongful improper conduct" necessary to support tortious interference claim); Fuller v. Exxon Mobil, M.C., 2009 WL 91707 (E.D. Mich. Jan. 14, 2009) (must show act done for purpose of invading contract rights or business relation; calls at work not sufficient where purpose of calls was debt collection); Pippert v. Niece, 518 F. Supp. 2d 1265 (D. Or. 2007) (tenants failed to state claim against landlord for tortious interference with their contract with housing authority, as landlord's report of damage and delinquency was required by authority's rules); Audio Odyssey, Ltd. v. Brenton First Nat'l Bank, 284 F. Supp. 2d 1159 (S.D. Iowa 2003) (creditor's enforcement of its contract with borrower was not tortious interference with other contracts); VonTurkovich v. APC Capital Partners, L.L.C., 259 F. Supp. 2d 314 (D. Vt. 2003) (lender's "threatening and overbearing" questioning of borrower's long-term tenant, which caused tenant to relocate, had no proper relationship to assignment of rents; borrower stated claim for tortious interference); Bowshier v. Chrysler Fin. Corp., 144 F. Supp. 2d 919 (S.D. Ohio 2001) (creditor's seizure of non-consumer debtor's assets privileged where undertaken as good-faith attempt to defend legally protected interest; resulting interference with debtor's contract with its landlord not tortious); Lombard v. Economic Dev. Admin., 2000 WL 347177 (S.D.N.Y. Mar. 30, 2000) (either action for sole purpose of harming plaintiff or use of dishonest, criminal, or fraudulent means), *aff'd*, 280 F.3d 209 (2d Cir. 2002); *In re* Gormally, 550 B.R. 27 (Bankr. S.D.N.Y. Apr. 25, 2016) (usual rule requiring showing of crime or tort makes exception for conduct for the sole purpose of inflicting economic harm on plaintiff; filing *lis pendens*, with knowledge that underlying litigation was meritless and that property owner was negotiating a sale, was abuse of process); IN Energy Solutions, Inc. v. Realgy, L.L.C., 969 A.2d 807 (Conn. App. Ct. 2009) (must show either malice or improper means such as fraud or intimidation); Blakey v. Victory Equip. Sales, 576 S.E.2d 288 (Ga. Ct. App. 2002) (malice is essential element; not shown where creditor had good-faith belief that identity theft victim was complicit in misuse of name); Morgan Asset Holding Corp. v. CoBank, 736 N.E.2d 1268 (Ind. Ct. App. 2000) (where senior creditor acted to protect itself, it had legitimate reason for its action, so interference with rights of subordinate creditor not tortious); Walts v. First Union Mortg. Corp., 686 N.Y.S.2d 428 (N.Y. App. Div. 1999) (dismissing claim of tortious interference with contractual relations against insurer that billed banks for mortgage insurance premiums that were no longer required because loan principal had dropped to 75% of appraised value; it sent bills out of economic justification, not malice); Filmar Racing, Inc. v. Stewart, 541 S.E.2d 733 (N.C. Ct. App. 2001) ("lack of justification" element requires showing of an act not reasonably related to legitimate business interest and "no motive for interference other than malice"). *See also* Smith v. JP Morgan Chase Bank, 2014 WL 6790749 (N.D. Tex. Dec. 2, 2014) (lender's employee did not tortiously interfere with lender's commitment to make loan

wrongful.[225] If the wrongful act is a false report to a credit reporting agency, the claim may be preempted by the Fair Credit Reporting Act.[226]

Only a stranger to a contract can tortiously interfere with it; one who has a direct economic interest in the contract, or is party to the contractual arrangement, is not a stranger.[227] For example, a mortgage servicer will not be liable for interfering with the homeowner's relationship with the lender unless it is acting for its own interest or commits an independently wrongful act.[228] Similarly, the Hawaii Supreme Court held that an attorney representing a client will not be liable for interference with the other party's contract or prospective economic relationships unless the plaintiff can show actions outside the scope of representation and actual malice—that is, a desire to harm, independent of the duty to protect the client.[229]

to plaintiffs where he obtained no personal benefit from sabotaging refinancing). *But see* Others First, Inc v. Better Bus. Bureau of Greater St. Louis, Inc., 829 F.3d 576 (8th Cir. 2016) (Mo. law; must show improper means, i.e., independently wrongful acts, for either tort); SIRQ, Inc. v. The Layton Companies, Inc., 379 P.3d 1237 (Utah 2016) (Utah definition of interference with business expectancy has recently been narrowed to require showing of improper means; showing of improper purpose is insufficient).

225 Pierce v. Zoetis, Inc., 818 F.3d 274 (7th Cir. 2016) (Ind. law) (must show illegal, not merely tortious, act; defamation is not sufficient); Muir v. Navy Fed. Credit Union, 529 F.3d 1100 (D.C. Cir. 2008) (bank's wrongful debit to consumer's account was conversion, so consumer's claim of tortious interference with prospective economic relations should have gone forward); Lombard v. Economic Dev. Admin., 280 F.3d 209 (2d Cir. 2002) (dishonest, criminal, or fraudulent); Davric Marine Corp. v. Rancourt, 216 F.3d 143 (1st Cir. 2000) (fraud or intimidation); Kahalas v. Schiller, 2016 WL 659680 (D. Mass. Feb. 18, 2016) (must show wrongfulness in addition to the interference; defamation, threats, or misrepresentations are sufficient); Dommel Properties L.L.C. v. Jonestown Bank and Trust Co., 2013 WL 1149265 (M.D. Pa. Mar. 19, 2013) (imparting truthful information not tortious, but former owner stated a claim if tax sale purchaser informed tenant it was new owner at time when title had not passed); Hoffman v. Connecticut, 2009 WL 2366001 (D. Me. July 29, 2009) (wrongful means sufficiently alleged, here fraud), *modified on other grounds and adopted by* 671 F. Supp. 2d 166 (D. Me. 2009); Ford v. Torres, 2009 WL 537563 (E.D. Va. Mar. 3, 2009) (false statement is wrongful means sufficient to support claim for intentional interference with prospective economic relations); North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111 (D. Mass. 2007) (claim stated for tortious interference with auditor's contract with nursing home chain, where defendant pharmacy refused to participate in audit process, making it impossible to complete audit; jury question as to wrongful means); Italverde Trading Inc. v. Four Bills of Lading, 485 F. Supp. 2d 187 (E.D.N.Y. 2007) (independent tort sufficient to support wrongful conduct element of tortious interference with prospective economic advantage); Blair v. Supportkids, Inc., 222 F. Supp. 2d 1038 (N.D. Ill. 2002) (obligors stated claim with allegations that private child support collector sent income withholding notices to employers without required court order); Downes-Patterson Corp. v. First Nat'l Supermarkets, 780 A.2d 967 (Conn. App. Ct. 2001) ("improper motive or improper means" element of tort requires showing that interference was wrongful "by some measure beyond the fact of the interference"); Saye v. Deloitte & Touche, L.L.P., 670 S.E.2d 818 (Ga. Ct. App. 2008) (where wrongful means alleged is defamation, must show all elements of defamation); Spengler v. Sears Roebuck & Co., 878 A.2d 628 (Md. Ct. Spec. App. 2005) (must show improper means such as violence, intimidation, defamation, injurious falsehood, fraud, criminal act, or bad faith institution or threat of groundless civil suits or criminal prosecutions); Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711 (Tex. 2001) (interference with prospective business advantage requires showing of "independently tortious or unlawful means"). *See also* Matrix Group Ltd. v. Rawlings Sporting Goods Co., 477 F.3d 583 (8th Cir. 2007) (Fla. law; degree of wrongfulness needed to support claim of tortious interference with contract is less than that required for punitive damages); Carl v. Republic Sec. Bank, 282 F. Supp. 1358 (S.D. Fla. 2003) (no independently wrongful act; bank that set off account had contractual right of setoff and no notice of special purpose); First Nat'l Bank v. Cunningham, 308 P.3d 30 (Kan. Ct. App. 2013) (providing truthful information not wrongful); Mantia v. Hansen, 79 P.3d 404 (Or. Ct. App. 2003) (if the improper means alleged is filing of a baseless lawsuit, plaintiff must show all the elements of malicious prosecution; not shown here because no termination in favor).

226 *See generally* National Consumer Law Center, Fair Credit Reporting § 10.7 (9th ed. 2017), *updated at* www.nclc.org/library.

227 Johnson v. Wellborn, 418 Fed. Appx. 809 (11th Cir. 2011) (Fla. law; persons who are acting as creditor's agents cannot tortiously interfere with mortgage contract between creditor and consumer); Thompson v. Lyndon S. Ins. Co., 2018 WL 4095920 (N.D. Ala. Aug. 28, 2018) (lender who was listed as additional loss payee on car insurance was not a stranger to borrower's contract with insurance company); Brooks v. Branch Banking & Trust Co., 107 F. Supp. 3d 1290 (N.D. Ga. 2015) (dismissing intentional interference claim; lender was not stranger to contracts between borrower and the tenants of the mortgaged property, because the security agreement allowed lender to collect the rents if borrower defaulted); Ragan v. Hancor, Inc., 920 F. Supp. 2d 810 (N.D. Ohio 2013) (parent corporation cannot tortiously interfere with contract with subsidiary); Taylor v. McNichols, 243 P.3d 642, 660 (Idaho 2010); Ihebereme v. Capital One, 730 F. Supp. 2d 40 (D.D.C. 2010) (lender cannot tortiously interfere with mortgage), *aff'd*, 573 Fed. Appx. 2 (D.C. Cir. 2014); Kevilegian v. Trott & Trott, P.C., 771 F. Supp. 2d 763 (E.D. Mich. 2010) (parties to a contract or their agents, here mortgage lenders and servicers, cannot tortiously interfere); Chapman v. Chase Manhattan Mortg. Co., 2007 WL 2815246 (N.D. Okla. Sept. 24, 2007) (person cannot tortiously interfere with contract to which it is a party); All Fleet Refinishing, Inc. v. West Ga. Nat'l Bank, 634 S.E.2d 802 (Ga. Ct. App. 2006); LaSonde v. Chase Mortg. Co., 577 S.E.2d 822 (Ga. Ct. App. 2003) (non-party with "legitimate economic interest," here lender who provided mortgage for previous owner and refused to let new owner assume, not a stranger, so cannot tortiously interfere). *But cf.* U.S. Capital Funding VI, Ltd. v. Patterson Bankshares, Inc., 137 F. Supp. 3d 1340 (S.D. Ga. 2015) (consultant that advised client to act in a way that caused it to breach its contract with plaintiff was a stranger to the contract; consultant was not a party to contract, nor to business relationship that gave rise to contract, and had no economic interest in contract); Sparkman v. CONSOL Energy, Inc., 571 S.W.3d 569 (Ky. 2019) (parent corporation's privilege to interfere in affairs of subsidiary may be lost by malice, but not sufficiently alleged here).

228 Stapp v. Bank of Am., 2012 WL 3853440 (E.D. Tex. Sept. 5, 2012) (servicer cannot tortiously interfere with loan contract unless it acts "solely in its own interests"; not shown here), *adopted*, 2012 WL 4502422 (E.D. Tex. Sept. 28, 2012); Parker v. BAC Home Loan Servicing, L.P., 831 F. Supp. 2d 88 (D.D.C. 2011) (exception if agent acts for its own pecuniary interest or commits independently wrongful act; borrower stated claim if systemic failures of servicer's recordkeeping resulted in refusal to accept loan modification payments and forward them to lender, but claim will fail if servicer acted at behest of lender).

229 Kahala Royal Corp. v. Goodsill, Anderson, Quinn and Stifel, 151 P.3d 732, 748–754 (Haw. 2007) (finding no liability in absence of evidence that attorneys had a desire to harm that was independent of their duty to their clients or that they acted for personal gain or with ill will).

15.4.2 Tortious Interference with a Contract

A claim of tortious interference with a contract may arise in the debt collection context where a creditor prevents a debtor from benefiting from a contract with a third party.[230] For example, the collector's contacts with the debtor's employer may cause the debtor to lose a job. As another example, a mortgage lender or servicer may commit this tort if it interferes with a property owner's contract with a tenant.[231]

One court has recited the elements of tortious interference with contract as "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third party's breach of that contract without justification, actual breach of the contract and damages resulting therefrom."[232] The elements of the tort can be translated to the employment context as:

- That the consumer was employed;
- That the collector knew of the employment contract;
- That the collector intended to bring about its termination;[233]
- That the employer did terminate the contract;[234] and
- That the interference by the collector proximately caused the employer to end the plaintiff's employment contract.

Generally, the plaintiff must show interference with an existing contract, not a prospective contract.[235] Liability under

230 Dawson v. Litton Loan Servicing, L.P., 2013 WL 1283848 (D. Colo. Mar. 28, 2013) (failed loan modification; servicer tortiously interfered with contract with lender if it misdirected borrowers' performance and thwarted attempts at cure); Nash v. Green Tree Servicing, L.L.C., 943 F. Supp. 2d 640 (E.D. Va. 2013) (mishandled loan modification not tortious, but refusal to correct errors and failure to cooperate in efforts to avoid default sufficient to state claim); Dorr v. Sacred Heart Hosp., 597 N.W.2d 462 (Wis. Ct. App. 1999). *But cf.* McCarthy v. Wachovia Bank, 759 F. Supp. 2d 265, 280 (E.D.N.Y. 2011) (judgment creditor's garnishment of debtor's bank account did not interfere with debtor's contract with bank, as that contract authorized bank to comply with garnishment orders).

231 *See, e.g.*, Sovereign Bank v. Sturgis, 863 F. Supp. 2d 75 (D. Mass. 2012) (claim stated where, after void foreclosure, lender interfered with homeowner's contract with tenant by demanding rent from borrower's tenant); Webb v. Green Tree Servicing, L.L.C., 2011 WL 6141464 (D. Md. Dec. 9, 2011) (refusing to dismiss claim that mortgage servicer intentionally interfered with homeowner's contract with tenant where it sent agents to the property, threatened to lock tenant out, and called tenant repeatedly, all at a time when homeowner was in arrears but no foreclosure had occurred); Smith v. J.P. Morgan Chase Bank, 2011 WL 5373969 (D. Nev. Nov. 4 2011) (contacting borrower's tenants and demanding they pay rent to lender); Barbanti v. Quality Loan Serv. Co., 2006 WL 3692638 (E.D. Wash. Dec. 11, 2006) (purchaser under contract for deed stated tortious interference claim against original seller who ordered plaintiff's commercial tenant to leave, causing tenant to stop paying rent); VonTurkovich v. APC Capital Partners, L.L.C., 259 F. Supp. 2d 314 (D. Vt. 2003) (lender's "threatening and overbearing" questioning of borrower's long-term tenant, which caused tenant to relocate, had no proper relationship to assignment of rents; borrower stated claim for tortious interference). *See also* Dommel Properties L.L.C. v. Jonestown Bank and Trust Co., 2013 WL 1149265 (M.D. Pa. Mar. 19, 2013) (imparting truthful information not tortious, but former owner stated claim if tax sale purchaser informed tenant it was new owner at time when title had not passed). *But cf.* Brooks v. Branch Banking & Trust Co., 107 F. Supp. 3d 1290 (N.D. Ga. 2015) (dismissing intentional interference claim; lender was not stranger to contracts between borrower and the tenants of the mortgaged property, because the security agreement allowed lender to collect the rents if borrower defaulted); Winding v. Cal-Western Reconveyance Corp., 2011 WL 221321 (E.D. Cal. Jan. 24, 2011) (wrongful interference not shown where debtor's tenant broke lease after lender posted notice required by foreclosure law).

232 Astor Holdings, Inc. v. Roski, 325 F. Supp. 2d 251 (S.D.N.Y. 2003) (also questioning whether New York law requires proof of "but for" causation). *See also* Werbicky v. Green Tree Servicing, L.L.C., 2016 WL 1248697 (D. Nev. Mar.28, 2016) (reciting list of elements; must show specific intent to interfere unless criminal or fraudulent conduct is alleged); City Bank v. Compass Bank, 717 F. Supp. 2d 599 (W.D. Tex. 2010) (non-consumer case with detailed discussion of elements).

233 *See* Walters v. Fid. Mortg. of California, 730 F. Supp. 2d 1185 (E.D. Cal 2010) (need not show actual intent; just "knowledge that interference is certain or substantially certain to occur as a result of [defendant's] action;" interference may be incidental to other purpose, if interference is known to be a necessary consequence); Mumford v. ITT Commercial Fin. Corp., 858 P.2d 1041 (Utah Ct. App. 1993) (intent requirement is met if defendant knows that the interference is substantially certain to occur as a result of defendant's action). *Cf.* Fuller v. Exxon Mobil, M.C., 2009 WL 91707 (E.D. Mich. Jan. 14, 2009) (collection call to workplace not actionable without evidence that defendant had specific purpose of interfering with debtor's employment).

234 Robinson v. Managed Accounts Receivable, Inc., 654 F. Supp. 2d 1051 (C.D. Cal. 2009) (military officer's fear that collection calls at base could cause loss of promotion or charges of conduct unbecoming an officer too speculative to support claim); Challen v. Town & Country Charge, 545 F. Supp. 1014 (N.D. Ill. 1982) (creditor's letter enlisting employer's support in collecting the debt not tortious interference with contract in absence of allegation that employee was fired). *But see* Griffin v. Turner, 830 S.E.2d 239 (Ga. Ct. App. 2019) ("interference with a contractual right or relationship need not result in a breach of the contract to be actionable; it is sufficient if the invasion retards performance of the duties under the contract or makes the performance more difficult or expensive;" refusing to dismiss claim by school photographer who resigned after defendant defamed him to school authorities and threatened to defame him to parents).

235 Jones v. Option One Mortg. Corp., 466 Fed. Appx. 449 (6th Cir. 2012) (Ohio law; expert testimony that defendant's misstatements reduced credit score below level needed to qualify for a loan was insufficient; must show specific contract that would have been made if credit score had been higher); Banga v. Allstate Ins. Co., 2009 WL 3073925 (E.D. Cal. Sept. 22, 2009) (claim fails because no showing of specific contract with third party), *rejected in part on other grounds by* 2010 WL 1267841 (E.D. Cal. Mar. 31, 2010); Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp., 2009 WL 2922984 (N.D. Miss. Sept. 8, 2009) (must show existing contract, that would have been performed but for the interference); Gagliardi v. Experian Info. Solutions, Inc., 2009 WL 365647 (W.D. Pa. Feb. 12, 2009) (claim fails because no contract identified), *aff'd*, 357 Fed. Appx. 413 (3d Cir. 2009); Roybal v. Equifax, 2008 WL 4532447 (E.D. Cal. Oct. 9, 2008) (denying claim because no showing of interference with existing contract; consumer's attempt to refinance was defeated by inaccurate reporting); Util. Metal Research v. Coleman, 2008 WL 850456 (E.D.N.Y. Mar. 28, 2008) (denying claim because debtor fails to identify specific contract, or show that creditor's actions were a substantial factor in disrupting contractual relations; difficult to prove where debtor's business was in process of failing); Chapman v. Chase Manhattan Mortg. Co., 2007 WL 2815246 (N.D. Okla. Sept. 24, 2007) (interference with unsuccessful refinancing insufficient, as no contract had been formed). *See generally* § 15.4.3, *infra* (tortious interference with prospective economic relations).

this tort may protect employment at will.[236] Some courts, however, treat interference with contracts terminable at will as interference with prospective economic relations and require a showing of independently wrongful means.[237] An employer contact that violates state or federal debt collection law would probably meet the standard of wrongfulness.

Causation can be established by showing that the consumer was discharged and that the collector had either threatened to cause the job loss or had taken steps which put the job in jeopardy.[238] If the employer refuses to testify or asserts other reasons for firing the consumer, the consumer may still be able to establish proximate cause by circumstantial evidence. For example, proximate cause can be inferred when there is a short period of time between the collector's contact with the employer and the termination of employment.[239]

Examples of claims against creditors for interference with contract include:

- An employee whose former company had defaulted on a debt to a supplier was fired after the supplier doubled its prices to his new employer, told the employer that "everything would be all right" if it fired the employee, and repeatedly asked whether the employee still worked there.[240]
- Damages were awarded to consumers for the seizure of half their modular home to coerce payment of a debt owed not by the consumers but by the contractor who was installing the home. The seizure interfered with the consumers' contract with the contractor.[241]
- A court refused to dismiss a claim that an insurance company tortiously interfered with a homeowner's relationship with his mortgage company by entering into an exclusive contract with it to force-place insurance at inflated premium rates.[242]
- Summary judgment for consumers was upheld against a hospital which placed a lien on their personal injury recovery for the full amount of a medical bill, instead of filing a claim against their health maintenance organization (HMO), where the contracts between the hospital, the HMO, and the consumers required the hospital to accept a lesser amount from the HMO. The hospital deliberately prevented the consumers from benefiting from their contract with the HMO. Because the hospital acted with intentional disregard for the patient's rights, the issue of punitive damages should have been submitted to the jury.[243]
- After being told that the consumers were represented by counsel, a collector continued to threaten and harass them, causing them to violate a clause of their contract with their attorney that forbade them from dealing directly with an opposing party.[244]

The measure of damages for tortious interference with a contract is the same as that for breach of contract: the amount necessary to put the plaintiff in the same position they would have been in if the contract had been performed.[245]

236 Western Air Charter, Inc. v. Sojitz Corp., 2019 WL 4509304 (C.D. Cal. May 2, 2019) (interference with an at-will contract may be tortious interference with contract—not just with prospective economic advantage—if an independently wrongful act is alleged); Pacific Gas & Elec. Co. v. Bear Stearns & Co., 791 P.2d 587, 590–591 (Cal. 1990) (interference with at-will contract is actionable interference with contractual relationship, on theory that contract "at the will of the parties, respectively does not make it one at the will of others"; "[t]he actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable"); Griffin v. Turner, 830 S.E.2d 239 (Ga. Ct. App. 2019) (refusing to dismiss tortious interference with contract claim; at-will employment can give rise to contractual rights); Fellhauer v. City of Geneva, 568 N.E.2d 870 (Ill. 1991); Levens v. Campbell 733 So. 2d 753, 761 (Miss. 1999) (an at-will employee may have a cause of action for tortious interference with contract).

237 Guzik v. Albright, 2018 WL 4386084, at *6 (S.D.N.Y. Sept. 14, 2018) (when employment contract is at will, employee can only bring claim for tortious interference with prospective contract, and must show that defendant used wrongful means, violated a duty to plaintiff, or acted with malice); Herron v. Fannie Mae, 861 F.3d 160 (D.C. Cir. 2017) (noting that courts are "especially unwilling" to find reasonable expectations in at-will relationships); Transcription Communications Corp. v. John Muir Health, 2009 WL 666943 (N.D. Cal. Mar. 13, 2009); Ford v. Torres, 2009 WL 537563 (E.D. Va. Mar. 3, 2009); Selinger v. GF Health Prods., Inc., 885 N.Y.S.2d 713 (N.Y. Sup. Ct. 2009). *See* § 15.4.3, *infra*.

238 *See* Janvrin v. Continental Resources, Inc., 934 F.3d 845, 852 (8th Cir. 2019) (S.D. law) (causation sufficiently shown where company would not have terminated independent trucker's contract if it had not received call from defendant customer demanding that he be terminated); Gottlieb v. Culp, 2002 WL 10064 (Cal. Ct. App. Jan. 3, 2002) (issue of material fact whether supplier, which refused to sell fabric to manufacturer because it employed an individual whose former company had defaulted on debt to supplier, caused manufacturer to breach its contract with the employee). *But cf.* Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. Ct. 1997) (debtor failed to raise fact issue whether single contact with employer was "but for" cause of loss of employment; fact that debt collection lawsuit resulted in unfavorable publicity was insufficient absent evidence of purposeful action specifically intended to harm the present or proposed contract).

239 Warschauser v. Brooklyn Furniture Co., 144 N.Y.S. 257 (N.Y. App. Div. 1913) (employee fired two days after creditor threatened to cause termination if employee did not pay delinquent installment).

240 Gottlieb v. Culp, 2002 WL 10064 (Cal. Ct. App. Jan. 3, 2002). *See also* Hill Grocery Co. v. Carroll, 136 So. 789 (Ala. 1931) (creditor caused debtor to be fired from job); Long v. Newby, 488 P.2d 719 (Alaska 1971) (same); London Guar. & Accident Co. v. Horn, 69 N.E. 526 (Ill. 1903) (upholding award of damages for employee who lost job because his refusal to settle claim with insurer led insurer to threaten employer with cancellation of entire insurance policy); Warschauser v. Brooklyn Furniture Co., 144 N.Y.S. 257 (N.Y. App. Div. 1913) (employee fired two days after creditor threatened to cause termination if employee did not pay delinquent installment).

241 Cady v. Marcella, 729 N.E.2d 1125 (Mass. App. Ct. 2000).

242 Persaud v. Bank of Am., 2014 WL 4260853, at *14–16 (S.D. Fla. Aug. 8, 2014). *See also* Burdick v. Bank of Am., 99 F. Supp. 3d 1372, 1379 (S.D. Fla. 2015).

243 Dorr v. Sacred Heart Hosp., 597 N.W.2d 462 (Wis. Ct. App. 1999). *But see* Morrow v. Cmty. Health Systems, Inc., 2017 WL 4641797 (M.D. Tenn. Oct. 17, 2017) (healthcare provider refused payments from health insurance and sought full recovery from tort recoveries; tortious interference not shown because patients were neither parties to, nor third-party beneficiaries of, insurance companies' contracts with providers).

244 Polis v. Am. Liberty Fin., Inc., 237 F. Supp. 2d 681 (S.D. W. Va. 2002).

245 *In re* EZ Pay Serv., Inc., 390 B.R. 421 (Bankr. M.D. Fla. 2007).

15.4.3 Tortious Interference with Prospective Economic Relations

The elements of tortious interference with prospective economic relations have been stated as: (1) a reasonable expectation of entering into a relationship; (2) defendant's knowledge of that expectancy; (3) intentional[246] and unjustified interference by defendant that caused a termination of that expectancy; and (4) damage to plaintiff as a result of defendant's conduct.[247] A claim may arise if the creditor's or collector's wrongful acts interfere with the consumer's ability to obtain other credit[248] or enter into some other transaction.[249] A consumer claiming tortious interference with prospective contractual relations must show a reasonable expectation of entering into the contract.[250] Courts may require that there be an independent tortious or wrongful act.[251]

246 *See, e.g.*, Johnson v. Nationstar Mortg., L.L.C., 2017 WL 3401303 (W.D. Ky. Aug. 8, 2017) (must show that interference with prospective contract was intentional; dismissing claim where mortgage servicer's inaccurate reports that property owners were delinquent was merely negligent).

247 Hukic v. Aurora Loan Serv., Inc., 2006 WL 1457787 (N.D. Ill. May 22, 2006) (claim sufficiently alleged where willful failure to correct inaccurate reporting resulted in credit denials), *later op. aff'd on other grounds*, 588 F.3d 420 (7th Cir. 2009) (affirming dismissal of other counts and later entry of summary judgment against consumer on tortious interference count). *See also* Petit v. Key Bank, 688 A.2d 427 (Me. 1996) (listing elements as: existence of valid contract or prospective economic advantage, interference with that contract or advantage through fraud or intimidation, and damages proximately caused by interference; proof may be by preponderance).

248 Dawson v. Litton Loan Servicing, L.P., 2013 WL 1283848 (D. Colo. Mar. 28, 2013) (if servicer purported to offer loan modification, with intent to "pull the rug out from under" borrowers, interference with expectancy shown); Roybal v. Equifax, 2008 WL 4532447 (E.D. Cal. Oct. 9, 2008) (claim stated where consumer was negotiating with specific lenders during time when defendant credit reporting agency knew of inaccurate information, but had not deleted it); Hukic v. Aurora Loan Serv., Inc., 2006 WL 1457787 (N.D. Ill. May 22, 2006) (declining to dismiss tortious interference claim where willful failure to correct inaccurate reporting resulted in credit denials; reasonable expectation, defendant's knowledge, intentional interference, and injury sufficiently alleged), *later op. aff'd on other grounds*, 588 F.3d 420 (7th Cir. 2009) (affirming dismissal of other counts and later entry of summary judgment against consumer on tortious interference count).

249 *In re* Houston Reg'l Sports Network, L.L.C., 547 B.R. 717 (S.D. Tex. Mar. 16, 2016) (tortious interference sufficiently alleged; plaintiff was able to enter into transaction with third party, but at much lower sales price than would have been received in absence of defendant's interference); Smith v. Chase Bank & Mortg., 2011 WL 939288 (D.S.C. Jan. 13, 2011) (refusing to dismiss claim for tortious interference where creditor's assistant manager spoke with prospective tenant, who then decided not to rent from debtor-landlord), *adopted*, 2011 WL 938409 (D.S.C. Mar. 16, 2011). *But cf.* Fed. Nat'l Mortg. Ass'n v. Obradovich, 2016 WL 1213920 (N.D. Ill. Mar. 29, 2017) (claim fails; must show conduct directed to person with whom plaintiff hopes for a business relationship; not shown where prospective purchasers of home withdrew because lender's property service had damaged the property, but neither lender nor property service had directed any communication or activity toward the prospective purchasers).

250 Kllosowski v. City of Bay City, 696 Fed. Appx. 707 (6th Cir. 2017) (city employee who told seasonal employee not to come back next year did not tortiously interfere with business expectations; employee had no reasonable expectation of being given this assignment every year); Herron v. Fannie Mae, 861 F.3d 160 (D.C. Cir. 2017) (noting that courts are "especially unwilling" to find reasonable expectations in at-will relationships); Muir v. Navy Fed. Credit Union, 529 F.3d 1100 (D.C. Cir. 2008) (bank had actual knowledge that consumer was pursuing a business opportunity at time it converted funds from consumer's account); Giacalone v. Experian PLC, 2013 WL 3199982 (N.D. Ill. June 24, 2013) (claim based on inaccurate credit reporting must show that specific third party accessed the information and denied credit as a result); *In re* Eze, 565 B.R. 464 (Bankr. D. Mass. 2017) (damage is essential element of tortious interference with business expectancy; not shown here because insufficient detail about possible contracts and reasons for denial); Edeh v. Equifax Info. Serv., Inc., 919 F. Supp. 2d 1006 (D. Minn. 2013) (consumer failed to show that credit would have been granted if report timely provided); DT Apartment Group, L.P. v. CWCapital, L.L.C., 2012 WL 6693192 (N.D. Tex. Dec. 26, 2012) (letter of intent from prospective purchaser of real estate sufficient to show reasonable expectation); Pulliam v. Am. Express Travel Related Serv. Co., 2009 WL 1586012 (N.D. Ill. June 4, 2009) (must show more than "a wish or a hope"; claim fails where consumer fails to allege what loans he applied for and why, but for misinformation reported by defendant, he would have qualified); Helena Chem. Co. v. Huggins, 2008 WL 4908463 (D.S.C. Nov. 13, 2008) (prospect must be "a close certainty"; not shown where general discussions about purchase of business had not reached agreement as to price); Roybal v. Equifax, 2008 WL 4532447 (E.D. Cal. Oct. 9, 2008) (consumer negotiating with specific lenders stated claim for interference with prospective economic relations, but fact question as to damages because accurate derogatory information also in file); Thomas v. CitiMortgage, Inc., 2004 WL 1630779 (N.D. Ill. July 16, 2004) (claim stated where current lender knew of refinancing efforts, consumer had reasonable chance of refinancing, current lender persistently reported three missed payments after consumer presented canceled checks showing payment, and this caused denial of refinancing); *In re* Gormally, 550 B.R. 27 (Bankr. S.D.N.Y. Apr. 25, 2016) (reasonable expectation shown where third party persistently attempted to buy plaintiff's property on which defendant placed abusive *lis pendens*); *In re* McWade Properties, L.L.C., 2012 WL 5897184 (Bankr. D.D.C. Nov. 7, 2012) (borrower failed to allege that lender's refusal to provide payoff amount and premature posting of foreclosure signs resulted in loss of sale to specific buyers); Havilah Real Prop. Services v. VLK, L.L.C., 108 A.3d 334 (D.C. 2015) (reasonable expectation shown where landowner had actively marketed properties, buyers had expressed interest, and some had begun negotiating contracts that fell through because of defendant's bad-faith filing of litigation). *But cf.* Personnel Dep't, Inc. v. Prof'l Staff Leasing Corp., 297 Fed. Appx. 773 (10th Cir. 2008) (Colo. law; claim of tortious interference with prospective business relations does not require showing of specific relationship or customer).

251 Matter of Dallas Roadster, Ltd., 846 F.3d 112 (5th Cir. 2017) (Tex. law; for interference with business expectancy must show independently tortious or unlawful act); Pierce v. Zoetis, Inc., 818 F.3d 274 (7th Cir. 2016) (Ind. law; must show illegal, not merely tortious, act; defamation is not sufficient); ProTradeNet, L.L.C. v. Predictive Profiles, Inc., 369 F. Supp. 3d 788 (W.D. Tex. 2019) (sharp or unfair conduct not sufficient, must be independently tortious); *In re* Ivie, 587 B.R. 729 (D. Idaho 2018) (wrongful means shown; unpaid subcontractor on project to build fiber optic network sent meritless mechanic's lien notices to homeowners and businesses served by the network, predictably unleashing frenzy of complaints to project manager); Guzik v. Albright, 2018 WL 4386084 (S.D.N.Y. Sept. 14 2018) (bad faith threat of litigation against entity

One court held that a consumer alleged sufficient facts to state a claim for interference with prospective economic relations when the debtor ceased making payments on a truck after discovering that the seller had understated the mileage by 100,000 miles. Even though it was aware of the understated mileage, the bank, the assignee of the note, reported to a credit reporting agency that the debt was delinquent. As a result, the consumer was denied other credit. The court held that the consumer was justified in ceasing to make payments and that the bank knew or should have known that a report that the debt was delinquent would unlawfully interfere with the debtor's ability to obtain future credit.[252]

Some courts hold that the defendant must have knowledge of a specific prospective relationship and intend to interfere with it, for example by sabotaging a refinancing.[253] Intent can be shown if the defendant knows that interference is substantially certain to occur as a result of its actions.[254] In one case a consumer's allegation that he was denied credit after a credit reporting agency furnished inaccurate information to the lender, even though it was notified of problems with the information, was sufficient to state a claim for intentional interference with a prospective contractual relationship.[255] "Reckless disregard" for the truth was sufficient to show intent, and the agency's knowledge of the purpose for which lenders use credit reports was sufficient to show knowledge of the prospective relationship. A banker's testimony that the consumer might have received the loan but for the incorrect information was sufficient to show interference.

15.4.4 Justification As a Defense

Justification is a defense to a claim of tortious interference with a contract or with prospective economic relations. In determining whether a creditor's actions are justified, courts will consider: (1) the nature of the defendant's conduct; (2) the defendant's motive if it claims to have exercised a colorable legal right in good faith; (3) the plaintiff's interests in the contract; (4) the interests sought to be advanced by the defendant; (5) society's interests in protecting the defendant's freedom of action and the plaintiff's contractual interests; (6) the proximity or remoteness of the defendant's conduct to the interference; and (7) the relations between the plaintiff and the defendant.[256] When the act that interferes with the contract or

with which plaintiff seeks economic relations is a wrongful means); Kabalas v. Schiller, 2016 WL 659680 (D. Mass. Feb. 18, 2016) (must show wrongfulness in addition to interference; defamation, threats, or misrepresentations are sufficient); SWL, L.L.C. v. NextGear Capital, Inc, 131 N.E.3d 746 (Ind. Ct. App. 2019) (defamation is not sufficient to support independently wrongful element); Thimjon Farms P'ship v. Int'l Bank and Trust, 837 N.W.2d 327, 334–335 (N.D. 2013); SIRQ, Inc. v. The Layton Companies, Inc., 379 P.3d 1237 (Utah 2016) (must show improper means). *See generally* § 15.4.1, *supra*.

252 Maberry v. Said, 911 F. Supp. 1393, 1405 (D. Kan. 1995) (applying Mo. law).

253 Muir v. Navy Fed. Credit Union, 529 F.3d 1100 (D.C. Cir. 2008) (sufficiently alleged bank's knowledge that consumer was pursuing business opportunity at time it converted his funds); Guzik v. Albright, 2018 WL 4386084 (S.D.N.Y. Sept. 14, 2018) (fact issue whether defendant actually knew of prospective consulting agreement at time when it made threats to company with which plaintiff was negotiating agreement); Lanton v. Ocwen Loan Servicing, Inc., 2016 WL 4734674 (S.D. Ohio Sept. 8, 2016) (defendant's incorrect credit reporting prevented small business from obtaining financing to buy vehicles to fulfill existing or offered contracts; interference with business expectations claim fails because no showing that defendant knew of specific contract opportunities); Nelson v. Canon USA, Inc., 2008 WL 410649 (W.D. Wash. Feb. 12, 2008) (allegation that creditor knew of, and thwarted, sale of equipment that would have brought in sufficient funds to pay debtor's obligations states claim); Italverde Trading Inc. v. Four Bills of Lading, 485 F. Supp. 2d 187 (E.D.N.Y. 2007) (must show knowledge of specific business relations); Chapman v. Chase Manhattan Mortg. Co., 2007 WL 2815246 (N.D. Okla. Sept. 24, 2007) (consumer failed to allege creditor's knowledge of refinancing attempt, or intent to interfere); Thomas v. CitiMortgage, Inc., 2004 WL 1630779 (N.D. Ill. July 16, 2004) (claim stated where current lender knew of consumer's refinancing efforts); Robb v. Bond Purchase, L.L.C., 580 S.W.3d 70 (Mo. Ct. App. 2019) (need not allege details about contract or expectancy, just enough to enable defendant, upon reasonable inquiry, to ascertain those facts; here, knowledge of potential buyer was sufficient).

254 Bank of Commerce v. Jefferson Enters., L.L.C., 303 P.3d 183 (Idaho 2013).

255 Yeager v. TRW, Inc., 984 F. Supp. 517 (E.D. Tex. 1997).

256 *See* Jacked Up, L.L.C. v. Sara Lee Corp., 854 F.3d 797 (5th Cir. 2017) (both Illinois and Texas recognize defense of "privilege" in tortious interference with contract cases); Noble Sys. Corp. v. Alorica Cent., L.L.C., 543 F.3d 978 (8th Cir. 2008) (Minn. Law; defense of justification is shown if defendant pursued its legal rights via legal means or has a legitimate interest, economic or otherwise, in the contract or expectancy sought to be protected, and employs no improper means; senior creditor who foreclosed and seized collateral did not tortiously interfere with junior creditor's contract); Wilson v. Everbank, 77 F. Supp. 3d 1202 (S.D. Fla. 2015) (Fla., N.Y., and Ill. law; privilege to interfere with contract to protect one's own economic interests will be lost if interferer acts in bad faith, "maliciously or with conspiratorial motives"; bad faith sufficiently alleged here where lender charged "unearned commissions" to cover kickbacks to insurers for force-placed insurance); Herzig v. Suntrust Mortg., 2014 WL 1319468 (W.D. Ky. Mar. 31, 2014) (sending foreclosure notice to debtor's tenant was justified; necessary to protect tenant's statutory rights in foreclosure); Rapid Circuits, Inc. v. Sun Nat'l Bank, 2011 WL 1666919 (E.D. Pa. May 3, 2011) (justification shown if creditor, which had security interest in plaintiff debtor's receivables, sent letters directing payment to creditor only to plaintiff's current debtors; but defense fails if letters sent to customers who did not currently owe anything, in effort to publicize plaintiff's troubles and force it out of business), *order entered by* 2011 WL 1667917 (E.D. Pa. May 3, 2011); Vinas v. Chubb Corp., 499 F. Supp. 2d 427 (S.D.N.Y. 2007) (fact issues as to economic justification of surety company that disparaged client's accountants); Gen. Elec. Capital Corp. v. Commercial Serv. Group, 485 F. Supp. 2d 1015 (N.D. Iowa 2007) (no tortious interference where creditor simply exercised its contractual rights in protection of its financial interests); Italverde Trading Inc. v. Four Bills of Lading, 485 F. Supp. 2d 187 (E.D.N.Y. 2007) (economic justification defense fails if malice or fraudulent or illegal acts proven); Farm Credit Midsouth, PCA v. Bollinger, 548 S.W.3d 164 (Ark. Ct. App. 2018) (crop lender's interference in farmer's relationship with prospective purchaser of crops was justified by lender's need to protect own interests); DVG Pub. Adjustment Services, L.L.C. v. People's United Bank, 2016 WL 3097013 (Conn. Super. Ct. May 12, 2016) (freezing of account was justified; bank knew it would interfere with depositor's business, but was protecting itself while it negotiated about improperly endorsed checks deposited in plaintiff's account); Sulu v. Megana, 879 N.W.2d 674 (Neb. 2016) (must show that interference was unjustified; no liability for giving truthful

prospective contract is the initiation of litigation or acts such as the filing of a *lis pendens* that are ancillary to litigation, the District of Columbia's highest court holds that a defendant can claim only a conditional good-faith privilege, not the absolute privilege applicable to statements made in judicial proceedings.[257] The burden is on the defendant to prove justification or privilege.[258]

15.5 Defamation

15.5.1 Overview of Elements

The law of libel and slander is subject to complex local variation, and decisions are often inconsistent even within the same jurisdiction. The development of a particular jurisdiction's case and statutory law therefore requires especially close scrutiny. The law of defamation has its own vocabulary and requirements of pleading, damages, and privilege, which will be discussed here only as relevant to debt collection.

The law of defamation is intended to protect a person's reputation; it presumes that others in the community have a good opinion of the person defamed. Libel encompasses both written and recorded defamation, while slander applies in cases of oral, televised, or gesticulated defamation.

Libel is generally held to comprise the following elements:

- It must be a statement that is partially or wholly false;
- It must be communicated to a third party;[259]
- It must be injurious to reputation, esteem, or good will;[260] and

information to another or "honest advice within the scope of a request for the advice"; here, advising student that she could write to school board if she was dissatisfied with teacher); Thimjon Farms P'ship v. Int'l Bank and Trust, 837 N.W.2d 327 (N.D. 2013) (bank had right to force company to turn over plaintiff customers' deposits to repay line of credit, even if this caused company to fail and customers to lose their deposits); Bridge v. Park Nat'l Bank, 903 N.E.2d 702 (Ohio Ct. App. 2008) (fact question whether mortgage lender had privilege to interfere in borrower's contract with restoration contractor hired to repair fire-damaged property); Dykstra v. Page Holding Co., 766 N.W.2d 491 (S.D. 2009) (justification shown where bank that cut off farmer's line of credit was acting to preserve its own interests and did not violate any banking laws); Collins v. Greene County Bank, 916 S.W.2d 941 (Tenn. Ct. App. 1995) (urging a guarantor to break contract would be privileged if bank was "charged with responsibility" for guarantor, no improper means were used, and bank acted to protect welfare of another, but noting that banker's statement that debtor was "stealing you blind" was "a questionable manner of informing of problems with a loan"). *See also* Audi of Am., Inc. v. Bronsberg & Hughes Pontiac, Inc., 321 F. Supp. 3d 503 (M.D. Pa. 2018) (non-consumer case with extensive discussion of lack of privilege element of tortious interference; applying Restatement standards); Ragan v. Hancor, Inc., 920 F. Supp. 2d 810 (N.D. Ohio 2013) (parent corporation is privileged to act—even aggressively—to further the business interests of its subsidiary); Lee v. Wells Fargo Bank, 2013 WL 754053 (S.D. Tex. Feb. 27, 2013) (prospective purchaser of debtor's home, who had got as far as earnest money stage, failed to state claim against foreclosing bank; bank had privilege to interfere with sale contract to enforce power of sale provision of its mortgage); Recio v. Evers, 771 N.W.2d 121 (Neb. 2009) (providing truthful information cannot support tortious interference claim, even if actual malice can be shown); Lenders Funding, L.L.C. v. WAIM Mgmt. Co., 2018 WL 3338832 (N.C. Super. Ct. July 6, 2018) (justification not shown where creditor was seeking to coerce individual to pay corporate debt for which he was not personally liable). *But see* Rich v. Fox News Network, L.L.C., 939 F.3d 112 (2d Cir. 2019) (N.Y. law; justification defense can be defeated by showing of malice; here, media organization arranged for private detective to contract with family of murder victim and then breach confidentiality provision of the contract); Westgate Resorts, Ltd. v. Sussman, 387 F. Supp. 3d 1318 (M.D. Fla. 2019) (justification not shown; attorney advised time-share owners, who wished to terminate contracts, to stop paying; attorney knew that his strategy was legally ineffective).

See generally Restatement (Second) of Torts, introductory note to div. 9, ch. 37, and §§ 766 to 767 (1979); § 15.4.1, *supra*.

257 Havilah Real Prop. Services v. VLK, L.L.C., 108 A.3d 334 (D.C. 2015) (noting mixed views on this question). *See generally* § 15.1.3.1, *supra* (litigation privilege).

258 Finch v. Southside Lincoln-Mercury, Inc., 685 N.W.2d 154 (Wis. Ct. App. 2004).

259 Yohannes v. Olympic Collection, Inc., 2017 WL 6060113 (W.D. Wash. Dec. 7, 2017) (refusing to dismiss defamation claim; falsified information in garnishment notice published to consumer's employer); Ihebereme v. Capital One, 933 F. Supp. 2d 86 (D.D.C. 2013) (publication to family members not shown, where letters sent to debtor's home were addressed to debtor by name), *aff'd*, 573 Fed. Appx. 2 (D.C. Cir. 2014); Giacalone v. Experian P.L.C., 2013 WL 3199982 (N.D. Ill. June 24, 2013) (publication not sufficiently alleged; no showing that inaccurate information in credit report viewed by consumer was ever sent to prospective creditor); Gibson v. Regions Fin. Corp., 2008 WL 110917 (E.D. Ark. Jan. 9, 2008) (insults during verbal quarrel at time of police search could not support defamation claim, because all persons present were involved with the case), *aff'd on other grounds*, 557 F.3d 842 (8th Cir. 2009); DirectTV v. Cavanaugh, 321 F. Supp. 2d 825 (E.D. Mich. 2003) (denying defamation claim; no showing that demand letter, which accused consumer of signal theft, was published to third party); DirecTV, Inc. v. Karpinsky, 269 F. Supp. 2d 918 (E.D. Mich. June 17, 2003) (consumer failed to state claim; did not allege identities of third parties to whom misinformation published); Cabble v. Claire's Stores, Inc., 919 F. Supp. 397 (M.D. Ala. 1996) (where store's accusation of shoplifting was heard by all three accused plaintiffs, there was sufficient publication); Fed. Deposit Ins. Corp. v. S. Prawer & Co., 829 F. Supp. 439 (D. Me. 1993) (communication to someone within the same organization may meet publication requirement); Wal-Mart Stores v. Lee, 74 S.W.3d 634 (Ark. 2002) (sufficient publication shown where statements were made in hearing of unprivileged third parties, statements to police were accessible on police scanner, and republication was foreseeable); Curtis v. Citibank South Dakota, 261 P.3d 1059 (Mont. 2011) (sending debt to collection agency, with actual knowledge it was result of identity theft, was sufficient communication); Bentley v. Cravens, Dargan & Co., 1991 WL 216948 (Ohio Ct. App. Oct. 25, 1991) (collection agency's telephone statement to alleged debtor's employee that debtor was notorious for changing his audit figures was publication).

260 Ryan v. Romo, 2015 WL 1221281 (S.D. Ohio Mar. 17, 2015) (statement that plaintiffs do not occupy property as their principal residence, which caused lender to accelerate mortgage, was not defamatory; does not expose plaintiff to hatred or ridicule; acceleration was not the kind of damage defamation law is intended to remedy); Johnson v. Trott & Trott, P.C., 829 F. Supp. 2d 564 (W.D. Mich. 2011) (statement that debtor was currently married to co-debtor ex-wife not defamatory); Rapid Circuits, Inc. v. Sun Nat'l Bank, 2011 WL 1666919 (E.D. Pa. May 3, 2011) (false statement that small business is involved in litigation could be defamatory), *order entered by* 2011 WL 1667917 (E.D. Pa. May 3, 2011); Blagogee v. Equity Trs., Inc., 2010 WL 2933963 (E.D. Va. July 16, 2010) ("social embarrassment" resulting from erroneous advertisement of foreclosure not sufficient to show "reputational

- It must be defamatory on its face (*per se*) or in light of extrinsic facts (*per quod*), and, in some jurisdictions, if it is defamatory only in light of extrinsic facts, it must have caused special (pecuniary) damage.[261]

The requirement of a statement is not satisfied by a threat to make a statement[262] or a request for a credit report.[263]

The elements of slander are generally the same as those of libel, except that the words must be communicated orally or in an otherwise transitory manner. However, some courts make distinctions between slander and libel on the question whether a statement is defamatory *per se* or only when special damages are proven. This issue is discussed in §§ 15.5.2 and 15.5.3, *infra*.

15.5.2 *Defamation* Per Se *and Defamation* Per Quod

Many courts make a distinction between two types of defamation: defamation *per se* and defamation *per quod*. These courts define certain statements whose defamatory meaning is clear without reference to extrinsic facts as defamation *per se*. These statements are actionable without the need to prove any special type of damage. By contrast, statements whose defamatory meaning is apparent only in light of additional facts are defined as defamation *per quod*, and are actionable only if the plaintiff proves "special," i.e., pecuniary damages.

Courts often recite a closed list of statements that are defamatory *per se*. In the case of slander, one formulation is that a statement is slander *per se* if there is an imputation of:

- Criminal conduct;
- Unchastity;
- A loathsome disease; or
- Conduct or character adversely affecting the slandered party's business, trade, or professional reputation.[264]

Some courts recite a similar list when defining the types of statements that are libel *per se*, or describe the list as one generally applicable to defamation.[265] Other courts, however, define libel *per se* in more general terms as a statement that a person is guilty of a crime, dishonesty, or immorality.[266] Yet other courts have abandoned the distinction between libel *per se* and libel *per quod*, so do not require special damages to be pleaded regardless of the nature of the defamatory statement.[267]

If "special damages" are required, they must be pecuniary.[268] They may include loss of a job or a promotion,[269] denial

harm"); Carlton v. Choicepoint, Inc., 2009 WL 4127546 (D.N.J. Nov. 23, 2009) (refusing to dismiss claim that reporting a judgment as outstanding after it had been satisfied was defamatory under N.J. and N.Y. law); Bauer v. Ford Motor Credit Co., 140 F. Supp. 2d 1019 (D. Minn. 2001) (creditor's phone calls to neighbors and employers of wrong consumer, which resulted in considerable small-town gossip, not defamatory where consumers produced no evidence that anyone's opinion of them was lowered as a result), *vacated in part on other grounds*, 149 F. Supp. 2d 1106 (D. Minn. 2001); Pennfield Precision, Inc. v. EF Precision, Inc., 2000 WL 1201381 (E.D. Pa. Aug. 15, 2000) (false statement by business to a customer that rival company "is going out of business" capable of defamatory meaning as it may deter others from associating or dealing with plaintiff in business relationships).

261 *See* § 15.5.2, *infra*.

262 Federico v. Bank of Am. Corp., 2011 WL 2470094 (D. Md. June 17, 2011) (must show statement actually made; written threat to do so not sufficient).

263 Robinson v. Greystone Alliance, 2011 WL 2601573 (D. Md. June 29, 2011) (request to CRA for consumer's credit report cannot be defamatory, because not a statement).

264 Baeza v. Bank of Am., 2012 WL 4062809 (D. Nev. Sept. 14, 2012) (reciting this list as slander *per se*); Ausley v. Bishop, 515 S.E.2d 72, 75–76 (N.C. Ct. App. 1999) (reciting similar list as slander *per se*).

265 *See, e.g.*, Gros v. Midland Credit Mgmt., 525 F. Supp. 2d 1019 (N.D. Ill. 2007) (defamation *per se* is limited to statements regarding commission of a crime, infection with a venereal disease, inability to perform or want of integrity in discharge of duties of a public office, fornication or adultery, or words that prejudice a party in the party's trade, profession, or business); Wynne v. Stevenson, 2002 WL 31804497 (N.D. Ill. Dec. 13, 2002) (similar list). *But see* Jackson v. Bank of N.Y. Mellon, 2016 WL 4942085 (S.D. Ala. July 19, 2016) (for libel need only show false statement that exposes plaintiff to ridicule or contempt; for slander must show either accusation of indictable offense, or special, that is, pecuniary, damages).

266 McGowan v. Homeward Residential, Inc., 500 Fed. Appx. 882 (11th Cir. 2012) (Ga. law); Garner v. Academy Collection Serv., Inc., 2005 WL 643680, at *4 (N.D. Ga. Mar. 11, 2005). *See also* Murungi v. Texas Guaranteed, 693 F. Supp. 2d 597, 606 (E.D. La. 2010) (statement is defamatory *per se* if it accuses another of criminal conduct or by its nature tends to injure one's personal or professional reputation).

267 Hinkle v. Alexander, 417 P.2d 586, 590 (Or. 1966). *See also* Carlton v. Choicepoint, Inc., 2009 WL 4127546 (D.N.J. Nov. 23, 2009) (listing elements of defamation without making distinction between *per se* and *per quod* or requiring any showing of special damages).

268 Bruce v. HomeBridge Fin. Services, Inc., 2019 WL 5322554 (N.D. Ga. July 10, 2019) (false statements about a mortgage are not libel *per se*; must show special damages; emotional or reputational damages are not sufficient), *adopted*, 2019 WL 5387415 (N.D. Ga. July 29, 2019); Khepera-Bey v. Santander Consumer USA, Inc., 2012 WL 1965444 (D. Md. May 30, 2012) (special damages must be pecuniary, not just emotional, damages); Morin v. Nationwide Fed. Credit Union, 2008 WL 5157740, at *5 (D. Conn. Dec. 8, 2008); Garner v. Academy Collection Serv., Inc., 2005 WL 643680, at *4 (N.D. Ga. Mar. 11, 2005); Wynne v. Stevenson, 2002 WL 31804497, at *3 (N.D. Ill. Dec. 13, 2002). *See also* Haynes v. Alverno Heights Hosp., 515 P.2d 568 (Okla. 1973) (allegation of damage to "personnel rating" and "standing with [plaintiff's] employer" insufficient). *See also* Gentleman v. Mass. Higher Education Assistance Corp., 2017 WL 4180286 (N.D. Ill. Sept. 21, 2017) (special damages subject to heightened pleading standard; must specify what credit was applied for, whether it was denied or granted on less favorable terms, etc.). *But see* Rannels v. S.E. Nichols, Inc., 591 F.2d 242 (3d Cir. 1979) (allegations of loss of respect, pain and embarrassment, handicap in profession, and loss of consortium sufficient to plead special damages); Manno v. Am. Gen. Fin. Co., 439 F. Supp. 2d 418 (E.D. Pa. 2006) (stating that proof of damages is necessary for all defamation claims, but humiliation and mental anguish is sufficient for libel).

269 *See* Fiori v. Truck Drivers, Local 170, 354 F.3d 84 (1st Cir. 2004) (Mass. Law; affirming award of lost salary as special damages for libel); Wynne v. Stevenson, 2002 WL 31804497 (N.D. Ill. Dec. 13, 2002) (employer contact followed by loss of job). *See also* D. Dobbs, Handbook of the Law of Remedies § 7.2(3), at 268 (2d ed. 1993); Dan B. Dobbs, Paul T. Hayden and Eileen M. Bubeck, The Law of Torts vol. 3, ch. 44, § 534, at 226–227 (2d ed. 2011); *id.* § 535, at 229.

of credit,[270] higher interest rates,[271] or other out-of-pocket losses.[272] By contrast, for defamation *per se*, "general damages" may be awarded to compensate for the injury to the plaintiff's reputation without proof of injury or loss.[273]

15.5.3 Is It Defamatory to State That a Person Has Failed to Pay a Debt?

In jurisdictions that distinguish between defamation *per se* and defamation *per quod*, an important issue is whether a false statement that a person has failed to pay a debt is defamation *per se*. If it is not, then the statement will be actionable only if it has caused "special"—that is, pecuniary—damages.

If the statement implies criminal wrongdoing, such as violating a bad check law, concealing collateral, or committing criminal fraud, then it will likely be defamation *per se* because it is an imputation of criminal conduct.[274] The statement may also be defamatory *per se* if the failure to pay the debt reflects poorly on a consumer's business, profession, or trade.[275] If the jurisdiction defines defamation *per se* to include any statement that a person is guilty of dishonesty or immorality, then a statement that implies that the consumer has the ability to pay but is refusing to pay a just debt may be defamation *per se*.[276]

However, many courts follow what is sometimes called the "nontrader rule" and hold that a false representation that a nonmerchant consumer refuses to pay a just debt is not defamatory *per se*, so is actionable only if special damages are proven.[277] This rule is based on the fiction that the false assertion of

270 Ellis v. Bureaus, Inc., 2017 WL 3034327 (S.D. Ala. July 17, 2017) (denial of credit sufficient to support libel *per quod* claim); Dornhecker v. Ameritech Corp., 99 F. Supp. 2d 918 (N.D. Ill. 2000) (denial of credit is sufficient pecuniary loss to support special damages, which must be shown in libel *per quod*). *See also* McGowan v. Homeward Residential, Inc., 500 Fed. Appx. 882 (11th Cir. 2012) (Ga. law; affirming dismissal of libel claim because of insufficient pleading of special damages, but implying that denial of specific credit application or grant of credit on less favorable terms would be sufficient).

271 Dixon-Rollins v. Experian Info. Serv., Inc., 753 F. Supp. 2d 452 (E.D. Pa. 2010) (special damages must be "estimable in money" and "established by specific instances," here evidence that mortgage lender charged higher rate because of erroneous report); Woods v. Asset Res., 2006 WL 3782704 (E.D. Cal. Dec. 21, 2006) (special damages sufficiently alleged; damage to credit reputation prevented consumers from refinancing house to take advantage of lower interest rates); Rubin v. Sterling Enters., 674 A.2d 782 (Vt. 1996) (special damages shown where defamatory communication to bank caused plaintiff to be charged higher interest rate).

272 Banga v. Allstate Ins. Co., 2009 WL 3073925 (E.D. Cal. Sept. 22, 2009) (increase in homeowner's insurance premiums as result of false report that she had filed two fire-related claims), *report and recommendation rejected in part on other grounds by* 2010 WL 1267841 (E.D. Cal. Mar. 3, 2010).

273 *See generally* 50 Am. Jur. 2d Libel & Slander §§ 143, 147 (2017). *See generally* R.E. Barber, Annotation, *Libel: Imputing Credit Unworthiness to Nontrader*, 99 A.L.R.2d 700 (1965).

274 Campbell v. Triad Fin. Corp., 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007) (statement that consumers were concealing collateral was defamation *per se*; defrauding creditor is crime under Ohio law); Harris v. Americredit Fin. Serv., Inc., 2005 WL 2180477 (W.D. Va. Sept. 9, 2005) (repossessor loudly and publicly accused consumer of crime and stated he would be arrested); Flamm v. Sarner & Assoc., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (characterizing plaintiff as "thief" who stole thousands of dollars), *later decision at* 2006 WL 43770 (E.D. Pa. Jan. 3, 2006) (denying summary judgment; fact issue as to what was said during workplace confrontation); Tranum v. Broadway, 283 S.W.3d 403 (Tex. App. 2008) (false accusation of larceny was slander *per se*; special damages need not be shown). *See also* Fennell v. G.A.C. Fin. Corp., 218 A.2d 492 (Md. 1966) (letter to consumer's employer that discussed debt and consequent pressure to "tip the till" was libelous *per se*); Ellis v. Safety Ins. Co., 672 N.E.2d 979 (Mass. App. Ct. 1996) (accusation of filing false insurance claim is defamatory *per se*, because it alleges commission of crime).

275 *See, e.g.*, North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111, 128 (D. Mass. 2007) (special damages not necessary where defendant allegedly stated that auditor was incompetent and untrustworthy); Hanania v. Loren-Maltese, 319 F. Supp. 2d 814 (N.D. Ill. 2004) (statement that former town clerk "is a bigot who cost the town $300,000" is defamation *per se*; accuses her of "lack of ability to function as a public official"); Pinnacle Sys., Inc. v. XOS Technologies, Inc., 2003 WL 21397845 (N.D. Cal. May 19, 2003) (statement that business is "in financial trouble" and "will be bankrupt soon" was slander *per se*); Tech Plus, Inc. v. Ansel, 793 N.E.2d 1256 (Mass. App. Ct. 2003) (accusing sales agent of anti-Semitism is defamation *per se*, because good sales agent must get along with persons of diverse backgrounds); Ausley v. Bishop, 515 S.E.2d 72 (N.C. Ct. App. 1999) (falsely informing mortgage lender that borrower made false statements in his mortgage application and informing potential customer that former employee, now a competitor, has stolen files, is defamation *per se* because it damages plaintiff in his profession); Tranum v. Broadway, 283 S.W.3d 403 (Tex. App. 2008) (accusing employee of dishonesty vis-à-vis employer injuriously affects employee in profession or occupation, so is slander *per se*; special damages need not be shown). *But see* Kin Chun Chung v. JP Morgan Chase Bank, 975 F. Supp. 2d 1333 (N.D. Ga. 2013) (statement that real estate investor was delinquent on her mortgage not *per se* defamatory because it did not attack her general capacity to carry out her profession).

276 *See, e.g.*, Wynne v. Stevenson, 2002 WL 31804497 (N.D. Ill. Dec. 13, 2002); Carter v. Sterling Fin. Co., 132 So. 2d 430 (Fla. Dist. Ct. App. 1961) (referring to consumer as "deadbeat and not an honest person" was defamatory in itself); Stickle v. Trimmer, 143 A.2d 1 (N.J. Super. Ct. App. Div. 1958) (if statement that consumer had failed to pay a just debt is found to imply refusal, rather than inability, it can be defamatory, and special damages need not be proven).

277 *See* McGowan v. Homeward Residential, Inc., 500 Fed. Appx. 882 (11th Cir. 2012) (Ga. law; statement that individual owes a debt or that mortgage is in foreclosure not defamatory *per se*); Smith v. First Nat'l Bank, 837 F.2d 1575 (11th Cir. 1988) (Ga. law; creditor's report to a credit reporting agency of consumer's delinquency on a credit card account to which her ex-husband had signed her name was not libel *per se*, so not actionable without showing of special damages); Jordan v. Tucker, Alba & Assoc., 2017 WL 2223918 (E.D.N.Y. May 19, 2017) (misstatements about personal finances are libel *per se* only if plaintiff can show connection with plaintiff's trade or business); Baeza v. Bank of Am., 2012 WL 4062809 (D. Nev. Sept. 14, 2012) (false report of default not libel *per se*); Steinmetz v. Gen. Elec. Co., 2009 WL 2058792 (S.D. Cal. July 13, 2009) (false statement that debt was "included in bankruptcy" not defamation *per se*); Morin v. Nationwide Fed. Credit Union, 2008 WL 5157740 (D. Conn. Dec. 8, 2008) (statement that borrower was in default not defamatory *per se*, but plaintiff here raised fact issues as to special damages); Gros v. Midland Credit Mgmt., 525 F. Supp. 2d 1019 (N.D. Ill. 2007) (statements impugning credit are defamation *per quod*; special damages must be pleaded very specifically); Cross v. Receivables Mgmt. Solutions, Inc., 2006 WL 446083 (D. Colo. Feb. 21, 2006) (report that person owes debt not defamatory unless additional facts and special damages are shown); Jolly v. Academy Collection Serv., 400 F. Supp. 2d 851, 863–864 (M.D.N.C. 2005) (must

default does not cause injury except to merchants who depend upon credit.

This rule may have made some sense when credit was not an important part of life for ordinary consumers, but has little justification today. Because a false statement of refusal to pay is in fact injurious to a consumer's employment and credit reputation, some courts hold that these misrepresentations are actionable without any need to prove special damages.[278]

plead special damages if defamation claim is based on statement that plaintiff did not pay a debt); Garner v. Academy Collection Serv., Inc., 2005 WL 643680 (N.D. Ga. Mar. 11, 2005) (denying consumer's defamation claim against collector who reported paid debt as unpaid because special damages not alleged); Wynne v. Stevenson, 2002 WL 31804497 (N.D. Ill. Dec. 13, 2002) (special damages must be pleaded; sufficiently alleged here); Aronson v. Creditrust Corp., 7 F. Supp. 2d 589 (W.D. Pa. 1998) (debt buyer falsely indicated that debtor entered into and breached settlement agreement; statement capable of defamatory meaning (for example, plaintiff unwilling to pay debts) but no cause of action because plaintiff pleaded no special/actual damages); Ragland v. Household Fin. Corp., 119 N.W.2d 788 (Iowa 1963) (dunning letter sent to schoolteacher's employer is not libelous *per se*; must show special damages); Haynes v. Alverno Heights Hosp., 515 P.2d 568 (Okla. 1973) (letter to consumer's employer stating that debt was owed and requesting assistance, but not otherwise maligning the debtor, is not libelous *per se*, but could be actionable if special damages shown); Fields v. Worsham, 476 S.W.2d 421 (Tex. App. 1972) (letter to plaintiff's business associates notifying them of suit against him and his refusal to pay was not defamatory in itself; special damages had to be shown); Weaver v. Beneficial Fin. Co., 106 S.E.2d 620 (Va. 1959) (dunning letter to employer is not actionable as defamation without special damages). *See also* Makofsky v. Cunningham, 576 F.2d 1223 (5th Cir. 1978) (La. law; false statement that businessman had failed to perform a contract was not defamatory *per se*, which under Louisiana law means that proof of malice is required); Franklin v. Pepco Holdings, 875 F. Supp. 2d 66 (D.D.C. 2012) (employer's statement to debt collector that former employee owed money for tuition reimbursement not libel *per se*; might be defamatory if published to debtor's friends or business partners; claim also fails because no showing of special damages). *See generally* Note, *Debt Collection Practices: Iowa Remedies for Abuse of Debtor's Rights*, 68 Iowa L. Rev. 753 (1983); R.E. Barber, Annotation, *Libel: Imputing Credit Unworthiness to Nontrader*, 99 A.L.R.2d 700 (1965).

278 *See, e.g.*, Holt v. Boyle Bros., 217 F.2d 16 (D.C. Cir. 1954) (statement that consumer refused to pay a just debt was defamatory without need to show special damages); Ihebereme v. Capital One, 730 F. Supp. 2d 40 (D.D.C. 2010) (refusing to dismiss libel claim without mentioning any requirement of special damages; falsely stating that homeowner was in default on mortgage made him appear "at the very least both irresponsible and financially insolvent"), *aff'd*, 573 Fed. Appx. 2 (D.C. Cir. 2014); Carlton v. Choicepoint, Inc., 2009 WL 4127546 (D.N.J. Nov. 23, 2009) (refusing to dismiss claim that reporting a judgment as outstanding after it had been satisfied was defamatory under N.J. and N.Y. law); Conway v. Signal Oil & Gas Co., 194 S.E.2d 909 (Ga. 1972) (letter to unobligated consumer's employer accusing her of default on account owed by her spouse and requesting employer's assistance was libelous *per se*); Stickle v. Trimmer, 143 A.2d 1 (N.J. Super. Ct. App. Div. 1958) (if statement that consumer had failed to pay just debt is found to imply refusal, rather than inability, it can be defamatory, and special damages need not be proven); Neaton v. Lewis Apparel Stores, 48 N.Y.S.2d 492 (N.Y. App. Div. 1944) (letter to employer that threatened garnishment and accused employee of refusing to pay "just debt" is libelous *per se*).

15.5.4 *Truth As a Defense*

The falsity of the statement is an element of a defamation claim, and truth is often called an absolute defense.[279] This defense requires proof of more than the validity of the debt or the literal truth of the statement. It imposes upon the defendant the burden of rebutting any defamatory meaning, purpose, or effect of the statement.[280] Nonetheless, a number of decisions deny defamation claims even where the statement appears to overstate the debtor's delinquency, often on the ground that the statement is literally true or that the gist of it is true.[281]

279 *See, e.g.*, Fuller v. Exxon Mobil, M.C., 2009 WL 91707 (E.D. Mich. Jan. 14, 2009) (not defamation where it was true that debtor owed debt); Cohn v. Gulf State Credit, L.L.C., 2004 WL 2032822 (N.D. Ill. Sept. 3, 2004) (granting summary judgment to defendant where plaintiff failed to show that defendant knew that statement was false or, believing it to be true, lacked reasonable grounds for that belief).

280 *See, e.g.*, San Antonio Credit Union v. O'Connor, 115 S.W.3d 82, 100 (Tex. App. 2003) (defendant bears burden of proving substantial truth of defamatory statement; not shown here).

281 Williams v. Nissan Motor Acceptance Corp., 2002 WL 2026032 (6th Cir. Aug. 28, 2002) (report of "voluntary repossession" not defamatory even though it was "paper repossession" after car was totaled so that creditor could negotiate directly with insurance company); Lupo v. JPMorgan Chase Bank, 2015 WL 5714641 (D. Md. Sept. 28, 2015) (falsity not shown; during dispute over amount of payments, lender reported delinquency to credit bureaus, resulting in loss of debtor's security clearance; statement that debtor had not paid was true, even if amount demanded was unauthorized); Wilson v. Am. Gen. Fin., Inc., 2013 WL 967161 (W.D. Pa. Mar. 12, 2013) (statement that account was four months past due was literally true, where homeowner had missed four payments over a period of years, and not made them up); Dalton v. Countrywide Home Loans, Inc., 828 F. Supp. 2d 1242 (D. Colo. 2011) (statement that borrower had settled for less than amount due was true, and thus non-defamatory, even though borrower was forced into default and short sale by lender's mishandling of construction loan); Pippert v. Niece, 518 F. Supp. 2d 1265 (D. Or. 2007) (disagreement about amount owed does not make landlord's required report to housing authority false and defamatory); Allen v. Nelnet, Inc., 2007 WL 2786432 (D. Colo. Sept. 24, 2007) (statement that consumer had neither paid loan nor filed disability application was substantially true when made, despite ongoing dispute over required proof of disability); Trundle v. Homeside Lending, Inc., 162 F. Supp. 2d 396 (D. Md. 2001) (report that mortgage was "involved in" bankruptcy literally true where consumer's ex-husband filed bankruptcy and listed mortgage among his debts); Vaneck v. Countrywide Home Loans Corp., 2006 WL 279366 (Conn. Super. Ct. Jan. 11, 2006) (where gist of publication is true, error of detail not defamatory; where statement that mortgage was in foreclosure was true, defendant servicer's statement that it was creditor not actionable); Hnilica v. Rizza Chevrolet, 893 N.E.2d 928 (Ill. App. Ct. 2008) (defamation claim fails; statement that consumers had signed contract to buy car was true when made, even if signature was induced by fraud, but allowing UDAP claim, alleging this fraud, to go forward); Altman v. Amoco Oil Co., 406 N.E.2d 142 (Ill. App. Ct. 1980) (applying rule of innocent construction; "09" bad debt rating not defamatory, as one of its meanings was merely "in collection" rather than "skip"); Kirksey v. New Orleans Jazz and Heritage Found., 116 So. 3d 664 (La. Ct. App. 2013) (statement that businessman had misappropriated funds was substantially true, where he avoided liability only because of finding that his one-man company, not businessman individually, had misappropriated); Spengler v. Sears Roebuck & Co., 878 A.2d 628 (Md. Ct. Spec. App. 2005) (report of delinquency not false where person who had made charges was authorized user); Smith

If a statement was true when made, some courts hold it is not defamatory even if later events cause it to be untrue.[282] A statement of opinion is defamatory only if it implies the existence of underlying facts.[283] Some courts allow defamation claims to proceed where the statement that the consumer is in default on a debt is true except that the debt is invalid or disputed,[284] or where the defendant omitted material facts.[285]

15.5.5 Immunity and Privilege

In most jurisdictions, malice is an element of the tort of defamation only if the plaintiff is a public figure or the defamatory statement relates to a matter of public concern.[286] By virtue of a qualified immunity provision of the Fair Credit Reporting Act (FCRA), however, a plaintiff must plead and prove malice or a willful intent to injure in a defamation claim against a credit reporting agency or against a user of or contributor to a consumer credit report.[287] This immunity applies where the false information was discovered through the FCRA's procedures that require disclosure to consumers, or through a disclosure by certain users of the consumer's report.[288] It does not protect a creditor from liability for sending a false claim of debt to a collector.[289]

Reports of suspected criminal behavior made to the proper authorities may be protected by absolute or qualified privilege.[290] A qualified privilege will be lost by

v. Magnolia Lady, Inc., 925 So. 2d 898 (Miss. Ct. App. 2006) (statement to unemployment commission that large sum of cash was "missing" when in fact it had been temporarily misplaced, was substantially true; defamation not sufficiently alleged); Witherwax v. Transcare, 801 N.Y.S.2d 782 (N.Y. Sup. Ct. 2005) (no defamation claim where statement that consumer owed bill was true, even though this resulted from creditor's negligence in sending bill to wrong address).

282 Frascogna v. Wells Fargo Bank, 2009 WL 2843284 (S.D. Miss. Aug. 31, 2009) (statement that foreclosure sale was scheduled was true when made, even though last-minute workout caused cancellation); Thurman v. Case Credit Corp., 2005 WL 3074149 (E.D. Mo. Nov. 16, 2005) (no defamation if statements were true when made; payments were delinquent, but buyer then negotiated extension of time).

283 North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111 (D. Mass. 2007); Marshall Invs. Corp. v. R.P. Carbone Co., 2006 WL 2644959 (E.D. La. Sept. 13, 2006) (statement that prospective borrower is "a bad person" does not imply any defamatory facts).

284 Manno v. Am. Gen. Fin. Co., 439 F. Supp. 2d 418 (E.D. Pa. 2006) (fact issue whether statement that debt was "charged off" was false, where consumer paid reduced amount pursuant to settlement of dispute over damaged goods); Watson v. Telecheck Serv., Inc., 2010 WL 4273188 (Tex. App. Oct. 21, 2010) (fact issue whether consumer owed debt; stopped payment on check because of dispute). *See also* Lyon v. Chase Bank, 2009 WL 2170518 (D. Or. Apr. 27, 2009) (statement that cardholder owed debt was false, because cardholder not obligated to pay until card issuer responded to billing dispute; here, consumer consistently expressed willingness to pay amount actually owed and issuer stonewalled attempts to determine this), *later decision reversed on other grounds*, 656 F.3d 877 (9th Cir. 2011) (reversing denial of claim under state debt collection statute and refusal to award actual damages and other relief on FCBA claim; noting that jury rendered verdict against consumer on defamation claim). *But see* Hammond v. Citibank, 2011 WL 4484416 (S.D. Ohio Sept. 27, 2011) (statement that lender had obtained a foreclosure judgment was true, even though foreclosure was improper); Montoya v. Countrywide Bank, 2009 WL 1813973 (N.D. Cal. June 25, 2009) (statement that consumers owed mortgage and were unable to pay was true, even if underlying mortgage was illicitly obtained); Hnilica v. Rizza Chevrolet, 893 N.E.2d 928 (Ill. App. Ct. 2008) (defamation claim fails; statement that consumers had signed contract to buy car was true when made, even if signature was induced by fraud, but allowing UDAP claim, alleging this fraud, to go forward); Barner v. Krohle, 2006 WL 3028766 (Ohio Ct. App. Oct. 26, 2006) (statement that condominium owner was not paying fees was not defamation, as it was substantially true, even though it omitted fact that owner withheld fees because of dispute). *But cf.* Vargas v. Bank of Am., 2013 WL 1386342 (S.D. Cal. Apr. 4, 2013) (statement that consumer owed a deficiency after mortgage foreclosure not false, where anti-deficiency statute made debt uncollectible, but did not eliminate it).

285 *See, e.g.*, Nelson v. Canon USA, Inc., 2008 WL 410649 (W.D. Wash. Feb. 12, 2008) (fact issue as to "defamation by omission"; whether arguably selective communication to police "left a false impression that would be contradicted by the inclusion of omitted facts"); Allen v. Nelnet, Inc., 2007 WL 2786432 (D. Colo. Sept. 24, 2007) (defense of substantial truth may be defeated by showing that defendant omitted material facts, which caused publication to create defamatory impression).

286 Floyd v. Wells Fargo Home Mortg. Corp., 848 F. Supp. 2d 635 (E.D. La. Jan. 31, 2012) (claim requires showing of fault, but need not amount to malice); Goldsmith v. HSW Fin. Recovery, Inc., 757 F. Supp. 2d 95 (D.N.H. 2010) (expressing standard as failure to exercise reasonable care in publishing a false and defamatory statement of fact to a third party, assuming no privilege applies to the communication); *In re* Maxey, 395 B.R. 665 (Bankr. W.D. Mo. 2008) (standard for private-figure defamation is negligence); Sateren v. Montgomery Ward & Co., 362 S.E.2d 324, 326 n.2 (Va. 1987). *See also* Wolfe v. MBNA Am. Bank, 485 F. Supp. 2d 874 (W.D. Tenn. 2007) (showing of malice required only to overcome Fair Credit Reporting Act's qualified immunity provision). *But see* Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012) (Georgia requires showing of malice—knowing falsehood or reckless disregard for truth—in ordinary libel action, not involving public figure). *But cf.* Makofsky v. Cunningham, 576 F.2d 1223 (5th Cir. 1978) (Louisiana requires showing of malice unless statement is defamatory *per se*).

287 *See* National Consumer Law Center, Fair Credit Reporting § 10.4 (9th ed. 2017), *updated at* www.nclc.org/library.

288 *See* National Consumer Law Center, Fair Credit Reporting § 10.4.3 (9th ed. 2017), *updated at* www.nclc.org/library.

289 Curtis v. Citibank South Dakota, 261 P.3d 1059 (Mont. 2011) (FCRA preemption provision did not apply to provision of false information to collector, which was not a credit reporting agency, and was receiving information for purposes of debt collection, not reporting).

290 Councilman v. Alibris, Inc., 386 F. Supp. 2d 5 (D. Mass. 2005) (absolute privilege for statements made in response to law enforcement investigation; qualified privilege for statements to law enforcement seeking to initiate complaint or investigation); Field v. U-Haul Co. of E. Bay, 2004 WL 2005739 (Cal. Ct. App. Sept. 8, 2004) (police report was privileged, but not accusations at the scene that were directed to plaintiff, not to police, and overheard by others); Packard v. Cent. Me. Power Co., 477 A.2d 264 (Me. 1984) (utility's report to sheriff's department, which happened to be customer's employer, of its suspicion that customer had stolen electricity was protected by qualified privilege because it was made for the public purpose of detecting and bringing a criminal to punishment); Corellas v. Viveiros, 572 N.E.2d 7 (Mass. 1991) (spontaneous initial report to police conditionally privileged; reports to police during ongoing investigation are absolutely privileged; defamation claim barred). *See also* Stoutt v. Baco Popular, 320 F.3d 26 (1st Cir. 2003) (federal anti-money-laundering act provides absolute immunity to financial institution that reports possible criminal activity to law enforcement, even if report is knowingly false and malicious); Nieman v. Firstar Bank, 2005 WL

malice,[291] bad faith,[292] or possibly failure to investigate.[293] In many states, a litigation or "judicial proceedings" privilege will protect any statements made in connection with a judicial or administrative proceeding,[294] or a fair and substantially accurate report of such a proceeding.[295] In addition, courts recognize a common interest privilege that shields statements made to someone who has a legitimate interest in the information.[296] A credit report given to other creditors is privileged, absent proof of malice or broader communication.[297]

Many defamation cases in the debt collection context arise either from a letter to a consumer's employer or from publication of a list of debts allegedly due (a "deadbeat" list). It can be argued that neither communication is protected by the creditor's qualified privilege because each type of communication inevitably reaches persons having no right or interest in receiving it.[298]

15.5.6 Pleading and Proof

Some jurisdictions require allegations of defamation to be pleaded with specificity.[299] Whether a statement is defamatory

2346998 (N.D. Ohio Sept. 26, 2005) (anti-money-laundering act provides absolute immunity for banks' reports of suspicious activity; some circuits recognize only qualified immunity). *See generally* § 15.1.3, *supra*.

291 Border Collie Rescue, Inc. v. Ryan, 418 F. Supp. 2d 1330 (M.D. Fla. 2006) (qualified privilege for "voluntary statements by private individuals to law enforcement in furtherance of an investigation" may be lost by showing of falsity and "common law express malice"); *In re* BFW Liquidation, L.L.C., 471 B.R. 652 (Bankr. N.D. Ala. 2012) (conditional privilege, lost by malice; fact issue here where store swore out bad check complaint against identity theft victim); Fleming v. U-Haul of Ga., Inc., 541 S.E.2d 75 (Ga. Ct. App. 2000) (privilege for report to law enforcement is conditional, lost by malice); Carney v. Patino, 2018 WL 5629638 (Ind. App. Oct. 30, 2018) (qualified privilege for good faith reports to law enforcement lost by malice; shown here where complaining witness, who had shown hostility to current plaintiff, lied to police). *See* Cal. Civ. Proc. Code, § 47(b)(5) (privilege for reports to law enforcement is lost if report is knowingly or recklessly false).

292 Hall v. District of Columbia, 867 F.3d 138 (D.D.C. Cir. 2017) (qualified privilege can be lost by bad faith; here restaurant workers who caused customer's arrest should have known that customer who temporarily exited building after paying undisputed amount of bill, leaving behind her credit card, various belongings, and other members of her party, did not intend to walk out on bill; also knew that amount left after payment was well below the threshold for felony theft).

293 Funk v. Lincoln-Lancaster County Crime Stoppers, 885 N.W.2d 1 (Neb. 2016) (qualified privilege lost where officer failed to investigate obvious problems with bank's complaint; reasonably prudent officer would have done so). *But see* Robert B. James, DDS, Inc. v. Elkins, 553 S.W.3d 596 (Tex. App. 2018) (qualified privilege lost by malice; inadequate investigation is not sufficient but reckless disregard for truth shown here).

294 *See* § 15.1.3.1, *supra*.

295 Vaile v. Willick, 2008 WL 2754975 (W.D. Va. July 14, 2008) (jury question whether statement that plaintiff, who had been held civilly liable in case arising from removal of children from ex-wife's custody, had been "found guilty" of kidnapping and felony non-support, had so "substantially departed" from the record as to lose privilege).

296 *See* § 15.1.3.2, *supra*.

297 *See* Dawkins v. Sears Roebuck & Co., 109 F.3d 241 (5th Cir. 1997) (Miss. law; common law privilege protects creditor's report to credit reporting agency where malice not shown); A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc., 245 F.2d 775 (2d Cir. 1957) (N.Y. law; actual malice must be shown to overcome qualified privilege of credit reporting agency); Janossy v. Washington Mut. Bank, 2002 WL 31031636 (Cal. Ct. App. Sept. 12, 2002) (negligence or inadvertence insufficient to defeat qualified privilege); Pulver v. Avco Fin. Serv., 227 Cal. Rptr. 491 (Cal. Ct. App. 1986) (defense of privilege must be raised affirmatively; cause of action against lender stated for giving a false credit report); Vidrine v. Am. Prof'l Credit, Inc., 477 S.E.2d 602 (Ga. Ct. App. 1996) (no defamation if collector reported truthfully that account had been placed for collection, though he failed to add that debt was disputed); Calhoun v. Chase Manhattan Bank, 911 S.W.2d 403 (Tex. App. 1995) (privilege may be lost either by publication outside the legitimate "interest group" or by malice, for example, known falsehood or reckless disregard for truth; burden on plaintiff to prove malice or excessive publication); Rubin v. Sterling Enters., 674 A.2d 782 (Vt. 1996) (privilege would be lost if plaintiff showed clear and convincing evidence of malice). *But cf.* Vinson v. Ford Motor Credit Co., 259 So. 2d 768 (Fla. Dist. Ct. App. 1972) (even if conditional privilege is still recognized, not applicable where creditor falsely told credit reporting agency that car had been repossessed when it had been voluntarily returned); Student Loan Fund, Inc. v. Duerner, 951 P.2d 1272 (Idaho 1997) (upholding punitive damages award where student loan guarantee agency "recklessly" provided false information to credit reporting agencies after consumer provided evidence that his payments had been made). *See generally* § 15.1.3, *supra*; National Consumer Law Center, Fair Credit Reporting § 10.5.2 (9th ed. 2017), *updated at* www.nclc.org/library (statutory immunities under Fair Credit Reporting Act); 50 Am. Jur. 2d Libel & Slander §§ 259 to 268, 301 (2017).

298 *See* Blair v. Supportkids, Inc., 222 F. Supp. 2d 1038 (N.D. Ill. 2002) (private child support collector exceeded privilege by sending income withholding notices to employers without required court order); Flamm v. Sarner & Assoc., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (telling employer and co-workers that consumer was "a thief" was defamatory; no privilege because employer was stranger to debt collection case, and statement was "over-embellished"), *later decision at* 2006 WL 43770 (E.D. Pa. Jan. 3, 2006) (denying summary judgment; fact issue as to what was said during workplace confrontation); Warren v. Bank of Marion, 618 F. Supp. 317 (D. Va. 1985) (denying summary judgment where notice of *lis pendens*, allegedly containing claim of fraud known to be false, was filed in land records office); Neigel v. Seaboard Fin. Co., 173 A.2d 300 (N.J. Super. Ct. App. Div. 1961); Hinkle v. Alexander, 417 P.2d 586 (Or. 1966) ("deadbeat" list in store window published to general public was defamatory; libel is actionable without allegation of special damages). *Cf.* Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126 (S.C. 1999) (question of fact whether "common interest" privilege was exceeded where lender revealed information to prospective buyer of borrower's property to explain why it had problem with buyer's loan application; question whether lender could have explained problem without giving this specific information). *But cf.* Payne v. Diner's Club Int'l, 696 F. Supp. 115 (S.D. Ohio 1988) (listing of consumer's card number in Diner's Club warning bulletin not actionable because bulletin stated that reason included loss and theft and that no inference should be made about person's reputation or credit rating).

299 Huertas v. United States Dep't of Educ., 2009 WL 3165442 (D.N. Sept. 28, 2009) ("false credit information" not specific enough t state claim); Steinmetz v. Gen. Elec. Co., 2009 WL 2058792 (S.D Cal. July 13, 2009) ("wildly inaccurate information" not specif enough to state claim; need not quote exact words, but must provic "the substance"); Fuller v. Exxon Mobil, M.C., 2009 WL 91707 (E.D Mich. Jan. 14, 2009) (if written statement alleged, must quote exa

per se is often treated as a question of law, while it is a question of fact whether a statement is defamatory in light of extrinsic facts.[300] Some courts, however, state more generally that it is always a question of law whether a statement is capable of a defamatory meaning.[301] Yet other courts state that it is a question of law whether a statement is reasonably susceptible of a defamatory interpretation but that, if it is susceptible of such an interpretation, it is a question of fact whether it was so understood.[302]

15.6 Malicious Prosecution and Abuse of Process

15.6.1 Description of the Two Torts and State Variants

Malicious prosecution and abuse of process are both torts that apply to wrongful use of judicial or quasi-judicial processes.[303] Malicious prosecution is the more widely accepted and precisely defined of the two. Some courts restrict malicious prosecution to criminal proceedings,[304] but more commonly both of these torts may be applied to either criminal or civil proceedings. Malicious prosecution is sometimes labeled "wrongful civil prosecution" or "vexatious litigation" when applied to civil processes.

The most commonly cited distinction between the two torts is that abuse of process cannot be based on the wrongful initiation of legal proceedings, but only on misuse of process after it has been issued.[305] However, these distinctions are not always recognized, and some courts hold that the two torts

words; if slander, exact words not needed, but must show substance of statement "with specificity"); Adams v. Martinsville DuPont Credit Union, 573 F. Supp. 2d 103 (D.D.C. 2008) (must quote exact words); Purdue Employees Fed. Credit Union v. VanHouten, 2008 WL 4414712 (N.D. Ind. Sept. 24, 2008) ("precise words" must be alleged); Arikat v. J.P. Morgan Chase & Co., 430 F. Supp. 2d 1013 (N.D. Cal. 2006) (must specify who published what to whom), *later decision at* 2006 WL 3086702 (N.D. Cal. Oct. 30, 2006) (amended complaint also fails for lack of specificity); Gorman v. Wolpoff & Abramson, L.L.P., 370 F. Supp. 2d 1005 (N.D. Cal. 2005); Morris v. Household Mortg. Serv., Inc., 350 F. Supp. 2d 786 (N.D. Ill. 2004) (must quote defamatory words and show special damages); Varela v. Investors Ins. Holding Corp., 586 N.Y.S.2d 272 (N.Y. App. Div. 1992) (must state the specific words; not sufficient to allege existence of improper default judgment and refusal to set it aside), *aff'd*, 615 N.E.2d 218 (N.Y. 1993). *But see* Murray v. Amoco Oil Co., 539 F.2d 1385 (5th Cir. 1976) ("barebone" pleading sufficient; consumer alleged that creditor libeled him by turning an account over to collection agency); Util. Metal Research v. Coleman, 2008 WL 850456 (E.D.N.Y. Mar. 28, 2008) (federal rules do not require precise words; gist of slanderous statement is sufficient); North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111, 128 (D. Mass. 2007) (complaint need not set forth false statements verbatim; need only show content, timing, and context, to whom made, and that they damaged plaintiff's reputation); Wynne v. Stevenson, 2002 WL 31804497 (N.D. Ill. Dec. 13, 2002) (exact words not required, but "general nature" of statements and to whom communicated).

300 *See* Purcell v. Universal Bank, 2003 WL 1962376 (E.D. Pa. Apr. 28, 2003) (fact question whether statement that business owner had failed to pay debt was defamatory where failure to credit payment resulted from card issuer's negligent failure to legibly print routing numbers); Brown v. O'Bannon, 84 F. Supp. 2d 1176 (D. Colo. 2000) (defamation *per se* a question of law; plaintiff must show that false statement made plaintiff contemptible or ridiculous in public estimation, exposed plaintiff to public hatred or contempt, or hindered association with "virtuous men").

301 Pennoyer v. Marriott Hotel Serv., Inc., 324 F. Supp. 2d 614, 618 (E.D. Pa. 2004) (stating generally that determination whether statement is capable of defamatory meaning is for the court).

302 Smith v. Maldonado, 85 Cal. Rptr. 2d 397, 403 (Cal. Ct. App. 1999); Chedester v. Stecker, 643 P.2d 532 (Haw. 1982) (when statements are susceptible of both a defamatory and non-defamatory meaning, question whether they are libelous *per se* is for jury); Neaton v. Lewis Apparel Stores, Inc., 48 N.Y.S.2d 492 (N.Y. App. Div. 1944) (if language is capable of two meanings, only one of which is defamatory, it is jury question whether language is defamatory).

303 *For cases comparing the two torts, see*: Munger v. Deutsche Bank, 2011 WL 2930907 (N.D. Ohio July 18, 2011) (explaining the difference: bringing foreclosure action for intended purpose, but knowing that creditor lacked standing, would be malicious prosecution but not abuse of process; claim fails here because special damages not shown); DirecTV, Inc. v. Zink, 286 F. Supp. 2d 873 (E.D. Mich. 2003) (allegation that groundless action was brought to extort money did not state claim for abuse of process); Fletcher v. Wagner, 221 F. Supp. 2d 153 (D. Mass. 2002) (unsuccessfully applying for criminal complaint will not support malicious prosecution claim; abuse-of-process claim available if plaintiff can show ulterior, improper purpose); Sickler v. Eckroth (*In re* Eckroth), 247 B.R. 799 (Bankr. D.N.D. 2000); Sodesky v. Cherry Scaffolding, Inc., 2017 WL 38735678 (E.D. Pa. Sept. 5, 2017) (dismissing abuse of process but allowing Dragonetti Act (malicious prosecution) claim to go forward; meritless lawsuit in retaliation for exercise of FLSA rights; no evidence of misuse of process after issuance); Ramona Unified Sch. Dist. v. Tsiknas, 37 Cal. Rptr. 3d 381 (Cal. Ct. App. 2005) (continued pursuit of litigation after lack of merit becomes apparent may be malicious prosecution, but cannot be abuse of process, however bad the motive); McGrew v. Heinold Commodities, Inc., 497 N.E.2d 424 (Ill. App. Ct. 1986) (taking judgment and issuing garnishment on paid debt not abuse of process but may have been malicious prosecution); Prather v. Providian Nat'l Bank, 2006 WL 1868335 (Ky. Ct. App. July 6, 2006) (consumer stated claim for wrongful use of civil proceedings but not for abuse of process where she alleged that evidence in collection action was withheld and falsified, but not that action was used for purpose other than debt collection); Honzawa v. Honzawa, 766 N.Y.S.2d 29 (N.Y. App. Div. 2003) (malicious prosecution and abuse of process may be pleaded in the alternative; personal animosity led to filing of groundless lawsuit and attachment of bank accounts). *See also* Metro Media Entertainment, L.L.C. v. Steinruck, 912 F. Supp. 2d 344 (D. Md. 2012) (explaining the difference between "malicious use of process" and "abuse of process"). *See generally* § 15.6.3.1, *infra* (comparison of torts of abuse of process and malicious prosecution).

304 *See, e.g.*, Szekeres v. Szekeres, 16 A.3d 713 (Conn. App. Ct. 2011) (malicious prosecution ordinarily implies prior criminal complaint); LaMantia v. Redisi, 38 P.3d 877 (Nev. 2002) (malicious prosecution claim available only for misuse of criminal proceedings; abuse-of-process claim can arise from criminal or civil proceedings but requires willful use of process for purpose other than resolving a legal dispute).

305 *See* § 15.6.3.1, *infra*.

may overlap.[306] Some courts recognize three instead of two torts.[307]

Because of the similarity between these two torts, some judicial decisions merge their respective elements. For example, New Mexico has merged the two causes of action into a hybrid tort, called "malicious abuse of process," which combines elements from the two former actions.[308] Lack of probable cause remains relevant, but termination in favor of the plaintiff is no longer required.[309] Pennsylvania's statutory tort of wrongful use of civil proceedings also combines elements of the two common law torts: a civil action must have been procured, initiated, or continued in a grossly negligent manner or without probable cause as defined by the statute, for a purpose other than securing proper discovery, joinder, or adjudication of a claim, and proceedings must have terminated in favor of the person against whom they were brought.[310] Georgia has codified a tort of abusive civil litigation, combining some elements of both torts, and has provided statutory defenses and a pre-suit demand requirement.[311]

In a case where the defense fabricated evidence, New Hampshire recognized a new tort of "malicious defense." The elements of the tort are similar to those for malicious prosecution: lack of probable cause; knowledge of the lack of probable cause; "a purpose other than that of securing the proper adjudication of the claim and defense thereto, such as to harass, annoy or injure, or to cause unnecessary delay or needless increase in the cost of litigation"; termination in favor of plaintiff; and injury to plaintiff.[312]

Connecticut's statutory tort of vexatious litigation applies to defenses as well as affirmative claims.[313] Other jurisdictions have refused to recognize a malicious prosecution cause of action for assertion of a defense.[314] However, filing a counterclaim may amount to the initiation of a proceeding for purposes of a malicious prosecution claim.[315] In addition, a claim

306 *See, e.g., In re* Babb, 2009 WL 212568 (Bankr. E.D.N.C. Jan. 26, 2009) (either malicious prosecution or abuse of process available to challenge malicious filing of *lis pendens*); Toll Bros. v. Gen. Accident Ins. Co., 1999 WL 744426 (Del. Super. Ct. Aug. 4, 1999) (liability insurance policy that covers "malicious prosecution" also covers abuse of process where the two torts are so similar that lawyers find them confusing), *aff'd*, 765 A.2d 953 (Del. 2000); Verdon v. Song, 251 So. 3d 256 (Fla. Dist. Ct. App. 2018) (malicious prosecution and abuse of process are two separate torts, but may overlap, and do so here, where wife used threats of domestic violence complaint to coerce husband to authorize use of his credit card); Seipel v. Olympic Coast Inv., 188 P.3d 1027 (Mont. 2008) (knowingly filing a baseless claim can be both abuse of process and malicious prosecution); Connette v. Key Risk Ins. Co., 819 S.E.2d 741 (N.C. App. 2018) (plaintiff stated claims for both malicious prosecution and abuse of process against insurer that used "heavily edited" surveillance video to obtain criminal complaints in effort to force worker to pay back workers' compensation award); Miller-Wagenknecht v. City of Monroe Falls, 2001 WL 1545626 (Ohio Ct. App. Dec. 5, 2001) (in some situations the same elements that constitute abuse of process may also support an action for malicious prosecution).

307 Read v. Profeta, 2017 WL 123438 (D.N.J. Jan. 11, 2017) (describing New Jersey's three closely related torts arising from misuse of legal process: malicious prosecution, malicious use of process, and malicious abuse of process); Shea v. Chase Manhattan Bank, 2000 WL 288360 (Conn. Super. Ct. Mar. 6, 2000) (explaining differences between Connecticut's three "similar but not identical causes of action for misuse of the legal system:" malicious prosecution (criminal), vexatious litigation (civil malicious prosecution), and abuse of process); Gilbert v. Ince, 981 P.2d 841 (Utah 1999) (non-consumer case; defining elements of malicious prosecution, abuse of process, and wrongful use of civil proceedings using *Restatement* definitions).

308 The elements of malicious abuse of process in New Mexico are (i) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (ii) a primary motive in the use of process to accomplish an illegitimate end; and (iii) damages. Initiation need not be shown. In short, there must be both a misuse of the power of the judiciary by a litigant and a malicious motive. *See* Taylor v. L. & P. Building Supply of Las Cruces, Inc., 2015 WL 7803614 (D.N.M. Oct. 27, 2015); Durham v. Guest, 204 P.3d 19 (N.M. 2009) (initiation not required; overruling earlier decision on this issue); Weststar Mortg. Corp. v. Jackson, 61 P.3d 823 (N.M. 2002); Devaney v. Thriftway Mktg. Co., 953 P.2d 277 (N.M. 1998).

309 Weststar Mortg. Corp. v. Jackson, 61 P.3d 823 (N.M. 2002) (probable cause must be determined based on what defendant knew at time of initiating prosecution). *See also* Hewitt v. Rice, 154 P.3d 408 (Colo. 2007) (contrasting Colorado law, which recognizes both abuse of process and malicious prosecution, with New Mexico which recognizes a single tort; in Colorado, termination in favor is essential element of malicious prosecution, while in New Mexico it is simply evidence on issue of probable cause).

310 42 Pa. Cons. Stat. §§ 8351 to 8354. *See* Gigli v. Palisades Collection, L.L.C., 2008 WL 3823295 (M.D. Pa. Aug. 14, 2008) (consumer stated claim where debt buyer filed claim, despite absence of paperwork showing validity of debt or assignment, then voluntarily dismissed when consumer sought discovery; fact questions as to lack of probable cause and improper purpose); Donnelly v. Commonwealth Fin. Sys., Inc., 2008 WL 762085 (M.D. Pa. Mar. 20, 2008) (evidence that debt buyer purchased claims at steeply discounted prices was probative on question whether it knew it lacked paperwork to prove that current plaintiff was obligated, and thus whether it acted with gross negligence or recklessness in violation of statute creating liability for wrongful use of civil process); Drudy v. Slomnicki (*In re* Slomnicki), 243 B.R. 644 (Bankr. W.D. Pa. 2000) (statute codifies elements of wrongful use of civil proceedings: proceedings "procured, initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based").

311 Ga. Code Ann. §§ 51-7-80 to 51-7-85. *See* Coen v. Apteam, Inc., 816 S.E.2d 64 (Ga. Ct. App. 2018) (statutory abusive litigation claim for vigorous pursuit of meritless defense; general damages, including emotional distress damages, are available, and plaintiff need not prove special damages, but punitive damages are not available); Sevostiyanova v. Tempest Recovery Serv., 705 S.E.2d 878 (Ga. Ct. App. 2011) (notices from Bankruptcy Court not sufficient substitute for statutory demand requirement).

312 Aranson v. Schroeder, 671 A.2d 1023 (N.H. 1995).

313 Conn. Gen. Stat. § 52-568.

314 *See In re* Kids Creek, 2000 WL 1761020 (N.D. Ill. Nov. 29, 2000) (defense against a claim, even in bad faith, can never support malicious prosecution claim); Young v. Allstate Ins. Co., 198 P.3d 666 (Haw. 2008) (noting the risk of chilling legitimate defenses and the availability of an intentional infliction of emotional distress claim if party goes beyond insisting upon its legal rights in a permissible way); Wilkinson v. Shoney's, Inc., 4 P.3d 1149 (Kan. 2000).

315 Restatement (Second) of Torts § 674, cmt. A (1977). *See* Klemp v. Columbia Collection Serv., Inc., 2014 WL 5324318 (D. Or. Oct. 17, 2014).

for abuse of process may be available for actions taken in defense of a suit.[316]

15.6.2 Malicious Prosecution

15.6.2.1 Summary of Elements

The elements of a malicious prosecution claim are often identified as:

- A proceeding is instituted;
- The proceeding is without probable cause;
- The proceeding was instituted either maliciously or for an improper purpose; and
- The proceeding is terminated in favor of the defendant.[317]

Courts in some jurisdictions, including the District of Columbia,[318] Illinois,[319] Maryland,[320] New York,[321] North Carolina,[322] Ohio,[323] Texas,[324] and Virginia,[325] impose an additional requirement of "special injury" such as arrest or seizure of property.[326] New Jersey requires a showing of special damages for a claim arising from a civil matter.[327]

One advantage of a malicious prosecution claim is that the privilege for statements made in litigation or to the authorities generally does not apply to it.[328]

15.6.2.2 Institution of a Proceeding

The first required element of a malicious prosecution claim is the institution of a proceeding. Arbitration proceedings[329] and small claims actions[330] qualify. Filing a complaint is sufficient, even without service of process.[331] On the other hand, examples of steps that have been held not to constitute a proceeding include:

- Preliminary steps in a criminal prosecution, such as execution of a search warrant or an arrest that does not result in the filing of charges;[332]

316 *See* § 15.6.3.2, *infra*.

317 Dan B. Dobbs, Paul T. Hayden, and Eileen M. Bubeck, The Law of Torts, vol. 3, ch. 46, § 586, at 388–389 (2d ed. 2011). *See, e.g.*, McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 956 (9th Cir. 2011) (Mont. law; reciting these elements plus damages and that the defendant was responsible for instigating, prosecuting, or continuing the proceedings); Martin v. O'Daniel, 507 S.W.3d 1 (Ky. 2016) (detailed history of malicious prosecution cause of action; articulating elements and abrogating prior law defining initiation of proceeding).

318 *See, e.g.*, Pleznac v. Equity Residential Mgmt., L.L.C., 320 F. Supp. 3d 99 (D.D.C. 2018) (filing of consecutive meritless lawsuits amounts to special damages); Griffith v. EduCap, Inc., 2018 WL 4308572 (D.D.C. Sept. 10, 2018) (expenses incurred in defending against a lawsuit—even if grossly disproportionate to the amount at stake—are not special damages); Osinubepi-Alao v. Plainview Fin. Serv., Ltd., 44 F. Supp. 3d 84 (D.D.C. 2014) (wage garnishment is special damage); Joeckal v. Disabled Am. Veterans, 793 A.2d 1279 (D.C. 2002) (must show arrest, seizure of property, or other limited circumstances; emotional distress, injury to reputation, loss of income, and litigation expenses insufficient). *See also* Havilah Real Prop. Services v. VLK, L.L.C., 108 A.3d 334 (D.C. 2015) (*lis pendens* not special injury).

319 *See* Johnson v. Pushpin Holdings, L.L.C., 2015 WL 1345768 (N.D. Ill. Mar. 23, 2015) (actions filed in distant venues; costs of travel, etc., which exceeded amount at stake, were not special injury sufficient to support Illinois malicious prosecution claim); Thomas v. Hileman, 775 N.E.2d 231 (Ill. App. Ct. 2002) (must be "special injury," consisting of more than the ordinary effects of a lawsuit; arrest of person, seizure of property, or possibly filing of multiple suits sufficient, but here chilling of free speech is insufficient).

320 *See* Gittens v. Thieblot Ryan, PA, 2013 WL 2103668 (D. Md. May 14, 2013) (must show arrest, imprisonment, seizure of property or other "special injury"; not sufficient that garnishment action for similarly-named person's judgment debt resulted in freezing of bank account, bounced checks, fees and cancellation of services and debit cards); Krashes v. White, 341 A.2d 798 (Md. 1975) (defining the situations in which plaintiff must show arrest, seizure of property or other special injury).

321 Engel v. CBS, Inc., 711 N.E.2d 626 (N.Y. 1999) (must be special injury, consisting of highly substantial and identifiable interference with person, property, or business similar to that caused by provisional remedy such as arrest).

322 *See, e.g.*, Alexander v. Alexander, 567 S.E.2d 211 (N.C. Ct. App. 2002) (for civil malicious prosecution must show some arrest of the person, seizure of property, or other special damage; requirement satisfied by restraining order that limited plaintiff's freedom of movement).

323 *See, e.g.*, Turner v. Lerner, Sampson & Rothfuss, 776 F. Supp. 2d 498 (E.D. Ohio 2011) (*lis pendens* or asset freeze not sufficient); Robb v. Chagrin Lagoons Yacht Club, Inc., 662 N.E.2d 9 (Ohio 1996) (claim of malicious prosecution based on a civil action requires proof of seizure of property, even though arrest is no longer a required element of malicious prosecution based on a criminal case).

324 *See, e.g.*, Liu v. Arrow Fin. Serv., Inc., 2010 WL 1994190, at *12 (S.D. Tex. May 17, 2010); Finlan v. Dallas Indep. Sch. Dist., 90 S.W.3d 395 (Tex. App. 2002) (must show "physical interference with a party's person or property in the form of an arrest, attachment, injunction or sequestration"; business loss or damage to reputation insufficient).

325 *See, e.g.*, Chien v. Commonwealth Biotechnologies, Inc., 2013 WL 4482750 (D. Conn. Aug. 21, 2013) (Va. law; must show arrest, seizure of property, or other "special injury" if claim arises from civil proceedings).

326 *See generally* W. Page Keeton, Prosser & Keeton on the Law of Torts § 120 (5th ed. 1984) (many jurisdictions require "specialized grievance" such as interference with person or property).

327 Ali v. Jersey City Parking Auth., 2014 WL 1494578 (D.N.J. Apr. 16, 2014) (parking ticket is civil; claim fails because special damages not sufficiently alleged), *aff'd* 594 Fed. Appx. 730 (3d Cir. 2014).

328 *See, e.g.*, Hagberg v. California Fed. Bank, 81 P.3d 244 (Cal. 2004); Debrincat v. Fisher, 217 So. 3d 68 (Fla. 2017) (litigation privilege does not bar malicious prosecution claim; applying privilege would abolish a cause of action well-recognized in Florida law). *See also* Rosales v. Weltman, Weinberg & Reis Co., 2017 WL 1436957 (N.D. Ill. Apr. 24, 2017) (privilege bars every state cause of action except malicious prosecution or abuse of process). *But see* Yates v. Allied Int'l Credit Corp., 578 F. Supp. 2d 1251 (S.D. Cal. 2008) (exception applies only if prosecution reached arraignment stage; no claim where victim of false report was released informally when police realized they had been deceived). *See generally* § 15.1.3, *supra*.

329 Durham v. Guest, 204 P.3d 19 (N.M. 2009).

330 Kamps v. Midland Funding, L.L.C., 2013 WL 622505 (N.D. Ala. Feb. 19, 2013).

331 Shirokov v. Dunlop, Grubb & Weaver, P.L.L.C., 2012 WL 1065578, at *32–33 (D. Mass. Mar. 27, 2012).

332 Vine v. PLS Fin. Services, L.L.C., 2018 WL 456031 (W.D. Tex. Jan. 16, 2018) (submitting checks to DA's hot check program, which sent

- Sending a demand letter with a copy of a complaint;[333]
- Initiation of a non-judicial foreclosure;[334] and
- Application for a prejudgment remedy.[335]

A malicious prosecution claim may be available for continuing to pursue a properly filed lawsuit after learning that it lacks probable cause.[336]

In most jurisdictions, simply reporting information believed to be true and allowing the prosecuting authorities to make their own decision does not satisfy the requirement of institution of a proceeding, but a malicious prosecution claim will be available against a party who procures a criminal prosecution by providing false information or withholding relevant information.[337] However, a claim may not be available if the

demand letters but did not instate formal proceedings, did not amount to malicious prosecution); Yates v. Allied Int'l Credit Corp., 578 F. Supp. 2d 1251 (S.D. Cal. 2008) (California proceeding initiated at arraignment; no claim if victim of false and malicious police report released before that stage); Gibson v. Regions Fin. Corp., 2008 WL 110917 (E.D. Ark. Jan. 9, 2008) (initiation of proceeding not shown: search warrant issued, and car dealer's home and business searched, but dealer never arrested or brought before court), *aff'd on other grounds*, 557 F.3d 842 (8th Cir. 2009); Fletcher v. Wagner, 221 F. Supp. 2d 153 (D. Mass. 2002) (unsuccessfully applying for criminal complaint will not support malicious prosecution claim); Mayberry v. Ememessay, Inc., 201 F. Supp. 2d 687 (W.D. Va. 2002) (after financing fell through, car dealer falsely told consumer there was an arrest warrant and all-points bulletin out for her; no malicious prosecution because no proceeding actually instituted); Medina v. Downey Sav. & Loan Ass'n, 2005 WL 906507 (Cal. Ct. App. Apr. 20, 2005) (no proceeding instituted where bank customer jailed but not charged); Stanford v. Gaultieri, 2005 WL 1335340 (Mich. Ct. App. June 7, 2005) (filing police report or complaining to prosecutor not a proceeding where investigation never rose to the level of a prosecution); Stead-Bowers v. Langley, 636 N.W.2d 334 (Minn. Ct. App. 2001) (initiation not shown where complaint to police resulted in investigation but no prosecution); Warner Bros. Entertainment, Inc. v. Jones, 538 S.W.3d 781 (Tex. App. 2017) (incident report not sufficient; must show arrest or issuance of warrant). *See also* Councilman v. Alibris, Inc., 386 F. Supp. 2d 5 (D. Mass. 2005) (suspects who falsely accused others to save themselves did not initiate prosecution as it was ongoing).

333 Shirokov v. Dunlop, Grubb & Weaver, P.L.L.C., 2012 WL 1065578, at *32–33 (D. Mass. Mar. 27, 2012).

334 Severson v. Chase Manhattan Mortg. Co., 2013 WL 1688026 (D. Or. Mar. 8, 2013) (distinguishing cases that allow claims arising from administrative proceedings), *adopted*, 2013 WL 1702163 (D. Or. Apr.18, 2013); Sain v. Geske, 2008 WL 2811166 (D. Minn. July 17, 2008) (malicious prosecution claim cannot be based on non-judicial foreclosure; no lawsuit initiated). *See also* Lopez v. Countrywide Mortg., 2008 WL 4682040 (S.D. Tex. Oct. 20, 2008) (rescission of foreclosure, after discovering contamination of property, not malicious prosecution because creditor never sued property owner over the rescission deed).

335 Bernhard-Thomas Bldg. Co. v. Dunican, 2006 WL 301908 (Conn. Super. Ct. Jan. 18, 2006) (application for prejudgment remedy not a "civil proceeding" for purposes of vexatious litigation action, because no adjudication on merits).

336 Dickens v. Gemini Capital Group, 2015 WL 9412928 (W.D. Ark. Dec. 21, 2015) (debt buyer persisted for six months in prosecuting claim and resisting discovery after learning that claim was time-barred, then agreed to dismiss four days before trial); Zamos v. Stroud, 87 P.3d 802 (Cal. 2004); Inlet Beach Capital Investments, L.L.C. v. Enclave at Inlet Beach Owners' Ass'n, 236 So. 3d 1140 (Fla. Dist. Ct. App. 2018) (carrying on with foreclosure action for a year after learning that it was meritless); Arquette v. State of Hawaii, 290 P.3d 493, 500–503 (Haw. 2012).

337 *See* Gatheright v. Clark, 2016 WL 237153 (N.D. Miss. Jan. 20, 2016) (initiation shown if complainant filed knowingly false bad check affidavit); Samtani v. Cherukuri, 2015 WL 64671 (E.D.N.Y. Jan. 5, 2015) (allowing claim to proceed where defendant's statement omitted critical information, and district attorney, who "relied heavily" on it, dismissed charges upon learning the full story); Kent v. Drought, 2010 WL 4320334 (W.D.N.Y. Oct. 28, 2010) (providing false information to law enforcement will support claim of malicious prosecution or the closely related tort of false arrest); Rafter v. Bank of Am., 2009 WL 691929 (S.D.N.Y. Mar. 12, 2009) (complaint to law enforcement not initiation unless complainant furnishes false information or withholds relevant information); Heining v. Abernathy, 295 So. 3d 1032 (Ala. 2019) (for malicious prosecution claim alleging provision of false information to law enforcement, plaintiff must show that prosecution would not have been instituted but for false information); Shoney's Inc. v. Barnett, 773 So. 2d 1015 (Ala. Civ. App. 1999) (managers instituted criminal proceeding when they contacted police and suppressed known material facts); Bank of Eureka Springs v. Evans, 109 S.W.3d 672 (Ark. 2003) ("[w]here the information given to the prosecutor is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible"; affirming malicious prosecution judgment against bank that lied to prosecutor to procure groundless prosecution of debtor who filed bankruptcy); Horne v. J.H. Harvey Co., 617 S.E.2d 648 (Ga. Ct. App. 2005) (fact issue regarding malice where after bad check complaint issued, store employee furnished false information in filling out additional paperwork); Wolf Camera, Inc. v. Royter, 558 S.E.2d 797 (Ga. Ct. App. 2002) (employer accusing employee of theft withheld strongly exculpatory evidence); Fleming v. U-Haul of Ga., Inc., 541 S.E.2d 75 (Ga. Ct. App. 2000) (reversing summary judgment for defendant rental company that failed to make full and fair disclosures when swearing out theft complaint); Beeman v. Freesmeyer, 131 N.E.3d 488 (Ill. 2019) (commencement or continuance element of malicious prosecution may be shown by (1) significant role; (2) advice and cooperation or (3) pressure, influence or misstatement; issue is whether defendant proximately caused commencement of proceeding); Allen v. Berger, 784 N.E.2d 367 (Ill. App. Ct. 2002) (knowingly providing false information to authorities is sufficient to support the "instigating prosecution" element of malicious prosecution); Martin v. O'Daniel, 507 S.W.3d 1 (Ky. 2016) (abrogating prior law; proper standard is whether defendant is "the proximate and efficient cause of putting the law in motion against another person;" remanding to allow trial court to apply this standard in case alleging that police officers provided "inaccurate, false and misleading" information to prosecutor); Seguro-Suarez by and through Connette v. Key Risk Ins. Co., 819 S.E.2d 741 (N.C. Ct. App. 2018) (one who knowingly provides false information to law enforcement, here "heavily edited" surveillance video, has initiated prosecution, "irrespective of independent prosecutorial discretion"); Singh v. McLaughlin, 297 P.3d 514 (Or. Ct. App. 2013) (actively encouraging arrest while knowing it to be based on false allegations is sufficient for liability); Wal-Mart Stores, Inc. v. Rodriguez, 92 S.W.3d 502 (Tex. 2002) (party procures criminal prosecution by providing false information, or if the party's request was determining factor); Fuqua v. Graber, 158 S.W.3d 635 (Tex. App. 2005) (claim stated by allegation of false and misleading statements in a groundless adversary proceeding that led to criminal trial resulting in acquittal); Ellis County State Bank v. Keever, 936 S.W.2d 683 (Tex. App. 1996) (upholding actual and punitive damage award against creditor that twice failed to show up to take collateral from debtor and then obtained debtor's arrest for not turning it over). *Cf.* Huffman v. Sunshine Recycling, L.L.C., 826 S.E.2d 609 (S.C. 2019) (individual who makes report to police is not required to make investigation; emphasizing distinction between good faith report of mistaken or inaccurate information and purposeful provision of knowingly false information). *But cf.* First Valley Bank v. Martin, 144 S.W.3d 466 (Tex. 2004) (no malicious prosecution, even though creditor failed to disclose material facts and lied about having

law enforcement authorities do not rely on the false information, but act only after making an independent investigation.[338]

15.6.2.3 Lack of Probable Cause

The primary hurdle in a malicious prosecution suit is usually the requirement that the wrongful proceeding have been without probable cause or possible validity. This element is very fact specific.[339] Instituting a proceeding without investigating or obtaining documentation of its merits is a factor supporting a finding of lack of probable cause.[340] The mere

already seized part of collateral, where there was probable cause for criminal charges based on failure to turn over sales proceeds of rest of the collateral; creditor need not enquire into excuses or alibis).

338 James v. Woods, 899 F.3d 404 (5th Cir. 2018) (La. law; complaint to police is sufficient to support initiation element of malicious prosecution if police act on it without further investigation, but chain of causation here was broken by independent investigation); Linn v. Montgomery, 903 N.W.2d 337 (Iowa 2017) (report to police will support claim only if defendant makes knowingly false statements and law enforcement relies on them; not shown here where police reviewed financial records before bringing complaint); Smith v. City Bank & Tr. Co., 271 So. 3d 263 (La. Ct. App. 2019) (independent investigation not shown; officer relied solely on incomplete and inaccurate statements by bank official); Farm Bureau Mut. Ins. Co. v. Cully's Motocross Park, Inc., 742 S.E.2d 781 (N.C. 2013) (even if party withheld information, this does not amount to institution of criminal proceeding where charging officer exercises discretion as to whether to file charges). *See also* Borneisen v. Capital One Fin. Co., 490 Fed. Appx. 206 (11th Cir. 2012) (Fla. law; creditor's report of debtor's bomb threat was not initiation of prosecution where law enforcement authorities made independent investigation before arresting debtor); Scientific Prods., Inc. v. Garcia, 442 So. 2d 1019 (Fla. Dist. Ct. App. 1983) (if state's attorney makes decision to prosecute, creditor, who merely lodged information, not liable under state statute for malicious prosecution; strong dissent).

339 *Lack of probable cause sufficiently alleged or proven*: Briner v. City of Ontario, 370 Fed. Appx. 692 (6th Cir. 2010) (Ohio law; fact issue whether key witness was "badgered or threatened" by police into making accusation); Kitchens v. Bryan County Nat'l Bank, 825 F.2d 248 (10th Cir. 1987) (Okla. law; upholding jury's finding of no probable cause where evidence was conflicting); Cave v. Davison, 2001 WL 1098058 (E.D. La. Sept. 18, 2001) (probable cause absent where transactions in question were so clearly within scope of executive's duties that employer could not have held good-faith belief in alleged fraud); Citi-wide Preferred Couriers v. Golden Eagle Ins. Co., 8 Cal. Rptr. 3d 199 (Cal. Ct. App. 2003) (malicious process claim available if creditor demanded most but not all of alleged debt without probable cause); Sohacheski v. Baker, 2002 WL 31317336 (Cal. Ct. App. Oct. 16, 2002) (lack of probable cause shown where creditor's attorney failed to present evidence on essential element of claim); Arcaro v. Silva & Silva Enters. Corp., 91 Cal. Rptr. 2d 433 (Cal. Ct. App. 1999) (lack of probable cause where suit was filed after alleged debtor informed creditor and collection agency that signature was a forgery, provided handwriting exemplars, and told them that former officemate had access to information needed to open account in alleged debtor's name); Fleming v. U-Haul of Ga., Inc., 541 S.E.2d 75 (Ga. Ct. App. 2000) (reversing summary judgment for defendant; lack of probable cause for larceny prosecution is fact question where consumer made repeated calls to road service after rental truck broke down, then abandoned vehicle after waiting nearly two hours); Amos v. Brown, 828 So. 2d 138 (La. Ct. App. 2002) (lack of probable cause shown where there was "at least a reckless disregard for truth" in criminal proceeding arising from divorce-related property dispute); San Antonio Credit Union v. O'Connor, 115 S.W.3d 82 (Tex. App. 2003) (presumption of probable cause rebutted where complainant's belief that contractor had feloniously misappropriated funds was "unreasonable" in light of non-criminal explanations for his inability to pay subcontractors).

Lack of probable cause not sufficiently alleged or proven: Vanover v. Cook, 260 F.3d 1182 (10th Cir. 2001) (Kan. law; creditor had probable cause to garnish amount of original judgment that was reduced on appeal); Land v. Helmer, 843 F. Supp. 2d 547 (D.N.J. 2012) (dismissing malicious prosecution claim, even though prosecution on bad check charges was obtained by "inaccurate" grand jury testimony, because malicious prosecution claims are disfavored and facts fell within New Jersey's very broad bad check law); Gibbons v. Bank of Am. Corp., 2012 WL 94569 (D. Md. Jan. 11, 2012) (bank seeking to recover funds stolen by husband had probable cause to pursue wife and freeze bank accounts, where wife's name was on accounts, and she wrote checks for household expenses); Shapiro v. Haenn, 222 F. Supp. 2d 29 (D. Me. 2002) (probable cause where bank's legal position plausible); Goodwin v. Barry Miller Chevrolet, Inc., 543 So. 2d 1171 (Ala. 1989); Liberty Loan Corp. v. Mizell, 410 So. 2d 45 (Ala. 1982) (suit against debtor's ex-wife not malicious prosecution where creditor knew that, under divorce decree, debtor ex-husband had assumed liability but had later filed for bankruptcy); Cordes v. Outdoor Living Ctr., Inc., 781 S.W.2d 31 (Ark. 1989) (not malicious prosecution where warrant for debtor's arrest was issued before the debt was paid); Cammarano v. Kralik, 2009 WL 1459129 (Cal. Ct. App. May 26, 2009) (former plaintiff was not required to believe former defendant's denials, even if under oath, in light of various suspicious circumstances); Ben Palazzola, D.D.S. v. Jonathan Neil & Assoc., 2005 WL 2461811 (Cal. Ct. App. Oct. 5, 2005) (lack of probable cause not shown where insurer's error as to amount due resulted from miscalculation by insured and collector did not know of error); Marriott Corp. v. Allen, 463 S.E.2d 716 (Ga. Ct. App. 1995) (neither malice nor lack of probable cause shown where hotel sought prosecution of plaintiff who tried to cash check at hotel where he had cashed three prior dishonored checks, and a call to the bank revealed insufficient funds to cover new check); Troup County Elec. Membership Corp. v. Traylor, 316 S.E.2d 568 (Ga. Ct. App. 1984) (probable cause found where purpose for filing suit was collection of bona fide debt); DiGiacomo v. Walmart Stores, Inc., 2011 WL 2637189 (N.J. Super. Ct. App. Div. July 7, 2011) (identity theft victim failed to state claim against store that initiated larceny prosecution; probable cause existed where NSF checks were imprinted with victim's name and address); Pierson v. Aaron's Rental, 2010 WL 4522425 (Ohio Ct. App. Nov. 9, 2010) (consumer's boyfriend told rent-to-own agent to come back when consumer was home from work, rent-to-own company reported to police that consumer had "resisted" repossession attempt; probable cause for larceny complaint shown where payments were in arrears and consumer had not made arrangements for return of property).

340 Melford v. Kahane and Assoc., 371 F. Supp. 3d 1116 (S.D. Fla. 2019) (filing foreclosure action with actual knowledge of loan modification); Motes v. Midland Funding, L.L.C., 233 F. Supp. 3d 1256 (N.D. Ala. 2016) (allowing malicious prosecution claim to go to trial; fact issue whether debt buyer, who proceeded with small claims trial despite lack of key documents, could have reasonably believed it had a chance to win); Faulk v. Midland Funding, 2015 WL 5736103 (M.D. Ala. Sept. 30, 2015) (actual knowledge that debt was not owed); Osinubepi-Alao v. Plainview Fin. Serv., Ltd., 44 F. Supp. 3d 84 (D.D.C. 2014) (refusing to dismiss malicious prosecution claim against debt buyer that filed affidavits not based on personal knowledge and obtained garnishment of plaintiff's wages); McCullough v. Johnson, Rodenburg & Lauinger, 610 F. Supp. 2d 1247 (D. Mont. 2009) (good-faith belief not shown where debt buyer's attorneys, a large-volume debt collection firm, did not verify information received from debt seller, even though seller explicitly did not warrant its reliability; defendant firm sued on time-barred debt and persisted for six months after learning of problem), *later decision at* 645 F. Supp. 2d 917 (D. Mont. 2009) (denying defendant's motion for new trial), *aff'd*, 637 F.3d 939, 956 (9th Cir.

fact that the party who instituted the matter lost on the merits is insufficient to show lack of probable cause.[341] California courts hold that the plaintiff must show that no reasonable attorney would have believed the underlying suit to be tenable.[342]

Ordinarily an indictment or a court finding of probable cause is sufficient to show probable cause,[343] but a plaintiff may present evidence that these actions resulted from false testimony or other misconduct.[344] Denial of a directed verdict or motion for summary judgment for the defendant in the underlying suit may also be some evidence of probable cause, but courts are unlikely to treat it as conclusive.[345]

The consumer's guilt of a crime is a complete defense for the creditor and shields the creditor from liability for malicious prosecution.[346] The defendant may also disprove lack of probable cause by showing a good-faith belief in the validity of their actions at the time.[347] Good-faith reliance upon the advice

2011) (affirming finding of malice where defendant law firm knew of or intentionally disregarded facts showing that suit was time-barred); Gigli v. Palisades Collection, L.L.C., 2008 WL 3823295 (M.D. Pa. Aug. 14, 2008) (fact question where debt buyer sued despite lack of paperwork to show validity of debt or assignment, dismissed precipitously when asked for discovery); Turner v. Debt Buyers, Inc., 2011 WL 287901 (Cal. Ct. App. Jan. 31, 2011) (citing debt buyer's lack of investigation and its voluntary dismissal shortly after consumer's lawyer requested discovery as evidence that collection action was filed without probable cause); Geter v. Graham, 2005 WL 1846541 (Cal. Ct. App. Aug. 5, 2005) (eviction action not "objectively reasonable" where landlord failed to check whether tenants had paid former landlord); Nicholl v. Great Atl. & Pac. Tea Co., 517 S.E.2d 561 (Ga. Ct. App. 1999) (malice and lack of probable cause shown where store did not make reasonable investigation or follow its own standard procedures before criminally prosecuting identity theft victim); Smith v. City Bank & Tr. Co., 271 So. 3d 263 (La. Ct. App. 2019) (careless investigation, failure to disclose exculpatory video). *Cf.* Gill v. Kostroff, 82 F. Supp. 2d 1354 (M.D. Fla. 2000) (issue of fact as to probable cause where it was unclear what information card issuer possessed when it attempted to collect from consumer who was victim of identity theft). *But cf.* Smith v. Cavalry SPV I, L.L.C., 2017 WL 3981144 (W.D. Ark. Sept. 11, 2017) (action on time-barred debt, dismissed as soon as consumer's lawyer appeared; probable cause was sufficient if consumer at one time owed debt and had not paid); Miller v. Javitch, Block & Rathbone, L.L.P., 397 F. Supp. 2d 991 (N.D. Ind. 2005) (probable cause is objective; shown here where debt buyer's attorneys had report indicating original balance and interest rate, and bill of sale to debt buyer, but no copy of original account agreement); Myles v. Screentech, Inc., 98 So. 3d 563 (Ala. Civ. App. 2012) (probable cause shown, where larceny prosecution was initiated after inadequate, but apparently good-faith, investigation).

341 Hemmingson v. Messerli & Kramer, P.A., 2011 WL 494941 (D. Minn. Feb. 7, 2011) (granting summary judgment to former defendant not sufficient to show lack of probable cause or malice), *aff'd on other grounds*, 674 F.3d 814 (8th Cir. 2012); Traiger v. Bicer, 2006 WL 2879779 (Cal. Ct. App. Oct. 11, 2006) (summary judgment for defendant sufficient to show termination in favor, but not lack of probable cause); Cadle Co. v. D'Addario, 26 A.3d 682 (Conn. App. Ct. 2011); Winckel v. VonMaur, Inc., 652 N.W.2d 653 (Iowa 2002) (dismissal by prosecutor or acquittal after trial not sufficient to prove lack of probable cause at time of arrest); Spicer v. Spicer, 2017 WL 6418308 (Ill. App. Ct. Dec. 14, 2016) (incorrect legal advice or going to trial with weak case not sufficient; if defendant is an attorney, plaintiff bears a heavy burden to show malice sufficient to overcome litigation privilege); Prather v. Providian Nat'l Bank, 2006 WL 1868335 (Ky. Ct. App. July 6, 2006) (attorney's filing of suit that fails at trial not actionable as long as attorney made reasonable investigation before filing; claim against creditor's lawyer fails where he knew account was disputed but not that creditor had falsified records).

342 Litinsky v. Kaplan, 253 Cal. Rptr. 3d 626 (Cal. Ct. App. 2019) ("whether any reasonable attorney would have thought the claim tenable;" lawyer is entitled to rely on information from client, unless he or she discovers that information was false); Paulus v. Bob Lynch Ford, Inc., 43 Cal. Rptr. 3d 148, 153 (Cal. Ct. App. 2006).

343 *See, e.g.*, Miller v. Davis, 653 Fed. Appx. 448 (6th Cir. 2016) (Ohio law; grand jury indictment creates "conclusive presumption" of probable cause; exception if indictment obtained by false testimony or "reckless disregard for truth, but not shown here); Tucker v. Lakeshore Chevrolet, Inc., 2004 WL 2251807 (Ohio Ct. App. Oct. 7, 2004) (indictment for insufficient funds check establishes probable cause where consumer did not show it was procured by perjured testimony).

344 Samtani v. Cherukuri, 2015 WL 64671 (E.D.N.Y. Jan. 5, 2015) (grand jury indictment based on omissions and misrepresentations in current defendant's testimony); Lauter v. Anoufrieva, 642 F. Supp. 2d 1060 (C.D. Cal. 2009) (issuance of criminal complaint not conclusive as to probable cause if information furnished was false); Hawkins v. City of Greenville, 101 F. Supp. 2d 1356 (M.D. Ala. 2000); Shoney's Inc. v. Barnett, 773 So. 2d 1015 (Ala. Civ. App. 1999) (suppression of known material facts); Mulder v. Pilot Air Freight, 2005 WL 3163862 (Cal. Ct. App. Nov. 29, 2005) (defendant's report to police was so selective and incomplete as to be false); Fleming v. U-Haul of Ga., Inc., 541 S.E.2d 75 (Ga. Ct. App. 2000) (warrant did not establish probable cause where rental company failed to make full and fair disclosures when swearing out theft complaint); Braswell v. Medina, 805 S.E.2d 498 (N.C. Ct. App. 2017) (allowing malicious prosecution claim to go forward in case where conviction was reversed on appeal; fact that DA decided to prosecute and grand jury decided to indict created a prima facie case that there was probable cause, which was rebutted by evidence that current defendants "misrepresented, withheld or falsified evidence"); Tranum v. Broadway, 283 S.W.3d 403 (Tex. App. 2008) (knowingly providing false information to prosecutor showed lack of probable cause); San Antonio Credit Union v. O'Connor, 115 S.W.3d 82 (Tex. App. 2003). *See generally* § 15.6.2.2, *supra*.

345 Wolf Camera, Inc. v. Royter, 558 S.E.2d 797 (Ga. Ct. App. 2002) (denial of motion for directed verdict at criminal trial did not negate lack of probable cause, where it resulted from withholding of exculpatory evidence); Bacon v. Reimer & Braunstein, L.L.P., 929 A.2d 723 (Vt. 2007) (fact that claim survived motion for summary judgment is persuasive as to probable cause, but not sufficient here where denial was because of insufficient opportunity for discovery).

346 Blackford v. Wal-Mart Stores, 912 F. Supp. 537 (S.D. Ga. 1996) (proof by preponderance of evidence that consumer was guilty of crime defeats malicious prosecution claim); James v. Fast Fare, Inc., 685 F. Supp. 565 (D.S.C. 1988) (debtor had no cause of action for malicious prosecution where she admitted presenting checks knowing there were insufficient funds); Kmart v. Asaro, 751 So. 2d 513 (Ala. Civ. App. 1999) (no malicious prosecution where consumer knowingly wrote bad check); Morrill v. Norstar Bank, 557 N.Y.S.2d 655 (N.Y. App. Div. 1990) (no malicious prosecution where bad check charges were dismissed without prejudice on a technical error; no indication of plaintiff's innocence); First Valley Bank v. Martin, 144 S.W.3d 466 (Tex. 2004) (guilt prevents debtor from showing absence of probable cause even though creditor omitted and misstated facts in report to police); Tranum v. Broadway, 283 S.W.3d 403 (Tex. App. 2008) (malicious prosecution plaintiff must show innocence of crime charged; sufficiently shown here). *But cf.* Jones v. Soileau, 448 So. 2d 1268 (La. 1984) (upholding malicious prosecution judgment where criminal proceedings had ended in conviction that was later overturned on appeal).

347 *See* Davis v. World Credit Fund I, L.L.C., 543 F. Supp. 2d 953 (N.D. Ill. 2008) (key issue is what evidence debt buyer's lawyer, who sued then months later voluntarily dismissed, had in hand when suit was filed; here reasonable lawyer could believe client had justiciable claim); Sain

of counsel also disproves lack of probable cause,[348] but only if the defendant made full disclosure to counsel.[349]

15.6.2.4 Malice or Improper Purpose

Another required element of a malicious prosecution claim is that the proceeding must have been instituted either maliciously[350] or for an improper purpose.[351] The plaintiff need not

v. Geske, 2008 WL 2811166 (D. Minn. July 17, 2008) (probable cause shown; when eviction proceeding brought, foreclosure sale had taken place and redemption period passed; trespass citations also based on probable cause, when former owner kept coming back after eviction); Nutter v. Messerli & Kramer, P.A., 500 F. Supp. 2d 1219 (D. Minn. 2007) (even if stipulated dismissal was termination in favor, malicious prosecution claim fails because reasonable creditor could have believed debt was owed); Petty v. Venable, Baetjer, Howard & Civiletti, L.L.P., 2004 WL 1629774 (N.D. Tex. July 24, 2004) (probable cause exists if "a reasonable person would believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceedings were initiated"); Harrison v. McMahon, 2004 WL 1171391 (D. Conn. May 24, 2004) (fact question whether defendants had good-faith belief that intent element of bad check crime was met); Ancona v. Manafort Bros., 746 A.2d 184 (Conn. App. Ct. 2000); Traina v. Manousos, 2006 WL 3860315 (Conn. Super. Ct. Dec. 12, 2006) (standard is objective, "reasonable lawyer," but if lawyer actually admitted that claim was meritless, and being brought for leverage, then vexatious litigation sufficiently alleged); Buckenmaier v. Kondrat, 2004 WL 944770 (Conn. Super. Ct. Apr. 14, 2004) (where evidence of amount owed was "conflicting," no showing that creditor lacked good-faith belief in his claim); Stark v. Eunice Superette, Inc., 457 So. 2d 291 (La. Ct. App. 1984) (misidentification of plaintiff as person who cashed forged check was an honest mistake; not actionable); Smith v. Magnolia Lady, Inc., 925 So. 2d 898 (Miss. Ct. App. 2006) (lack of probable cause not sufficiently alleged where employee's violation of cash handling procedures was "suspicious" even though allegedly missing cash was in fact misplaced); Lester v. Buchanen, 929 P.2d 910 (Nev. 1996). *See also* Rodriguez v. Wal-Mart Stores, Inc., 52 S.W.3d 814 (Tex. App. 2001) (lack of probable cause not shown where faulty system for processing business checks led to bad check prosecution of wrong person; knowledge that system was imperfect not sufficient to show malicious prosecution), *rev'd in part on other grounds*, 92 S.W.3d 502 (Tex. 2002).

348 Collins v. Roost, 2009 WL 2168673 (Bankr. D. Or. July 17, 2009); Ancona v. Manafort Bros., 746 A.2d 184 (Conn. App. Ct. 2000); Shea v. Chase Manhattan Bank, 2000 WL 288360 (Conn. Super. Ct. Mar. 6, 2000) (for advice of counsel defense, must show actual consultation with counsel, full and fair disclosure, that lawyer was one from whom client could reasonably expect accurate and impartial opinion (in-house acceptable), and that advice was actually relied on in good faith); Kentucky Farm Bureau Mut. Ins. Co. v. Burton, 922 S.W.2d 385 (Ky. Ct. App. 1996); Blandino v. Fischel, 39 P.3d 258 (Or. Ct. App. 2002) (advice of counsel that a doubtful legal theory has a reasonable chance of success is sufficient to show probable cause to institute civil case; standard is higher for criminal case); Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. Ct. 1997); Kaarup v. St. Paul Fire & Marine Ins. Co., 485 N.W.2d 802 (S.D. 1992). *See also* Henze v. City of Lee's Summit, 2010 WL 2545841 (W.D. Mo. June 24, 2010) (giving weight to fact that police advised current defendant to seek protective order and assisted him in doing so, when he complained of threats by co-worker).

349 Harold McLaughlin Reliable Truck Brokers v. Cox, 922 S.W.2d 327 (Ark. 1996); Swat-Fame, Inc. v. Goldstein, 124 Cal. Rptr. 2d 556 (Cal. Ct. App. 2002) (allowing malicious prosecution claim to go forward against original complainant but not her lawyers; fact question whether she misinformed lawyers), *overruled on other grounds by* Zamos v. Stroud, 87 P.3d 802 (Cal. 2004); Linn v. Moffitt, 73 S.W.3d 629 (Mo. Ct. App. 2002) (dismissing malicious prosecution complaint as to lawyers, who reasonably believed client's story, but allowing it to go forward as to client who omitted key information when consulting them); Lawson v. Wilkinson, 447 S.W.2d 369 (Tenn. Ct. App. 1969) (rejecting advice of counsel defense where creditor did not make full disclosure to prosecuting attorney, and filed criminal complaint against his advice).

350 *Malice found*: McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 956 (9th Cir. 2011) (Mont. law; malice shown where law firm for debt buyer knew of or intentionally disregarded facts showing that its suit was time-barred); Briner v. City of Ontario, 370 Fed. Appx. 692 (6th Cir. 2010) (Ohio law; malice sufficiently alleged; ongoing controversy between police and towing company operator, who had complained of police misconduct; evidence that employee was badgered into accusing boss); Kitchens v. Bryan County Nat'l Bank, 825 F.2d 248 (10th Cir. 1987) (Okla. law; sufficient evidence for jury to determine malice: whether known and necessary consequence of action is to injure another); Samuels v. Midland Funding, L.L.C., 921 F. Supp 2d 1321 (S.D. Ala. 2013) (malice sufficiently alleged where debt buyer received minimal information from sellers, made no effort to obtain more, and was unable to produce any evidence at trial); HMS Capital, Inc. v. Lawyers Title Co., 12 Cal. Rptr. 3d 786 (Ct. App. 2004) (prima facie showing of malice where counsel, who engaged in "only perfunctory" discovery, knew that agreement did not provide for the charges sought); Fleming v. U-Haul of Ga., Inc., 541 S.E.2d 75 (Ga. Ct. App 2000) (malice shown where rental company prosecuted consumer for theft; consumer made repeated calls to road service after rented truck broke down, then abandoned truck after waiting nearly two hours); Amos v. Brown, 828 So. 2d 138 (La. Ct. App. 2002) (lack of probable cause plus use of criminal proceedings in divorce-related property dispute sufficient to show malice).

Malice not found: Duke v. Nachtigal, 2012 WL 195466 (D. Or. Jan. 19, 2012) (lack of probable cause not sufficient to prove malice; must show ulterior purpose; not shown here where unfounded action resulted from recordkeeping error); Edmonds v. Beneficial, Inc., 2005 WL 2361913 (S.D. Miss. 2005) (malice not shown where lender substantiated that identity thief had intercepted and cashed "live check," but failed to inform collection lawyers, who obtained default judgment and garnished consumers' wages), *aff'd*, 212 Fed. Appx. 334 (5th Cir. 2007); *Ex parte* State Farm Mut. Auto Ins. Co., 924 So. 2d 706 (Ala. 2005) (negligence not sufficient; no malicious prosecution where default judgment resulted from persistently sending notices to wrong address); Walker v. Windom, 612 So. 2d 1167 (Ala. 1992) (no evidence of malice where attorney representing bank brought suit against plaintiff for her former husband's obligations on a joint credit card account); Rogers v. Ash Grove Cement Co., 799 So. 2d 841 (La. Ct. App. 2001) (malice not shown where plaintiff did not allege that creditor's lawyers in unsuccessful racketeering action knew statements were false or intended to injure plaintiff); Beecy v. Pucciarelli, 441 N.E.2d 1035 (Mass. 1982) (lawyer's filing suit against wrong person after notice of mistake did not support an inference of malice, where lawyer dismissed the suit after being told again suit was filed against wrong person).

See generally Debra E. Wax, Annotation, *Liability of Attorney, Acting for Client, for Malicious Prosecution*, 46 A.L.R.4th 249, supp. § 3 (1986).

351 *See* Sodesky v. Cherry Scaffolding, Inc., 2017 WL 38735678 (E.D. Pa. Sept. 5, 2017) (meritless lawsuit in retaliation for exercise of FLSA rights); Klemp v. Columbia Collection Serv., Inc., 2014 WL 5324318, at *15 (D. Or. Oct. 17, 2014) (filing of inflated counterclaim to cause transfer of case from small claims court to circuit court may be improper purpose); Gigli v. Palisades Collection, L.L.C., 2008 WL 3823295 (M.D. Pa. Aug. 14, 2008) (lack of probable cause relevant to question whether action brought for improper purpose; here debt buyer sued despite lack of paperwork to prove validity of debt or assignment, dismissed when confronted with discovery request);

prove intent to harm; "gross negligence or great indifference to persons, property, or the rights of others" is sufficient to show "legal malice."[352] Malice is subjective and may be shown by circumstantial evidence.[353] Malice is a question of fact.[354]

Lack of probable cause and malice are closely related but not interchangeable.[355] For example, where wrongful foreclosure resulted from a bank's errors, there may have been a lack of objective probable cause, but malice was not shown where the bank, upon discovering the problem, undid the foreclosure and terminated the eviction proceedings.[356] Nonetheless, in some circumstances courts will infer malice from a complete lack of probable cause.[357]

Evidence of malice includes:

- Extensive Internet publication of sensational and groundless accusations;[358]
- Persisting with a proceeding after learning of its lack of merit;[359]

Turner v. Debt Buyers, Inc., 2011 WL 287901 (Cal. Ct. App. Jan. 31, 2011) (lack of investigation and demands for excessive amounts supported conclusion that action brought for improper purpose of coercing settlement of meritless claim). *See also* Reyes-Cardona v. J.C. Penney Co., 694 F.2d 894 (1st Cir. 1982) (applying Puerto Rico civil law, which is similar to common law standard; negligent filing of debt collection suit against wrong person is insufficient to create a cause of action). *Cf.* Williams v. Pinks, Feldman & Brooks, 530 N.Y.S.2d 162 (N.Y. App. Div. 1988) (no evidence of improper motive when creditor commenced action to collect debt); Citibank v. Hauff, 668 N.W.2d 528 (S.D. 2003) (improper purpose not shown where creditor had arguable, though unsuccessful, claim for ex-husband's unauthorized use of card). *See generally* Note, *Malicious Prosecution*, 26 U. Balt. L. Rev. 583 (1997).

352 *In re* Slaich, 2019 WL 1302338 (Bankr. C.D. Cal. Mar. 19, 2019) (subjective intent to injure is not required; recklessness is sufficient); *In re* Smith, 489 B.R. 875 (Bankr. M.D. Ga. 2013) (Georgia malicious prosecution judgment may be based on "reckless disregard" or "conscious indifference"); Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30 (Cal. 2006) (malice may range from open hostility to indifference); Clemons v. State Risk Mgmt. Trust Fund, 870 So. 2d 881 (Fla. Dist. Ct. App. 2004); Brooks v. H & H Creek, Inc., 478 S.E.2d 451 (Ga. Ct. App. 1996) (improper motive, reckless disregard, or conscious indifference to plaintiff's rights sufficient to show malice); Smith v. City Bank & Tr. Co., 271 So. 3d 263 (La. Ct. App. 2019) (malice inferred from finding that defendant acted in reckless disregard of plaintiff's rights; here employer brought criminal charges based on very inadequate investigation); Jestic v. Long Island Sav. Bank, 440 N.Y.S.2d 278 (N.Y. App. Div. 1981); Gunnels v. City of Brownfield, 153 S.W.3d 452 (Tex. App. 2003). *See also* Poskin v. T.D. Banknorth, 687 F. Supp. 2d 530 (W.D. Pa. 2009) (gross negligence is sufficient for Pennsylvania's statutory tort; borrowers stated claim against assignee bank that went ahead with foreclosure, without verifying information received from assignor finance company, despite knowledge that finance company had been caught falsifying information on other loans). *But cf.* LeForge v. BAC Home Loans, L.P., 2011 WL 1532139 (S.D. Ind. Apr. 21, 2011) ("shoddy procedures and negligence" not equivalent to malice; here lender brought foreclosure proceedings after mortgage delinquency had been resolved by short sale); Wal-Mart Stores v. Binns, 15 S.W.3d 320 (Ark. 2000) (incompetence not equivalent to malice).

353 Paulus v. Bob Lynch Ford, Inc., 43 Cal. Rptr. 3d 148 (Cal. Ct. App. 2006).

354 Zablonsky v. Perkins, 187 A.2d 314 (Md. 1963).

355 Beaulieu v. Bank of Am., 2014 WL 4843809 (D. Me. Sept. 29, 2014) (lack of probable cause just barely alleged where foreclosure failed because lender neglected to give statutorily required notice, but malice may be inferred only if groundlessness of claim is obvious); Duke v. Nachtigal, 2012 WL 195466 (D. Or. Jan. 19, 2012); *In re* Prince, 414 B.R. 285 (Bankr. M.D. Tenn. 2009), *rev'd in part on other grounds*, 2010 WL 841273 (M.D. Tenn. Mar. 4, 2010); Wal-Mart Stores v. Binns, 15 S.W.3d 320 (Ark. 2000).

356 *In re* Prince, 414 B.R. 285 (Bankr. M.D. Tenn. 2009), *rev'd in part on other grounds*, 2010 WL 841273 (M.D. Tenn. Mar. 4, 2010).

357 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 956 (9th Cir. 2011) (Mont. law; rebuttable presumption of malice arises from absence of probable cause); Melford v. Kahane and Assoc., 371 F. Supp. 3d 1116 (S.D. Fla. 2019) (lack of probable cause is sufficient basis for jury to infer malice; law firm carried on with foreclosure despite actual knowledge of loan modification); Samuels v. Midland Funding, L.L.C., 921 F. Supp. 2d 1321 (S.D. Ala. 2013) (malice can be inferred from lack of probable cause; sufficiently alleged where large volume debt buyer received minimal information from sellers, made no effort to obtain more, and was unable to produce any evidence at trial); Francis v. Hertz Corp., 2010 WL 761232 (N.D. Ga. Mar. 3, 2010) (malice may be inferred from complete lack of probable cause; not shown here where rental car company brought larceny complaint after sketchy investigation); Montgomery Ward v. Wilson, 664 A.2d 916 (Md. 1995) (malice can be implied from lack of probable cause for purposes of compensatory damages, but jury instructions should not imply that mere negligence in investigating is sufficient; for punitive damages, malice cannot be implied); Semones v. Southern Bell Tel. & Tel. Co., 416 S.E.2d 909 (N.C. Ct. App. 1992) (malice can be inferred from lack of probable cause to initiate criminal prosecution). *Cf.* Barrett v. Negrete, 126 Fed. Appx. 816 (9th Cir. 2005) (Cal. law; open question whether malice can be inferred from lack of probable cause). *But see* Sanders v. Daniel Int'l Corp., 682 S.W.2d 803 (Mo. 1994) (mere absence of probable cause insufficient; must show improper motive). *But cf.* Geter v. Graham, 2005 WL 1846541 (Cal. Ct. App. Aug. 5, 2005) (lack of probable cause not sufficient in itself to show malice, but shown here where landlord failed to investigate facts and filed eviction action to force tenants to accept unlawful rent increase).

358 Barrett v. Negrete, 126 Fed. Appx. 816 (9th Cir. 2005) (Cal. law).

359 Pierce v. Clayton County Georgia, 717 Fed. Appx. 866 (11th Cir. 2017) (actual knowledge of police department's clerical error); McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 956 (9th Cir. 2011) (Mont. law; malice shown where law firm continued with collection suit after its client confirmed that suit was barred); Kaplan v. Regions Bank, 2018 WL 3642576 (M.D. Fla. Aug. 1, 2018) (bank vigorously pursued victim of Ponzi scheme after federal courts had found current plaintiff to be innocent victim); Dickens v. Gemini Capital Group, 2015 WL 9412928 (W.D. Ark. Dec. 21, 2015) (debt buyer persisted for six months after learning that claim was time-barred); Lee v. Kim, 254 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019) (making demand for monetary settlement at time when belief in probable cause was "no longer defensible"); Cuevas-Martinez v. Sun, Salt, Sand, Inc., 248 Cal. Rptr. 3d 200 (Cal. Ct. App. 2019) (persisting with action for twenty months after discovery had shown that claims were meritless); Medley Capital Corp. v. Security Nat'l Guar., Inc., 225 Cal. Rptr. 3d 736 (Cal. Ct. App. 2017) (failure to investigate facts or research law before filing six-figure claim against wrong entity, and persisting with litigation after being repeatedly told of mistake, are sufficient allegations of malice); Guzman v. Olaires, 2004 WL 2030230 (Cal. Ct. App. Sept. 10, 2004) (malice or lack of probable cause may be shown by continuing with litigation after it becomes obvious that cause of action is meritless); Brewer v. Christiansen, 2002 WL 31174236 (Cal. Ct. App. Sept. 30, 2002) (malice is subjective; shown here where lawyer pressed forward even after learning of serious factual inaccuracies in client's story). *See also* Bloomer v. Ouellette, 333 F. Supp. 3d 1172 (D. Kan. 2018) (failure to disclose new evidence that eliminates probable cause is probative of malice); Shaw v. Law Offices of Hayt, Hayt, & Landau,

- Evidence of similar treatment of other debtors;[360]
- Threats;[361]
- False testimony or suppression of evidence;[362] and
- Institution of a criminal proceeding as a way of accomplishing some other purpose.[363]

Expressions of personal ill will are germane,[364] but personal ill will need not be shown.[365]

15.6.2.5 Termination in Favor

The final element of a malicious prosecution claim is that the proceeding must have been terminated in the defendant's favor.[366] Because of this requirement, a malicious prosecution action cannot be brought while the underlying suit is still pending.[367] Accordingly, it is premature to assert malicious prosecution by way of a counterclaim or defense.[368] It is safest to wait until any appeal of the underlying suit has been decided and all appeal periods have passed.[369]

A malicious prosecution claim cannot be brought if the plaintiff in the prior suit obtained a favorable judgment.[370] Some courts require that the proceeding be terminated on the merits, rather than on a basis such as the statute of limitations.[371] However, dismissal of a proceeding on non-merits

2018 WL 1634829 (D.N.J. Apr. 5, 2018) (denying summary judgment to collector; repeated levies on bank account of non-debtor father for debt of similarly-named son after being informed of error is sufficient evidence of malice). *But see* Collins v. Roost, 2009 WL 2168673 (Bankr. D. Or. July 17, 2009) (continuing to prosecute one claim after realizing it was bad not sufficient to show malice).

360 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 953–954 (9th Cir. 2011) (Mont. law).

361 Cave v. Davison, 2001 WL 1098058 (E.D. La. Sept. 18, 2001) (employer's threat to "destroy" former employee if he did not repay alleged debt and subsequent pursuit of criminal charges sufficient evidence of malice).

362 Shoney's Inc. v. Barnett, 773 So. 2d 1015 (Ala. Civ. App. 1999) (false testimony or suppression of evidence sufficient to prove malice by clear and convincing evidence); Lin v. Severson & Werson, 2004 WL 1345118 (Cal. Ct. App. June 16, 2004) (evidence that counsel in underlying action tried to suborn perjury is probative on malice and probable cause; tends to show counsel believed case was untenable); Horne v. J.H. Harvey Co., 617 S.E.2d 648 (Ga. Ct. App. 2005) (fact issue regarding malice where store employee furnished false information in filling out additional paperwork after bad check complaint issued); Prather v. Providian Nat'l Bank, 2006 WL 1868335 (Ky. Ct. App. July 6, 2006) (allegation that creditor withheld and falsified account statements sufficient to allege malice); Digby v. Texas Bank, 943 S.W.2d 914 (Tex. App. 1997) (facts sufficient to support malice and lack of probable cause elements where bank failed to make "full and fair" disclosure to authorities; reporting inculpatory evidence but not exculpatory, negated presumption of good faith).

363 Samtani v. Cherukuri, 2015 WL 64671 (E.D.N.Y. Jan. 5, 2015) (seeking criminal indictment in order to improve position in negotiations over commercial debt may be actionable if proven); George v. W.W.D. Automobiles, Inc., 937 So. 2d 958 (Miss. Ct. App. 2006) (malice shown where car dealer instituted criminal case as way of getting car back).

364 Bank of Eureka Springs v. Evans, 109 S.W.3d 672 (Ark. 2003) (when borrower mentioned bankruptcy, bank officials expressed personal ill will to borrower, then lied to prosecutor to initiate groundless prosecution for defrauding a secured creditor); Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30 (Cal. 2006) (malice clearly shown; meritless action and personal ill will); Zimmerman & Kabanovich v. Scottsdale Ins. Co., 2006 WL 2961021 (Cal. Ct. App. Oct. 18, 2006) (malice may be shown either by evidence of hostility or ill will, or by improper purpose for bringing action).

365 Shoney's Inc. v. Barnett, 773 So. 2d 1015 (Ala. Civ. App. 1999).

366 Houghton v. Foremost Fin. Serv. Corp., 724 F.2d 112 (10th Cir. 1983) (no malicious prosecution claim where creditor's replevin action not terminated in debtor's favor); Shaw v. Law Offices of Hayt, Hayt, & Landau, 2018 WL 1634829 (D.N.J. Apr. 5, 2018) (bank account levy was action, and withdrawal was termination in favor); Kent v. Drought, 2010 WL 4320334 (W.D.N.Y. Oct. 28, 2010) (grand jury's refusal to indict was termination in favor); Rafter v. Bank of Am., 2009 WL 691929 (S.D.N.Y. Mar. 12, 2009) (issue of fact whether dismissal of criminal charges was termination in favor); Mulder v. Pilot Air Freight, 2005 WL 3163862 (Cal. Ct. App. Nov. 29, 2005) (dismissal of criminal charge for insufficient evidence was termination in favor); Verdon v. Song, 251 So. 3d 256 (Fla. Dist. Ct. App. 2018) (*nolle prosequi* is termination in favor where it occurred because prosecutor, after review of merits, concluded that chance of conviction was slight); Berman v. Karvounis, 518 A.2d 726 (Md. 1987); Otiniano v. Magier, 580 N.Y.S.2d 759 (N.Y. App. Div. 1992); San Antonio Credit Union v. O'Connor, 115 S.W.3d 82 (Tex. App. 2003) (affirming malicious prosecution judgment for contractor whose indictment for misappropriation of funds was dismissed; reasonable jury could find that contractor was innocent and accuser's beliefs unreasonable).

367 Jordan v. Berman, 758 F. Supp. 269 (E.D. Pa. 1991) (malicious prosecution claim available only if prior proceeding has been terminated), *aff'd in part, vacated in part on other grounds*, 20 F.3d 1250 (3d Cir. 1994); Leek v. Cooper, 2012 WL 1511411 (Cal. Ct. App. May 1, 2012) (malicious prosecution claim will not lie for action taken in pending case, here seeking a debtor's exam at a time when collection activity was stayed pending appeal); Ulmer v. Frisard, 694 So. 2d 1046 (La. Ct. App. 1997) (proper to dismiss malicious prosecution claim that was brought before termination of allegedly malicious litigation).

368 Minnesota Corn Processors, Inc. v. McCormack, 2000 WL 948659 (E.D. Pa. July 7, 2000); Equality, Inc. v. I-Link Communications, 76 F. Supp. 2d 227 (D. Conn. 1999); First Fed. Sav. & Loan Ass'n v. Stone, 467 N.E.2d 1226 (Ind. Ct. App. 1984).

369 Montemayor v. Ortiz, 208 S.W.3d 627 (Tex. App. 2006) (no termination in favor until appellate process exhausted).

370 LaSonde v. Chase Mortg. Co., 577 S.E.2d 822 (Ga. Ct. App. 2003) (substantial success in underlying civil proceeding is complete defense); Watson v. Auto Advisors, Inc., 822 N.E.2d 1017 (Ind. Ct. App. 2005) (no malicious prosecution claim where creditor won its collection suit).

371 Mills v. City of Covina, 921 F.3d 1161 (9th Cir. 2019) (Cal. law; reversal on appeal was not termination in favor, where judgment was reversed because key evidence should have been suppressed pursuant to exclusionary rule); Murawski v. Reid, 375 F. Supp. 3d 998 (N.D. Ill. 2019) (*nolle prosequi* because witnesses were absent was not termination in favor; prosecutor remained free to re-file charges); Jesse L. Morgan v. The Vogler Law Firm, 2016 WL 3958608 (E.D. Mo. July 16, 2016) (dismissal because debt discharged in bankruptcy not termination in favor); Reynolds Casas & Reilly, L.L.P. v. 4920 Corp., 2005 WL 995244 (Cal. Ct. App. Apr. 29, 2005) (dismissal of eviction proceeding for defective three-day notice not termination in favor as it did not reflect on merits (whether rent was due)); Guerrero v. Windsor Square Homeowners Ass'n, 2001 WL 1480637 (Cal. Ct. App. Nov. 21, 2001) (successful statute-of-limitations defense was not a favorable termination because it did not reflect merits of case); Health Mgmt. Assoc., Inc. v. Weiner, 264 So. 3d 747 (Miss. 2019) (dismissal of federal criminal charge for lack of jurisdiction was procedural, not termination on merits). *But see* Di Loreto v. Costigian, 600 F. Supp. 2d 671 (E.D. Pa. 2009) (dismissal of involuntary bankruptcy petition because of defective service was favorable termination, but debtors failed to allege other required elements), *aff'd on other grounds*, 351 Fed. Appx. 747 (3d Cir. 2009); Prather v. Providian Nat'l Bank, 2006 WL 1868335 (Ky. Ct.

grounds in circumstances suggesting that failure on the merits was imminent may be sufficient.[372] A number of courts hold that termination of a proceeding by way of a settlement agreement is not a termination in favor of the defendant.[373]

Vacating a judgment[374] or granting a special motion to strike under an anti-SLAPP suit statute[375] can satisfy the requirement of termination in favor of the defendant. Voluntary dismissal may amount to termination in favor of the defendant,[376] but at least in some circumstances a dismissal without prejudice may be insufficient.[377] Denial of a prejudgment remedy or one part

App. July 6, 2006) (dismissal with prejudice for discovery violations is favorable termination).

372 Spak v. Phillips, 857 F.3d 458 (2d Cir. 2017) (Conn. Law; *nolle prosequi* of criminal charges is termination in favor, provided it is not result of compromise with defendant); Margheim v. Buljko, 855 F.3d 1077 (10th Cir. 2017) (dismissal of criminal case following grant of motion to suppress not termination in favor; grounds for dismissal were "purely technical" and had nothing to do with guilt or innocence); Lee v. Kim, 254 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019) (dismissal for lack of standing reflected on merits; company was shown to neither own nor control ADA non-compliant parking lot at issue); Guzman v. Olaires, 2004 WL 2030230 (Cal. Ct. App. Sept. 10, 2004) (dismissal as sanction for litigation conduct is favorable termination only if misconduct "amounts to a concession that plaintiff had no case"; here, complete and long-continued failure to respond to discovery made out prima facie case of favorable termination); Buckenmaier v. Kondrat, 2004 WL 944770 (Conn. Super. Ct. Apr. 14, 2004) (dismissal for failure to prosecute was favorable termination).

373 Zebrowski v. Wells Fargo Bank, 657 F. Supp. 2d 511 (D.N.J. 2009) (termination was unfavorable where consumers paid disputed amounts in order to stop foreclosure); Shapiro v. Haenn, 222 F. Supp. 2d 29 (D. Me. 2002) (voluntary withdrawal after settlement not favorable termination); Givens v. Rent-A-Center, Inc., 720 F. Supp. 160 (S.D. Ala. 1988), *aff'd*, 885 F.2d 879 (11th Cir. 1989) (dismissing malicious prosecution claim because *nolle prosequi* of criminal charges was result of settlement agreement); Dalany v. Am. Pac. Holding Corp., 50 Cal. Rptr. 2d 13 (Cal. Ct. App. 1996) (malicious prosecution action unavailable where prior proceeding was terminated by settlement agreement); Fuentes v. Berry, 45 Cal. Rptr. 2d 848 (Cal. Ct. App. 1995) (negotiated settlement not termination in favor of defendant; if termination is not on merits, the reasons must be examined to see if this reflects the opinion of the court or the prosecuting party that an action would not succeed); Laster v. Star Rental, Inc., 353 S.E.2d 37 (Ga. Ct. App. 1987) (denying malicious prosecution claim by rent-to-own customer where criminal prosecution for not returning leased goods was dismissed upon customer's promising to return the goods); Lee Ching v. Dung, 446 P.3d 1016 (Haw. Ct. App. 2019) (downgrading trespass claim to parking violation was compromise, not termination in favor), *rev'd in part on other grounds*, 477 P.3d 856 (Haw. 2020); Swick v. Liautaud, 662 N.E.2d 1238 (Ill. 1996) (allegation that prosecution ended in *nolle prosequi*, without more, was not sufficient to prove "termination in favor of accused"; *nolle prosequi* must be for "reasons consistent with innocence," not a result of agreement or compromise). *See also* Faulk v. Midland Funding, 2015 WL 5736103 (M.D. Ala. Sept. 30, 2015) (fact issue whether debt buyer's voluntary dismissal with prejudice was result of negotiation).

374 Gill v. Kostroff, 82 F. Supp. 2d 1354 (M.D. Fla. 2000) (question of fact whether vacation of judgment was termination in consumer's favor).

375 Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30 (Cal. 2006) (grant of special motion to strike under anti-SLAPP statute is favorable termination).

376 Barrett v. Negrete, 126 Fed. Appx. 816 (9th Cir. 2005) (Cal. law; favorable termination sufficiently alleged where accusation of sensational crime, unsupported by facts, voluntarily dismissed when accuser faced discovery requests); Holick v. Burkhart, 388 F. Supp. 3d 1370 (D. Kan. 2019) (dismissal without prejudice is favorable termination, so long as it is not inconsistent with lack of merit; need not show that it reflects on merits); Fooks v. Mason, Schilling & Mason Co., L.P.A., 2019 WL 4455983 (E.D. Ky. Sept. 17, 2019) (voluntary dismissal with prejudice is termination in favor); Dickens v. Gemini Capital Group, 2015 WL 9412928 (W.D. Ark. Dec. 21, 2015) (time-barred claim dismissed four days before trial); Osinubepi-Alao v. Plainview Fin. Serv., Ltd., 44 F. Supp. 3d 84 (D.D.C. 2014) (voluntary dismissal with prejudice after being served with discovery requests); Klemp v. Columbia Collection Serv., Inc., 2014 WL 5324318 (D. Or. Oct. 17, 2014) (reasonable jury could find that voluntary dismissal when faced with motion to dismiss "reflects on the merits"); Poskin v. TD Banknorth, 687 F. Supp. 2d 530 (W.D. Pa. 2009) (voluntary dismissal sufficient to show favorable termination for purposes of Pennsylvania's statutory wrongful use of civil proceedings claim); Noel v. Town of Plymouth, 895 F. Supp. 346 (D. Mass. 1995) (criminal prosecution was terminated in favor of the accused if district attorney formally abandoned the proceeding by a *nolle prosequi* or a motion to dismiss, unless this was on strictly technical or procedural grounds); Olivares v. Pineda, 253 Cal. Rptr. 3d 213 (Cal. Ct. App. 2019) (voluntary dismissal rebuttably presumed to be termination on merits); Medley Capital Corp. v. Security Nat'l Guar., Inc., 225 Cal. Rptr. 3d 736 (Cal. Ct. App. 2017) ("a voluntary dismissal, even one without prejudice, reflects on the merits. Although not *res judicata*, it is generally a favorable termination"); Turner v. Debt Buyers, Inc., 2011 WL 287901 (Cal. Ct. App. Jan. 31, 2011) (voluntary dismissal presumed to be termination in favor; further supported here by timing: dismissed shortly after consumer's lawyer requested discovery); Citi-Wide Preferred Couriers v. Golden Eagle Ins. Corp., 8 Cal. Rptr. 3d 199 (Cal. Ct. App. 2003) (favorable termination shown: when insured appeared ready for trial, insurer conceded that insured had paid all that was due and voluntarily dismissed case with prejudice); Nicholl v. Great Atl. & Pac. Tea Co., 517 S.E.2d 561 (Ga. Ct. App. 1999) (favorable termination shown where *nolle prosequi* of criminal charges occurred after handwriting exemplar showed that identity theft victim had not written the bad check). *Cf.* Allen v. Berger, 784 N.E.2d 367 (Ill. App. Ct. 2002) (voluntary dismissal of criminal charge not favorable termination unless "the circumstances . . . compel an inference . . . that there existed a lack of reasonable grounds to pursue the criminal prosecution.").

377 DeBoskey v. SunTrust Mortg., Inc., 2017 WL 4083557 (M.D. Fla. Sept. 14, 2017) (voluntary dismissal of foreclosure for lack of standing not termination in favor, because it did not "indicate the innocence of the plaintiff," that is, that he was not in default); Shirokov v. Dunlop, Grubb & Weaver, P.L.L.C., 2012 WL 1065578, at *33 (D. Mass. Mar. 27, 2012) (dismissal without prejudice not termination in favor); Carr v. Asset Acceptance, L.L.C., 2011 WL 3568338 (E.D. Cal. Aug. 12, 2011) (voluntary dismissal without prejudice not termination in favor); Walker v. Toyota Motor Credit Corp., 2007 WL 2500177 (S.D. Ind. Aug. 30, 2007) (dismissal without prejudice not favorable termination; here, replevin dismissed without prejudice after vehicle found, and creditor remained free to refile to seek damages for loss of use); Broadnax v. Greene Credit Serv., 694 N.E.2d 167 (Ohio Ct. App. 1997) (dismissal of bad check prosecution without prejudice not termination in favor where judge noted that there were "problems" with the case and that prosecutor "may want to" refile); Goodwin v. City of Shepardstown, 825 S.E.2d 363 (W. Va. 2019) (dismissal of criminal charges is favorable termination only if it prevents charges from ever being revived; dismissal without prejudice not sufficient). *But see* Sternberg v. Horner, 2009 WL 2468466 (Cal. Ct. App. Aug. 13, 2009) (voluntary dismissal without prejudice after demurrer was sustained was favorable termination); Olympia Sales, Inc. v. Roberts Enters., Inc., 2006 WL 1391217 (Conn. Super. Ct. May 7, 2006) (sufficient if proceeding terminated "without consideration"; here, voluntary dismissal without prejudice was favorable termination); Seipel v. Olympic

of a claim may be insufficient if the underlying action itself is not terminated,[378] but an abuse-of-process claim may be an alternative approach in these circumstances.[379]

15.6.2.6 Examples

Examples of malicious prosecution claims in the debt collection context include:

- A creditor's initiation of a bad check prosecution solely to coerce payment of a debt known to have resulted from identity theft,[380] a financial institution's error,[381] a good-faith dispute over the goods or services provided,[382] or other circumstances that would not support a conviction.[383] However, some states have statutes that immunize creditors from malicious prosecution claims if they follow certain procedures before initiating a dishonored check prosecution;[384]

Const Invs., 188 P.3d 1027 (Mont. 2008) (genuine issue of fact whether dismissal without prejudice was favorable termination).

378 Vanover v. Cook, 260 F.3d 1182 (10th Cir. 2001) (Kan. law; reduction on appeal of amount owed was not termination in favor); Hoffman v. Connecticut, 2009 WL 3055137 (D. Me. Aug. 7, 2009) (favorable termination not shown; real estate attachment was dissolved, but underlying fraudulent transfer action was ongoing), *modified on other grounds and adopted by* 671 F. Supp. 2d 166 (D. Me. 2009); Hewitt v. Rice, 154 P.3d 408 (Colo. 2007) (for malicious prosecution action based on filing of *lis pendens*, underlying action in which *lis pendens* filed must be terminated in current plaintiff's favor); Bernhard-Thomas Bldg. Sys., Inc. v. Dunican, 2006 WL 301908 (Conn. Super. Ct. Jan. 18, 2006) (denial of application for prejudgment remedy not termination of civil proceeding in favor, because it does not adjudicate the merits); Gecy v. Somerset Point at Lady's Island Homeowners' Assoc., Inc., 828 S.E.2d 73 (S.C. Ct. App. 2019) (removal of *lis pendens*, while underlying litigation remains pending, is not favorable termination, but if litigation terminates favorably, filing of improper *lis pendens* can support claim); Asser v. Commonwealth, 69 Va. Cir. 75 (Va. Cir. Ct. 2005) (even if malicious prosecution action available against taxing authorities, taxpayer failed to allege favorable termination where state released lien but continued to seek collection of amount due).

379 *See* § 15.6.3, *infra*.

380 *In re* BFW Liquidation, L.L.C., 471 B.R. 652 (Bankr. N.D. Ala. 2012) (victim stated claim for malicious prosecution against store that cashed check for thief despite obvious problems with identification, then prosecuted victim); Wal-Mart Stores v. Patterson, 816 So. 2d 1 (Ala. 2001) (checking account owner who was arrested and charged after his ex-wife forged his signature stated claim for negligence and malicious prosecution); Nicholl v. Great Atl. & Pac. Tea Co., 517 S.E.2d 561 (Ga. Ct. App. 1999) (favorable termination shown where *nolle prosequi* of criminal charges occurred after handwriting exemplar showed that consumer, a victim of identity theft, had not written the bad check); K-Mart Corp. v. Salmon, 547 A.2d 1069 (Md. Ct. Spec. App. 1988) (actual and punitive damages proper where store brought bad check charges against plaintiff even though it had accepted check from thief while doubting the thief's identity).

381 Hayfield v. Home Depot, 168 F. Supp. 2d 436 (E.D. Pa. 2001) (retailer vigorously pursued criminal bad check prosecution against customer whose check company negligently misprinted her account number, despite extensive efforts by customer and check company to correct the problem).

382 Rannels v. S.E. Nichols, Inc., 591 F.2d 242 (3d Cir. 1979) (Pa. law) (cause of action stated where consumer alleged that seller knew her stop payment order on check was result of dispute over defective zipper); Gooch v. Tudor, 674 S.E.2d 331 (Ga. Ct. App. 2009) (affirming malicious prosecution judgment and punitive damages against contractor who initiated theft-by-deception prosecution by swearing falsely that consumer, who offered to pay undisputed portion of bill and negotiate about the rest, had refused to pay); Hupp v. North Hills Lincoln-Mercury, Inc., 610 S.W.2d 349 (Mo. Ct. App. 1980) (upholding actual and punitive damages for bad check charges where consumer had told dealer not to deposit check until myriad of defects had been corrected on new car); Lawson v. Wilkinson, 447 S.W.2d 369 (Tenn. Ct. App. 1969) (stop payment after purchased horse proved to be unmanageable). *See also* Mason v. Rainbow Rentals, 2004 WL 102873 (Ohio Ct. App. Jan. 23, 2004) (no probable cause where creditor should have known difference between consumer's stop payment order and a bad check).

383 *See, e.g.*, Papadopoulos v. Josem, 2002 WL 194494 (Conn. Super. Ct. Jan. 11, 2002) (allowing plaintiff to proceed malicious prosecution claim against her former attorney who allowed a criminal dishonored check prosecution to go forward, even though she had covered the check); Semones v. Southern Bell Tel. & Tel. Co., 416 S.E.2d 909 (N.C. Ct. App. 1992) (denying summary judgment for malicious prosecution defendant who did not have reasonable grounds to believe that plaintiff knew when he drew check that there were insufficient funds to pay it); Gumm v. Heider, 348 P.2d 455 (Or. 1960) (general and punitive damages proper where payee brought bad check charges over insufficient funds check for a preexisting, disputed debt). *See also* Kitchens v. Barlow, 164 So. 2d 745 (Miss. 1964) (cause of action stated for bad check criminal prosecution when wrong person was allegedly being prosecuted; check writer's name was similar to current plaintiff's). *But see* Gatheright v. Clark, 2016 WL 1307519 (N.D. Miss. Mar. 31, 2016) (summary judgment for defendants; intentional misuse of bad check procedure not shown, even though creditor, seeking to collect on post-dated check, which is not covered by Mississippi law, filed false affidavit after it learned of debtor's bankruptcy filing); Guidry v. Clare, 442 F. Supp. 2d 282 (E.D. Va. 2006) (denying malicious prosecution claim and sanctioning consumer for frivolous action, where payee of insufficient funds check had legal and factual basis for criminal complaint); Kmart v. Asaro, 751 So. 2d 513 (Ala. Civ. App. 1999) (no malicious prosecution where consumer knowingly wrote bad check); Wenger v. Aceto, 883 N.E.2d 262 (Mass. 2008) (allowing anti-SLAPP motion to dismiss malicious prosecution and abuse-of-process claims; creditor's action had "reasonable basis in law" when law unclear whether check for antecedent debt could support larceny charge). *But cf.* Vasseur v. Eunice Superette, Inc., 386 So. 2d 692 (La. Ct. App. 1980) (upholding finding that payee of dishonored checks had not acted maliciously in bringing criminal charges). *See generally* National Consumer Law Center, Collection Actions Ch. 8 (5th ed. 2020), *updated at* www.nclc.org/library.

384 *ALABAMA*: The Alabama Worthless Check Act provides a safe harbor for payees of worthless checks who give the prescribed notice and follow statutory procedure, Ala. Code § 13A-9-13.2(3). *See* West v. Bruno's Inc., 837 So. 2d 303 (Ala. Civ. App. 2002) (statute protects only holder of worthless instrument; fact issue here whether check was worthless where bank records indicated it had been paid).

FLORIDA: A Florida statute also prescribes a notice procedure, but the plain language of the statute gives immunity only to subsequent holders of the check who give notice, not original holders. Fla. Stat. § 832.07(1)(a). However, a court has described the statute as applying to "any party who holds a worthless check." Vann Goings v. West Fla. Hosp., 504 So. 2d 1254, 1255 (Fla. Dist. Ct. App. 1986) (also holding statutory immunity inapplicable where payee withholds information from state attorney).

GEORGIA: Georgia provides a statutory defense where the creditor sends a letter demanding payment of the check before filing suit. Ga. Code Ann. § 16-9-20(h) (holder of worthless check who provides statutory notice is immune from civil liability for the giving of such notice and for proceeding as required; person who initiates prosecution against check writer who had no account at bank on which check was drawn is deemed to have probable cause even without giving notice).

- Wrongful garnishment;[385]
- Suing on a time-barred debt without verifying the information received from the prior holder, and persisting with the suit after learning of the problem;[386] or
- A false automobile theft prosecution by a car dealer as a means of obtaining possession of a car or forcing the consumer to drop a fraud, warranty, or other claim.[387]

15.6.3 Abuse of Process

15.6.3.1 Elements

Abuse of process is often described as the use of "legal process against another in an improper manner to accomplish a purpose for which it was not designed."[388] One court described this tort as having a "broad reach," and explained that it developed historically "as a 'catch-all' category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution."[389]

In contrast to malicious prosecution, the tort of abuse of process is not based on the improper institution of legal proceedings.[390] The gist of the action is the improper use of process *after* it has been issued to accomplish a purpose for which it was not designed.[391] However, some courts allow

See Tallman v. Hinton, 467 S.E.2d 596 (Ga. Ct. App. 1996) (Georgia statute would not provide a defense to merchant where notice did not conform to requirements of statute); Hartsfield v. Union City Chrysler-Plymouth, 463 S.E.2d 713 (Ga. Ct. App. 1995) (applying statutory provision that prohibits introduction of agreements that are not written on the check—here, an oral agreement not to cash a check); Grand Union Co. v. Edwards, 456 S.E.2d 736 (Ga. Ct. App. 1995) (Ga. Code Ann. § 16-9-20 does not require seller to give notice to consumer when account is closed, as opposed to overdrawn; merchant who gave notice, which partially complied with statute, did more than required; no cause of action); Blankenship v. Home Depot, Inc., 356 S.E.2d 61 (Ga. Ct. App. 1987) (statute provides immunity defense to creditor who gave notice to drawer to pay check); Wilson v. Home Depot, Inc., 348 S.E.2d 588 (Ga. Ct. App. 1986) (*nolle prosequi* of bad check charge after restitution does not overcome presumption of probable cause where consumer did not make check good within statutory notice period).

See generally National Consumer Law Center, Collection Actions § 8.4 (5th ed. 2020), *updated at* www.nclc.org/library (civil dishonored check statutes).

385 Shaw v. Law Offices of Hayt, Hayt, & Landau, 2018 WL 1634829 (D.N.J. Apr. 5, 2018) (denying summary judgment to collector; repeated levies on bank account of non-debtor father for debt of similarly-named son after being informed of error is sufficient evidence of malice); Pinkstaff v. Hill, 827 S.W.2d 747 (Mo. Ct. App. 1992) (wrongful garnishment was basis for malicious prosecution where garnishment was quashed after real owner of bank account intervened). *But cf.* Kentucky Farm Bureau Mut. Ins. Co. v. Burton, 922 S.W.2d 385 (Ky. Ct. App. 1996) (reliance on advice of counsel bars malicious prosecution claim based on wrongful garnishment).

386 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 955–956 (9th Cir. 2011) (Mont. law; affirming verdict against collection firm that filed and persisted with time-barred collection suit while knowing or intentionally disregarding facts showing that it was untimely).

387 Plessy v. Hayes Motor Co., 742 So. 2d 934 (La. Ct. App. 1999) (malicious prosecution proved where car dealer, after sale, had dispute with buyer over paperwork and payment and reported car stolen, leading to arrest of buyer and court proceedings); George v. W.W.D. Automobiles, Inc., 937 So. 2d 958 (Miss. Ct. App. 2006) (car dealer accused buyer of unauthorized use of vehicle it had sold her in yo-yo sale, as way of getting car back). *See generally* National Consumer Law Center, Automobile Fraud § 4.5.2 (6th ed. 2018), *updated at* www.nclc.org/library.

388 Coursen v. JP Morgan Chase & Co., 2012 WL 3055857, at *5 (M.D. Fla. July 25, 2012) ("willful or intentional misuse of process for some wrongful or unlawful object, or ulterior purpose not intended by law"); Larobina v. McDonald, 876 A.2d 522, 528 (Conn. 2005); Riemers v. Hill, 881 N.W.2d 624 (N.D. 2016). *See also* Houghton v. Foremost Fin. Serv. Corp., 724 F.2d 112 (10th Cir. 1983) (Okla. law; use of legal process for an improper purpose, to accomplish an end not lawfully obtainable, or to compel someone to do some collateral thing he could not legally be compelled to do); Pinewood Homes, Inc. v. Harris, 646 S.E.2d 826, 831 (N.C. Ct. App. 2007) ("the misapplication of civil or criminal process to accomplish some purpose not warranted or commanded by the process"); Restatement (Second) of Torts § 682 (1977) ("[o]ne who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process").

389 Barquis v. Merchants Collection Ass'n, 496 P.2d 817 (Cal. 1972).

390 *See, e.g.*, Vanover v. Cook, 260 F.3d 1182, 1191 (10th Cir. 2001) (Kan. law); Evans v. West, 935 F.2d 922 (7th Cir. 1991) (mere institution of proceeding not abuse of process); Zachary v. Midland Funding, L.L.C., 2018 WL 3474691, at *6 (E.D. Pa. July 18, 2018); Turner v. Lerner, Sampson & Rothfuss, 776 F. Supp. 2d 498 (E.D. Ohio 2011) (allegation that filing of suit was improper from the start will support malicious prosecution but not abuse of process); Munger v. Deutsche Bank, 2011 WL 2930907 (N.D. Ohio July 18, 2011) (filing of foreclosure by creditor that knew it lacked standing is malicious prosecution, not abuse of process; claim fails here for lack of special damages); Equality, Inc. v. I-Link Communications, 76 F. Supp. 2d 227 (D. Conn. 1999) (filing of suit and actions taken before filing cannot be abuse of process); Kmart v. Asaro, 751 So. 2d 513, 516 (Ala. Civ. App. 1999) (abuse-of-process claim cannot be based on issuance of criminal complaint); Packard v. Cent. Me. Power Co., 477 A.2d 264 (Me. 1984) (unlike malicious prosecution, must show improper conduct after complaint issued; wrongfully reporting theft of electricity to law enforcement officials insufficient); Montemayor v. Ortiz, 208 S.W.3d 627 (Tex. App. 2006) (misrepresentations made to obtain issuance of process will support claim for malicious prosecution but not abuse of process).

391 Gibson v. Regions Fin. Corp., 557 F.3d 842 (8th Cir. 2009) (Ark. law; search warrant is process, but no abuse-of-process claim where defendant did not pervert it to improper use after it was issued); Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 304 (3d Cir. 2003) (Pa. law); Orellana v. Macy's Retail Holdings, Inc., 2018 WL 3368716, at *17 (S.D.N.Y. July 10, 2018) (abuse of process claim cannot be based on misdeeds that occurred before plaintiffs were arrested); Kamaha VI, L.L.C. v. HJH, L.L.C., 2013 WL 5177843, at *3 (M.D. Fla. Sept. 12, 2013) (issuance of process for improper motive not sufficient; must show subsequent misuse); Owens v. Chasko, 2011 WL 3163261 (E.D. Cal. July 26, 2011) (allegation that creditor faxed discovery requests to debtor's place of business as way of humiliating him, before complaint had even been served, states claim); Zebrowski v. Wells Fargo Bank, 657 F. Supp. 2d 511 (D.N.J. 2009) (needlessly prolonging baseless litigation not sufficient; must show use of garnishment, attachment, arrest, or other process to compel compliance); Capitol Records, Inc. v. Weed, 2008 WL 1820667 (D. Ariz. Apr. 27, 2008) (claim can be based on filing of documents containing private information for improper purpose of coercing payment, but not on allegation that filing suit was malicious or oppressive); Hampton v. Nustar Mgmt. Fin. Group, 2007 WL 119146 (D. Nev. Jan. 10, 2007) (must allege abusive measures after filing of complaint); DirecTV, Inc. v. Zink, 286 F.

abuse-of-process claims to be based on the initiation of suit for a wrongful purpose, such as to coerce settlement of other matters.[392] A claim of abuse of process can be made out without showing that the underlying suit was terminated in the plaintiff's favor.[393] Conversely, the fact that the underlying suit lacked merit does not mean that the use of process in that case is abuse of process.[394]

Courts vary in their listings of the elements of the tort. One common statement of the elements is:

- The defendant made an illegal, improper, perverted use of the process, a use neither warranted nor authorized by the process;
- The defendant had an ulterior motive or purpose; and
- Damage resulted to the plaintiff from the irregularity.[395]

Damages may include damage to reputation, emotional distress, and the cost of defending against the improperly used process.[396]

Supp. 2d 873 (E.D. Mich. 2003); Givens v. Rent-A-Center, Inc., 720 F. Supp. 160 (S.D. Ala. 1988), *aff'd*, 885 F.2d 879 (11th Cir. 1989); Cordes v. Outdoor Living Ctr., Inc., 781 S.W.2d 31, 33 (Ark. 1989); Kennedy v. First Nat'l Bank, 551 N.E.2d 1002 (Ill. App. Ct. 1990) (mere institution of a proceeding not abuse of process); Advanced Constr. Co. v. Pilecki, 901 A.2d 189, 197 (Me. 2006) (abuse-of-process claims arise when litigants misuse individual legal procedures after a lawsuit has been filed); Celley v. Stevens, 2004 WL 134000 (Mich. Ct. App. Jan. 27, 2004); Ruggiero v. Kavlich, 2010 WL 3351429 (Ohio Ct. App. Aug. 26, 2010) (wrongfully filing action, here suing on debt allegedly already paid, not abuse of process; must show use of process after issuance for ulterior purpose); Mendoza v. Fleming, 41 S.W.3d 781 (Tex. App. 2001) (reversing denial of wrongful garnishment and abuse-of-process claims for issuing garnishment not for purpose of collecting debt but to freeze debtor's political campaign fund). *See also* Seguro-Suarez by and through Connette v. Key Risk Ins. Co., 819 S.E.2d 741 (N.C. Ct. App. 2018) (affirming denial of motion to dismiss; plaintiff's allegations met these requirements where, after defendants made false report to police and plaintiff was arrested, they caused criminal proceedings to be continued and plaintiff to be indicted). *Cf.* McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 956 (9th Cir. 2011) (Mont. law; affirming abuse-of-process claim where law firm both filed and then continued to prosecute time-barred suit on debt). *But see* Sprint Communications Co. v. Leggett, 307 S.W.3d 109 (Ky. 2010) (misuse of process, in other words, use to coerce result that court could not order, may take place before or after process is issued; here, utility's threats of eminent domain proceeding to take easement, used to coerce landowner into outright sale that could not be compelled through eminent domain).

392 *See, e.g.*, Neil v. Nesbit, 2014 WL 4897315 (N.D. Ill. Sept. 27, 2014) (baseless debt collection litigation, in attempt to force out plaintiff unit owner and her African-American tenant); Nelson v. Am. Power & Light, 2010 WL 3219498 (S.D. Ohio Aug. 12, 2010) (filing eviction action to coerce payment of utility bill may be abuse of process); North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111 (D. Mass. 2007) (filing groundless suit may be abuse of process if purpose was to drive party out of business); Assoc. Fin. Serv. Co. v. Bowman, Heintz, Boscia & Vician, P.C., 2001 U.S. Dist. LEXIS 7874 (S.D. Ind. Apr. 25, 2001) (allowing abuse-of-process claim to go forward based on filing of complaint with false allegations as means of coercing settlement of other matters); Cais v. Citizens Sav. Bank, 2001 WL 1200870 (Conn. Super. Ct. Sept. 17, 2001) (allowing abuse-of-process claim to go forward based on filing of foreclosure actions as means of inducing property owner to pay money that was not yet owed); Medford Coop. Bank v. Skerry, 2004 WL 1853343 (Mass. App. Ct. Aug. 12, 2004) (upholding abuse-of-process judgment for filing groundless suit with allegations that would harm defendant's reputation, as means of coercing him to pay a debt); Seipel v. Olympic Coast Inv., 188 P.3d 1027 (Mont. 2008) (abuse of process shown if defendant knowingly filed meritless claim as "instrument of coercion"); Singh v. McLaughlin, 297 P.3d 514 (Or. Ct. App. 2013) (reversing directed verdict on claim that defendant committed abuse of process by seeking false criminal charges to gain advantage in fight for control of small business). *See also* Sara Lee Corp. v. Pro Sports, Inc., 2004 WL 537926 (M.D.N.C. Mar. 12, 2004) (abuse of process may be based on filing of suit, if for a wrongful purpose, but not shown here).

393 Bright View Trading Co. v. Park, 2004 WL 2071976 (S.D.N.Y. Sept. 16, 2004) (because abuse of process, unlike malicious prosecution, does not require termination in favor of claimant, abuse-of-process claim may be brought as counterclaim); Minnesota Corn Processors, Inc. v. McCormack, 2000 WL 948659 (E.D. Pa. July 7, 2000); Cordes v. Outdoor Living Ctr., Inc., 781 S.W.2d 31, 34 (Ark. 1989) (claim can be stated even if legal procedure is ultimately successful); Cervantes v. Law Offices of John G. Hanlin, 2004 WL 1638174, at *8 n.4 (Cal. Ct. App. July 23, 2004); Goodwin Agency, Inc. v. Chesser, 206 S.E.2d 568 (Ga. Ct. App. 1974). *But cf.* Larobina v. McDonald, 876 A.2d 522 (Conn. 2005) (finding abuse-of-process claim premature where eventual outcome of underlying case and the evidence presented in it will be relevant to the claim).

394 Karony v. Dollar Loan Ctr., L.L.C., 2010 WL 5186065 (D. Nev. Dec. 15, 2010) (filing meritless action not abuse of process; must show misuse of process after issuance); North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111 (D. Mass. 2007) (filing groundless suit not abuse of process in and of itself, even if filed for purposes of harassment, but may be abuse of process if purpose was to drive party out of business); Shapiro v. Haenn, 222 F. Supp. 2d 29, 48 (D. Me. 2002) (abuse-of-process claim may be available even if underlying action was not wrongfully instituted); Lewis Truck & Trailer, Inc. v. Jandreau, 526 A.2d 532 (Conn. App. Ct. 1987) (prejudgment attachment used for proper purpose although underlying claim for unauthorized repairs not enforceable); Burton v. Bird, 99 P.3d 150 (Kan. Ct. App. 2004) (where garnishment was used to enforce valid child support order and order was later reversed on appeal, there was no ulterior purpose).

395 Vanover v. Cook, 260 F.3d 1182, 1191 (10th Cir. 2001) (Kan. law). *Accord* Franklin Collection Serv., Inc. v. Stewart, 863 So. 2d 925, 931 (Miss. 2003). *See also* Hogue v. Palisades Collection, L.L.C., 494 F. Supp. 2d 1043, 1053 (S.D. Iowa 2007) (elements are: (1) use of a legal process; (2) in an improper or unauthorized manner; and (3) resulting damages); Tomash v. John Deere Indus. Equip. Co., 399 N.W.2d 387, 390 (Iowa 1987) (elements are: (1) legal process and (2) its use in an improper or unauthorized manner); Millennium Equity Holdings, L.L.C. v. Mahlowitz, 925 N.E.2d 513, 522 (Mass. 2010) (elements are use of legal process to accomplish some ulterior purpose for which it was not designed or intended, or which was not legitimate propose of particular process employed, resulting in damage); McLain v. West Side Bone & Joint Ctr., 656 So. 2d 119, 123 (Miss. 1993) (elements are: (1) illegal use of process; (2) ulterior motive; and (3) resulting damage); Cent. Mo. Elec. Coop. v. Balke, 119 S.W.3d 627 (Mo. Ct. App. 2003) (elements are: (1) illegal, improper, perverted use of process, a use neither warranted nor authorized by the process; (2) for an illegal purpose; and (3) damage); Smith v. A.B. Bonded Locksmith, 757 N.E.2d 1242, 1249 (Ohio Ct. App. 2001) (elements are: (1) a legal proceeding has been set in motion in proper form and with probable cause; (2) the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) direct damage).

396 Millennium Equity Holdings, L.L.C. v. Mahlowitz, 925 N.E.2d 513 (Mass. 2010). *See also* Seidling v. Stepan, 890 N.W.2d 48 (Wis. Ct. App. 2016) (affirming award of attorney fees as damages for abuse of process; defendant twice used falsified service to obtain default

Some decisions listing the elements of the tort do not explicitly include damages as a requirement.[397] Some decisions require actual arrest or seizure of property as an element.[398] New York courts state the elements as "regularly issued civil or criminal process, an intent to do harm without excuse or justification, and use of the process in a perverted manner to obtain a collateral objective."[399]

Malice is not usually included as an element of an abuse-of-process claim.[400] Some courts require that the defendant's act be willful,[401] but even in jurisdictions that do not explicitly list willfulness as an element it may be subsumed in the requirement of an ulterior purpose. Willfulness is also relevant because some decisions hold that an ulterior motive may be inferred from willful abuse of process.[402]

Negligent acts in pursuit of a legitimate purpose do not amount to abuse of process, because there is no ulterior motive. For example, one court held that seeking and obtaining a court order to repossess an item from the wrong address, under the mistaken belief that it was located there, is not an abuse of process.[403]

judgments in improper venues; consumer incurred fees in opening the defaults and contesting the actions).

397 *See, e.g.*, Hampton v. Nustar Mgmt. Fin. Group, 2007 WL 119146 (D. Nev. Jan. 10, 2007) (elements are: (1) an ulterior purpose other than resolving a legal dispute; and (2) willful act in the use of legal process not proper in the regular conduct of the proceeding); Conner v. Howe, 344 F. Supp. 2d 1164 (S.D. Ind. 2004) (elements are: (1) ulterior motive; and (2) use of process that would not be proper in the normal prosecution of the case); Klass v. Frazer, 290 F. Supp. 2d 425 (S.D.N.Y. 2003) (elements of abuse of process are regularly issued civil or criminal process, intent to do harm without excuse or justification, and use of process in a perverted manner to obtain a collateral objective); Shapiro v. Haenn, 222 F. Supp. 2d 29, 47 (D. Me. 2002) (elements are: (1) a bad motive; and (2) use of a legal process for an improper, collateral objective); Minnesota Corn Processors, Inc. v. McCormack, 2000 WL 948659 (E.D. Pa. July 7, 2000) (elements are: (1) an ulterior purpose; and (2) use of the process to accomplish a result not within the scope of the proceeding in which it was issued, whether such result might otherwise be lawfully obtained or not); McGrew v. Heinold Commodities, Inc., 497 N.E.2d 424, 429 (Ill. App. Ct. 1986) (elements are: (1) an ulterior purpose or motive for the use of regular court process; and (2) an act in the use of process not proper in the regular prosecution of a suit); Sprint Communications Co. v. Leggett, 307 S.W.3d 109, 114 (Ky. 2010) (elements are: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding; nominal damages available if plaintiff cannot show actual damages); Advanced Constr. Co. v. Pilecki, 901 A.2d 189, 197 (Me. 2006) (elements are: (1) use of process in a manner improper in the regular conduct of the proceeding; and (2) an ulterior motive); Celley v. Stevens, 2004 WL 134000, at *4 (Mich. Ct. App. Jan. 27, 2004) (elements are: (1) ulterior purpose; and (2) use of process that is improper in the regular prosecution of the proceeding); Hewes v. Wolfe, 330 S.E.2d 16, 19 (N.C. Ct. App. 1985) (elements are: (1) ulterior motive; and (2) an act in the use of the legal process not proper in the regular prosecution of the proceeding).

398 *See, e.g.*, Edelson, PC v. Bandas Law Firm, PC, 2018 WL 3496085 (N.D. Ill. July 20, 2018) (Illinois claim for abuse of civil process requires showing of arrest or property seizure); Neil v. Nesbit, 2014 WL 4897315 (N.D. Ill. Sept. 27, 2014) (must suffer arrest or seizure of property; time and expense of contesting garnishment not special injury, where garnishment was quashed before any funds were seized); Metro Media Entertainment, L.L.C. v. Steinruck, 912 F. Supp. 2d 344 (D. Md. 2012) (abuse-of-civil-process claim must allege arrest or seizure of property); Krol v. Halloran and Sage, L.L.P., 2013 WL 811902 (Conn. Super. Ct. Jan. 24, 2013) (abuse-of-process claim must show "special injury"); Parks v. Neuf, 578 N.E.2d 282 (Ill. App. Ct. 1991).

399 Varela v. Investors Ins. Holding Corp., 586 N.Y.S.2d 272, 274 (App. Div. 1992), *aff'd on other grounds*, 615 N.E.2d 218 (N.Y. 1993). *See also* Tsafatinos v. Ward, 676 N.Y.S.2d 748 (N.Y. Civ. Ct. 1998) (elements are initiation of regularly issued civil process compelling the performance or forbearance of some prescribed act; purpose to do harm without economic or social excuse or justification; injury to person or property; and perversion of the process to seek some collateral advantage outside the legitimate ends of the process), *aff'd mem.*, 691 N.Y.S.2d 820 (N.Y. App. Term 1999).

400 Nevada Credit Rating Bureau v. Williams, 503 P.2d 9 (Nev. 1972). *But see* Beem v. Ferguson, 713 Fed. Appx. 974 (11th Cir. 2018) (Florida abuse of process claim requires showing of willful and malicious conduct); Dream Dealers Music v. Parker, 924 F. Supp. 1146, 1154 (S.D. Ala. 1996) (elements are malice, an ulterior purpose, and the wrongful use of process); Shoney's Inc. v. Barnett, 773 So. 2d 1015, 1024 (Ala. Civ. App. 1999). *But cf.* Pinewood Homes, Inc. v. Harris, 646 S.E.2d 826 (N.C. Ct. App. 2007) (elements are: (1) defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used; and (2) defendant committed some act that is a malicious misuse or misapplication of that process after issuance, to accomplish some purpose not warranted or commanded by the writ).

401 Beem v. Ferguson, 713 Fed. Appx. 974 (11th Cir. 2018) (Florida abuse of process claim requires showing of willful and malicious conduct); Grant v. Farm Credit Bank, 841 F. Supp. 186, 190 (W.D. La. 1992) (elements are: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings), *aff'd*, 8 F.3d 295 (5th Cir. 1993); Cordes v. Outdoor Living Ctr., Inc., 781 S.W.2d 31, 34 (Ark. 1989) (elements are: (1) a legal procedure set in motion in proper form, even with probable cause, and even with ultimate success; but (2) perverted to accomplish an ulterior purpose for which it was not designed; and (3) a willful act in the use of the process not proper in the regular course of the proceeding); Watson v. Auto Advisors, Inc., 822 N.E.2d 1017 (Ind. Ct. App. 2005) (elements are: (1) ulterior purpose; and (2) willful act in the use of process not proper in the regular conduct of the proceeding); Nevada Credit Rating Bureau v. Williams, 503 P.2d 9 (Nev. 1972) (elements are: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding). *See also* Markowitz v. Herbert, 2005 WL 950172 (Cal. Ct. App. Apr. 26, 2005); Drum v. Bleau, Fox & Assoc., 132 Cal. Rptr. 2d 602, 608 (Cal. Ct. App. 2003); Ratcliff v. Boydell, 674 So. 2d 272, 280 (La. Ct. App. 1996).

402 Shapiro v. Haenn, 222 F. Supp. 2d 29, 48 (D. Me. 2002) (wrongful motive may be inferred from improper act); Drum v. Bleau, Fox & Assoc., 132 Cal. Rptr. 2d 602, 609 (Cal. Ct. App. 2003); Kappell v. Bartlett, 246 Cal. Rptr. 815 (Cal. Ct. App. 1988) (ulterior motive can be inferred from knowing execution of false affidavit of service). *See also* Ladd v. Polidoro, 675 N.E.2d 382, 384 (Mass. 1997) (may be inferred, but proof of groundlessness of claim is insufficient); Medford Coop. Bank v. Skerry, 2004 WL 1853343 (Mass. App. Ct. Aug. 12, 2004) (evidence here sufficient to allow inference of improper purpose); Hewes v. Wolfe, 330 S.E.2d 16, 19 (N.C. Ct. App. 1985) (ulterior motive can be shown by willful act to use the prior proceeding to gain advantage in some collateral matter).

403 Smith v. A.B. Bonded Locksmith, 757 N.E.2d 1242 (Ohio Ct. App. 2001). *See also* Wal-Mart Stores v. Binns, 15 S.W.3d 320 (Ark. 2000) (no abuse of process where no misuse or ulterior motive; "negligent or incompetent" management brought larceny charges against employee as a result of a computer error); Burks v. Am. Acceptance Co., 863 N.E.2d 924 (Ind. Ct. App. Mar. 27, 2007) (debt buyer, apparently acting

15.6.3.2 "Process" Defined

Courts construe the term "process" broadly to include the entire range of procedures incident to the litigation process,[404] including discovery requests,[405] garnishment,[406] motions,[407] asserting bogus claims of privilege to obstruct discovery,[408] and making misrepresentations to opposing counsel or to the court.[409] Some courts allow an abuse-of-process claim to be based on actions defending a suit.[410]

Courts often hold that process does not include matters that do not involve judicial procedures.[411] For example, a number of decisions hold that non-judicial foreclosure is not process, because there is no action pursuant to court authority.[412] Nor does process include steps that do not result in suit being filed, such as sending dunning letters or complaining to police if they do not file charges.[413] Actions in

on incorrect information from seller, sued wrong consumer; no abuse of process because no ulterior purpose); Thomas v. Marion County, 652 N.W.2d 183 (Iowa 2002) (no abuse of process where damage resulted not from store's accurate report of bad check, but from county's mistaken arrest of check-writer's father who had nearly identical name); Beecy v. Pucciarelli, 441 N.E.2d 1035 (Mass. 1982) (collection suit filed negligently against wrong person was not filed for an improper purpose and not an abuse of process).

404 Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 310–311 (3d Cir. 2003) (Pa. law); Capitol Records, Inc. v. Weed, 2008 WL 1820667 (D. Ariz. Apr. 27, 2008) (process is "the entire range of procedures incident to the litigation process"); North Star Capital Acquisitions, L.L.C. v. Krig, 2008 WL 346021 (M.D. Fla. Feb. 7, 2008) (abuse-of-process claim can be based on deceptive letter that was enclosed with summons but was not necessary to serve purpose of notifying defendant she was being sued); Barquis v. Merchants Collection Ass'n, 496 P.2d 817 (Cal. 1972). *But see* Friello v. Bank of New York, 2012 WL 4892856 (N.D. Ill. Oct. 15, 2012) ("process" must be issued by court, under its official seal; pleadings, created and filed by the litigants, are not "process"); Zebrowski v. Wells Fargo Bank, 657 F. Supp. 2d 511 (D.N.J. 2009) (process is narrowly defined; not all "products of litigation," only garnishment, attachment, arrest, or similar acts to compel defendant's compliance); Equality, Inc. v. I-Link Communications, 76 F. Supp. 2d 227, 230 (D. Conn. 1999) (arguing against venue motion is not process); Tsafatinos v. Ward, 676 N.Y.S.2d 748 (N.Y. Civ. Ct. 1998) (seeking continuance not process because it does not compel the performance of or forbearance from some act; settlement attempts, even if coercive or overbearing, do not involve process), *aff'd mem.*, 691 N.Y.S.2d 820 (N.Y. App. Div. 1999). *But cf.* Shirokov v. Dunlop, Grubb & Weaver, P.L.L.C., 2012 WL 1065578, at *32–33 (D. Mass. Mar. 27, 2012) (Massachusetts definition limits process to writs of attachment, process used to initiate a civil action, or process related to bringing of criminal charges).

405 Owens v. Chasko, 2011 WL 3163261, at *5 (E.D. Cal. July 26, 2011).

406 Hogue v. Palisades Collection, L.L.C., 494 F. Supp. 2d 1043, 1053 (S.D. Iowa 2007). *See also* Hoffman v. Connecticut, 2009 WL 3055137 (D. Me. Aug. 7, 2009) (abuse of process sufficiently alleged: fraudulent transfer claim and real estate attachment against property of non-debtor spouse to coerce settlement by debtor spouse), *modified on other grounds and adopted by* 671 F. Supp. 2d 166 (D. Me. 2009); Advanced Constr. Co. v. Pilecki, 901 A.2d 189 (Me. 2006) (affirming abuse-of-process judgment based on filing of unjustified mechanic's lien).

407 Larobina v. McDonald, 876 A.2d 522, 530–531 (Conn. 2005) (includes request to court for extension of time, removing action to federal court, and moving for a settlement conference but failing to send a representative with settlement authority).

408 Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 310–311 (3d Cir. 2003) (Pa. law).

409 *Id. See also* Keylard v. Mueller Anderson, P.C., 2013 WL 4501446 (N.D. Ill. Aug. 22, 2013) (denying FDCPA claim, noting that state law claim for abuse of process is proper remedy if law firm used knowingly false affidavits of service to obtain body attachment).

410 *See, e.g.*, Ratcliff v. Boydell, 674 So. 2d 272 (La. Ct. App. 1996). *See generally* § 15.6.1, *supra* (whether malicious prosecution claim can be based on assertion of a defense).

411 *See, e.g.*, Yazzie v. Gov't Employees Ins. Co., 2018 WL 1384469 (D.N.M. Mar. 16, 2018) (threat of litigation as coercive negotiation tactic may be malicious abuse of process (New Mexico's combined tort), but only if suit is actually filed; bad faith refusal to settle is not sufficient); *In re* Ali, 2015 WL 4611343, at *60 (W.D. Tex. July 23, 2015) (endorsing and depositing checks does not involve process); *In re* Carpenter, 2013 WL 1953275 (Bankr. W.D. Pa. May 7, 2013) (statutorily required pre-foreclosure notice not process to support abuse-of-process claim); Fappani v. Bratton, 407 P.3d 78 (Ariz. Ct. App. 2017) (complaining to law enforcement and vigorously urging prosecution are not process); Larobina v. McDonald, 876 A.2d 522, 531 (Conn. 2005) (process does not include representation of party who has conflict of interest with another party, failing to make written settlement proposal, demanding payment of debt in full, or denying accuracy of facts alleged by opposing side); Varela v. Investors Ins. Holding Corp., 586 N.Y.S.2d 272, 274 (N.Y. App. Div. 1992), *aff'd*, 615 N.E.2d 218 (N.Y. 1993) (demanding payment before invalid judgment would be marked satisfied not process); Montpelier v. Moncier, 2017 WL 2378301 (Tenn. Ct. App. June 1, 2017) (even where improper purpose was clearly shown, serving Rule 11 sanctions motions on opposing counsel, which must be done 21 days before filing, was not process, because there was no use of court's authority before motions are filed).

412 Olson v. Deutsche Bank Nat'l Trust, 2013 WL 3366280 (D. Ariz. July 5, 2013); Baeza v. Bank of Am., 2012 WL 4062809 (D. Nev. Sept. 14, 2012) (non-judicial foreclosure not process); Smith v. Wachovia, 2009 WL 1948829 (N.D. Cal. July 6, 2009). *See also* Lopez v. Countrywide Mortg., 2008 WL 4682040 (S.D. Tex. Oct. 20, 2008) (attempting to rescind non-judicial foreclosure sale after discovering contamination of property not abuse of process; rescission deed was not process and was not used to coerce debtor to do anything).

413 8600 Landis, L.L.C. v. City of Sea Isle City, 2018 WL 1509088 (D.N.J. Mar. 27, 2018) (misuse of the process of an administrative agency, here a municipal planning board and zoning officer, is not sufficient; must show process issued by a court); Robinson v. Phelan, Hallinan & Schmieg, L.L.P., 2015 WL 1400569 (E.D. Pa. Mar. 25, 2015) (letters demanding sums not owed were not abuse of process, but carrying on foreclosure with actual knowledge that it was unauthorized would support a claim); Shirokov v. Dunlop, Grubb & Weaver, P.L.L.C., 2012 WL 1065578, at *32–33 (D. Mass. Mar. 27, 2012) (demand letter not process even though it directed recipient to website where copy of a complaint was posted); Glover v. Bally Total Fitness Corp., 2007 WL 465578 (M.D. Pa. Feb. 9, 2007) (consumer persistently dunned, but not sued, for debt not owed; no abuse of process because no process issued); Liles v. Am. Corrective Counseling Serv., Inc., 131 F. Supp. 2d 1114 (S.D. Iowa 2001) (no abuse of process where no process has issued, even though collector sent out "official notices" stating that a criminal complaint had been received, when county attorney had not yet reviewed case for possible prosecution); Preskitt v. Lyons, 865 So. 2d 424 (Ala. 2003) (letter threatening to record a judgment not legal process); Fappani v. Bratton, 407 P.3d 78 (Ariz. Ct. App. 2017) (reports to sheriff insufficient, even if they led to filing of noise complaints); Carney v. Rotkin, Schmerin & McIntyre, 254 Cal. Rptr. 478 (Cal. Ct. App. 1988) (no abuse of process because no process invoked where attorney falsely represented in letter that court had issued a bench warrant); Land Baron Investments v. Bonnie Springs Family L.P., 356 P.3d 511 (Nev. 2015) (claim cannot be based on complaint to administrative

the context of an administrative agency proceeding may be insufficient.[414]

15.6.3.3 Ulterior Purpose

An abuse-of-process claim requires a showing that process was used primarily to accomplish a purpose for which it was not designed.[415] Some incidental motive or spite is insufficient.[416] Neither bad intentions alone nor lack of probable cause will create liability for abuse of process if the other elements are not met.[417] Nonetheless, the fact that a party has at least one valid purpose does not necessarily mean that that purpose is primary; if the party also has an improper purpose, that purpose may be shown to be primary.[418]

Some courts hold that an abuse-of-process claim lies only if the defendant used the process primarily for a purpose unrelated to the underlying litigation.[419] Cases taking this view

agency, here citizen's complaint filed with county commissioners); Warner Bros. Entertainment, Inc. v. Jones, 538 S.W.3d 781 (Tex. App. 2017) (incident report to police insufficient if it does not result in arrest or issuance of warrant). *But cf.* Fletcher v. Wagner, 221 F. Supp. 2d 153 (D. Mass. 2002) (unsuccessfully applying for criminal complaint will not support malicious prosecution claim, but abuse-of-process claim available if plaintiff can show ulterior, improper purpose for the application).

414 Hawkeye Land Co. v. ITC Midwest, L.L.C., 125 F. Supp. 3d 885 (N.D. Iowa 2015) (abuse-of-process claim will not lie for abuse of administrative procedures or rules; must show misuse of the process of a court); Land Baron Investments v. Bonnie Springs Family L.P., 356 P.3d 511 (Nev. 2015) (claim cannot be based on complaint to administrative agency, here citizen's complaint filed with county commissioners); O'Hea v. Georgia Reg'l Health & Rehabilitation Ctr., 276 So. 3d 1266 (Miss. Ct. App. 2018) (making a report, even a false and malicious one, to an administrative agency, here the medical licensing board, is not abuse of process).

415 Harper v. Prof'l Probation Services, Inc., 2018 WL 5976560 (N.D. Ala. Nov. 14, 2018) (probationers stated claim against private probation service funded by fees; profit motive caused service to charge for unneeded services and increase probation period and fine); Wilson v. Brown Chrysler Dodge Jeep Ram, L.L.C., 2018 WL 700828 (W.D. La. Feb. 1, 2018) (procuring a criminal complaint in order to coerce the return of property involved in a civil dispute is an ulterior motive sufficient to support abuse of process claim); Hefley v. J. & M. Securities, L.L.C., 2016 WL 2643477 (E.D. Mo. May 10, 2016) (garnishment continued in knowing violation of automatic stay; intention to prevent debtor from making chapter 13 payments was improper purpose); Neil v. Nesbit, 2014 WL 4897315 (N.D. Ill. Sept. 27, 2014) (baseless debt collection litigation, in attempt to force out plaintiff unit owner and her African-American tenant); Hoffman v. Connecticut, 2009 WL 3055137 (D. Me. Aug. 7, 2009) (abuse of process sufficiently alleged: fraudulent transfer claim and real estate attachment against property of non-debtor spouse to coerce settlement by debtor spouse), *modified on other grounds and adopted by* 671 F. Supp. 2d 166 (D. Me. 2009); Capitol Records, Inc. v. Weed, 2008 WL 1820667 (D. Ariz. Apr. 27, 2008) (allegation that documents containing arguably private information filed with court to coerce payment of unreasonable sums sufficient to state a claim); Myles v. Screentech, Inc., 98 So. 3d 563 (Ala. Civ. App. 2012) (initiating unfounded criminal prosecution to extort payment of a debt would be abuse of process, but not shown here where inadequate, but good-faith, investigation led creditor to believe it was victim of fraud); Rogan v. Rungee, 140 A.3d 979 (Conn. Ct. App. 2016) (ulterior purpose shown; current defendant stated to lawyer that meritless and unsuccessful action he filed against neighbor had "worked" because it kept her "at bay" for four years, showing that purpose was to intimidate her from further complaints about his harassing behavior); Cadle Co. v. D'Addario, 26 A.3d 682 (Conn. App. Ct. 2011) (executors failed to show that primary purpose of creditor's persistent litigation against estate and executors was to coerce non-obligated family members to pay debt). *See also* Suffield Dev. Assoc. v. Nat'l Loan Investors, L.P., 802 A.2d 44, 48 (Conn. 2002); Millennium Equity Holdings, L.L.C. v. Mablowitz, 925 N.E.2d 513 (Mass. 2010) (affirming abuse-of-process judgment against litigant who filed suit against opposing party's attorney in hopes of disqualifying him from further work on the case); Seguro-Suarez by and through Connette v. Key Risk Ins. Co., 819 S.E.2d 741 (N.C. Ct. App. 2018) (affirming refusal to dismiss claim that defendant fabricated evidence to obtain criminal complaint, in effort to coerce worker to pay back sums awarded in workers' compensation case); Rodenberg Law Firm v. Sira, 931 N.W.2d 687 (N.D. 2019) (must show something "akin to extortion;" not shown here; unsuccessful FDCPA action was initiated for purpose of pursuing FDCPA claim); Riemers v. Hill, 881 N.W.2d 624 (N.D. 2016) (fact issue whether landlord's actions for rent and property damage were retaliation for tenant's complaints that led to Health Department condemnation of property).

416 Suffield Dev. Assoc. v. Nat'l Loan Investors, L.P., 802 A.2d 44, 48 (Conn. 2002); Gore v. Taylor, 792 P.2d 432 (Okla. Civ. App. 1990) (filing a claim for a proper purpose is not abuse of process even though an incidental effect is to pressure the defendant to pay an unrelated debt).

417 Vanover v. Cook, 260 F.3d 1182, 1191 (10th Cir. 2001) (Kan. law); Kamaha VI, L.L.C. v. HJH, L.L.C., 2013 WL 5177843, at *3 (M.D. Fla. Sept. 12, 2013) (spiteful motive not sufficient if process used for intended purpose); Henze v. City of Lee's Summit, 2010 WL 2545841, at *4 (W.D. Mo. June 24, 2010) (bad motive insufficient as long as process used for its intended purpose); Shapiro v. Haenn, 222 F. Supp. 2d 29, 48 (D. Me. 2002) (bad motive alone is insufficient); *In re* Prince, 414 B.R. 285 (Bankr. M.D. Tenn. 2009) (abuse-of-process claim fails if process used for intended purpose, even if evil motive present), *rev'd in part on other grounds*, 2010 WL 841273 (M.D. Tenn. Mar. 4, 2010); Cadle Co. v. D'Addario, 2007 WL 1532772 (Conn. Super. Ct. May 14, 2007) (no abuse of process if process used for its intended purpose, even if spite or ulterior purpose also present; not shown here where debt buyer had standing to sue to collect); Celley v. Stevens, 2004 WL 134000, at *4 (Mich. Ct. App. Jan. 27, 2004) (merely harboring bad motives without manifesting them by misusing process is insufficient). *See also* Hall v. Lilly, 666 So. 2d 1328 (La. Ct. App. 1996) (suing to collect a valid debt not improper, regardless of other motives; here, in-laws filed suit to foreclose on mortgage after husband separated from their daughter); Ladd v. Polidoro, 675 N.E.2d 382 (Mass. 1997) (bringing groundless action and attaching property not sufficient, must show ulterior purpose).

418 Young v. Allstate Ins. Co., 198 P.3d 666 (Haw. 2008) (use of process for its intended purpose does not necessarily mean it was used primarily for that purpose; ulterior purpose sufficiently alleged where insurer had company-wide policy of hardball litigation tactics even in meritless cases to force vulnerable accident victims to settle for much less than their actual damages).

419 Jordan v. Tucker, Alba & Assoc., 2017 WL 2223918 (E.D.N.Y. May 19, 2017) (filing mechanic's lien for grossly excessive amount not abuse of process where purpose was to enforce claim for work performed on property); Kenney v. CitiMortgage, Inc., 2015 WL 1957880 (D. Kan. Apr. 29, 2015) (must show use of process for purpose that could not be achieved as end result of judicial proceeding; plaintiffs here failed to show that "sloppy" handling of motion to intervene in foreclosure was attempt to coerce them to pay discharged personal obligation); Olson v. Deutsche Bank Nat'l Trust, 2013 WL 3366280 (D. Ariz. July 5, 2013) (providing false information to court, or presenting an invalid claim, not abuse of process); Metro Media Entertainment L.L.C. v. Steinruck, 912 F. Supp. 2d 344 (D. Md. 2012) ("settlement offer," even if pornographic nature of film consumer was accused of downloading

hold, for example, that bringing suit on a debt for the purpose of recovering the money sought by the suit is not abuse of process, even if the debt is not owed, because recovering money is not a collateral purpose.[420] Similarly, courts have held that the use of a postjudgment collection procedure such as garnishment is not abuse of process, even if it seeks an excessive amount or is directed at the wrong person, as long as it is used for its proper purpose of collecting a judgment.[421] This circular

gave powerful leverage, was used for proper purpose); Sharpe v. PHH Mortg. Co., 2012 WL 1809468 (S.D. Ohio May 17, 2012) (must show an attempt to achieve goals outside the lawsuit, or a result that court is powerless to order); Davis v. Nebraska Furniture Mart, Inc., 2012 WL 1252633 (D. Kan. Apr. 13, 2012) (repeatedly summoning unemployed debtor for debtor's examination was use of process for intended purpose; creditor could reasonably anticipate that debtor's situation would change), *aff'd* 567 Fed. Appx. 640 (10th Cir. 2014); Gibbons v. Bank of Am. Corp., 2012 WL 94569 (D. Md. Jan. 11, 2012) (temporary restraining order freezing bank accounts was used for intended purpose where bank was seeking to recover from wife funds stolen by husband); Riess v. Messerli & Kramer, P.A., 2011 WL 5506290 (D. Minn. Nov. 10, 2011) (misuse of garnishment procedure—here obtaining garnishment one week after sending of required notice, although Minnesota law required twenty-five days—violated FDCPA but was not abuse of process; process here was being used for its intended purpose); Odom v. Southeast Supply Header, L.L.C., 2010 WL 1780367 (S.D. Ala. Apr. 29, 2010) (must show use of process to seek "unlawful or improperly obtainable" result; no claim against parties who filed tort suit to seek money damages, even if they had malevolent intentions), *aff'd*, 418 Fed. Appx. 871 (11th Cir. 2011); Rodriguez v. Due Process of Mich., Inc., 2008 WL 4449651 (E.D. Mich. Sept. 30, 2008) (ulterior motive not sufficiently alleged; civil process servers, serving valid execution, misrepresented themselves as law enforcement, threatened arrest, and tried to seize property not belonging to debtor); Bright View Trading Co. v. Park, 2004 WL 2071976 (S.D.N.Y. Sept. 16, 2004) (collateral purpose sufficiently alleged where creditor made misstatements in application for attachment in order to gain control over a non-defendant's inventory and cause financial hardship and personal turmoil to defendants); DirecTV, Inc. v. Zink, 286 F. Supp. 2d 873, 876 (E.D. Mich. 2003) (no abuse of process to file suit to coerce and extort payment, as these objectives are "similar to those normally sought in lawsuits"); Equality, Inc. v. I-Link Communications, 76 F. Supp. 2d 227, 230 (D. Conn. 1999) (must have purpose other than obtaining judgment in underlying suit); Denardo v. Michalski, 811 P.2d 315 (Alaska 1991) (imprisonment of debtor for refusing to answer questions at debtor's examination not abuse of process where examination was used for its intended purpose of collecting debt); Markowitz v. Herbert, 2005 WL 950172, at *3 (Cal. Ct. App. Apr. 26, 2005) (adding debtor's daughter as defendant for purpose of pressuring debtor to settle a case is not abuse of process, as these steps are "within the normal use of process"); Pinewood Homes, Inc. v. Harris, 646 S.E.2d 826 (N.C. Ct. App. 2007) (listing collateral purpose as element).

420 Harvey v. Caesar's Entertainment Operating Co., 790 Fed. Appx. 582 (5th Cir. 2019) (Miss. Law; filing criminal worthless check charges because of desire to collect debt is not ulterior purpose); Cox v. Richland Holdings, Inc., 2018 WL 456877 (D. Nev. Jan. 16, 2018) (filing debt collection action, with demand for unauthorized fee, is not abuse of process); Smith v. Cavalry SPV I, 2017 WL 3981144 (W.D. Ark. Sept. 11, 2017) (attempt to collect time-barred debt not improper purpose); Hinten v. Midland Funding, L.L.C., 2013 WL 5739035 (E.D. Mo. Oct. 22, 2013) (not abuse of process if, despite use of false or misleading tactics, defendant intended to recover on the cause of action stated); Gamble v. Midland Funding, L.L.C., 2013 WL 979202 (N.D. Ala. Mar. 7, 2013) (claim alleging filing of baseless collection action fails); Chapman v. Chase Manhattan Mortg. Co., 2007 WL 2815246 (N.D. Okla. Sept. 24, 2007) (process was used for intended purpose when, at time foreclosure filed, mortgage was one payment behind because of returned check); Guillory v. WFS Fin., 2007 WL 879017 (N.D. Cal. Mar. 21, 2007) (suit on forged contract not abuse of process because suit was used for its intended purpose); Ursery v. Option One Mortg. Co., 2007 WL 2192657 (Mich. Ct. App. July 31, 2007) (even if foreclosure attempt improper, not abuse of process unless it was used for something foreclosure is not designed to accomplish); Ruggiero v. Kavlich, 2010 WL 3351429 (Ohio Ct. App. Aug. 26, 2010) (suing to collect debt allegedly not owed; failed to allege ulterior purpose); McGinnity v. Kirk, 362 P.3d 186 (Okla. 2015) (eviction proceedings brought against delinquent contract for deed purchaser not abuse of process; process used for intended purpose even though Oklahoma law requires foreclosure, not eviction, in contract-for-deed case). *See also* Conner v. Howe, 344 F. Supp. 2d 1164 (S.D. Ind. 2004) (collection suit was not for improper purpose even though payday loan was void); Sara Lee Corp. v. Pro Sports, Inc., 2004 WL 537926 (M.D.N.C. Mar. 12, 2004) (filing suit that asserts claim of greater rights than plaintiff actually has is not abuse of process because plaintiff is not using action for any purpose outside the legitimate scope of relief obtainable in such actions); Ross v. Ford Motor Credit Co., 867 S.W.2d 546, 554 (Mo. Ct. App. 1993) (obtaining a replevin order is not abuse of process where creditor had no purpose other than gaining possession of the property); Tsafatinos v. Ward, 676 N.Y.S.2d 748 (N.Y. Civ. Ct. 1998) (filing suit to prevent landlord from locking out tenant not abuse of process, as it was used for its intended purpose of restoring possession of premises to tenant), *aff'd mem.*, 691 N.Y.S.2d 820 (N.Y. App. Term 1999). *Cf.* Nutter v. Messerli & Kramer, P.A., 500 F. Supp. 2d 1219 (D. Minn. 2007) (if reasonable creditor could have believed debt was owed, attempt to collect was not abuse of process).

421 Vanover v. Cook, 260 F.3d 1182 (10th Cir. 2001) (Kan. law; excessive garnishment is not abuse of process as long as it is used for purpose of collecting a judgment); Gittens v. Thieblot Ryan, P.A., 2013 WL 2103668 (D. Md. May 14, 2013) (garnishment action against non-debtor with name similar to judgment debtor's was brought for proper purpose of collecting a judgment); Ross v. Vakulskas Law Firm, P.C., 2012 WL 4092419 (N.D. Iowa Sept. 17, 2012) (no abuse of process where, after small claims debtor failed to appear for debtor's examination, she was arrested and bond set at the amount of the debt; examination was used for its intended purpose and bond was set by judge, not creditor's attorney); Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (garnishment not abuse of process, even though account known to contain exempt funds, because used for intended purpose); Reno v. Supportkids, Inc., 2004 WL 828150 (D. Minn. Apr. 13, 2004) (no abuse of process in filing a lien in excessive amount and without complying with state law, because debt collection is proper purpose); Jordan v. Berman, 758 F. Supp. 269, 280–281 (E.D. Pa. 1991) (judgment debtors failed to state claim that filing a confession of judgment against them constituted abuse of process where creditors carried out process to its authorized conclusion), *aff'd in part, vacated in part on other grounds*, 20 F.3d 1250 (3d Cir. 1994); Bernhard-Thomas Bldg. Co. v. Dunican, 2006 WL 301908 (Conn. Super. Ct. Jan. 18, 2006) (baseless prejudgment attachment not abuse of process where its primary purpose was to secure prejudgment remedy); McGrew v. Heinold Commodities, Inc., 497 N.E.2d 424, 429–430 (Ill. App. Ct. 1986) (no abuse of process where garnishment was used for its proper purpose of collecting money, even if underlying debt was invalid); Ladd v. Polidoro, 675 N.E.2d 382 (Mass. 1997) (knowingly maintaining a meritless action and obtaining attachment insufficient; attachment must have been obtained in order to further a purpose it was not designed to accomplish). *Cf. In re* Ali, 2015 WL 4611343, at *61–62 (W.D. Tex. July 23, 2015) (sending garnishment notice to wide circle of recipients, including debtor's vendors and trade association, not abuse or process, in absence of showing that creditor knew that these entities did not hold any assets of debtor).

reasoning can mean that misuse of collection remedies is not abuse of process as long as they are employed for the purpose of collection. Courts using this analysis even hold that it is not abuse of process to present false affidavits or perjured testimony,[422] file suit in a distant forum,[423] or misuse other judicial procedures,[424] as long as the litigation is merely seeking judgment in the underlying suit.

Other courts, however, reject this artificial distinction. The Third Circuit, applying Pennsylvania law, held that such a restriction would render the tort "inapplicable to those cases where a legal process is pursued in a perverted manner in order to directly harm an adversary."[425] Courts taking this approach hold that misuse of process as a tactical weapon to coerce a desired result in the underlying litigation can be abuse of process.[426] These courts also allow an abuse-of-process claim where a creditor uses a collection remedy such as garnishment for the purpose for which it was designed—collection of money—but without any right to the amount sought or the asset attached.[427] For example, the Ninth Circuit, applying Montana law, held that a litigant commits abuse of process if it knows it has no valid legal

422 Bugg v. Midland Funding, L.L.C., 2019 WL 3936454 (W.D. Ark. Aug. 19, 2019) (sewer service and false affidavits); Sneed v. Winston Honore Holdings, L.L.C., 2017 WL 467686 (N.D. Ill. Feb. 3, 2017) (falsified service used to obtain default judgment); Bohannon v. LVNV Funding, L.L.C., 2015 WL 893362 (E.D. Va. Mar. 2, 2015) (false affidavit seeking default judgment not abuse of process where proceedings were being used for intended purpose of debt collection); Joy v. MERSCORP, Inc., 935 F. Supp. 2d 848 (E.D.N.C. 2013) (false statements in foreclosure action not abuse of process, where foreclosure was used for intended purpose); Hempel-DuBois v. Portfolio Recovery Assoc., 2011 WL 3627294 (D.N.H. Aug. 17, 2011) (obtaining attachment by use of false statements not abuse of process where attachment not used for ulterior purpose; i.e., other than securing property in case judgment was obtained); Shoney's Inc. v. Barnett, 773 So. 2d 1015, 1025 (Ala. Civ. App. 1999) (giving perjured testimony in criminal case not abuse of process because purpose was not to achieve some result other than conviction); Krol v. Halloran and Sage, L.L.P., 2013 WL 811902 (Conn. Super. Ct. Jan. 24, 2013) (claim fails because motion for summary judgment used for intended purpose even if it contained knowing falsehoods).

423 Spartalian v. Citibank, 2012 WL 3314164 (D. Or. Aug. 10, 2012) (filing collection action in distant and inappropriate forum not abuse of process where objective was to collect debt; must show intent to coerce some result other than debt collection).

424 Todro v. Reimer, Arnovitz, Chernek & Jeffrey Co., 704 Fed. Appx. 440 (6th Cir. 2017) (at time when court handling foreclosure had stayed eviction, foreclosure purchaser brought eviction action in municipal court; misuse not shown where purpose of eviction action is to cause occupant to leave home); Watson v. Auto Advisors, Inc., 822 N.E.2d 1017 (Ind. Ct. App. 2005) (misuse of assignment procedure to circumvent requirement of attorney to obtain small claims judgment not abuse of process because process was used to obtain the result—a money judgment—it was designed to accomplish).

425 Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 306 (3d Cir. 2003) (Pa. law).

426 *See, e.g.*, Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 308 (3d Cir. 2003) (Pa. law; using process to harass, drain the opponent's resources, delay payment, and delay the litigation may be abuse of process, but allegations here are too vague); Spaulding v. Tri-State Adjustments, Inc. 2019 WL 3986026 (W.D. Wis. Aug. 23, 2019) (allowing collector to file abuse of process counterclaim against consumers; if consumers "induced" collector to violate FDCPA, not use of statute for intended purpose); Bevan v. Butler and Assoc., 2017 WL 6557418 (D. Kan. Dec. 22, 2017) (improper purpose sufficiently alleged: causing service to be made at address known to be wrong, in order to obtain default judgment; proper purpose of summons it to notify party that lawsuit has been filed); Gatheright v. Clark, 2016 WL 237153 (N.D. Miss. Jan. 20, 2016) (filing of knowingly false bad check affidavit shortly after debtor filed bankruptcy sufficient to support claim of improper purpose); Osinubepi-Alao v. Plainview Fin. Serv., Ltd., 44 F. Supp. 3d 84 (D.D.C. 2014); Mueller v. Barton, 2014 WL 4546061 (E.D. Mo. Sept. 12, 2014) (rejecting the argument that bringing a collection action to collect a debt can never be abuse of process; debtor stated claim with allegations of deception as to ownership of debt and terms of payment agreement, and attempted to collect amounts arguably not owed); Samuels v. Midland Funding, L.L.C., 921 F. Supp. 2d 1321 (S.D. Ala. 2013) (ulterior purpose of coercing settlement sufficiently alleged where large volume debt buyer received minimal information from sellers, made no effort to obtain more, and was unable to produce any evidence at trial). *See also* Bethea v. Wells Fargo Bank, 2011 WL 2650580 (D. Kan. July 6, 2011) (allegation that creditor kept foreclosure action open and filed notice of sale to provide increased leverage over consumers who were making timely payments on forbearance agreement states claim). *See also* Drum v. Bleau, Fox & Assoc., 132 Cal. Rptr. 2d 602 (Cal. Ct. App. 2003) (ulterior purpose may be either to achieve a result "totally extraneous to" or "not within [the] legitimate scope" of the process; issuing execution contrary to stay, in hopes of depleting opponent's financial resources so that he could not appeal underlying judgment, may be abuse of process).

427 *See, e.g.*, Shaw v. Law Offices of Hayt, Hayt, & Landau, 2018 WL 1634829 (D.N.J. Apr. 5, 2018) (denying summary judgment to collector; repeated garnishments of non-debtor father's account for debt of similarly-named son after being informed of its error showed willful blindness in effort to "get paid at any cost"); Whitehead v. Ocwen Fin. Corp., 2017 WL 489418 (N.D. Okla. Feb. 6, 2017) (improper purpose sufficiently alleged: effort to collect debt that had been discharged in bankruptcy; lender foreclosed when consumers filed bankruptcy and declined to reaffirm, then, after discharge, vacated foreclosure and sought to collect); Robinson v. Phelan, Hallinan & Schmieg, L.L.P., 2015 WL 1400569 (E.D. Pa. Mar. 25, 2015) (abuse of process shown if defendants carried on with foreclosure, with actual knowledge it was unauthorized, in order to extort sums not owed); Garner v. Barton, 2015 WL 1120085 (E.D. Mo. Mar. 12, 2015) (manipulating garnishment process to cause seizure of more than was owed); Hogue v. Palisades Collection, L.L.C., 494 F. Supp. 2d 1043, 1053 (S.D. Iowa 2007) (knowingly using garnishment to obtain exempt funds may be abuse of process); Aikens v. CIT Group/Sales Fin., Inc., 2007 WL 108301 (S.D. Miss. Jan. 9, 2007) (use of replevin action to repossess a manufactured home when creditor did not in fact have a security interest in it states abuse-of-process claim); Cervantes v. Law Offices of John G. Hanlin, 2004 WL 1638174, at *8 n.4 (Cal. Ct. App. July 23, 2004) (filing suit in inconvenient and inappropriate venue is abuse of process where ulterior motive is to secure a default judgment and obtain higher monetary recovery); Suffield Dev. Assoc. v. Nat'l Loan Investors, L.P., 802 A.2d 44, 49 (Conn. 2002) (executions are properly used in accordance with a valid judgment and in an appropriate amount, so obtaining attachment for more than judgment may be abuse of process). *See also In re* Mills Int'l, 570 B.R. 169 (Bankr. E.D.N.C. 2017) (improper purpose shown if creditor's service of TRO, at time and place where equipment was about to be auctioned, coerced debtor into paying more than was owed, to prevent disruption of sale).

claim, yet files suit for the purpose of extracting money that the opposing party does not owe.[428]

Even some courts that require a collateral purpose construe the requirement broadly. For example, it may be a collateral purpose for a creditor to garnish exempt wages for the purpose of coercing the debtor to pay the debt.[429] Courts are split on the issue of whether collection of the underlying debt is an improper purpose for a creditor to instigate criminal charges.[430]

15.6.3.4 Examples

Examples of abuse of process in the debt collection context include:

- Filing a baseless *lis pendens*[431] or mechanic's lien;[432]
- Filing suit on a debt known to be time-barred, persisting in it after its untimeliness was confirmed, and seeking attorney fees from the opposing party without confirming that that party had a contractual fee obligation;[433]
- Obtaining an injunction preventing a judgment debtor from disposing of assets that has the effect of freezing the assets of non-debtors, where the judgment creditor's ulterior purpose is to coerce the non-debtor to pay the debt;[434]
- Engaging in venue abuse;[435]

428 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 956–957 (9th Cir. 2011) (Mont. law).

429 Shoney's Inc. v. Barnett, 773 So. 2d 1015, 1025 (Ala. Civ. App. 1999); Nevada Credit Rating Bureau v. Williams, 503 P.2d 9 (Nev. 1972) (excessive attachment as means of coercing payment of underlying debt is abuse of process). *See also* Nelson v. Am. Power & Light, 2010 WL 3219498 (S.D. Ohio Aug. 12, 2010) (filing eviction action to coerce payment of utility bill may be abuse of process); Sprint Communications Co. v. Leggett, 307 S.W.3d 109 (Ky. 2010) (reversing summary judgment for defendant telephone company on claim challenging its use of eminent domain powers, which could only obtain easement, in effort to coerce outright sale).

430 *IMPROPER*: Baker v. Oklahoma Tire & Supply Co., 344 F. Supp. 780 (W.D. Ark. 1972) (abuse of process for former employer to institute criminal bad check charges against employee for purposes of collecting debt); Routh Wrecker Serv. v. Washington, 980 S.W.2d 240 (Ark. 1998) (affirming $75,000 punitive damage award against vehicle seller who allowed meritless criminal case to proceed to trial for purpose of coercing payment); Harmon v. Cargo Carriage Corp., 895 S.W.2d 938 (Ark. 1995) (use of criminal prosecution to extort return of property or payment of money may constitute abuse of process; continuing criminal case after property sought was returned also may constitute abuse of process); Tomash v. John Deere Indus. Equip. Co., 399 N.W.2d 387, 290 (Iowa 1987) (use of criminal process to coerce payment of debt is abuse of process, but not shown here); Palmer Ford, Inc. v. Wood, 471 A.2d 297 (Md. 1984) (car repairer's threat of criminal charges of embezzlement, larceny and unauthorized use of a vehicle for the purpose of collecting a disputed repair bill improper); Weststar Mortg. Corp. v. Jackson, 39 P.3d 710 (N.M. Ct. App. 2002) (misuse of process shown by use of criminal prosecution to gain leverage in negotiations over civil debt), *rev'd on other grounds*, 61 P.3d 823 (N.M. 2002).

PROPER: Silver v. Sears, Roebuck & Co., 2000 WL 33682675 (E.D.N.C. July 31, 2000) (filing insufficient funds charges with goal of collecting on check is not improper ulterior motive); Vasseur v. Eunice Superette, Inc., 386 So. 2d 692 (La. Ct. App. 1980) (store's instigation of bad check criminal prosecution in order to collect underlying debt not improper, particularly because insufficient funds check criminal statute authorizes restitution as part of sentence); Broadnax v. Greene Credit Serv., 694 N.E.2d 167 (Ohio Ct. App. 1997) (abuse of process means the use of process to compel some action which the court could not compel; use of criminal charges to collect on insufficient funds check not abuse of process where criminal court could order restitution).

See generally National Consumer Law Center, Collection Actions Ch. 8 (5th ed. 2020), *updated at* www.nclc.org/library; A.S. Klein, Annotation, *Use of Criminal Process to Collect Debt as Abuse of Process*, 27 A.L.R.3d 1202 (1969); §§ 8.5, 15.6.2, *supra*; § 16.5.3, *infra*.

431 *In re* Babb, 2009 WL 212568 (Bankr. E.D.N.C. Jan. 26, 2009) (malicious filing of *lis pendens* will support either malicious prosecution or abuse-of-process claim); Nat'l City Bank v. Shortridge, 689 N.E.2d 1248 (Ind. 1997) (sufficient facts to state a claim for abuse of process where personal injury attorneys filed two *lis pendens* notices, the second just days before the court was to rule on the first, as a way of preventing sale of defendant's real property, his only asset; state law did not permit use of *lis pendens* before judgment in personal injury action); Talk of the Millennium Realty, Inc. v. Sierra, 819 N.Y.S.2d 213 (N.Y. Civ. Ct. 2006) (filing *lis pendens*, under circumstances where New York law clearly does not permit it, to coerce payment of disputed real estate commission, is a tort whether called tortious interference with contract or abuse of process); Hewes v. Wolfe, 330 S.E.2d 16, 19 (N.C. Ct. App. 1985) (affirming abuse-of-process verdict for filing *lis pendens* with ulterior purpose of ruining the defendant). *But cf.* Klass v. Frazer, 290 F. Supp. 2d 425 (S.D.N.Y. 2003) (filing *lis pendens* for its proper purpose of giving potential purchasers or lienors notice of suit is not abuse of process); Bernhard-Thomas Bldg. Co. v. Duncan, 2006 WL 301908 (Conn. Super. Ct. Jan. 18, 2006) (baseless prejudgment attachment not abuse of process where its primary purpose was to secure prejudgment remedy).

432 Advanced Constr. Co. v. Pilecki, 901 A.2d 189 (Me. 2006) (affirming abuse-of-process judgment against contractor who filed mechanic's lien to deny plaintiffs access to house and coerce them to pay sums already paid or not yet due). *But see* Jordan v. Tucker, Alba & Assoc., 2017 WL 2223918 (E.D.N.Y. May 19, 2017) (filing mechanic's lien for grossly excessive amount not abuse of process where purpose was to enforce claim for work performed on the property).

433 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 637 F.3d 939, 956–957 (9th Cir. 2011) (Mont. law). *But see* Loftis v. Credit Acceptance Corp. 2011 WL 976621, at *4–5 (E.D. Ark. Mar. 18, 2011) (filing time-barred action to coerce payment of debt not owed not abuse of process because purpose was to collect debt).

434 Pinewood Homes, Inc. v. Harris, 646 S.E.2d 826 (N.C. Ct. App. 2007).

435 Barquis v. Merchants Collection Ass'n, 496 P.2d 817 (Cal. 1972) (claim stated by allegations that defendant knowingly filed legally insufficient complaints against consumers in improper venues to procure default judgments for the ulterior purpose of impairing the consumers' defenses); Cervantes v. Law Offices of John G. Hanlin, 2004 WL 1638174, at *8 n.4 (Cal. Ct. App. July 23, 2004) (filing suit in inconvenient and inappropriate venue is abuse of process where ulterior motive is to secure a default judgment and obtain higher monetary recovery); Yu v. Signet Bank, 82 Cal. Rptr. 2d 304 (Cal. Ct. App. 1999) (reversing summary judgment for defendants for abuse of process where credit card company filed collection actions and obtained default judgments against California cardholders in Virginia without personal jurisdiction), *appeal after remand*, 126 Cal. Rptr. 2d 516 (Cal. Ct. App. 2003); Dishaw v. Wadleigh, 44 N.Y.S. 207 (N.Y. App. Div. 1897) (claim for abuse of process stated where attorney filed collection suits in distant counties, took default judgments, and collected them by issuing subpoenas to debtors, who paid the debts rather than journeying to the cities where the subpoenas were issued). *See also* Seidling v. Stepan, 890 N.W.2d 48 (Wis. Ct. App. 2016) (affirming award of punitive damages for "egregious" misuse of legal system;

- Suing an alleged debtor in court on a disputed debt, when the note required arbitration;[436]
- Altering a writ of execution so that the assets of an individual rather than a corporation could be seized;[437]
- Using sham documents and manufactured evidence to pursue a claim in court;[438]
- Obtaining and executing upon a default judgment after agreeing to dismiss the case;[439]
- Using replevin to obtain possession of property in which the creditor did not in fact have a security interest;[440]
- Instituting a replevin action on the pretext that the action was necessary to discover the location of the collateral, when in fact the creditor's ulterior purpose was to recover a debt that had been discharged in bankruptcy;[441]
- Using garnishment to obtain funds that the creditor knows are exempt,[442] or as a form of discovery when a debtor's examination could have been used;[443]
- Refusing to release a garnishment after receiving notice of the debtor's bankruptcy, in hopes of sabotaging the debtor's chapter 13 plan;[444]
- Falsifying an affidavit of service of process;[445]
- Continuing litigation[446] or postjudgment execution proceedings[447] known to be baseless;
- Obtaining an excessive attachment in an attempt to coerce payment of the underlying debt;[448] and

after consumer prevailed in action to rescind land contract, current defendant twice used falsified service to obtain default judgments against her in improper venues). *But see* Spartalian v. Citibank, 2012 WL 3314164 (D. Or. Aug. 10, 2012) (filing collection action in distant and inappropriate forum not abuse of process where objective was to collect debt; must show intent to coerce some result other than debt collection). *But cf.* Meyer v. Conlon, 162 F.3d 1264 (10th Cir. 1998) (filing suit for delinquent insurance premiums in Iowa against a Wyoming insured and serving the insured by mail while insured and company were embroiled in controversy over other matters, not abuse of process, where this was permitted by policy provisions and Iowa law, and was company's standard practice); Owens v. Chasko, 2011 WL 3163261 (E.D. Cal. July 26, 2011) (filing suit, even in distant forum, may be privileged, but no abuse-of-process claim in any event in absence of pattern); Mackinder v. OSCA Dev. Co., 198 Cal. Rptr. 864 (Cal. Ct. App. 1984) (filing action in county where property giving rise to debt was located not abuse of process even though debtors did not reside there); Porter v. Stormont-Vail Hosp., 621 P.2d 411 (Kan. 1980) (numerous orders to appear in aid of execution and two arrests of a judgment debtor residing 200 miles from the court over disputed debt not abuse of process); Mercury Marine Div. v. Costas, 342 S.E.2d 632 (S.C. Ct. App. 1986) (where creditor twice sued business person in county other than county of residence, summary judgment for creditor proper; no purpose other than collection of debt shown). *See generally* Alan K. Chen, *Due Process as Consumer Protection: State Remedies for Distant Forum Abuse*, 20 Akron L. Rev. 9, 10–13 (1986); § 10.3, *supra*, § 16.3.5, *infra*.

436 Hicks v. Bank of Am., 218 Fed. Appx. 739 (10th Cir. 2007) (Tenn. law).

437 Miniscalco v. Gordon, 916 F. Supp. 478 (E.D. Pa. 1996).

438 Coursen v. JP Morgan Chase & Co., 2012 WL 3055857, at *5 (M.D. Fla. July 25, 2012).

439 Goodwin Agency, Inc. v. Chesser, 206 S.E.2d 568 (Ga. Ct. App. 1974).

440 Aikens v. CIT Group/Sales Fin., Inc., 2007 WL 108301 (S.D. Miss. Jan. 9, 2007) (denial of motion to dismiss). *But cf.* Ross v. Ford Motor Credit Co., 867 S.W.2d 546, 554 (Mo. Ct. App. 1993) (obtaining a replevin order is not abuse of process where creditor had no purpose other than gaining possession of the property).

441 Houghton v. Foremost Fin. Serv. Corp., 724 F.2d 112 (10th Cir. 1983) (Okla. law; reversing grant of summary judgment to creditor).

442 Davis v. Nebraska Furniture Mart, Inc., 2012 WL 1252633 (D. Kan. Apr. 13, 2012) (knowingly garnishing account containing only exempt funds is abuse of process; fact question here as to knowledge); Hogue v. Palisades Collection, L.L.C., 494 F. Supp. 2d 1043, 1053 (S.D. Iowa 2007) (denial of motion to dismiss); Arc Inv. Co. v. Tiffith, 330 P.2d 305 (Cal. 1958) (repeated issuance of garnishment on exempt wages may be abuse of process); Czap v. Credit Bureau, 86 Cal. Rptr. 417 (Cal. Ct. App. 1970) (levying on exempt wages with ulterior purpose of threatening debtor's employment and coercing her to pay debt may be abuse of process). *But see* Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (garnishment not abuse of process, even though account known to contain exempt funds, because used for intended purpose); Parker v. Wetsch & Abbott, P.L.C., 2006 WL 4846042 (S.D. Iowa July 11, 2006) (use of garnishment to reach exempt funds not abuse of process, as this is its normal use and procedure is available to debtor to challenge it).

443 Hogue v. Palisades Collection, L.L.C., 494 F. Supp. 2d 1043, 1053 (S.D. Iowa 2007) (denial of motion to dismiss).

444 Hefley v. J. & M. Securities, L.L.C., 2016 WL 2643477 (E.D. Mo. May 10, 2016).

445 Bowens v. Mel S. Harris & Assoc., 2008 WL 619162 (W.D.N.Y. Mar. 3, 2008) (allegation of "sewer service" sufficient to state claim), *later op. at* 2011 WL 6208303 (W.D.N.Y. Dec. 14, 2011) (granting summary judgment to defendants where they could reasonably have believed that service address was correct); Cordero v. Calvary SpIV L.L.C., 2004 WL 1244107 (N.D. Ill. June 3, 2004) (denial of motion to strike); Kappell v. Bartlett, 246 Cal. Rptr. 815 (Cal. Ct. App. 1988); Parks v. Neuf, 578 N.E.2d 282 (Ill. App. Ct. 1991) (allowing claim of abuse of process to go forward against private process server who falsified return of service for ulterior purpose of obtaining service fees). *But see* Smith v. Fireside Thrift Co., 2007 WL 2729329 (N.D. Cal. Sept. 18, 2007) (dismissing abuse-of-process claim; falsifying proof of service, obtaining default judgment and garnishing wages protected by litigation privilege); Rusheen v. Cohen, 128 P.3d 713, 718 (Cal. 2006) (filing false affidavit of service of process, which ultimately enabled litigant to levy upon judgment, is protected by absolute immunity under California statute).

446 Samuels v. Midland Funding, L.L.C., 921 F. Supp. 2d 1321 (S.D. Ala. 2013) (ulterior purpose of coercing settlement sufficiently alleged where large volume debt buyer received minimal information from sellers, made no effort to obtain more, and was unable to produce any evidence at trial); Okemo Mtn., Inc. v. Sikorsky, 2006 WL 335858 (D. Vt. Feb. 14, 2006) (may be abuse of process to proceed to trial against individual while knowing that release absolved him, with purpose to harass and annoy him), *later decision at* 2006 WL 3333100 (D. Vt. Nov. 16, 2006) (judgment as matter of law for current defendant; no reasonable jury could have found that release was intended to cover current plaintiff); Gen. Elec. Capital Corp. v. MHPG, Inc., 2006 WL 2560314 (Mass. Super. Ct. July 26, 2004) (granting summary judgment on liability). *But see* Hempel-DuBois v. Portfolio Recovery Assoc., 2011 WL 3627294 (D.N.H. Aug. 17, 2011) (continuing litigation after learning that key affidavits were forged not abuse of process); Hampton v. Nustar Mgmt. Fin. Group, 2007 WL 119146 (D. Nev. Jan. 10, 2007) (continuing litigation as lever to obtain settlement of underlying suit is neither improper motive nor ulterior purpose); Equality, Inc. v. I-Link Communications, 76 F. Supp. 2d 227, 230 (D. Conn. 1999) (continuing meritless litigation not abuse of process).

447 Shaw v. Law Offices of Hayt, Hayt, & Landau, 2018 WL 1634829 (D.N.J. Apr. 5, 2018) (denying summary judgment to collector on claim that it abused process by repeatedly garnishing non-debtor's account after being informed of its error).

448 Suffield Dev. Assoc. v. Nat'l Loan Investors, L.P., 802 A.2d 44, 49 (Conn. 2002) (reversing grant of creditor's motion to strike claim

- Procuring a criminal complaint in order to coerce the return of property involved in a civil dispute.[449]

15.7 Other Debt Collection Torts

15.7.1 Torts Involving Personal Injury or Restraint

Torts not applicable to typical debt collection practices may apply in particular factual situations. The common law torts of assault or battery can arise during abusive collection actions.[450] In extreme cases, where a harassed debtor commits suicide, a wrongful death claim may be attempted,[451] but will present difficult questions of proximate cause and foreseeability.[452]

False arrest and false imprisonment claims may be viable if a creditor or collector wrongfully causes the debtor to be arrested.[453] A false imprisonment claim may also be available

involving misrepresentation of amount of judgment in order to obtain excessive attachment and pressure opponent to settle); Zinn v. Rice, 27 N.E. 772 (Mass. 1891) (issuing excessive attachment not for purpose of securing payment of the debt, but to injure debtor, may be abuse of process); Cady v. Marcella, 729 N.E.2d 1125 (Mass. App. Ct. 2000) (issuing execution on property of little market value as means of coercion may be abuse of process), Rahaman v. Weber, 2005 WL 89413 (Minn. Ct. App. Jan. 19, 2005) (seizure of more than $10,000 statutory limit from bank account states abuse-of-process claim); Nevada Credit Rating Bureau v. Williams, 503 P.2d 9 (Nev. 1972) (affirming abuse-of-process judgment based on issuing excessive attachment and refusing to release any items from attachment). *See also* Goldsmith v. Aargon Agency, 2018 WL 1567848 (D. Nev. Mar. 30, 2018) (refusing to dismiss abuse of process claim against judgment creditor that obtained writs of execution for sums not awarded by judgment). *See generally* Thomas J. Goger, Annotation, *Liability of Creditor for Excessive Attachment or Garnishment*, 56 A.L.R.3d 493, §§ 3, 5, 6, 8 (1974).

449 Wilson v. Brown Chrysler Dodge Jeep Ram, L.L.C., 2018 WL 700828 (W.D. La. Feb. 1, 2018) (yo-yo sale).

450 *See* Ryan v. Ford Motor Co., 939 N.E.2d 891 (Ohio Ct. App. 2010) (consumer who backed off because repossessor was "about thirty years younger . . . and 150 pounds heavier" stated claim for assault; wife who observed confrontation, but did not interact with repossessor, failed to state claim); Ledisco Fin. Serv., Inc. v. Viracola, 533 S.W.2d 951 (Tex. App. 1974) (collection agency responsible for employee's assault and battery on consumer while attempting to obtain return of the consumer's credit card, but not for obscene telephone calls). *See also* Robey v. Fed. Deposit Ins. Corp., 2011 WL 4102326 (D. Neb. Sept. 14, 2011) (fact issue whether repossessor's demeanor, in conversation with debtor's wife, was "menacing" enough to constitute assault). *See generally* National Consumer Law Center, Repossessions § 13.6 (9th ed. 2017), *updated at* www.nclc.org/library.

451 *See, e.g.*, Smith v. J.P. Morgan Chase Bank, 2011 WL 5373969 (D. Nev. Nov. 4 2011) (suicide not a bar to wrongful death claim; debtor-husband committed suicide while lender was egregiously mishandling loan modification, harassing debtors, and bringing arguably wrongful foreclosure); North Shore Pharmacy Serv., Inc. v. Breslin Assoc. Consulting, L.L.C., 491 F. Supp. 2d 111 (D. Mass. 2007) (auditor allegedly committed suicide as a result of campaign to drive him out of business; fact issues as to causation; also questions as to Massachusetts law on wrongful death claims arising from suicide); Burdett v. Harrah's Kan. Casino Corp., 311 F. Supp. 2d 1166 (D. Kan. 2004) (Kansas wrongful death statute allows recovery for tort for which victim could have recovered in lifetime, here negligent infliction of emotional distress; widow of compulsive gambler who committed suicide after being harassed for casino debts alleged proximate cause sufficient to support claim).

452 *See, e.g.*, MacDermid v. Discover Fin. Serv., 2006 WL 1454743 (M.D. Tenn. May 12, 2006) (neither proximate cause nor foreseeability sufficiently alleged, even though card issuer continued its threats of criminal prosecution after being informed of consumer's longstanding and severe bipolar disorder), *aff'd in part, rev'd in part*, 488 F.3d 721 (6th Cir. 2007) (remanding for further proceedings as to intentional infliction of emotional distress claim). *See also* Wilkinson v. United States, 2007 WL 3544062 (D.N.D. Nov. 9, 2007) (wrongful death claim fails; proximate cause cannot be shown where debtor died of heart attack after wrongful seizure of land, but had multiple risk factors in addition to stress), *rev'd in part on other grounds*, 564 F.3d 927 (8th Cir. 2009).

453 *See* Hall v. District of Columbia, 867 F.3d 138 (D.C. Cir. 2017) (reversing dismissal of false imprisonment claim against officer who arrested customer without investigating restaurant workers' report that she had walked out without paying bill); Wilson v. Brown Chrysler Dodge Jeep Ram, L.L.C., 2018 WL 700828 (W.D. La. Feb. 1, 2018) (refusing to dismiss false arrest claim against officers who withheld exculpatory evidence showing that alleged theft was civil dispute over yo-yo sale); Kent v. Drought, 2010 WL 4320334 (W.D.N.Y. Oct. 28, 2010) (during dispute over logging contract, landowner falsely informed police that logger had stolen timber; logger was arrested, detained, and arraigned, but grand jury refused to indict; logger stated claims for both false arrest and malicious prosecution); Watkins v. Kanitz, 2004 WL 3457634 (W.D. Mich. Sept. 24, 2004) (refusing to dismiss consumer's claims for false arrest and false imprisonment against police who arrested her when she disobeyed order to allow self-help repossession to go forward); Greenberg v. Pryszlak, 46 A.3d 591 (N.J. Super. Ct. App. Div. 2012) (reversing summary judgment for defendants on false arrest and false imprisonment claims; fact issue whether trooper who arrested consumer at request of garage owner had probable cause to arrest, where consumer stopped payment on check and tendered check for smaller amount during dispute over the quality of repairs); Singh v. McLaughlin, 297 P.3d 514 (Or. Ct. App. 2013) (reversing directed verdict against plaintiff on false imprisonment charge; plaintiff alleged that attorney falsely procured his arrest to gain advantage in dispute over control of small business; attorney-client privilege will not apply if lawyer was helping client commit crime of filing false criminal complaint). *See also* Keylard v. Mueller Anderson, P.C., 2013 WL 4501446 (N.D. Ill. Aug. 22, 2013) (denying FDCPA claim, noting that state law claim for false arrest is proper remedy if law firm used knowingly false affidavits of service to obtain body attachment); Montgomery Ward v. Wilson, 664 A.2d 916, 925–929 (Md. 1995) (false imprisonment claim is available if private party detains a person or wrongfully instigates warrantless arrest, but not for wrongfully securing arrest warrant, which is malicious prosecution). *But see* Gatheright v. Clark, 2016 WL 237153 (N.D. Miss. Jan. 20, 2016) (false arrest not sufficiently alleged where sheriff's department made decision to arrest, even if complainant filed knowingly false bad check affidavit); Callon v. Cox, 2012 WL 314880 (S.D. Ind. Jan. 25, 2012) (state governmental immunity statute bars claim against municipal officials who failed to credit plaintiffs' payment of court costs and caused their arrest on a body attachment); *In re* BFW Liquidation, L.L.C., 471 B.R. 652 (Bankr. N.D. Ala. 2012) (neither false imprisonment nor false arrest where defendant store did not detain consumer and arrest was based on a warrant—even though warrant was issued as a result of false statements by defendant); Myles v. Screentech, Inc., 98 So. 3d 563 (Ala. Civ. App. 2012) (false arrest claim against person who reports information to police requires showing that informant acted in bad faith without reasonable cause to believe accused committed a crime; not shown here where inadequate but apparently good-faith investigation led creditor to believe it was victim of a fraud); Hagberg v. California Fed. Bank, 81 P.3d 244 (Cal. 2004) (false arrest and false imprisonment claims barred by statutory privilege for statements made to authorities). *But cf.* Harvey v. Caesar's

if the debtor's freedom of movement is restrained in some other way during a collection attempt.[454]

15.7.2 Trespass

A collection attempt that involves a visit to the debtor's home may be a trespass.[455] Many states allow repossessors a qualified privilege to enter on private property, however, if this can be done without breach of peace.[456] Mortgage lenders and servicers may have a contractual right to enter a home to preserve it in certain circumstances such as abandonment by the homeowner, but acts that go beyond the steps that are reasonably necessary to inspect or protect the property may amount to trespass.[457] Nominal damages may be available for trespass even if the consumer suffers no actual damage.[458]

15.7.3 Conversion and Other Torts Directed Against the Consumer's Property

The tort of conversion occurs when the defendant wrongfully exercises dominion or control over identifiable personal property that the plaintiff has a right to possess.[459] This tort most commonly arises in the repossession context,[460] but other collection abuses may also amount to conversion.[461] Some

Entertainment Operating Co., 55 F. Supp. 3d 901 (N.D. Miss. 2014) (La. law; false arrest claim fails, because debtor who voluntarily went to prosecutor's office was never restrained), *aff'd* 790 Fed. Appx. 582 (5th Cir. 2019); Fleming v. U-Haul of Ga., Inc., 541 S.E.2d 75 (Ga. Ct. App. 2000) (valid warrant bars false imprisonment claim); Hiber v. Creditors Collection Serv., 961 P.2d 898 (Or. Ct. App. 1998) (no liability where attorney acted in good faith when seeking arrest of debtor for failure to appear at debtor's exam, even though warrant was void because of jurisdictional irregularities); Rodriguez v. Wal-Mart Stores, Inc., 92 S.W.3d 502 (Tex. 2002) (no false imprisonment where store did not knowingly provide false information to instigate arrest on bad check charge).

454 Wilson v. Houston Funeral Home, 50 Cal. Rptr. 2d 169 (Cal. Ct. App. 1996) (where funeral director drove widow to bank to try to cash check instead of to cemetery, side trip to the bank was false imprisonment). *But cf.* Smith v. Magnolia Lady, Inc., 925 So. 2d 898 (Miss. Ct. App. 2006) (false imprisonment not sufficiently alleged where there was no evidence that employee being questioned about misplaced cash was not free to leave, despite presence of armed sheriff's officer; also detention was reasonable where cash handling procedures had been violated).

455 *See, e.g.*, Gordon v. Bank of N.Y. Mellon Corp., 2017 WL 662856 (N.D. Ind. Jan. 17, 2017) (discussing Indiana law of civil and criminal trespass; civil trespass requires only showing of unauthorized entry); Njema v. Wells Fargo Bank, 2015 WL 5008940 (D. Minn. Aug. Aug. 18, 2015) (borrower stated trespass claim against property preservation service and bank, arising from repeated lock-outs at time when borrower was residing in house and negotiating with bank for short sale); Gens v. Colonial Sav., 2013 WL 1120503 (N.D. Cal. Mar. 18, 2013) (at a time when it did not own the mortgage, bank caused its agents to enter occupied house and damage and remove personal property; clause of mortgage permitting entry no defense because it did not own mortgage); CitiFinancial Mortg. Co. v. Frasure, 2008 WL 2199496 (N.D. Okla. May 23, 2008) (harassing home visit to collect debt not owed was trespass), *aff'd on other grounds*, 327 Fed. Appx. 49 (10th Cir. 2009); King v. Bank of N.Y., 2005 WL 2177209 (S.D. Tex. Sept. 7, 2005) (allegation of eviction attempt pursuant to wrongful foreclosure stated claim for trespass); Countrywide Home Loan Serv. L.L.P. v. Stultz, 832 N.E.2d 125 (Ohio Ct. App. 2005) (consumer stated claim for trespass against mortgage servicer that locked family out and denied access to personal property before foreclosure). *See also* Mitchell v. First Call Bail & Surety, 412 F. Supp. 3d 1208 (D. Mont. 2019) (allowing plaintiff to proceed with claims of trespass, false imprisonment, and assault against bounty hunters who broke into his home and took him into custody at gunpoint for missing court appearance on traffic charge; bounty hunters have privilege to enter on private property, but it is not absolute and not blanket permission to perform actions that would be forbidden to police officers). *But see* Rodriguez v. Due Process of Mich., Inc., 2008 WL 4449651 (E.D. Mich. Sept. 30, 2008) (consent to enter bars trespass claim, even if consent obtained by fraud; here, civil process servers misrepresented selves as law enforcement); *In re* Sharpe, 391 B.R. 117 (Bankr. N.D. Ala. 2008) (trespass claim fails because foreclosing lender had right to possession after default). *But cf.* O'Dea v. Wells Fargo Home Mortg., 2013 WL 441461 (S.D. Tex. Feb. 5, 2013) (inspector sent by lenders lied to condo security to gain access to common areas, asked owners for access to condo and was denied; owners' trespass claim failed because mortgage agreement allowed exterior inspections without notice or consent); Case v. St. Mary's Bank, 63 A.3d 1209 (N.H. 2013) (trespass claim fails; foreclosing bank locked out tenant who had complained of code violations; although not yet an owner, bank was permitted by mortgage agreement to enter). *See generally* National Consumer Law Center, Repossessions § 13.6 (9th ed. 2017), *updated at* www.nclc.org/library (discussion of trespass in context of repossession).

456 *See* National Consumer Law Center, Repossessions § 6.4.7.1 (9th ed. 2017), *updated at* www.nclc.org/library.

457 Fed. Nat'l Mortg. Ass'n v. Obradovich, 2016 WL 1213920 (N.D. Ill. Mar. 29, 2017) (contract allowed lender to enter mortgaged property to take "reasonable or appropriate" steps to preserve it; refusing to dismiss trespass claim where debtors alleged they had not defaulted, and property service's bungled preservation efforts damaged the home); Napolitano v. Green Tree Servicing, 2016 WL 447451 (D. Me. Feb. 4, 2016) (refusing to dismiss trespass claim; loan documents allowed lender to enter at reasonable times for reasonable cause; fact issues as to reasonableness where, at a time when property was unoccupied but being cared for by borrowers, property service entered and winterized so negligently that it caused property damage); Flippin v. Aurora Bank, 2012 WL 3260449 (N.D. Ill. Aug. 8, 2012) (refusing to dismiss trespass claim against lender's property service that entered property which was secure, well-maintained, and obviously occupied, and changed locks, turned off water, and removed valuable property at a time when no order of possession had been entered; mortgage allowed "reasonable and appropriate" entry as needed to protect property); Jacobini v. J.P. Morgan Chase, 2012 WL 252437 (M.D. Fla. Jan. 26, 2012) (mortgage permitted lender to enter for reasonable cause, upon notice, but if entry by property service was unreasonable, it was trespass); Nelson v. Safeguard Properties, 2017 WL 5196011 (Mich. Ct. App. Nov. 9, 2017) (at time when foreclosure not yet begun, and owner had notified lender that property was not vacant, contractors employed by property service broke in, ransacked the house, removed or damaged personal property, and locked out owner; key issue is whether contractors used by property service were its agents). *But cf.* Clay v. Nat'l City Bank, 2012 WL 5038336 (Ky. Ct. App. 2012) (visits by lender's property service to vacant property not trespass, because mortgage permitted lender to enter to protect abandoned property).

458 Smith v. A.B. Bonded Locksmith, 757 N.E.2d 1242 (Ohio Ct. App. 2001).

459 Dan B. Dobbs, Paul T. Hayden and Eileen M. Bubeck, The Law of Torts, vol. 1, ch. 4, § 61, at 168–170 (2d ed. 2011).

460 *See* National Consumer Law Center, Repossessions § 13.6.2 (9th ed. 2017), *updated at* www.nclc.org/library.

461 *See, e.g.*, White v. Wachovia Bank, 563 F. Supp. 2d 1358 (N.D. Ga. 2008) (consumers stated claim for trover and conversion where bank imposed

courts hold that wrongful seizure of money is not conversion in ordinary circumstances, but allow a conversion claim for money that has been set aside, such as a real estate escrow or settlement proceeds held in an attorney's trust account.[462] A willful and knowing conversion may be actionable under a state civil theft law, many of which provide for multiple damages.[463]

Trespass to chattels is a tort similar to conversion where the wrongdoer deprives a party of possession only temporarily.[464] A slander of title claim can arise if a collector files an unjustified lien or *lis pendens* on the consumer's property.[465]

15.7.4 Negligence

Negligence claims can arise in a variety of collection scenarios.[466] For example, a negligence claim may lie if a creditor

overdraft charges when account had positive balance, took funds from consumers' other accounts to cover, and refused to re-credit); Billsie v. Brooksbank, 525 F. Supp. 2d 1290 (D.N.M. 2007) (garnished wages of wrong person, because of mistyped Social Security number, refused to return improperly garnished funds); Matthews v. Homecoming Fin. Network, 2005 WL 2387688 (N.D. Ill. Sept. 26, 2005) (consumers stated claim for conversion and trespass to chattels where foreclosing creditor locked them out of their home before date set by foreclosure order and refused to return personal property left in the house); Liberty Nat'l Life Ins. Co. v. Caddell, 701 So. 2d 1132 (Ala. Civ. App. 1997) (conversion action where life insurance company continued to take automatic premium withdrawals out of insured's bank account after he cashed in insurance policy despite persistent efforts by insured to correct the problem; compensatory damages of $50,000 for "mental anguish," plus punitive damages); Becker v. Longinaker, 784 N.W.2d 202 (Iowa Ct. App. 2010) (seizure of property of debtor and third party, to which bank had no right, to coerce payment of deficiency to which it was not entitled); Rahaman v. Weber, 2005 WL 89413 (Minn. Ct. App. Jan. 19, 2005) (consumer stated claim for conversion of exempt funds by wrongful levy); Countrywide Home Loan Serv. L.L.P. v. Stultz, 832 N.E.2d 125 (Ohio Ct. App. 2005) (consumers stated conversion claim against mortgage servicer that locked them out before foreclosure complaint filed and denied access to personal property for over a month). *See also* Int'l Group, L.L.C. v. Padilla, 2012 WL 5398674 (W.D.N.Y. Nov. 2, 2012) (wrongful attachment may be conversion, but only if attachment is void or voidable). *But cf.* Morgan v. N.A.R., Inc., 2008 WL 639128 (D. Utah 2008) (creditor did not wrongfully interfere with consumer's possession of her money; after debt was paid, it twice informed employer that garnishment was canceled, and promptly returned garnished funds sent by employer); Taylor v. Gelfand, 505 S.E.2d 222 (Ga. Ct. App. 1998) (erroneous freezing of bank account was not conversion where account was frozen pursuant to legal process and debtor could not show malice or lack of probable cause).

462 Hall v. District of Columbia, 867 F.3d 138 (D.D.C. Cir. 2017) (reversing summary judgment on conversion claim to restaurant that retained cash left on table by consumer's party, after restaurant had coerced consumer to pay more than was owed); Garner v. Barton, 2015 WL 1120085 (E.D. Mo. Mar. 12, 2015) (failure to return excess sums garnished from debtor's pay may be conversion); Arnett v. Bank of Am., 874 F. Supp. 2d 1021 (D. Or. 2012) (misapplication of "specific, identifiable funds" from real estate escrow is conversion); Client Funding Solutions v. Crim, 2012 WL 3017984 (N.D. Ill. July 24, 2012) (settlement proceeds); Hausen v. PS Illinois Trust, 2012 WL 266169 (N.D. Ill. Jan. 29, 2012) (surplus sales proceeds where sale of contents of storage locker yielded more than the amount of the lien). *But see* Boler v. Bank of Am., 2017 WL 6555343 (N.D. Ala. Dec. 22, 2017) (conversion claim fails; proceeds of insurance check for property damage are not "money capable of identification").

463 Burt v. Chase Auto Fin. Corp., 2019 WL 6219508 (E.D. Wis. Nov. 21, 2019) (declining to dismiss civil theft complaint arising from allegedly unauthorized repossession; wrongful intent sufficiently alleged); Auto Liquidation Ctr. v. Bates, 969 N.E.2d 139 (Ind. Ct. App. 2012) (unpublished) (distinguishing criminal conversion from simple breach of contract; must show "knowing or intentional exercise of unauthorized control over the property of another," here awarding treble damages against yo-yo car dealer who refused to return down payment). *But cf.* Oliver v. ARS Ohio, L.L.C., 2019 WL 343249 (N.D. Ohio Jan. 28, 2019) (civil theft claim fails; theft offense not sufficiently alleged where wrongful repossession resulted from mistake); Bullard v. U.S. Bank, 2012 WL 2542907 (N.D. Fla. June 30, 2012) (civil theft statute requires clear and convincing evidence of intent to steal; not shown where valuable property disappeared after lender's property service trespassed and changed locks on shed). *See generally* National Consumer Law Center, Federal Deception Law § 8.8 (3d ed. 2017), *updated at* www.nclc.org/library.

464 *See* National Consumer Law Center, Repossessions §§ 7.4.1, 13.6.2 (9th ed. 2017), *updated at* www.nclc.org/library.

465 *See, e.g.*, Joy v. MERSCORP, Inc., 935 F. Supp. 2d 848 (E.D.N.C. 2013) (slander of title shown where servicer recorded a deed based on foreclosure that was void because of servicer's false statements and failure to comply with statutory requirements; special damages requirement satisfied because homeowner incurred moving expenses as result); Reno v. Supportkids, Inc., 2004 WL 828150 (D. Minn. Apr. 13, 2004) (refusing to dismiss slander of title claim where collector filed lien in inflated amount on debtor's home); First Nat'l Bank of Mo. v. Ricon, Inc., 311 S.W.3d 857 (Mo. Ct. App. 2010) (filing of unauthorized *lis pendens*; false statement shown, also pecuniary harm where notice caused refinancing to fail; fact issue as to malicious publication). *But cf.* Sam v. Am. Home Mortg. Servicing, 2010 WL 761228 (E.D. Cal. Mar. 3, 2010) (slander of title claim arising from filing notice of mortgage default is barred by litigation privilege).

466 *See, e.g.*, Ward v. Bank of Am., 2019 WL 2103124 (W.D. Wash. May 14, 2019) (mishandling of foreclosure; homeowner led to believe he had already lost house, then subjected to new foreclosure action; Washington deed of trust statute creates a duty sufficient to support claims of negligence and negligent misrepresentation); Hall v. District of Columbia, 867 F.3d 138 (D.C. Cir. 2017) (reversing summary judgment to restaurant on negligence claim; fact question whether restaurant workers negligently caused consumer's arrest and resultant injuries where they reported felony theft without grounds to conclude that she had refused to pay, and in particular had no grounds to allege that allegedly unpaid amount satisfied felony threshold); Fed. Nat'l Mortg. Ass'n v. Obradovich, 2016 WL 1213920 (N.D. Ill. Mar. 29, 2017) (denying motion to dismiss negligence claim against property service that entered unoccupied but not abandoned property, and winterized so unskillfully as to cause serious property damage); Quinones v. Ocwen Loan Servicing, L.L.C., 282 F. Supp. 3d 1207 (C.D. Cal. 2017) (consumer stated negligence claim against creditor who made over 2000 robocalls; duty of care will arise if creditor goes beyond its role as lender of money and becomes aggressive debt collector); Arndt v. Wells Fargo Bank, 2015 WL 2395484 (E.D. Pa. May 20, 2015) (tenant of foreclosed property stated claim for negligence, including demand for punitive damages; property service locked out tenant and removed property despite being informed of tenant's lawful presence); Howard v. CitiMortgage, Inc., 2014 WL 6802550 (S.D. Miss. Dec. 14, 2014) (egregious mishandling of mortgage servicing); Raley v. Bank of Am., 2014 WL 6684906 (N.D. Ala. Nov. 24, 2014) (consumer alleged duty of care sufficient to support negligence claim; bank failed to investigate claim that debt was result of identity theft, and filed Form 1099 forgiveness of debt, resulting in large tax liability); Narramore v. HBSC Bank, 2010 WL 2732815 (D. Ariz. July 7, 2010) (foreclosure while loan modification was in progress; if lender told borrower that

initiates collection activity after negligently failing to realize that a debt has been paid,[467] or if it negligently pursues collection activity against the wrong person.[468] A number of courts have held creditors liable for negligently extending credit to an identity thief.[469] A key issue in many cases is whether the defendant owed a duty to the consumer.[470]

sale would be postponed, it had duty to notify him when it was not); DePrinzio v. MBNA Nat'l Bank, 2005 WL 2039175 (E.D. Pa. Aug. 24, 2005) (allowing negligence claim to go forward based on credit reports made by bank that omitted critical information; not barred by Fair Credit Reporting Act preemption); Johnson v. Citimortgage, Inc., 351 F. Supp. 2d 1368 (N.D. Ga. 2004) (breach of duty by mortgage servicer to exercise reasonable care and skill where it refused to apply payments properly and made knowingly false report to credit reporting agency); Witherwax v. Transcare, 801 N.Y.S.2d 782 (N.Y. Sup. Ct. 2005) (consumer stated claim for negligence against creditor that sent bill to wrong address, then referred debt to collection without attempting to telephone consumer or bill his insurance company; creditor had correct phone number and insurance information). *Cf.* Wilson v. GMAC Fin. Serv. Corp., 2009 WL 467583 (E.D. Tenn. Feb. 24, 2009) (allowing negligence claim arising from disagreement over return of leased vehicle to go forward, but if duty allegedly breached arose from contract, no tort claim would be available). *See also* Owens-Benniefield v. Nationstar Mortg., L.L.C., 258 F. Supp. 3d 1300 (M.D. Fla. June 15, 2017) (borrower stated negligence claim against servicer who assigned debt to another servicer after deed in lieu of foreclosure transaction had been completed and recorded). *But see* Cohen v. Beachside Two—I Homeowners' Ass'n, 2006 WL 1795140 (D. Minn. June 29, 2006) (negligence claim unavailable for violation of duty that arises solely from contract, here allegations that bank wrongfully paid certain disputed fees out of escrow), *aff'd as modified*, 272 Fed. Appx. 534 (8th Cir. 2008); Reno v. Supportkids, Inc., 2004 WL 828150 (D. Minn. Apr. 13, 2004) (negligence claim fails because private child support collector owed no duty to obligor); Hagberg v. California Fed. Bank, 81 P.3d 244 (Cal. 2004) (negligence claim barred by statutory privilege for statements made to authorities). *But cf.* Middleton v. Rogers Ltd., 804 F. Supp. 2d 632 (S.D. Ohio 2011) (economic loss rule bars claim regarding negligent collection acts that cause only economic harm); Chaconas v. JP Morgan Chase Bank, 713 F. Supp. 2d 1180 (S.D. Cal. May 10, 2010) (proximate cause not shown; frail older debtor injured in fall when running to answer unauthorized call). *See generally* § 15.1.4, *supra*.

467 *See, e.g.*, Goodwin v. Capital One, 2015 WL 5120860 (M.D. Ga. Aug. 28, 2015) (debtor stated negligence and conversion claims against creditor and repossessor who repossessed vehicle that had been paid for in chapter 13 plan); Searle v. Harrah's Entertainment, Inc., 2010 WL 3928632 (Tenn. Ct. App. Oct. 6, 2010) (affirming negligence judgment against creditor that engaged in abusive attempts to collect check that it should have known had been paid). *See also* Himmelstein v. Comcast of the Dist., L.L.C., 908 F. Supp. 2d 49 (D.D.C. 2012) (cable company charged for equipment that had been returned, and refused to correct records after mistake discovered; allowing negligence claim to go forward, but seeking additional briefing on question whether there was any duty outside the contract), *later op. at* 931 F. Supp. 2d 48 (D.D.C. 2013) (negligence claim is preempted by FCRA).

468 *See, e.g.*, Reid v. LVNV Funding, 2016 WL 247571 (D. Utah Jan. 20, 2016) (law firm had duty to investigate to confirm judgment debtor's identity when faced with obvious conflict; here firm pursued identity theft victim after being presented with extensive documentation); Alves v. Verizon, 2010 WL 2989988 (D.N.J. July 27, 2010) (local phone company's persistent failure to fix equipment problem caused long-distance carrier's abusive dunning of consumer for another customer's debt; local company breached duty to maintain telephone line and account; long-distance carrier breached duty to bill proper owners of account); Liu v. Arrow Fin. Serv., Inc., 2010 WL 1994190 (S.D. Tex. May 17, 2010) (consumer stated claim for negligence but not gross negligence where creditor failed to tell counsel to discontinue action after learning that debt was result of identity theft); Phillips v. Messerli & Kramer, P.A., 2008 WL 5050127 (D. Minn. Nov. 20, 2008) (allowing negligence claim to proceed for wrongful levy on funds of non-party, non-debtor spouse); Cross v. Receivables Mgmt. Solutions, Inc., 2006 WL 446083 (D. Colo. Feb. 21, 2006) (consumer stated claim for negligence where collectors persistently reported and dunned for debt they had not verified, and which consumer had never heard of); Pourny v. Maui Police Dep't, 127 F. Supp. 2d 1129 (D. Haw. 2000) (negligence action against creditor would lie, where creditor seized exempt property and property not owned by debtor); Lindor v. Palisades Collection, L.L.C., 914 N.Y.S.2d 867 (N.Y. Super. Ct. 2010) (collectors owe duty to persons with names similar to debtors'; here, misspelling of debtor's name resulted in false reporting of debt on credit report of non-debtor).

469 *See* § 15.1.5, *supra*.

470 Brandt v. Ocwen Loan Servicing, L.L.C., 2017 WL 5878581 (E.D. Cal. Nov. 29, 2017) (rejecting defendant's argument that negligence claim must be dismissed because of absence of duty; 1000 to 2000 collection calls over five years "would appear to constitute the type of 'harassing and abusive behavior that exceed[s] the normal domain of a lender collecting on a debt'"); Dougherty v. Bank of Am., 177 F. Supp. 3d 1230 (E.D. Cal. 2016) (lender or servicer's relationship with debtor usually does not create duty of care sufficient to support negligence claim, but this must be determined on a case by case basis; foreseeability of harm and close connection between defendant's conduct and the harm both weigh in favor of finding a duty here: servicers strung borrowers along with false promises that unaffordable modification could be made feasible by state home-saver program, but never took necessary steps to enable homeowners to participate in the program); Nunn v. JP Morgan ChaseBank, 2016 WL 2793003 (Cal. Ct. App. May 13, 2016) (finding duty of care when processing loan modification; fact issues whether it was breached by dual tracking and mishandling of documents).

15.7.5 Misrepresentation, Civil Conspiracy, and Extortion

Other torts that are occasionally applicable in the debt collection context are fraud[471] and negligent misrepresentation.[472] For either claim, the consumer must be able to show reliance on the misrepresentation.[473]

The elements of the tort of civil conspiracy vary among jurisdictions. One statement of the elements is:

1. A combination of two or more persons or entities;
2. An agreement among them for a common purpose;
3. Knowledge of the common purpose and intent to participate on the part of each participant; and
4. The commission of one or more overt acts in furtherance of the conspiracy.[474]

A civil conspiracy claim is useful as a way of reaching persons who joined in an agreement to accomplish some wrongful result but did not commit tortious acts themselves. Courts have allowed debtors to proceed with civil conspiracy

471 Vine v. PLS Fin. Services, L.L.C., 2018 WL 456031 (W.D. Tex. Jan. 16, 2018) (payday lender falsely told borrowers that checks would not be used for criminal prosecution; misstatements when submitting post-dated checks to DA's program also actionable); Yohannes v. Olympic Collection, Inc., 2017 WL 6060113 (W.D. Wash. Dec. 7, 2017); Dougherty v. Bank of Am., 177 F. Supp. 3d 1230 (E.D. Cal. 2016) (falsity and reliance sufficiently alleged; servicers strung borrowers along with false promises to enable them to participate in state home-saver program that would make otherwise unaffordable modification feasible); Llames v. J.P. Morgan Chase & Co., 2012 WL 1032910 (N.D. Ill. Mar. 23, 2012) (refusing to dismiss claim that creditor committed fraud by misrepresenting that it would remove authorized user from account in return for her payment of past-due amount); Dimas v. Vanderbilt Mortg. & Fin., Inc., 2010 WL 3342216 (S.D. Tex. Aug. 25, 2010) (recording fraudulent liens; anyone doing title search would rely on the false statements); Alves v. Verizon, 2010 WL 2989988 (D.N.J. July 27, 2010) (fraud sufficiently alleged where local phone company broke months of promises to fix equipment problem that resulted in long-distance company's abusive dunning of wrong customer, and long-distance company failed to stop the dunning); Aikens v. CIT Group/Sales Fin., Inc., 2007 WL 108301 (S.D. Miss. Jan. 9, 2007) (reliance sufficiently alleged where consumer testified that she did not know whether creditor's statements were true or not, and hired counsel and sued to resolve the matter); Kmart v. Asaro, 751 So. 2d 513 (Ala. Civ. App. 1999) (evidence of fraud sufficient to go to jury, where store agreed to accept repayment for bad check from consumer's chapter 13 bankruptcy and not prosecute criminally, then prosecuted); Mbigi v. Wells Fargo Home Mortg., 785 S.E.2d 8 (Ga. Ct. App. 2016) (reversing dismissal of fraud claim based on various misstatements in course of mishandled loan modification ending in wrongful foreclosure). *But cf.* Narvaez v. Wilshire Credit Corp., 757 F. Supp. 2d 621 (N.D. Tex. 2010) (lender misrepresented amount of debt by force-placing insurance on properly insured property, but claim barred by economic loss rule where duty breached arose from loan contract). *See generally* National Consumer Law Center, Automobile Fraud Ch. 8 (6th ed. 2018), *updated at* www.nclc.org/library (detailed discussion of fraud in the context of automobile sales).

472 *See* Allison v. J.P. Morgan Chase Bank, 2012 WL 4633177 (E.D. Tex. Oct. 2, 2012) (lender told borrowers they qualified for aid for hurricane-destroyed property, but they must be two months in arrears, then foreclosed and sold when they missed payments; negligent misrepresentation claim goes forward, not barred by statute of frauds or economic loss rule); Stanton v. Ocwen Loan Servicing, 2010 WL 3824640 (D. Utah Sept. 28, 2010) (negligent misrepresentation will lie only if there is special or fiduciary relationship; lender/borrower not *per se* special, but long course of false reassurances during loan modification negotiations could create special relationship); Glover v. Bally Total Fitness Corp., 2007 WL 465578 (M.D. Pa. Feb. 9, 2007) (denying motion to dismiss consumer's fraudulent and negligent misrepresentation claims based on creditor's misrepresentations to credit reporting agency, on which other creditors relied); Barber v. Nat'l Bank, 815 P.2d 857 (Alaska 1991) (mortgage servicing company's misrepresentation that it had postponed foreclosure sale of a residence was actionable as knowing or negligent misrepresentation); Mbigi v. Wells Fargo Home Mortg., 785 S.E.2d 8 (Ga. Ct. App. 2016) (reversing dismissal of negligent misrepresentation claim based on various misstatements in course of mishandled loan modification ending in wrongful foreclosure). *But see* Tipton v. Willamette Subscription Television, 735 P.2d 1250 (Or. Ct. App. 1987) (claim for negligent misrepresentation not stated by allegations that demand letters for unauthorized reception of cable television company's signals misrepresented consumers' legal liability; attorneys owed no duty to accurately advise their adversaries of the law).

473 Johnson v. Nationstar Mortg., L.L.C., 2017 WL 3401303 (W.D. Ky. Aug. 8, 2017) (mortgage servicer's inaccurate reporting resulted in failure of homeowner's negotiations with Verizon for cell tower; misrepresentation claim fails because consumer's did not rely on false information); Owens-Benniefield v. Nationstar Mortg., L.L.C., 258 F. Supp. 3d 1300 (M.D. Fla. June 15, 2017) (dismissing fraud claim on ground that consumer who disputed servicer's statement that she owed debt did not rely on that statement), *later decision at* 2017 WL 3149429 (M.D. Fla. July 25, 2017) (dismissing amended fraud claim on same ground); Middleton v. Rogers Ltd., Inc., 804 F. Supp. 2d 632 (S.D. Ohio 2011) (dismissing misrepresentation claims because of insufficient reliance allegations); Aikens v. CIT Group/Sales Fin., Inc., 2007 WL 108301 (S.D. Miss. Jan. 9, 2007) (consumer, who actively disputed creditor's claim of right to possession, stated claim for fraud; reliance sufficiently alleged where consumer testified that she did not know whether creditor's statements were true or not, and hired counsel and sued to resolve the matter); Gros v. Midland Credit Mgmt., 525 F. Supp. 2d 1019 (N.D. Ill. 2007) (consumer fails to state common law fraud claim against creditor who knowingly sold invalid debt; reliance not shown where consumer's response was to sue creditor and debt buyer); Riker-Vanholland v. Transouth Fin. Corp., 2004 WL 1812739 (N.D. Iowa Aug. 13, 2004) (consumer failed to state fraud claim against collector who falsely threatened criminal prosecution; reliance not shown where consumer's response to threat was to sue the collector); Reno v. Supportkids, Inc., 2004 WL 828150 (D. Minn. Apr. 13, 2004) (fraud claim fails because plaintiffs neither believed misstatements nor parted with money in reliance on them); DirectTV v. Cavanaugh, 321 F. Supp. 2d 825 (E.D. Mich. 2003) (denying fraud claim because consumer did not rely on demand letters by paying the amount demanded); Richards v. United Collections Bureau, 46 Conn. L. Rptr. 161 (Super. Ct. 2008) (reliance shown where consumer took out unaffordable subprime loan in response to collector's negligent misrepresentation that she could save her house only by going to specified loan broker). *See generally* National Consumer Law Center, Consumer Warranty Law § 11.4.3 (5th ed. 2015), *updated at* www.nclc.org/library (detailed discussion of negligent misrepresentation).

474 *See, e.g.*, Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d 593 (S.D.N.Y. 2001) (summarizing elements in California, Illinois, and New York as agreement to participate in unlawful act or lawful act in unlawful means, and overt act performed in furtherance of scheme, causing injury). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 10.4.2.3 (9th ed. 2016), *updated at* www.nclc.org/library.

claims where collectors work with other parties to wrong the debtor.[475]

Extortion is a crime that can arise in the debt collection context—for example, when a collector uses a false threat of criminal prosecution to persuade someone to pay a disputed debt. Some courts recognize a private cause of action to remedy extortion.[476]

15.7.6 Other Potential Tort Claims

A few states, including Georgia, Louisiana, New Mexico, and Texas, recognize a tort action for unreasonable collection methods.[477] Kansas and Colorado recognize a cause of action

475 Gordon v. Bank of New York Mellon Corp., 964 F. Supp. 2d 937 (N.D. Ind. 2013) (refusing to dismiss civil conspiracy claim where lender caused property service to break into wrong person's home, steal personal property, and leave the house open to vandals); Coursen v. JP Morgan Chase & Co., 2012 WL 3055857 (M.D. Fla. July 25, 2012) (refusing to dismiss claim alleging that holder and servicer conspired to use sham documents and fabricated evidence to "manufacture a default"); Client Funding Solutions, Inc. v. Crim, 2012 WL 3017984 (N.D. Ill. July 23, 2012) (conspiracy between attorney and litigation lender sufficiently alleged: withholding settlement proceeds needed for medical bills and everyday living, to coerce accident victim to settle with litigation lender); Combs v. NCO Fin. Sys., 2011 WL 1288686 (E.D. Pa. Apr. 5, 2011) (claim stated for creditor's conspiracy with collector to violate FDCPA; concerted action shown where calls to creditors' number automatically connected with collector), *order entered by* 2011 WL 1288699 (E.D. Pa. Apr. 5, 2011); Nelson v. Am. Power & Light, 2010 WL 3219498 (S.D. Ohio Aug. 12, 2010) (landlord had agreement with electric company, allowing it to bring eviction action in landlord's name against tenants who did not pay electric bill, but non-payment of utilities was not grounds for eviction under tenant's lease; tenant stated claim for conspiracy between electric company and landlord); Quesenberry v. Alliant Law Group, P.C., 2010 WL 1189457 (E.D. Tex. Mar. 5, 2010) (meeting of minds sufficiently alleged; collector and law firm working together to violate state and federal debt collection statutes), *adopted*, 2010 WL 1189481 (E.D. Tex. Mar. 24, 2010); Capitol Records, Inc. v. Weed, 2008 WL 1820667 (D. Ariz. Apr. 27, 2008) (copyright action seeking monetary relief for unauthorized file sharing; allowing consumer to bring counterclaim for conspiracy: agreement between record company and private investigator to access computer files in violation of federal law); Flamm v. Sarner & Assoc., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (creditor and collection attorney may be liable on civil conspiracy claim for harassment by process server they hired if they authorized or ratified server's tactics), *later decision at* 2006 WL 43770 (E.D. Pa. Jan. 3, 2006) (denying summary judgment; fact issue as to what lawyers told process server; must show agreement either to do an unlawful act, or to do a lawful act by unlawful means); Greenberg v. Pryszlak, 46 A.3d 591 (N.J. Super. Ct. App. Div. 2012) (reversing summary judgment for defendants on civil conspiracy claim; fact issue whether garage owner conspired with state trooper to cause unlawful arrest of consumer who stopped payment on check during dispute over quality of repairs). *But see* Tate v. Sallie Mae, Inc., 2011 WL 3651813 (W.D.N.C. Aug. 19, 2011) (dismissing civil conspiracy claim because of intracorporate immunity rule; fact that individual collectors' compensation was based on results not a sufficient personal stake to defeat immunity); Born v. Hosto & Buchan, P.L.L.C., 2010 WL 2431063 (Ark. June 17, 2010) (no claim for alleged conspiracy between attorney and client). *But cf.* Kevelighan v. Trott & Trott, P.C., 771 F. Supp. 2d 763 (E.D. Mich. 2010) (must show underlying actionable tort; claim fails when all other surviving claims sound in contract); Gonzalez v. First Franklin Loan Serv., 2010 WL 144862 (E.D. Cal. Jan. 11, 2010) (must show common design, wrongful act, and that defendant personally owed duty that was breached; claim against lender fails because it owed no duty beyond those arising in contract); Daviscourt v. Columbia State Bank, 2008 WL 113899 (D. Colo. Jan. 9, 2008) (must show agreement to do wrongful act or to do lawful act by wrongful means; not shown where bank officer made one call to sheriff's office, asking when bench warrant would be served); Gros v. Midland Credit Mgmt., 525 F. Supp. 2d 1019 (N.D. Ill. 2007) (creditor knowingly sold nonexistent debt to debt buyer, but conspiracy claim fails because no evidence that buyer knew debt nonexistent). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 10.4.2.3 (9th ed. 2016), *updated at* www.nclc.org/library (general discussion of civil conspiracy).

476 Flatley v. Mauro, 139 P.3d 2 (Cal. 2006) (allowing claim for civil extortion to go forward; "pre-litigation demand" was attempt at extortion by false criminal accusation, in violation of criminal statute); Schiffman v. Knoll, 2019 WL 1254152 (Cal. Ct. App. Mar. 19, 2019) (unpublished) (California recognizes civil cause of action for extortion, but claim here barred by litigation privilege where it arose from threat to disparage defendant in another suit, in response to that party's attorney's threat to file malicious prosecution action); Duncan v. Ford Motor Credit, Repossessors, Inc., 2018 WL 3060265 (Iowa Ct. App. June 20, 2018) (consumer stated civil extortion claim against defendants who, after she paid full amount owed for return of repossessed vehicle, refused to turn it over unless she signed release absolving them of all liability); Becker v. Longinaker, 784 N.W.2D 202 (Iowa Ct. App. 2010) (affirming verdict, including punitive damages, for civil extortion; threat to commit theft shown where bank seized property of debtor and third party to which it had no right, to coerce payment of deficiency to which it was arguably not entitled). *See also In re* Prebul, 2011 WL 2947045 (Bankr. E.D. Tenn. July 19, 2011) (civil conspiracy to commit extortion is actionable, but dismissing claim because of failure to allege resulting harm where debtor did not pay in response to defendants' extortion). *But see* Rodriguez v. Due Process of Mich., Inc., 2008 WL 4449651 (E.D. Mich. Sept. 30, 2008) (no private civil cause of action for extortion); Chapman v. Chase Manhattan Mortg. Co., 2007 WL 2815246 (N.D. Okla. Sept. 24, 2007) (no civil cause of action for extortion; even if there were, threat to exercise a legal right cannot be extortion). *But cf.* Rolle v. Law Office of Samuel Streeter, 2010 WL 729022 (D. Ariz. Mar. 2, 2010) (no civil cause of action for extortion when Arizona statute allowing tort recovery for certain crimes was unconstitutionally overbroad; statute has since been amended); State v. Rendelman, 947 A.2d 546 (Md. 2008) (threat of litigation, however meritless or bad faith, cannot be "wrongful threat of economic injury" or extortion, within meaning of Maryland criminal law).

477 *GEORGIA:* Dolanson Co. v. Citizens & S. Nat'l Bank, 251 S.E.2d 274 (Ga. 1978) (unreasonable bill-collection procedures, e.g., making false statements, threats, and harassing telephone calls, constitute actionable tortious wrong; but not shown here); Blazer Fin. Serv., Inc. v. Stewart, 233 S.E.2d 1 (Ga. Ct. App. 1977).

LOUISIANA: Hairford v. Centurytel, Inc., 856 So. 2d 139 (La. Ct. App. 2003) (a "debtor has a right to be free from unreasonable coercion and from unreasonable violations of his right to privacy in his personal affairs"). *Cf.* Carr v. Hibernia Nat'l Bank, 251 Fed. Appx. 855 (5th Cir. 2007) (creditor revived judgment against plaintiff's deceased father, improperly served her, and prosecuted the action for five years; where no coercive action except filing suit alleged, daughter failed to state a claim for unreasonable debt collection).

NEW MEXICO: Billsie v. Brooksbank, 525 F. Supp. 2d 1290 (D.N.M. 2007) (recognizing claim for unreasonable collection activity, closely related to invasion of privacy; consumer stated claim where lawyer garnished wages of wrong consumer and refused to return funds when mistake discovered).

TEXAS: Enis v. Bank of Am., 2012 WL 4741073 (N.D. Tex. Oct. 3, 2012) (harassing calls by mortgage servicer, multiple times a day between 8:00 a.m. and 11:00 p.m., continuing after requests to stop,

for wrongful garnishment.[478] Georgia and Hawaii recognize a cause of action for wrongful foreclosure.[479]

Louisiana recognizes a tort cause of action for "abuse of rights" against a person who "attempts to exercise a legal right with the intention of harming or imposing a detriment upon another" if there is "(1) no benefit to the person exercising the legal right and (2) damage or injury to the person against whom the legal right is asserted."[480] It is a defense that the person has a "legitimate and serious interest in the exercise of the right."[481] Alabama recognizes a cause of action for wanton or intentional conduct,[482] although the plaintiff may also need to allege an underlying wrong.[483] The law of nuisance has been applied in at least one case of typical debt collection harassment.[484]

If a creditor or collector violates or misuses a contract term, it may be liable for breach of the implied covenant of good faith and fair dealing.[485] Most courts treat such a violation as a

are sufficient to state claim for common law unreasonable debt collection); MacAllister v. BAC Home Loans Servicing, L.L.P., 2011 WL 2200672 (E.D. Tex. Apr. 28, 2011) (homeowners barely stated claim: lender persistently failed to respond to questions about new payment amount, told them to continue paying old amount during investigation of problem, then initiated foreclosure based on homeowners' continued payment of old amount), *adopted*, 2011 WL 2183844 (E.D. Tex. June 6, 2011); Vanderbilt Mortg. & Fin., Inc. v. Flores, 746 F. Supp. 2d 819 (S.D. Tex. 2010) (must show more than simple negligence; vigorous efforts to collect debt known to be not owed are sufficient); Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (must show a course of harassment; improper garnishment not sufficient); *In re* Davis, 377 B.R. 827 (Bankr. E.D. Tex. 2007) ("collection efforts such as a person of ordinary care and prudence would not have used under the same or similar circumstances"; shown where seller of real property repeatedly refused to credit payments, threatened foreclosure, and demanded sums not due); EMC Mortg. Co. v. Jones, 252 S.W.3d 857 (Tex. App. 2008) (unreasonable collection shown where foreclosure sale took place "by accident" after loan modification agreed to and foreclosure canceled; affirming damages for past mental anguish, lost time, and damage to credit reputation). *Cf.* Davis v. Farm Bureau Bank, 2008 WL 1924247 (W.D. Tex. Apr. 30, 2008) (must show "efforts that amount to a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm"; not shown where creditor reported discharged debt as "charged off" but made no other collection efforts). *But cf.* Enis v. Bank of Am., 2013 WL 1721961 (N.D. Tex. Apr. 22, 2013) (claim fails; telephone harassment that did not include threats of bodily injury not sufficient to show "a willful course of harassment intended to inflict both mental anguish and bodily harm"); Narvaez v. Wilshire Credit Corp., 757 F. Supp. 2d 621 (N.D. Tex. 2010) (misrepresentations of amount due, here charging for force-placed insurance on properly insured property, not sufficient to state claim).

478 Chavez v. Liberty Acquisitions Servicing, L.L.C., 2016 WL 814631 (D. Colo. Mar. 2, 2016) (malice and lack of probable cause need not be shown for wrongful garnishment claim); Sigg v. Emert, 361 P.3d 523 (Kan. Ct. App. 2015). *Cf.* Maxwell v. St Francis Health Ctr., 2017 WL 4037732 (D. Kan. Sept. 3, 2017) (Kansas law allows cause of action for wrongful garnishment after the underlying judgment is set aside only if that judgment was fraudulently obtained; not shown here even though creditor's misstatements about debtor's military status violated the Servicemembers Civil Relief Act). *See generally* National Consumer Law Center, Collection Actions § 14.2.7 (4th ed. 2017), *updated at* www.nclc.org/library (tort and other remedies for wrongful or excessive wage garnishment); National Consumer Law Center, Collection Actions § 14.5.7 (4th ed. 2017), *updated at* www.nclc.org/library (tort and other claims for wrongful seizure of debtor's bank account).

479 Galima v. Ass'n of Apt. Owners of Palm Court, 2017 WL 1240181 (D. Haw. Mar. 30, 2017) (Hawaii recognizes claim for wrongful foreclosure if foreclosing entity fails to comply with law and has no right to foreclose); Mbigi v. Wells Fargo Home Mortg., 785 S.E.2d 8 (Ga. Ct. App. 2016) (inducing default and using it as basis for foreclosure).

480 *In re* Cigars, Cigarettes, etc., Inc., 399 B.R. 605 (Bankr. M.D. La. 2009).

481 *Id.* (legitimate and serious interest shown where supplier had delivered product, current plaintiff had quickly removed it to storage area, and supplier had not been paid).

482 Faulk v. Midland Funding, 2015 WL 5736103 (M.D. Ala. Sept. 30, 2015) (wantonness claim goes forward; debt buyer alleged to have brought action despite actual knowledge that debt was not owed); Raley v. Bank of Am., 2014 WL 6684906 (N.D. Ala. Nov. 24, 2014) (consumer alleged recklessness sufficient to support wantonness claim; without investigating consumer's claim that debt was result of identity theft, bank sent 1099 forgiveness-of-debt form to IRS, resulting in large tax liability for consumer); Gustin v. Allied Interstate, 2014 WL 1923735 (N.D. Ala. May 13, 2014) (fact issue whether collection agency committed tort of wantonness where its collectors, whose pay included commissions, were induced to cut corners and disregard the FDCPA in order to maximize their earnings); Gamble v. Midland Funding, 2013 WL 979202 (N.D. Ala. Mar. 7, 2013) (harassment for debt known not to be owed will support a claim); Kamps v. Midland Funding, L.L.C., 2013 WL 622505 (N.D. Ala. Feb. 19, 2013) (bringing suit on debt known not to be owed will support a claim); Champion v. Global Credit Card Serv., 2012 WL 3542225 (N.D. Ala. Aug. 15, 2012) (Alabama recognizes cause of action for "wantonness"; must show that "defendant acts or fails to act with a reckless or conscious disregard of the rights or safety of others, and is aware that harm will likely or probably result").

483 Gamble v. Midland Funding, 2013 WL 979202 (N.D. Ala. Mar. 7, 2013) (allowing claim for negligent, wanton, or intentional conduct to proceed where consumer sufficiently alleged invasion of privacy).

484 Wiggins v. Moskins Credit Clothing Store, 137 F. Supp. 764 (E.D.S.C. 1956) (invasion of landlady's proprietary interest in her home by repeated collection calls regarding tenant's debt may be "tantamount to a nuisance" and actionable). *Cf.* Janossy v. Washington Mut. Bank, 2002 WL 31031636 (Cal. Ct. App. Sept. 12, 2002) (tort of private nuisance requires interference with use and enjoyment of land, but rejecting debtors' contention that several collection calls per month to their home made it uninhabitable); Sofka v. Thal, 662 S.W.2d 502 (Mo. 1983) (private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land, but collection calls here were not sufficiently offensive). *But see* Klein v. Just Energy Group, Inc., 2015 WL 3407837 (W.D. Pa. May 27, 2015) (nuisance claim applies only for invasion of interest in real property). *See generally* Note, *Commercial Nuisance: A Theory of Consumer Protection*, 33 Chi. L. Rev. 590 (1966).

485 *See, e.g.*, Quimby v. Caliber Home Loans, 2015 WL 3751511 (S.D. Ind. Apr. 22, 2015) (claim for breach of covenant of good faith and fair dealing will apply if defendants mishandled escrow); Howard v. CitiMortgage, Inc., 2014 WL 6802550 (S.D. Miss. Dec. 14, 2014) (egregious mishandling of mortgage servicing); Belsito Communications, Inc. v. Dell, Inc., 2013 WL 4860585 (S.D.N.Y. Sept. 12, 2013) (duty of good faith and fair dealing may plausibly include a duty not to treat customer as delinquent when he is not—and certainly to take steps to correct the problem when it is pointed out); Girgis v. Countrywide Home Loans, Inc., 733 F. Supp. 2d 835 (N.D. Ohio 2010) (must allege breach of contract with bad motive; here, failure to timely credit payments and imposition of unauthorized late fees in order to deprive borrowers of the benefits of the contract); Ihebereme v. Capital One, 730 F. Supp. 2d 40 (D.D.C. 2010) (lender's arbitrary and capricious behavior in making payment process more difficult and sabotaging refinancing, although

contract claim rather than a tort claim, however, at least in the absence of a special relationship between the parties.[486]

15.7.7 *Framing a Criminal Law Violation As a Tort Claim;* Prima Facie *Tort*

Some states incorporate the duties created by statutes, particularly criminal statutes, into their tort law on a general basis,[487] so a violation of any criminal law restricting collection methods can the basis for a tort claim. For example, a civil claim might be based on a simulated process or criminal blackmail statute. Unfair or deceptive acts or practices (UDAP) statutes often provide another means of framing a cause of action for violation of a criminal law.[488] Even where civil damages are not available for the crime, commission of a crime is highly probative of elements of other torts.[489]

A "prima facie tort" claim may also be available for other gratuitously harmful conduct that fails to fit into the definition of an established tort. The elements of a prima facie tort are: (1) an intentional but otherwise lawful act; (2) intent to cause injury to plaintiff; (3) injury to plaintiff; and (4) absence of justification or insufficient justification for defendant's act.[490] This is, however, a "tort of last resort," and recovery

not explicitly forbidden by contract, "evaded the spirit" of contract by making performance more difficult), *aff'd*, 573 Fed. Appx. 2 (D.C. Cir. 2014); LPP Mortg., Ltd. v. Prosper, 2008 WL 5272723 (D. V.I. Dec. 17, 2008) (allegation that lender foreclosed when borrowers were not in default is sufficient to state a claim); Morin v. Nationwide Fed. Credit Union, 2008 WL 5157740 (D. Conn. Dec. 8, 2008) (borrower stated claim against former employer's credit union that made false credit reports and repossessed vehicle without proper notice at a time when borrower was in acrimonious conflict with former employer; apparent default may have been result of credit union's manipulations); *In re* Laskowski, 384 B.R. 518 (Bankr. N.D. Ind. 2008) (debtor and bankruptcy trustee stated claim for breach of covenant of good faith and fair dealing against mortgage company that failed to credit or account for trustee's timely chapter 13 payments); Mbigi v. Wells Fargo Home Mortg., 785 S.E.2d 8 (Ga. Ct. App. 2016) (inducing default and then using it as basis for foreclosure can violate covenant); First Nat'l Bank v. Twombly, 689 P.2d 1226 (Mont. 1984) (commercial lender tortiously breached obligation not to accelerate payment of a debt except in good faith; punitive damages recoverable); Wright Safety Co. v. U.S. Bank, 2009 WL 4653550 (Ohio Ct. App. Dec. 9, 2009) (allegations that lender misapplied payments so as to create default and collect default interest, then sabotaged refinancing, sufficient to state claim). *But see* Coyer v. HSBC Mortg. Serv., Inc., 701 F.3d 1104 (6th Cir. 2012) (Michigan does not recognize claim for breach of covenant of good faith and fair dealing). *But cf.* Himmelstein v. Comcast of the Dist., L.L.C., 908 F. Supp. 2d 49 (D.D.C. 2012) (breach of covenant requires showing of "a conscious and deliberate act, which unfairly frustrates the agreed common purposes"; must be more than "honest mistake, bad judgment or negligence"; not shown here where cable company persistently failed to correct erroneous charge); Pulver v. Avco Fin. Serv., 227 Cal. Rptr. 491 (Cal. Ct. App. 1986) (sustaining demurrer to claim of breach of good faith and fair dealing; refusing to imply covenant that lender would not damage borrower's credit rating and harass her to repay loan of her sister).

486 *See, e.g.*, Donald Marshall Berlin v. Bank of Am., 2015 WL 1873219 (D.D.C. Apr. 24, 2015) (borrowers stated claim; bank "willfully rendered imperfect performance" when it stonewalled borrowers' efforts to comply with settlement agreement; noting that breach of covenant of good faith and fair dealing is contract claim); Rapacki v. Chase Home Fin., 797 F. Supp. 2d 1085 (D. Or. 2011) (contract claim: no emotional distress, damage to reputation, or punitive damages available); Baldain v. Am. Home Mortg. Servicing, Inc., 2010 WL 56143 (E.D. Cal. Jan. 5, 2010) (claim for breach of covenant of good faith and fair dealing states a breach-of-contract claim, but tort claim fails because no special relationship between borrower and lender); Chapman v. Chase Manhattan Mortg. Co., 2007 WL 2815246 (N.D. Okla. Sept. 24, 2007) (no tort claim for violation of implied covenant of good faith and fair dealing in debtor-creditor context); UMLIC VP L.L.C. v. T.& M. Sales & Envtl. Sys., Inc., 176 S.W.3d 595 (Tex. App. 2005) (tort action for breach of good faith and fair dealing allowed only in contracts creating a special relationship, arising from shared trust or imbalance of bargaining power; lender-borrower or lender-guarantor relationship is not special, so only contract damages available for improper conduct of foreclosure sale). *See generally* National Consumer Law Center, Consumer Credit Regulation § 2.4.11 (2d ed. 2015), *updated at* www.nclc.org/library; National Consumer Law Center, Consumer Warranty Law § 11.3 (5th ed. 2015), *updated at* www.nclc.org/library.

487 *See, e.g.*, Massey v. MBNA Am. Bank, 2005 WL 3099011 (W.D. Ky. Nov. 17, 2005) (where Kentucky has criminal statute forbidding telephone harassment, consumer may have cause of action under statute providing tort action for violation of statute). *But cf.* Heavrin v. Nelson, 384 F.3d 199, 203 (6th Cir. 2004) (Ky. Rev. Stat. Ann. § 446.070 (West) does not abrogate the litigation privilege; no private right of action for perjury in a legal proceeding). *See generally* National Consumer Law Center, Automobile Fraud § 7.1 (6th ed. 2018), *updated at* www.nclc.org/library.

488 *See generally* § 16.3, *infra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices § 3.2.7 (9th ed. 2016), *updated at* www.nclc.org/library.

489 *See, e.g.*, Searle v. Harrah's Entertainment, Inc., 2010 WL 3928632 (Tenn. Ct. App. Oct. 6, 2010) (criminal extortion, here threat of arrest to induce debtor to pay same debt twice, meets outrageousness element for intentional infliction of emotional distress).

490 Jackson Cnty., Mo., *ex rel.* Nixon v. MERSCORP, Inc., 915 F. Supp. 2d 1064 (W.D. Mo. 2013) (must show act committed with "specific, clear-cut, express malicious intent to injure," injury to plaintiff, and insufficient justification for defendant's act; intent to injure county not shown where MERS sought to save money by not recording certain transfers); Util. Metal Research v. Coleman, 2008 WL 850456 (E.D.N.Y. Mar. 28, 2008) (must show: (1) intentional infliction of harm; (2) special damages; (3) absence of excuse or justification; (4) by an act or series of acts that would otherwise have been lawful; must show "disinterested malevolence"; not shown where creditor was trying to collect lawful debt); *In re* Borges, 485 B.R. 743 (Bankr. D.N.M. 2012) (very limited cause of action; must show acts committed with intent to injure plaintiff, and without justification; not shown here where all lender's actions were permitted by loan agreement or by statute); Cridlebaugh v. Putnam County State Bank of Milan, 192 S.W.3d 540 (Mo. Ct. App. 2006) (refusing to release deed of trust until homeowners paid off granddaughter's debt for which they were not liable was inequitable but did not show the actual malice—that is, an intent to cause injury—required to support claim of prima facie tort); Michaels v. MVP Health Care, Inc., 91 N.Y.S.3d 567 (N.Y. App. Div. 2018) (elements are: "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful. In addition, there can be no recovery under this theory unless malevolence is the sole motive for defendant's otherwise lawful act or, in other words, unless defendant acts from disinterested malevolence;" sufficiently alleged

is rare.[491] It may be unavailable in the debt collection context, because some states require a showing of "disinterested malevolence"—that is, conduct for the sole purpose of causing injury—so the claim will fail if a pecuniary or business motive exists.[492]

15.7.8 Tort Claims Against Governmental Entities

Where state officials are involved, a tort claim may be cast as a civil rights violation.[493] Ordinary tort actions against governmental creditors will, however, raise special problems: the consent to suit found in state tort claims acts generally excludes certain collection activities, such as tax collection, and the complexities of municipal liability law are beyond the scope of this treatise.[494]

here where insurer gave wrong advice to insurance broker, then filed complaint, resulting in criminal prosecution, when he acted on that advice); Aurora Loan Serv. v. Grant, 851 N.Y.S.2d 56 (N.Y. Sup. Ct. 2007) (prima facie tort claim fails in absence of particularized statement of special damages). *See also* Amaya v. Bregman, 149 F. Supp. 3d 1312 (D.N.M. Dec. 16, 2015) (criteria for lack of justification similar to those for lack of probable cause or misuse of process in malicious abuse-of-process action).

491 Hinten v. Midland Funding, L.L.C., 2013 WL 5739035 (E.D. Mo. Oct. 22, 2013) (dismissing prima facie tort claim for debt collection abuses because there is a recognized tort available to remedy this wrong); Cosmas v. Am. Express Centurion Bank, 757 F. Supp. 2d 489 (D.N.J. 2010) (dismissing prima facie tort claim because it is a gap filler tort and will not lie where facts alleged would support claim of slander of credit or negligence, even though negligence claim was barred by FCRA preemption); Marseglia v. JP Morgan Chase Bank, 750 F. Supp. 2d 1171 (S.D. Cal. 2010) (tort in se claim fails because Rosenthal Act provides private civil remedy); Chaconas v. JP Morgan Chase Bank, 713 F. Supp. 2d 1180 (S.D. Cal. 2010) ("tort in se" claim unavailable because statutes, here state and federal debt collection acts, provide a remedy for the conduct in question); Michaels v. MVP Health Care, Inc., 91 N.Y.S.3d 567 (N.Y. App. Div. 2018) (claim will fail if plaintiff prevails on malicious prosecution claim). *But see* Weakley v. Redline Recovery Serv., L.L.C., 723 F. Supp. 2d 1341 (S.D. Cal. 2010) (allowing tort in se claim to go forward, even though consumer also stated claims for invasion of privacy and Rosenthal Act violations).

492 Williams v. Atlantic Law Group, L.L.C., 2016 WL 1253652 (D. Del. Mar. 30, 2016) (disinterested malevolence not shown; law firm, seeking to collect sum not owed, was motivated by desire to advance its client's interests and earn a fee); Schoolcraft v. City of New York, 133 F. Supp. 3d 563, 568–569 (S.D.N.Y. 2015) (must show "disinterested malevolence"; showing of pecuniary motive will defeat prima facie tort claim).

493 *See* § 14.11, *supra*.

494 *In re* Larsen v. Chinwuba, 832 A.2d 193 (Md. 2003) (sovereign immunity protected insurance commissioner from defamation and false light claims, even though statements made to media while investigating solvency of health maintenance organizations arguably violated insurance code); Smith v. A.B. Bonded Locksmith, 757 N.E.2d 1242 (Ohio Ct. App. 2001) (Ohio statute provides immunity for bailiff and locksmith acting under bailiff's orders who entered consumer's mother's home, where consumer no longer resided, to serve a valid repossession order; consumer could prove nothing worse than negligence). *See generally* National Consumer Law Center, Collection Actions § 10.2.14 (5th ed. 2020), *updated at* www.nclc.org/library (remedies for abusive debt collection by federal government); § 14.11, *supra* (section 1983 claims).

15.8 Attorney's Liability to Third Parties for Collection Negligence and Other Torts

Collection attorneys can be held liable under the Fair Debt Collection Practices Act to debtors against whom they prosecute claims.[495] Attorneys can also generally be held liable to opposing parties for intentional torts,[496] but common law rules may insulate the attorney from liability to consumers for damages caused by negligent debt collection acts.[497] Thus, a

495 *See* § 4.7.3.3, *supra*.

496 *See, e.g.*, Rapid Circuits, Inc. v. Sun Nat'l Bank, 2011 WL 1666919 (E.D. Pa. May 3, 2011) (must allege intentional torts, committed with intent to injure; sufficiently alleged where creditor and attorneys used defamation and intentional interference with contract in effort to drive debtor out of business), *order entered by* 2011 WL 1667917 (E.D. Pa. May 3, 2011); Murungi v. Mercedes Benz Credit Corp., 2001 WL 649747 (E.D. La. June 11, 2001) (no immunity for "intentionally tortious actions, ostensibly performed for a client's benefit"); Carney v. Rotkin, Schmerin & McIntyre, 254 Cal. Rptr. 478 (Cal. Ct. App. 1988) (reversing dismissal of intentional infliction of emotional distress claims against attorney who falsely told elderly debtor that bench warrant had been issued for her arrest); Fox v. Pollack, 226 Cal. Rptr. 532 (Cal. Ct. App. 1986) (attorney has no duty to protect interest of adverse party, but can be subjected to liability for torts such as malicious prosecution); Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756 (Ill. App. Ct. 2003) ("actively aiding and abetting" a client's tortious conduct sufficiently alleged in complex real estate case); Mapother & Mapother, P.S.C. v. Douglas, 750 S.W.2d 430 (Ky. 1988) (creditor's attorney may be liable to non-client for intentional torts in the nature of abuse of process or malicious prosecution, but not for negligence); Ulmer v. Frisard, 694 So. 2d 1046 (La. Ct. App. 1997) (litigant had no cause of action against adversary's attorney except for "intentionally tortious" actions; creditors' attorney's vigorous attacks on debtors' bankruptcy discharge showed, at worst, "the acrimonious nature of the litigation"); Banco Popular N. Am. v. Gandi, 876 A.2d 253 (N.J. 2005) (attorney liable to adverse party for civil conspiracy if attorney knowingly counsels and assists client with fraudulent transfers; liable for misrepresentations if adverse party is intended to, and does rely, on statements during negotiations); Korn v. Ellyn M. Epstein & DeSimone Reporting Group, 727 A.2d 1130 (Pa. Super. Ct. 1999) (malicious prosecution). *See also* Taylor v. McNichols, 243 P.3d 642, 658 (Idaho 2010) (litigation privilege is absolute and generally protects attorney from liability to opposing party for acts or communication when the attorney is acting as a representative and not for his or her own interests; here, privilege bars claims for civil conspiracy and tortious interference with contract); Cantey Hangar, L.L.P. v. Byrd, 467 S.W.3d 477 (Tex. 2015) (attorney is immune from liability to opposing party for acts that are part of duties of an attorney, even if fraudulent, but not for acts such as assault that are foreign to those duties). *Cf.* Hahn v. Satullo, 806 N.E.2d 567 (Ohio Ct. App. 2004) (in absence of malice, attorney has no liability to opposing party for invasion of privacy). *See generally* § 15.1.3.1, *supra*.

497 Wyant v. Nationstar Mortg., L.L.C., 2014 WL 3446633 (W.D. La. June 10, 2014) (foreclosure attorney liable to debtor only for intentional, tortious conduct; misstatements insufficient unless attorney knew they were false); Cingolani v. BAC Home Loans Servicing, L.P., 2012 WL 3029829 (E.D. Mich. July 25, 2012) (attorney representing lender in foreclosure action owes duty only to lender, not to borrower; negligence claim fails); Lane v. Fein, Such & Crane, L.L.P., 767 F. Supp. 2d 382 (E.D.N.Y. 2011) (negligence insufficient; must allege fraud, collusion or a malicious or tortious act); Finserv Cas. Corp. v. Settlement Funding, L.L.C., 724 F. Supp. 2d 662 (S.D. Tex. 2010) (lawyer has qualified immunity for act such as supervising seizure pursuant to writ of execution that is normal part of lawyer's duties, even

collection attorney who negligently files suit against or levies on the home of the wrong John Smith may be insulated from tort liability for negligence. Some states codify this protection.[498] A Minnesota statute that authorizes treble damages for attorney misconduct requires a showing of intentional fraud or deceit.[499]

One of the primary impediments found in common law to negligence claims has been the lack of privity between the attorney and the victim. This requirement of privity of contract has been attacked in general as outmoded,[500] and a number of cases recognize that a non-client who was an intended beneficiary of the lawyer's services can sue the lawyer for negligence.[501]

A few courts have gone further and recognized the right of an adverse party to sue an attorney for negligence. In a California case,[502] an attorney falsely informed an older widow that a warrant had been issued for her arrest. The attorney claimed that there could be no claim for negligence because the widow was an adverse party and he did not owe her a duty of care. The court rejected this claim, finding a duty of care in the statutory obligation of attorneys as officers of the court to deal honestly and fairly with adverse parties and counsel.

Another rule that protects attorneys is the adverse party rule. Many of the state privity cases involve suits by a former adverse litigant against the opponent's attorney for negligently bringing an unfounded claim. The courts generally hold that the adverse party's claim must contain all the elements of malicious prosecution:[503] intent, lack of probable cause, success in the terminated litigation, and malice.[504] Limiting adverse parties to malicious prosecution claims serves such public policies as the lawyer's duty to zealously represent a client, finality of judgments without retaliatory suits, access to courts free of retaliation, and parties' responsibility for their own attorney fees.[505] These policy concerns are not present when the plaintiff is not a former adverse party but merely a bystander harmed by the attorney's negligence.

One case held that the adverse party rule only protected attorneys' activities which required "the office, professional training, skill and authority of an attorney." Thus, where a judgment creditor's attorney accompanied the federal marshals who went to seize a debtor's property, inspected the non-debtor wife's intimate personal property, and prevented her from leaving the house, a court allowed the wife's claims of invasion of privacy and intentional infliction of emotional distress to go to trial. The court reasoned that the collection attorney's special skills were not necessary to help the marshals serve the writ, nor was she authorized to bar the wife from leaving the premises.[506]

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if underlying action was frivolous, or lawyer was negligent in determining ownership of property seized; privilege lost only by intentional fraud or by tort "tangentially related" to case, for example, assaulting the other party); Karony v. Dollar Loan Ctr., L.L.C., 2010 WL 5186065 (D. Nev. Dec. 15, 2010) (professional negligence claim will not lie where consumer had no contractual professional relationship with creditor's attorney); Bertwell v. Allstate Ins. Co., 2008 WL 304735 (D.S.C. Jan. 31, 2008) (attorney liable to third party only for violation of "independent duty" owed to third party, or activity by lawyer for his or her own benefit); Jones v. Bass, 343 F. Supp. 2d 1066 (D. Wyo. 2004) (attorney owes no duty of care to adverse party), *aff'd*, 149 Fed. Appx. 764 (10th Cir. 2005 Mapother & Mapother, P.S.C. v. Douglas, 750 S.W.2d 430 (Ky. 1988) (creditor's attorney may be liable to non-client for intentional torts in the nature of abuse of process or malicious prosecution, but not for negligence). *But cf.* Banco Popular N. Am. v. Gandi, 876 A.2d 253 (N.J. 2005) (lender stated claims for both negligent and intentional misrepresentation against attorney who assisted borrower and guarantor in series of fraudulent transfers, then misrepresented guarantor's financial condition in opinion letter on which he knew lender would rely); Newman v. Upton, Cohen & Slamowitz, 781 N.Y.S.2d 508 (App. Div. 2004) (attorney liable to third persons only for affirmative acts of negligence; not shown by collection suit where plaintiff had not disputed debt in response to firm's collection letter). *See generally* Dan B. Dobbs, Paul T. Hayden and Eileen M. Bubeck, The Law of Torts, vol. 4, ch. 55, § 725, at 40–42 (2d ed. 2011); Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 6.1 (2017); Joan Teshima, Annotation, *Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4th 615 (1988); Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client*, 61 A.L.R.4th 464 (1988).

498 *See, e.g.*, Ark. Code Ann. § 16-22-310. *See also* Born v. Hosto & Buchan, P.L.L.C., 372 S.W.3d 324 (Ark. 2010) (noting that statute does not immunize attorney from liability for fraud, other intentional torts, or negligent hiring and supervision, but finding these claims barred on other grounds; statute bars abuse-of-process claim based on filing of time-barred suit). *See generally* § 15.1.3.1, *supra*.

499 Minn. Stat. § 481.071. *See* Hemmingson v. Messerli & Kramer, P.A., 2011 WL 494941 (D. Minn. Feb. 7, 2011) (fraud or deceit not sufficiently alleged), *aff'd on other grounds*, 674 F.3d 814 (8th Cir. 2012).

500 Dan B. Dobbs, Paul T. Hayden and Eileen M. Bubeck, The Law of Torts, vol. 4, ch. 55, § 725, at 36–38 (2d ed. 2011).

501 *See, e.g.*, Sparks v. Craft, 75 F.3d 257 (6th Cir. 1996) (attorney may be liable under Kentucky law for damage caused by negligence to a person intended to be benefited by attorney's services regardless of lack of privity); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961) (beneficiaries of will against testator's attorney); Morales v. Field, DeGolf, Huppert & MacGowan, 160 Cal. Rptr. 239 (Cal. Ct. App. 1979) (beneficiaries of trust against trustor's lawyer); Donaly v. Garry, 97 Cal. Rptr. 191 (Cal. Ct. App. 1979) (lender against collection agency's attorney). *But see* Born v. Hosto & Buchan, P.L.L.C., 372 S.W.3d 324, 332–333 (Ark. 2010) (Ark. Code Ann. § 16-22-310, which exempts lawyers from liability to third parties with whom they are not in privity, except for certain intentional torts, bars negligence claims).

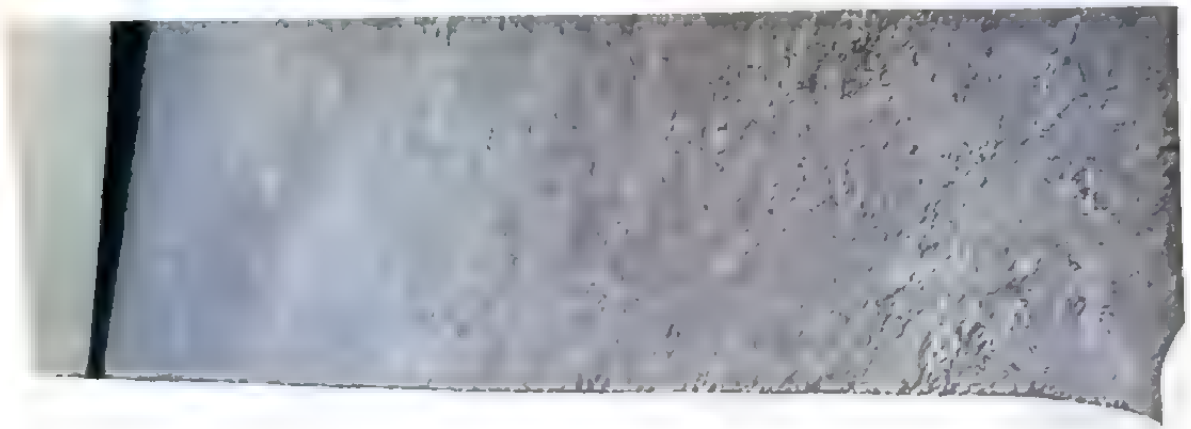
502 Carney v. Rotkin, Schmerin & McIntyre, 254 Cal. Rptr. 478 (Cal. Ct. App. 1988). *See also* Fox v. Pollack, 226 Cal. Rptr. 532 (Cal. Ct. App. 1986) (attorney has no duty to protect interest of adverse party, but implying that negligent misrepresentation claim might be recognized on other facts).

503 Dan B. Dobbs, Paul T. Hayden and Eileen M. Bubeck, The Law of Torts, vol. 4, ch. 55, § 725, at 40–42 (2d ed. 2011). *But see* Gigli v. Palisades Collection, L.L.C., 2008 WL 3823295 (M.D. Pa. Aug. 14, 2008) (no negligence cause of action against adversary's lawyer, even though consumer here stated claim for violation of Dragonetti Act, which combines elements of malicious prosecution and abuse of process).

504 *See* § 15.6, *supra*.

505 Dan B. Dobbs, Paul T. Hayden and Eileen M. Bubeck, The Law of Torts, vol. 4, ch. 55, § 725, at 40–42 (2d ed. 2011).

506 Miller v. Stonehenge/FASA-Texas, 993 F. Supp. 461 (N.D. Tex. 1998). *See also* Cantey Hangar, L.L.P. v. Byrd,467 S.W.3d 477 (Tex. 2015) (non-debt collection case; attorney is immune from liability to opposing party for acts that are part of duties of an attorney, even if fraudulent, but not for acts such as assault that are foreign to those duties).



courts have ruled that an adverse party
y for breach of ethical rules,[507] such a
determining whether the attorney has
t, such as abuse of process.[508]

of Principals, Officers

creditor for acts of a collection agency,
s inadequate capital, should always be
bility generally turns on the level of con-
cised over the collector's activities.[509] A

creditor may also be liable for negligently hiring a collector, even if the collector is an independent contractor.[510]

In addition, a creditor or collector is liable for the wrongful acts of its employees in the course of their employment.[511] Even a clearly forbidden act—for example, assault and battery—may give rise to liability if it was a wrong way of doing an authorized task or an emotional reaction to work done for the employer.[512] Personal liability of the officers of a collection agency will

.3, *infra*.
.2d 271 (N.J. 1998).
Mortg. Ass'n, 641 Fed. Appx. 438 (5th Cir. 2016)
e whether Fannie Mae exercised enough supervision
C to create an agency relationship, making it liable
ordon v. Bank of N.Y. Mellon Corp., 2017 WL 662856
017) (fact issues as to property service's control over
ent contractors who secured or cleared out proper-
Dean & Assoc., 2011 WL 2746847 (S.D. Fla. July 14,
ble for independent contractor collector's common
ons of state debt collection statute, if collector was
pparent authority to take the actions complained of);
Receivable Mgmt., Inc., 2007 WL 1200949 (D. Or.
t issues whether debt buyer liable for egregious mis-
r it hired; issues whether debt buyer knew debt was
her it either intended, or at least understood, that mis-
ur); Freeman v. CAC Fin., Inc., 2006 WL 925609 (S.D.
06) (card issuer who hired collector will be liable for
duct if it was negligent in hiring collector, exercised
show agency, or knew how collector was conducting
v. Horton Bros. Recovery, Inc., 2005 WL 736681 (D.
5) (allowing state tort claims arising from attempted
forward against seller; fact issue whether repossessor
pendent contractor); Spencer v. Hendersen-Webb, Inc.,
(D. Md. 1999) (fact issue whether collector was cred-

(E.D. Tex. 2007) (original creditor not vicariously liable for assignee's misconduct in absence of evidence that it controlled assignee or knew what assignee was doing, or that assignee had apparent authority to act for creditor); Fed. Home Loan Mortg. Corp. v. Lamar, 2006 WL 2422903 (N.D. Ohio, Aug. 22, 2006) (law firm not vicariously liable for assault and intentional infliction of emotional distress by process server, who was independent contractor; no evidence of firm's right to control his method of carrying out duties), *aff'd on other grounds*, 503 F.3d 504 (6th Cir. 2007); Pourny v. Maui Police Dep't, 127 F. Supp. 2d 1129 (D. Haw. 2000) (creditor not vicariously liable for actions of independent contractor process server where it neither ordered him to do acts complained of, nor was negligent in hiring him); Craig v. Andrew Aaron & Assoc., 947 F. Supp. 208 (D.S.C. 1996) (creditor not liable for collector's actions, where it did not know what collector was going to do, and terminated contract with collection agency as soon as it learned of misconduct); Taylor v. Gelfand, 505 S.E.2d 222 (Ga. Ct. App. 1998) (creditor would not be liable, in the absence of evidence that it authorized, knew of, or ratified lawyer's allegedly tortious actions). *See generally* Restatement (Second) of Agency § 245 (1958); 15A Am. Jur. 2d *Collection and Credit Agencies* § 2 (2011); 6 Am. Jur. 2d *Assault and Battery* §§ 100 to 110 (2008); W.E. Shipley, Annotation, *Liability for Assault by Employee in Collecting Debt*, 22 A.L.R.2d 1227 (1952); National Consumer Law Center, Repossessions § 13.10.4 (9th ed. 2017), *updated at* www.nclc.org/library (liability of creditor for acts of repossessors); § 2.9, *supra*.

510 Freeman v. CAC Fin., Inc., 2006 WL 925609 (S.D. Miss. Mar. 31, 2006) (credit card issuer who hired collector will be liable for collector's misconduct if it was negligent in hiring collector, it exercised enough control to show agency, or it knew how collector was conducting itself);

corporate structure and the extent of an offi-
nvolvement in the tort.[513]

.W.3d 361 (Ky. 2005) (dealership liable for action of fired gun at tires as consumer drove away; action was ıployment because purpose was to further employer's to repossess the vehicle); Soon Phat, L.P. v. Alvarado, (Tex App. 2013) (towing company liable for driver's use ırce). *But cf.* Berhow v. People's Bank, 423 F. Supp. 2d .. 2006) (bank officer not acting in course of his employ- stole from customers; no vicarious liability); Henderson lio, Inc., 506 S.W.2d 434 (Mo. 1974) (employer not liable s assault and battery because it was unforeseeable and scope of employment); Spitsin v. WGN Transp., Inc., 97 Super. Ct. 2014) (cab company not liable for actions of verely beat passenger who did not pay fare).

Due Process of Mich., Inc., 2008 WL 4449651 (E.D. 0, 2008) (fact issue as to supervisor's respondeat superior liability for fraud and false imprisonment, where process servers misrepresented selves as law enforcement, and one process server called "our boss" for advice during the incident); Dillon v. Select Portfolio Servicing, 2008 WL 227229 (D.N.H. Jan. 28, 2008) (failed to state claim against majority stockholder of corporate tortfeasor; no showing whether stockholder had knowledge of wrongdoing or power to prevent it); Fleming-Dudley v. Legal Investigations, Inc., 2007 WL 952026 (N.D. Ill. Mar. 22, 2007) (dismissing claim against owner and shareholder without prejudice; control not enough; liability only in "true veil-piercing" situation); Norton v. Collectronics, Inc., 2004 WL 238808 (Cal. Ct. App. Feb. 10, 2004) (collection agency chief executive officer who controlled the various corporate entities and "participated in all relevant decisions" could be personally liable). *See* Dobbyn, *A Practical Approach to Consistency in Veil-Piercing Cases*, 19 U. Kan. L. Rev. 185 (1971). *See also* § 11.4.4, *supra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices (9th ed. 2016), *updated at* www.nclc.org/library.

Chapter 16 Other State Remedies

16.1 Introduction

16.1.1 Benefits of State Statutory Claims

This chapter summarizes state claims (other than tort actions for damages) for abusive collection practices. It provides only a starting point for explaining these remedies: local law varies and must be researched separately.

In many states, the state remedies described in this chapter provide powerful sanctions for abusive debt collection practices and should be closely examined. These state remedies are particularly significant because many provide causes of action with statutes of limitations that are longer than the FDCPA's one-year period.[1] Many extend to creditors collecting their own debts, so fill the most significant gap in the FDCPA. They may also apply to debt buyers without the need to prove the principal purpose of the debt buyer's business.[2] These state claims also allow the debtor to litigate the case in state court, if that is perceived as a better forum than federal court.[3]

This chapter first examines state debt collection laws. It then turns to the application of the general standards of state unfair and deceptive acts and practices (UDAP) statutes to abusive debt collection. (For purposes of this chapter, statutes that contain specific debt collection restrictions are treated as debt collection statutes, even if they are codified in the state UDAP statute.)

The chapter then analyzes state credit repair organization statutes and state restrictions on unethical and unauthorized practice of law. It concludes with brief examinations of criminal prosecution, injunctive relief, and other state limitations on debt collection.

16.1.2 Preemption Issues

The FDCPA does not preempt state statutory claims unless they are inconsistent with it.[4] A consumer can recover statutory damages under both the FDCPA and a state debt collection statute.[5] Nothing in the FDCPA prevents a state from, as a matter of state law, applying its prohibitions to entities that the FDCPA does not cover.[6]

In general, the National Bank Act (NBA), the Home Owners Loan Act (HOLA), and the regulations under these statutes do

1 *See, e.g.*, Hoffman v. Transworld Systems, 2020 WL 1314399 (9th Cir. Mar. 19, 2020) (Washington Consumer Protection Act claim, asserting that certain FDCPA violations were *per se* CPA violations, is governed by CPA's four-year statute of limitations); Currier v. PDL Recovery Group, L.L.C., 2017 WL 712887 (E.D. Mich. Feb. 23, 2017) (Michigan debt collection act claims are covered by six-year catch-all statute of limitations); Hagy v. Detmers & Adams, L.L.C., 2013 WL 434053 (S.D. Ohio Feb. 5, 2013) (granting consumer judgment on UDAP claim even though FDCPA claim is time-barred); Purnell v. Arrow Fin. Services, L.L.C., 2009 WL 1508340 (E.D. Mich. May 29, 2009) (six-year statute of limitations applies to Michigan Collection Practices Act claim that does not have traditional common-law counterpart); Harrington v. CACV of Colorado, L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007) (allowing UDAP claims, which are subject to four-year statute of limitations, to proceed even though parallel FDCPA claims were time-barred); Riker-Vanholland v. Transouth Fin. Corp., 2004 WL 1083260 (N.D. Iowa May 7, 2004) (*pro se* consumer could state claim under state debt collection act, even though her other claims were either time-barred or otherwise deficient; state statute, which does not specify limitations period, is "action not otherwise provided for" with five-year limitations period); Kouabo v. Chevy Chase Bank, 336 F. Supp. 2d 471 (D. Md. 2004) (FDCPA claim time-barred, but Maryland claim timely); Petrolito v. Arrow Fin. Services, 221 F.R.D. 303 (D. Conn. 2004) (certifying two subclasses—FDCPA and Connecticut UDAP—because Connecticut statute has longer limitations period than FDCPA); Fuller v. Becker & Poliakoff, P.A., 192 F. Supp. 2d 1361, 1365 (M.D. Fla. 2002) (FDCPA and state subclasses in class action, because Florida statute has four-year and FDCPA one-year statute of limitations); Tenuto v. Transworld Sys., 2000 WL 1470213 (E.D. Pa. Sept. 29, 2000) (splitting class action into subclasses; subclass members who received letters within four years have claims under Pennsylvania statute, even though FDCPA claims are time-barred); Watkins v. Peterson Enters., Inc., 57 F. Supp. 2d 1102 (E.D. Wash. 1999) (state debt collection statute probably subject to three-year statute of limitations, so would reach acts barred under FDCPA). *See also* § 16.3.3, *infra*.

2 *See* § 4.7.2.2, *supra* (issues regarding FDCPA coverage of debt buyers).

3 *See, e.g.*, Nevada v. Bank of Am. Corp., 672 F.3d 661 (9th Cir. 2012) (no federal question jurisdiction over attorney general's suit even though it raised claim under state UDAP statute that borrowed FDCPA substantive standards); Ortega v. HomEq Servicing, 2010 WL 383368 (C.D. Cal. Jan. 25, 2010) (state debt collection claim cannot be removed to federal court even if state law incorporates FDCPA substantive provisions); Dean v. Compass Receivables Mgmt., Corp., 148 F. Supp. 2d 116 (D. Mass. 2001) (debt collection case cannot be removed to federal court if plaintiff pleads only UDAP claims). *See also* West Virginia *ex rel.* McGraw v. Fast Auto Loans, Inc., 918 F. Supp. 2d 551 (N.D. W. Va. 2013) (remanding to state court action by attorney general alleging debt collection harassment directed to consumers in West Virginia, in effort to collect auto title loans lawfully entered into in Virginia, on ground that claims under West Virginia debt collection statute did not arise under federal law and parties were not diverse).

4 Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055 (9th Cir. 2011); Dean v. Compass Receivables Mgmt., Corp., 148 F. Supp. 2d 116 (D. Mass. 2001). *See also* Som v. Daniels Law Offices, P.C. 573 F. Supp. 2d 349 (D. Mass. 2008) (FDCPA does not preempt Mass. UDAP statute). *Cf.* Codar v. Arizona, 1996 WL 471335 (9th Cir. Aug. 19, 1996) (Arizona debt collector licensure statute is preempted only to extent it prevents out-of-state collector from sending FDCPA-required notices to in-state debtors).

5 Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055 (9th Cir. 2011).

6 Pirouzian v. SLM Corp., 396 F. Supp. 2d 1124 (S.D. Cal. 2005) (state statute's broader definition of collector to include creditors is not inconsistent with FDCPA); Alkan v. CitiMortgage, 336 F. Supp. 2d 1061 (N.D. Cal. 2004) (state statute may cover creditors even though FDCPA does not).

not preempt state debt collection or UDAP statutes.[7] Prior to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act[8] in 2010, some courts held that federal banking laws preempted the application to mortgage servicers of state debt collection statutes' restrictions on contacting represented consumers.[9] Courts—even the court that issued the leading decision taking the contrary position[10]—have now abandoned that view in light of the Dodd-Frank Act.[11] That Act clarified that the preemptive effect of federal banking laws is significantly narrower than the federal banking agencies had asserted. Preemption under the NBA and HOLA is discussed in detail in NCLC's Mortgage Lending Ch. 5 (3d ed. 2019), *updated at* www.nclc.org/library.

The federal bankruptcy laws may preempt state debt collection statutes when they are applied to acts taken by a creditor in the context of a debtor's bankruptcy case.[12] However, claims that do not depend on bankruptcy law, and that are based on debt collection activities that occur after the bankruptcy case is closed, will not be preempted.[13] The exclusive remedy provisions of Medicare law may bar claims arising from attempts to collect Medicare liens.[14]

The Eleventh Circuit has held that the Higher Education Act (HEA) does not preempt state debt collection laws when they do not prevent the collector from taking the steps mandated by the Department of Education.[15] Thus, federal law did not

7 Barzelis v. Flagstar Bank, 784 F.3d 971 (5th Cir. 2015) (HOLA does not preempt state debt collection statute's prohibition of threats to take illegal action, unauthorized fees, mischaracterizing a debt, and other deceptive means); Boerner v. LVNV Funding, L.L.C., 358 F. Supp. 3d 767 (E.D. Wis. Jan. 8, 2019) (Wisconsin debt collection statute is not preempted by federal banking regulations); Commonwealth of Pa. v. Think Fin., Inc., 2016 WL 183289 (E.D. Pa. Jan. 14, 2016) (federal banking laws do not preempt state debt collection and UDAP claims against non-bank entity that engaged in "rent-a-bank" scheme to evade state usury and debt collection laws; non-bank defendant was the "de facto" lender); Pariscoff v. JPMorgan Chase Bank, 2013 WL 3776589 (S.D. Ohio July 16, 2013); Lenhart v. Everbank, 2013 WL 5745602 (S.D. W. Va. Oct. 23, 2013) (pre-Dodd-Frank criteria; West Virginia statute forbidding contact with debtor known to be represented not preempted by HOLA); Moore v. Wells Fargo Bank, 2013 WL 3965313 (D. Or. Aug. 1, 2013) (application of UDAP statute's prohibition of unfair and deceptive practices to national bank is not preempted); Duran v. Wells Fargo Bank, 878 F. Supp. 2d 1312 (S.D. Fla. 2012) (NBA does not preempt state debt collection statute); Sacco v. Bank of Am., 2012 WL 6566681 (W.D.N.C. Dec. 17, 2012); Robinson v. Wells Fargo Bank, 2012 WL 12855469, at *10–11 (N.D. Tex. July 19, 2012) (applying pre-Dodd-Frank-Act rule; state laws prohibiting repeated debt collection telephone calls and threats to take actions prohibited by law are not preempted); Cline v. Bank of Am., 823 F. Supp. 2d 387 (S.D. W. Va. 2011) (collection of car loan; West Virginia statute forbidding harassment and abuse not preempted); Smith v. BAC Home Loans Servicing, L.P., 769 F. Supp. 2d 1033, 1046 (S.D. W. Va. 2011) (interpreting pre-Dodd-Frank-Act statute and rule; claim that bank committed debt collection violation by breaching loan modification agreement, foreclosing, and sending foreclosure notices when homeowner was not in default is not preempted; preemption is not implicated just because a broad debt collection statute "happens to ensnare certain practices of national banks"); Lucia v. Wells Fargo Bank, 798 F. Supp. 2d 1059 (N.D. Cal. 2011) (holding claim not preempted, but dismissing on other grounds), *rev'd on other grounds sub nom.* Corvello v. Wells Fargo Bank, 728 F.3d 878 (9th Cir. 2013) (finding state debt collection statute applicable and reversing dismissal of debt collection claim); Watkins v. Wells-Fargo Bank, 2011 WL 777895 (S.D. W. Va. Feb. 28, 2011) (National Bank Act and OCC regulations do not preempt West Virginia debt collection claim alleging that bank sought to collect debt that had been voided pursuant to settlement agreement); Bishop v. Ocwen Loan Servicing, L.L.C., 2010 WL 4115463 (S.D. W. Va. Oct. 19, 2010) (HOLA does not preempt claim based on demand for late fees that were not authorized by contract, although it preempts state laws that would place substantive limits on those fees); Alkan v. CitiMortgage, 336 F. Supp. 2d 1061 (N.D. Cal. 2004); Bate v. Wells Fargo Bank (*In re* Bate), 454 B.R. 869 (Bankr. M.D. Fla. 2011) (Florida debt collection act, which forbids telephone harassment and direct contact with represented debtor, applies generally to all creditors, and does not interfere with the business of banking; not preempted by National Bank Act); Hood v. Santa Barbara Bank & Trust, 49 Cal. Rptr. 3d 369, 382–383 (Cal. Ct. App. 2007) (federal banking laws do not preempt application of California debt collection statute to national banks and thrifts); Chevy Chase Bank v. McCamant, 512 S.E.2d 217 (W. Va. 1998). *See also* Tielke v. Bank of Am., 2013 WL 3753968 (S.D. Tex. July 12, 2013) (NBA does not preempt Texas Debt Collection Act provision forbidding telephone harassment, but consumers here failed to sufficiently allege TDCA claims), *rev'd on other grounds*, 581 Fed. Appx. 408 (5th Cir. 2014) (reversing conclusion that TDCA claims were not sufficiently alleged). *See generally* National Consumer Law Center, Mortgage Lending §§ 5.8.4.6, 5.14.4.3, 5.14.4.4 (3d ed. 2019), *updated at* www.nclc.org/library (detailed discussion of banking agency preemption and its application to debt collection).

8 Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

9 *See, e.g.*, Padgett v. OneWest Bank, 2010 WL 1539839 (N.D. W. Va. Apr. 19, 2010) (HOLA preempts claim based on contact with represented debtor; note that in O'Neal v. Capital One Auto Fin., Inc., 2011 WL 4549148 (N.D. W. Va. Sept. 29, 2011), this judge abandoned this view); Lomax v. Bank of Am., 435 B.R. 362 (N.D. W. Va. 2010).

10 Meluzio v. Capital One Bank, 469 B.R. 250 (N.D. W. Va. 2012) (repudiating earlier view that federal banking laws preempted state restriction on contacting represented debtors).

11 Tinsley v. OneWest Bank, 2014 WL 3700456 (S.D. W. Va. July 24, 2014); Meluzio v. Capital One Bank, 469 B.R. 250 (N.D. W. Va. 2012); O'Neal v. Capital One Auto Fin., Inc., 2011 WL 4549148 (N.D. W. Va. Sept. 29, 2011) (concluding that its earlier decisions finding this state law preempted were wrongly decided); *In re* Pryor, 479 B.R. 694 (Bankr. E.D.N.C. 2012) (treating Dodd-Frank Act as clarifying existing law; holding that NBA and implementing regulations do not preempt North Carolina law forbidding contact with debtor known to be represented); Bate v. Wells Fargo Bank (*In re* Bate), 454 B.R. 869 (Bankr. M.D. Fla. 2011) (Florida debt collection act, which forbids telephone harassment and direct contact with represented debtor, applies generally to all creditors and does not interfere with the business of banking; not preempted by National Bank Act).

12 *See* §§ 13.3, 13.7.4, *supra*.

13 *See* §§ 13.4.1, 13.4.2, *supra*.

14 Einhorn v. Care Plus Health Plans, Inc., 42 F. Supp. 3d 1329 (S.D. Fla. 2014) (failure to exhaust administrative remedies provided by Medicare law barred claim alleging that health plan attempted to collect Medicare lien in excess of permitted amount).

15 Lawson-Ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908 (11th Cir. 2020) (Florida Consumer Collection Practices Act provisions forbidding misinformation are not preempted by Higher Education Act's preemption of disclosure requirements; noting difference between affirmative misrepresentation and failure to disclose; here, servicer made false statements in response to non-delinquent borrower's requests for information); Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113 (11th Cir. 2004). *Accord* Ammedie v. Sallie Mae, Inc., 485 Fed. Appx. 399 (11th Cir. 2012) (reiterating limited scope of HEA preemption of state debt collection laws); Smith v. Collection Tech., Inc., 2016 WL 1169529 (S.D. W. Va. Mar. 22, 2016) (HEA does not prevent application of UDAP statute to collector that wrongfully garnished student loan debtor's

preempt a claim under Florida's debt collection statute that the collector asserted a legal right that it knew did not exist. On the other hand, the Ninth Circuit, without analyzing whether the specific state requirements at issue were inconsistent with the HEA, held that the HEA preempted application of a state debt collection statute to the pre-litigation debt collection activities of a student loan guarantee agency.[16] This view has little justification, as the HEA's requirements are not inconsistent in any way with the core requirements of the typical state debt collection statute, such as prohibitions of abusive language, deception, and late-night calls.

A Florida court held that the exclusivity provisions of the state workers compensation law do not preempt a Florida Consumer Protection Act claim against a healthcare provider that unlawfully attempted to collect directly from the injured worker.[17]

Preemption by the Fair Credit Reporting Act[18] is occasionally an issue in UDAP debt collection litigation. Courts have held that the specific preemption provisions of the FCRA override a UDAP claim that is based on communications to a credit reporting agency.[19] But FCRA preemption is irrelevant to other claims, such as a claim that a creditor violated the state UDAP statute by referring to a collection agency a debt that it knew the consumer did not owe.[20] Preemption under the FCRA is discussed in detail in another NCLC treatise.[21]

16.1.3 Litigation Privilege

Courts are divided on the question of whether California's broad statutory litigation privilege bars claims under the state debt collection statute that arise from litigation, such as suit on a time-barred claim or pre-litigation misrepresentations to induce settlement. Some courts have found some or all claims barred.[22] Other courts,[23] however, including the first

wages instead of performing its obligation to assist him in rehabilitating loan); Weber v. Great Lakes Educ. Loan Serv., 2013 WL 3943507 (W.D. Wis. July 30, 2013) (provisions of Wisconsin Consumer Act forbidding debt collection harassment not preempted by Higher Education Act); McComas v. Fin. Collection Agencies, Inc., 1997 WL 118417 (S.D. W. Va. Mar. 7, 1997) (HEA and its regulations do not preempt claims under West Virginia debt collection statute regarding collector's false threats, deceptive statements, misidentification, and demand for unauthorized fees). *See also* Peete-Bey v. Educ. Credit Mgmt. Corp., 131 F. Supp. 3d 422 (D. Md. 2015) (due diligence regulations adopted under HEA apply to guaranty agency only when it is acting as such, so cannot be basis for preemption when it is pursuing collection of a loan that has already been assigned to DoE and then farmed out for collection); Snuffer v. Great Lakes Educ. Loan Serv., Inc., 97 F. Supp. 3d 827 (S.D. W. Va. 2015) (HEA does not preempt state law provisions forbidding threatening or fraudulent conduct, but does preempt provision forbidding contact with represented debtor); Williams v. Educ. Credit Mgmt. Corp., 88 F. Supp. 3d 1338, 1343 (M.D. Fla. 2015) (HEA does not preempt Florida prohibition against threatening to enforce debts known not to be legitimate, or Florida's requirement of a notice that HEA does not require, but does preempt its prohibition of communication with represented debtor and its prohibition of harassment, because it would chill federal collections if courts determined whether level of contact was unreasonable); Adams v. Pa. Higher Educ. Assistance Agency, 787 S.E.2d 583 (W. Va. 2016) (HEA preempts state law forbidding contact with represented debtor, but not provisions forbidding assertion of a right known not to exist or collection of a debt known to be invalid). *But see* Clark v. Navient Solutions, L.L.C., 396 F. Supp. 3d 1083 (M.D. Fla. 2019) (provisions of Florida Consumer Collection Practices act that forbid contact with represented debtor and telephone harassment are preempted by Higher Education Act's requirements of direct communication with debtor and diligent efforts to collect debts).

16 Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260 (9th Cir. 1996) (acknowledging that HEA only preempts inconsistent provisions of state law, yet concluding that all state pre-litigation collection requirements are preempted without further analysis). *Accord* Hunt v. Sallie Mae, Inc., 2014 WL 793075 (D. Or. Feb. 23, 2014) (holding state debt collection claims preempted, without examining whether the particular state law prohibitions alleged here were inconsistent with HEA). *See also* Pirouzian v. SLM Corp., 396 F. Supp. 2d 1124 (S.D. Cal. 2005) (reading Ninth Circuit precedent as preempting all state regulation of pre-litigation collection activities, without need to determine whether they are inconsistent with HEA). *See generally* National Consumer Law Center, Student Loan Law §§ 9.4.4, 14.6.3.4 (6th ed. 2019), *updated at* www.nclc.org/library.

17 Davis v. Sheridan Healthcare, Inc., 281 So. 3d 1259 (Fla. Dist. Ct. App. 2019).

18 15 U.S.C. §§ 1681 to 1681x. *See* § 14.6.1, *supra*.

19 *See, e.g.*, Misel v. Green Tree Servicing, L.L.C., 782 F. Supp. 2d 171 (E.D.N.C. 2011) (North Carolina Debt Collection Act claim alleging false credit reporting is preempted by FCRA); Corby v. Am. Express Co., 2011 WL 4625719 (C.D. Cal. Oct. 5, 2011) (FCRA preempts section of Rosenthal Act that forbids knowingly communicating false credit information); Ayers v. Aurora Loan Services, L.L.C., 787 F. Supp. 2d 451 (E.D. Tex. May 27, 2011) (Texas Debt Collection act claim alleging false report that loan was in foreclosure is preempted by FCRA); Thomas v. U.S. Bank, 2007 WL 764312 (D. Or. Mar. 8, 2007); Islam v. Option One Mortgage Corp., 432 F. Supp. 2d 181, 200 (D. Mass. 2006).

20 Curtis v. Citibank, 261 P.3d 1059 (Mont. 2011). *See also* Fritz v. Duke Energy Carolinas, L.L.C., 2014 WL 3721373 (E.D.N.C. July 24, 2014) (FCRA did not preempt claim against creditor that failed to inform collector about misapplied payment, so that collector made inaccurate report).

21 National Consumer Law Center, Fair Credit Reporting § 10.7 (9th ed. 2018), *updated at* www.nclc.org/library.

22 *See, e.g.*, Hedayati v. Perry Law Firm, 2018 WL 3155186 (C.D. Cal. May 16, 2018) (litigation privilege bars Rosenthal Act claims that arose solely in context of litigation, here false statement in itemized statement of account provided during collection action), *adopted*, 2018 WL 3129803 (C.D. Cal. June 25, 2018); Boon v. Prof'l Collection Consultants, 978 F. Supp. 2d 1157 (S.D. Cal. 2013) (claim barred by privilege where only debt collection conduct alleged was filing of time-barred action); De la Torre v. Legal Recovery Law Office, 2013 WL 5462294 (S.D. Cal. Sept. 30, 2013) (litigation privilege protects cellphone and workplace calls made before filing action to collect judgment debt); Cassady v. Union Adjustment, Inc., 2008 WL 4773976 (N.D. Cal. Oct. 27, 2008) (case-by-case analysis; claims are barred where communications occurred "entirely in the context of filing a state court action to collect a debt"); Lopez Reyes v. Kenosian & Miele, L.L.P., 525 F. Supp. 2d 1158 (N.D. Cal. Dec. 6, 2007) (if gravamen of claim is communicative action, privilege applies); Nickoloff v. Wolpoff & Abramson, L.L.P., 511 F. Supp. 2d 1043 (C.D. Cal. 2007) (litigation privilege bars Rosenthal Act claims based on statements during arbitration proceeding); Taylor v. Quall, 458 F. Supp. 2d 1065 (C.D. Cal. 2006); G.R. v. Intelligator, 110 Cal. Rptr. 3d 559 (Cal. Ct. App. 2010) (where court rule governing use of credit reports in litigation provided adequate sanction for violation, application of privilege would not vitiate Rosenthal Act). *See generally* § 15.1.3, *supra*.

23 *See, e.g.*, Picazo v. Tirey, 2018 WL 1583228 (S.D. Cal. Apr. 2, 2018) (Rosenthal Act prevails over litigation privilege); Gonzalez v. Law Office of Allen Robert King, 195 F. Supp. 3d 1118 (C.D. Cal. 2016)

published state appellate decision,[24] hold that statutory claims are not barred. These courts reason that a contrary construction would effectively immunize activity that the statute specifically prohibits, and the more specific debt collection statute should prevail over the general privilege statute.

A federal court has applied a similar rationale to conclude that privilege does not bar a claim that a collector violated the Michigan Occupational Code by falsely stating in pleadings that certain claims had been assigned to its client.[25] Similarly, Wisconsin's health care privacy statute, specifically regulating the handling of confidential medical information in legal proceedings, has been held to override the common law judicial proceedings privilege.[26] A federal court in Utah has held that the privilege bars common law claims against a lawyer-debt collector, but not statutory claims, here a claim under the Utah Consumer Sales Practices Act.[27] Another federal court has declined to extend the District of Columbia litigation privilege to violations of the District's Debt Collection Practices Act, noting that D.C. courts have limited it to defamation cases.[28] A federal court refused to extend Washington's litigation privilege to a UDAP claim that alleged that an FDCPA violation was a *per se* violation of the UDAP statute.[29]

On the other hand, the Florida Supreme Court holds that the litigation privilege applies to all causes of action, common law and statutory, including claims under the state UDAP and debt collection statutes.[30] Nonetheless, the privilege does not protect deception in documents served with a complaint[31] or in letters sent after a foreclosure,[32] and it may not apply to correspondence during a foreclosure case about the reinstatement amount.[33] In Pennsylvania, the Third Circuit held that the litigation privilege barred UDAP and debt collection act claims that were based on a foreclosure action and communications in connection with that action.[34] A few decisions from Illinois[35] and Massachusetts[36] have also applied the privilege to statutory actions. Texas law grants broad immunity to attorneys, provided that their actions are not "foreign to the duties of a

(noting split of authority; concluding that privilege does not apply); Picard v. ABC Legal Services, Inc., 2015 WL 3465832 (N.D. Cal. June 1, 2015) (allowing Rosenthal Act claim alleging sewer service to go forward); Huy Thanh Vo v. Nelson & Kennard, 931 F. Supp. 2d 1080 (E.D. Cal. 2013); Ansari v. Elec. Document Processing, Inc., 2013 WL 4547621 (N.D. Cal. Aug. 29, 2013) (litigation privilege does not bar Rosenthal Act claim alleging falsified service of process); Holmes v. Elec. Document Processing, Inc., 966 F. Supp. 2d 925 (N.D. Cal. 2013) (privilege does not bar claim of false service of process); Do v. Hollins Law, P.C., 2013 WL 4013659 (N.D. Cal. Aug. 5, 2013) (phone calls without proper disclosure of identity not privileged even though made in connection with litigation); Townsend v. Nat'l Arbitration Forum, Inc., 2012 WL 12736, at *13 (C.D. Cal. Jan. 4, 2012); Welker v. Law Office of Daniel J. Horwitz, 699 F. Supp. 2d 1164 (S.D. Cal. 2010); Gerber v. Citigroup, Inc., 2009 WL 248094 (E.D. Cal. Jan. 29, 2009) (violations of Rosenthal Act not privileged), *adopted*, 2009 WL 2058576 (E.D. Cal. July 14, 2009); Welker v. Law Office of Horwitz, 626 F. Supp. 2d 1068 (S.D. Cal. June 16, 2009) ("routine debt collection letters" not privileged); Oei v. N. Star Capital Acquisitions, L.L.C., 486 F. Supp. 2d 1089 (C. D. Cal. 2006); Gross v. Judge, 2013 WL 4606152 (Cal. Ct. App. Aug. 28, 2013) (unpublished) (refusing to dismiss Rosenthal Act claim; homeowners' association not protected by litigation privilege). *See also* People v. Persolve, L.L.C., 160 Cal. Rptr. 3d 841 (Cal. Ct. App. 2013) (since state debt collection statute that is "borrowed" to support a UDAP claim is more specific than, and in irreconcilable conflict with, the privilege statute, privilege will not apply).

24 Komarova v. Nat'l Credit Acceptance, Inc., 95 Cal. Rptr. 3d 880 (Cal. Ct. App. 2009).

25 Eager v. Credit Bureau Collection Services, Inc., 2013 WL 5719224 (W.D. Mich. Oct. 18, 2013).

26 *In re* Ortiz, 430 B.R. 523 (Bankr. E.D. Wis. 2010) (attachment of unredacted medical information to proof of claim).

27 Brown v. Constantino, 2009 WL 3617692 (D. Utah Oct. 27, 2009) (finding no preemption; noting that Johnson v. Riddle, 2007 WL 1732400 (D. Utah June 14, 2007), which certified this question to Utah Supreme Court, was settled before that court could rule).

28 Osinubepi-Alao v. Plainview Fin. Serv., Ltd., 2014 WL 22121383 (D.D.C. May 29, 2014).

29 Hoffman v. Transworld Systems, Inc., 2018 WL 5734641 (W.D. Wash. Nov. 2, 2018), *aff'd in relevant part*, 806 Fed. Appx. 549 (9th Cir. 2020) (litigation privilege is confined to defamation claims).

30 Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380 (Fla. 2007) (inclusion of inflated costs in re-instatement letter sent before mortgage foreclosure). *See also* Kinsey v. MLH Fin. Services, Inc., 509 Fed. Appx. 852 (11th Cir. 2013) (Fla. law; claims under state debt collection statute barred; privilege covers claims arising from "any act that occurs during the course of a judicial proceeding, so long as the act has some relation to the proceeding"); Trent v. Mortgage Elec. Registration Sys., Inc., 288 Fed. Appx. 571 (11th Cir. 2008) (Fla. law; litigation privilege bars state debt collection act claims arising from foreclosure); Perez v. Bureaus Inv. Group II, L.L.C., 2009 WL 1973476 (S.D. Fla. July 8, 2009) (privilege bars state debt collection act claim alleging filing of time-barred lawsuit); Gaisser v. Portfolio Recovery Assoc., 571 F. Supp. 2d 1273 (S.D. Fla. 2008) (privilege bars Florida debt collection statute claims arising from filing of time-barred lawsuit); Pack v. Unifund CCR Partners, 2008 WL 686800 (M.D. Fla. Mar. 13, 2008) (privilege bars claims under Florida debt collection statute arising from filing of lawsuit).

31 N. Star Capital Acquisitions, L.L.C. v. Krig, 611 F. Supp. 2d 1324 (M.D. Fla. 2009) (stipulated judgment for entire amount claimed, described as settlement offer and "your last chance to avoid going to court").

32 Monroe v. Citimortgage, 2007 WL 2071284 (M.D. Fla. July 19, 2007) (privilege did not protect letters sent after foreclosure, even though court retained jurisdiction over case, where letters not necessary to prosecute, defend, or appeal from foreclosure).

33 Blake v. Seterus, Inc., 2017 WL 543223 (S.D. Fla. Feb. 9, 2017).

34 Schwartz v. OneWest Bank, 614 Fed. Appx. 80 (3d Cir. 2015) (Pa. law; privilege protects foreclosure complaints, sale notices, and all communications between bank's attorneys and borrower's attorney). *Accord* Bronstein v. Bayview Loan Servicing, L.L.C., 2020 WL 703652 (E.D. Pa. Feb. 11, 2020) (law firm is immune from liability for statements made in foreclosure complaint); Bainbridge v. Ocwen Loan Servicing, L.L.C., 2017 WL 1178047, at *22–24 (M.D. Pa. Mar. 30, 2017) (misstatements to court in foreclosure action).

35 Rosales v. Weltman, Weinberg & Reis Co., 2017 WL 1436957, at *5 (N.D. Ill. Apr. 24, 2017) (dismissing UDAP claim; litigation privilege bars all claims for a wrongful lawsuit except malicious prosecution).

36 Mack v. Wells Fargo Bank, 41 N.E.3d 323 (Mass. Ct. App. 2015) (litigation privilege protects foreclosure firm from UDAP liability to homeowner for communicating with her while knowing she was represented by counsel and scheduling a foreclosure sale despite preliminary injunction barring it from conducting such a sale).

lawyer," but the state debt collection statute creates an exception in certain circumstances.[37]

California's litigation privilege may bar claims under the state's UDAP statutes, but only if the claim is premised on privileged communications.[38] If, for example, the claim is based on a lender's imposition of improper charges, and its prelitigation attempts to collect those charges, the privilege is inapplicable.[39]

Connecticut courts have held that the privilege precludes claims under the state debt collection practices and UDAP statutes against an attorney for filing allegedly baseless collection suits or pleadings that contain misstatements,[40] but not claims based on misrepresentations outside the pleadings.[41] But another court held that the litigation privilege did not bar a claim that a lender had led a borrower to believe that a foreclosure action against him had been dismissed, and then reopened it and sought to eject his family once he was deployed overseas and unable to respond.[42] The court viewed this conduct as not in furtherance of the litigation.

The application of the litigation privilege to common law torts is discussed in § 15.1.3.1, *supra*. That section also discusses the privilege for statements made in judicial proceedings.

16.1.4 State Governmental Immunity

Government entities may be immune when they are collecting their own debts,[43] or the debt may not fall within the statute's scope.[44] States may also have special sovereign immunity statutes that protect state employees.[45] Absolute judicial immunity is likely to protect persons acting under court order, such as guardians ad litem, from state statutory claims based on their attempts to collect debts.[46] One court has held that an attorney retained by a private collector that had contracted with the state to collect child support was entitled to absolute prosecutorial immunity when she negotiated with and sued the obligor.[47] On the other hand, the Eleventh Amendment did not immunize a private company that was retained by a state governmental office as an independent contractor to carry out a bad check diversion program.[48]

16.1.5 Special Issues in Utility Collection Cases

Regulated utilities, which must file tariffs with an administrative agency, may be protected by the filed-rate doctrine from state debt collection claims.[49] Practitioners should, however, look closely to determine whether the conduct complained of is actually covered by a tariff. For example, where the relevant tariff limited telephone companies' liability except in case of willful misconduct, a consumer was allowed to go forward with state debt collection claims alleging that a long-distance carrier willfully and knowingly continued to bill him and seek termination for nonpayment after he had switched to a new carrier.[50]

Another question is whether consumers challenging collection methods for utility debts must proceed before the state utility commission rather than in court. An Oregon decision holds that utility customers were not required to seek administrative relief before bringing an action under the state debt collection statute, because the Public Utility Commission had no authority to enforce that statute.[51] Similarly, a claim that

37 Ruiz deBalderas v. ETX Successor Athens, 2020 WL 1479583 (E.D. Tex. Mar. 4, 2020), *adopted*, 2020 WL 1478563 (E.D. Tex. Mar. 26, 2020).

38 *See, e.g.*, Carr v. Asset Acceptance, L.L.C., 2011 WL 3568338 (E.D. Cal. Aug. 12, 2011) (litigation privilege bars claim that false statements made in collection suit violated state UDAP statute).

39 Guiccone v. JPMorgan Chase Bank, 2015 WL 1968114 (N.D. Cal. May 1, 2015).

40 Dina v. Cuda & Assoc., 950 F. Supp. 2d 396, 407–408 (D. Conn. 2013) (privilege bars claim based on filing of false affidavit to obtain judgment); Jonas v. Delallo, 2012 WL 6846396 (Conn. Super. Ct. Dec. 11, 2012).

41 Davis v. Hunt, Leibert, Jacobson, P.C., 2014 WL 5798585, at *5 (D. Conn. Nov. 7, 2014) (litigation privilege inapplicable to claim that collection firm violated UDAP statute by misrepresenting that foreclosure action was dismissed, and by demanding that family vacate home without advising them that it had not obtained court order necessary to give it right to possession).

42 Davis v. Hunt Leibert Jacobson, P.C., 2014 WL 5798585 (D. Conn. Nov. 7, 2014).

43 Wall v. City of Raleigh, 465 S.E.2d 551 (N.C. Ct. App. 1996) (city employees collecting parking fines were engaged in governmental function, so were immune from claims under state debt collection act).

44 *See, e.g., In re* DeSteph, 2009 WL 5171833 (Bankr. D.N.H. Dec. 2, 2009) (state agency is not subject to state debt collection statute when it imposes administrative penalties).

45 *See* Greenberg v. Caesar's Entertainment Corp., 2015 WL 437577 (E.D. Pa. Feb. 2, 2015) (list of exceptions in state sovereign immunity statute is exclusive, and does not include intentional violation of debt collection statute; dismissing claim against police officers who arrested casino patron for highly disputed debt), *reconsideration denied*, 2015 WL 2069411 (E.D. Pa. May 5, 2015).

46 Amour v. Collection Prof'ls, Inc., 350 P.3d 71 (Mont. 2015) (absolute quasi-judicial immunity barred state debt collection claim against court-appointed guardian ad litem arising from efforts to collect her fee; declining to reach question whether immunity would cover intentional tort).

47 Cottingham v. Policy Studies, Inc., 2008 WL 768854 (M.D. Tenn. Mar. 21, 2008).

48 Rosaria v. Am. Corrective Counseling Services, Inc., 506 F.3d 1039 (11th Cir. 2007).

49 *See, e.g.*, Holt v. W. Va.-Am. Water Co., 760 S.E.2d 502 (W. Va. 2014) (construing UDAP statute's exemption transactions under public utility tariffs broadly to encompass all matters addressed by utility's tariff and to immunize water company from UDAP liability for terminating customer's service in violation of public utility commission order).

50 Adamson v. WorldCom Communications, Inc., 78 P.3d 577 (Or. Ct. App. 2003).

51 Isom v. Portland Gen. Elec. Co., 677 P.2d 59 (Or. Ct. App. 1984). *See also* Egbarin v. Northeast Utilities Serv. Co., 2015 WL 4965891 (Conn. Super. Ct. July 23, 2015) (finding jurisdiction to decide claims under state UDAP and debt collection statutes alleging that utility company transferred balance from one account to another in violation of agency rule, because agency had no power to enforce those statutes), *later decisions* 2016 WL 3202491 (Conn. Super. Ct. May 18, 2016) (CCPA and CUTPA violations sufficiently alleged), 2016 WL 3202494 (Conn.

a utility company attempted to collect a debt discharged in bankruptcy does not relate to rate structure, so can be litigated in court.[52]

16.2 Consumer Protections Under State Debt Collection Statutes and Regulations

16.2.1 Overview

State debt collection statutes provide the primary consumer remedy for debt collection abuse in many instances. For example, in many states these statutes apply to creditors who are not covered by the federal Fair Debt Collection Practices Act.[53] Even in suits against collectors, state remedies, which often include statutory damages and attorney fees, may compare favorably to FDCPA remedies.

All but five states have statutes specifically dealing with abuses by debt collectors.[54] These statutes are cited and summarized at Appendix D, *infra*.

Although state debt collection statutes are varied, certain common forms exist. One common form provides standards for licensing collection agencies. These licensing laws may also:

- Proscribe abusive practices and provide a private right of action for injured consumers;
- Proscribe unethical practices in the relations between collection agencies and creditors; and
- Authorize an administrative agency to issue licenses and promulgate regulations.

Another common form emphasizes consumer protection rather than licensing, proscribing specific types of misconduct and providing a private right of action for injured consumers. A third common form provides criminal penalties against misconduct such as simulating legal process.

State statutes regulating specific types of debt, such as payday loans or rent-to-own transactions,[55] may also include debt collection standards, which will prevail over more general state debt collection statutes. A number of states have more than one type of statute.

Thirty-six jurisdictions require at least some debt collectors to be licensed, registered, or bonded, and about half provide an express private right of action for consumers.[56] A private right of action is implied under some of the other statutes.[57] Violation of statutory debt collection restrictions may also be actionable under general consumer protection law.[58]

State debt collection statutes should be applied and construed liberally to accomplish their remedial purposes.[59]

16.2.2 Constitutionality of State Debt Collection Statutes

In *Harris v. Beneficial Finance Co.*,[60] the Florida Supreme Court upheld the Florida debt collection statute, a relatively broad and protective state statute, against a creditor's claim that the statutory prohibition of employer contacts infringed upon its right of free speech under the First Amendment and that the remedy of $500 minimum statutory damages deprived it of property without due process of law. The West Virginia statute's restrictions on telephone harassment have been upheld against a First Amendment challenge.[61]

First Amendment jurisprudence is in a time of flux, and some Supreme Court justices have called for it to be reexamined.[62] In *Barr v. American Ass'n of Political Consultants, Inc.*,[63] the Supreme Court, at the behest of entities making political calls, struck down a provision of the Telephone Consumer Protection Act that carved out calls made to collect government debt from a restriction on autodialed and prerecorded calls. The Court held that this carve-out violated the First Amendment, because it was content-based. The plurality opinion explicitly distinguishes statutes like the Fair Debt Collection Practices Act, however, and holds that "[o]ur decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity."[64] Three dissenters would not have found the carve-out unconstitutional at all.

A restriction on contact with represented debtors, if the attorney's contact information is "known or can be easily

Super. Ct. May 18, 2016) (also stated claim for contact with represented consumer).

52 Thomas v. Peoples Gas Light & Coke Co., 959 N.E.2d 1201 (Ill. App. Ct. 2011).

53 *See* Hartman v. Meridian Fin. Services, 191 F. Supp. 2d 1031, 1048 (W.D. Wis. 2002) (refusing to read FDCPA's exceptions to definition of debt collector into Wisconsin debt collection statute).

54 The six states that do not have debt collection statutes are Kentucky, Mississippi, Missouri, Montana, Ohio, and South Dakota. In addition, the Georgia statute summarized in Appendix D, Ga. Code Ann. §§ 7-3-1 to 7-3-29, deals only with debt collectors working for industrial loan companies.

55 *See, e.g.*, Minn. Stat. Ann. §§ 325F.91, 325F.92.

56 *See* Appx. D, *infra*.

57 *See* § 16.2.5, *infra*.

58 *See* §§ 16.2.5, 16.3.6, *infra*.

59 Hartman v. Meridian Fin. Services, 191 F. Supp. 2d 1031, 1050 (W.D. Wis. 2002); Schauer v. GMAC, 819 So. 2d 809 (Fla. Dist. Ct. App. 2002) (Fla. debt collection act must be liberally construed); City Fin. Co. v. Boykin, 358 S.E.2d 83 (N.C. Ct. App. 1987).

60 338 So. 2d 196 (Fla. 1976). *See also In re* Sechuan City, Inc., 96 B.R. 37 (Bankr. E.D. Pa. 1989) (coercive, harassing signs not constitutionally protected commercial speech because they went beyond informing public of bankruptcy). *But cf.* ACA Int'l v. Healey, 457 F. Supp. 3d 17 (D. Mass. 2020) (temporary ban on telephone calls and collection suits during coronavirus pandemic violates First Amendment; ban on calls does not materially advance debtors' interests beyond existing protections, and ban on suits denies right to petition for redress of grievances). *See generally* Annot., *Validity, Construction, and Application of State Statutes Prohibiting Abusive or Coercive Collection Practices*, 87 A.L.R.3d 786 (1978).

61 Stover v. Fingerhut Direct Mktg., Inc., 709 F. Supp. 2d 473 (S.D. W. Va. 2009).

62 Barr v. Am. Ass'n of Political Consultants, Inc., ___ U.S. ___, 140 S. Ct. 2335, 2356, 207 L. Ed. 2d 784 (2020) (Breyer, J., concurring in judgment with respect to severability and dissenting in part).

63 *Id.*

64 *Id.* at 2347.

ascertained," although broader than that of the FDCPA, was not void for vagueness.[65] Statutory requirements that out-of-state debt collectors obtain a license or maintain an office are not an undue burden on commerce.[66] The Eleventh Circuit held that a requirement that debt buyers register in the state before filing suit did not violate the state constitution's guarantee of access to courts.[67]

16.2.3 Scope of State Debt Collection Statutes

16.2.3.1 Types of Debts Covered

16.2.3.1.1 "Claim" vs. "debt"; "credit"

Debt collection statutes are frequently limited in their coverage to a "claim"[68] or a "debt."[69] A number of courts hold that the term "debt" includes rent[70] and condominium and homeowner association assessments.[71] If the statute merely requires

65 *Id. See also* Hall v. Bureau of Employment Agencies, 138 Cal. Rptr. 725 (Cal. Ct. App. 1976) (requirement that collector conform to "ethical business standards" not unconstitutionally vague where it was applied to campaign of telephone harassment).

66 Silver v. Woolf, 694 F.2d 8 (2d Cir. 1982) (Connecticut's statute regulating out-of-state debt collection agencies and requiring them to obtain licenses not unconstitutional burden on interstate commerce); Collins v. Erin Capital Mgmt., L.L.C., 991 F. Supp. 2d 1195 (S.D. Fla. Oct. 28, 2013) (requiring out-of-state passive debt buyer to register before bringing garnishment actions in Florida did not violate dormant commerce clause); Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358 (D. Md. 2010) (Maryland licensing statute did not facially discriminate against out-of-state collection agencies, and burden on interstate commerce was not excessive in relation to local benefits); Norton v. Local Loan Co., 251 N.W.2d 520 (Iowa 1977); Commonwealth v. Allied Bond & Collection Agency, 476 N.E.2d 955 (Mass. 1985) (statute did not violate Commerce Clause by requiring out-of-state collection agency to obtain license and maintain office in Massachusetts); Meyers v. Matthews, 71 N.W.2d 368 (Wis. 1955). *But cf.* Codar v. Arizona, 1996 WL 471335 (9th Cir. Aug. 19, 1996) (requirement that out-of-state collection agency maintain office in state may violate Commerce Clause if it requires more than office for recordkeeping and audit purposes; whether residency requirement is constitutional depends on whether employment of state resident merely to manage in-state office is sufficient); Nat'l Revenue Corp. v. Violet, 807 F.2d 285 (1st Cir. 1986) (prohibition of collection activities by anyone not licensed to practice in R.I. is unconstitutional burden on commerce); Eric M. Berman, P.C. v. City of New York, 895 F. Supp. 2d 453, 469–470 (E.D.N.Y. 2012) (debt collection ordinance violates Commerce Clause to extent it regulates contracts formed entirely outside the state), *vacated in part on other grounds*, 796 F.3d 171 (2d Cir. 2015) (vacating ruling that ordinance was preempted by state law; remanding for resolution of First Amendment challenge).

67 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1198 (11th Cir. 2010) (Fla. law).

68 *See, e.g.*, Flores v. Rawlings Co., L.L.C., 177 P.3d 341 (Haw. 2008) (claims recovery service, which pursued subrogation claims for medical benefits plan, must register as Hawaii collection agency, defined to include entities that collect any type of "claim"). *But cf.* Hinkle v. Matthews, 337 F. Supp. 3d 674 (S.D. W. Va. 2018) (sale of gap insurance at time of automobile purchase, when its full cost was paid to seller, does not create a claim; seller's acceptance of payment does not make it a debt collector), *aff'd*, ___ Fed. Appx. ___, 2020 WL 7353778 (4th Cir. Dec. 15, 2020).

69 *Finding coverage*: Piper v. Portnoff Law Assoc., 274 F. Supp. 2d 681 (E.D. Pa. 2003) (delinquent water bill was debt), *aff'd*, 396 F.3d 227 (3d Cir. 2005); Hartman v. Meridian Fin. Services, 191 F. Supp. 2d 1031, 1048 (W.D. Wis. 2002) (timeshare obligation met definition of debt regardless of whether it was in default); People *ex rel.* Rhoades v. W. Va. Credit Bur. Reporting Services, 96 F. Supp. 2d 528 (S.D. W. Va. 2000) (W. Va. Consumer Credit Protection Act's debt collection provisions apply to "any debt," not just revolving charge accounts); Ledisco Fin. Services v. Viracola, 533 S.W.2d 951 (Tex. App. 1976) (collector attempting to repossess consumer's credit card was acting "in connection with a 'debt' "); Lily v. Tolar, 2002 WL 1926527 (Tex. App. Aug. 22, 2002) (bail bond covered); Tennessee Attorney General, Op. No. 00-105, 2000 Tenn. AG LEXIS 107 (June 8, 2000) (purchase of and collection upon unpaid judgments is covered). *See also* Kett v. Cmty. Credit Plan, Inc., 596 N.W.2d 786 (Wis. 1999), *aff'g* 586 N.W.2d 68 (Wis. Ct. App. 1998) (Wisconsin Consumer Act applies to *in rem* proceedings to recover collateral).

Finding no debt and no coverage: Fusco v. Ocwen Loan Servicing, L.L.C., 2020 WL 2519978 (S.D. Fla. Mar. 2, 2020) (convenience fee for paying by phone or online is debt within meaning of FDCPA, but not Florida Consumer Collection Practices Act; FDCPA covers charges "incident to" payment of a debt, but Florida requires showing of an obligation; because consumer could avoid fee by mailing check, it was not an obligation); McGinity v. Tracphone Wireless, Inc., 5 F. Supp. 3d 1337 (M.D. Fla. 2014) (debt collection statute inapplicable to extortion attempt where extortionist demanded money, but did not claim that it was based on a debt); Vanderbilt Mortg. & Fin., Inc. v. Flores, 747 F. Supp. 2d 794 (S.D. Tex. 2010) (landowners whose land was used, without their knowledge or consent, to secure third parties' debts, never incurred debt or alleged debt for personal, family or household purposes); Hunter v. Bev Smith Ford, 2008 WL 1925265 (S.D. Fla. Apr. 29, 2008) (yo-yo sale of motor vehicle; no debt owed, because contract, which was contingent on financing, never formed), *aff'd*, 353 Fed. Appx. 218 (11th Cir. 2009); Jones v. TT of Longwood, Inc., 2006 WL 2789140 (M.D. Fla. Sept. 26, 2006) (dismissing claim under state debt collection statute arising from yo-yo sale of motor vehicle; no debt where transaction never completed and title never passed); Friday v. United Dominion Realty Trust, Inc., 575 S.E.2d 532, 537–538 (N.C. Ct. App. 2003) (stating that court costs are to be imposed by trial court and are not a "debt," so debt collection statute is inapplicable to landlord's demand for them); Pargas of Longview, Inc. v. Jones, 573 S.W.2d 571 (Tex. App. 1978) (dispute over ownership of butane gas tank affixed to consumer's land and repossessed by gas distributor did not involve "debt"). *See also* Henshaw v. Wells Fargo Bank, 2015 WL 5345439 (S.D. W. Va. Sept. 11, 2015) (noting two different definitions of consumer in West Virginia statute: general definitions include one who "incurs" a debt, but debt collection provisions apply only to one who is obligated or allegedly obligated to pay; finding no coverage for attempts by mortgage lender to collect debt discharged in bankruptcy because lender never alleged that borrowers were personally obligated).

70 Jarzyna v. Home Properties, L.P., 763 F. Supp. 2d 742 (E.D. Pa. 2011) (state debt collection statute applies to landlord); Pippert v. Niece, 518 F. Supp. 2d 1265 (D. Or. 2007) (Oregon statute covers landlord, manager, property management company, and rent collector); Friday v. United Dominion Realty Trust, Inc., 575 S.E.2d 532 (N.C. Ct. App. 2003) (landlord that sought to recover past due rent and related charges was debt collector; late fees for past due rent and contractual administrative fee for filing eviction action are debts as defined by state debt collection statute).

71 Agrelo v. Affinity Mgmt. Services, L.L.C., 841 F.3d 944 (11th Cir. 2016) (fine imposed by homeowners' association is debt covered by Florida statute; distinguishing cases arising from government-imposed fines); Haddad v. Alexander, Zelmanski, Danner & Fioritto, 698 F.3d 290 (6th Cir. 2012) (condo assessments are debts covered

a "claim" or a "debt" it will also probably apply to collection of dishonored checks[72] and to collection of obligations arising from non-credit transactions.[73]

Other state debt collection statutes are limited to "credit."[74] These statutes will probably not apply to collection of dishonored checks that are not written as part of a credit transaction, such as a payday loan.[75] Nor will they apply to debts for rent or condominium assessments,[76] or debts arising from cash transactions.[77]

by Michigan Collection Practices Act); Scherer v. Steel Creek Prop. Ass'n., 2016 WL 1251223 (W.D.N.C. Mar. 30, 2016) (property owners' association assessment is covered debt, but dismissing claim on other grounds); Malowney v. Bush/Ross, 2009 WL 3806161 (M.D. Fla. Nov. 12, 2009) (condo assessment is debt as defined by Florida debt collection statute); Wright v. Bush Ross P.A., 2008 WL 190466 (M.D. Fla. Jan. 18, 2008) (condominium and homeowners association assessments are consumer debts; debt need not arise from credit transaction); Kelly v. Dugan, 282 So. 3d 969 (Fla. Dist. Ct. App. 2019) (statute applies to condominium assessments; note that Florida's intermediate appellate decisions are split on this issue); Reid v. Ayers, 531 S.E.2d 231 (N.C. Ct. App. 2000) ("debt" in North Carolina debt collection statute is not limited to credit transactions and includes homeowner association dues); Davis Lake Cmty. Ass'n v. Feldmann, 530 S.E.2d 865 (N.C. Ct. App. 2000) (homeowners association dues and assessments are "debts"); Fleet v. Webber Springs Owners' Assoc., Inc., 772 S.E.2d 369 (W. Va. 2015) (homeowners' association assessments are claims within meaning of West Virginia Consumer Credit Protection Act, because maintenance of common areas and roads is a family or household purpose).

72 Rosaria v. Am. Corrective Counseling Services, Inc., 506 F.3d 1039 (11th Cir. 2007) (allowing Florida debt collection statute claims to go forward against for-profit bad check program that contracted with prosecutor's office); Frankowski v. Nathanson, 2016 WL 7337247 (E.D. Mich. Dec. 19, 2016) (e-check, for automatic withdrawal as part of payment plan for debt, was debt covered by FDCPA and Michigan statute); Cavnar v. BounceBack, Inc., 2015 WL 4429095 (E.D. Wash. July 17, 2015) (Wash. statute does not specifically exempt bad check diversion programs; fact issue whether program here fits within general exemption for public officers); Semper v. JBC Legal Group, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005) (law firm that purchased debts, here NSF checks, for purpose of collecting them, was debt collector within meaning of Washington collection agency statute); Int'l Bureau of Fraud Control, Ltd. v. Clayton, 544 N.E.2d 416 (Ill. App. Ct. 1989) (company that collected returned checks for retailers was debt collector covered by collection agency statute); Cash N Go, Inc. v. Spruce, 2018 WL 2175703 (W. Va. Ct. App. May 11, 2018) (returned check was a claim). *See also* Iowa Code § 537.7102(3) (defining debt to include check when given in connection with rent-to-own, payday loan, or consumer sales transaction); Landfried v. Spokane County, 2011 WL 1584328 (E.D. Wash. Apr. 27, 2011) (check diversion program seeks to collect debts owed to others and meets definition of collection agency, so must be licensed); Liles v. Am. Corrective Counseling Services, 131 F. Supp. 2d 1114 (S.D. Iowa 2001) (fact question whether independent contractor hired by county attorney to process NSF checks, who sent out misleading notices about criminal prosecution, was debt collector under Iowa debt collection statute). *But cf.* St. Pierre v. Winn Dixie Stores, Inc., 592 So. 2d 1252 (Fla. Dist. Ct. App. 1992) (payment of cash in exchange for check is not extension of credit, so is not covered by Florida debt collection statute).

73 *See, e.g.*, PurCo Fleet Services v. Idaho State Dep't of Fin., 90 P.3d 346 (Idaho 2004) (claim for damage to rental vehicle is "claim or other indebtedness" covered by Idaho debt collection law). *But see* Sizemore v. Northwestern Mut. Life Ins. Co., 2017 WL 3528851 (S.D. W. Va. Aug. 16, 2017) ("claim" must include deferral of payment; attempt to collect alleged overpayment of disability benefits not covered).

74 *See, e.g.*, Stephen Boston v. ClubCorp. USA, Inc., 2019 WL 1877592 (C.D. Cal. Jan. 2, 2019) (recurring payments for ongoing services, here club dues, are not debt because there is no credit transaction); Mlnarik v. Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., 2014 WL 6657747 (N.D. Cal. Nov. 21, 2014) (fines imposed for violation of homeowners' association rules were not a debt covered by Rosenthal Act, because association did not extend credit to homeowners); UDO v. Kelkris Assoc., Inc., 2012 WL 5985663 (S.D. Cal. Nov. 29, 2012) (Rosenthal Act does not apply to debt for nonconsensual towing and storage of car, because there was no extension of consumer credit); Jachimiec v. Regent Asset Mgmt. Solutions, 2011 WL 2160661 (S.D. Cal. May 26, 2011) (Rosenthal Act applies only to transactions in which property, services, or money are obtained on credit; bank fees not consumer debt); Branco v. Credit Collection Services Inc., 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011) (debt for unpaid car insurance arises from credit transaction, so state debt collection statute applies); Leon v. Emergency Med. Group of Watsonville, 2016 WL 3773933 (Cal. Ct. App. July 11, 2016) (medical billing service could be debt collector; credit was extended because services were performed without advance payment); Alaskan Fireplace, Inc. v. Everett, 667 N.W.2d 378 (Wis. Ct. App. 2003) (not consumer credit transaction within meaning of Wisconsin statute where parties contemplated single payment to be made by homebuilder). *But cf.* Reid v. Ayers, 531 S.E.2d 231 (N.C. Ct. App. 2000) ("debt" in North Carolina debt collection statute is not limited to credit transactions).

75 Edwards v. Crosscheck, Inc., 2011 WL 2836759 (N.D. Cal. July 13, 2011) (NSF check not consumer credit transaction); Abels v. JBC Legal Group, P.C., 428 F. Supp. 2d 1023 (N.D. Cal. 2005) (NSF check not debt because not credit transaction); Midwest Recovery Services v. Wolfe, 463 N.W.2d 73 (Iowa 1990) (collection of bad checks that were written for cash not covered by Iowa debt collection statute, which applies to consumer credit transactions).

76 *See, e.g.*, State *ex rel.* Morrissey v. Copper Beech Townhome Communities Twenty-Six, L.L.C., 806 S.E.2d 172 (W. Va. 2017) (debt collection and deceptive practices provisions of West Virginia Consumer Credit Protection Act do not apply to fees charged by residential landlords pursuant to leases); Leasure v. Willmark Communities, Inc., 2013 WL 6097944 (S.D. Cal. Mar. 14, 2013) (landlord's attempts to collect rent not covered by Rosenthal Act; statute applies only to "consumer credit" transactions and landlord does not extend credit); Durham v. Cont'l Cent. Credit, 2009 WL 3416114 (S.D. Cal. Oct. 20, 2009) (homeowners association annual assessments not covered by Rosenthal Act because no extension of credit).

77 Greenberg v. Caesar's Entertainment Corp., 2016 WL 1106885 (E.D. Pa. Mar. 21, 2016) (erroneous overpayment by casino not debt covered by Pennsylvania's Fair Credit Extension Uniformity Act, which applies only to debts resulting from loans or purchases); UDO v. Kelkris Assoc., Inc., 2012 WL 5985663 (S.D. Cal. Nov. 29, 2012) (Rosenthal Act does not apply to towing debt because it was a cash transaction); Gouskos v. Aptos Vill. Garage, Inc., 114 Cal. Rptr. 2d 558 (Cal. Ct. App. 2001) (California Fair Debt Collection Act did not apply to collection of car repair debt because there was no credit offered and no payment for repairs); Sterling Mirror, Inc. v. Gordon, 619 A.2d 64 (D.C. 1993) (D.C. Consumer Credit Protection Act applies to actions to enforce rights arising from consumer credit sale or direct installment loan, not to collection of cash due on delivery); Carter Opticians, Inc. v. Davis, 367 So. 2d 227 (Fla. Dist. Ct. App. 1979) (sale of eyeglasses to be picked up and paid for in cash few hours after order did not involve "credit"); Anderson v. Nextel Partners, Inc., 745 N.W.2d 464 (Iowa 2008) (Iowa debt collection statute inapplicable to cell phone contract; no extension of credit where consumer paid in full for phone at time of purchase, even though contract was contingent on credit approval and consumer paid by month for phone service); State *ex rel.* Miller v. Nat'l Farmers Org., 278 N.W.2d 905 (Iowa 1979) (because organization's

16.2.3.1.2 Must the debt arise from a "transaction"?

Some debt collection statutes apply only to debts arising from a "transaction." Courts usually decline to apply these statutes to collection of tort claims,[78] claims of debt based on shoplifting[79] or unauthorized receipt of a subscription television service's signals,[80] benefit overpayments,[81] or fines.[82]

16.2.3.1.3 Is the statute limited to consumer debts?

Although some state debt collection statutes apply to business as well as consumer debts,[83] many apply only to consumer transactions.[84] Courts have held that transactions involving

membership dues and assessments are "due and payable" on specific date, no "credit" and, therefore, no debt involved).

78 Antoine v. State Farm Mut. Auto. Ins. Co., 662 F. Supp. 2d 1318 (M.D. Fla. 2009) (tort judgment not debt; no Florida Creditors Collection Practices Act claim against collector who vigorously pursued innocent third party whose name was vaguely similar to judgment debtor's); Shaw v. Credit Collection Services, 2008 WL 2941261 (M.D. La. July 28, 2008) (debt arising from motor vehicle accident); Ybarra v. Greenberg & Sada, P.C., 429 P.3d 839 (Colo. 2018) (subrogated tort claim not covered, because it does not arise from business transaction); Dickey v. Healthcare Recoveries, 1998 WL 20728 (Tex. App. Jan. 23, 1998) (Texas debt collection statute does not apply to health care insurer's pursuit of subrogation claim against third-party tortfeasor who caused consumer's injuries, because its rights did not arise from transaction, so is not debt). *See also* Panag v. Farmers Ins. Co., 204 P.3d 885 (Wash. 2009) (Washington Collection Agency Statute did not cover activities of agency collecting insurance company's subrogation claims from allegedly at-fault drivers, but drivers stated UDAP claim).

79 Payless Drug Store v. Brown, 698 P.2d 45 (Or. Ct. App. 1985) (debt collection statute does not apply to shoplifting because it is not "transaction"), *rev'd and remanded on other grounds*, 708 P.2d 1143 (Or. 1985).

80 *See, e.g.*, DirecTV, Inc. v. Karpinsky, 269 F. Supp. 2d 918, 927 (E.D. Mich. 2003), *as amended by* 274 F. Supp. 2d 918 (E.D. Mich. 2003) (alleged signal theft not debt); DirecTV, Inc. v. Cephas, 294 F. Supp. 2d 760 (M.D.N.C. 2003) (sums owed as result of signal theft not debt, but allowing UDAP claims to go forward); Tipton v. Williamette Subscription Television, 735 P.2d 1250 (Or. Ct. App. 1987) (claims arising from unauthorized reception of signals is not consumer transaction, since no transaction).

81 Leach v. Connecticut Dep't of Labor, 2019 WL 1436969 (N.H. Mar. 14, 2019) (overpayment of employment benefits is not consumer transaction; state agency seeking repayment is not debt collector).

82 Syria v. Alliance One Receivables Mgmt., Inc., 2018 WL 3455499 (W.D. Wash. July 18, 2018) (criminal court fines and fees, here being collected by private collector, are not claims because they do not originate in contract), *aff'd*, 770 Fed. Appx. 861 (9th Cir. 2019); Herrera v. AllianceOne Receivables Mgmt., Inc., 2015 WL 3796123 (S.D. Cal. June 18, 2015) (persistent attempt to collect traffic fines from wrong person; Rosenthal Act claim fails because fines are not a debt); Worley v. Mun. Collections of Am., Inc., 2015 WL 890878 (N.D. Ill. Feb. 27, 2015) (municipal fines not a debt covered by consumer act); Sailola v. Mun. Services Bureau, 2014 WL 3389395 (D. Haw. July 9, 2014) (fine and criminal court fees not covered, because underlying transaction not for consumer purpose); *In re* DeSteph, 2009 WL 5171833 (Bankr. D.N.H. Dec. 2, 2009) (state agency's imposition of penalties for sale of unregistered securities wholly different from collecting debt); *In re* Benson, 2009 WL 2957786 (Bankr. E.D. Pa. Sept. 10, 2009) (parking fines not debt under state debt collection statute); Rector v. City and County of Denver, 122 P.3d 1010 (Colo. App. 2005) (debt for traffic fines or municipal parking fees did not arise from consumer transaction, so Colorado Fair Debt Collection Act does not apply). *But see* Daley v. Datacom Sys. Corp., 585 N.E.2d 51 (Ill. 1991) (unpaid municipal parking fine was "debt").

83 *See* Shelton v. Wilson, 185 Fed. Appx. 696 (9th Cir. 2006) (Or. law) (affirming injunction against unlicensed collection of business debt).

84 *See* Jones v. Portfolio Recovery Assoc., 796 Fed. Appx. 821 (5th Cir. 2019) (consumer's testimony that she never used credit card other than for consumer purposes is sufficient, even though she did not tie her testimony to this particular credit card); McDonald v. Bennett, 674 F.2d 1080 (5th Cir. 1982) (Texas Debt Collection Act applies to consumer transactions, not to business ventures); Norton v. LVNV Funding, L.L.C., 396 F. Supp. 3d 901 (N.D. Cal. 2019) (consumer's allegation that she only used credit cards for consumer purposes sufficient, even though she could not identify this particular alleged credit card debt); Scherer v. Steel Creek Prop. Ass'n., 2016 WL 1251223 (W.D.N.C. Mar. 30, 2016) (dismissing claim regarding collection of property owners' association assessment, because plaintiff landowners who planned to use property for horse farm are not consumers); Amos Fin., L.L.C. v. Law Office of Charles Kazarian, 2016 WL 3102008 (D. Mass. June 2, 2008) (Mass. statute does not apply to line of credit provided to debtor's professional corporation, even if debtor used funds for consumer purposes); Harden v. Autovest, L.L.C., 2016 WL 3049308 (W.D. Mich. May 31, 2016) (fact issue whether loan was consumer; license plate for truck was commercial, but consumer testified that he simply transferred the plate from his old truck); Gray v. Chase Bank, 2011 WL 4716232 (S.D. W. Va. Oct. 7, 2011) (granting summary judgment to creditor because consumer failed to show that credit card was used for personal, family or household purposes); Golden v. Wisconsin Physician's Serv. Health Ins. Corp., 2010 WL 5289682 (E.D. Cal. Dec. 16, 2010) (insurer attempting to recover from physician sums paid in error; not consumer debt); Carlson v. Trans Union, L.L.C., 2003 WL 21750706 (N.D. Tex. July 22, 2003) (allegation that plaintiff was being wrongfully held liable for debts of former employer did not state claim under Texas statute; not consumer debt); *In re* DeSteph, 2009 WL 5171833 (Bankr. D.N.H. Dec. 2, 2009) (penalties imposed by state agency for sale of unregistered securities not consumer debt); Cavalry SPV I, L.L.C. v. Watkins, 249 Cal. Rptr. 3d 334 (Cal. Ct. App. 2019) (credit card debt arose from consumer credit transaction where card agreement prohibited non-consumer use and there was no evidence that plaintiff used it otherwise); Leach v. Conn. Dep't of Labor, 2019 WL 1436969 (N.H. Mar. 14, 2019) (receipt of unemployment benefits is not a consumer transaction, defined as one involving provision of property, service, or credit for personal, family, or household purposes or a consumer credit transaction, so debt collection statute does not apply to attempts to recoup overpayment); Wells Fargo Bank v. Corneal, 767 S.E.2d 374 (N.C. App. 2014) (must allege that loan was for personal, family, household, or agricultural purposes); Rowe v. Bank of the Cascades, 683 P.2d 93 (Or. Ct. App. 1984); Miller v. Clear Mtn. Bank, Inc., 2013 WL 1301128 (W. Va. Mar. 29, 2013) (definition of consumer in debt collection section of West Virginia Consumer and Credit Protection Act is narrower than that in general definitions section; loan for agricultural purposes not covered). *See also* ERGS II, L.L.C. v. Lichtin, 2013 WL 1246770 (E.D.N.C. Mar. 27, 2013) (North Carolina requirements for debt buyers' suits on purchased debts apply only to consumer debt; not applicable to personal guarantee of debt of L.L.C.). *See generally* § 4.6.1, *supra* (similar definition under FDCPA); National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.1.8 (9th ed. 2016), *updated at* www.nclc.org/library (similar definitions under state UDAP statutes).

timeshares,[85] taxes,[86] medical debts,[87] and bail bonds[88] are consumer transactions. The Ninth Circuit held that a loan obtained by the trustee of a revocable trust, to finance repairs to the home of her niece, the beneficiary, was a consumer transaction covered by California's Rosenthal Act.[89] By contrast, courts usually hold that these statutes do not apply to debts to purchases items for resale,[90] acquisition of property for investment purposes,[91] and debts by businesses for their ongoing expenses.[92] When a transaction has mixed purposes, courts often treat the question of whether it is a consumer transaction as a question of fact.[93]

One court granted summary judgment against an identity theft victim on her claim under the state debt collection law because she could not prove that the debt—of which she knew nothing—was incurred for consumer purposes.[94] The court noted, however, that evidence about the nature of the specific charges made with the fraudulently obtained credit card might be sufficient to establish consumer use. Another court, noting the difficulty of applying the consumer transaction definition in identity theft cases, allowed claims by the owner of a small business to go forward where the thief had used the owner's personal identifying information in connection with the accounts and the bank treated the debts as if they were owed personally by the victim.[95] Proof that the defendant's business is collection of consumer debts may be sufficient.[96]

In determining whether a debt arises from a consumer transaction, several courts hold that the purpose of the debt, not the nature of the collateral securing it, is determinative. Thus, a loan for business purposes may be considered a business debt that is not covered by the state debt collection statute, even when it is secured by the borrower's personal residence.[97] Conversely, a loan for personal, financial, or household use is subject to the statute, even if it is secured by business assets or

85 Hartman v. Meridian Fin. Services, 191 F. Supp. 2d 1031, 1048–1049 (W.D. Wis. 2002) (timeshare purchase is consumer transaction).

86 Peters v. Quinney, 2001 WL 1627650 (Tex. App. Dec. 20, 2001) (person who borrowed money to pay his income taxes was consumer within meaning of Texas Debt Collection Act).

87 Schools v. PMAB, L.L.C., 2014 WL 6460613 (D. Md. Nov. 14, 2014) (plaintiff who received barrage of wrong-number calls sufficiently alleged consumer debt; collector's website advertised that it collected individual medical debt, and numerous consumers had filed complaints against it with Better Business Bureau); Flores v. Rawlings Co., L.L.C., 177 P.3d 341 (Haw. 2008) (pursuing subrogation claims for medical benefits plan was consumer debt collection, because underlying debt arose from consumer transaction, purchase of medical care).

88 London v. Gums, 2014 WL 546914 (S.D. Tex. Feb. 10, 2014) (bond is consumer debt, guarantor-wife is consumer, and bonding company is creditor covered by Texas debt collection statute); Monroe v. Frank, 936 S.W.2d 654 (Tex. App. 1996) (person who obtained bail bond for family friend was consumer within meaning of Texas debt collection statute).

89 Gillam v. Levine, 955 F.3d 1117 (9th Cir. 2020) (Cal. law; trust created for tax and estate planning purposes does not lose all state and federal consumer protections).

90 Lockwood v. Auto. Fin. Co., 2005 WL 2107165 (W.D. Pa. Aug. 30, 2005) (where definition of debt is limited to "personal, family or household purposes," it does not apply to vehicle dealer's purchase of cars for resale); Ford v. City State Bank, 44 S.W.3d 121 (Tex. App. 2001) (rancher's purchase of cattle not for personal, household, or family purposes).

91 *See, e.g.*, Kelly v. Regions Bank, 2013 WL 5436674 (N.D. Fla. Sept. 27, 2013) (borrowers' testimony that they "had thought about" building vacation home on land not sufficient to raise fact issue as to consumer use; borrowers already owned a vacation home in Florida, had purchased several parcels of Florida land, and had listed the parcel for sale); Acciard v. Whitney, 2008 WL 5120898 (M.D. Fla. Dec. 4, 2008) (Florida Creditors Collection Practices Act inapplicable where claims arose from complex scam involving sale of investment real estate to naive buyers); Margita v. Diamond Mortgage Corp., 406 N.W.2d 268 (Mich. Ct. App. 1987) (purchase of rental housing as investment was not "debt").

92 *See, e.g.*, B.F. Jackson, Inc. v. CoStar Realty Info., Inc., 2009 WL 1812922 (S.D. Tex. May 20, 2009) (Texas debt collection statute inapplicable to collection of debt for small business's Internet access), *adopted*, 2015 WL 3902340 (S.D. Tex. June 24, 2015).

93 *See, e.g.*, Rhoades v. W. Va. Credit Bureau Reporting Services, Inc., 96 F. Supp. 2d 528 (S.D. W. Va. 2000) (West Virginia debt collection statute applies to any consumer debt; fact question whether debtor was consumer, where she owned interior design business, but claimed that potted plants from creditor-florist were intended for her home). *See also* Oppenheim v. I.C. Sys., Inc., 627 F.3d 833 (11th Cir. 2010) (plaintiff here sold laptop online, using PayPal to process buyer's payment, parted with computer after PayPal informed him payment was good; PayPal then dunned him after buyer's payment proved fraudulent; this was consumer transaction because it arose from services provided by PayPal, and was consumer); Parent v. Citibank, 2010 WL 2425943 (E.D. Wis. June 11, 2010) (transaction was consumer under Wisconsin statute where, at request of builder's dissatisfied customer, Home Depot transferred amount from customer's account to builder's personal account; transaction at issue was Home Depot's handling of builder's personal account, not builder's commercial transaction with customer); Levant v. Am. Honda Fin. Corp., 356 F. Supp. 2d 776 (E.D. Mich. 2005) (car not leased for "personal, family or household purposes" within meaning of Michigan Collection Practices Act where it was driven for personal and business use by guarantor's daughter, who was property manager of family business, and some lease payments were made by company).

94 Touroussian v. Asset Acceptance, L.L.C., 2013 WL 5524831, at *6 (C.D. Cal. Oct. 4, 2013) (identity theft victims' FDCPA and RFDCPA claims fail because they did not sufficiently allege that the thief's debt—a charge account at a retail store—was incurred for personal or household purposes).

95 Soria v. U.S. Bank, 2019 WL 8167925 (C.D. Cal. Apr. 25, 2019). *See also* §§ 16.2.3.4, 16.2.4.4.7, *infra* (claims by non-debtors).

96 Schools v. PMAB, L.L.C., 2014 WL 6460613 (D. Md. Nov. 14, 2014) (plaintiff who received barrage of wrong-number calls sufficiently alleged consumer debt; collector's website advertised that it collected individual medical debt, and numerous consumers had filed complaints against it with Better Business Bureau).

97 Sosso v. ESB Bank, 2016 WL 3855031 (W.D. Pa. July 16, 2016) (fact issue whether loan was consumer; refinance of residential mortgage provided cash that may have been intended for business use); Hinchcliffe v. Option One Mortgage Corp. 2009 WL 1708007 (E.D. Pa. June 16, 2009) (loan secured by personal residence, but used to pay expenses of investment properties, was business loan, not covered by Pennsylvania debt collection statute); Ocasio v. Ocwen Loan Servicing, L.L.C., 2009 WL 650244 (E.D. Pa. Mar. 13, 2009) (loan was not for personal purposes where it was secured by personal residence, but borrower signed as individual and as proprietor of small business). *See also In re* Howe, 446 B.R. 170 (Bankr. E.D. Pa. 2009) (type of account—personal or commercial—not conclusive where debtor took cash advances on personal credit card in attempt to save failing business; debt was commercial).

paid from a business line of credit.[98] Courts may give weight to the borrower's statement of the purpose of the transaction at the time of consummation.[99] If the debtor originally enters into the transaction for consumer purposes, then the statute is likely to continue to apply, even if the consumer's purpose later changes.[100]

16.2.3.1.4 Other state provisions regarding particular types of debts

Some state debt collection statutes apply only to debts below a certain dollar amount.[101] The debt collection provisions of the Colorado Uniform Consumer Credit Code explicitly exempt the collection of student loans.[102] Pennsylvania's debt collection statute excludes debts owed to the state[103] and debts arising from loans secured by purchase money mortgages.[104]

In contrast to the FDCPA, some state debt collection statutes do not exclude debts that were not in default when acquired.[105] Nevertheless, California's debt collection statute applies only to a debt that is "due and owing."[106] A court has interpreted this requirement to mean that the debt must be delinquent at the time of the collection activity.[107] Rhode Island's debt collection statute also applies only to the extent that the collection activity concerns a debt that was in default at the time it was obtained by the collector.[108]

Whether state debt collection statutes apply to mortgage servicing, billing, and foreclosure is discussed at § 16.2.3.3.9, *infra*.

16.2.3.2 Types of Activities Covered

The typical state debt collection statute covers contacts made for the purpose of debt collection. An allegation that the defendant left messages requesting the called party to call a certain number may be insufficient, without more, to establish the debt collection purpose of the calls.[109] Some courts hold that contacts made in connection with mortgage foreclosure, or to offer a mortgage workout, are not made in connection with debt collection.[110]

Some courts have held that filing a proof of claim in bankruptcy is not an "attempt to collect a debt" as defined by the state debt collection statute.[111] The Ninth Circuit held that informational letters from a new mortgage servicer, advising the borrowers of the transfer of the loan and offering them repayment options, were not "in the collection of a claim" within meaning of the Washington statute where they did not

98 Davis v. Hollins Law, 942 F. Supp. 2d 1004 (E.D. Cal. 2013) (end use of funds is determinative; fact issues here where business credit card was used to purchase ordinary household items including groceries and diapers); Selby v. Bank of Am., Inc., 2011 WL 902182 (S.D. Cal. Mar. 14, 2011) (loan secured by investment real estate is consumer loan if proceeds used for personal, family, or household purposes). *See also* Hetherington v. Allied Int'l Credit Corp., 2008 WL 2838264 (S.D. Tex. July 21, 2008) (fact issue whether debt for NSF check, written on bank account opened in name of debtor d.b.a. his former small business, but used for household and personal purposes, was consumer debt).

99 Dixon v. Golden-Masano-Bradley, Law Firm, 228 Fed. Appx. 142 (3d Cir. 2007) (borrowers' claim under state collection practices law fails where promissory note provided that funds would not be used for personal, family, or household purposes, even though proceeds were so used); McCarthy v. WPB Partners, L.L.C., 2016 WL 4014581 (D.N.H. July 26, 2016) (statute did not apply where preprinted contract stated that loan was business and funds should not be used for personal purposes; no evidence that lender knew at time of origination that borrower might use funds for consumer purposes). *Cf.* Shapiro v. Haenn, 222 F. Supp. 2d 29, 40 (D. Me. 2002) (fact question whether loan to purchase land was for consumer purposes where consumer claimed that he bought it to build his home on, and did so five years later, but loan papers labeled it commercial and he had tried to sell land before he building home).

100 Haddad v. Alexander, Zelmanski, Danner & Fioritto, 698 F.3d 290 (6th Cir. 2012) (Mich. law; time for determining whether condo assessments are consumer debts is time of purchase; where purchaser lived in condo for fifteen years, then rented it out, assessments remained consumer debt).

101 Islam v. Option One Mortg. Co., 432 F. Supp. 2d 181 (D. Mass. 2006) (dismissing claim under state debt collection regulations because they exclude first mortgage real estate loans and loans over $25,000); Dorr v. Sacred Heart Hosp., 597 N.W.2d 462 (Wis. Ct. App. 1999) (remanding case for determination whether two hospital bills should be aggregated, in which case they would exceed statute's $25,000 cap).

102 Colo. Rev. Stat. § 5-1-202(1)(f).

103 *See* Keller v. GC Services, L.P., 2013 WL 3213338 (E.D. Pa. June 26, 2013) (debt owed to state student loan guaranty agency is excluded).

104 *See, e.g.*, Dehart v. Homeq Servicing Corp., 2013 WL 12147768 (E.D. Pa. June 25, 2013) (even where claim under Pa. debt collection statute is based solely on collection of insurance, fees, and costs, if obligation arises from a purchase money mortgage it falls within exemption), *aff'd*, 679 Fed. Appx. 184 (3d Cir. 2017).

105 Hartman v. Meridian Fin. Services, 191 F. Supp. 2d 1031, 1048 (W.D. Wis. 2002); Flores v. Rawlings Co., L.L.C., 177 P.3d 341 (Haw. 2008) (since Hawaii's debt collection statute does not have exception for debts not in default when assigned, it applies to company that pursued collection against medical plan beneficiaries who settled claims with tortfeasors who caused their medical expenses). *But see* Laccinole v. Twin Oaks Software Dev., Inc., 2014 WL 2440400 (D.R.I. May 30, 2014) (dues processing firm that sent reminder letter to club member whose debit card was declined, during grace period when dues were not yet in default, was not a debt collector because debt was not in default when "obtained"); PurCo Fleet Services, Inc. v. Koenig, 240 P.3d 435 (Colo. App. 2010) (company that took assignment of debt for damages to rental car not debt collector, because debt not in default when assigned), *aff'd on other grounds*, 285 P.3d 979 (Colo. 2012).

106 Cal. Civ. Code § 1788.2(f), (h).

107 Sanders v. LoanCare, L.L.C., 2019 WL 441964 (C.D. Cal. Feb. 1, 2019) (debt collection statute applies when consumer has missed due date and is in grace period for making payment).

108 R.I. Gen. Laws § 19-14.9-3(5)(f)(3). *See* Laccinole v. Twin Oaks Software Dev., Inc., 2014 WL 2440400 (D.R.I. May 30, 2014) (billing company that sent out reminder letters during grace period was not debt collector, as debts were not yet in default).

109 Brody v. Genpact Serv., L.L.C., 980 F. Supp. 2d 817 (E.D. Mich. 2013) (message stating that "this is [name] from Genpact Services, please call back" was not a communication within meaning of FDCPA or Michigan debt collection statutes, because it did not convey information about the debt); Rogers v. Bank of Am. Corp., 2010 WL 3703030 (E.D. Cal. Sept. 15, 2010).

110 *See* § 16.2.3.3.9, *infra*.

111 Covert v. LVNV Funding, L.L.C., 2013 WL 6490318 (D. Md. Dec. 9, 2013) (filing proof of claim in bankruptcy case is not an attempt to collect a debt, so Maryland debt collection statute is inapplicable); Jenkins v. Genesis Fin. Solutions (*In re* Jenkins), 456 B.R. 236, 239–240 (Bankr. E.D.N.C. 2011).

demand payment.[112] Another bankruptcy court held that a debt buyer that filed bankruptcy claims, but did not engage in any other collection activity, was not required to register as a collector under Tennessee law.[113] The court relied primarily on a ruling by the state licensing board that the particular debt buyer did not have to register.

16.2.3.3 Types of Collectors Covered

16.2.3.3.1 Creditors collecting their own debts

While some state debt collection statutes apply only to collection agencies,[114] many go beyond the FDCPA and apply to creditors collecting their own debts.[115] One implication of this

112 Walcker v. SN Commercial, L.L.C., 286 Fed. Appx. 455, 457 (9th Cir. 2008).

113 *In re* Rogers, 2008 WL 1902050 (Bankr. E.D. Tenn. Apr. 25, 2008). *See generally* § 16.2.3.3.2, *infra*.

114 *See* Silberstein v. Fed. Nat'l Mortg. Ass'n, 2017 WL 187165 (W.D. Ark. Jan. 17, 2017) (mortgage lenders and servicers are creditors, not covered by statute, because they are not collecting debts owed to another); Lacelle v. 2010-2 SFR Venture, L.L.C., 2012 WL 5493999 (E.D. Wash. Nov. 9, 2012) (assignee who acquired mortgage from FDIC after original lender failed was a creditor collecting its own debt, not covered by Washington Collection Agency Act); Bohner v. LHR, Inc., 2011 WL 4472621 (D. Minn. Aug. 9, 2011) (Minnesota collection agency statute explicitly excludes banks collecting debts owed to themselves), *adopted*, 2011 WL 4460394 (D. Minn. Sept. 26, 2011); Braun v. Stawiarski, 2006 WL 2793150 (D. Colo. Sept. 28, 2006) (creditor bank foreclosing mortgage not covered by Colorado debt collection statute); Walcker v. SN Commercial, L.L.C., 2006 WL 3192503 (E.D. Wash. Nov. 2, 2006) (mortgage servicer not debt collector under Washington debt collection statute, which incorporates FDCPA exemptions, where it collected only for related companies, and its principal business was not debt collection), *aff'd*, 286 Fed. Appx. 455 (9th Cir. 2008); Ailetcher v. Beneficial Fin. Co., 632 P.2d 301 (Haw. Ct. App. 1981) (finance company not subject to collection agency statute); Calvary Invs., L.L.C. v. Vonderheide, 2001 WL 1386190 (Ohio Ct. App. Nov. 9, 2001) (Ohio statute requiring debt collector to have in-state office inapplicable to purchaser of debt after default that sued in own name). *See also* Bongiovanni v. World Fin. Nat'l Bank Recovery, 2013 WL 142080 (W.D. Wash. Jan. 11, 2013) (Washington Collection Agency Act claim fails; addition of "Recovery Department" after creditor's name would not create false impression that a third party was collecting debt); *In re* Rogers, 2008 WL 1902050 (Bankr. E.D. Tenn. Apr. 25, 2008) (buyer of defaulted debt without recourse did not need to obtain collector's license to file bankruptcy claims).

115 *CALIFORNIA*: Masuda v. Citibank, 38 F. Supp. 3d 1130 (N.D. Cal. 2014); Moya v. Chase Cardmember Serv., 661 F. Supp. 2d 1129 (N.D. Cal. 2009); Aquino v. Capital One Fin. Corp., 2008 WL 1734752 (N.D. Cal. Apr. 14, 2008) (dismissing FDCPA claim but allowing Rosenthal Act claim to go forward against creditor); Bonvillian v. United Auto Credit, 2007 WL 810097 (E.D. Cal. Mar. 15, 2007); Pickering v. Coast Ctr. for Orthopedic Arthroscopic Surgery & Treatment, 2009 WL 932629 (Cal. Ct. App. Apr. 8, 2009) (creditor liable both for its own deception and for misconduct of collector, which was its agent); First N. Am. Nat'l Bank v. Superior Court, 2005 WL 67123 (Cal. Ct. App. Jan. 13, 2005) (consumer stated claim under state debt collection statute against creditor bank for telephone harassment and improper workplace contacts).

CONNECTICUT: Krutchkoff v. Fleet Bank, 960 F. Supp. 541 (D. Conn. 1996) (Connecticut Creditors Practices Act covers creditors as well as collectors, but provides no private right of action; *Editor's Note*: 2007 amendments created private right of action). *Cf.* Wagner v. Am. Nat'l Educ. Corp., 1983 U.S. Dist. LEXIS 10287 (D. Conn. Dec. 30, 1983) (student loan servicing company billing and collecting debts for vocational school not subject to collection statute applying only to extenders of credit, but it was covered by state debt collection agency statute).

FLORIDA: Helman v. Bank of Am., ___ Fed. Appx. ___, 2017 WL 1350728, at *3 (11th Cir. Apr. 12, 2017); Williams v. Educ. Credit Mgt., Corp., 88 F. Supp. 3d 1338, 1343 (M.D. Fla. 2015); Groves v. U.S. Bank, 2011 WL 2192821 (M.D. Fla. June 6, 2011) (creditor whose primary business is not debt collection not covered by verification provision of debt collection statute, but is covered by other sections that apply to "any person"); Wright v. Bush Ross P.A., 2008 WL 190466 (M.D. Fla. Jan. 18, 2008) (Florida statute applies to any person committing forbidden debt collection acts; homeowners association collecting assessments is covered); Craig v. Park Fin. of Broward Cnty., Inc., 390 F. Supp. 2d 1150 (M.D. Fla. 2005) (some provisions of Florida statute apply to "any person"); Schauer v. GMAC, 819 So. 2d 809 (Fla. Dist. Ct. App. 2002) (some parts of Florida act apply only to collectors, but sections forbidding deception, harassment, etc. apply to creditors); Heard v. Mathis, 344 So. 2d 651 (Fla. Dist. Ct. App. 1977) (statute that applies to "any person" covers individual collecting debt owed to him); Williams v. Streeps Music Co., 333 So. 2d 65 (Fla. Dist. Ct. App. 1976) (statute that applies to "any person" covers retailer); Cook v. Blazer Fin. Serv., Inc., 332 So. 2d 677 (Fla. Dist. Ct. App. 1976) (statute that applies to "any person" covers small loan company even though licensing provisions apply only to collection agencies); White v. Fed. Fin. Corp., 379 So. 2d 136 (Fla. Dist. Ct. App. 1980) (Florida statute covers collection agency even though it owned accounts it collected). *See also* Abby v. Paige, 2013 WL 141145 (S.D. Fla. Jan. 11, 2013) (comparing FDCPA and Florida Consumer Collection Practices Act; Florida act covers creditors, but imposes knowledge requirements not found in FDCPA), *aff'd*, 553 Fed. Appx. 970 (11th Cir. 2014).

MARYLAND: Wells Fargo Bank v. Scarlett, 2013 WL 4401315 (D. Md. Aug. 14, 2013) (Maryland act applies to creditor collecting own debts, here, mortgage lender seeking to collect from co-grantee who was not named on note or deed of trust).

MICHIGAN: Gingiloski v. Commercial Recovery Services, 2017 WL 2334946 (E.D. Mich. May 30, 2017) (entity collecting debt is either debt collector covered by Occupational Code, or regulated person covered by Regulation of Collection Practices Act; here dismissing MRCPA claim because defendant is shown to be collection agency covered by Occupational Code); Wolfe v. GC Services, L.P., 2009 WL 230637 (E.D. Mich. Jan. 30, 2009) (entity that collects debts is either "regulated person," subject to Mich. Comp. Laws §§ 445.251 to 445.258, or collection agency, subject to Mich. Comp. Laws §§ 339.901 to 339.920). *See also* Knight v. Ocwen Loan Servicing, L.L.C., 2017 WL 4918531 (E.D. Mich. Oct. 31, 2017) (Michigan Occupational Code, which regulates debt collectors, does not apply to mortgage servicer; granting leave to amend to assert claim pursuant to Regulation of Collection Practices Act). *Cf.* Cadle Co. II, Inc. v. Wechsler, 2006 WL 2959698 (Mich. Ct. App. Oct. 17, 2006) (owner of debt not required to be licensed as debt collector).

NEW HAMPSHIRE: Dionne v. Fed. Nat'l Mortg. Ass'n, 2016 WL 3264344 (D.N.H. June 14, 2016) (covers creditors collecting "directly or indirectly" so creditor may be vicariously liable for misconduct of collector).

NEW YORK: Frederick v. Capital One Bank, 2015 WL 5521769 (S.D.N.Y. Sept. 17, 2015) (N.Y. statute covers principal creditors and assignees as well as third party collectors).

NORTH CAROLINA: Davis Lake Cmty. Ass'n v. Feldmann, 530 S.E.2d 865 (N.C. Ct. App. 2000); Friday v. United Dominion Realty Trust, Inc., 575 S.E.2d 532 (N.C. Ct. App. 2003) (landlord that sought to recover past due rent and related charges was debt collector). *Cf.* Williams v. HomeEq Servicing Corp., 646 S.E.2d 381 (N.C. Ct. App. 2007) (one of state's two debt collection statutes applies only to collection agencies and excludes banks and their subsidiaries).

broader coverage is that, while landlords are usually immune from liability under the federal Fair Debt Collection Practices Act because they are collecting their own debts,[116] they are often subject to state debt collection and other state consumer protection statutes.[117] However, debt collection statutes that apply only to debts arising from extensions of credit may not apply to rent debts.[118]

State debt collection statutes may also provide a basis for holding creditors liable for the acts of debt collectors who are their agents.[119] Unless the statute sets forth some other standard,[120] courts usually apply common law agency principles in determining whether a creditor is liable for its collector's

OREGON: Ying Chang v. Citimortgage, Inc., 2013 WL 5939985 (D. Or. Nov. 2, 2013) (statute applies to creditors; here, servicer who took over servicing when loan not yet in default); Pippert v. Niece, 518 F. Supp. 2d 1265 (D. Or. 2007) (Oregon statute covers creditors, here landlord, manager, and property management company).

PENNSYLVANIA: Jarzyna v. Home Props., L.P., 763 F. Supp. 2d 742, 752 (E.D. Pa. 2011). *See also* Flamm v. Sarner & Assoc., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (creditor liable under Pa. UDAP and debt collection statutes for hiring collectors known to engage in harassing debt collection methods). *But see* Conklin v. Purcell, Krug, & Haller, 2007 WL 404047 (M.D. Pa. Feb. 1, 2007) (erroneously dismissing *pro se* litigant's claims under Pa. debt collection and UDAP statutes; discussing FDCPA exemption for creditors collecting their own debts but not broader scope of Pa. statutes), *aff'd*, 282 Fed. Appx. 193 (3d Cir. 2008).

TEXAS: Miller v. BAC Home Loans, 726 F.3d 717 (5th Cir. 2013) (assignee was debt collector, whether or not mortgage was in default at time of assignment); Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985) (mortgage servicing company and bona fide assignee of debt fall within definition of "debt collector" under Texas statute), *modified in part on other grounds*, 761 F.2d 237 (5th Cir. 1985); Davis v. Wells Fargo Bank, 976 F. Supp. 2d 870 (S.D. Tex. 2013) (mortgage lender's successor is debt collector covered by TDCA), *vacated in part on other grounds*, 2014 WL 585403 (S.D. Tex. Feb. 14, 2014) (dismissing negligence and unjust enrichment claims of certain named plaintiffs); Gomez v. Wells Fargo Bank, 2010 WL 2900351 (N.D. Tex. July 21, 2010) (mortgagee bank); Peters v. Quinney, 2001 WL 1627650 (Tex. App. Dec. 20, 2001) (individual who loaned money to friend was subject to Texas Debt Collection Act when trying to collect debt).

WEST VIRGINIA: Patrick v. PHH Mortgage Corp., 937 F. Supp. 2d 773 (N.D. W. Va. 2013) (mortgage company is debt collector covered by West Virginia statute); Thomas v. Firestone Tire & Rubber Co., 266 S.E.2d 905 (W. Va. 1980) (statute applying to "any person" covers retailer that is collecting its own debt). *See also* Watkins v. Wells-Fargo Bank, 2011 WL 777895 (S.D. W. Va. Feb. 28, 2011) (former creditor was "acting as a creditor," and subject to debt collection statute, when it sought to collect a debt that had been voided pursuant to settlement agreement); Universal Bank v. Machnic (*In re* Machnic), 271 B.R. 789 (Bankr. S.D. W. Va. 2002) (creditor would be liable for debt collection violations by its attorney, as attorney is its agent).

WISCONSIN: Barrows v. Petri & Stocking, S.C., 2008 WL 3540405 (W.D. Wis. Aug. 13, 2008) (lender who obtained judgment against consumer was merchant within meaning of Wisconsin Consumer Act, as was its successor, National Credit Union Administration, which took over failed credit union); Patzka v. Viterbo College, 917 F. Supp. 654 (W.D. Wis. 1996) (college was creditor covered by debt collection provisions of Wisconsin Consumer Act).

116 15 U.S.C. §§ 1692a(4), 1692a(6)(A). *See* § 4.8.1, *supra*.

117 *See* Jarzyna v. Home Properties, L.P., 763 F. Supp. 2d 742 (E.D. Pa. 2011) (state debt collection statute applies to landlord); Pippert v. Niece, 518 F. Supp. 2d 1265 (D. Or. 2007) (Oregon statute covers landlord, manager, property management company, and rent collector); Friday v. United Dominion Realty Trust, Inc., 575 S.E.2d 532 (N.C. Ct. App. 2003) (landlord that sought to recover past due rent and related charges was debt collector); Creekside Apartments v. Poteat, 446 S.E.2d 826 (N.C. Ct. App. 1994) (landlord violated state debt collection statute by collecting and demanding rent for apartments which had been declared uninhabitable by city). *But cf.* Lamb v. HSC Real Estate, Inc., 2008 WL 467410 (E.D. Wash. Feb. 19, 2008) (Washington Collection Agency Act exempts "property management companies"; fact question whether collector here fits definition). *See generally* § 16.3, *infra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.2.6 (9th ed. 2016), *updated at* www.nclc.org/library.

118 *See* § 16.2.3.1, *supra*.

119 *See, e.g.*, Agrelo v. Affinity Mgmt. Services, L.L.C., 841 F.3d 944 (11th Cir. 2016) (Fla. law; homeowners' association may be vicariously liable under state law of agency for acts of collector it employed); Dionne v. Fed. Nat'l Mortg. Ass'n, 2016 WL 3264344 (D.N.H. June 14, 2016) (statute covers entities "directly or indirectly" collecting debts; creditor can be liable for misconduct of its law firm); White v. Sherman Fin. Group, L.L.C., 984 F. Supp. 2d 841 (E.D. Tenn. 2013) (debt buyer, even if not covered by licensing requirement, may be vicariously liable for actions of its law firm); Lilly v. RAB Performance Recoveries, L.L.C., 2013 WL 4010257 (E.D. Tenn. Aug. 5, 2013) (if debt buyer is collection agency, it can be vicariously liable for misconduct of law firm that is its agent); Boles v. Moss Codilis, L.L.P., 2011 WL 2618791 (W.D. Tex. July 1, 2011) (FDCPA claim fails but Texas Debt Collection Act claim goes forward against creditor whose lawyer's letters to debtors misrepresented their potential liability); Bottoni v. Sallie Mae, Inc., 2011 WL 2293226 (N.D. Cal. June 8, 2011) (agency relationship sufficiently alleged; creditor told collector to add impermissible fee); Valdez v. Capital Mgmt. Services, L.P., 2010 WL 4643272 (S.D. Tex. Nov. 16, 2010) (debt buyer did business as three closely related companies; two companies were agents of the third, and all were debt collectors who could be held liable for misconduct of collection agencies they employed); Cavanaugh v. HBSC Card Services, Inc., 2010 WL 3746260 (M.D. Fla. Sept. 22, 2010); Flamm v. Sarner & Assoc., P.C., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (creditor liable under Pa. UDAP and debt collection statutes for hiring collectors known to engage in harassing debt collection methods); Baker v. Citibank, 13 F. Supp. 2d 1037 (S.D. Cal. 1998) (overruling motion to dismiss claim that creditor was liable under state debt collection statute for collection agency's misconduct); Pickering v. Coast Ctr. for Orthopedic Arthroscopic Surgery & Treatment, 2009 WL 932629 (Cal. Ct. App. Apr. 8, 2009) (creditor liable both for its own deception and for misconduct of collector, which was its agent). *See also* Long v. Nationwide Legal File and Serve, Inc., 2013 WL 5219053 (N.D. Cal. Sept. 17, 2013) (to hold attorney services company liable for falsified service of process by independent contractor it hired, must show first that both are debt collectors; RFDCPA definition of "act or practice in connection with the collection of consumer debt" is broad enough to cover service of process; must also show control; fact issue here); Richburg v. Palisades Collection, L.L.C., 247 F.R.D. 457 (E.D. Pa. 2008) (collector may be liable for letter sent by attorney who was its agent). *But cf.* Basich v. Patenaude & Felix, APC, 2013 WL 1755484 (N.D. Cal. Apr. 24, 2013) (summary judgment for creditor; no evidence that it controlled activities of collection law firm that levied on wrong person's bank account); Wells Fargo Bank. v. Scarlett, 2013 WL 4401315 (D. Md. Aug. 14, 2013) (borrower failed to show that title company, which made harassing calls, was agent of defendant lender).

120 *See, e.g.*, Schakosky v. Client Services, Inc., 634 F. Supp. 2d 732 (E.D. Tex. 2007) (Texas debt collection statute makes creditor liable for independent collector's misconduct, but only if it hires with "actual knowledge that the independent debt collector repeatedly or continuously engages in acts or practices" that violate statute; not sufficiently pleaded here).

violation of a state debt collection statute.[121] Theories such as common enterprise, ratification, or alter ego liability may also be available to hold creditors or parent corporations liable.[122]

16.2.3.3.2 Assignees and debt buyers

The scope of state debt collection statutes is particularly complex as applied to debt buyers. Most state debt collection statutes were originally enacted before the proliferation of debt buying, and some are ambiguous as to whether they apply to debt buyers. Many of these statutes' definitions have been amended piecemeal over the years, and it is common for the definition of "debt collector" or "collection agency" to include multiple prongs, any number of which may apply to debt buyers. In some states, decisions have primarily interpreted just one prong of the definition, leaving other prongs open for interpretation. The summaries of these statutes in Appendix D, *infra*, include details about the definitions that may apply to debt buyers, and are a good starting point for analyzing their applicability, but there is no substitute for analyzing the particular statute's exact language.

In many states, the definition of "debt collector" or "collection agency" is idiosyncratic. However, there are some patterns in state definitions, discussed in this subsection.

First, some state debt collection statutes apply only to collection of debts owed to others. This limitation may be found in the definition of "debt collector" or "collection agency," or the statute may confine the term "claim" or "debt" to ones owed to others. A debt buyer may argue that such a statute does not apply to it, because the debts it purchases or acquires by assignment are then owed to it, not to others.

A number of courts have rejected this argument, interpreting the reference to a debt owed to "another" to refer to the original owner of the debt.[123] Often these courts find the key factor to be whether the debt was purchased when it was in default.[124] Other courts have held that these statutes do not apply to debt buyers.[125] Even these courts, though, may deny the exemption

121 *See, e.g.*, Agrelo v. Affinity Mgmt. Services, L.L.C., 841 F.3d 944 (11th Cir. 2016) (liability of homeowners' association for acts of collector it employed should be determined by Florida agency law); Mangiaracina v. Orange Lake Country Club, Inc., 2015 WL 685778 (M.D. Fla. Feb. 18, 2015) (consumers sufficiently alleged that entity collecting debts was agent of creditors); London v. Gums, 2014 WL 546914 (S.D. Tex. Feb. 10, 2014) (creditor-bail bondsman liable for misconduct of its employee collector, but not that of third party collector it hired in absence of evidence of agency, actual knowledge of misconduct, or ratification); Bent v. Smith, Dean & Assoc., 2011 WL 2746847 (M.D. Fla. July 14, 2011) (Florida statute, unlike FDCPA, applies to creditors; debtor alleged agency relationship sufficient to make creditor liable for collector's misconduct). *Cf.* Basich v. Patenaude & Felix, 2013 WL 1755484, at *9, 10 (N.D. Cal. Apr. 24, 2013) (applying agency principles; creditor not liable where it did not have right to control collector's activities); *In re* Humes, 496 B.R. 557 (Bankr. E.D. Ark. 2013) (creditor not vicariously liable for intentional wrongdoing of law firm that falsely told debtor that action would "go away" if he entered into payment plan, then obtained default judgment, as fraudulent conduct is outside scope of agency, but creditor was liable for law firm's breach of payment agreement); Howe v. Creditors Interchange Receivable Mgmt., L.L.C. (*In re* Howe), 446 B.R. 153 (Bankr. E.D. Pa. 2009) (complaint that does not allege an agency relationship must be dismissed; state debt collection statute does not make creditor vicariously liable for collector's FDCPA violation).

122 FTC v. Vantage Point Services, 2015 WL 2354473 (W.D.N.Y. May 15, 2015) (fact question whether debt buyer and its related collection agencies amounted to a common enterprise); Davidson v. Seterus, Inc., 230 Cal. Rptr. 3d 441 (Cal. Ct. App. 2018) (reversing dismissal of complaint against parent corporation where complaint alleged agency, ratification, and active engagement in offending conduct; also noting that alter ego liability, while "an extreme remedy, and sparingly used," may be appropriate where plaintiff shows "specific manipulative conduct by the parent toward the subsidiary which relegate[s] the latter to the status of merely an instrumentality, agency, conduit or adjunct of the former").

123 Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (owner and employee of debt buyer, both of whom actively participated in debt collection, were third-party debt collectors under Texas definition, which tracks FDCPA, where debt buyer acquired debt when it was in default); Commercial Serv. v. Fitzgerald, 856 P.2d 58 (Colo. App. 1993) (statute's reference to collection of debts "owed or due another" refers to credit *originally* extended by another, so covers debt buyer even though it owned debts at time it filed suit); Med. Recovery Services, L.L.C. v. Strawn, 321 P.3d 703 (Idaho 2014) (state debt collection statute applies to collection agency that received assignments of debts and then sued on them, as this amounts to "collecting or receiving payment for others"); Centurion Capital Corp. v. Druce, 828 N.Y.S.2d 851 (N.Y. Civ. Ct. 2006) (holding debt buyer to fall within New York City's administrative code definition of "debt collection agency," which tracks FDCPA, even though it now owns the debt); CA Partners v. Spears, 274 S.W.3d 51, 79 (Tex. App. 2008) (Texas definition of third-party debt collector same as FDCPA; holder of deed of trust was debt collector, because it received assignment after default). *See also* Spaulding v. Lajoie, 2014 WL 2006770 (Mass. App. Ct. 2014) (purchaser of landlord-tenant debts who then proceeds to collect on them must be licensed under state debt collection statute; this debt buyer actively sought collection and had direct contact with the debtors). *Cf.* PurCo Fleet Services, Inc. v. Koenig, 240 P.3d 435, 446–447 (Colo. App. 2010) (interpreting definition that tracks FDCPA to require debt buyer to be licensed if debt was obtained when it was in default, but not shown here), *aff'd on other grounds*, 285 P.3d 979 (Colo. 2012).

124 *See, e.g.*, PurCo Fleet Services, Inc. v. Koenig, 240 P.3d 435, 446–447 (Colo. App. 2010) (interpreting definition that tracks FDCPA to require debt buyer to be licensed if debt was obtained when it was in default; mistakenly applying this rule to hold that licensure was not required where assignment was pursuant to master agreement that predated transactions with this debtor; decision is questionable since coverage turns on whether the debt was in default when it was obtained, not when agreement to assign debts was signed), *aff'd on other grounds*, 285 P.3d 979 (Colo. 2012); CA Partners v. Spears, 274 S.W.3d 51, 79 (Tex. App. 2008) (Texas definition of third-party debt collector same as FDCPA; holder of deed of trust was debt collector, because it received assignment after default).

125 Grismore v. RJM Acquisitions, L.L.C., 2009 WL 806627 (D. Ariz. Mar. 26, 2009) (debt buyer not required to register as debt collector if it buys debts outright without time payments or any kind of contingency arrangement), *aff'd*, 399 Fed. Appx. 217 (9th Cir. 2010); McClain v. Cavalry SPV I, L.L.C., 2019 WL 4451781, at *6 (S.D. Ohio Sept. 17, 2019) (debt buyer suing on purchased debt is not "collection agency," defined by Ohio Rev. Code § 1319.12 as one that collects on debts owed to another); Dorrian v. LVNV Funding, L.L.C., 94 N.E.3d 370 (Mass. 2018) (debt buyer that farms out collection work and has no contact with debtors does not meet statute's criterion that its principal purpose be collection of debt, so need not be licensed; giving weight to longstanding view of state regulator); Asset Acceptance

when the assignment does not divest the assignor of all control or right to the claim or otherwise appears to be a sham.[126]

One of the prongs of the definition of "debt collector" in the Fair Debt Collection Practices Act also restricts it to collection of debts "owed or due or asserted to be owed or due another."[127] In its 2017 decision *Henson v. Santander Consumer USA Inc.*,[128] the Supreme Court interpreted that language to exclude a debt buyer that was collecting a debt that it owned, even though it had not originated the debt. Debt buyers may cite this decision as grounds for courts to interpret state debt collection statutes in the same way. However, the interpretation of state debt collection statutes is a question of state law, not federal law. Moreover, many of these statutes were enacted when it was widely accepted that the FDCPA's reference to a debt owed to "another" referred to the original owner of the debt.[129] It would be reasonable to conclude that state legislatures had this interpretation in mind when they enacted the statutory language, not a different interpretation that was issued years later.

Another reason that *Henson* should not interfere with the application of state debt collection statutes to debt buyers is that it interprets only one of the two prongs of the FDCPA's definition of "debt collector." The other prong applies the statute to "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts."[130] The *Henson* court explicitly declined to address this "principal purpose" prong,[131] but many debt buyers are likely to meet it.[132] State debt collection statutes that incorporate the FDCPA's reference to "debts owed or due or asserted to be owed or due another" typically also incorporate the FDCPA's "principal purpose" prong,[133] so should continue to be applicable to debt buyers even if state courts adopt *Henson*'s interpretation of the "due another" prong.[134]

A second pattern in state debt collection statutes is that many include a definition of "debt collector" or "collection agency" as any entity that solicits claims or accepts assignment of claims for purposes of collection.[135] Debt buyers are likely to be held to be soliciting claims for collection accepting assignment of claims, so will fall within the scope of these statutes even if they are not considered to be collecting debts for another.[136]

The applicability of some state debt collection statutes hinges on whether the entity is engaging in debt collection. Most courts have held that debt buyers who purchase debts, but then hire others to pursue collection—sometimes referred to as "passive" debt buyers—are engaged in debt collection.[137]

Corp. v. Robinson, 625 N.W.2d 804 (Mich. Ct. App. 2001) (holding that entity that purchased the obligation and then attempted to collect on it is not a collection agency, defined in part as an entity collecting a claim owed another; failing to evaluate other part of definition, which brings in entities directly or indirectly engaged in soliciting claims for collection); Equable Ascent Fin., L.L.C. v. Ybarra, 2013 WL 5442391 (Ohio Ct. App. Sept. 30, 2013) (purchaser of debt is not collecting it for another, so collection agency statute is inapplicable, but fact issue here whether debt buyer owned debt, or was collecting on behalf of owner).

126 *See, e.g.*, Purco Fleet Services, Inc. v. Idaho State Dep't of Fin., 90 P.3d 346 (Idaho 2004) (state debt collection statute applicable where assignment did not divest the assignor of all control and right to the claim). *See also* Hernandez v. Palisades Collection, L.L.C., 2008 WL 4426890 (D. Conn. 2008) (debt buyer is creditor, not subject to Collection Agency Act, if it purchases without recourse and not just as sham to avoid provision of act that forbids collection agencies to sue on assigned debts); Zapata v. Ball State Univ., 16 N.E.3d 491 (Ind. Ct. App. 2014) (unpublished) (company's "assignment" of debt to company president was sham to avoid requirement that corporation must be represented by counsel to sue on debt).

127 15 U.S.C. § 1692a(6).

128 ___ U.S. ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017).

129 *See, e.g.*, Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009); Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007); Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003); Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000); N. Star Capital Acquisitions, L.L.C. v. Krig, 611 F. Supp. 2d 1324 (M.D. Fla. 2009); Larsen v. JBC Legal Group, P.C., 533 F. Supp. 2d 290 (E.D.N.Y. 2008); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1484 (M.D. Ala. 1987).

130 15 U.S.C. § 1692a(6).

131 Henson v. Santander Consumer USA Inc., ___U.S. ___, 137 S. Ct. 1718, 1721, 198 L. Ed. 2d 177 (2017).

132 *See* § 4.7.2.2, *supra* (analysis of *Henson*).

133 *See, e.g.*, Mass. Gen. Laws ch. 93, § 24; 19 R.I. Gen. Laws 19-14.9-3.

134 *See, e.g.*, Commercial Serv. of Perry, Inc. v. Fitzgerald, 856 P.2d 58 (Colo. App. 1993) (concluding that state debt collection statute applied to debt buyer because its principal purpose was debt collection, and construing other provisions of the statute to be consistent with this reading).

135 *See, e.g.*, N.D. Cent. Code § 13-05-01.1.

136 *In re* Wilson, 311 B.R. 566 (D. Or. 2004) (debt buyer that purchases all right, title, and interest in debt and then seeks to collect falls within definition of "collection agency" because it is "engaged in soliciting claims for collection"; finding exclusion for factoring services inapplicable because debt buyer purchased the debts one at a time, without an overarching agreement), *aff'd*, 185 Fed. Appx. 696 (9th Cir. 2006); Fausset v. Mortgage First, L.L.C., 2010 WL 987169 (N.D. Ind. Mar. 12, 2010) (fact issue whether assignee of mortgage was collection agency required to be licensed; if "default loan servicing company" solicited claims for collection, license was required); McCorriston v. LWT, Inc., 536 F. Supp. 2d 1268 (M.D. Fla. 2008) (debt buyer that purchased portfolios of charged-off debts may be in business of soliciting debts for collection, and therefore required to register as collection agency); Goray v. CCR Unifund Partners, 2007 WL 4260017 (D. Haw. Dec. 4, 2007) (Hawaii statute defines collector to include persons who regularly accept assignment of claims; debt buyer who purchased charged-off credit card accounts and hired local counsel to sue in its name falls within this definition, even if it does not fall within other prongs of the definition, so is required to register); Simpson v. Cavalry SPV I, L.L.C., 440 S.W.3d 335 (Ark. 2014) (debt buyer that purchases accounts and retains attorney to sue on them is debt collector, subject to debt collection statute's licensing requirements); Gray v. Suttell & Assoc., 334 P.3d 14 (Wash. 2014) (debt buyer that solicits claims for collection is debt collector and must be licensed, even if it outsources the collection activity; recent amendment to Collection Agency Act, explicitly covering these debt buyers, was clarification, not change, of existing law). *See also* LeBlanc v. Unifund CCR Partners, G.P., 601 F.3d 1185 (11th Cir. 2010) (Fla. law; out-of-state debt buyer that sent dunning letter met statutory definition, which requires that it collect or attempt to collect debts and solicit debts for collection).

137 LeBlanc v. Unifund CCR Partners, G.P., 601 F.3d 1185, 1197 (11th Cir. 2010) (Fla. law); Lawrence v. First Fed. Inv. Fund, 2020 WL 1065860

Many statutes specify that either direct or indirect collection activity suffices, making it particularly clear that they apply to such debt buyers.[138] However, Tennessee amended its debt collection statute in 2014 to exempt debt buyers that hire attorneys or collection agencies to collect.[139]

Several state debt collection statutes have been amended in recent years to include an explicit definition of "debt buyer" or to add a definition that unequivocally sweeps them in. For example, the Maryland statute that requires collection agencies to be licensed applies, *inter alia*, to "an entity collecting a claim it owns, if the claim was in default when acquired."[140]

West Virginia's collection agency licensure statute defines "collection agency" as one seeking to collect a debt "originally" due or asserted to be due or owed another.[141] Sometimes, however, these definitions are only for the purposes of certain specific requirements such as licensure.

Several states have also adopted statutes or court rules in recent years that specifically address the documentation that debt buyers must present to a court in order to obtain a default judgment or that institute other protections against improper judgments on purchased debts.[142] The pleading and proof requirements for suits on assigned debts are discussed in detail in NCLC's *Collection Actions* treatise.[143]

The question whether a debt buyer has standing to sue on a debt assigned to it is discussed in another treatise in this series.[144] Whether, when a state credit statute requires a lender to be licensed in order to originate a debt, a debt buyer or collector of that debt must also be licensed, is also discussed in another treatise.[145]

16.2.3.3.3 Entities not in the business of debt collection

Some state debt collection statutes exclude entities that collect debts only occasionally.[146] For example, one of North

(D. Utah Mar. 5, 2020) (passive debt buyer is "collection office" which must register as collection agency; noting that "many of the worst abuses in the debt collection industry are by debt buyers"); Galvan v. NCO Fin. Systems, Inc., 2016 WL 792009 (N.D. Ill. Mar. 1, 2016) (passive debt buyer required to be licensed); Simpson v. Cavalry SPV I, L.L.C., 440 S.W.3d 335 (Ark. 2014) (debt buyer solicits claims for collection so debt collection statute applies to it even though its collection activity is limited to retaining law firms to file suit on the debts; rejecting argument that statute, which was silent on the question, should be interpreted to require that collection activity be direct); LVNV Funding, L.L.C. v. Trice, 32 N.E.3d 553, 559 (Ill. 2015) (Collection Agency Act applies to debt buyers and assignees that collect solely through attorneys they hire, even before statute was amended in 2013 to add a special definition of debt buyer); LVNV Funding v. Finch, 207 A.3d 202 (Md. 2019) (debt buyer on whose behalf affidavits were filed in collection actions by persons claiming to be its authorized representatives and to have personal knowledge of facts is acting as collection agency and must be licensed). *See also* Cavalry SPV I, L.L.C. v. Watkins, 249 Cal. Rptr. 3d 334 (Cal. Ct. App. 2019) (passive debt buyer can be debt collector if it indirectly collects through separate entity, if two form an "interdependent economic enterprise"; shown here where debt buyer and collector were under common ownership, shared some employees, and debt buyer made policy decisions exercised control over its affiliate). *But see* Dorrian v. LVNV Funding, L.L.C., 94 N.E.3d 370 (Mass. 2018) (debt buyer that farms out collection work and has no contact with debtors does not meet statute's criterion that its principal purpose be collection of debt, so need not be licensed; giving weight to longstanding view of state regulator).

138 *See, e.g.*, Ademiluyi v. PennyMac Mortgage Inv. Trust Holdings I, 929 F. Supp. 2d 502 (D. Md. 2013) (Maryland Collection Agency Act applies to buyers of defaulted debt who file collection actions in Maryland); Fiorenzano v. LVNV Funding, L.L.C., 2012 WL 2562415 (D.R.I. June 29, 2012) (debt buyer, which purchased past-due debt but hired law firm to collect it, is collector covered by registration requirement of Rhode Island statute, which applies to entities that directly or indirectly collect debts); Winemiller v. Worldwide Asset Purchasing, L.L.C., 2011 WL 1457749 (D. Md. Apr. 15, 2011) (debt buyer is a collection agency; rejecting arguments that filing lawsuits is not "do[ing] business" as a collection agency as required by statute, and that debt buyers do not meet definition).

139 Tenn. Code Ann. § 62-20-103(a)(9). *See* Bradford v. LVNV Funding, L.L.C., 599 Fed. Appx. 580 (6th Cir. 2015) (former Tennessee statute did not require license for debt buyer that hired attorney or collection agency to collect; statute has since been amended to explicitly exclude these debt buyers).

140 Md. Code Ann., Bus. Reg. §§ 7-101. *See* LVNV Funding v. Finch, 207 A.3d 202 (Md. 2019) (passive debt buyer must be licensed, and debt buyer on whose behalf "authorized representatives" filed affidavits in collection actions is acting as a collection agency). *But cf.* Blackstone v. Sharma, 191 A.3d 1188 (Md. 2018) (substitute trustees of out-of-state trusts owning defaulted mortgages are not required to obtain Maryland collectors' licenses before initiating foreclosure; amendment was intended to clarify coverage of debt buyers, not to expand statute to cover real estate mortgages).

141 W. Va. Code § 47-16-2(b).

142 Cal. Civil Code §§ 1788.50 to 1788.64; Colo. Rev. Stat. § 5-16-111(2); Conn. Gen. Stat. § 36a-813, 36a-814 Me. Stat. tit. 32, § 11013(9), 11013(10), 11019; Md. Rules of Civil Procedure § 3-306; Mass. Uniform Small Claim Rule 2(b); Minn. Stat. § 548.101; N.Y. Comp. Codes R. & Regs. tit. 22, §§ 202.27-a, 202.27-b, 208.14-a, 210.14-a, 212.14-a, 212.14-b; N.C. Gen. Stat. §§ 58-70-115, 58-70-150, 58-70-155; Or. Rev. Stat. § 646.639(2)(t); Vt. Rules Civ. Proc. 55; Vt. Rules of Small Claims Proc. 3e.

143 National Consumer Law Center, Collection Actions Ch. 3, 4 (5th ed. 2020), *updated at* www.nclc.org/library.

144 National Consumer Law Center, Collection Actions § 4.3 (5th ed. 2020), *updated at* www.nclc.org/library.

145 National Consumer Law Center, Consumer Credit Regulation § 3.11.7.2 (3d ed. 2020), *updated at* www.nclc.org/library.

146 Stephen Boston v. ClubCorp. USA, Inc., 2019 WL 1877592 (C.D. Cal. Jan. 2, 2019) (club that allowed one new member, current plaintiff, to make time payments on his initiation fee, was not debt collector); Moore v. Transworld Systems, Inc., 2018 WL 6683335 (C.D. Cal. Aug. 9, 2018) (dismissing Rosenthal Act claim against health insurer that tried twice to collect debt that was not owed; no showing that it regularly collects debts arising from consumer transactions); Calhoun v. Certegy Check Serv., Inc., 2014 WL 4146886 (M.D. Fla. Aug. 20, 2014) (construing debt collection statute, which applies only to entities regularly collecting debts, not to apply to check guarantee service, where debtor alleged only that it reported the debt to credit bureaus, not that it engaged in direct collection efforts); Kirkpatrick v. Dover & Fox, P.C., 2013 WL 5723077 (S.D. Tex. Oct. 21, 2013) (fact issue whether law firm collected debts often enough to be covered by Texas Debt Collection Act; 5% of its practice was debt collection, and consumers presented evidence that it sent 38 letters to various debtors); Groves v. U.S. Bank, 2011 WL 2192821 (M.D. Fla. June 6, 2011) (creditor whose primary business is not debt collection not covered by verification provision of debt collection statute, but is covered by other sections that apply to "any person"); Royal Co. Auctioneers, Inc. v. Coast Printing Equip. Co., 238 Cal. Rptr. 538 (Cal. Ct. App. 1987) (person collecting debt of another in single isolated instance not "in the business of collecting claims

Carolina's two debt collection statutes allows a claim only if the acts or practices were "in or affecting commerce," which is construed to mean those normal day-to-day activities regularly conducted by the business and for which the business was organized.[147] Illinois exempts businesses whose collection activities are confined to and directly related to the operation of a business other than debt collection.[148]

16.2.3.3.4 Attorneys

It is common for debt collection statutes to exclude lawyers from their licensing provisions, and sometimes from their substantive prohibitions as well.[149] In other states, courts

for others"); Old Republic Ins. Co. v. Gordon, 137 A.3d 237 (Md. Ct. Spec. App. 2016) (credit insurer that sought subrogation from defaulted debtor was not in the business of collecting debts); Catherman v. First State Bank, 796 S.W.2d 299 (Tex. App. 1990) (law firm that did not regularly collect consumer debts was not "debt collector"). *See also* Miller v. Faulkner, 2009 WL 2883140 (D. Conn. Sept. 12, 2009) (attorney who filed FDCPA suit on behalf of consumers, and made calls to the FDCPA defendants in pre-litigation efforts to resolve the matter, was not engaged in debt collection, so state UDAP and debt collection statutes are inapplicable); Hartman v. Meridian Fin. Services, 191 F. Supp. 2d 1031, 1049 (W.D. Wis. 2002) (timeshare seller was "merchant" under Wisconsin debt collection statute, as it met requirement of regularly engaging in consumer transactions).

147 Davis Lake Cmty. Ass'n v. Feldmann, 530 S.E.2d 865 (N.C. Ct. App. 2000).

148 225 Ill. Comp. Stat. § 425/2.03. *See* Residential Credit Solutions, Inc. v. Pendyuk, 2012 WL 6963533 (Ill. App. Ct. Oct. 4, 2012) (unpublished) (whether mortgage servicer is debt collector depends on what else it does besides collect mortgage payments).

149 *ALASKA*: Alaska Stat. § 08.24.090(b) (excluding attorneys when engaged in the regular course of their business).

ARIZONA: Ariz. Rev. Stat. § 32-1004 (exempting attorneys from licensing requirements), § 32-1051 (exempting attorneys from certain duties).

ARKANSAS: Ark. Code Ann. § 17-24-102(b) (attorneys licensed in Arkansas who are rendering collection services for clients are exempt from provisions regarding licensure, fees, and long-arm jurisdiction).

CONNECTICUT: Under Conn. Gen. Stat. § 36a-800(2), part of the Consumer Collection Agencies Act, "consumer collection agency" does not include "any member of the bar of this state." On the other hand, the Creditors' Collection Practices Act, Conn. Gen. Stat. §§ 36a-645 through 36a-648a, which applies to creditors collecting their own debts, does not contain any language that would exclude attorneys.

DELAWARE: Del. Code Ann. tit. 30, § 2301(a)(11) (excluding attorneys licensed in Delaware).

HAWAII: Haw. Rev. Stat. § 443B-1, part of the state collection agencies law, excludes licensed attorneys acting within the scope of their profession. *See, e.g.*, Goray v. CCR Unifund Partners, 2007 WL 4250017 (D. Haw. Dec. 4, 2007) (attorney and legal assistants retained by debt buyer explicitly exempt from collection agency act). However, the state Collection Practices Act, Haw Rev. Stat. §§ 480D-1 to 480D-5, does not have an exception for attorneys.

IDAHO: Idaho Code Ann. § 26-2239 (stating that the Act does not apply to "[p]ersons licensed to practice law in this state, to the extent that they are retained by their clients to engage in activities authorized by this act, and such activities are incidental to the practice of law," but also stating "Such exemption shall not apply to an attorney engaged in a separate business conducting the activities authorized by this act").

ILLINOIS: 225 Ill. Comp. Stat. § 425/2.03 (Collection Agency Act does not apply to licensed attorneys at law). *See* Tilmon v. LVNV Funding, L.L.C., 2013 WL 1001237 (S.D. Ill. Mar. 13, 2013) (law firms explicitly exempted by Illinois Collection Agency Act); Jeffries v. Dutton & Dutton, P.C., 2006 WL 1343629 (N.D. Ill. May 11, 2006) (lawyers are specifically exempted by Illinois statute); Gibbs v. Bitt & Gaines, P.C., 6 N.E.3d 755 (Ill. App. Ct. 2014) (law firm is exempt from Collection Agency Act); People *ex rel.* Khajehhosseini v. Kluever & Platt, L.L.C., 2014 WL 2730287 (Ill. App. Ct. June 13, 2014) (unpublished) (construing Illinois debt collection statute's exemption of attorneys to exempt law firms as well).

INDIANA: Ind. Code. § 25-11-1-2 (term "collection agency" does not include an attorney).

LOUISIANA: La. Rev. Stat. Ann. § 9:3534.1 (the terms "collection agency" and "debt collector" do not include a licensed Louisiana attorney).

MARYLAND: Md. Code Ann., Bus. Reg. § 7-102(b)(9) (inapplicable to "a lawyer who is collecting a debt for a client, unless the lawyer has an employee who: (i) is not a lawyer; and (ii) is engaged primarily to solicit debts for collection or primarily makes contact with a debtor to collect or adjust a debt through a procedure identified with the operation of a collection agency"). *See, e.g.*, Murray v. Bierman, Geesing, Ward & Wood, L.L.C., 2012 WL 440679, at *5 (D. Md. Sept. 27, 2012) ("MCALA's licensing requirement does not apply to lawyers collecting debts for clients."). See also Grant-Fletcher v. McMullen & Drury, P.A., 964 F. Supp. 2d 514, 527 (D. Md. 2013) (plaintiff did not allege facts showing that employee was primarily engaged to solicit debts for collection). *But see* Allen v. Silverman Theologou, L.L.P., 2015 WL 2129698 (D. Md. May 6, 2015) (law firm is a collection agency and does not qualify for the attorney exception).

MASSACHUSETTS: Mass. Gen. Laws ch. 93, § 24 (excluding "attorneys-at-law collecting a debt on behalf of a client").

MICHIGAN: The prohibitions of the state Regulation of Collection Practices Act apply to "regulated persons." Mich. Comp. Laws §§ 445.251(g) defines this term as "a person whose collection activities are confined and are directly related to the operation of a business other than that of a collection agency including . . . [a]n attorney who is handling a claim or collection on behalf of a client and in the attorney's own name"). *See* Newman v. Trott & Trott, P.C., 889 F. Supp. 2d 948, 965–967 (E.D. Mich. 2012) (state occupational code excludes attorneys and law firms from definition of "collection agency," but they fall within scope of state Regulation of Collection Practices Act); Misleh v. Timothy E. Baxter & Assoc., 786 F. Supp. 2d 1330 (E.D. Mich. 2011) (lawyer collecting on behalf of client is regulated person covered by state Regulation of Collection Practices Act). *But see* Stolicker v. Muller, Muller, Richmond, Harms, Myers & Sgroi, 2005 WL 2180481 (W.D. Mich. Sept. 9, 2005) (law firm collecting on behalf of client not "regulated person" covered by Regulation of Collection Practices Act).

On the other hand, the state Occupational Code's collection agency provisions exclude ""a person whose collection activities are confined and are directly related to the operation of a business other than that of a collection agency such as . . . [a]n attorney who is handling a claim or collection on behalf of a client and in the attorney's own name." Mich. Comp. Laws § 339.901(b). *See* Montgomery v. Shermeta, Adams & Von Allmen, P.C., 885 F. Supp. 2d 849 (W.D. Mich. 2012) (law firm is exempt from state occupational code's definition of "collection agency"); Dudis v. Mary Jane M. Elliott, P.C., 2012 WL 3150821 (E.D. Mich. Aug. 2, 2012) (state occupational code is inapplicable to law firm); Grden v. Leiken, Ingber & Winters, P.C., 2010 WL 199947 (E.D. Mich. Jan. 19, 2010) (attorney collecting on behalf of client is not a collection agency under Occupational Code), *aff'd in part, rev'd in part on other grounds*, 643 F.3d 169 (6th Cir. 2011).

MINNESOTA: Minn. Stat. § 332.32(2) (term "collection agency" does not include "persons whose collection activities are confined to and are directly related to the operation of a business other than that of a collection agency such as . . . lawyers"). *See* Burgi v. Gurstel Law Firm, P.A., 2008 WL 46234984 (D. Minn. Oct. 17, 2008) (collection agency act exemption for lawyers "engaged in the practice of law" applies to lawyers retained by card issuer to send pre-litigation demand

letters and, if necessary, sue); State *ex rel.* Swanson v. Messerli & Kramer, P.A., 2009 WL 1046869 (Minn. Ct. App. Apr. 21, 2009) (attorney exception in Minnesota Collection Agency Act applies broadly to attorneys engaged in practice of law and bars claims arising from garnishment practices or claims for unauthorized attorney fees).

NEBRASKA: Neb. Rev. Stat. § 45-602 (licensing statute; "collection agency" does not include "attorneys at law handling claims and collections in their own names and not operating a collection agency under the management of a layperson").

NEVADA: Nev. Rev. Stat. § 649.020 ("collection agency" does not include "[a]ttorneys and counselors at law licensed to practice in this State, so long as they are retained by their clients to collect or to solicit or obtain payment of such clients' claims in the usual course of the practice of their profession"). *See* Carpenter v. Alessi & Konig, L.L.C., 2013 WL 5234253 (D. Nev. Sep. 16, 2013) (Nevada's licensure law defines collection agency to exclude lawyers collecting for their clients "in the usual course of the practice of their profession" so long as the lawyers are not "conducting collection agencies"; firm hired by homeowners' association to collect assessments and file lien was not a collection agency); Calvert v. Alessi & Konig, L.L.C., 2013 WL 592906 (D. Nev. Feb. 12, 2013) (same).

NEW JERSEY: N.J. Stat. Ann. § 45:18-6 (exempting "an attorney at law duly authorized to practice in this state").

NEW MEXICO: N.M. Stat. Ann. § 61-18A-2(C)(6) ("collection agency" does not include "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client"). *See, e.g.*, Martinez v. Gugliemo & Associates, P.L.L.C., 2014 WL 12597409, at *5 (D.N.M. June 19, 2014) ("In other words, there is an exemption for lawyers and law firms.").

NORTH CAROLINA: N.C. Gen. Stat. § 58-70-15(c), part of the state collection agencies law, states that "collection agency" does not include "[a]ttorneys-at-law handling claims and collections in their own name and not operating a collection agency under the management of a layman." The article of the state UDAP statute entitled Prohibited Acts by Debt Collectors, N.C. Gen. Stat. §§ 75-50 to 75-56, does not explicitly exclude attorneys, but it makes a private cause of action available only through the state UDAP statute, which does exclude attorneys. *See* Schwinn v. Shapiro & Ingle, L.L.P., 2013 WL 1010457 (E.D.N.C. Mar. 13, 2013) (claim under North Carolina debt collection statute must satisfy requirements of UDAP statute, which exempts "professional services rendered by a member of a learned profession," so does not allow claim against lawyers collecting debts for their clients); Culver v. JBC Legal Group, P.C., 2005 WL 5621875 (E.D.N.C. June 28, 2005) (UDAP statute's exemption for members of learned professions applies to debt collection statute also); Godfredson v. JBC Legal Group, P.C., 387 F. Supp. 2d 543 (E.D.N.C. 2005) (exemption for member of learned profession rendering professional services applies to lawyer collecting debts); Sadler v. Scott Lowery Law Office, P.C., 737 S.E.2d 191 (N.C. Ct. App. 2013) (collection law firm with one supervising attorney and numerous non-lawyer employees was not a collection agency, where collection was undertaken on behalf of clients, in the law firm's name); Reid v. Ayers, 531 S.E.2d 231 (N.C. Ct. App. 2000) (attorneys and law firms collecting debts are excluded by exemption for services provided by learned profession). *Cf. In re* Huff, 521 B.R. 107 (Bankr. N.D.N.C. 2014) (learned profession exception to North Carolina statute protects only the professional, not the client, here creditor who is alleged to have acted unconscionably in obtaining deed of trust).

NORTH DAKOTA: N.D. Cent. Code § 13-05-02.3 includes in its exemptions: "Attorneys at law who are licensed to practice in the state of North Dakota." The provision also states: "This exemption is limited to the actions of the licensed attorney and does not extend to persons either employed by the attorney or acting on behalf of the attorney."

OREGON: Or. Rev. Stat. § 697.005(1)(b)(D), part of the state collection agency law, states that "collection agency" does not include "attorney-at-law rendering services in the performance of the duties of an attorney-at-law." The provisions of Oregon's UDAP statute regarding unlawful debt collection practices, §§ 646.639 to 646.641, does not exclude attorneys, but a court held that the statute "does not apply to litigation activities, but rather only to nonlitigation collection efforts." Daniel N. Gordon, P.C. v. Rosenblum, 370 P.3d 850, 861 (Or. Ct. App. 2016).

PENNSYLVANIA: 18 Pa. Cons. Stat. § 7311, defines collection agency as "[a] person, other than an attorney at law duly admitted to practice in any court of record in this Commonwealth, who, as a business, enforces, collects, settles, adjusts, or compromises claims, or holds himself out, or offers, as a business, to enforce, collect, settle, adjust, or compromise claims." *But cf.* Lesher v. Law Office of Mitchell N. Nay, P.C., 2009 WL 4794176 (M.D. Pa. Dec. 7, 2009) ("The 18 Pa. C. S. § 7311 issues include the issue whether Law Offices of Mitchell N. Kay, P.C., is a collection agency. The defendant in its brief suggests that the plaintiff's theory that the defendant is a law firm, not a collection agency, should result in a dismissal of the 18 Pa. C. S. § 7311 claim. We do not agree. Whether the defendant law firm is a "collection agency" is not shown by the defendant to be free from dispute in this case.").

On the other hand, Pennsylvania's other debt collection practices statute, the Fair Credit Extension Uniformity Act, 73 Pa. Stat. Ann. § 2270.3(3)(ii), states that "collection agency" includes: "[a]n attorney, whenever such attorney attempts to collect a debt, as herein defined, except in connection with the filing or service of pleadings or discovery or the prosecution of a lawsuit to reduce a debt to judgment." *See, e.g.*, Salvati v. DeutscheBank Nat'l Trust Co., 575 Fed. Appx. 49 (3d Cir. 2014) (sending statutorily required pre-foreclosure notice is "in connection with" a lawsuit); Glover v. Udren Law Offices, P.C., 139 A.3d 195, 200 (Pa. 2016) ("In the FCEUA, the Legislature sought directly to curtail abuses by these third parties—including attorneys, when their actions were taken in their capacities as debt collectors."). *See also* Fratz v. Goldman & Warshaw, P.C., 2012 WL 4931469 (E.D. Pa. Oct. 16, 2012) (attorneys' debt collection activities—here, submission of documents in arbitration proceedings—not exempted); Richburg v. Palisades Collection, L.L.C., 247 F.R.D. 457 (E.D. Pa. 2008) (attorney exemption inapplicable to lawyer's dunning letter that did not mention litigation). *Cf.* Gigli v. Palisades Collection, L.L.C., 2008 WL 3853295 (M.D. Pa. Aug. 14, 2008) (attorney exemption bars claim against debt buyer's attorneys for inclusion of false information in pleading, but not claim against debt buyer that supplied arguably false information to attorneys). *But cf.* Silva v. Mid-Atlantic Mgmt. Corp., 277 F. Supp. 2d 460 (E.D. Pa. 2003) (lawyers, who were debt collectors within meaning of FDCPA, not covered by state debt collection statute, as they did not use extra-judicial methods of collection, and state statute exempts litigation activities).

RHODE ISLAND: R.I. Gen. Laws § 19-14.9-3(5) ("debt collector" does not include "[a]ttorneys-at-law collecting a debt on behalf of a client").

TENNESSEE: Tenn. Code Ann. § 62-20-103 (inapplicable to attorneys at law). See Lilly v. RAB Performance Recoveries, L.L.C., 2013 WL 3834008 (E.D. Tenn. July 23, 2013) (law firm that sent dunning letters for its client, a collection agency, was protected by attorney exception; distinguishing this from "non-lawyerly" activities such as debt buying).

TEXAS: Tex. Fin. Code § 392.001(7) states: "'Third-party debt collector' means a debt collector, as defined by [the FDCPA], but does not include an attorney collecting a debt as an attorney on behalf of and in the name of a client unless the attorney has nonattorney employees who: (A) are regularly engaged to solicit debts for collection; or (B) regularly make contact with debtors for the purpose of collection or adjustment of debts." This is only a partial exemption for attorneys, and courts have concluded that attorneys can be held liable under the Act if the evidence shows that they satisfy the separate definition of "debt collector." *See* Ruiz deBalderas v. ETX Successor Athens, 2020 WL 1479583 (E.D. Tex. Mar. 4, 2020), *adopted*, 2020 WL 1478563 (E.D. Tex. Mar. 26, 2020); Swank v. Citimortgage, Inc., 2014 WL 12464925, at *4 (W.D. Tex. Jan. 27, 2014); Kirkpatrick v. Dover & Fox, 2013 WL

5723077 (S.D. Tex. Oct. 21, 2013) (need not show that debt collection was principal business in order for law firm to meet definition of "debt collector"; firm that sent 38 debt collection letters in one year was debt collector); Hunt v. BAC Home Loans Servicing, L.P., 2012 WL 219330, at *9 (S.D. Tex. Jan. 24, 2012); Eads v. Wolpoff & Abramson, L.P., 538 F. Supp. 2d 981, 988 n.1 (W.D. Tex. 2008) (Gibson v. Crupo de Ariel, L.L.C., 2006 WL 42369, at *4 (N.D. Tex. Jan. 9, 2006).

UTAH: Utah Code Ann. § 12-1-7 (inapplicable to "an attorney licensed to practice in this state").

WASHINGTON: Wash. Rev. Code § 19.16.100(5) ("collection agency" does not mean "[a]ny person whose collection activities are carried on in his, her, or its true name and are confined and are directly related to the operation of a business other than that of a collection agency, such as . . . lawyers"). *See* Genschork v. Suttell & Hammer, 2013 WL 6118678 (E.D. Wash. Nov. 21, 2013) (after judgment was vacated and case dismissed, attorneys obtained garnishment order by misrepresenting that judgment was valid; debt collection claim fails because it arose from attorney's "competence or strategy," not the entrepreneurial aspects of practice); Lacelle v. 2010-2 SFR Venture, L.L.C., 2012 WL 5493999 (E.D. Wash. Nov. 9, 2012) (lawyer who served as trustee of deed of trust is protected by attorney exemption); Motherway v. Gordon, 2010 WL 2803052 (W.D. Wash. July 15, 2010) (law firm hired by debt buyer to collect is protected by attorney exception); Campion v. Credit Bureau Services, Inc., 2000 WL 33255504 (E.D. Wash. Sept. 19, 2000) (collector's lawyer is not collector, so not liable under Washington Collection Agency Act for failure to follow proper garnishment procedure). *But see* Paris v. Steinberg & Steinberg, 828 F. Supp. 2d 1212 (W.D. Wash. 2011) (interpreting Washington debt collection statute to exempt attorneys only when collecting their own debts, not debts owed to others); Mandelas v. Gordon, 2010 WL 2639846 (W.D. Wash. June 28, 2010) (exemption applies only if law firm is collecting debt owed to it; denying motion to dismiss claim against lawyer who obtained arbitration award in favor of debt buyer and used garnishment to collect). *But cf.* Moritz v. Daniel N. Gordon, P.C., 895 F. Supp. 2d 1097 (W.D. Wash. 2012) (out-of-state law firm is not exempt from requirement to obtain collection agency license); Carter v. Suttell & Assoc., P.S., 2011 WL 396038 (Wash. Ct. App. Jan. 13, 2011) (exemption for attorneys is not absolute, but merely engaging in collection litigation is insufficient; placing FDCPA warning on letters not conclusive, as FDCPA defines debt collector more broadly than state law); Lang v. Gordon, 2011 WL 62141 (W.D. Wash. Jan. 6, 2011) (applying collection agency act to law firm not unconstitutional, because running a collection agency is entrepreneurial; fact issue here whether firm was a collection agency); Trust Fund Services v. Aro Glass Co., 575 P.2d 716 (Wash. 1978) (trust fund that was created to receive assignments of, and bring suit for, employers' unpaid obligations to union health plans was mere alter ego of law firm that filed suit, so firm need not be licensed as debt collector as it falls within exemption for lawyers, whose collection activities are carried on in true name and are confined and directly related to operation of noncollection agency business).

WEST VIRGINIA: W. Va. Code § 47-16-2(b) (licensing statute; "collection agency" does not include "attorneys-at-law handling claims and collections in their own names and not operating a collection agency under the management of a layman").

WISCONSIN: Wis. Stat. § 218.04(1)(a), part of a statute regulating collection agencies, states that the term collection agency "does not include attorneys at law authorized to practice in this state and resident herein." On the other hand, the debt collection provisions of Wisconsin's Consumer Act, Wis. Stat. §§ 427.101 to 427.105, do not exclude attorneys, and courts have held that a law firm may be a debt collector. Kobilka v. Cottonwood Fin. Wisconsin, L.L.C., 2015 WL 1137471 (W.D. Wis. Mar. 12, 2015) ("Defendant Kohn Law Firm, SC, is a limited liability company, engaged in the collection of debt on behalf of others. Kohn Law Firm is also a 'debt collector' and 'merchant' as defined by Wis. Stat. § 421.301"); Hopkins v. Capital One Bank, USA, 2015 WL 327631 (W.D. Wis. Jan. 26, 2015) (same).

distinguish between the practice of law on the one hand, and running a collection agency[150] or buying defaulted debts for purposes of collection on the other.[151] Some states exempt lawyers from the registration requirements for collection agencies, but apply the substantive prohibitions.[152] Other state debt collection statutes apply generally to lawyers.[153] The

WYOMING: Wyo. Stat. Ann. § 33-11-101(b)(viii) ("collection agency" does not include "[a]ny licensed attorney acting in an attorney-client relationship with the creditor, and who conducts the collection in the true name of the client").

150 *See, e.g.*, Carpenter v. Alessi & Konig, L.L.C., 2013 WL 5234253 (D. Nev. Sept. 16, 2013) (attorney exemption of Nevada's licensure statute inapplicable to lawyers who are "conducting collection agencies," but collecting assessments and filing lien for homeowners association is practice of law); Grant-Fletcher v. McMullen & Drury, P.A., 964 F. Supp. 2d 514 (D. Md. 2013) (law firm not required to be licensed; debtor failed to sufficiently allege that non-lawyer employees who spoke to her about the debt and sent a dunning letter were primarily engaged in debt collection); McLain v. Gordon, 2010 WL 3340528 (W.D. Wash. Aug. 24, 2010) (statutory exemption for attorneys applies only if they are not acting as collection agencies); Gibson v. Grupo de Ariel, L.L.C., 2006 WL 42369 (N.D. Tex. Jan. 9, 2006) (Texas debt collection statute covers attorneys who employ non-attorneys who regularly solicit debts for collection or contact debtors for purposes of collection; fact issues here as to attorney who owned debt buyer); Sadler v. Scott Lowery Law Office, PC, 737 S.E.2d 191 (N.C. Ct. App. 2013) (collection law firm with one supervising attorney and numerous non-lawyer employees was not a collection agency, where collection was undertaken on behalf of clients, in the law firm's name); Daniel N. Gordon, P.C. v. Rosenblum, 370 P.3d 850 (Or. App. 2016) (Oregon statute does not apply to litigation activities, here demanding sums not owed).

151 Abels v. JBC Legal Group, 227 F.R.D. 541 (N.D. Cal. 2005) (California Fair Debt Collection Act does not apply to lawyer-collector, but claims allowed to go forward against law firm that purchased and sought to collect old NSF checks); Semper v. JBC Legal Group, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005) (law firm that purchased debts, here NSF checks, for purpose of collecting them, was debt collector; state license required); State *ex rel.* Hatch v. JBC Legal Group, P.C., 2006 WL 1388453 (Minn. Dist. Ct. Apr. 13, 2006) (state statute's exemption for lawyers is absolute, but fact issue here whether firm that bought old NSF checks was acting "as lawyers" where it had 99:1 ratio of non-lawyer to lawyer employees, lawyers were not licensed to practice in jurisdictions where they dunned, and firm had never sued Minnesota debtor); Tennessee Attorney General, Op. No. 00-105, 2000 Tenn. AG LEXIS 107 (June 8, 2000) (company that purchases and collects upon unpaid judgments is collection service even though it is owned by attorneys, who would be exempt if acting on behalf of clients). *See also* Lilly v. RAB Performance Recoveries, L.L.C., 2013 WL 3834008 (E.D. Tenn. July 23, 2013) (attorney exemption applies to law firm that sent dunning letters for its client, a collection agency; distinguishing this from "non-lawyerly" activities such as debt buying).

152 *See, e.g.*, McKeown v. Mary Jane M. Elliot, P.C., 2007 WL 4326825 (E.D. Mich. Dec. 10, 2007) (attorney representing creditor was exempt from collection agency act but covered by collection practices act); Lemieux v. Jensen, 2004 WL 302318 (S.D. Cal. Jan. 29, 2004) (attorneys excluded from definition of debt collector in Cal. Civil Code § 1788.2, but § 6077.5 requires them to comply with state debt collection law). *See also* Mass. Banking Op. 06-059, Attorney-at-Law Exclusion and Applicability of Debt Collection Law to Attorneys (Oct. 13, 2006), *available at* www.mass.gov, search for "selected opinion 06-060 (debt collector licensing law applies to collection attorneys unless they are admitted to practice law in Massachusetts).

153 Ward v. G. Reynolds Sims & Assoc., 2013 WL 364012 (E.D. Mich. Jan. 30, 2013) (lawyers covered by Michigan Collection Practices Act,

Pennsylvania debt collection statute applies to lawyers, but exempts activities "in connection with the filing or service of pleadings or discovery or the prosecution of a lawsuit to reduce a debt to judgment."[154] Thus, attorneys are subject to the statute when they send dunning letters.[155] In addition, the exemption does not extend to a creditor that supplies incorrect information to the collection attorney.[156]

Even if law firms are exempt, the exemption may not apply when the claim is based on acts of a non-attorney collector employed by the firm.[157] Until it was amended in 2019,[158] California's debt collection statute excluded ""an attorney or counselor at law" from definition of "debt collector."[159] However, most courts held that, even though individual attorneys were excluded, the statute applied to law firms.[160] In addition, a section of the state Business and Professions Code dealing with attorney conduct and discipline requires attorneys to comply with the substantive obligations imposed on debt collectors, and imposes other specific requirements.[161]

Even without explicit statutory language, courts may find that acts taken in the course of litigation do not fall within the scope of the statute[162] or are protected by a litigation privilege.[163] The New York Court of Appeals has held that a New York City debt collection ordinance, as applied to attorneys' nonlegal debt collection activities, was not preempted by state regulation of attorneys.[164] It also held, however, that the ordinance violated the Commerce Clause to the extent that it regulated contracts formed entirely outside New York.

16.2.3.3.5 Repossessors

Some decisions hold that state debt collection statutes apply to repossession.[165] As the U.S. Supreme Court has observed,

although not by Michigan Occupational Code); Misleh v. Timothy E. Baxter & Assoc., 2011 WL 1458006 (E.D. Mich. Apr. 15, 2011) (lawyer collecting on behalf of client is regulated person covered by Michigan Collection Practices Act, although is exempt from debt collection provisions of Michigan Occupational Code); Rewalt v. Draper & Goldberg, P.L.L.C., 2008 WL 2566957, at *5 (S.D. W. Va. June 24, 2008) (law firm may be debt collector within meaning of West Virginia Consumer Credit Protection Act's debt collection provisions; fact question whether law firm was collecting "indirectly" where demand letters were sent by "Riverside Tr. Co.," arguably alter ego of law firm, and required payment to be made to law firm); Ray v. Int'l Bank, Inc., 2005 WL 2305017 (D. Colo. Sept. 21, 2005) (complaint initiating foreclosure action is "initial communication" in attempt to collect debt, triggering notice requirement of state debt collection statute); Universal Bank v. Machnic (*In re* Machnic), 271 B.R. 789 (Bankr. S.D. W. Va. 2002) (attorneys not exempt from Consumer Credit Protection Act's debt collection provisions, even in their litigation activities, and creditor itself is liable for acts of its attorney). *See generally* § 4.7.3.3, *supra* (application of FDCPA to lawyers).

154 Fair Credit Extension Uniformity Act, 73 Pa. Stat. Ann. § 2270.3(3)(ii). *See* Glover v. Udren Law Offices, P.C., 139 A.3d 195, 200 (Pa. 2016) ("In the FCEUA, the Legislature sought directly to curtail abuses by these third parties—including attorneys, when their actions were taken in their capacities as debt collectors."). *See also* Salvati v. DeutscheBank Nat'l Trust Co., 575 Fed. Appx. 49 (3d Cir. 2014) (sending statutorily required pre-foreclosure notice is "in connection with" a lawsuit); Glover v. Fed. Deposit Ins. Corp., 698 F.3d 139 (3d Cir. 2012) (affirming dismissal of claim based on law firm's failure to dismiss foreclosure complaint once homeowner was no longer in default); Gigli v. Palisades Collection, L.L.C., 2008 WL 3853295 (M.D. Pa. Aug. 14, 2008) (state debt collection statute's partial exemption for attorneys bars claim against debt buyer's attorneys for inclusion of false information in pleading, but not claim against debt buyer that supplied arguably false information to attorneys); Silva v. Mid-Atlantic Mgmt. Corp., 277 F. Supp. 2d 460 (E.D. Pa. 2003) (lawyers, who were debt collectors within meaning of FDCPA, not covered by state debt collection statute, as they did not use extra-judicial methods of collection, and Pennsylvania statute exempts litigation activities).

155 *See* Richburg v. Palisades Collection, L.L.C., 247 F.R.D. 457 (E.D. Pa. 2008) (attorney exemption inapplicable to lawyer's dunning letter which did not mention litigation). *See also* Fratz v. Goldman & Warshaw, P.C., 2012 WL 4931469 (E.D. Pa. Oct. 16, 2012) (attorneys' debt collection activities—here, submission of documents in arbitration proceedings—are not exempted). *But cf.* Salvati v. Deutsche Bank Nat'l Tr. Co., 575 Fed. Appx. 49 (3d Cir. 2014) (attorney representing lender in foreclosure action is covered by FCEUA's exception for lawyer "in connection with the filing or service of pleadings"; mailing of defective preforeclosure notice was not non-litigation collection activity, because notice is statutorily required step in foreclosure proceeding).

156 Pierce v. Calvary I, L.L.C., 2013 WL 6773632 (W.D. Pa. Dec. 30, 2013) (attorney exemption protected only the attorneys, not the debt buyer that furnished information to them and authorized suit on purchased debt); Gigli v. Palisades Collection, L.L.C., 2008 WL 3853295 (M.D. Pa. Aug. 14, 2008).

157 Makreas v. Moore Law Group, A.P.C., 2012 WL 359710, at *5 (N.D. Cal. Feb. 2, 2012) (denying motion to dismiss).

158 2019 Cal. Stat. ch. 545 (S.B. 187).

159 Former Cal. Civ. Code § 1788.2(c). *See, e.g.*, Gerber v. Citigroup, Inc., 2009 WL 248094 (E.D. Cal. Jan. 29, 2009) (Rosenthal Act's exemption for lawyers bars claim against individual lawyers), *adopted*, 2009 WL 2058576 (E.D. Cal. July 14, 2009); Lemieux v. Jensen, 2004 WL 302318 (S.D. Cal. Jan. 29, 2004) (attorneys excluded from definition of debt collector in Cal. Civil Code § 1788.2, but § 6077.5 requires them to comply with state debt collection law); Carney v. Rotkin, Schmerin & McIntyre, 254 Cal. Rptr. 478 (Cal. Ct. App. 1988) (attorney not debt collector within meaning of debt collection statute).

160 *See, e.g.*, Gonzalez v. Law Office of Allen Robert King, 195 F. Supp. 3d 1118 (C.D. Cal. 2016) (dismissing claim against attorney, but allowing claim to go forward against law firm; firm's paralegal falsely told tenant that if he moved out by certain date, firm would not pursue eviction action; firm then went forward and obtained default judgment); Davis v. Hollins Law, 942 F. Supp. 2d 1004 (E.D. Cal. 2013); Huy Thanh Vo v. Nelson & Kennard, 931 F. Supp. 2d 1080 (E.D. Cal. 2013).

161 Cal. Bus. & Prof. Code § 6077.5 (West).

162 *See, e.g.*, Duke v. Nachtigal, 2012 WL 195466 (D. Or. Jan. 19, 2012) (construing state debt collection statute not to apply to use of postjudgment execution procedures, even where debt is not owed).

163 *See* § 16.1.3, *supra*.

164 Eric M. Berman, P.C. v. City of New York, 25 N.Y.3d 684 (N.Y. 2015).

165 *See* Gable v. Santander Consumer USA, Inc., 2019 WL 5864329 (E.D. Wis. Nov. 8, 2019) (repossession indirectly assists creditor in collection of debts, so state debt collection statute applies); Soberanis v. City Title Loan, L.L.C., 2017 WL 1232437 (D.S.C. Apr. 3, 2017) (refusing to dismiss claim that repossession that breached peace was violation of state credit statute's prohibition of unconscionable debt collection conduct); Clark v. Par, Inc., 2015 WL 13781846 (C.D. Cal. July 22, 2015); Aviles v. Wayside Auto Body, Inc., 49 F. Supp. 3d 216, 235 (D. Conn. 2014) (allowing debtor and debtor's niece, who was present during repossession, to go to trial on claim that creditor was liable under state debt collection law for repossession agent's cursing and yelling during repossession; fact question whether repossession agent was creditor's agent); Shannon v. Windsor Equity Grp., Inc., 2014 WL 977899 (S.D. Cal. Mar. 12, 2014) (state debt collection statute, which defines "debt"

enforcement of a security interest (via non-judicial mortgage foreclosure in the case that was before the Court) is a form of debt collection, even though it seeks payment of money through sale of the property, rather than directly from the debtor.[166] Michigan explicitly includes repossessors in the statutory definition of collection agencies.[167] In 2014, the state supreme court interpreted this statute, which at that time applied to persons directly or indirectly collecting debts, to cover entities that act as middlemen, contracting with lenders to farm out collection and repossession services to others.[168] However, the statute was amended in 2016 to exclude these middlemen.[169] Under South Carolina's debt collection statute, one of the factors in determining whether debt collection conduct is unconscionable is whether it involves taking or threatening to take possession of personal property without a present right to do so.[170]

On the other hand, courts interpreting the Florida, Maryland, Minnesota, North Carolina, and West Virginia debt collection statutes have held them inapplicable to repossessors hired by creditors.[171] Decisions are mixed as to whether California's Rosenthal Act applies to repossessors.[172]

The Uniform Commercial Code's repossession provisions do not provide a basis for considering the state debt collection statute displaced, as its explicit general rule is that it is to be supplemented by principles of other laws.[173] However, the West Virginia Supreme Court has held that repossession is governed only by the Uniform Commercial Code, not by the state debt collection statute.[174] Although the court did not make its rationale clear, it may have based its decision on the West Virginia definition of "claim" as an obligation of a consumer "to pay money."[175]

16.2.3.3.6 Child support collectors

Some states have special provisions covering private collectors of child support, or explicitly subjecting them to the provisions of general debt collection statutes.[176] Many of these statutes focus primarily on preventing collectors from taking

to include "property" which is owed to another person, applies to company that offered skip tracing, repossession services, and remarketing); Hayes v. Find Track Locate, Inc., 60 F. Supp. 3d 1144 (D. Kan. 2014) (tracking and location company that arranges for repossession is a debt collector under state debt collection statute, which applies to those who enforce consumer transactions); Porter v. Wachovia Dealer Serv., Inc., 63 U.C.C. Rep. Serv. 2d 979 (D. Or. 2007) (applying state debt collection law to creditor that allegedly threatened repossession and made harassing phone calls); Lithia Motors, Inc. v. Yovan, 204 P.3d 120 (Or. Ct. App. 2009) (affirming $500 actual damages and $2000 punitive damages award against creditor that violated state debt collection statute by attempting wrongful repossession and threatening theft prosecution), *vacated and remanded*, 249 P.3d 1281 (Or. 2011) (remanding for reconsideration in light of state supreme court decision on standards for reducing punitive damages awards); Ledisco Fin. Serv. v. Viracola, 533 S.W.2d 951 (Tex. App. 1976) (consumer's duty to return credit card is part of the obligation arising out of the consumer credit transaction, so agent's repossession of it was covered by state debt collection statute); Kett v. Cmty. Credit Plan, Inc., 596 N.W.2d 786 (Wis. 1999) (state debt collection law applies to creditor's commencement of action to repossess collateral). *But see* Davis v. Toyota Motor Credit Corp., 251 F. Supp. 3d 925 (D. Md. 2017) (repossession is not debt collection, so Maryland's debt collection statute is inapplicable); Cooper v. Fulton Bank, 2017 WL 5478318, at *3–4 (D. Md. Nov. 15, 2017) (Maryland's debt collection statute does not apply to "mere repossession"); Khepera-Bey v. Santander Consumer USA, Inc., 2012 WL 1965444, at *9 (D. Md. May 30, 2012) (*pro se* case); Tucker v. Raw Recovery, Inc., 1998 U.S. Dist. LEXIS 20162 (M.D.N.C. Oct. 28, 1998) (repossession company not covered by state debt collection law, because repossession of collateral is not collection of debt); Nichols v. Metro. Bank, 468 N.W.2d 84 (Minn. Ct. App. 1991) (collection agency statute does not cover repossession, so collector's bond is unavailable to plaintiff injured during repossession); Banks v. Paul White Chevrolet, Inc., 629 S.E.2d 792 (W. Va. 2006) (drawing distinction between repossession activities, which are governed only by U.C.C., and debt collection activities, which are governed by state debt collection law). *But cf.* Hulse v. Ocwen Fed. Bank, 195 F. Supp. 2d 1188 (D. Or. 2002) (foreclosing on deed of trust not covered by Oregon debt collection law, because not attempt to force debtors to pay).

166 Obduskey v. McCarthy & Holthus L.L.P., ___ U.S. ___, 139 S. Ct. 1029, 1036–1037, 203 L. Ed. 2d 390 (2019). *See* § 16.2.3.3.9, *infra* (more detailed discussion of this decision).

167 Mich. Comp. L. § 339.901. *See* Alexander v. Blackhawk Recovery & Investigations, L.L.C., 731 F. Supp. 2d 674 (E.D. Mich. 2010) (consumer stated FDCPA and Michigan Occupational Code claims; repossession attempt with breach of peace, and failure to give statutorily required notices); Montgomery v. Huntington Bank, 2002 WL 31296642 (Mich. Ct. App. Oct. 11, 2002) (collectors and repossessors covered, but not creditors).

168 Badeen v. Par, Inc., 853 N.W.2d 303 (Mich. 2014).

169 Mich. Comp. Laws Ann. § 445.251(2).

170 Soberanis v. City Title Loan, L.L.C., 2017 WL 1232437 (D.S.C. Apr. 3, 2017) (also holding that this provision does not create an independent cause of action for improper repossession, but merely identifies improper repossession as a factor in determining unconscionability).

171 Davis v. Toyota Motor Credit Corp., 251 F. Supp. 3d 925 (D. Md. 2017) (repossession is not debt collection covered by Maryland Debt Collection Act); Khepera-Bey v. Santander Consumer USA, Inc., 2012 WL 1965444, at *9 (D. Md. May 30, 2012) (*pro se*); Seibel v. Soc'y Lease, Inc., 969 F. Supp. 713 (M.D. Fla. 1997); Nichols v. Metro. Bank, 468 N.W.2d 84 (Minn. Ct. App. 1991) (collection agency surety bond does not cover injuries resulting from unlawful repossession of automobile because repossession is not collection agency activity as defined by statute); Banks v. Paul White Chevrolet, Inc., 629 S.E.2d 792 (W. Va. 2006) (drawing distinction between repossession activities, which are governed only by U.C.C., and debt collection activities, which are governed by state debt collection law).

172 *APPLIES*: Shannon v. Windsor Equity Group, Inc., 2014 WL 977899 (S.D. Cal. Mar. 12, 2014) (state debt collection statute, which defines "debt" to include "property" that is owed to another person, applies to company that offered skip tracing, repossession services, and remarketing; non-debtor, who was harassed by skip tracer who incorrectly believed he possessed the encumbered car, stated claims pursuant to Rosenthal Act).

DOES NOT APPLY: Brooks v. Leon's Quality Adjusters, Inc., 2016 WL 4539967 (E.D. Cal. Aug. 30, 2016) (dismissing Rosenthal Act claim; repossessors not "regularly engaged" in collecting debts even if they sometimes gave debtors the option to pay and avoid repossession); Pflueger v. Auto Fin. Group, 1999 WL 33740813 (C.D. Cal. Apr. 26, 1999).

173 U.C.C. § 1-103(b); U.C.C. § 1-103 cmt. 3.

174 Banks v. Paul White Chevrolet, Inc., 629 S.E.2d 792 (W. Va. 2006).

175 W. Va. Code § 46A-2-122(b).

176 Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Maine, New York, North Dakota, Oregon, Texas, and West Virginia. These statutes are summarized at Appendix D, *infra*.

advantage of vulnerable obligees, but they may also set limits on debt collection tactics.

16.2.3.3.7 Out-of-state collectors

Some debt collection statutes apply to out-of-state debt collectors who collect debts from residents of the legislating states.[177] Consumers being dunned by an out-of-state collector may also be protected by the debt collection laws of the collector's home state.[178] Other state debt collection statutes, however, exclude interstate communications.[179]

16.2.3.3.8 Other specific entities

Other entities that have been found to be covered by a state's debt collection law include a for-profit "debt counselor,"[180] a claims recovery service that pursued subrogation claims for a medical benefits plan,[181] and a process server that went beyond its messenger role and sought to collect illegal fees for itself.[182]

Unless the statutory language is unusually narrow, a state debt collection statute should apply to entities that collect personal information about the debtor as part of the debt collection process. For example, Colorado's debt collection statute was held to cover a company that surreptitiously captured consumers' unlisted telephone numbers for creditors, even though most of its messages did not even mention the debt.[183]

A court held that an arbitration service provider did not meet the definition of a debt collector in California's debt collection statute.[184] The court might have ruled otherwise if the debtor's complaint had included more specific allegations about the undisclosed financial relationship between the arbitration provider and the debt collection firm that used it.[185] Another court held that the California debt collection statute's inclusion of "any person who composes and sells . . . forms, letters, and other media" did not extend to a company that provided an online payment service.[186] A federal court held that the Wisconsin debt collection statute did not make the seller of goods liable for the debt collection acts of the credit card lender to which the debt for the goods was owed, as the debt was owed to the lender, not the seller.[187]

177 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185 (11th Cir. 2010) (out-of-state debt buyer that sent collection letter to Florida consumer was required to register as Florida collector because it solicited consumer accounts from creditor that did business in Florida); Grice v. VIM Holdings Group, L.L.C., 2017 WL 6210891 (D. Mass. Dec. 8, 2017) (applying Mass. statute to out-of-state payday lender who sent email containing unlawful threats to Mass. consumer's Mass. employer); Weakley v. Redline Recovery Services, L.L.C., 723 F. Supp. 2d 1341 (S.D. Cal. 2010) (out-of-state collector who repeatedly contacted California consumer and his employer in California was subject to Rosenthal Act); Jomarron v. Nasco Enters., Inc., 2005 WL 2231863 (D. Conn. Aug. 4, 2005) (violation of Connecticut Collection Agency act; Texas collector, not licensed in Connecticut, dunned Connecticut consumer). *But see* Blackstone v. Sharma, 191 A.3d 1188 (Md. 2018) (substitute trustees of out-of-state trusts owning defaulted mortgages are not required to obtain Maryland collectors' licenses before initiating foreclosure; amendment was intended to clarify coverage of debt buyers, not to expand statute to cover real estate mortgages). *But cf.* Obenauf v. Frontier Fin. Group, Inc., 785 F. Supp. 2d 1188 (D.N.M. 2011) (license required only if debt being collected by out-of-state collector originated in New Mexico); Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. Dist. Ct. App. 1979) (Florida statute did not apply to deceptive call placed by collector in Michigan to debtor's mother in Rhode Island, falsely stating that Florida debtor's children had been in an accident as a means of procuring debtor's address). *See generally* § 16.2.2, *supra* (constitutionality of restrictions on out-of-state collection).

178 *See* Cushman v. GC Services, L.P., 657 F. Supp. 2d 834 (S.D. Tex. 2009) (consumer who was not Texas resident stated Texas Debt Collection Act Claim, where collector was Texas corporation and opened file on consumer, sent letters, and coordinated collection efforts from Texas), *aff'd on other grounds*, 397 Fed. Appx. 24 (5th Cir. 2010); Mlynek v. Household Fin. Corp., 2000 WL 1310666 (N.D. Ill. Sept. 13, 2000) (Florida Consumer Collection Practices Act protects out-of-state consumer being dunned by Florida collector). *But see* Elyazidi v. SunTrust Bank, 780 F.3d 227 (4th Cir. 2015) (denying Maryland debt collection claim, even though lender's counsel prepared documents at its Maryland office, where borrower was Virginia resident who incurred debt in Virginia, misrepresentations occurred in papers filed in Virginia, and any harm that ensued took place there); Hartman v. Meridian Fin. Services, 2001 WL 1823617 (W.D. Wis. Aug. 28, 2001) (allowing Wisconsin consumer to go forward with claims under Wisconsin but not North Carolina debt collection laws against North Carolina collector who mailed collection letters from that state). *But cf.* Edeh v. Midland Credit Mgmt., 748 F. Supp. 2d 1030 (D. Minn. 2010), *aff'd*, 413 Fed. Appx. 925 (8th Cir. 2011) (Rosenthal Act is meant to protect California consumers; no cause of action where employee of California company made improper calls from Arizona to consumer in Minnesota); Pollock v. Bay Area Credit Serv., L.L.C., 2009 WL 2475167 (S.D. Fla. Aug. 13, 2009) (Rosenthal Act does not cover California-based collector's calls from Georgia to Florida debtor).

179 Cadle Co. II, Inc. v. Wechsler, 2006 WL 2959698 (Mich. Ct. App. Oct. 17, 2006) (entity whose collection actions are limited to interstate communications need not obtain license). *See also* Scheetz v. PYOD, L.L.C., 2014 WL 3489715 (N.D. Ind. July 15, 2014) (interpreting state debt collection statute to apply only to entities with physical presence in state, so out-of-state debt buyers need not be licensed).

180 Page v. Performance Debt Resolution, 2013 WL 621197 (N.D. Cal. Jan. 30, 2013) ("debt negotiation" provider, which took payments from consumers and falsely promised to negotiate with creditors, was debt collector covered by FDCPA and Rosenthal Act), *adopted*, 2013 WL 621139 (N.D. Cal. Feb. 19, 2013); Yang v. DTS Fin. Group, 570 F. Supp. 2d 1257 (S.D. Cal. 2008) (debt collector within meaning of both FDCPA and Rosenthal Act).

181 Flores v. Rawlings Co., L.L.C., 177 P.3d 341 (Haw. 2008) (claims recovery service must register pursuant to Hawaii Collection Agency Act, which has broader coverage than FDCPA). *But see* Old Republic Ins. Co. v. Gordon, 137 A.3d 237 (Md. Ct. Spec. App. 2016) (mortgage insurer, bringing subrogation action against defaulted borrower, was not collection agency subject to licensing requirements of collection agency act; collection of defaulted debts is merely incidental to its business as insurer).

182 Andrews v. S. Coast Legal Serv., Inc., 582 F. Supp. 2d 82 (D. Mass. 2008).

183 Udis v. Universal Communications Co., 56 P.3d 1177 (Colo. App. 2002).

184 Townsend v. Nat'l Arbitration Forum, Inc., 2012 WL 12736 (C.D. Cal. Jan. 4, 2012).

185 *See* National Consumer Law Center, Consumer Arbitration Agreements §§ 1.4.4.2, 12.6 (8th ed. 2020), *updated at* www.nclc.org/library.

186 Lindblom v. Santander Consumer, USA, Inc., 2015 WL 9481547 (E.D. Cal. Dec. 10, 2015) (company that designed and provided Speedpay service, which charged unauthorized fees that were mostly kicked back to lender, was not covered by Rosenthal Act).

187 Parent v. Home Depot, 2011 WL 2650725 (E.D. Wis. July 6, 2011), *aff'd on other grounds*, 694 F.3d 919 (7th Cir. 2012).

The state debt collection statute may impose liability upon employees of a debt collection company who violate the statute.[188] A nonprofit organization is not exempt from a debt collection statute that applies to any "person."[189]

16.2.3.3.9 Servicing, billing, and mortgage foreclosure; eviction

Some statutes exempt specific types of entities, such as banks, servicers, and billing companies.[190] If the statute does not include a specific exemption, mortgage servicers[191] and

188 *See* § 16.2.5.2.5, *infra*.

189 State *ex rel.* Miller v. Nat'l Farmers Org., 278 N.W.2d 905 (Iowa 1979) (nonprofit organization falls under debt collection chapter of Iowa Consumer Credit Code, but statute inapplicable to collection of membership dues because it was not credit transaction).

190 *COLORADO*: *See, e.g.*, Scate v. Nationstar Mortgage, Inc., 2014 WL 7053940 (D. Colo. 2014) (Colorado exempts loan servicers whose principal business is servicing loans not in default, whether or not the subject loan was in default when servicing began); Schwartz v. Bank of Am., 2011 WL 1135001 (D. Colo. Mar. 28, 2011) (Colorado Fair Debt Collection Practices Act explicitly exempts entities whose principal business is lending and servicing of loans that are not in default, so national bank is exempt).

HAWAII: *See, e.g.*, Klohs v. Wells Fargo Bank, 901 F. Supp. 2d 1253, 1265–1266 (D. Haw. 2012) (Hawaii collection statute explicitly exempts banks, so bank is exempt when acting as servicer).

ILLINOIS: *See, e.g.*, Aribal v. GMAC Mortg., L.L.C., 2013 WL 3895282 (N.D. Ill. July 29, 2013) (fact issue whether assignee of mortgage, which claimed to be exempt "loan and finance" company, but whose website showed that it specialized in acquiring delinquent mortgages, was a collection agency covered by Illinois Collection Agency Act); Jeffries v. Dutton & Dutton, P.C., 2006 WL 1343629 (N.D. Ill. May 11, 2006) (Illinois statute exempts banks, lawyers, and persons under contract with creditor who contact debtors only in creditor's name); Bank of Am. v. Kulesza, 14 N.E.3d 684 (Ill. App. Ct. 2014) (Illinois exemption for banks and subsidiaries not limited to first-tier subsidiaries; mortgage servicer owned by subsidiary of bank was exempt); Aurora Loan Services, L.L.C. v. Kmiecik, 992 N.E.2d 125 (Ill. App. Ct. 2013) (loan servicer, which was wholly owned subsidiary of federally chartered bank, falls within Illinois Collection Agency Act's exemption for banks).

MARYLAND: *See, e.g.*, Flowers v. Baltax 2017, L.L.C., 2019 WL 3501584 (D. Md. Aug. 1, 2019) (entity that purchased and sought to foreclose tax liens was not a required to be licensed as collection agency; interpreting dicta in *Blackstone v. Sharma*, 191 A.3d 1188 (Md. 2018), to exclude mortgage industry from state collection agency licensing statute).

MICHIGAN: *See, e.g.*, Grimm v. Seterus, Inc., 2015 WL 9647544 (E.D. Mich. Dec. 14, 2015) (servicer falls into Michigan Occupational Code exception for banks and other businesses whose collection activities are related to a business other than debt collection), *adopted*, 2016 WL 67736 (E.D. Mich. Jan. 6, 2016); Polidori v. Bank of Am., 977 F. Supp. 2d 754 (E.D. Mich. 2013) (national bank that was collecting a mortgage debt that had been assigned to it falls within Michigan debt collection statute's exemption for nationally chartered bank that is collecting its own claims); Hewitt v. Bank of Am., 2013 WL 3490668, at *12 (W.D. Mich. July 11, 2013) (Michigan Occupational Code's definition of collection agency exempts state or nationally chartered bank that is collecting in its own name); Fuller v. Exxon Mobil, M.C., 2009 WL 91707 (E.D. Mich. Jan. 14, 2009) (Michigan act's exception for conduct "specifically authorized by a regulatory board or officer" exempts national bank whose credit card agreements are regulated by federal OCC).

MINNESOTA: *See, e.g.*, Carlson v. First Rev. Assurance, 359 F.3d 1015 (8th Cir. 2004) (Minnesota Collection Agency Act exempts businesses that administratively process payments; bank that picked up payments from post office box and credited them to agency's account not collection agency); Bohner v. LHR, Inc., 2011 WL 4472621 (D. Minn. Aug. 9, 2011) (Minnesota collection agency statute explicitly excludes banks collecting debts owed to themselves), *adopted*, 2011 WL 4460394 (D. Minn. Sept. 26, 2011).

NORTH CAROLINA: *See, e.g.*, Williams v. HomeEq Servicing Corp., 646 S.E.2d 381 (N.C. Ct. App. 2007) (collection agency statute exempts banks and their subsidiaries, so this loan servicer, a bank subsidiary, is exempt).

WASHINGTON: *See, e.g.*, Lamb v. HSC Real Estate, Inc., 2008 WL 467410 (E.D. Wash. Feb. 19, 2008) (Washington Collection Agency Act exempts "property management companies"; fact question whether collector here fits definition).

191 *See, e.g.*, Miller v. BAC Home Loans Servicing, LP, 726 F.3d 717 (5th Cir. 2013) (mortgage servicers are covered by Texas Debt Collection Act, whether or not mortgage was in default when servicing began); Perry v. Stewart Title Co., 761 F.2d 237 (5th Cir. 1985) (Tex. law); Koepplinger v. Seturus, Inc., 2020 WL 2063416 (M.D.N.C. Apr. 29, 2020) (although mortgage servicer that solicited delinquent claims from only one source (Fannie Mae) did not meeting definition of "collection agency" in Collection Agency Act, it met definition of "debt collection" under state Debt Collection Act), *adopted*, 2018 WL 4401738 (M.D.N.C. Sept. 14, 2018); Rivera v. Bayview Loan Servicing, 2020 WL 1508328 (E.D. Pa. Mar. 30, 2020) (allowing consumer to proceed with state debt collection claim against servicer whose business model was to buy and seek to collect defaulted mortgages); Moody v. PennyMac Loan Services, L.L.C., 2019 WL 7596261 (D.N.H. Nov. 12, 2019) (NH statute's definition of debt collector, which is broader than FDCPA's, covers servicer even if debt was not in default when servicing began); Knight v. Ocwen Loan Servicing, 301 F. Supp. 3d 723 (E.D. Mich. 2018) (loan servicer meets Michigan Collection Practices Act's definition of "regulated person"); Winne v. Nat'l Collegiate Student Loan Trust 2005-1, 228 F. Supp. 3d 141 (D. Me. 2017) (loan servicer was debt collector; could be held vicariously liable for actions of collector it hired); Warwick v. Bank of N.Y. Mellon, 2016 WL 2997166 (C.D. Cal. May 23, 2016) (servicer that merged with original servicer at time when debt was in default was covered by Rosenthal Act, but not FDCPA); Porterfield v. JP Morgan Chase, 2014 WL 3587783, at *22 (W.D. Tex. July 21, 2014); Dubridge v. Ocwen Loan Servicing, 2014 WL 1878770 (W.D. Mich. May 12, 2014) (loan servicer is "regulated person" covered by Michigan Regulation of Debt Collection Procedures Act); Tirabassi v. Chase Home Fin., L.L.C., 2015 WL 1402016 (C.D. Cal. Mar. 24, 2015); Martorella v. Deutsche Bank Nat'l Trust Co., 931 F. Supp. 2d 1218 (S.D. Fla. 2013) (lender's and loan servicer's communications about mortgage debtor's liability to pay for force-placed insurance were within ambit of debt collection, as required for Florida debt collection statute claim); Glenn v. FNF Servicing, Inc., 2013 WL 4095524 (E.D.N.C. Aug. 13, 2013) (state debt collection statute applies to servicer seeking to collect on mortgage loan); O'Brien v. Quicken Loan Services, 2013 WL 2319248, at *11 (S.D. W. Va. May 28, 2013) (denying motion to dismiss claim that loan servicer that collected payments, imposed late charges, and reported to credit bureaus was debt collector); Patrick v. Teays Valley Trs., L.L.C., 2012 WL 5993163 (N.D. W. Va. Nov. 30, 2012) (substitute trustee was debt collector within meaning of West Virginia act, at least when it was trying to collect debt, not simply foreclose); Bentley v. Bank of Am., 773 F. Supp. 2d 1367 (S.D. Fla. 2011) (mortgage servicer not debt collector, but covered by provisions forbidding "any person" to engage in telephone harassment or assert right known not to exist); Mielke v. Bank of Am. Home Loans Servicing, 2011 WL 1464848 (E.D. Mich. Apr. 18, 2011) (servicer's letters concerning loan modification, which stated that loan was seriously in default and stated amount due, were

billing or collection services for landlords,[192] homeowners associations,[193] or other providers[194] will likely be subject to the debt collection law. In these states, if the statute applies to creditors themselves, not just to third party collectors, it will also apply to a creditor that is foreclosing on a debt it originated.[195] Property services that lock out debtors and secure property in preparation for foreclosure may also be covered by state debt collection statutes.[196] A few states explicitly exempt some or all mortgages from the definition of debt, however, thus eliminating coverage of mortgage foreclosure and possibly mortgage servicing as well.[197]

Some courts hold that a foreclosure action that seeks only sale of the home, not payment of money, is not debt collection.[198]

"communication in connection with the collection of a debt," covered by Michigan Collection Practices Act); Gathing v. MERS, Inc., 2010 WL 889945 (W.D. Mich. Mar. 10, 2010) (denying summary judgment on Michigan Collection Practices Act and Michigan Occupational Code claims against holder and servicer of sub-prime mortgages; fact issues whether holder "took ownership" and what role it played; servicer described self as debt collector in correspondence with debtor); Thompson v. CIT Group/Consumer Fin., Inc., 2005 WL 2562606 (M.D. Fla. Oct. 11, 2005) (allowing claims to go forward against foreclosure management company that was overseeing foreclosure on behalf of creditor; at this early stage, court cannot say that company is not debt collector); Gann v. BAC Home Loans Servicing, L.L.P., 145 So. 3d 906 (Fla. Dist. Ct. App. 2014) (loan servicer was a person, covered by section forbidding attempt to enforce right known not to exist); Lamell v. OneWest Bank, 485 S.W.3d 53 (Tex. App. Nov. 17, 2015) (servicers covered whether or not debt was in default when servicing began). *See also* Williams v. HomeEq Servicing Corp., 646 S.E.2d 381 (N.C. Ct. App. 2007) (mortgage servicer exempt from collection agency statute, but debtor stated claim under prohibited acts by debt collectors statute). *Cf.* Perez v. Saxon Mortg. Services, Inc., 2006 WL 2868938 (M.D. Fla. Oct. 6, 2006) (mortgage servicer may be liable under state debt collection statute for repeatedly contacting represented debtor; issue of fact whether it was exempted from licensing requirements as financial institution), *vacated in part on other grounds*, 2007 WL 430723 (M.D. Fla. Feb. 5, 2007).

But cf. Sheddy v. J.P. Morgan Chase Bank, 2013 WL 5450288 (N.D. Tex. Sept. 30, 2013) (Texas Debt Collection Act applies to mortgage servicers but provides that it does not prohibit "exercising or threatening to exercise a statutory or contractual right of seizure, repossession or sale that does not require court proceedings," including non-judicial foreclosure).

192 *See, e.g.*, Sanz v. Fernandez, 633 F. Supp. 2d 1356 (S.D. Fla. 2009) (landlord services company required to register as debt collector). *But cf.* Ramsay v. Sawyer Prop. Mgmt. of Maryland, L.L.C., 2016 WL 6583892 (Md. Ct. Spec. App. Nov. 4, 2016) (unpublished) (property manager that negotiated leases, was listed on lease as lessor, collected rent, and sued in its own name after delinquencies was not debt collector; distinguishing cases of managers that have no relation to initial transaction and are hired for specific purposes that include debt collection). *See generally* § 16.2.3.1.1, *supra* (whether debts for rent fall within state debt collection statutes).

193 *See, e.g.*, Manikan v. P. Ridge Neighborhood Homeowners Ass'n, 2018 WL 1536734 (S.D. Cal. Mar. 29, 2018) (homeowners' association, management company that regularly collected debts for association, and process server hired by management company are all subject to Rosenthal Act; association was trying to collect debt that had already been paid in full, and process server hired by management association broke into property, causing damage and frightening homeowners' family); Ellis v. Alessi Tr. Corp., 2012 WL 5986524 (D. Nev. Nov. 28, 2012) (fact issue whether company established to carry out foreclosures for law firm's homeowners' association clients was a "community manager," required by Nevada law to have a debt collection license). *See generally* § 16.2.3.1.1, *supra* (whether debts for homeowners association assessments fall within state debt collection statutes).

4 Leon v. Emergency Med. Group of Watsonville, 2016 WL 3773933 (Cal. Ct. App. July 11, 2016) (medical billing service was debt collector if bills were delinquent at time notices were sent; fact issue as to when bills became delinquent). *But see* Laccinole v. Twin Oaks Software Dev., Inc., 2014 WL 2440400 (D.R.I. May 30, 2014) (billing company that sent out reminder letters during grace period was not debt collector, as debts were not yet in default); Davis v. Prof'l Bus. Services, 712 P.2d 511 (Idaho 1985) (construing definition of "collection agency" not to encompass invoicing service, because it did no more than send bills and referred unpaid bills to collector).

195 *See, e.g.*, Davis v. Wells Fargo Bank, 976 F. Supp. 2d 870 (S.D. Tex. 2013) (state debt collection statute applies to manipulative foreclosure practices by bank into which bank that originated the loan had merged), *vacated in part on other grounds*, 2014 WL 585403 (S.D. Tex. Feb. 14, 2014) (dismissing negligence and unjust enrichment claims of certain named plaintiffs); Woods v. Reverse Mortg. USA, Inc., 2017 WL 4399201 (S.D. W. Va. Sept. 29, 2017) (reverse mortgage lender is subject to debt collection provisions of West Virginia Consumer Credit Protection Act when collecting its own debt). *But cf.* Vaughan v. Wells Fargo Bank, 2017 WL 1498069 (W.D. Ark. Apr. 25, 2017) (state debt collection statute's repossession and foreclosure provisions inapplicable to mortgage lender, because its principal purpose is not enforcement of security interests).

196 Amelina v. Manufacturers' & Traders' Trust Co., 2016 WL 3982483 (S.D. Cal. July 21, 2016) (refusing to dismiss FDCPA and Rosenthal Act claims against servicer and property service; borrower sufficiently alleged that servicer used property service in effort to coerce payment; at time when borrowers had right to remain in house, property service viciously harassed borrower and children); Hayes v. Self-Help Credit Union, 2014 WL 4198412 (M.D.N.C. Aug. 22, 2014) (property preservation service was debt collector and collection agency covered by North Carolina statutes). *But see* Seghetti v. Flagstar Bank, 2016 WL 3753143 (D. Md. July 13, 2016) (before foreclosure was final, servicer sent in property preservation service that vandalized and stole personal property; no violation of Maryland act because this was not attempt to collect a debt).

197 *See* Stone v. JPMorgan Chase Bank, 415 F. Supp. 3d 628 (E.D. Pa. 2019) (state debt collection statute does not apply to collection of purchase money mortgage, i.e., one taken by mortgagee other than seller to secure repayment of money advanced at time mortgagor acquires title and used to pay all or part of purchase price); Dehart v. HomeEq Servicing Corp., 2013 WL 12147768 (E.D. Pa. June 25, 2013) (even where claim under Pa. debt collection statute is based solely on collection of insurance, fees, and costs, if the obligation arises from purchase money mortgage it falls within exemption), *aff'd*, 679 Fed. Appx. 184 (3d Cir. 2017); Trunzo v. Citi Mortgage, 876 F. Supp. 2d 521 (W.D. Pa. 2012) (Pa. debt collection statute excludes purchase money mortgages, whether provided by seller of home or third-party lender); Pettaway v. Harmon Law Offices, P.C., 2005 WL 2365331 (D. Mass. Sept. 27, 2005) (allegation that form letters used by foreclosure attorneys overstated certain costs do not state claim under Massachusetts debt collection statute, which excludes first mortgages from definition of debt); Morris v. HomeEq Servicing Corp., 2010 WL 537745 (Mich. Ct. App. Feb. 16, 2010) (residential mortgage loans and servicers exempt from Michigan Collection Practices Act; issue is whether kind of transaction is "specifically authorized by law . . . administered by a regulatory board or officer" not whether specific misconduct is prohibited).

198 Barnes v. Routh, Crabtree, Olsen, P.C., 2016 WL 81799 (D. Or. Jan. 7, 2016) (foreclosure not covered by Oregon statute, which provides that compliance with FDCPA is compliance with state statute, and foreclosure is not debt collection under FDCPA); Moore v. Wells Fargo Bank, 2013 WL 3965313 (D. Or. Aug. 1, 2013) (foreclosure on deed of

However, in the absence of an explicit statutory exemption, most courts hold that foreclosure is a means of debt collection and is subject to the state debt collection statute.[199] A U.S. Supreme Court opinion strongly supports this view, interpreting the FDCPA's general definition of "debt collector" to encompass mortgage foreclosure:

> We have explained that a home loan is an obligation to pay money, and the purpose of a mortgage is to secure that obligation. . . . Foreclosure, in turn, is "the process in which property securing a mortgage is sold to pay off the loan balance due." . . . In other words, foreclosure is a means of collecting a debt. And a business pursuing nonjudicial foreclosures would, under the capacious language of the Act's primary definition, be one that "regularly collects or attempts to collect, directly or indirectly, debts."
>
> It is true that, as [the plaintiff] points out, nonjudicial foreclosure does not seek "a payment of money from the debtor" but rather from sale of the property itself. . . . But nothing in the primary definition requires that payment on a debt come "from a debtor." The statute speaks simply of the "collection of any debts . . . owed or due." . . . Moreover, the provision sweeps in both "direc[t]" and "indirec[t]" debt collection. Ibid. So, even if nonjudicial foreclosure were not a direct attempt to collect a debt, because it aims to collect on a consumer's obligation by way of enforcing a security interest, it would be an indirect attempt to collect a debt.[200]

While the Supreme Court's actual holding in the case turns on the effect of a more limiting sub-definition of "debt collector" that does not appear in many state debt collection statutes, its statement about the general meaning of debt collection should be highly persuasive to state courts.

Even if a court concludes that foreclosure is not a form of debt collection, it may apply the statute to a collector who seeks payment from the debtor or others, rather than merely enforcing the security interest.[201] Courts may distinguish letters that are "purely informational"—for example, describing foreclosure prevention and loan modification procedures—from those attempting to collect a debt.[202]

A number of decisions hold that California's debt collection statute does not apply to the foreclosure process.[203]

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trust is not debt collection, because it is not attempt to seek money); Hulse v. Ocwen Fed. Bank, 195 F. Supp. 2d 1188, 1206, 1211 (D. Or. 2002) (foreclosing on deed of trust is not state debt collection); Trent v. Mortg. Elec. Registration Sys., Inc., 2007 WL 2120262 (M.D. Fla. July 20, 2007) (mortgage foreclosure itself is not debt collection under state statute), *aff'd on other grounds*, 288 Fed. Appx. 571 (11th Cir. 2008); Burton v. Prince, 2019 WL 1064868 (Tex. App. Mar. 7, 2019) (filing of trustee's deeds and providing redemption letter were not debt collection). *See also* Tribeca Lending Corp. v. McCormick, 745 S.E.2d 493, 501 (W. Va. 2013) (eviction action that seeks only possession of premises is not debt collection).

199 *See, e.g.*, Ademiluyi v. PennyMac Mortgage Inv. Trust Holdings I, 929 F. Supp. 2d 502 (D. Md. 2013) (mortgage foreclosure is debt collection); Brush v. Wells Fargo Bank, 911 F. Supp. 2d 445 (S.D. Tex. Nov. 29, 2012) (foreclosure is debt collection covered by Texas Debt Collection Act); Ray v. Int'l Bank, Inc., 2005 WL 2305017 (D. Colo. Sept. 21, 2005) (mortgage foreclosure is debt collection; allowing consumer to go forward with claim alleging failure to give notice required by state debt collection statute); Rey v. Acosta, 860 S.W.2d 654 (Tex. App. 1993) (wrongful acceleration of real estate note). *Cf.* Banko v. Quality Loan Serv. Co., 454 P.3d 1263 (Nev. 2019) (non-judicial foreclosure is debt collection, covered by Nevada Debt Collection Act, but businesses that conduct non-judicial foreclosures, who are extensively regulated under another statutory scheme, are not required to be licensed as debt collectors). *But cf.* Spoor v. PHH Mortg. Co., 2011 WL 883666 (N.D. W. Va. Mar. 11, 2011) (merely evaluating and acting on loan modification request is not debt collection within meaning of West Virginia statute).

200 Obduskey v. McCarthy & Holthus L.L.P., ___U.S. ___, 139 S. Ct. 1029, 1036–1037, 203 L. Ed. 2d 390 (2019).

201 *See, e.g.*, Aluia v. Dyck-O'Neal, Inc., 2015 WL 3709368 (M.D. Fla. June 15, 2014) (attempt to collect deficiency after foreclosure is debt collection); Wells Fargo Bank v. Scarlett, 2013 WL 4401315 (D. Md. Aug. 14, 2013) (lender was collecting a debt, not foreclosing a mortgage, when it sought payment from co-grantee who was not a party to note or deed of trust); Gann v. BAC Home Loan Servicing, LP, 145 So. 3d 906 (Fla. App. 2014) (letter may serve dual purpose of demanding payment and enforcing security interest; statute applied to letter that demanded specific sum by specific date to prevent initiation of foreclosure); Gann v. BAC Home Loans Servicing, L.L.P., 145 So. 3d 906 (Fla. Dist. Ct. App. 2014) (servicer that demanded sum certain to avoid foreclosure was seeking to collect "alleged debt"). *But cf.* LaCourse v. Ocwen Loan Servicing, L.L.C., 2015 WL 1565250 (D.N.H. Apr. 7, 2015) (foreclosure not debt collection where debtor had discharged personal liability on debt through bankruptcy).

202 Ellis v. JPMorgan Chase & Co., 752 Fed. Appx. 380 (9th Cir. 2018) (letters sent to mortgagors who had discharged debts in bankruptcy were purely informational); Pinson v. Albertelli Law Partners, L.L.C., 618 Fed. Appx. 551 (11th Cir. 2015) (Fla. law; letters stating reinstatement amount and warning that interest and fees would accumulate were attempt to collect a debt; letter requesting additional documents without naming sum was not); Walcker v. SN Commercial, L.L.C., 286 Fed. Appx. 455 (9th Cir. 2008) (informational letters from new servicer, advising borrower of transfer and offering repayment options, but not demanding payment, were not "in the collection of a claim" within meaning of Washington statute); Sellers v. Rushmore Loan Mgmt. Services, L.L.C., 2017 WL 1683613 (M.D. Fla. May 3, 2017) (monthly statements sent to borrower whose personal liability had been discharged in bankruptcy were an attempt to collect debt); Gilbert v. Deutsche Bank Trust Co. Americas, 2017 WL 1012981 (E.D.N.C. Mar. 14, 2017) (letters stating that defendant had taken over servicing, that interest rate was about to adjust, and that rate had adjusted were not attempts to collect debt); Leahey-Fernandez v. Bayview Loan Servicing, L.L.C., 159 F. Supp. 3d 1294 (M.D. Fla. 2016) (billing statements, sent to debtor after bankruptcy discharge, were an attempt to collect discharged debt); Nordwall v. PNC Mortg., 2015 WL 4095350 (M.D. Fla. July 7, 2014) (analyzing several letters sent to represented debtors, to determine which were informational and which were demands); Hubertise v. PNC Bank, 2015 WL 3948192 (Fla. Cir. Ct. Jan. 5, 2015) (letter inviting borrowers to foreclosure prevention workshop and providing contact information for questions was purely informational).

203 *See, e.g.*, Santoro v. CTC Foreclosure Serv. Co., 12 Fed. Appx. 476 (9th Cir. 2001) (letters notifying homeowner of foreclosure sale and offering workout did not seek to collect the debt, so state debt collection statute does not apply); Greene v. Wells Fargo Bank, 2018 WL 6832092 (N.D. Cal. Dec. 28, 2018) (Rosenthal Act does not apply to non-judicial foreclosures; distinguishing cases in which servicer was seeking payment of money); Park v. U.S. Bank, 2011 WL 4102211 (S.D. Cal. Sept. 13, 2011) (foreclosure not debt collection; dismissing claim because consumer failed to allege actions outside the scope of

Most courts hold, however, that it applies to attempts through means other than foreclosure to collect the money owed on a mortgage debt,[204] such as harassing calls,[205] imposition of unauthorized fees,[206] misrepresentations,[207] and false threats to foreclose.[208] Prior to 2019, several courts had held that the California statute was entirely inapplicable to mortgage debts.[209] A 2019 statutory amendment, specifying that it was clarifying, rather than changing existing law, overruled these decisions by specifically providing that "debt" includes a mortgage debt.[210]

16.2.3.4 Persons Who Do Not Owe the Debt

Many courts have construed state debt collection statutes to apply to collection acts against a person who does not, in fact, owe the debt,[211] such as relatives of the

the ordinary foreclosure process); Clark v. Countrywide Home Loans, Inc., 732 F. Supp. 2d 1038 (E.D. Cal. 2010); Hamilton v. Bank of Blue Valley, 746 F. Supp. 2d 1160 (E.D. Cal. 2010); Gates v. Wachovia Mortg., 2010 WL 4025064 (E.D. Cal. Oct. 13, 2010) (telephone calls in connection with foreclosure not debt collection); Fullmer v. JPMorgan Chase Bank, 2010 WL 2511178 (E.D. Cal. June 17, 2010) (statute does not apply to communications relating to non-judicial foreclosure); Saldate v. Wilshire Credit Corp., 711 F. Supp. 2d 1126 (E.D. Cal. Feb. 12, 2010) (foreclosure not debt collection; allegation of deceptive letters and phone calls by servicer fails to state claim); Champlaie v. BAC Home Loans Servicing, L.P., 706 F. Supp. 2d 1029 (E.D. Cal. 2009); Keen v. Am. Home Mortg. Servicing, Inc., 664 F. Supp. 2d 1086 (E.D. Cal. 2009); Razawi v. Fed. Deposit Ins. Corp., 2009 WL 2914120 (E.D. Cal. Sept. 29, 2009) (trustee engaged in non-judicial foreclosure is specifically exempted from Rosenthal Act by Cal. Civ. Code § 2924(b)); Connors v. Home Loan Corp., 2009 WL 1615989 (S.D. Cal. June 9, 2009) (Rosenthal debt collection act does not cover foreclosure). *See also* Jozinovich v. JP Morgan Chase Bank, 2010 WL 234895 (N.D. Cal. Jan. 14, 2010) (merely mailing notice of rescission did not convert residential mortgage into personal loan covered by Rosenthal Act).

204 *See, e.g.*, Jordan v. Nationstar Mortg., L.L.C., 2020 WL 425615 (E.D. Cal. Jan. 27, 2020) (mishandling of escrow and loan modification attempts were sufficiently "distinct from the foreclosure process" to support Rosenthal Act claim); London v. Wells Fargo Bank, 2018 WL 4214923 (E.D. Cal. Sept. 5, 2018) (borrowers sufficiently alleged debt collection activity in addition to foreclosure process: failure to credit timely payments, demands for sums already paid; and misleading statements about loan modification); Tirabassi v. Chase Home Fin., L.L.C., 2015 WL 1402016 (C.D. Cal. Mar. 24, 2015); Chao v. Aurora Loan Services, L.L.C., 2011 WL 6963098 (N.D. Cal. Sept. 13, 2011) (applicable to demand that debtor make series of payments to cure arrearage and avoid foreclosure); Osei v. Countrywide Home Loans, 692 F. Supp. 2d 1240 (E.D. Cal. 2010) (borrower stated Rosenthal Act claims against lender alleging unauthorized fees and threat to report false information); Herrera v. LCS Fin. Services Corp., 2009 WL 5062192 (N.D. Cal. Dec. 22, 2009) (borrower stated claim against lender and servicer of second mortgage, who demanded part of deficiency barred by California law); Yulaeva v. Greenpoint Mortgage Funding, Inc., 2009 WL 2880393 (E.D. Cal. Sept. 3, 2009) (allegedly false credit reporting was "squarely" connected to debt collection and only "incidentally" to foreclosure, so statute applies); *In re* Landry, 493 B.R. 541, 552–558 (Bankr. E.D. Cal. May 15, 2013) (Rosenthal Act's very specific and limited exception for trustees of deed of trust performing certain required actions does not create "implied free-ranging" exception for all acts of deed of trust trustee; lender and mortgage servicer are covered debt collectors); Davidson v. Seterus, Inc., 230 Cal. Rptr. 3d 441 (Cal. Ct. App. 2018) (Rosenthal Act applies to servicer seeking payment).

205 *See, e.g.*, Amelina v. Manufacturers' & Traders' Trust Co., 2016 WL 3982483 (S.D. Cal. July 21, 2016) (borrowers stated FDCPA and Rosenthal Act claims against servicer and property service; sufficiently alleged that servicer caused property service to harass borrower and children in effort to coerce payment); Azzini v. Countrywide Home Loans, 2010 WL 962856 (S.D. Cal. Mar. 15, 2010) (mortgage loan is debt, and allegation of telephone harassment in efforts to collect mortgage states claim); Reyes v. Saxon Mortgage Services, Inc., 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009) (harassing calls and automated calls to cell phone); Hurrey-Mayor v. Wells Fargo Home Mortg., Inc., 2009 WL 3647632 (S.D. Cal. Nov. 4, 2009) (harassing calls and automated calls to cell phone).

206 Walters v. Fid. Mortg. of Cal., Inc., 730 F. Supp. 2d 1185 (E.D. Cal. 2010) (applicable to demands for unauthorized fees during loan servicing); Bledea v. IndyMac Fed. Bank, 2010 WL 715255 (E.D. Cal. Feb. 25, 2010) (allegations of threats to report false information and addition of unauthorized fees sufficiently state claim); Baldain v. Am. Home Mortg. Servicing, Inc., 2010 WL 56143 (E.D. Cal. Jan. 5, 2010) (allegations that servicer misstated amount of debt, added unauthorized fees, and threatened to report false information state claim).

207 *See, e.g.*, Schrupp v. Wells Fargo Bank, 2016 WL 3753326 (E.D. Cal. July 13, 2016) (misleading and inconsistent statements by servicer that offered trial payment plan); Boessenecker v. J.P. Morgan Chase Bank, 2013 WL 3856242 (N.D. Cal. July 24, 2013) (Rosenthal Act applies to conflicting and inaccurate statements about amounts owed that lender made while servicing home mortgage loan); Reyes v. Wells Fargo Bank, 2011 WL 30759 (N.D. Cal. Jan. 3, 2011) (applies to misstatements in offer letter for allegedly sham "forbearance to modification" package); Gumbs v. Litton Loan Servicing, 2010 WL 1992199 (E.D. Cal. May 13, 2010) (allegations of deceptive phone calls and letters and other unlawful acts by servicer trying to collect debt state claim); Harvey G. Ottovich Revocable Living Trust v. Washington Mut., Inc., 2010 WL 3769459 (N.D. Cal. Sept. 22, 2010) (claim stated by allegations that lender "repeatedly obfuscated the truth with regard to the loan amounts and payments," thwarting efforts to pay off mortgage and prevent foreclosure).

208 *See, e.g.*, Trant v. Wells Fargo Bank, 2012 WL 2871642 (S.D. Cal. July 12, 2012) (applies to unjustified threat of foreclosure); Frison v. Accredited Home Lenders, Inc., 2011 WL 1103468 (S.D. Cal. Mar. 25, 2011) (applies to false threat of foreclosure). *See also* Castellanos v. JPMorgan Chase & Co., 2009 WL 1833981 (S.D. Cal. June 23, 2009) (attempt to collect money by threat of foreclosure is debt collection, covered by Rosenthal Act, even though foreclosure is not). *But cf.* Bledea v. IndyMac Fed. Bank, 2010 WL 715255 (E.D. Cal. Feb. 25, 2010) (because foreclosure not debt collection, threat to foreclose did not violate Rosenthal Act, but other threats may do so).

209 *See, e.g.*, Darrin v. Bank of Am., 2013 WL 877087 (E.D. Cal. Mar. 7, 2013) (residential mortgage not debt within Rosenthal Act definition); Chernik v. Bank of Am. Home Loans, 2010 WL 3269797 (E.D. Cal. Aug. 18, 2010) (mortgage servicers are entirely excluded).

210 Cal. Civ. Code § 1788.2(f), *as amended by* 2019 Cal. Legis. Serv. Ch. 545 (S.B. 187).

211 *See, e.g.*, McCaig v. Wells Fargo Bank, 788 F.3d 463 (5th Cir. 2015) (Tex. law; deceased mortgagor's son and daughter-in-law, who took over payments and entered into forbearance agreement, but neither assumed the debt nor occupied the property, had standing to sue; Texas statute provides cause of action for any person who suffers actual damage as a result of violation); Rudio v. Credit Control, L.L.C., 2018 WL 4772303 (N.D. Cal. Oct. 1, 2018) (FDCPA and Rosenthal act cover attempts to collect "alleged debt"; assignment of debt after it had been settled and paid); Hartley v. 21st Mortg. Corp., 2017 WL 4322430 (S.D. W. Va. Sept. 28, 2017) (consumer who received calls seeking to collect discharged debt was "allegedly obligated" and covered by state debt collection statute);

debtor[212] and victims of identity theft or mistaken identity.[213] Some of these rulings are based on statutory

Masuda v. Citibank, 38 F. Supp. 3d 1130 (N.D. Cal. 2014) (non-debtor cell phone subscriber who received 300 robocalls, despite requests to stop, is a "person from whom a debtor collector seeks to collect a consumer debt which is . . . alleged to be due," so may bring Rosenthal Act claim); McGuire v. Jim Walter Homes, 2014 WL 5149725 (S.D. W. Va. Oct. 14, 2014) (even if bankruptcy discharge has eliminated personal liability for mortgage, borrowers will be protected by West Virginia debt collection statute if lender's calls and letters demanded payment); Shannon v. Windsor Equity Group, Inc., 2014 WL 977899 (S.D. Cal. Mar. 12, 2014) (non-debtor, harassed by skip tracer who incorrectly believed he possessed the encumbered car, had standing to sue for Rosenthal Act and FDCPA violations); Redmond v. Green Tree Servicing, L.L.C., 941 F. Supp. 2d 694 (E.D.N.C. 2013) (tenants being harassed for landlord's delinquent mortgage); Ashley v. Gen. Elec. Capital Corp., 2013 WL 6133562 (M.D. Fla. Nov. 21, 2013) (cell phone subscriber who received numerous calls after informing creditor it had wrong number had standing to sue for violation of Florida Creditors' Collection Practices Act); Fisher v. T.C.I., 2000 U.S. Dist. LEXIS 7150 (N.D. Ill. Apr. 19, 2000) (consumer stated claim under Illinois Collection Agency Act). *But see* Graham v. Star USA Credit Union, 2018 WL 4854665 (S.D. W. Va. Oct. 5, 2018) (car loan signed only by driver's credit-worthy father; driver was not a consumer because she was not personally obligated on the loan); McNeely v. Wells Fargo Bank, 115 F. Supp. 3d 779 (S.D. W. Va. 2015) (borrower's ex-husband, who resided in home, which had been awarded to him at divorce, and was required by divorce decree to pay mortgage, was not covered by West Virginia statute because he was not personally liable for the debt secured by the mortgage); Harrison v. PNC Bank, 2015 WL 2171632 (S.D. W. Va. May 8, 2015) (borrower whose personal liability on home loan was discharged in bankruptcy was not a consumer within meaning of West Virginia statute); Smith v. MarkOne Fin., L.L.C., 2015 WL 419005 (M.D. Fla. Feb. 2, 2015) (51 robocalls to debtor's landlord, who had been listed as reference, would not violate statute because landlord was neither obligated nor allegedly obligated on debt, but calls here violated statute because landlord was family member). *But cf.* Boster v. LiveWell Fin., Inc., 2019 WL 1344726 (S.D. W. Va. Mar. 25, 2019) (dismissing remainderman's debt collection claims against creditor and servicer because their communications never alleged that he was obligated to pay his late mother's reverse mortgage loan, upon which they were foreclosing; remainderman was neither obligated nor allegedly obligated to pay back reverse mortgage obtained by holder of life interest; he signed deed of trust as "non-borrowing resident" and did not sign note; all debt collection correspondence was directed to estate of now-deceased life tenant); Hanshaw v. Wells Fargo Bank, 2015 WL 5345439 (S.D. W. Va. Sept. 11, 2015) (state debt collection statute inapplicable where homeowners had been discharged from personal liability on mortgage loan, and servicer's contacts with them did not seek to recover the debt or assert that they were personally obligated to repay it); Condon v. Global Credit & Collection Corp., 2010 WL 5071014 (M.D. Fla. Dec. 7, 2010) ("vaguely threatening" phone call, with failure to identify self, received by debtor's lawyer; not clear whether call was intended for lawyer or client, but lawyer, who is neither obligated nor allegedly obligated, has no standing to sue under FDCPA or Florida statute); Jenkins v. Allied Interstate, Inc., 2009 WL 3157399 (W.D.N.C. Sept. 28, 2009) (North Carolina statute does not protect non-debtor who received numerous wrong-number calls from collector; applies only to debtors, who must have some connection to debt). *See generally* § 4.4, *supra*.

212 *See, e.g.*, Aviles v. Wayside Auto Body, 49 F. Supp. 3d 216 (D. Conn. 2014) (Connecticut statute provides right of action to any person harmed by creditor's abusive practices to collect a debt, so nondebtor family member at whom creditor screamed and swore during repossession attempt can bring suit); Brush v. Wells Fargo Bank, 911 F. Supp. 2d 445 (S.D. Tex. 2012) (mortgagor's nonobligated husband has standing if improper collection conduct, here harassing calls, is directed against him); Mosley v. Green Tree Servicing, L.L.C., 2011 WL 2477685 (Conn. Super. Ct. May 23, 2011) (nondebtor father receiving harassing calls seeking to collect debt of similarly-named debtor son); Walter v. Palisades Collection, L.L.C., 2011 WL 1666869 (E.D. Pa. May 2, 2011) (nonobligated spouse), *order entered by* 2011 WL 1694432 (E.D. Pa. May 2, 2011); Croye v. GreenPoint Mortgage Funding, Inc., 740 F. Supp. 2d 788 (S.D. W. Va. 2010) (nonobligated spouse who received improper phone calls covered by statute if he can show he was "allegedly obligated"); Caton v. Green Tree Servicing, 2008 WL 222352 (N.D. W. Va. Jan. 25, 2008) (granting summary judgment to debtor's nondebtor mother who received letters falsely stating she was liable on debt); Barth v. First Consumer Credit, Inc., 2008 WL 5003026 (Mich. Ct. App. Nov. 25, 2008) (debtor's nondebtor wife suffered injury or loss as result of violation, so stated claim for debt collection harassment); Campbell v. Beneficial Fin. Co., 616 S.W.2d 373 (Tex. App. 1981) (debtor's mother protected). *See also* Myers v. Americollect, Inc., 194 F. Supp. 3d 839 (E.D. Wis. 2016) (parent of minor patient stated claim against collector and hospital that sent bill and dunning letter to child instead of financially responsible parent). *But see* McCaskill v. Navient Solutions, Inc., 178 F. Supp. 3d 1281 (M.D. Fla. 2016) (mother of student loan debtor had no standing to sue for violation of Florida's statute's telephone harassment provisions, because she was not obligated or allegedly obligated on the debt); McNeely v. Wells Fargo Bank, 2015 WL 4506556 (S.D. W. Va. July 24, 2015) (ex-husband, who was required by divorce decree to make payments on wife's mortgage, and had been attempting to negotiate a modification, was not covered by West Virginia statute because he was not personally liable on the mortgage). *But cf.* Weller v. JP Morgan Chase Bank, 2017 WL 3581099 (N.D. W. Va. Aug. 18, 2017) (widow who did not sign mortgage loan note cannot bring claim under state debt collection statute regarding collection attempts and loan modification efforts for that loan, but if she entered into loan modification agreement she may be consumer as to it).

213 *See, e.g.*, Adkins v. Credit Acceptance Corp., 2016 WL 7451619 (S.D. W. Va. Dec. 28, 2016) (consumer who denied owing alleged debt can bring suit under state debt collection statute against creditor that repeatedly demanded that she pay it, but she must plead that whoever incurred the debt did so for personal, family, or household purposes); Juarez v. Citibank, 2016 WL 4547914 (N.D. Cal. Sept. 1, 2016) (recipient of numerous wrong-number robocalls, continuing after collector was informed of mistake, was a debtor covered by Rosenthal Act, because creditor sought to collect from him); Scott v. Portfolio Recovery Assoc., 139 F. Supp. 3d 956 (S.D. Iowa 2015) (non-debtor whose wages were garnished stated federal and Illinois claims against debt buyer); Halsten v. Target Nat'l Bank, 2013 WL 3804844 (M.D. Fla. July 19, 2013) (Florida statute that forbids attempts to collect debt known not to be legitimate "clearly contemplates that person who owes no debt will have a cause of action"; here, person being dunned for credit card debt of unknown person); Fini v. Dish Network, L.L.C., 955 F. Supp. 2d 1288 (M.D. Fla. 2013) (cell phone owner had standing to bring Florida debt collection claim as person "allegedly obligated"; repeated autodialed calls seeking to collect debt of unrelated third party who had given plaintiff's cell number as contact when initiating TV service); Basich v. Patenaude & Felix, APC, 2013 WL 1755484 (N.D. Cal. Apr. 24, 2013) (nondebtor with same first name and SSN that differed by one digit from that of judgment debtor); Guillen v. Bank of Am., 2011 WL 4071996 (N.D. Cal. Aug. 31, 2011) (identity theft victim); Desmond v. Accounts Receivable Mgt., Inc., 72 So. 3d 179 (Fla. Dist. Ct. App. 2011) (automated calls to nondebtor, here person with name similar to credit card debtor, with no method to call back and point out mistake, states claim for "conduct that can reasonably be expected to abuse or harass" persons called by mistake). *But see* Fisher v. Eastern Air Lines, Inc., 517 F. Supp. 672 (M.D.N.C. 1981) (statute that applies to person who "has incurred debt or alleged debt" requires that alleged debtor have some connection to underlying debt; not shown where collector directed efforts at wrong person). *See generally* § 16.2.3.1.3 (whether debt incurred by identity

language that includes alleged debts, however, and courts may find these statutes inapplicable to a collector who reaches a non-debtor, but does not claim that the non-debtor owes the debt.[214]

16.2.4 State Debt Collection Statutes' Protections

16.2.4.1 General Standards

The substantive prohibitions of many state debt collection statutes are modeled on the FDCPA, and interpretations of the FDCPA may be persuasive.[215] Many courts apply the FDCPA's "least sophisticated consumer" standard in interpreting state debt collection statutes.[216] In some states, violation of the FDCPA is a *per se* violation of the state act.[217]

On the other hand, some states vary from FDCPA substantive standards in significant ways. The state statute's prohibitions may be narrower than the FDCPA's,[218] or the

thief is incurred for consumer purposes), § 16.2.4.4.7 (liability for dunning non-debtor), *infra*.

214 *See, e.g.*, Teague v. Mary Jane M. Elliot, PC, 2015 WL 400969 (E.D. Mich. Jan. 28, 2015) (nondebtor husband has no standing to sue for collection efforts directed solely at wife); Ballard v. Bank of Am., 2013 WL 5963068, at *10–11 (S.D. W. Va. Nov. 7, 2013) (deceased debtor's son does not have claim under state debt collection statute, where creditor claimed only that estate was liable), *aff'd*, 578 Fed. Appx. 226 (4th Cir. 2014); Prophet v. Myers, 2009 WL 1437799 (S.D. Tex. May 21, 2009) (non-debtor does not have standing to raise claims arising from letter to same-named son at son's address; no abusive conduct directed to plaintiff); Sanchez v. Client Services, Inc., 520 F. Supp. 2d 1149 (N.D. Cal. 2007) (daughter who answered phone for non-English-speaking mother had no standing because she neither owed nor was alleged to owe debt, nor was she person from whom defendant was trying to collect); Belin v. Litton Loan Servicing L.P., 2006 WL 1992410 (M.D. Fla. July 14, 2006) (Florida debt collection statute allows only debtors and alleged debtors to sue, not consumer's non-debtor mother and girlfriend who answered calls). *See also* Young v. EOSCCA, 800 S.E.2d 224 (W. Va. 2017) (non-debtor who received wrong-number calls intended for someone named Jim (not called party's name) was not consumer; "allegedly obligated" refers only to debt alleged to be owed by person being dunned).

215 Farrin v. Northstar Mortg., L.L.C., 2016 WL 6407841 (D. N.H. Oct. 16, 2016) (applying FDCPA criteria to New Hampshire claim; noting similarity of statutes and lack of New Hampshire case law); Liu v. Arrow Fin. Services, L.L.C., 2010 WL 1994190 (S.D. Tex. May 17, 2010) (Texas Debt Collection Act is modeled on FDCPA and should be similarly construed; here, evaluating claim of bona fide error); Hartman v. Meridian Fin. Services, 191 F. Supp. 2d 1031, 1049–1050 (W.D. Wis. 2002) (relying on FDCPA to hold that use of false name in letter violated Wisconsin Consumer Act); *In re* Hathcock, 437 B.R. 696 (Bankr. M.D. Fla. 2010) (giving great weight to FDCPA interpretations; letter that did not overshadow validation notice in violation of FDCPA did not violate Florida debt collection statute). *See also* McMullen v. McHughes Law Firm, 454 S.W.3d 200 (Ark. 2015) (where neither party briefed the question whether Arkansas Fair Debt Collection Act standards are the same as FDCPA, court will assume that they are).

216 Bloodworth v. United Credit Serv., Inc., 2016 WL 1453520 (E.D. Wis. Apr. 12, 2016) (applying unsophisticated consumer standard to both FDCPA and Wisconsin Consumer Act claims; issue whether consumer would perceive language as a threat); Rivernider v. Brough, 2013 WL 5353748 (S.D. Fla. Sept. 24, 2013) (unsophisticated consumer standard for both FDCPA and FCCPA, but letter would not lead tenant of condo to believe that she was liable for owner's delinquent assessments); Zengerle v. Dynia & Assoc., 2013 WL 5172763 (E.D. Mich. Sept. 13, 2013) (unsophisticated consumer standard for Michigan Debt Collection Procedures Act claim); Langley v. Weinstein & Riley, P.S., 2013 WL 2951057 (S.D. Tex. June 14, 2013) (unsophisticated consumer standard for both FDCPA and TDCA; granting summary judgment for consumer because letter would lead unsophisticated consumer to believe that oral dispute was sufficient to trigger cessation of collection activity under FDCPA); Chao v. Aurora Loan Services, L.L.C., 2011 WL 6963098 (N.D. Cal. Sept. 13, 2011); Miranda v. Law Office of D. Scott Carruthers, 2011 WL 2037556 (E.D. Cal. May 23, 2011) ("notice of pending court proceedings" would deceive least sophisticated consumer into believing that suit had already been filed); McKeown v. Mary Jane M. Elliot, P.C., 2007 WL 4326825 (E.D. Mich. Dec. 10, 2007) (Michigan criteria for misleading or deceptive communications similar to FDCPA: least sophisticated consumer); *In re* Cheaves, 439 B.R. 220 (Bankr. M.D. Fla. 2010) (unsophisticated consumer standard same for FDCPA and Florida debt collection statute, but letter here would not deceive unsophisticated consumer into thinking it was from attorney). *See also* Flood v. Mercantile Adjustment Bureau, L.L.C., 176 P.3d 769 (Colo. 2008) (where language of Colorado statute's notice provisions tracks that of FDCPA, least sophisticated consumer standard applies). *Cf.* Forsyth Mun. Hosp. v. Contreras, 421 S.E.2d 167 (N.C. Ct. App. 1992) (assuming without deciding that "least sophisticated consumer" standard would be applied in cases under state debt collection statute, but finding no deception). *But see* Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087 (D. Or. 2000) (Oregon debt collection statute does not use "least sophisticated debtor" standard; technically correct statements which would mislead unsophisticated debtor violate FDCPA but not state statute).

217 McDermott v. Marcus, Errico, Emmer & Brooks, PC, 773 F.3d 109 (1st Cir. 2014) (violation of FDCPA violates Massachusetts debt collection statute, and is per se UDAP violation); Strouse v. Enhanced Recovery Co., 956 F. Supp. 2d 627 (E.D. Pa. 2013) (FDCPA violation is per se violation of state debt collection act; here sending letters to home of identity theft victim's parents, where victim did not reside, after being told to communicate only with her attorney); Osei v. Countrywide Home Loans, 692 F. Supp. 2d 1240 (E.D. Cal. 2010) (violation of FDCPA, here threat to report false information, is per se violation of Rosenthal Act); Day v. Am. Home Mortgage Servicing, Inc., 2010 WL 2231988 (E.D. Cal. June 3, 2010) (contact with consumer, known to be represented, did not violate Rosenthal Act's own prohibition, which applies only if collector has been informed in writing, but because Rosenthal Act also requires compliance with FDCPA, consumer still stated Rosenthal Act claim); Flamm v. Sarner & Assoc., P.C., 2006 WL 43770 (E.D. Pa. Jan. 3, 2006) (violation of FDCPA also violates state debt collection act, but consumer must show "ascertainable damages" to recover); Harding v. Regent, 347 F. Supp. 2d 334 (N.D. Tex. 2004) (violations of FDCPA may constitute acts "prohibited by law" and therefore violate Texas debt collection statute). *But see* Ortiz v. Accounts Receivable Mgmt., Inc., 2010 WL 547910 (S.D. Fla. Feb. 12, 2010) (violation of FDCPA is not per se violation of Florida statute).

218 *See, e.g.*, Aluia v. Dyck-O'Neal, Inc., 2015 WL 3709368 (M.D. Fla. June 15, 2014) (FDCPA violation, here improper venue, has no counterpart in Florida statute); Dennis v. Reg'l Adjustment Bureau, Inc., 2010 WL 3359369 (S.D. Fla. July 7, 2010) (Florida statute does not require collector to identify self unless requested by consumer); Beeders v. Gulf Coast Collection Bureau, Inc., 2010 WL 2696404 (M.D. Fla. July 6, 2010) (unlike FDCPA, Florida statute requires collector to identify self only if requested by debtor), *aff'd*, 432 Fed. Appx. 918 (11th Cir. 2011); Malowney v. Bush/Ross, 2009 WL 3806161 (M.D. Fla. Nov. 12, 2009) (unlike FDCPA, Florida act forbids only threats of legally impossible actions, not actions never intended to be taken); Reese v. JPMorgan Chase & Co., 686 F. Supp. 2d 1291 (S.D. Fla. 2009) (provision of Florida statute forbidding attempt to collect illegitimate debt or exercise non-existent right requires showing of

state may impose liability for acts that the FDCPA does not forbid.[219]

16.2.4.2 Privacy Protections

16.2.4.2.1 Introduction

Some debt collection statutes protect privacy by prohibiting undue publicity of a consumer's debt. A statute that prohibited placing language "calculated to embarrass the debtor" on an envelope was violated when the word "debtor" appeared at the top of the window in an envelope, because that word is "loaded with unpleasant associations."[220] Some states prohibit disclosure of information "affecting the debtor's reputation."[221] Courts may require proof that the disclosure actually affected or was likely to affect the consumer's reputation.[222]

State privacy laws are another source or protection for debtors.[223] For example, state privacy statutes may regulate the use of medical or other confidential information in debt collection or litigation.[224]

16.2.4.2.2 Credit reporting

Reporting false or disputed information about the debt or the debtor's creditworthiness to a third party such as a credit bureau may violate the state debt collection statute.[225] However, state

actual knowledge); Mateti v. Activa Fin., L.L.C., 2009 WL 2507423 (D. Md. Aug. 14, 2009) (Maryland statute, unlike FDCPA, does not impose strict liability; must show actual knowledge that information was false or right alleged non-existent), Pollock v. Bay Area Credit Serv., L.L.C., 2009 WL 2475167 (S.D. Fla. Aug. 13, 2009) (Florida standard for deception narrower than FDCPA); Citibank v. MacDonald, 2017 WL 2812923 (Cal. Ct. App. June 29, 2017) (unpublished) (Cal. Civ. Code § 1788.15, which forbids going forward with action knowing that service has not been made, clearly includes knowledge requirement, while FDCPA does not; allegation of sewer service states claim for violation of § 1788.17, making FDCPA violations *per se* Rosenthal Act violations, but not for violation of § 1788.15); Schauer v. Morse Operations, Inc., 5 So. 3d 2 (Fla. Dist. Ct. App. 2009) (must show that lender had actual knowledge that sums not owed).

219 *See, e.g.*, Hapin v. Arrow Fin. Services, 428 F. Supp. 2d 1057, 1062 n.3 (N.D. Cal. 2006) (California Rosenthal Fair Debt Collection Act claims may survive even if all FDCPA claims fail). *See also* § 16.1.2, *supra*.

220 Hansen v. Cent. Adjustment Bureau, Inc., 348 So. 2d 608, 609 (Fla. Dist. Ct. App. 1977). *See also* Garcia v. Creditors Specialty Services, Inc., 2016 WL 3345459 (N.D. Cal. June 16, 2016) (Rosenthal Act forbids written communications that convey information meant to be seen by third party and intended to embarrass the debtor; finding plausible inference of intent where window envelope that revealed the words "Creditors' Specialty Services" and "settlement offer" with a red dollar sign was placed in mailbox to which entire household had access); Keasey v. Judgment Enforcement Law Firm, P.L.L.C., 2014 WL 1744268 (W.D Mich. Apr. 30, 2014) ("Judgment Enforcement Law Firm" visible in return address disclosed a debt in violation of FDCPA, Michigan Occupational Code, and Michigan Collection Practices Act).

221 *See* Waddell v. Capital Accounts, L.L.C., 2019 WL 5792865 (W.D. W. Va. Nov. 5, 2019) (threats to call employer about disputed debt violated state law provision forbidding "the accusation or threat to accuse any person of . . . any conduct which, if true, would tend to disgrace such person or in way subject him to ridicule or the contempt of society"); Rumpf v. Quorum Fed. Credit Union, 2018 WL 6271597 (W.D. Wis. Nov. 30, 2018) (creditor's statement in appellate brief that debts were primarily for gambling may violate this provision; statement will be protected by litigation privilege only if it is relevant to issue whether debt was for consumer purposes); Berg v. Merchants Ass'n Collection Div., 586 F. Supp. 2d 1336 (S.D. Fla. 2008) (debt collection message on answering machine, overheard by neighbor and girlfriend, affected reputation); Laughlin v. Household Bank, Ltd., 969 So. 2d 509 (Fla. Dist. Ct. App. 2007) (telling employer that consumer has committed "credit card fraud" affected reputation); Heard v. Mathis, 344 So. 2d 651 (Fla. Dist. Ct. App. 1977). *See also* Caton v. Green Tree Servicing, 2008 WL 222352 (N.D. W. Va. Jan. 25, 2008) (lender's call to landowner, on whose land manufactured home was located, violated prohibition on communications that "tend to disgrace" consumer).

222 *See, e.g.*, Meyer v. Navient Solutions, L.L.C., 2019 WL 2303126 (E.D. Wis. May 30, 2019) (calls to delinquent borrowers' relatives, stating that servicer needed up-to-date contact information in order to provide "important updates," did not violate prohibition against disclosing information affecting customer's reputation; calls disclosed only existence of loan, not delinquency); Weber v. Great Lanes Educ. Loan Serv., 2013 WL 3943507 (W.D. Wis. July 30, 2013) (fact that student has taken out student loans and owes repayment is not stain on one's reputation; disclosure to debtor's mother that debtor owes student loan is not violation). *See also* Niven v. Nat'l Action Fin. Services, Inc., 2008 WL 4190961 (M.D. Fla. Sept. 10, 2008) (message left on office answering machine and picked up by debtor's assistant; fact issue whether message would affect reputation).

223 *See* § 16.8.3, *infra*.

224 *See, e.g., In re* Ortiz, 430 B.R. 523 (Bankr. E.D. Wis. 2010) (specific healthcare privacy statute overrides common law litigation privilege). *See also In re* Helfman, 2020 WL 2790437 (N.J. Super. Ct. App. Div. May 29, 2020) (affirming licensing board's sanctions against psychologist who divulged confidential patient information to collection attorneys he employed to collect delinquent accounts). *See generally* § 16.8.3, *infra*.

225 O'Brien v. Quicken Loan Services, 2013 WL 2319248, at *11 (S.D. W. Va. May 28, 2013) (claim adequately pleaded by allegations that defendant reported an alleged delinquency that was created by failing to credit timely payments and imposing of unauthorized late charges); Bledea v. IndyMac Fed. Bank, 2010 WL 715255 (E.D. Cal. Feb. 25, 2010); Champlaie v. BAC Home Loans Servicing, L.P., 706 F. Supp. 2d 1029 (E.D. Cal. 2009) (threat to report false information violates Rosenthal Act); Welch v. Target Nat'l Bank, 2009 WL 1659708 (M.D. Fla. June 15, 2009) (continuing to report debt known to be discharged in bankruptcy was "backdoor method" of collection; consumer stated claim under Florida debt collection statute); Johnson v. MBNA Am. Bank, 2006 WL 618077 (M.D.N.C. Mar. 9, 2006) (question of fact whether creditor committed unfair act in violation of state debt collection law by dunning widow for late husband's secret credit card debt and reporting it to credit bureaus, when it knew or should have known widow might not be liable); Akalwadi v. Risk Mgmt. Alternatives, 336 F. Supp. 2d 492, 511 (D. Md. 2004) (fact question whether reporting same debt twice, with arguably incorrect amount, was knowing or reckless); Spencer v. Hendersen-Webb, Inc., 81 F. Supp. 2d 582 (D. Md. 1999) (denying cross-motions for summary judgment). *See also* Gonzales v. Arrow Fin. Services, L.L.C., 489 F. Supp. 2d 1140 (S.D. Cal. 2007) (threat to report stale debt, or implication that it had already been reported, was deceptive); Schafer v. Fed. Services Corp., 875 S.W.2d 455 (Tex. App. 1994) (prohibition against reporting disputed debt applies where consumer does not dispute amount, but disputes whether purported creditor owns debt). *But see In re* Pultz, 400 B.R. 185 (Bankr. D. Md. June 13, 2008) (false credit reporting does not violate Md. Code Ann., Com. Law § 14-202(5), which forbids disclosure or threat of disclosure of information affecting debtor's reputation to third person who does not have legitimate business need for information). *But cf.* Gamby v. Equifax Info. Services, L.L.C., 2010

statutory claims based on conduct that the Fair Credit Reporting Act regulates, including certain actions relating to furnishing of information to credit reporting agencies, may fall within a preemption provision of that Act.[226] The analysis of the Act's preemption provisions is highly technical and is addressed in detail in National Consumer Law Center, Fair Credit Reporting (9th ed. 2018), *updated at* www.nclc.org/library.[227]

16.2.4.2.3 Workplace calls

Employer contacts are prohibited by some state debt collection statutes.[228] Many state debt collection statutes also prohibit calls to the debtor at work, usually if the debtor has requested that such calls cease or the collector knows that the employer prohibits such calls.[229] Some statutes prohibit calls to the debtor at work unless the collector has tried unsuccessfully to reach the debtor at home.[230]

16.2.4.2.4 Third-party contacts

Contacts with family members and other third parties are considered unfair and abusive under many state debt collection statutes.[231] For example, a creditor who discussed the consumers' debt with relatives while obtaining location information

WL 46946 (E.D. Mich. Jan. 7, 2010) (false report not shown; where consumer's nonliability for credit card debt, which resulted from unauthorized use by family member, became clear only at trial, statement was "true when made").

226 15 U.S.C. § 1681t. *See generally* National Consumer Law Center, Fair Credit Reporting § 10.7 (9th ed. 2018), *updated at* www.nclc.org/library.

227 National Consumer Law Center, Fair Credit Reporting § 10.4 (qualified immunity), § 10.7 (preemption) (9th ed. 2018), *updated at* www.nclc.org/library.

228 *See, e.g.*, Weakley v. Redline Recovery Services, L.L.C., 723 F. Supp. 2d 1341 (S.D. Cal. 2010) (denying motion to dismiss claim against collector who, despite having two current phone numbers for debtor-Marine, spoke with his superiors, discussed debt, and described debtor as dishonest); Sanchez v. Client Services, Inc., 520 F. Supp. 2d 1149 (N.D. Cal. 2007) (fact issue whether messages on workplace answering machine revealed debt collection purpose); Stinson v. GC Services, L.P., 2008 WL 2328210 (S.D. Tex. June 4, 2008) (allegation that collector called human resources department and tried to garnish wages without conforming to Texas procedural requirements states claim under Texas debt collection statute); Me. Stat. tit. 32, § 11,012; Laughlin v. Household Bank, Ltd., 969 So. 2d 509 (Fla. Dist. Ct. App. 2007) (call to supervisor stating that consumer was guilty of credit card fraud; consumer alleged that this caused loss of job). *See also* Heath v. Avco Fin. Services, 587 N.W.2d 457 (Wis. 1998) (finance company's call to employer in which it identified itself would violate state debt collection statute regardless of whether message it left was for employer or debtor to return call). *But cf.* Gill v. Kostroff, 82 F. Supp. 2d 1354 (M.D. Fla. 2000) (sending wage garnishment order to employer was not impermissible communication, even though default judgment on which it was based was later vacated by consent); Kohler v. Ford Motor Credit Co. 462 N.Y.S.2d 297 (N.Y. App. Div. 1983) (allegation that creditor visited debtor at job, and "caused a disturbance and caused him extreme embarrassment, relative to his employer" did not state cause of action under statute prohibiting contacting employer or threatening to do so); Assoc. Fin. Services Co. v. Hornik, 336 N.W.2d 395 (Wis. Ct. App. 1983) (where statute prohibited employer contacts, except, *inter alia*, to verify earnings, consumer must prove contact was not to verify earnings). *See generally* §§ 5.6, 15.3, 15.5, *supra*.

229 Robinson v. Managed Accounts Receivable, Corp., 654 F. Supp. 2d 1051 (C.D. Cal. 2009) (calls to military base where debtor known to be in active service; creditor knew workplace calls were forbidden; debtor stated claim for punitive damages); First N. Am. Nat'l Bank v. Superior Court, 2005 WL 67123 (Cal. Ct. App. Jan. 13, 2005); Hill v. Navy Fed. Credit Union, 2010 WL 2764698 (Conn. Super. Ct. June 2, 2010) (allegation that creditor called workplace after being informed it was inconvenient states claim; need not allege that employer forbade calls); City Fin. Co. v. Boykin, 358 S.E.2d 83 (N.C. Ct. App. 1987) (creditor violated state debt collection statute by continuing to phone consumer at work despite consumer's request to cease and provision of neighbor's phone number where he received messages). *But cf.* Johnson v. Nat'l Recovery Group, L.L.C., 2010 WL 1992636 (E.D. Cal. May 14, 2010) (allegation of workplace calls insufficient without allegation that consumer notified caller in writing that calls were forbidden), *adopted*, 2010 WL 2303320 (E.D. Cal. June 7, 2010); Caton v. Green Tree Servicing, 2008 WL 222352 (N.D. W. Va. Jan. 25, 2008) (calling workplace and asking co-worker to tell consumer to call certain number about "a business matter" did not violate West Virginia ban on employer contacts); Sigala v. Arrow Fin. Services, L.L.C., 2007 WL 642955 (S.D. Cal. Feb. 22, 2007) (workplace calls forbidden only if collector knows or should know of work rule forbidding them, or debtor requests in writing that contact not be made; here, rule not enforced if calls less than three minutes, and collector did not know of rule).

230 Clark v. Quick Collect, Inc., 2005 WL 1586862 (D. Or. June 30, 2005) (calls to workplace permitted where phone log showed unsuccessful attempts to reach consumers at home, even though collector did not leave message on home answering machine; call in which collector identified self to receptionist as "with QCI" did not reveal debt collection purpose); Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087 (D. Or. 2000) (single call to consumer at work violated Oregon Unfair Debt Collection Practices Act, which requires that collector first make reasonable efforts to contact debtor at home; consumer's home phone number was listed); *In re* Castro, 2008 WL 4820526 (Bankr. E.D. N.C. Nov. 5, 2008) (finding that workplace calls violated automatic stay; noting that calls violated N.C. Gen. Stat. § 58-70-100(4), which forbids workplace calls if collector can reach consumer during non-working hours).

231 *See, e.g.*, Baldwin v. Monterey Fin. Services, Inc., 2016 WL 5723734 (M.D. Pa. Sept. 30, 2016) (denying creditor's motion for summary judgment on claim that creditor revealed that debtor owed debt by calling debtor's reference and stating that call was from company's "review department" and that debtor should "call today to resolve this outstanding matter," but granting summary judgment as to a second call that was less specific); Smith v. MarkOne Fin., L.L.C., 2015 WL 419005 (M.D. Fla. Feb. 2, 2015) (contacts with family members forbidden, but contacts with landlord, whom debtor had listed as reference, were not); Poitevint v. United Recovery Sys., L.P., 899 F. Supp. 2d 1230 (N.D. Fla. 2012) (fact issue whether number, content, and timing of calls to debtor and family member showed intent to harass); Branco v. Credit Collection Services, Inc., 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011) (leaving debt collection message for debtor message on family answering machine that several family members used violates state debt collection law); Valero v. Bryant, LaFayette & Assoc., 2011 WL 1438436 (E.D. Cal. Apr. 14, 2011) (abusive call to debtor's seriously ill father); Tourgeman v. Collins Fin. Services, Inc., 2011 WL 3176453 (S.D. Cal. July 26, 2011) (refusing to dismiss claim that service of collection action complaint on debtor's father violated state debt collection statute); Puttner v. Debt Consultants of Am., 2009 WL 1604570 (S.D. Cal. June 4, 2009) (allegations of repeated calls to family members, harassment calls sufficient to state claim). *But see* N.H. Rev. Stat. Ann. § 358-C:3(IV)(a) (allowing calls to person residing with debtor and reasonably believed to be family member over the age of 18). *But cf.* Brooks v. Midland Credit Mgmt., Inc., 2013 WL 1010455 (D. Md. Mar. 13, 2013) (call to household answering machine not sufficient

violated a state prohibition against third party contacts except to locate the consumers.[232] It may be actionable simply to provide in a contract that the consumer waives the right to be free from third party contacts.[233]

16.2.4.3 Abusive Collection Activities

16.2.4.3.1 Telephone harassment

Abusive debt collection conduct is proscribed by many state debt collection statutes. Many decisions have applied this prohibition to telephone harassment. Particular violations include:

- Excessively repeated calls or other contacts,[234] which may include missed or unanswered calls.[235]

to state claim in absence of allegation that any third party actually received information).

232 Pub. Fin. Co. v. Van Blaricome, 324 N.W.2d 716 (Iowa 1982). *See also* McKibben v. Collection Prof'l Services, 2010 WL 2025319 (E.D. Cal. May 18, 2010) (contact with debtor's daughter and debtor's church, revealing existence of debt); Berg v. Merchants Ass'n Collection Div., 586 F. Supp. 2d 1336 (S.D. Fla. 2008) (Florida statute forbids disclosure to non-household members with no legitimate need for information, if disclosure affects reputation; sufficiently alleged here where debt collection message on home answering machine overheard by neighbor and girlfriend); Dowling v. I.C. Sys., Inc., 2005 WL 2675010 (M.D. Fla. Oct. 20, 2005) (consumer raised fact issues regarding conversation with non-debtor daughter who answered phone, and call to neighbor at another address); Sec. Marine Bank v. Larson, 291 N.W.2d 662 (Wis. Ct. App. 1980) (bank employee's gratuitous statements to debtor's relatives that debtor was in default and dying of cancer, and his uninvited entry into relative's home and refusal to leave, violated state debt collection statute). *But see* Segal v. Nat'l Action Fin. Services, 2006 WL 449176 (M.D. Fla. 2006) (sending sealed letter to consumer at stepson's address not prohibited third party contact); Flood v. Mercantile Adjustment Bureau, L.L.C., 176 P.3d 769 (Colo. 2008) (disclosure of debt information to third-party mailing service that printed and sent collection letters was *de minimis* and unlikely to harm debtors, so did not violate ban on third-party communications).

233 *See* U.S. Life Credit Corp. v. Wilson, 301 S.E.2d 169 (W. Va. 1982) (clause unconscionable).

234 *See, e.g.*, N.L. by Mother Lemos v. Credit One Bank, 2018 WL 5880796 (E.D. Cal. Nov. 8, 2018), *aff'd*, 960 F.3d 1164 (9th Cir. 2020) (denying defendant's motion for summary judgment on claim that 785 calls in one month to non-debtor, a 10-year old child, was violation); Soria v. U.S. Bank, 2019 WL 8167925, at *11 (C.D. Cal. Apr. 25, 2019) (denying creditor's motion for summary judgment; fact question whether 232 calls over seven-month period shows intent to harass); Miller v. Ginny's, Inc., 2017 WL 6398302 (M.D. Fla. Dec. 16, 2017) (if daily calls continued after request to stop, they would violate provisions of Florida statute forbidding harassing calls, and assertion of right known not to exist); Juarez v. Citibank, 2016 WL 4547914 (N.D. Cal. Sept. 1, 2016) (three calls per day for forty-two days, most after being informed that collector had wrong number); Tinsley v. OneWest Bank, 2014 WL 3700456 (S.D. W. Va. July 24, 2014) (five calls in six days may be abusive where debtor repeatedly asked collector to stop calling); Priscoff v. JPMorgan Chase Bank, 2013 WL 3776589 (S.D. Ohio July 16, 2013) (fact question whether 300 calls demonstrates intent to harass sufficient to be violation of state debt collection statute); Cole v. U.S. Bank, 2011 WL 3651029 (S.D. Tex. Aug. 17, 2011) (numerous rude and abusive calls, including four in one day, resulting in physical illness); Stewart v. Xrimz, L.L.C., 2011 WL 1002207 (M.D. Pa. Mar. 18, 2011) (frequent calls and text messages with foul language and impersonation of law enforcement officer); Stuart v. AR Res., 2011 WL 904167 (E.D. Pa. Mar. 16, 2011) (unreasonably frequent calls with profanity and misrepresentations), *later decision at* 2011 WL 904202 (E.D. Pa. Mar. 16, 2011) (denying motions to dismiss statutory claims; dismissing common law invasion of privacy claim); Rucker v. Nationwide Credit, Inc., 2011 WL 25300 (E.D. Cal. Jan. 5, 2011) (fact question whether eighty calls in about a year were harassing); Oppenheim v. I.C. Sys., Inc., 695 F. Supp. 2d 1303 (M.D. Fla. 2010) (thirty or forty "belligerent" phone calls sufficient to state claim), *aff'd on other grounds*, 627 F.3d 833 (11th Cir. 2010); McKibben v. Collection Prof'l Services, 2010 WL 2025319 (E.D. Cal. May 18, 2010) (allegation of "constant and continuous" calls sufficient to state claim); Reyes v. Saxon Mortg. Services, Inc., 2009 WL 3738177 (S.D. Cal. Nov. 5, 2009) (harassing calls and automated calls to cell phone); Hurrey-Mayor v. Wells Fargo Home Mortg., Inc., 2009 WL 3647632 (S.D. Cal. Nov. 4, 2009) (harassing calls and automated calls to cell phone); Robinson v. Managed Accounts Receivable, Corp., 654 F. Supp. 2d 1051 (C.D. Cal. 2009) (repeated calls, including false threats, to military base where calls were forbidden; debtor stated claim for punitive damages); Pollock v. Bay Area Credit Serv., L.L.C., 2009 WL 2475167 (S.D. Fla. Aug. 13, 2009) (fact issue whether 187 calls to cell phone, ten leaving prerecorded message, were harassment); Panahiasl v. Gurney, 2007 WL 738642 (N.D. Cal. Mar. 8, 2007) (repeated abusive phone calls violate state debt collection statute); Rouse v. Law Offices of Rory Clark, 465 F. Supp. 2d 1031 (S.D. Cal. 2006) (calls and other collection action continued after plaintiff repeatedly furnished proof he was judgment debtor's similarly-named non-debtor son); Baker v. Citibank, 13 F. Supp. 2d 1037 (S.D. Cal. 1998) (overruling motion to dismiss suit alleging frequent telephone calls in violation of state debt collection practices statute); First N. Am. Nat'l Bank v. Superior Court, 2005 WL 67123 (Cal. Ct. App. Jan. 13, 2005) (fact question whether eighty contacts in 230 days unreasonable); Armata v. Target Corp., 99 N.E.3d 788 (Mass. 2018) (rejecting creditor's contention that calls initiated by predictive dialer are not subject to Massachusetts regulation's limit of two calls per week). *But see* Caudell v. Fin. Credit Network, Inc., 2011 WL 1377643 (E.D. Cal. Apr. 12, 2011) (daily calls not violation); Gates v. Wachovia Mortg., 2010 WL 4025064 (E.D. Cal. Oct. 13, 2010) (allegation that calls continued after written request to stop insufficient to state Rosenthal Act claim; must allege that calls were threatening, harassing, obscene, or deceptive). *But cf.* Daley v. Bono, 420 F. Supp. 3d 1247 (M.D. Fla. 2019) (four to eight letters over period of two or more years to debtor's attorney not harassing); Medley v. Dish Network, L.L.C., 2018 WL 4092120 (M.D. Fla. Aug. 27, 2018) (six telephone calls and five routine billing notices over five months not excessive), *aff'd in part, rev'd in part on other grounds*, 958 F.3d 1063 (11th Cir. 2020); Valentine & Kebartas, Inc. v. Lenahan, 801 S.E.2d 431 (W. Va. 2017) (250 phone calls—up to six per day—during eight month period are not sufficient to support claim for harassing calls); Cesaire v. Med. Services, Inc., 2016 WL 6910257, at *8–9 (M.D. Fla. Nov. 23, 2016) (fifteen calls per month, some of which were unanswered, not a violation absent other oppressive conduct); Branco v. Credit Collection Services, Inc., 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011) (fourteen calls not harassment; no evidence of pattern or content); Arteaga v. Asset Acceptance, L.L.C., 733 F. Supp. 2d 1218 (E.D. Cal. 2010) (eighteen calls, most of which were not answered, over five months not violation); Dennis v. Reg'l Adjustment Bureau, Inc., 2010 WL 3359369 (S.D. Fla. July 7, 2010) (six calls to cell phone over four-month period insufficient); Wolfe v. GC Services L.P., 2009 WL 230637 (E.D. Mich. Jan. 30, 2009) (claim fails because debtor, who was receiving calls from more than one collector, failed to produce phone records showing that defendant made offending calls); Norris v. Nationstar Mortg., L.L.C., 2019 WL 2022531 (Cal. Ct. App. May 8, 2019) (unpublished) (daily robocalls do not violate Rosenthal Act); Schauer v. Morse Operations, Inc., 5 So. 3d 2 (Fla. Dist. Ct. App. 2009) (seven calls in six months, one stating that co-signer would be "in big trouble," insufficient as matter of law to state claim).

235 Brown v. Flagstar Bancorp, Inc., 2014 WL 408821 (M.D. Fla. Feb. 3, 2014) (unanswered calls may "communicate" within the meaning of

- Calls at unusual or inconvenient times;[236] and
- Profane or abusive language.[237]

Some state debt collection statutes require a showing of intent to harass or that the frequency of the calls would reasonably be expected to harass the debtor.[238] In a Florida case involving more than 100 collection calls about a disputed debt, the jury considered whether the activity violated a statute that prohibited "willfully communicating with a debtor or any member of his family with such frequency as can reasonably be expected to harass the debtor or his family." The jury was instructed to weigh the following factors:

- The frequency and abrasiveness of the contacts;
- The legitimacy of the collector's claim;
- The legitimacy of the consumer's excuse for not paying;
- The evidence of the harassing purpose of the contact; and
- Whether the calls continued after passage of a reasonable time for persuading, exchanging information, and negotiating.[239]

FCCPA provisions forbidding telephone harassment and communication with represented debtors); Pruden v. CitiMortgage, Inc., 2014 WL 2142155 (D.N.H. May 23, 2014) (one month of daily hang-up calls was sufficient to support claim for telephone harassment); Bresko v. M. & T. Bank Corp., 2013 WL 5328241 (M.D. Fla. Sept. 23, 2013) (unanswered call is communication covered by Florida statute if collector's number shows up on caller ID); Neu v. Genpact Services, L.L.C., 2013 WL 1773822 (S.D. Cal. Apr. 25, 2013) (fact issue as to intent to harass; 150 calls to home and cell phone, none answered); Clements v. HSBC Auto Fin., Inc., 2011 WL 2976558 (S.D. W. Va. July 21, 2011) (intent to harass sufficiently shown; over 800 autodialed calls to represented consumers; most calls unanswered); Armata v. Target Corp., 99 N.E.3d 788 (Mass. 2018) (unanswered calls are communications subject to Massachusetts regulation's limit of two calls per week, even if caller does not leave voicemail message). *See also* Enis v. Bank of Am., 2013 WL 1721961 (N.D. Tex. Apr. 22, 2013) (genuine issue of fact as to harassing phone calls: 110 calls, thirty-one answered); Krapf v. Nationwide Credit, Inc., 2010 WL 2025323 (C.D. Cal. May 21, 2010) (fact question whether four to eight calls per day violated prohibition against causing telephone to ring repeatedly to annoy called party, but where debtor answered only two calls there was not violation of prohibition against unreasonably frequent communication). *But cf.* Cesaire v. Med. Services, Inc., 2016 WL 6910257, at *9 (M.D. Fla. Nov. 23, 2016) (absent other oppressive conduct, large volume of unanswered calls merely represents legitimate persistent attempt to reach consumer).

236 *See, e.g.*, Brooks v. Suncoast Schs. F.C.U., 2012 WL 6059199 (M.D. Fla. Dec. 6, 2012) (very frequent calls, some outside permitted hours); Thompson v. Chase Bank, 2010 WL 1329061 (S.D. Cal. Mar. 30, 2010) (calls on Easter and Mother's Day sufficient to support claim for calls at unusual or inconvenient times); Gilroy v. Ameriquest Mortgage Co., 632 F. Supp. 2d 132 (D.N.H. 2009) (evidence sufficient that calls came from defendant and were harassing; need not show time and content of each call; here about 200 late evening calls, up to three per night, to older woman who had told creditor she went to bed at eight and could not pay at present), *later decision at* 2009 WL 2169858 (D.N.H. July 21, 2009) (denying creditor's motion for new trial); Hamilton v. Ford Motor Credit Co., 502 A.2d 1057 (Md. Ct. Spec. App. 1986) (upholding $10,001 award for repeated and late night phone calls despite request to stop).

237 *See, e.g.*, Summers v. Merchants and Med. Credit Corp., 2013 WL 1507529 (E.D. Mich. Apr. 12, 2013) (fact issue whether calling consumer a liar is, without more, harassment); Stewart v. Xrimz, L.L.C., 2011 WL 1002207 (M.D. Pa. Mar. 18, 2011) (frequent calls and text messages with foul language and impersonation of law enforcement officer); Stuart v. AR Res., 2011 WL 904167 (E.D. Pa. Mar. 16, 2011) (unreasonably frequent calls with profanity and misrepresentations), *later decision at* 2011 WL 904202 (E.D. Pa. Mar. 16, 2011) (denying motions to dismiss statutory claims); Sasscer v. Donnelly, 2010 WL 2195797 (M.D. Pa. May 27, 2010) (frequent calls, profane language, arguably false threats); Iruegas v. Diversified Adjustment Serv., Inc., 2010 WL 1171088 (W.D. Tex. Mar. 22, 2010) (profane language, threat to report debt after debtor stated it was not his); Casey v. I.C. Sys., Inc., 2010 WL 415310 (M.D. Fla. Jan. 29, 2010) (fact question whether collector used abusive language or refused to identify self upon request); Guajardo v. GC Services, L.P., 2009 WL 3715603 (S.D. Tex. Nov. 3, 2009) (fact issue whether number and content of calls offensive enough to be violations); Islam v. Option One Mortgage Co., 432 F. Supp. 2d 181 (D. Mass. 2006) (offensive language, here racial epithets directed to consumer who had already paid); Laughlin v. Household Bank, Ltd., 969 So. 2d 509 (Fla. Dist. Ct. App. 2007) (abusive language; calls continuing after being informed that consumer was represented); Williams v. HomeEq Servicing Corp., 646 S.E.2d 381 (N.C. Ct. App. 2007) (telephone harassment sufficiently alleged where calls were very frequent, and "rude and abrasive"); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (affirming $5 million in compensatory damages where creditor threatened older identity theft victim with jail, used rude and obscene language, and refused to believe her denials even when reiterated by sheriff), *vacated on other grounds*, 2003 Tex. LEXIS 50 (Apr. 24, 2003) (vacating decision pursuant to parties' settlement). *But see* Assoc. Fin. Services Co. v. Hornik, 336 N.W.2d 395 (Wis. Ct. App. 1983) (sixty-nine calls over nineteen months not unreasonably frequent where debtor was continuously late in paying monthly installment and content of calls was generally not abusive; statement "God damn it Walt, what are we going to do about this?" exhibited use of colloquialism to express personal concern and was not obscene).

238 Romero v. Dep't Stores Nat'l Bank, 725 Fed. Appx. 537 (9th Cir. 2018) (Cal. law) (numerous robocalls to cell phone, continuing after revocation of consent to call); Krapf v. Nationwide Credit, Inc., 2010 WL 2025323 (C.D. Cal. May 21, 2010) (180 calls in a month may violate prohibition against calls with such frequency as to be unreasonable and to constitute harassment); Sanchez v. Client Services, Inc., 520 F. Supp. 2d 1149 (N.D. Cal. 2007) (number and pattern of calls showed intent to harass); Akalwadi v. Risk Mgmt. Alternatives, 336 F. Supp. 2d 492 (D. Md. 2004) (fact question whether this number and pattern of calls violated statute's prohibition of acts "reasonably expected to abuse or harass"); Joseph v. J.J. Mac Intyre Companies, L.L.C., 238 F. Supp. 2d 1158 (N.D. Cal. 2002) (whether collector's 200 calls over nine months was actionable harassment or annoyance under California debt collection statute, which prohibits causing phone to ring repeatedly to annoy the person called and communicating with such frequency as to be unreasonable and to constitute harassment, turns on volume of calls and repeat calls after request to stop; fact that collector was collecting on seventeen debts irrelevant), later op. at 281 F. Supp. 2d 1156 (N.D. Cal. 2003) (calls outside statute of limitations period relevant to determine whether pattern exists); Williams v. HomeEq Servicing Corp., 646 S.E.2d 381 (N.C. Ct. App. 2007) (whether phone calls were made "with such frequency as to be unreasonable or to constitute harassment" is generally jury question; depends on frequency and abrasiveness of calls, legitimacy of creditor's claim).

239 Story v. J.M. Fields, Inc., 343 So. 2d 675 (Fla. Dist. Ct. App. 1977) (reversing court's directed verdict for defendant). *See also* Harrington v. Roundpoint Mortg. Servicing Corp., ___ F. Supp. 3d ___, 2017 WL 5952875 (M.D. Fla. Nov. 30, 2017) (applying these factors and holding that 23 calls a month for a year did not constitute harassment, where debt was legitimate, debtor answered only one call, and callers were always polite); Ortiz v. Accounts Receivable Mgmt., Inc., 2010 WL 547910 (S.D. Fla. Feb. 12, 2010) (fact question whether this number and pattern of autodialed calls shows intent to harass); Nicholas v. Nationwide Credit, Inc., 2010 WL 503071 (S.D. Fla. Feb. 8, 2010) (fact question whether fifty-eight calls in eighty-two days were "reasonably

Intent to harass may be inferred from the number of calls.[240] Continuing calls after the debtor has requested that they stop is also evidence of intent to harass.[241] A Wisconsin decision interpreted its prohibition of conduct likely to threaten or harass a debtor as creating an objective, "reasonable person" standard.[242]

One court has held that language that is merely harsh and insulting does not violate a statute that prohibits "grossly abusive" language.[243] But where a statute forbade "fighting words," that is, words likely to incite an immediate breach of the peace, use of the words "liar," "deadbeat" and "dishonest" during a phone call violated the statute.[244] The statutory definition of harassment is generally broader than the "highly offensive" or "extreme and outrageous" standard needed to support tort claims.[245]

16.2.4.3.2 Threatening or filing unfounded criminal charges

Threatening or filing unfounded criminal charges violates a state debt collection statute.[246] Even if the debtor is, in fact, guilty of a crime, threatening or filing criminal charges may violate the debt collection statute if it is for the purpose of collecting a civil debt.[247]

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expected to harass"); Scott v. Florida Health Sciences Ctr., Inc., 2008 WL 4613083 (M.D. Fla. Oct. 16, 2008) (nineteen phone calls to collect debt known to have been already paid by insurer may be considered harassing); Segal v. Nat'l Action Fin. Services, 2006 WL 449176 (M.D. Fla. 2006) (fact question as to number and content of phone calls, whether calls would abuse or harass consumer); Desmond v. Accounts Receivable Mgt., Inc., 72 So. 3d 179 (Fla. Dist. Ct. App. 2011) (automated calls to non-debtor, here person with name similar to credit card debtor, with no method to call back and point out mistake, states claim for "conduct that can reasonably be expected to abuse or harass"). *See also* Poitevint v. United Recovery Sys., L.P., 899 F. Supp. 2d 1230 (N.D. Fla. 2012) (fact issue whether number, content, and timing of calls to debtor and family member showed intent to harass).

240 Soria v. U.S. Bank, 2019 WL 8167925, at *11 (C.D. Cal. Apr. 25, 2019) (232 calls over seven-month period; " A reasonable juror could infer an intent to harass based on the sheer number of collection calls."); Brooks v. Suncoast Schs. FCU, 2012 WL 6059199 (M.D. Fla. Dec. 6, 2012) (multiple calls per day, five days a week, for four months, to several phone numbers, sufficient to show intent to harass); Duncan v. JP Morgan Chase Bank, 2011 WL 5359698 (S.D. W. Va. Nov. 4, 2011) (intent to annoy, abuse, oppress, or threaten, as required by state debt collection statute, may be inferred from number of calls; here calls continued after request to cease direct contact with represented debtor, and one caller was rude); Brandt v. IC Sys., Inc., 2010 WL 582051 (M.D. Fla. Feb. 19, 2010) (intent to harass must be alleged; may be shown by number and pattern of calls). *But see* Robinson v. Wells Fargo Bank, 576 Fed. Appx. 358 (5th Cir. 2014) (Tex. law; call volume alone not sufficient to show intent to harass; must show calls at inappropriate hours, with threats, or with bad language, or workplace calls after being forbidden to call workplace); Lardner v. Diversified Consultants, Inc., 17 F. Supp. 3d 1215 (S.D. Fla. 2014) (volume of calls alone not sufficient; must show that calls continued after debtor and collector communicated to convey information about the debt, negotiate, or tell collector not to call).

241 N.L. by Mother Lemos v. Credit One Bank, 2018 WL 5880796 (E.D. Cal. Nov. 8, 2018), *aff'd*, 960 F.3d 1164 (9th Cir. 2020).

242 Sec. Marine Bank v. Larson, 291 N.W.2d 662 (Wis. Ct. App. 1980). *See generally* § 6.2.4, *supra* (federal statute uses unsophisticated consumer test).

243 Dick v. Mercantile-Safe Dep. & Trust Co., 492 A.2d 674 (Md. Ct. Spec. App. 1985) (threats to use lawful procedures to collect debt, inquiries about marital status within context of case, remarks "damn airplane" and "give a damn," and references to purchaser being liar did not meet "grossly abusive" standard, which requires flagrant or great abuse). *See also* Seals v. Gen. Revenue Corp., 2002 WL 32099632 (N.D. W. Va. Aug. 29, 2002) (rude attitude, statement that "I know now what I'm dealing with," and suggestion that borrower go to work at McDonalds insufficient allegations of "abusive language"), *aff'd*, 53 Fed. Appx. 286 (4th Cir. 2002).

244 Tim O'Neill Chevrolet v. Forristall, 551 N.W.2d 611 (Iowa 1996).

245 Sprogis v. Suntrust Bank, 2013 WL 2456090 (M.D. Fla. June 6, 2013) (allegation that calls were "constant," "made several times per day," and sufficient to cause emotional distress states claim under state debt collection statute, but not for intrusion on seclusion); Kleiman v. Equable Ascent, 2013 WL 49754 (C.D. Cal. Jan. 3, 2013) (not inconsistent to hold that consumer has stated claim for FDCPA and RFDCPA violations but not invasion of privacy; phone calls sometimes twice a day for arguably time-barred debt, no allegation of the content of the calls or whether they were answered); Ramsour v. JP Morgan Chase Bank, 2012 WL 6004230 (S.D. Cal. Nov. 30, 2012) (summary judgment for consumer on FDCPA and RFDCPA, genuine fact issue as to intrusion on seclusion; persistent calls to elderly person, known to be represented); Oppenheim v. I.C. Sys., Inc., 695 F. Supp. 2d 1303 (M.D. Fla. 2010) (thirty or forty "belligerent" phone calls sufficient to state claim for FDCPA and Florida debt collection act violations, but not invasion of privacy), *aff'd on other grounds*, 627 F.3d 833 (11th Cir. 2010). *See generally* Ch. 15, *supra* (standards for tort claims).

246 Alonso v. Blackstone Fin. Group, L.L.C., 962 F. Supp. 2d 1188 (E.D. Cal. 2013) (collector misrepresented self as law enforcement officer, and told debtor she would be arrested at work next day); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (affirming award of $5 million in compensatory damages where creditor threatened older woman with jail for not making manufactured home payments that she did not actually owe), *vacated on other grounds*, 2003 Tex. LEXIS 50 (Apr. 24, 2003) (vacating decision pursuant to parties' settlement); Peters v. Quinney, 2001 WL 1627650 (Tex. App. Dec. 20, 2001) (upholding $26,584 verdict under Texas debt collection statute against lender who swore out false criminal complaint after being advised by county attorney that matter was probably civil); Cent. Adjustment Bur., Inc. v. Gonzalez, 528 S.W.2d 314 (Tex. App. 1975) ($3500 awarded for profane and abusive language, misrepresentations as to involvement of attorney, false threats of criminal charges, and accusations of fraud). *See also* Vine v. PLS Fin. Services, L.L.C., 2018 WL 456031, at *15–16 (W.D. Tex. Jan. 16, 2018) (denying collector's motion for summary judgment on claim that it wrongfully threatened criminal prosecution on post-dated payday loan checks by referring them to district attorney's office; fact that collector did not communicate threat directly to debtor is irrelevant where collector knew that district attorney's office would threaten arrest); Lensch v. Armada Corp., 795 F. Supp. 2d 1180 (W.D. Wash. 2011) (provision of Washington statute allowing collector to warn of criminal prosecution in NSF check notices was preempted by FDCPA ban of false threats where criminal prosecution was time-barred).

247 Brown v. Oaklawn Bank, 718 S.W.2d 678 (Tex. 1986). *See also* Commonwealth v. Tucker, 142 A.2d 786 (Pa. Super. Ct. 1958) (collector committed crime by filing criminal charges for purpose of coercing payment of debt); § 15.6, *supra*, 16.5.3, *infra*. *But see* Garcia v. Nueces County Employees Credit Union, 2008 WL 4938271 (Tex. App. Nov. 20, 2008) (filing criminal charges did not violate Texas debt collection act where borrower's actions—selling encumbered car to innocent purchaser without seeking lender's contractually required permission or informing purchaser of lien—were crimes). *But cf.* Hatcher v. Budget Rent-a-Car, 617 F.2d 91 (5th Cir. 1980) (not violation

16.2.4.3.3 Contacting represented debtors

The debt collection statutes of a number of states, including California,[248] Colorado,[249] Florida,[250] North Carolina,[251] Pennsylvania,[252] Washington,[253] and West Virginia,[254] include explicit prohibitions against contacting represented debtors. West Virginia's prohibition has been upheld against a challenge that it was unconstitutionally vague.[255] Courts have also held that federal banking law does not preempt such a prohibition,[256] although the West Virginia Supreme Court held that the Higher Education Act did preempt it.[257] The West Virginia statute, which formerly required only that the lawyer's identity be "readily ascertainable," now prohibits contact with a represented debtor only if the debtor gives the collector written or electronic notice that states that the attorney represents the debtor with respect to the specific debt

of Texas debt collection statute to report true facts to prosecutor, even if prosecutor then filed unfounded charges).

248 Cal. Civ. Code § 1788.14(c). *See* Huizar v. Mandarich Law Group, 2013 WL 4209050 (C.D. Cal. Aug. 14, 2013) (robocalls to cell phones of debtor and non-debtor continued after being told of representation); Ramsour v. JP Morgan Chase Bank, 2012 WL 6004230 (S.D. Cal. Nov. 30, 2012) (persistent calls to elderly person, known to be represented); Day v. Am. Home Mortgage Servicing, Inc., 2010 WL 2231988 (E.D. Cal. June 3, 2010); Sam v. Am. Home Mortgage Servicing, Inc., 2010 WL 761228 (E.D. Cal. Mar. 3, 2010) (letter from Mortgage Litigation Consultants stating that consumers had retained named attorney, but not signed by attorney, was sufficient to notify creditor that consumers were represented; contacts with consumers thereafter violated Rosenthal Act); Moya v. Chase Cardmember Serv., 661 F. Supp. 2d 1129 (N.D. Cal. 2009) (fact issue whether letter sent to represented consumer was permissible statement of account or forbidden collection letter); Castellanos v. JPMorgan Chase & Co., 2009 WL 1833981 (S.D. Cal. June 23, 2009) (account statements permissible, but other calls and letters to represented debtors violated Rosenthal Act); Yee v. Ventus Capital Services, 2006 WL 1310463 (N.D. Cal. May 12, 2006) (denying summary judgment on claim that collector contacted represented debtor). *But cf.* Thompson v. Chase Bank, 2010 WL 1329061 (S.D. Cal. Mar. 30, 2010) (no violation where debtors sent dispute of debt and attorney contact information only to defunct bank that had originated their loan, which had been assigned to defendant months earlier); Offril v. J.C. Penny Co., 2009 WL 69344 (N.D. Cal. Jan. 9, 2009) (no showing that collector actually knew of representation; creditor's knowledge not imputed to collector).

249 Colo. Rev. Stat. § 5-16-105(1)(b). *See* Cross v. Receivables Mgmt. Solutions, 2006 WL 446083 (D. Colo. Feb. 21, 2006) (refusing to dismiss claim that collector violated state debt collection law by sending verification notice to represented debtor).

250 Fla. Stat. § 559.72(18). *See* Nordwall v. PNC Mortg., 2015 WL 4095350 (M.D. Fla. July 7, 2014) (letter requesting that collector communicate with law firm was sufficient to put collector on notice that debtor was represented, even though it was signed by paralegal, where letterhead included names and addresses of attorneys); Brooks v. Suncoast Schs. F.C.U., 2012 WL 6059199 (M.D. Fla. Dec. 6, 2012) (barrage of calls continued after creditor was informed of representation); Patten v. Ocwen Loan Servicing, L.L.C., 2011 WL 1706889 (M.D. Fla. May 5, 2011) (letter to represented borrower not "for informational purposes only" where it included a payment coupon and the words "due immediately"); Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328 (M.D. Fla. 2010) (must show actual knowledge that consumer was represented; dismissing claim against collector, but allowing claim to go forward against creditor who sent debt to collector without telling collector it had received notice from consumer's bankruptcy counsel); Cavanaugh v. HBSC Card Services, Inc., 2010 WL 3746260 (M.D. Fla. Sept. 22, 2010) (creditor may be liable where its collector contacted represented consumer, but collector itself is not liable if creditor failed to notify it that consumer was represented); Brazier v. Law Offices of Mitchell N. Kay, P.C., 2009 WL 764161 (M.D. Fla. Mar. 19, 2009) (fact issue whether letter addressed to consumer care of consumer's lawyer was communication with consumer to which FDCPA and CCPA "least sophisticated consumer" standard applied); Laughlin v. Household Bank, Ltd., 969 So. 2d 509 (Fla. Dist. Ct. App. 2007) (abusive phone calls after being informed debtor was represented). *But cf.* Daley v. Bono, 420 F. Supp. 3d 1247 (M.D. Fla. 2019) (no violation where letters were sent only to debtor's attorney).

251 N.C. Gen. Stat. § 75-55(3). *See In re* Pryor, 479 B.R. 694 (Bankr. E.D.N.C. 2012) (National Bank Act and implementing regulations do not preempt North Carolina law forbidding contact with debtor known to be represented).

252 73 Pa. Stat. § 2270.4(b)(1)(vi). *See* Baldwin v. Monterey Fin. Services, Inc., 2016 WL 5723734 (M.D. Pa. Sept. 30, 2016) (must show that caller had actual knowledge that consumer was represented).

253 Wash. Rev. Code § 19.16.250(12). *See* Graves v. Quick Collect, 2011 WL 2474280 (W.D. Wash. June 20, 2011) (fact question whether letter was sent to debtors or to their attorney).

254 W. Va. Code § 46A-2-128(e). *See* Parks v. Round Point Mortg. Servicing Corp., 2019 WL 1519303 (S.D. W. Va. Apr. 8, 2019) (unanswered phone calls to debtor, after being properly notified of representation, violated this section); Patrick v. PHH Mortg. Corp., 937 F. Supp. 2d 773 (N.D. W. Va. 2013) (contact with represented consumers sufficiently alleged); Lenhart v. Everbank, 2013 WL 5745602 (S.D. W. Va. Oct. 23, 2013) (West Virginia provision forbidding contact with consumer known to be represented not preempted by HOLA); Petty v. Countrywide Home Loans, 2013 WL 1837932, at *13 (S.D. W. Va. May 1, 2013) (denying motion to dismiss; complaint need not state name of the attorney who was representing the debtor); Adams v. Chrysler Fin. Co., 2013 WL 1385407 (S.D. W. Va. Apr. 3, 2013) (fact issue as to when consumers were first represented); Shaffer v. HSBC Nevada, 2013 WL 209483 (S.D. W. Va. Jan. 17, 2013) (fact issues whether debtor provided name and contact information, or whether contact information was easily ascertainable if debtor provided name); Croye v. GreenPoint Mortgage Funding, Inc., 740 F. Supp. 2d 788 (S.D. W. Va. 2010) (contacts with represented debtor and non-obligated spouse); Clements v. HSBC Auto Fin., Inc., 2010 WL 4281697 (S.D. W. Va. Oct. 19, 2010) (attorney's address was "readily ascertainable" where consumers provided correct telephone number; contact with represented consumers violated West Virginia act); Stover v. Fingerhut Direct Mktg., Inc., 2010 WL 1050426 (W.D. W. Va. Mar. 17, 2010) (unanswered phone call can be communication, within meaning of provision forbidding contact with represented debtor). *But cf.* White v. Ally Fin., Inc., 2013 WL 1857266 (S.D. W. Va. May 2, 2013) (not violation for collector to contact consumer regarding debt owed by late husband's estate, where it knew only that she had been represented in an individual bankruptcy).

255 Stover v. Fingerhut Direct Mktg., Inc., 709 F. Supp. 2d 473 (S.D. W. Va. 2009) (provision of West Virginia statute forbidding contact if it "appears that" consumer is represented and attorney's contact information is known or "can be easily ascertained" not unconstitutionally vague).

256 *See, e.g.*, Tinsley v. OneWest Bank, 2014 WL 3700456 (S.D. W. Va. July 24, 2014). *See generally* § 16.1.2, *supra*.

257 Adams v. Pa. Higher Educ. Assistance Agency, 787 S.E.2d 583 (W. Va. 2016) (HEA preempts state law forbidding contact with represented debtor, but not provisions forbidding assertion of a right known not to exist or collection of a debt known to be invalid).

and includes the attorney's name, address, and telephone number.[258]

Sending a represented debtor copies of correspondence with the debtor's attorney about reaffirmation options in bankruptcy violates this type of prohibition.[259] Even without an explicit statutory prohibition, it can amount to harassment if a collector continues to contact a debtor after being told that the debtor is represented and that the collector should call the debtor's attorney.[260]

16.2.4.4 Unfair and Deceptive Debt Collection Activities

16.2.4.4.1 Introduction

Deceptive debt collection tactics have been the subject of frequent decisions under state debt collection statutes. Courts often draw on the standards developed under the Federal Trade Commission Act, the Fair Debt Collection Practices Act, and UDAP statutes when applying these provisions.[261]

16.2.4.4.2 Deception regarding the existence or amount of a debt

False or misleading statements about the amount of a debt are deceptive.[262] Collecting or seeking to collect amounts that are not actually owed is a violation.[263] For example, it is a violation to:

258 W. Va. Code 46A-2-128(e). *See* Waugh v. Elan Fin. Serv., 2018 WL 2976430 (S.D. W. Va. June 13, 2018) (amended statute will not be applied retroactively); Casto v. Branch Banking & Trust Co., 2018 WL 265586 (S.D. W. Va. Jan. 6, 2018) (genuine issues of fact where calls made during sixteen day period between postmark date of notice letter and recording of letter in defendant's file); Huffman v. Branch Banking & Trust Co., 2017 WL 2177351 (S.D. W. Va. May 17, 2017) (declining to dismiss; noting presumption that properly mailed letter will arrive); Biser v. Manufacturers' & Traders Trust Co., 211 F. Supp. 3d 845 (S.D. W. Va. Sept. 29, 2016) (amended statute applies prospectively only).

259 *See* Sears, Roebuck & Co. v. O'Brien, 178 F.3d 962 (8th Cir. 1999) (sending copy of reaffirmation proposal to debtor who was represented by counsel violated state debt collection statute); Greenwood Trust Co. v. Smith, 212 B.R. 599 (B.A.P. 8th Cir. 1997) (federal bankruptcy law did not preempt section of Iowa Consumer Credit Code which forbade creditor contact with debtor known to be represented by counsel; sending "informational copy" of proposed reaffirmation agreement to debtor was violation); *In re* Montsko, 1997 WL 699817 (Bankr. S.D. Iowa Jan. 14, 1997); *In re* Smith, 1997 WL 697951 (Bankr. S.D. Iowa 1997); *In re* Lenahan, 1997 WL 697947 (Bankr. S.D. Iowa 1997). *See also* Fisher v. Am. Gen. Fin. Co., 2002 WL 31760189 (4th Cir. Dec. 11, 2002) (violation of West Virginia statute, but actual damages not shown). *But cf.* Mitchell Rubenstein & Assoc., 857 F.3d 939 (D.C. Cir. 2017) (letter sent to lawyer at client's address; claim fails because this appears to be computer error, and lawyer had procedures in place to prevent errors).

260 Porter v. Wachovia Dealer Services, Inc., 2007 WL 2693370 (D. Or. Sept. 12, 2007) (fact question whether calls to debtor, after he told creditor to deal with his attorney, were harassment).

261 *See* §§ 7.2, 16.2.4.1, *supra* (incorporation of FDCPA standards by state debt collection statutes), § 16.3.4, *infra* (UDAP statutes' standards as applied to debt collection); National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2 (9th ed. 2016), *updated at* www.nclc.org/library (UDAP statutes' general definitions of deception).

262 *See, e.g.*, Stapp v. Bank of Am., 2013 WL 1313160 (E.D. Tex. Feb. 28, 2013) (series of highly inconsistent statements and letters concerning loan amount, arrearage, and payment amounts misrepresented amount of debt), *adopted*, 2013 WL 1309735 (E.D. Tex. Mar. 28, 2013); Seldon v. Home Loan Services, Inc., 647 F. Supp. 2d 451 (E.D. Pa. 2009) (borrowers stated claim against mortgage servicer: misstatements about amount of debt, false promises about repayment plan, threats to take improper non-judicial action, alleged plan to take home in preference to collecting debt); Jefferies v. Ameriquest Mortgage Co., 543 F. Supp. 2d 368 (E.D. Pa. 2008) (denying subprime lender's motion for summary judgment on claim that its incomplete or inaccurate disclosures gave "false impression of the character, amount" of debt in violation of state debt collection statute); *In re* Davis, 377 B.R. 827 (Bankr. E.D. Tex. 2007) (misrepresentation of amount of debt violates state debt collection act). *But cf.* Thompson v. Bank of Am., 783 F.3d 1022 (5th Cir. 2015) (false statements about status of loan modification efforts were not misrepresentations of character or amount of the debt; communications about modification of a loan do not relate to its collection, so state debt collection statute is inapplicable); Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717 (5th Cir. 2013) (Texas law) (misrepresentation that foreclosure would be delayed while servicer considered homeowners' loan modification application was not misrepresentation of character or amount of debt); Verdin v. Fed. Nat'l Mortgage Ass'n, 2013 WL 4126785 (5th Cir. Aug. 15, 2013) (Tex. law; refusal to provide payoff quote is not an affirmative misrepresentation of the amount of the debt, so not a violation of state debt collection statute); McMullen v. Synchrony Bank, et al., 2018 WL 443763 (D.D.C. Jan. 11, 2018) (credit issuer's billing statement, which included allegedly unauthorized sum billed by merchant, was not deceptive where statement included instructions for dispute procedure, and bank provided dispute form in response to oral complaint by consumer); Himes v. Client Services, Inc., 990 F. Supp. 2d 59 (D.N.H. 2014) (response to debt validation request not misleading, where attached account statement showed that amount demanded had increased because of interest and late fees); Heflin v. Select Portfolio Servicing, Inc., 2013 WL 4532666 (N.D. Tex. Aug. 1, 2013) (failure to keep promises made during loan modification negotiations not misrepresentation of character, amount, or extent of debt); Stewart v. Steel Creek Homeowners' Ass'n, 816 S.E.2d 268 (N.C. Ct. App. July 3, 2018) (misstating amount of annual assessment in demand letter did not violate North Carolina statute, which forbids only misstating amount of debt in legal proceeding); Reynolds v. Southwestern Bell Tel., L.P., 2006 WL 1791606 (Tex. App. June 29, 2006) (letter did not misrepresent character, extent, or amount of debt where it stated that "records show" debt, but acknowledged it was disputed and invited consumer to provide further information).

263 Conteh v. Shamrock Cmty. Ass'n, Inc., 648 Fed. Appx. 377 (4th Cir. 2016) (seeking excessive amount in writ of execution would violate Maryland statute, unless it was mathematical or typographical error); Thompkins v. Key Health Med. Solutions, Inc., 2015 WL 1292228 (M.D.N.C. Mar. 23, 2015) (refusing to dismiss claims against lender that paid medical providers their customary charges, then sought to recover twice this amount from patients' personal injury recoveries), *adopted*, 2015 WL 3902340 (M.D.N.C. June 24, 2015); Glenn v. FNF Servicing, Inc., 2013 WL 4095524 (E.D.N.C. Aug. 13, 2013) (servicer persistently attempted to collect on behalf of bankrupt lender, which had purported to refinance but never paid off original loan); Basich v. Patenaude & Felix, APC, 2013 WL 1755484 (N.D. Cal. Apr. 24, 2013) (levying the wrong bank account, here that of non-debtor with same

first name and similar SSN, is a false representation to collect a debt and may also be an unconscionable means); Cuevas v. BAC Home Loan Servicing, L.P., 2012 WL 4339063 (S.D. Tex. Sept. 19, 2012) (servicer demanded specific sum for property taxes; when borrower timely tendered that amount, servicer refused it and foreclosed); Sasscer v. Donnelly, 2010 WL 2195797 (M.D. Pa. May 27, 2010) (arguably false threats and demands for excessive amounts); Bledea v. IndyMac Fed. Bank, 2010 WL 715255 (E.D. Cal. Feb. 25, 2010) (demand for unauthorized sums); Champlaie v. BAC Home Loans Servicing, L.P., 706 F. Supp. 2d 1029 (E.D. Cal. 2009) (demanding sums not due); Baker v. Countrywide Home Loans, Inc., 2009 WL 1810336 (N.D. Tex. June 24, 2009) (fact question whether certain checks had been received and not credited; if they had, collection notices sent thereafter were false and violated Texas statute); Gigli v. Palisades Collection, L.L.C., 2008 WL 3853295 (M.D. Pa. Aug. 14, 2008) (no evidence that debt existed or was owned by assignee); Barrows v. Petri & Stocking, S.C., 2008 WL 3540405 (W.D. Wis. Aug. 13, 2008) (garnishment summons served on consumer's bank included claim for disbursements exceeding statutorily permitted amount and was per se violation of Wisconsin act); Cross v. Receivables Mgmt. Solutions, 2006 WL 446083 (D. Colo. Feb. 21, 2006) (dunning for and reporting old credit card debt, which debt buyer could not or would not verify, was unfair and unconscionable in violation of Colorado debt collection statute); Edstrom v. All Services & Processing, 2005 WL 645920 (N.D. Cal. Feb. 22, 2005) (issue of fact whether certain fees, although authorized by rules of homeowners association, were actually incurred and reasonable); Semper v. JBC Legal Group, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005) (purchaser of NSF checks demanded damages to which it was not entitled; Washington bad check statute allowed them only to seller, not assignee); Sandlin v. Shapiro & Fishman, 919 F. Supp. 1564 (M.D. Fla. 1996) (state statute which forbade attempt to collect debt which was not "legitimate" applied to charge imposed for verifying debt when that charge was prepayment penalty not permitted by contract); Pickering v. Coast Ctr. for Orthopedic Arthroscopic Surgery & Treatment, 2009 WL 932629 (Cal. Ct. App. Apr. 8, 2009) (affirming $150,000 damages; healthcare creditor, attempting to collect grossly excessive amount directly from insured patient, made numerous false statements); Tallahassee Title Co. v. Dean, 411 So. 2d 204 (Fla. Dist. Ct. App. 1982) (escrow agent violated state debt collection statute by paying disputed insurance premium to insurer, over home seller's protest, out of proceeds of sale of home); Fireside Bank v. Askins, 460 P.3d 157, 163 (Wash. 2020) (attempting, through writs of garnishment, to collect more than is owed violates state debt collection statute). *See also* Pannell v. Green Tree Serv., L.L.C., 2014 WL 3361984 (S.D. W. Va. July 8, 2014) (refusing to dismiss claim that creditor violated state debt collection statute by misrepresenting that debt was in arrears; although this type of misrepresentation is not specifically prohibited, it falls within general prohibitions of abusive, fraudulent, and unfair tactics); Eaton v. Citibank, 2010 WL 936555 (M.D. Pa. Mar. 15, 2010) (fact issue whether card agreement offered by creditor, which permitted it to accept check marked "paid in full" and continue collection efforts, was actual agreement between parties). *But see* Patrick v. Teays Valley Trs., L.L.C., 2012 WL 5993163 (N.D. W. Va. Nov. 30, 2012) (law firm and substitute trustee did not violate W. Va. debt collection law by foreclosing on home when borrower was not in default, as they have no duty to investigate amount or validity of the debt). *But cf.* Marchese v. J.P. Morgan ChaseBank, 917 F. Supp. 452 (D. Md. 2013) (pursuing foreclosure without having obtained proper signatures and notarization not a violation of prohibition against attempting to collect a debt when there is no right to do so); Hill v. Midland Funding, L.L.C., 2013 WL 1645553 (D. Md. Apr. 16, 2013) (truthful but legally insufficient affidavits not enough to support claim where debt buyer reasonably believed debt was valid); CybrCollect v. N.D. Dep't of Fin. Insts., 703 N.W.2d 285 (N.D. 2005) (debiting consumers' accounts for returned check fee, without written authorization, in violation of Automatic Clearinghouse rules, did not violate North Dakota collection agency statute, where notice by signs at point of sale was sufficient to comply with EFTA).

- Dun the consumer for attorney fees,[264] collection fees,[265]

264 Waugh v. Elan Fin. Serv., 2018 WL 2976430 (S.D. W. Va. June 13, 2018) (statement that balance "may include" attorney fees violated West Virginia statute because fees not permitted); Baker v. Citibank, 13 F. Supp. 2d 1037 (S.D. Cal. 1998) (false threats to file suit and false representation that attorney fees would be added to debt stated claim under state debt collection practices statute); *In re* Saldivar, 2013 WL 2452699 (Bankr. S.D. Tex. June 5, 2013) (attorney fees not authorized by Texas law governing home equity loans); Universal Bank v. Machnic (*In re* Machnic), 271 B.R. 789 (Bankr. S.D. W. Va. 2002) (seeking collection attorney fees in addition to debt violates W. Va. Consumer Credit Protection Act's prohibition against collecting or attempting to collect debt collector's fee from debtor); Ai v. Frank Huff Agency, Ltd., 607 P.2d 1304 (Haw. 1980) (contract that provided for illegally excessive charge and pyramided attorney fees on attorney fees violated state debt collection statute that prohibited collection agency from recovering illegal charges); I.F.C. Personal Money Managers, Inc. v. Vadney, 508 N.Y.S.2d 845 (N.Y. Super. Ct. 1986) (threats to collect attorney fees not provided by contract or statute was violation); Davis Lake Cmty. Ass'n v. Feldmann, 530 S.E.2d 865 (N.C. Ct. App. 2000) (demand for attorney fees not owed would be violation); Evergreen Collectors v. Holt, 803 P.2d 10 (Wash. Ct. App. 1991) (attempt to collect $200 attorney fees after dropping excessive claim for insurance premium violated state debt collection statute). *But cf.* Memmott v. OneWest Bank, 2011 WL 1560985 (D. Or. Feb. 9, 2011) (seeking fees not a violation where deed of trust authorized them), *adopted*, 2011 WL 1559298 (D. Or. Apr. 25, 2011). *See generally* National Consumer Law Center, Collection Actions Ch. 6 (5th ed. 2020), *updated at* www.nclc.org/library (state restrictions on creditor's recovery of attorney fees).

265 Seeger v. AFNI, Inc., 548 F.3d 1107 (7th Cir. 2008) (attempts by collector that owned debt to collect collection fee violated Wisconsin statute where contract allowed fee only if original creditor hired third-party collector); Commonwealth of Pa. v. Think Fin., 2016 WL 183289 (E.D. Pa. Jan. 14, 2016) (demand for fees authorized by credit agreement but forbidden by state law); Patrick v. PHH Mortg. Corp., 937 F. Supp. 2d 773 (N.D. W. Va. 2013) (after modification agreement was recorded and homeowners made all required payments, mortgage company falsely claimed homeowners were in default, dunned for sums not due, threatened foreclosure, and foreclosed), *later decision*, 998 F. Supp. 2d 478 (N.D. W. Va. 2014) (genuine issues of fact as to threats and misrepresentations); Elmore v. Northeast Fla. Credit Bur., Inc., 2011 WL 4480419 (M.D. Fla. Sept. 27, 2011) (threat to begin "long and costly asset search" violated Florida statute, where collector admitted knowing that it would be illegal to charge debtor for this search); Acik v. I.C. Sys., Inc., 640 F. Supp. 2d 1019 (N.D. Ill. 2009) (Illinois statute allows collection fees "expressly authorized" by agreement creating debt; provision for "all costs and fees, including attorney fees" did not expressly authorize collector's contingency fee); Adams v. A & S Collection Assoc., Inc., 2007 WL 2206936 (D. Conn. July 30, 2007) (awarding punitive damages against collector who sought to evade restriction on fees added by collector by contractually requiring creditor to add 49% collection fee and 18% interest to accounts sent for collection); Patzka v. Viterbo College, 917 F. Supp. 654 (W.D. Wis. 1996) (collection fee was not permitted by Wisconsin Consumer Act). *See also* Hansen v. Ticket Track, Inc., 213 F.R.D. 412 (W.D. Wash. 2003) (allowing class action to proceed against collector for pay parking lots that added illegal collection fee to its demands). *Cf.* Firstcollect, Inc. v. Armstrong, 976 S.W.2d 294 (Tex. App. 1998) (affirming class certification order in suit claiming that collection agency's addition of 32% collection fee violated Texas debt collection statute); Banks v. Paul White Chevrolet, Inc., 629 S.E.2d 792 (W. Va. 2006) (fact question whether motor vehicle seller's agent, who collected late payment plus $300 fee after default but before end of right to cure period, was debt collector or repossessor; if collector, fee violated debt collection statute, if repossessor, fee

late fees,[266] or other fees[267] that are not actually owed;

- Seek amounts to which the creditor is not yet entitled—such as court costs for a suit that has not yet been filed;[268]
- Dun or sue a consumer for a debt that has already been paid,[269] that the consumer never incurred,[270] that has been

might be permitted by U.C.C.). *See generally* National Consumer Law Center, Collection Actions § 6.6 (5th ed. 2020), *updated at* www.nclc.org/library (state restrictions on addition of collection fees to debt).

266 Capozio v. JP Morgan Chase Bank, 2017 WL 5157532 (E.D. Pa. Nov. 7, 2017) (misapplication of payments, resulting in unauthorized late fees, would violate Pennsylvania debt collection and UDAP statutes).

267 Sanders v. LoanCare, L.L.C., 2019 WL 441964 (C.D. Cal. Feb. 1, 2019) (refusing to dismiss claim that servicer violated state debt collection statute by charging convenience fee for making online payment during grace period without contractual authorization); Lindblom v. Santander Consumer, USA, Inc., 2018 WL 500347 (E.D. Cal. Jan. 22, 2018) (denying creditor's motion for summary judgment on claim that speedpay fee for service that allowed payments to be immediately credited violated FDCPA, and therefore also violated Rosenthal Act, where it was charged by service provider but mostly kicked back to lender, and was not authorized by contract or state law); Muhammed v. PNC Bank, 2016 WL 815289 (S.D. W. Va. Feb. 29, 2016) (speedpay fee, for service that allowed payments to be immediately credited, was "incidental to" obligation, and thus subject to West Virginia prohibition against collecting any fee incidental to principal obligation unless expressly authorized by statute or contract), *later decision* 2016 WL 5843477 (S.D. W. Va. Oct. 4, 2016) (denying class certification because named plaintiff not West Virginia resident); Enis v. Bank of Am., 2013 WL 1721961 (N.D. Tex. Apr. 22, 2013) (debtor stated claim for misstatement of amount of debt against creditor that imposed late fees after refusing to credit timely payments); Walters v. Fid. Mortg. of Cal., Inc., 730 F. Supp. 2d 1185 (E.D. Cal. 2010) (mortgage servicer's demands for unlawful fees); Osei v. Countrywide Home Loans, 692 F. Supp. 2d 1240 (E.D. Cal. 2010) (demand for unauthorized fees); Baldain v. Am. Home Mortg. Servicing, Inc., 2010 WL 56143 (E.D. Cal. Jan. 5, 2010) (allegations that servicer misstated amount of debt, added unauthorized fees, and threatened to report false information state claim); Jessamey v. Norfolk Fin. Corp., 2006 WL 1211029 (Mass. App. Ct. Apr. 28, 2006) (fact question whether process server, who misrepresented self as constable, was using execution to coerce constable's fees to which he was not entitled).

268 *See, e.g.*, Neptune v. Whetstone Partners, L.L.C., 34 F. Supp. 3d 1247 (S.D. Fla. 2014) (denying motion to dismiss claim that numerous automated "reminder" calls before payments were due, and continuing after requests to stop, amounted to attempt to collect payments before they were due, in violation of state debt collection statute's prohibition against asserting the existence of a right that did not exist); *In re* Melchor, 2011 WL 1600570 (Bankr. S.D. Tex. Apr. 27, 2011) (demanding sum certain for attorney fees, for which it had not sought required approval from Bankruptcy Court); Wiginton v. Pac. Credit Corp., 634 P.2d 111 (Haw. Ct. App. 1981) (collection agency's demand deceptively included probable legal expenses, in violation of statute prohibiting claim for attorney fees and costs until suit was filed); Int'l Bureau of Fraud Control, Ltd. v. Clayton, 544 N.E.2d 416 (Ill. App. Ct. 1989) (collection agency could collect $10 pursuant to statute for each NSF check it collected, but could not collect "costs and expenses" provided by same statute until those were awarded in judgment); Allstate Lien & Recovery Corp. v. Stansbury, 126 A.3d 40 (Md. Ct. Spec. App. 2015) (inclusion of lien enforcement costs, for a sale that had not yet occurred, in amount demanded to redeem car violated Maryland's lien statute and debt collection act). *See also* Eads v. Wolpoff & Abramson, L.L.P., 538 F. Supp. 2d 981 (W.D. Tex. 2008) (attempt to collect unauthorized filing fee may be misrepresentation, and threat to take action that cannot legally be taken).

269 Rudio v. Credit Control, L.L.C., 2018 WL 4772303 (N.D. Cal. Oct. 1, 2018) (debt had been settled and paid); Henry v. Ocwen Loan Servicing, Inc., 2018 WL 3130422 (S.D. W. Va. June 25, 2018) (lender, which had received fire insurance proceeds for destroyed home, sufficient to pay off mortgage, refused to apply them to mortgage and continued to threaten foreclosure and eviction); Hall v. Equifax Info. Services, L.L.C., 204 F. Supp. 3d (E.D. Pa. 2016) (after patient and hospital agreed to settle bill out of patient's personal injury recovery, patient paid agreed-upon sum and was told that balance was zero; hospital then sent debt to collection); Watkins v. Wells-Fargo Bank, 2011 WL 777895 (S.D. W. Va. Feb. 28, 2011) (trying to collect debt that had been voided pursuant to settlement agreement); Fetters v. Paragon Way, Inc., 2010 WL 5174989 (M.D. Pa. Dec. 15, 2010) (dunning former debtor for debt that had been settled violates state debt collection statute); Eichmann v. Mann Bracken, L.L.C., 689 F. Supp. 2d 1094 (W.D. Wis. 2010) (knowingly filing baseless claim for debt known not to be owed may violate state debt collection statute); Scott v. Fla. Health Sciences Ctr., Inc., 2008 WL 4613083 (M.D. Fla. Oct. 16, 2008) (repeated phone calls to collect debt known to have been paid in full by insurer). *See also* Summers v. Merchants and Med. Credit Corp., 2013 WL 1507529 (E.D. Mich. Apr. 12, 2013) (continuing to badger consumer after she had settled with original creditor); Donnachie v. Frank S. Falzone & Assoc., P.P.L.C., 2010 WL 3191891 (M.D. Pa. Aug. 11, 2010) (knowingly supplying false information to collector, here that settled debt was still owing). *But see* McCartney v. Citifinancial Auto Credit, Inc., 2010 WL 5834802 (E.D. Tex. Dec. 14, 2010) (seeking to collect debt that had already been paid pursuant to settlement agreement stated claim only for breach of contract, not violation of Texas debt collection statute), *adopted*, 2011 WL 675386 (E.D. Tex. Feb. 16, 2011).

270 Williams v. Educ. Credit Mgt., Corp., 88 F. Supp. 3d 1338, 1343 (M.D. Fla. 2015) (mistaken identity; attempts to collect from person with same name and dissimilar identifying information; plaintiff stated claim for attempting to collect debt known not to be legitimate); Bromfield v. HSBC Bank, 2014 WL 183895 (D. Or. Jan. 13, 2014) (denying motion to dismiss claim that creditor violated state debt collection statute by debiting account for credit card charges made by thief, after consumer had reported theft); Alonso v. Blackstone Fin. Group, L.L.C., 962 F. Supp. 2d 1188 (E.D. Cal. 2013) (false threats to garnish non-debtor ex-husband's wages and to cause consumer's arrest); Redmond v. Green Tree Servicing, L.L.C., 941 F. Supp. 2d 694 (E.D.N.C. 2013) (North Carolina statute protected non-debtor tenants being harassed for landlord's delinquent mortgage); Huizar v. Mandarich Law Group, 2013 WL 4209050 (C.D. Cal. Aug. 14, 2013) (robocalls to cell phones of debtor and non-debtor); Halsten v. Target Nat'l Bank, 2013 WL 3804844 (M.D. Fla. July 19, 2013) (person being dunned for credit card debt of unknown person has claim under Florida debt collection statute); Martinez v. Commercial Recovery Sys., Inc., 2013 WL 2237571 (M.D. Fla. May 21, 2013) (threat to take actions it could not legally take, including real estate lien and garnishment of non-debtor spouse's wages); Brignola v. Home Properties, L.L.C., 2013 WL 1795336 (E.D. Pa. Apr. 26, 2013) (refusing to dismiss claim that collector violated state debt collection statute by misrepresenting that non-debtor son was liable for deceased father's debt); Basich v. Patenaude & Felix, APC, 2013 WL 1755484 (N.D. Cal. Apr. 24, 2013) (levying on bank account of non-debtor with same first name and SSN that differed by one digit from that of judgment debtor); Fini v. Dish Network, L.L.C., 955 F. Supp. 2d 1288 (M.D. Fla. 2013) (repeated autodialed calls seeking to collect debt of unrelated third party who had given plaintiff's cell number as contact when initiating television service); Guillen v. Bank of Am., 2011 WL 4071996 (N.D. Cal. Aug. 31, 2011) (debt sent to aggressive collection and reported to CRAs despite proof of identity theft); Walter v. Palisades Collection, L.L.C., 2011 WL 1666869 (E.D. Pa. May 2, 2011) (non-obligated spouse), *order entered by* 2011 WL 1694432 (E.D. Pa. May 2, 2011); Stuart v. AR Res., 2011 WL 904167 (E.D. Pa. Mar. 16, 2011) (misrepresenting liability for family member's debt), *later decision* 2011 WL 904202 (E.D. Pa.

released,[271] or that has been discharged in bankruptcy;[272]

- Dun a consumer for an illegal loan, such as a payday loan made in a jurisdiction that outlaws them;[273]
- Represent that a consumer will owe a deficiency after foreclosure when the jurisdiction bars deficiency judgments;[274]
- Seek late fees or other fees in excess of statutory limits;[275]
- Demand interest beyond that authorized by the agreement or by statute;[276]
- Represent that a mortgage loan delinquency had been cured or the obligation modified, but then foreclosing;[277] or

Mar. 16, 2011) (denying motions to dismiss statutory claims; dismissing common law invasion of privacy claim); Valdez v. Capital Mgmt. Services, L.L.P., 2010 WL 4643272 (S.D. Tex. Nov. 16, 2010) (allowing identity theft victim to proceed with claim that persistent attempts to collect, after receiving proof of identity theft, was misrepresentation about debt); Stewart v. Alonzo, 2009 WL 174938 (S.D. Tex. Jan. 28, 2009) (false representations sufficiently alleged: dunning letters for debt consumer never contracted for and did not owe); Caton v. Green Tree Servicing, 2008 WL 222352 (N.D. W. Va. Jan. 25, 2008) (granting summary judgment to debtor's non-debtor mother, who received letters falsely stating she was liable on debt); Johnson v. MBNA Am. Bank, 2006 WL 618077 (M.D.N.C. Mar. 9, 2006) (fact question whether creditor violated state debt collection law by dunning widow for late husband's secret credit card debt and reporting it to credit bureaus, when it knew or should have known widow might not be liable). *See also* Iruegas v. Diversified Adjustment Serv., Inc., 2010 WL 1171088 (W.D. Tex. Mar. 22, 2010) (threat to report debt, after debtor stated it was not his). *But cf.* Rivernider v. Brough, 2013 WL 5353748 (S.D. Fla. Sept. 24, 2013) (letter to tenant of condo would not lead unsophisticated consumer to believe that she was obligated to pay owner's delinquent assessments); White v. Ally Fin., Inc., 2013 WL 1857266 (S.D. W. Va. May 2, 2013) (letter addressed to "estate of" deceased borrower would not lead reasonable widow/administrator to believe she was personally liable); Gill v. Kostroff, 82 F. Supp. 2d 1354 (M.D. Fla. 2000) (attempts to collect debt from identity theft victim did not violate state debt collection law where plaintiff did not establish that creditor or its attorney knew debt was false).

271 Owens-Benniefield v. Nationstar Mortgage, L.L.C., 258 F. Supp. 3d 1300 (M.D. Fla. June 15, 2017) (refusing to dismiss claim under state debt collection statute against servicer that had been party to deed-in-lieu-of-foreclosure transaction, yet continued to dun former homeowner, and assigned debt to another servicer). *See also* Vanderbilt Mortgage & Fin., Inc. v. Flores, 746 F. Supp. 2d 819 (S.D. Tex. 2010) (issue whether lender's broadly worded release of fraudulent mechanics' liens on third parties' land also discharged borrowers; if so, continued collection efforts misrepresented the status of debt, in violation of Texas Debt Collection Act).

272 Leahey-Fernandez v. Bayview Loan Servicing, L.L.C., 159 F. Supp. 3d 1294 (M.D. Fla. 2016); Farrin v. Northstar Mortg., L.L.C., 2016 WL 6407841 (D. N.H. Oct. 16, 2016) (collection attempts against debtor who had discharged debt in bankruptcy, stated intention to surrender property, and consented to foreclosure). *But cf.* Helman v. Bank of Am., ___ Fed. Appx. ___, 2017 WL 1350728 (11th Cir. Apr. 12, 2017) (Fla. law; concluding that mortgage lender's postbankruptcy monthly billing statements made it so clear that consumer was not personally obligated that even the least sophisticated consumer would not be deceived).

273 *See, e.g., In re* McClendon, 2012 WL 5387677 (Bankr. E.D.N.C. Nov. 2, 2012) (if construction loan was usurious, attempt to collect would be attempt to collect interest not due; here, fact issue whether lender made statutorily required determination of borrower's ability to pay high rate-spread loan); *In re* Delbert Services Corp. (Mass. Comm'r of Banks Apr. 4, 2013), *available at* www.mass.gov (ordering Massachusetts-licensed debt collector to discontinue collection efforts for payday loans that were illegally made to Massachusetts residents).

274 Boles v. Moss Codilis, L.L.P., 2011 WL 2618791 (W.D. Tex. July 1, 2011) (misrepresenting that Texas homeowners could be liable for deficiency after foreclosure of home equity loan); Alborzian v. JPMorgan Chase Bank, 185 Cal. Rptr. 3d 84 (Cal. App. 2015) (reversing dismissal of claim that creditor acted deceptively where its letters seeking to collect deficiency after foreclosure sale implied that the claim was legally enforceable, when state law prohibited suit on such a claim). *See also* O'Neill v. Country Motors, Inc., 2015 WL 8779594 (D. Conn. Dec. 15, 2015) (sale of repossessed car without notice and accounting required by statute may have resulted in demand for more than was owed for deficiency, a misrepresentation of the amount of debt).

275 Acosta v. Credit Bureau of Napa County, 2015 WL 1943244 (N.D. Ill. Apr. 29, 2015) (imposing processing fee for consumer debt, when additional fees were permitted only for commercial debts); Friday v. United Dominion Realty Trust, Inc., 575 S.E.2d 532 (N.C. Ct. App. 2003) (claiming late charges in excess of legal limit violated debt collection and UDAP statutes, but notice of actual past-due rent sent from landlord to tenant did not constitute unfair and deceptive trade practice). *See also* Mejia v. Marauder Corp., 2007 WL 806486 (N.D. Cal. Mar. 15, 2007) (assignee of NSF check for payday loan demanded fee explicitly forbidden by payday loan statute).

276 Ben-Davies v. Blibaum & Assoc., 421 F. Supp. 3d 94 (D. Md. 2019) (demand for postjudgment interest in excess of legally permissible rate); Lannan v. Levy & White, 186 F. Supp. 3d 77 (D. Mass. 2016) (charging prejudgment interest calculated from date services provided, instead of later date when demand was first made); Moscona v. California Bus. Bur., 2011 WL 5085522 (S.D. Cal. Oct. 25, 2011) (demanding unauthorized interest; payment agreement authorized interest on delinquent debt, but collector demanded interest for period in which debt was not yet delinquent); Quesenberry v. Alliant Law Group, P.C., 2010 WL 1189457 (E.D. Tex. Mar. 5, 2010) (communication seeking to collect interest not authorized by agreement sent to consumer's lawyer), *adopted*, 2010 WL 1189481 (E.D. Tex. Mar. 24, 2010).

277 Watson v. Citimortgage, Inc., 814 F. Supp. 2d 726 (E.D. Tex. 2011) (lender falsely stated that loan was being modified and foreclosure postponed, while going ahead with foreclosure); Warden v. PHH Mortg. Corp., 2010 WL 3720128 (N.D. W. Va. Sept. 16, 2010) (consumers stated claim where lender stated that payment of specified sum would bring loan current, accepted that sum, then foreclosed); Gomez v. Wells Fargo Bank, 2010 WL 2900351 (N.D. Tex. July 21, 2010) (borrower stated claim against mortgagee bank that told borrower she need not make payments during negotiations, that modification was pre-approved, and that estranged husband need not sign, then denied modification and foreclosed because husband had not signed); McCauley v. Ocwen Fed. Bank, 2010 WL 760438 (D. Minn. Feb. 26, 2010) (denying motion to dismiss claim under state debt collection law against servicer that failed to abide by forbearance agreement, failed to credit payments, and foreclosed on home); Burnette v. Wells Fargo Bank, 2010 WL 1026968 (E.D. Tex. Feb. 16, 2010) (lender promised to postpone foreclosure if borrower, who sought loan modification, provided certain documents; borrower complied, but lender foreclosed), *adopted*, 2010 WL 1026969 (E.D. Tex. Mar. 17, 2010); Waterfield Mortg. Co. v. Rodriguez, 929 S.W.2d 641 (Tex. App. 1996) (upholding award of $7402.61 actual and $15,000 exemplary damages and $7500 attorney fees against mortgage lender that violated state debt collection statute that prohibited misrepresenting the character, extent, or amount of a debt by misleading the consumers to believe that they had cured their delinquency, thereby stopping a foreclosure on their home, where the lender had routinely accepted late payments for years and then rushed through a foreclosure and eviction). *See also* Stoler v. PennyMac Loan Services, L.L.C., 2019 WL 5106417 (S.D. W. Va. Oct.11, 2019) (proceeding to foreclosure during time when servicer said it would consider modification request may be unfair); Hanson v. Amerihome Mortg. Co., 2017 WL 6626328 (S.D. W. Va. Dec. 28, 2017) (refusing to dismiss claim that servicer violated state debt collection statute by scheduling foreclosure sale despite representing to homeowners that their loss mitigation process was still ongoing, and failing to advise them of their right to appeal a of assistance). *But see* Chavez v. Wells Fargo Bank, 578 Fed.

- Demand that a borrower pay premiums for insurance that was force-placed without justification.[278]

A false statement may violate the state debt collection statute even if it is communicated to someone other than the debtor—for example, when a creditor communicates false information to a debt collector.[279]

Some states require some showing of knowledge or reason to know that the amount is not owed.[280] For example, Florida courts hold that seeking amounts that are not owed or asserting a right that does not exist is a violation only if the collector has actual knowledge to the contrary.[281] Maryland takes the same approach, but Maryland decisions are clearer in recognizing that reckless disregard is sufficient.[282] This knowledge

Appx. 345 (5th Cir. 2014) (statements about loan modification do not concern "the character, extent or amount of a consumer debt"; bank's assurances "not to worry" about qualifying for the modification were not affirmative misrepresentations sufficient to support claim for false or misleading statements).

278 Treece v. J.P. Morgan Chase Bank, 2014 WL 7661506 (S.D. Fla. Oct. 31, 2014) (force-placing insurance that was not required by the mortgage); Martorella v. Deutsche Bank Nat'l Trust Co., 931 F. Supp. 2d 1218 (S.D. Fla. 2013) (attempts to collect for force-placed insurance continued after lender was shown proof of insurance); Henderson v. Wells Fargo Bank, 974 F. Supp. 2d 993 (N.D. Tex. 2013) (charges for force-placed insurance following wrongful rejection of borrower's chosen insurance). *See also* Tielke v. Bank of Am., 581 Fed. Appx. 408 (5th Cir. 2014) (Tex. law; fact issue whether insurance was force-placed at time when borrowers had acceptable insurance)

279 Anderson v. Enhanced Recovery Co., 2016 WL 1594424 (E.D. Mich. Apr. 21, 2016) (statute forbidding false statement in effort to collect a debt does not require that statement be made to debtor; debtor stated a claim where Verizon, after investigating claim of identity theft, told her she did not owe the debt, then sent debt to collection; false statement to collector would support claim). *See also* Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328 (M.D. Fla. 2010) (allowing claim to go forward against creditor who sent debt to collector without telling collector it had received notice from consumer's bankruptcy counsel); Cavanaugh v. HBSC Card Services, Inc., 2010 WL 3746260 (M.D. Fla. Sept. 22, 2010) (creditor may be liable where its collector contacted represented consumer, but collector itself is not liable if creditor failed to notify it that consumer was represented). *See also* Vine v. PLS Fin. Services, L.L.C., 2018 WL 456031 (W.D. Tex. Jan. 16, 2018) (consumer can maintain claim under state debt collection statute against collector for threatening criminal prosecution on post-dated payday loan checks, even though collector did not threaten her directly, but referred the checks to district attorney's office with knowledge that it would threaten arrest). *But see* Fireside Bank v. Askins, 430 P.3d 1145 (Wash. Ct. App. 2018) (communications between attorneys, here arguably incorrect accounting, are not communications attempting to collect debt covered by Washington Collection Agency Act), *rev'd*, 460 P.3d 157 (Wash. 2020) (reversing Court of Appeals ruling that debtors had not used proper procedural vehicle to raise their claims, on ground that this issue had not been preserved for appeal; creditor's use of garnishments to collect more than was due violated state debt collection statute; no comment on whether communications between attorneys might also have been violation).

280 *See, e.g.*, Baylor v. Mitchell, Rubenstein & Assoc., 857 F.3d 939 (D.D.C. 2017) (actual knowledge not shown; confusion over amount of interest was at worst negligent, and sending letter to attorney to client's address was result of computer error); Canham v. Fair Collections and Outsourcing, Inc., 2014 WL 3952902 (N.D. Ill. Aug. 13, 2014) (collector who verified amount with creditor after debtor's dispute not liable for attempting to collect unauthorized amounts; no further duty to investigate); Scheunemann v. J.C. Christenson & Assoc., Inc., 802 F. Supp. 2d 981(E.D. Wis. 2011) (for claim of false threat of legal action, must show actual knowledge or reason to know that right asserted did not exist; not sufficiently alleged here).

281 *See, e.g.*, Medley v. Dish Network, L.L.C., 958 F.3d 1063 (11th Cir. 2020) (Fla. law; fact issue whether collector actually knew that debt had been discharged in bankruptcy and that debtor was represented by counsel); Gause v. Med. Bus. Consultants, Inc., 424 F. Supp. 3d 1175 (M.D. Fla. 2019) (collector's statement that it would assume debt was valid if debtor did not telephone immediately was assertion of right it knew did not exist, because FDCPA allows debtor 30 days to dispute debt); Sellers v. Rushmore Loan Mgmt. Services, L.L.C., 2017 WL 1683613 (M.D. Fla. May 3, 2017) (borrower sufficiently alleged actual knowledge of bankruptcy discharge); Prescott v. Seterus, Inc., 2016 WL 4257517 (S.D. Fla. July 7 2016) (charging estimated attorney fees that consumer had not agreed to pay does not violate Florida debt collection statute unless collector knew the fees were not owed; not shown here where collector misconstrued clause's silence about estimated fees); Goodin v. Bank of Am., 114 F. Supp. 3d 1197 (M.D. Fla. 2015) (actual knowledge shown where bank proceeded with foreclosure, after being told by debtors, their attorney, and the bankruptcy trustee that the funds needed to bring mortgage current were being held in the court registry, and would be paid out as soon as bank filed transfer-of-servicing form); Martorella v. Deutsche Bank Nat'l Trust Co., 931 F. Supp. 2d 1218 (S.D. Fla. 2013) (actual knowledge sufficiently alleged where attempts to collect for force-placed insurance continued after lender was shown proof of insurance); Fini v. Dish Network, L.L.C., 955 F. Supp. 2d 1288 (M.D. Fla. 2013) (fact issue as to actual knowledge; calls to non-debtor continued for three months after creditor was notified of wrong number); Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328 (M.D. Fla. 2010) (allowing claim under Florida statute to proceed against creditor that sent claim to collector after receiving notice of bankruptcy, but dismissing claim against collector); Reese v. JPMorgan Chase & Co., 686 F. Supp. 2d 1291 (S.D. Fla. 2009) (consumer must plead facts showing that creditor knew that amount claimed was not owed); Malowney v. Bush/Ross, 2009 WL 3806161 (M.D. Fla. Nov. 12, 2009) (where Florida law would permit foreclosure for small delinquency on condo assessments, false threat not shown; must show legal impossibility, not just lack of intent to take threatened action); Gannon v. I.C. Sys., Inc., 2009 WL 2075244 (S.D. Fla. July 13, 2009) (collector could reasonably believe that debt was owed; did not know of creditor's alleged failure to credit large payment); Cole v. LoBello Painting, Inc., 2007 WL 2330860 (M.D. Fla. Aug. 14, 2007) (painter's filing of claim for hotly disputed debt not violation of prohibition against assertion of right with actual knowledge it does not exist); Cooper v. Litton Loan Servicing (*In re* Cooper), 253 B.R. 286 (Bankr. N.D. Fla. 2000) (lawyer who relies in good faith on information given by creditor not liable); Schauer v. Morse Operations, Inc., 5 So. 3d 2 (Fla. Dist. Ct. App. 2009) (must show that lender had actual knowledge that sums not owed; claim fails where allegedly forged paperwork lender received from car dealer appeared to be in order); Williams v. Streeps Music Co., 333 So. 2d 65 (Fla. Dist. Ct. App. 1976) (attempts to collect paid-off debt violate state debt collection statute only if defendant knew, rather than should have known, that debt was not owed).

282 Olson v. Midland Funding, L.L.C., 578 Fed. Appx. 248 (4th Cir. 2014) (Md. law; must show knowledge or reckless disregard, but neither shown here; fact that debt buyer lost at trial not sufficient to show it knew or should have known action was meritless when filed); Brooks v. Cama Self Directed IRA, L.L.C., 2019 WL 418412, at *11 (D. Md. Jan. 31, 2019) (finding allegations of knowledge or reckless disregard sufficient where defendant charged more than note's interest rate limit and past demands had sought lower rate); Peckey v. Bank of Am., 2015 WL 1622967 (D. Md. Apr. 10, 2015) (genuine issue as to reckless disregard, where collector continued collection efforts without investigating paperwork that consumer had faxed that showed that debt had been settled); Allen v. Bank of Am., 933 F. Supp. 2d 716 (D. Md. 2013) (homeowners stated claim against servicer for attempting to collect sums

requirement applies only to mistakes of fact; it does not protect against errors of law.[283]

The Oregon Supreme Court has held that its statute's prohibition against attempting or threatening to enforce a right that does not exist refers only to the means of enforcing a debt, and not to the existence of the debt itself.[284] Thus, filing suit to collect a claimed debt that does not exist does not violate that prohibition. However, the court noted that other sections of the debt collection act prohibit misrepresenting that a debt may be increased by fees and attempting to collect unauthorized interest or charges.[285] In addition, it noted that the state UDAP statute applies to a suit that seeks to enforce a debt that does not exist.

16.2.4.4.3 Deception regarding collection remedies and in collection suits

A creditor or collector violates a state debt collection statute by threatening to take actions that it does not intend to take or that are not authorized by law.[286] For example, it is deceptive to:

known not to be owed; fact issue whether servicer knew or recklessly disregarded evidence that payments had been misapplied); Bradshaw v. Hilco Receivables, L.L.C., 765 F. Supp. 2d 719 (D. Md. 2011) (collection attempts by unlicensed collector were assertion of right known not to exist; reckless disregard is sufficient to satisfy knowledge requirement); Stovall v. SunTrust Mortgage, Inc., 2011 WL 2011 WL 4402680 (D. Md. Sept. 20, 2011) (must show actual knowledge or reckless disregard); Mateti v. Activa Fin., L.L.C., 2009 WL 2507423 (D. Md. Aug. 14, 2009) (Maryland statute does not impose strict liability; must show actual knowledge or reckless disregard that interest rate claimed by debt seller was incorrect); Kouabo v. Chevy Chase Bank, 336 F. Supp. 2d 471, 475 (D. Md. 2004) (filing suit against debtor who was current on payments violates state debt collection statute if collector knew or recklessly disregarded true facts); Spencer v. Hendersen-Webb, Inc., 81 F. Supp. 2d 582 (D. Md. 1999) (reckless disregard sufficient). *See also* Conteh v. Shamrock Cmty. Ass'n, Inc., 648 Fed. Appx. 377 (4th Cir. 2016) (Md. law; mathematical or typographical error not sufficient; fact issue here whether excessive demand resulted from error, or from addition of unauthorized fee); Hawkins v. Regional Mgmt., Inc., 2018 WL 480766 (Md. Ct. Spec. App. Jan. 19, 2018) (dismissing claim because consumer failed to allege actual or constructive knowledge that charges were unauthorized). *Cf.* Powell v. Palisades XVI, L.L.C., 782 F.3d 119 (4th Cir. 2015) (reckless disregard not shown where debt buyer could have reasonably believed it was authorized to collect); Keysar-Bomar v. Alba Law Group, P.A., 2016 WL 2866797 (D. Md. May 17, 2016) (actual knowledge not shown even though lender was violating federal banking law by seeking to enforce due on sale clause against widow who inherited the property, where firm relied on lender's statement that loan was in default); Peete-Bey v. Educ. Credit Mgmt. Corp., 131 F. Supp. 3d 422 (D. Md. 2015) (actual knowledge or reckless disregard not shown; defunct trade school had falsified attendance records to conceal dropout rate, but student loan debtor failed to show that her records had been falsified and that collector knew or disregarded this); Alston v. Cavalry Portfolio Services, L.L.C., 2013 WL 4501325 (D. Md. Aug. 21, 2013) (knowledge not shown; debt buyer acknowledged that debt was not valid, but no evidence it communicated this to defendant collector).

283 Long v. Pendrick Capital Partners II, L.L.C., 374 F. Supp. 3d 515, 538 (D. Md. 2019); Cooke v. Carrington Mortg. Services, 2019 WL 3241128 (D. Md. July 18, 2019); Brooks v. Cama Self Directed IRA, L.L.C., 2019 WL 418412, at *11 (D. Md. Jan. 31, 2019); Ben-Davies v. Blibaum & Assoc., 421 F. Supp. 3d 94 (D. Md. 2019) (demand for unauthorized interest was an error of law).

284 Porter v. Hill, 838 P.2d 45 (Or. 1992) (filing suit on non-existent debt not violation of debt collection statute's prohibition against attempting to enforce "right or remedy" that does not exist, as those terms refer to methods of collection, not to existence of debt). *See also* Lyon v. Chase Bank, 656 F.3d 877, 883–884 (9th Cir. 2011) (Or. law) (Oregon debt collection statute does not prohibit attempts to collect non-existent debt, but does prohibit attempting to collect a debt and reporting it to credit reporting agencies after failing to comply with Fair Credit Billing Act obligation to respond to billing dispute); Arnett v. Bank of Am., 874 F. Supp. 2d 1021 (D. Or. 2012) (attempting to collect debt that does not exist is not a violation); Memmott v. OneWest Bank, 2011 WL 1560985 (D. Or. Feb. 9, 2011) (debt collector may file suit on alleged debt; not violation even if debt does not exist), *adopted*, 2011 WL 1559298 (D. Or. Apr. 25, 2011); Pro Car Care, Inc. v. Johnson, 118 P.3d 815 (Or. Ct. App. 2005) (demand letter threatening civil action did not violate statute, even if sum demanded was excessive; civil action is proper method of determining existence and amount of debt); Hedrick v. Spear, 907 P.2d 1123 (Or. Ct. App. 1995) (filing collection suit that included improper interest and other charges did not violate Oregon debt collection statute).

285 Porter v. Hill, 838 P.2d 45 (Or. 1992). *See also* Thomas v. U.S. Bank, 2007 WL 764312 (D. Or. Mar. 8, 2007) (demand for unauthorized fee violated Oregon debt collection statute).

286 Patrick v. PHH Mortg. Corp., 937 F. Supp. 2d 773 (N.D. W. Va. 2013) (after loan modification was recorded and homeowners made all required payments, lender falsely alleged default, threatened foreclosure, and foreclosed), *defendant's motion for summary judgment denied*, 998 F. Supp. 2d 478 (N.D. W. Va. 2014) (fact question whether lender had right to foreclose where it had told homeowners that their loan modification agreement would be effective on a certain date); Broughton v. Weltman, Weinberg & Reis, L.P.A., 2011 WL 1211461 (M.D. Fla. Mar. 31, 2011) (threat to impose lien on Florida consumer's home violated FCCPA, because Florida's broad homestead exemption made lien "a legal impossibility"); Cox v. Hilco Receivables, L.L.C., 726 F. Supp. 2d 659 (N.D. Tex. 2010) (denying motion to dismiss claim that debt buyer violated state debt collection statute by misrepresenting that debt was owed to it when former version of state retail installment sales law required any holder of debt to be licensed); Sasscer v. Donnelly, 2010 WL 2195797 (M.D. Pa. May 27, 2010) (arguably false threats); Renteria v. Nationwide Credit, Inc., 2009 WL 2754988 (S.D. Cal. Aug. 27, 2009) (threats of garnishment and real estate seizure that may not be legally possible); Robinson v. Managed Accounts Receivable, Corp., 654 F. Supp. 2d 1051 (C.D. Cal. 2009) (workplace calls with false threats); Mulinix v. Unifund CCR Partners, 2008 WL 2001747 (S.D. Cal. May 8, 2008) (fact issue whether debt buyer who dismissed suit on eve of trial and never presented evidence that it owned debt was threatening to take action that legally could not be taken or harassing debtor); Eads v. Wolpoff & Abramson, L.L.P., 538 F. Supp. 2d 981 (W.D. Tex. 2008) (attempt to collect unauthorized fee may be misrepresentation and threat to take action that cannot legally be taken); Valero v. Bryant, LaFayette & Assoc., L.L.P., 2011 WL 1438436 (E.D. Cal. Apr. 14, 2011) (false statement that collector had file of personal information on debtor which it would sell at public auction if debtor did not pay within twenty-four hours); Adams v. CIR. Law Offices L.L.P., 2007 WL 2481550 (S.D. Cal. Aug. 29, 2007) (false threat of suit); Brincks v. Taylor, 2002 WL 63024 (N.D. Tex. Jan. 8, 2002) (phone call misstating creditor's ability to obtain wage garnishment and lien on home may be violation of state debt collection statute); *In re* Garza, 605 B.R. 817 (Bankr. S.D. Tex. 2019) (threat to sell car, which had been repossessed in willful violation of automatic stay, was threat to do act specifically prohibited by law); CA Partners v. Spears, 274 S.W.3d 51 (Tex. App. 2008) (holder of deed of trust knowingly misrepresented that it had lien on personal as well as real property); Kirk v. Credit Acceptance Corp., 829 N.W.2d 522 (Wis. Ct. App. 2013) (seeking a deficiency, even though claim was barred because repossession breached contract). *See also* Lensch v. Armada Corp., 795 F. Supp. 2d 1180 (W.D. Wash. 2011) (provision of Washington statute allowing collector to warn of criminal prosecution in NSF check notices was preempted by FDCPA ban of false threats where criminal prosecution was time-barred); *In re* Navy Fed. Credit Union, Administrative Proceeding, File No. 2016-CFPB-0024, Consent

- Misrepresent the imminence of suit[287] or other collection remedies;[288]
- Misrepresent that the collector will invoke legal remedies that it does not intend to invoke, for example because the debt is too small or because the debt is not in default;[289]
- Proceed with a foreclosure or other creditor's remedy without having sent notices or taken other preliminary steps required by law;[290]

Order (CFPB Oct. 11, 2016), *available at* https://files.consumerfinance.gov (misrepresenting consequences of default and falsely threatening to garnish wages and contact military debtors' commanding officers are deceptive practices); First N. Am. Nat'l Bank v. Superior Court, 2005 WL 67123 (Cal. Ct. App. Jan. 13, 2005) (threat that consumers would lose all defenses if creditor assigned debt). *But cf.* Hoffman v. Transworld Systems, Inc., 2018 WL 5734641 (W.D. Wash. Nov. 2, 2018) (provision of collection agency act forbidding threat to take unauthorized action is not violated by actually taking such action), *aff'd in relevant part*, 806 Fed. Appx. 549 (9th Cir. 2020); Faiella v. Green Tree Servicing, L.L.C., 2017 WL 589096 (D.N.H. Feb. 14, 2017) (not sufficient to allege actions "that no reasonable servicer or holder would take;" must specify unlawful actions or actions defendant in regular course of business does not take); Jelencovich v. Dodge Enters., Inc., 2009 WL 4899405 (S.D. Fla. Dec. 14, 2009) (postjudgment demand that described creditor remedies, but did not mention exemptions, not deceptive where clerk of court was required to attach claim of exemption forms to writs of garnishment); Brusewitz v. Law Offices of Gerald Moore & Assoc., 2006 WL 3337361 (W.D. Wis. Nov. 15, 2006) (no misrepresentation shown where attorney frequently followed through on taking cases to arbitration, even though he did not do so in this case); Lozano v. Am. Express Travel Related Services, Inc., 2002 WL 31968994 (D. Or. Dec. 6, 2002) (threat to review account is not prohibited representation that assignment of debt will cause debtor to lose defenses or be subject to harsh collection tactics). *See generally* §§ 7.2.1, 7.2.4, 7.2.5, 7.2.10, 7.3.5, *supra*.

287 Summers v. Merchants and Med. Credit Corp., 2013 WL 1507529 (E.D. Mich. Apr. 12, 2013) (denying motion to dismiss claim that collector violated state debt collection statute by threatening referral to attorney within 24 hours and telling debtor that settlement with creditor was not valid); Gifford v. Midland Credit Mgmt., Inc., 2011 WL 3476803 (C.D. Cal. Aug. 8, 2011) (reasonable fact-finder could conclude that letter was false threat of imminent litigation); Wright v. Asset Acceptance Corp., 2000 WL 33216031 (S.D. Ohio Dec. 30, 1999) (denying collector's motion for summary judgment; threat to sue debtor could be misrepresentation of imminence of suit if collector did not own debt). *See also* McMullen v. JPMorgan ChaseBank, 2018 WL 5880767 (C.D. Cal. Jan. 29, 2018) (unsophisticated consumer could have interpreted letter as threat of litigation: after borrowers reported that identity thief had withdrawn funds from their home equity line, lender sent loan modification package which stated that if they provided all required materials lender would not initiate foreclosure); Martin v. Trott Law, P.C., 198 F. Supp. 3d 794 (E.D. Mich. 2016) (fact issue whether letter's language concerning reinstatement would lead unsophisticated consumer to believe sheriff's sale had been scheduled, when foreclosure had not yet taken place); Bloodworth v. United Credit Serv., Inc., 2016 WL 1453520 (E.D. Wis. Apr. 12, 2016) (issue whether unsophisticated consumer would read "consider other methods of enforcing collection" as a threat of litigation where letter also demanded payment within five days and stated that no further delay would be tolerated). *But cf.* Winans v. Franklin Collection Serv., Inc., 2018 WL 3942073 (M.D.N.C. Aug.16, 2018) (false threat not sufficiently alleged: advice to call your attorney if you do not intend to pay in full, unchecked boxes for employment verified and assets located, statement that "we seldom resort to litigation . . . if a claim is timely paid"); Bliese v. Credit Bureau of Ukiah, Inc., 2013 WL 1694952 (N.D. Cal. Apr. 18, 2013) (threats of litigation and garnishment not false where collector had sought and received authorization to sue, and garnishment would result from successful action; lapse of time not probative of falsity where parties were attempting to negotiate a settlement); Lefkowitz v. I.C. Sys., Inc., 361 N.Y.S. 930 (N.Y. App. Div. 1974) (letter that merely stated that collector would recommend referral to attorney is not false representation that legal action is imminent), *aff'd*, 343 N.E.2d 771 (N.Y. 1974) (affirming appellate division decision, but encouraging attorney general to file new more carefully developed enforcement proceeding).

288 Askew v. HRFC, L.L.C., 810 F.3d 263 (4th Cir. 2016) (Md. law; collector falsely told debtor that it had filed a replevin warrant and made a report to the Registry of Motor Vehicles); Koepplinger v. Seterus, Inc., 2018 WL 4055268 (M.D.N.C. Aug. 28, 2018) (refusing to dismiss claim that servicer violated debt collection statute by falsely stating that it would accelerate if full payment not received by specified date), *adopted*, 2018 WL 4401738 (M.D.N.C. Sept. 14, 2018); Cezair v. J.P. Morgan, Chase Bank, 2014 WL 4295048 (D. Md. Aug. 29, 2014) (refusing to dismiss claim that foreclosure trustee violated state debt collection statute by sending notice stating that foreclosure sale could occur 14 days earlier than allowed by law).

289 McCaig v. Wells Fargo Bank, 788 F.3d 463 (5th Cir. 2015) (Tex. law; threat to foreclose when consumers were current on payments required by forbearance agreement is actionable under state debt collection statute); Suarez v. Camden Prop. Trust, 2019 WL 34233427 (E.D. N.C. July 29, 2019) (collection letter stated that $65 debt would be sent to collection if not paid within 30 days; creditor did not refer balances if less than $100 or less than 60 days old).

290 Dionne v. Fed. Nat'l Mortg. Ass'n, 2016 WL 3264344 (D.N.H. June 14, 2016) (violating RESPA by conducting foreclosure sale prior to acting on consumers' completed loss mitigation application); Johnson v. LVNV Funding, L.L.C., 2014 WL 4852027 (E.D. Wis. Sept. 29, 2014) (consumers stated claim for harassment if debt buyer initiated foreclosure without giving required notices of assignment and right to cure); Dina v. Cuda & Assoc., 950 F. Supp. 2d 396 (D. Conn. 2013) (use of bank execution, which was invalid because of failure to follow Connecticut procedure, violated both FDCPA and Connecticut Creditors' Collection Practices Act); Davis v. Hunt, Leibert, Jacobson, P.C., 2014 WL 5798585 (D. Conn. Nov. 7, 2014) (refusing to dismiss claim that collection firm violated state debt collection statute by demanding that family vacate home, without advising them that it had not obtained the court order necessary to give it the right to possession); Brush v. Wells Fargo Bank, 911 F. Supp. 2d 445 (S.D. Tex. Nov. 29, 2012) (serious noncompliance with foreclosure procedure sufficient to support a claim; here, total failure to send required notices); Biggers v. BAC Home Loans Servicing, L.P., 767 F. Supp. 2d 725 (N.D. Tex. 2011) (denying motion to dismiss claim that servicer violated state debt collection statute by threatening foreclosure before it had been assigned the deed of trust or had sent proper notice of default); Rey v. Acosta, 860 S.W.2d 654 (Tex. App. 1993) (wrongful acceleration of real estate note without statutorily required notice and grace period violates state debt collection act); Dixon v. Brooks, 604 S.W.2d 330 (Tex. App. 1980) (deed seller's threat to terminate contract without providing statutorily required notice violates prohibition against threats to take action prohibited by law). *But see* Merrill v. Dyck-O'Neal, Inc., 745 Fed. Appx. 844 (11th Cir. 2018) (provision of statutorily-required 30-day notice that debt has been assigned is not condition precedent to collection, so collector that pursued collection before 30-day period expired did not violate state debt collection statute's prohibition against threatening to enforce debt known not to be legitimate); Crowley v. JPMorgan Chase Bank, 2015 WL 6872896 (D. Md. Nov. 9, 2015) (no claim for errors of process or procedure in collection of valid defaulted debt); Crowley v. JPMorgan Chase Bank, 2015 WL 6872896 (D. Md. Nov. 9, 2015) (lender's foreclosure activity was not attempt to collect a debt without the right to do so, even though it had violated state pre-foreclosure notice requirements); Beal v. Wyndham Vacation Resorts, Inc., 956 F. Supp. 2d 962 (W.D. Wis. 2013) (proper remedy for suing on timeshare contract without providing proper notices and attaching copy of contract is dismissal of the lawsuit, not additional Wisconsin

- Represent falsely that collection procedures such as a foreclosure sale have been or will be cancelled or postponed,[291] or that the creditor or collector will take or has taken other steps that will help the debtor;[292]
- File a false certification of service of process;[293]
- Make false statements in pleadings;[294] or

Consumer Act remedy for attempting to enforce a right that did not exist); Security Fin. v. Kirsch, 926 N.W.2d 167 (Wis. 2019) (failure to provide statutorily-required notice of right to cure entitles debtor to dismissal of suit but does not extinguish creditor's right to enforce the debt, so collection attempts do not violate prohibition against attempting to enforce a right that does not exist).

291 *See, e.g.*, Miller v. BAC Home Loans, 726 F.3d 717, 723–724 (5th Cir. 2013) (Tex. law; misrepresentation that servicer would consider homeowners' loan modification application before foreclosing); Moorer v. Always Towing & Recovery, Inc., 2018 WL 4233005 (E.D. Wis. Sept. 5, 2018) (consumer was told that specified payment would bring loan current and stop repossession; she timely made each payment demanded but collector repossessed; consumer stated claims for debt collection act violations and conversion); Davis v. Hunt Leibert Jacobson, P.C., 2014 WL 5798585 (D. Conn. Nov. 7, 2014) (dismissing foreclosure pursuant to agreement, then reopening it without proper notice and ordering family to move out); McFarland v. Wells Fargo Bank, 19 F. Supp. 3d 663 (S.D. W. Va. 2014) (bank informed borrower he had been approved for loan modification and signed agreement, but then refused to honor it); Porterfield v. JP Morgan Chase, 2014 WL 3587783, at *23 (W.D. Tex. July 21, 2014) (foreclosing after agreeing not to may violate state debt collection statute); Ward v. G. Reynolds Sims and Assoc., 2013 WL 364012 (E.D. Mich. Jan. 30, 2013) (attorney's false statement that he had released garnishment, which caused debtor to not contest it, violates Michigan Collection Practices Act); May v. Wells Fargo Home Mortgage, 2013 WL 2984795, at *4 (N.D. Tex. June 17, 2013) (false affirmative statement as to whether a foreclosure is scheduled is actionable misrepresentation); Petty v. Countrywide Home Loans, 2013 WL 1837932, at *13 (S.D. W. Va. May 1, 2013) (borrowers stated claim against creditor and servicer who misrepresented that that borrowers qualified for loan modification, told them to stop making payments, and misrepresented that lender would not foreclose). *See also* Stoler v. PennyMac Loan Services, L.L.C., 2019 WL 5106417 (S.D. W. Va. Oct. 11, 2019) (proceeding to foreclosure during time when servicer said it would consider modification request may be unfair); Hall v. Equifax Info. Services, L.L.C., 204 F. Supp. 3d (E.D. Pa. 2016) (after patient and hospital agreed to settle bill out of patient's personal injury and patient paid the agreed-upon sum and was told that balance was zero, hospital sent debt to collection); Overholt v. Wells Fargo Bank, 2011 WL 4862525 (E.D. Tex. Sept. 2, 2011) (consumers stated claims under state debt collection statute against lender that, in violation of loan modification contract, refused to accept payments, and carried on with foreclosure and eviction after assuring consumer that foreclosure was error and would be rescinded), *adopted*, 2011 WL 4862706 (E.D. Tex. Oct. 13, 2011). *But see* Kruse v. Bank of New York Mellon, 936 F. Supp. 2d 790 (N.D. Tex. Apr. 1, 2013) (claim based on false oral statement that foreclosure has been postponed is barred by statute of frauds). *But cf.* Chavez v. Wells Fargo Bank, 578 Fed. Appx. 345 (5th Cir. 2014) (Texas law) (bank's assurances "not to worry" about qualifying for loan modification were not "affirmative misrepresentations" sufficient to support claim for false or misleading statements); Verdin v. Fed. Nat'l Mortg. Ass'n, 540 Fed. Appx. 253 (5th Cir. 2013) (Tex. law; creditor's statement that homeowner should not "worry about the foreclosure" is not a statement that it will forgo foreclosure, so not a violation of state debt collection statute); Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717 (5th Cir. 2013) (Texas law) (misrepresentation that foreclosure would be delayed while servicer considered homeowners' loan modification application was not misrepresentation of character or amount of debt); Rabe v. Wells Fargo Bank, 2013 WL 5458068 (E.D. Tex. Sept. 30, 2013) (false statements that foreclosure would be postponed not actionable misrepresentations about the character, extent or amount of the debt). *See generally* § 16.2.4.4.2, *supra* (deception regarding existence or amount of a debt).

292 Vine v. PLS Fin. Services, L.L.C., 2018 WL 456031 (W.D. Tex. Jan. 16, 2018) (lender sent bounced checks to county diversion program that threatened arrest, even though payday borrowers had been told that post-dated checks would not be used to threaten or pursue criminal charges); Corvello v. Wells Fargo Bank, 2016 WL 3995909 (N.D. Cal. Jan. 29, 2016) (Rosenthal Act violation shown if lender's communications would mislead unsophisticated consumer into believing she would receive a loan modification if she completed trial payments, or be notified if she would not, when lender did not intend, or did not have the administrative ability, to do this); Weiner v. Ocwen Fin. Corp., 2015 WL 4599427 (E.D. Cal. July 29, 2015) (attorney, who had no authority to settle, negotiated a payment plan; statement that collection activity would cease if timely payments were made was deceptive); Ranson v. Bank of Am., 2013 WL 1077093 (S.D. W. Va. Mar. 14 2013) (lender told borrower to stop making payments while loan modification was underway, then, months later, denied modification on grounds known to lender from the beginning); Reyelts v. Cross, 968 F. Supp. 2d 835 (N.D. Tex. 2013) (homeowners stated claim for false representations to collect a debt; roofing contractor promised to handle all the paperwork for homeowners' insurance claim, failed to do so, then dunned and sued homeowners after insurer denied claim), *aff'd*, 566 Fed. Appx. 316 (5th Cir. 2014). *See also* Moss v. Ditech Fin., L.L.C., 2016 WL 4077719 (D. Md. Aug. 1, 2016) (consumer paid substantial sum to reinstate mortgage, believing she would then owe only the agreed-upon monthly payments; lender then demanded corporate advances and attorney fees; if reinstatement agreement waived these prior expenses, demand violated the Maryland statute); McNeely v. Wells Fargo Bank, 115 F. Supp. 3d 779 (S.D. W. Va. 2015) (letter that misstated terms of modification agreement raised fact question as to deceptive or misleading conduct).

293 *See, e.g.* Picard v. ABC Legal Services, Inc., 2015 WL 3465832 (N.D. Cal. June 1, 2015) (alleged sewer service); Ansari v. Elec. Document Processing, Inc., 2013 WL 4547621 (N.D. Cal. Aug. 29, 2013); Holmes v. Elec. Document Processing, Inc., 966 F. Supp. 2d 925 (N.D. Cal. 2013) (false service of process violates Rosenthal Act; claim not barred by litigation privilege); Johnson v. Brock & Scott, P.L.L.C., 2012 WL 4483916 (E.D.N.C. Sept. 27, 2012) (alleged sewer service); Engelen v. Erin Capital Mgmt., 2011 WL 3844587 (S.D. Cal. Aug. 30, 2011) (claim that default judgment and garnishment were obtained by false affidavit of service alleges extrinsic fraud on the state court, not error by the state court itself, so claims under state debt collection statute not barred by *Rooker-Feldman* rule); Scott v. Kelkris Assoc., Inc., 2010 WL 4393274 (E.D. Cal. Oct. 29, 2010) (allowing plaintiff to proceed with claim under state debt collection statute that default judgment and garnishment were obtained by sewer service; fact issues whether creditor knew that service was made at address where consumer did not reside).

294 *See, e.g.*, Eager v. Credit Bureau Collection Services, Inc., 2013 WL 5719224 (W.D. Mich. Oct. 18, 2013) (false statement that certain claims had been assigned to its client); Berg v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 2009 WL 901011 (N.D. Ill. Mar. 31, 2009) (inaccuracies and inconsistencies in statements of amounts due in complaint and affidavit would confuse unsophisticated consumer and make it more difficult to challenge amounts); Harrington v. CACV of Colorado, L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007) (filing action in wrong venue, and knowingly false statements to obtain default judgment sufficient to state UDAP claim for violation of Massachusetts debt collection regulations); *In re* Eastman, 419 B.R. 711 (Bankr. W.D. Tex. 2009) (filing suit on discharged debt and carrying on after learning that debt was discharged; false statements in course of lawsuit violated Texas debt collection statute). *See also* Montgomery v. Midland Credit Mgmt.,

- Sue or threaten suit on a time-barred debt,[295] or on a debt that the collector knows to be legally invalid for other reasons.[296]

Consumers stated a claim under Oregon's unlawful debt collection practices act against a utility company that terminated or threatened to terminate service to residential customers, when it knew or should have known they had legislative protection from such termination.[297]

16.2.4.4.4 Deception regarding the identity of the collector or the owner of the debt

It is deceptive and a violation of a state debt collection statute to:

- Misrepresent or conceal the identity of the creditor or collector;[298]

Inc., 2014 WL 3563198 (E.D. Pa. June 19, 2014) (debt buyer's employee filed affidavit, without reviewing documents that would have alerted her to identity theft); Dina v. Cuda & Assoc., 950 F. Supp. 2d 396 (D. Conn. 2013) (service of expired bank account execution on bank was deceptive debt collection tactic even though bank rather than consumer was misled). *But cf.* Lembach v. Bierman, 528 Fed. Appx. 297 (4th Cir. 2013) (Md. law; robosigned signature on foreclosure affidavit is not an attempt to enforce a right with knowledge that the right does not exist, where underlying debt is valid). *See generally* § 16.1.3, *supra* (whether litigation activities are privileged).

295 *See* Shadow v. Midland Credit Mgmt., 2018 WL 4357980 (S.D. Cal. Sept. 13, 2018) (refusing to dismiss claim that collection letter seeking payment of time-barred debt was deceptive, despite small print stating that creditor would not sue on it, and because it did not warn that time-barred debt would be revived by a written acknowledgement, which might occur if consumer accepted installment payment option); Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870 (N.D. Ill. 2009) (filing suit on time-barred debts is violation); Richburg v. Palisades Collection, L.L.C., 247 F.R.D. 457 (E.D. Pa. 2008) (collector can be liable for filing suit on time-barred debt, even if its attorney is protected by attorney exemption; fact issue here as to bona fide error); Klewer v. Calvary Inv., 2002 WL 2018830 (W.D. Wis. Jan. 30, 2002) (debt buyer's attempt to collect time-barred debt was attempt to enforce right that it should have known did not exist). *See also* Gonzales v. Arrow Fin. Services, L.L.C., 489 F. Supp. 2d 1140 (S.D. Cal. 2007) (threat to report stale debt, or implication that it had already been reported, was deceptive). *See also* Cal. Civ. Code § 1788.14(d) (prohibiting written communications to collect time-barred debts without specified disclosures); Me. Stat. tit. 32, §§ 11013(7), 11013(8) (prohibiting collectors from bringing collection actions on time-barred debts); W. Va. Code § 46A-2-128(f) (requiring debt collector to make a disclosure in the initial written communication with the debtor if the debt is time-barred). *But see* Thomas v. U.S. Bank, 2007 WL 764312 (D. Or. Mar. 8, 2007) (suing or threatening to sue on time-barred debt does not violate Oregon debt collection statute). *But cf.* Garrison v. Caliber Home Loans, Inc., 233 F. Supp. 3d 1282 (M.D. Fla. 2017) (attempt to collect debt that was partially time-barred, which did not include threat of lawsuit, does not violate Florida statute); Dittig v. Elevate Recoveries, L.L.C., 2016 WL 4447818 (W.D. Pa. Aug. 24, 2016) (FDCPA and Pa. claims fail because dunning letters did not threaten litigation); Reed v. AFNI, Inc., 2011 WL 112430 (D. Utah Jan. 13, 2011) (refusing to hold that attempt to collect time-barred debt violates UDAP statute); McCorriston v. LWT, Inc., 536 F. Supp. 2d 1268 (M.D. Fla. 2008) (statute requires actual knowledge that debt was time-barred); FIA Card Services v. Gachiengu, 571 F. Supp. 2d 799 (S.D. Tex. Aug. 14, 2008) (bona fide error defense available where action was time-barred, but statute of limitations question was subject of split among federal circuits). *See generally* § 7.2.5, *supra*.

296 Lyon v. Chase Bank, 656 F.3d 877 (9th Cir. 2011) (creditor who continued collection attempts while refusing to provide explanation required by FDCPA and Fair Credit Billing Act as a condition of continued collection activity violated Oregon debt collection act provision forbidding attempts to enforce a remedy known not to exist); Hererra v. LCS Fin. Services Corp., 274 F.R.D. 666 (N.D. Cal. 2011) (certifying class in Rosenthal Act action alleging that collector routinely sought to collect deficiencies that were barred by California statute); Liu v. Arrow Fin. Services, L.L.C., 2010 WL 1994190 (S.D. Tex. May 17, 2010) (collector sued identity theft victim after it knew she did not owe debt); Marketic v. U.S. Bank, 436 F. Supp. 2d 842 (N.D. Tex. 2006) (allegation that assignee sought to foreclose on home equity loan that was prohibited by Texas constitution states claim under Texas Debt Collection Act); Kim v. Riscuity, Inc., 2006 WL 2192121 (N.D. Ill. July 31, 2006) (refusing to dismiss claim under state debt collection law against debt buyer for suing on contracts it knew were illegal under Illinois health club law); Losure v. Capital One Services, Inc., 2006 WL 166520 (M.D. Fla. Jan. 23, 2006) (declining to dismiss claim under Florida debt collection statute; allegation that collector "knew or should have known" that debt had been settled is sufficient); Kirk v. Credit Acceptance Corp., 829 N.W.2d 522 (Wis. Ct. App. 2013) (seeking a deficiency, where claim was barred because repossession breached contract).

297 Isom v. Portland Gen. Elec. Co., 677 P.2d 59 (Or. Ct. App. 1984) (utility disregarded customers' rights under partial payment, medical certification, and low-income energy assistance rules).

298 Burns v. Ross, Stuart & Dawson, Inc., 2016 WL 7013007 (E.D. Mich. Dec. 1, 2016) (creditor and letter provider created false impression of third party involvement; pre-collection letters send on letterhead of letter provider, instructing consumer to pay creditor); Moss v. Barton, 2016 WL 1441146 (E.D. Mo. Apr. 8, 2016) (fact issue whether assignment of debt to attorney was partial or complete; if complete, attorney violated FDCPA by suing in name of original creditor); Thomas v. Portfolio Recovery Assoc., L.L.C., 2013 WL 4517175 (S.D. Cal. Aug. 12, 2013) (form complaint that failed to identify original creditor, and affirmatively alleged that debt buyer was the creditor who sold goods or extended credit, violated both FDCPA and RFDCPA); Alonso v. Blackstone Fin. Group, L.L.C., 962 F. Supp. 2d 1188 (E.D. Cal. 2013) (collector misrepresented self as law enforcement officer and told debtor she would be arrested); Martinez v. Commercial Recovery Sys., Inc., 2013 WL 2237571 (M.D. Fla. May 21, 2013) (creditor misrepresented self as sheriff's deputy); Henggeler v. Brumbaugh & Quandahl, P.C., 2012 WL 2855104 (D. Neb. July 5, 2012) (denying motion to dismiss claim that collectors' use of name of fictitious entity violated state debt collection statute). Pippert v. Niece, 518 F. Supp. 2d 1265 (D. Or. 2007) (collector for former landlord failed to properly identify self and entity for which it was collecting); Hosseinzadeh v. M.R.S. Assoc., Inc., 387 F. Supp. 2d 1104 (C.D. Cal. 2005) (message on answering machine failed to meaningfully disclose collector's identity in violation of state debt collection statute); Hartman v. Meridian Fin. Services, 191 F. Supp. 2d 1031, 1049–1050 (W.D. Wis. 2002) (use of false name violates Wisconsin debt collection statute); Joseph v. J.J. MacIntyre Companies, L.L.C., 238 F. Supp. 2d 1158 (N.D. Cal. 2002) (collector's use of alias states claim). *But cf.* DuHart v. LRAA Collections, 652 Fed. Appx. 483 (8th Cir. 2016) (use of "dba" name for initial billing, and variation on official name in pre-collection letter, not sufficient to subject creditor to false name exception of FDCPA and Arkansas Fair Debt Collection Act); Trent v. Mortg. Elec. Registration Sys., Inc., 288 Fed. Appx. 571 (11th Cir. 2008) (foreclosure notice that described MERS as "creditor" not deceptive, because MERS had legal right to foreclose); Hayes v. Asset Acceptance, 2014 WL 1767106 (S.D. Fla. May 2, 2014) (answering machine messages cannot violate FCCPA provision forbidding "refusal" to identify self, because consumer never requested identification); Beeders v. Gulf Coast Collection Bureau, Inc., 2010 WL 2696404 (M.D. Fla. July 6, 2010) (although autodialed calls with failure to identify self violated FDCPA, they do not

se a misleading name;[299]

ssert the rights of the owner of a debt without actually wning it;[300]

lisrepresent the involvement of an attorney;[301] or

- Use dunning forms that simulate legal process or create the impression of government affiliation.[302]

olate Florida statute, which requires collector to identify self only if quested by debtor), *aff'd*, 432 Fed. Appx. 918 (11th Cir. 2011); Glover Client Services, Inc., 2007 WL 2902209 (W.D. Mich. Oct. 2, 2007) ollector's blocking caller ID was neither deceptive statement, nor mmunicating without disclosing its identity).

lair v. Supportkids, Inc., 2003 WL 21799933 (N.D. Ill. July 25, 2003) llowing claim to go forward against CEO and board chairman who rsonally participated in choosing deceptive company name "Child upport Enforcement"); Pittenger v. Collection Agency Licensing ureau, 25 Cal. Rptr. 324 (Cal. Ct. App. 1962). *But cf.* Forsyth Mem'l osp. v. Contreras, 421 S.E.2d 167 (N.C. Ct. App. 1992) (debt collec- n letter mailed on letterhead of hospital holding company's attorney d not violate state debt collection law by failing to reveal relation- ip between hospital and hospital holding company or by suggesting at patient's debt to hospital had been turned over to independent bill ollector).

ndsay v. Rushmore Loan Mgmt., 2016 WL 1169957 (D. Md. Mar. 24,)16) (incorrect identification of owner of debt in collection action as assertion of rights known not to exist, as collector would not be ntitled to enforce debt on behalf of party that did not own it); Young Unifund CCR Partners, 2014 WL 4698646 (N.D. Ill. Sept. 22, 2014) enying motion to dismiss FDCPA and state debt collection claims; ing suit without proper assignment of the debt may falsely imply at collector has legal right to collect); Thomas v. Urban P'ship Bank,)13 WL 1788522 (N.D. Ill. Apr. 26, 2013) (homeowner stated Illinois ollection Act claim against servicer that sought to collect for bank hich allegedly did not own the loan); Brooks v. Midland Credit Mgmt., c., 2013 WL 1010455 (D. Md. Mar. 13, 2013) (consumer stated claim r asserting right known not to exist: debt buyer knew that it did not vn debt and was not authorized to add certain interest); DiCesari v. sset Acceptance, L.L.C., 2012 WL 4108944 (E.D. Pa. Sept. 18, 2012) ebt buyer sued, knowing it had no legal proof of ownership of debt). *e also* Wilson v. Bank of N.Y. Mellon, 2013 WL 5273328, at *10 J.D. Tex. Sept. 18, 2013) (if servicer lacked authority to appoint sub- itute trustee, then foreclosure action violated provisions forbidding lse threat to seize property or take actions forbidden by law). *But cf.* lson v. Midland Funding, L.L.C., 578 Fed. Appx. 248 (4th Cir. 2014) ebt buyer's inability to prove ownership and existence of debt in col- ction suit does not violate Maryland debt collection statute in absence evidence that debt buyer did not own the debt or that debt- [illegible]

Mitchell, Rubenstein, & Assoc., 55 F. Supp. 3d 43 (D.D.C. 2014) (letter on law firm letterhead, stating firm had "been instructed to review" debt for possible legal action, but had not yet done so, did not misrepresent attorney involvement), *later op. aff'd*, 857 F.3d 939 (D.C Cir. 2017) (affirming summary judgment against consumer on other claims under D.C. debt collection law). *But cf.* Jones v. Dufek, 830 F.3d 523 (D.C. Cir. 2016) (letter did not misrepresent attorney involvement; demand for payment was on law firm letterhead, but with disclaimer immediately below the signature stating that no attorney had personally reviewed the account); *In re* Cheaves, 439 B.R. 220 (Bankr. M.D. Fla. 2010) (letter would not deceive unsophisticated consumer into thinking it was from attorney).

302 *See* Miranda v. Law Office of D. Scott Carruthers, 2011 WL 2037556 (E.D. Cal. May 23, 2011) ("notice of pending court proceedings" would deceive least sophisticated consumer into believing that lawsuit had already been filed); N. Star Capital Acquisitions, L.L.C. v. Krig, 611 F. Supp. 2d 1324 (M.D. Fla. 2009) (fact question whether proposed stipulated judgment served with complaint was deceptive); Mullinix v. Unifund CCR Partners, 2008 WL 2001747 (S.D. Cal. May 8, 2008) (fact issue whether "assignee of . . . Navy Defending Democracy" was false assertion of government affiliation or mere quotation of slogan that debtor chose to place on credit card); Barker v. Tomlinson, 2006 WL 1679645 (M.D. Fla. June 7, 2006) (affirming $10,000 punitive damage award where collector falsely claimed to be pre-trial diversion program and misrepresented that arrest warrant was imminent); Gradisher v. Check Enforcement Unit, 210 F. Supp. 2d 907 (W.D. Mich. 2002) (private collector working with sheriff's office, but paid by merchants, violated Michigan Collection Practices act by sending notices on official stationary describing possible criminal penalties, when sheriff's office had not yet seen case and rarely prosecuted such cases); Steiner & Munach, P.A. v. Williams, 334 So. 2d 39 (Fla. Dist. Ct. App. 1976) (unfiled complaint, or statement of claim, that threatened future filing simulated process, giving false impression of authorization by government or attorney); Tester v. Nat'l Credit Exch., Inc., 299 So. 2d 46 (Fla. Dist. Ct. App. 1974) (use of document labeled "Final Demand Before Suit" with legal caption and language and type style similar to summons states claim for simulating process). *See also* Hayes v. Self-Help

idation notices and documentation uirements

echo the FDCPA's requirement of a validation f the state statute does not require such a notice, ; or obscuring the consumer's validation rights PA is likely a violation of a general prohibition the state statute.[304] Some states require credi- the debtor specific documentation of the debt

rongful garnishment

garnishing an account containing only exempt benefits violates the Iowa Fair Debt Collection and the unconscionable debt collection pro- Iowa Consumer Credit Code.[306] Garnishing a servicemember's bank account without filing the affidavit required by the Servicemembers Civil Relief Act violated the Washington Collection Agency Act.[307] A bank's freezing of a customer's account to force them to pay their consumer debt to another bank may be a state debt collection violation.[308] Obtaining a default judgment and garnishing wages without proper notice violated the Washington collection agency and UDAP statutes.[309]

16.2.4.4.7 Other unfair or deceptive tactics

Filing suit in an improper venue violates a state debt collection statute.[310] A collector whose dunning letter referred consumers to a website containing egregious misrepresentations violated the Oregon Unfair Debt Collection Practices Act.[311] A collector or creditor violates a state debt collection statute by:

- Dunning HMO subscribers for medical bills covered by their HMO, in violation of state insurance law or the governing contract;[312]

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hnson v. CFS II, Inc., 2013 WL 1809081 (N.D. Cal. Apr. 28, ing on California's incorporation of FDCPA's validation .irement; where creditor knew that first letter, with correct of dispute rights, went to wrong address, second, correctly- letter, which did not provide required notice, was "initial ood v. Mercantile Adjustment Bureau, L.L.C., 176 P.3d 769 8) (confusing and contradictory language obscured state- verification rights). *See also* Maloney v. Alliance Collection Inc., 2018 WL 5816375 (E.D. Wis. Nov. 6, 2018) (sending ition notices within 30 days could confuse debtor as to time disputing debt). *But see* Himes v. Client Services, Inc., 2013 153 (D.N.H. Apr. 22, 2013) (New Hampshire debt collection es not include a validation requirement). *But cf.* Coburn v. Assoc., Inc., 2015 WL 6473606 (E.D. Mich. Sept. 29, 2015) oes not require collector to validate debt that has already been n though collector continued to report it delinquent for two r payment).

Martin v. Butler & Hosch, P.A., 2014 WL 3593622 (M.D. Fla. 2014) (statement that debt "will be assumed to be valid" if con- oes not dispute within thirty days violated both FDCPA and

2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (consumer stated claim for unconscionable debt collection practices; garnishment, without prior investigation, of account containing Social Security and refusal to return garnished funds upon being told of exemption). *But see* Gates v. MTCA Group, Inc., 93 F. Supp. 3d 1182 (S.D. Cal. 2015) (garnishment of bank account containing Social Security benefits not unfair or a deceptive threat of unlawful action where collection attorney followed state procedure, and debtor then used that procedure to exempt the funds, but collector's oral misstatements regarding debtor's rights might be violations of FDCPA and state debt collection law); Lange v. CIR. Law Offices, 2010 WL 2524089 (S.D. Cal. June 22, 2010) (garnishing bank account that contained Social Security did not violate California's Rosenthal Act; creditor had no duty to investigate before garnishment). *See generally* National Consumer Law Center, Collection Actions §§ 14.3, 14.5.4 (5th ed. 2020), *updated at* www.nclc .org/library (protection of Social Security benefits and other exempt

- Freezing electronic access to all of the debtor's accounts and disabling certain electronic services when a debtor became delinquent on a credit card account;[313]
- Misrepresenting the legal status of an obligation, for example by representing a disputed debt as undisputed;[314] or
- Making misleading statements about the effect the consumer's payment will have.[315]

16.2.4.5 Unlicensed Collection Activity

Some courts hold that a consumer does not have a direct private cause of action against a collection agency for operating without a license required by state law.[316] However, a collection agency's threat to take action that it cannot legally take because of its lack of a license may be actionable under the state debt collection law as a deceptive tactic.[317] A threat of suit by an attorney who is not licensed in the jurisdiction is also deceptive.[318] In addition, a violation of a state law requiring collectors to be licensed may provide the basis for injunctive relief,[319] and may also be the basis of an FDCPA[320] or UDAP

(hospital violated state debt collection, UDAP, and racketeering statutes by placing lien against HMO subscriber's personal injury recovery, in violation of contracts which required hospital to accept HMO payment and hold subscribers harmless).

313 *In re* Navy Fed. Credit Union, Administrative Proceeding, File No. 2016-CFPB-0024, Consent Order (CFPB Oct. 11, 2016), *available at* https://files.consumerfinance.gov.

314 *See, e.g.*, Stallings v. CitiMortgage, Inc., 2013 WL 4417424 (E.D. Tex. Aug. 14, 2013) (series of contradictory letters about status of loan modification, some sent after house had been sold in foreclosure, were false representations of status of debt and deceptive means to collect), *aff'd*, 611 Fed. Appx. 215 (5th Cir. 2015); Summers v. Merchants and Med. Credit Corp., 2013 WL 1507529 (E.D. Mich. Apr. 12, 2013) (denying motion to dismiss claim that collector violated state debt collection statute by misrepresenting to debtor that her settlement with creditor was not valid); Johnson v. Brock & Scott, P.L.L.C., 2012 WL 4483916 (E.D.N.C. Sept. 27, 2012) (denying collector's motion for judgment on pleadings; law firm's false statement that judgment had been entered against consumer would violate state debt collection law); Harding v. Regent, 347 F. Supp. 2d 334 (N.D. Tex. 2004) (letter that treated disputed debt as undisputed may violate Texas Debt Collection Act). *See also* Herrera v. LCS Fin. Services Corp., 2009 WL 5062192 (N.D. Cal. Dec. 22, 2009) (least sophisticated consumer would be confused by second mortgage lender's statement that she "must" pay deficiency after foreclosure, when California law barred suit on deficiency).

315 Moorer v. Always Towing & Recovery, Inc., 2018 WL 4233005 (E.D. Wis. Sept. 5, 2018) (consumer was told that specified payment would bring loan current and stop repossession; she timely made each payment demanded but collector repossessed; consumer stated claims for debt collection act violations and conversion); Solomon v. BAC Home Loans Servicing, L.P., 2013 WL 5000069 (E.D. Tex. Aug. 15, 2013) (false oral assurances as to loan modification not sufficient, but sending borrowers a copy of unsigned agreement and accepting reduced payments could support claim for deceptive means of collecting the additional payments); Cuevas v. BAC Home Loan Servicing, L.P., 2012 WL 4339063 (S.D. Tex. Sept. 19, 2012) (servicer demanded specific sum for property taxes; when borrower timely tendered that amount, servicer refused it and foreclosed); Chao v. Aurora Loan Services, L.L.C., 2011 WL 6963098 (N.D. Cal. Sept. 13, 2011) (refusing to dismiss claim that servicer's letter, which asked for payments to cure arrearage but then stated that the payment would not cure it, was so misleading that it violated state debt collection statute).

316 *See, e.g.*, Velez v. Health Revenue Recovery Group, L.L.C., 2017 WL 1476144 (M.D.N.C. Apr. 24, 2017) (stating in *dicta* that there appears to be no private cause of action for collector's failure to register as required by state debt collection statute); Galvan v. NCO Fin. Systems, Inc., 2016 WL 792009 (N.D. Ill. Mar. 1, 2016) (finding private right of action for harassment but not for unlicensed practice); Matute v. Main St. Acquisition Corp., 2012 WL 4513420 (S.D. Fla. Oct. 2, 2012); Paris v. Steinberg & Steinberg, 828 F. Supp. 2d 1212 (W.D. Wash. 2011); Trent v. Mortgage Elec. Registration Sys., Inc., 2007 WL 2120262 (M.D. Fla. July 20, 2007) (no private right of action for failure to register as out-of-state collection agency), *aff'd*, 288 Fed. Appx. 571 (11th Cir. 2008); Hoskin v. Plaquemines Parish Gov't, 743 So. 2d 736 (La. Ct. App. 1999) (no private cause of action under Louisiana debt collection licensing law).

317 *See, e.g.*, Collins v. Erin Capital Mgmt., L.L.C., 991 F. Supp. 2d 1195 (S.D. Fla. Oct. 28, 2013) (garnishment action brought by unregistered debt buyer was threat to take action that could not legally be taken); Bradshaw v. Hilco Receivables, L.L.C., 765 F. Supp. 2d 719 (D. Md. 2011) (collection attempt by unlicensed collector was assertion of right known not to exist, a violation of the Maryland debt collection statute). *See also* Goray v. CCR Unifund Partners, 2007 WL 4260017 (D. Haw. Dec. 4, 2007) (attempt to collect by unregistered agency violated state debt collection statute); LVNV Funding v. Finch, 207 A.3d 202 (Md. 2019) (judgments obtained by unlicensed collector will support UDAP and debt collection claims for asserting right known not to exist). *But cf.* ValleCastro v. Tobin, 2015 WL 6478412 (D. Conn. Oct. 27, 2015) (unlicensed collector's statement that account "may be reviewed for possible legal action" did not threaten lawsuit or other action that could not legally be taken); Conner v. BCC Fin. Mgmt. Services, Inc., 489 F. Supp. 2d 1358 (S.D. Fla. 2007) (consumer has no private cause of action for collection agency's faults in registration procedure and cannot frame claim as assertion of legal right while knowing that right does not exist).

318 *In re* Belile, 209 B.R. 658 (Bankr. E.D. Pa. 1997) (letter which threatened immediate suit, although no employee of collector was admitted in Pennsylvania, threatened action which could not be taken and violated former state debt collection regulation).

319 *See, e.g.*, Cooper v. Ellis, Crosby, & Assoc., 2007 WL 1322380 (D. Conn. May 2, 2007) (granting injunction against further collection activity in Connecticut unless collector becomes properly licensed); Shelton v. Wilson (*In re* Wilson), 311 B.R. 566 (D. Or. 2004) (affirming bankruptcy court's issuance of injunction against unlicensed collector), *aff'd*, 185 Fed. Appx. 696 (9th Cir. 2006); Cavalry SPC I, L.L.C. v. Morrisey, 752 S.E.2d 356 (W. Va. 2013) (affirming grant of attorney general's motion for temporary injunction forbidding debt buyer from collecting debts acquired before it obtained license). *See also* Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (denying motion to dismiss claim for injunction requiring debt buyer to post bond as required by state statute; fact that bond was posted after consumer sued did not moot claim); Purco Fleet Services, Inc. v. Idaho State Dep't of Fin., 90 P.3d 346 (Idaho 2004) (reinstating state agency's cease and desist order against unlicensed collector).

320 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185 (11th Cir. 2010) (fact issue whether letter from collector not registered in Florida was threat of litigation; if so, it threatened action that could not legally be taken and was FDCPA violation); Buhler v. BCG Equities, L.L.C., 2020 WL 888733 (D. Utah Feb. 24, 2020) (denying motion for judgment on pleadings on claim that out-of-state debt buyer that sues or threatens suit in Utah without registering as collection agency violates Utah debt collection statute); Alexander v. Absolute Resolutions Corp., 2019 WL 1938891 (W.D. Ark. May 1, 2019) (allowing FDCPA claim to go forward against retroactively licensed collector that was unlicensed at time it filed suit; Arkansas statute allows unlicensed agency, upon payment of $10,000 penalty, to receive retroactive license, and provides that this penalty is the only consequence of and remedy for unlicensed practice; court construes this provision to apply only to

claim.[321] Some state lending laws may require an assignee of a loan to have a state lending license in order to collect more than the legal rate of interest.[322]

A consumer might also be able to have a judgment declared void if it was obtained by an entity that was required to, but did not, have a license. However, the highest court in Maryland[323] and the Illinois Supreme Court[324] held that a judgment obtained by a collector that should have, but did not have, a license was merely voidable, not void. The court reasoned that violation of a statutory licensure requirement could not deprive a court of jurisdiction that was conferred by the state constitution. The result might be different where a judgment is entered by a court of limited jurisdiction.

16.2.5 State Debt Collection Statutes' Remedies

16.2.5.1 Is There a Private Cause of Action?

The remedies provided by state debt collection statutes vary widely. Some statutes explicitly authorize private actions. Where the statute is silent as to consumer remedies, some courts have implied a private cause of action to enforce

penalties imposed by state agency); Smith v. LVNV Funding, L.L.C., 894 F. Supp. 2d 1045 (E.D. Tenn. 2012) (threatening or taking steps without a required license is FDCPA violation); Fiorenzano v. LVNV Funding, L.L.C., 2012 WL 2562415 (D.R.I. June 29, 2012) (filing of lawsuit by debt buyer that had failed to register as required by Rhode Island law was sufficient to support FDCPA claim); Bradshaw v. Hilco Receivables, L.L.C., 765 F. Supp. 2d 719 (D. Md. 2011) (collection attempt by unlicensed collector was assertion of right known not to exist); Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358 (D. Md. 2010); Goray v. CCR Unifund Partners, 2007 WL 4260017 (D. Haw. Dec. 4, 2007) (unregistered agency's attempt to collect violated FDCPA and state debt collection statute); Cooper v. Ellis, Crosby, & Assoc., 2007 WL 1322380 (D. Conn. May 2, 2007) (lack of state-required license is FDCPA violation); Keli v. Universal Fid. Corp., 1997 WL 33820142 (D. Haw. Feb. 25, 1997) (engaging in collection activities without state-required license is FDCPA violation); Russey v. Rankin, 911 F. Supp. 1449, 1459 (D.N.M. 1995) (unlicensed debt collection activity is FDCPA violation); Sibley v. Firstcollect, Inc., 913 F. Supp. 469 (M.D. La. 1995) (engaging in debt collection without license was "tak[ing] action that cannot legally be taken" and was FDCPA violation); Carrigan v. Cent. Adjustment Bureau, Inc., 494 F. Supp. 827, 502 F. Supp. 468 (N.D. Ga. 1980). *But see* Wade v. Reg'l Credit Ass'n, 87 F.3d 1098 (9th Cir. 1996) (violation of Idaho debt collection law's licensure requirement is not per se FDCPA violation, and this notice did not make any misstatements or threaten any particular action); Berg v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 2009 WL 901011 (N.D. Ill. Mar. 31, 2009) (denying FDCPA claim; filing suit is not "transacting business," so debt buyer need not obtain state license); Taylor v. Quall, 471 F. Supp. 2d 1053 (C.D. Cal. 2007) (violation of California law requiring registration of business name is not FDCPA violation). *But cf.* Klein v. Credico, Inc., 922 F.3d 393 (8th Cir. 2019) (fact that one of collection letter's three signatories was not registered to collect debts in Minnesota is not FDCPA violation where other two and collection agency were); Baham v. Bayview Loan Servicing, 2020 WL 1324992 (D. Nev. Mar. 20, 2020) (violation of Nevada licensing statute is not, without more, FDCPA violation); Watson v. ARC Mgmt. Group, L.L.C., 2017 WL 6460220 (E.D. Tenn. Dec. 18, 2017) (Tennessee law allows agency to retroactively cure violation by obtaining license); Estate of Caruso v. Fin. Recoveries, 2017 WL 2704088 (D. N.J. June 22, 2017) (failure to file bond required by state law is not *per se* FDCPA violation; noting that state law provides no private right of action for this violation); Skinner v. Asset Acceptance, L.L.C., 876 F. Supp. 2d 473 (D.N.J. 2012) (unlicensed collection can support FDCPA claim for threat to take action not permitted by law, but letter here—a settlement offer—did not threaten to take any action); Lucero v. Bur. of Collection Recovery, Inc., 2012 WL 681797 (D.N.M. Feb. 28, 2012) (rejecting FDCPA claim against debt collector that had a license, but allegedly committed acts that could have justified license revocation; it did not make misrepresentations to debtor about its compliance with licensing requirements); Pescatrice v. Elite Recovery Serv., Inc., 2007 WL 1192441 (S.D. Fla. Apr. 23, 2007) (faults in collection agency registration not per se FDCPA violations); Thibodeau v. Credit Adjustment Bureau, 2006 WL 3498159 (M.D. Fla. Dec. 4, 2006) (unregistered collector's threat to report debt to credit bureau was not threat of legal action, so was not FDCPA violation). *See generally* §§ 7.2.5, 8.3.6, *supra*.

321 *See, e.g.*, Gray v. Suttell & Assoc., 2016 WL 409706 (E.D. Wash. Feb. 2, 2016) (unlicensed practice is unfair pursuant to Wash. UDAP statute; injury requirement satisfied if debtor's income was garnished pursuant to order illegally obtained by unlicensed collector); Moritz v. Daniel N. Gordon, P.C., 2012 WL 222955 (W.D. Wash. Jan. 25, 2012) (allowing debtor to file amended complaint alleging that unlicensed collection activity was UDAP violation; debtor's payment of postage to dispute debt satisfies UDAP statute's injury requirement); Bradshaw v. Hilco Receivables, L.L.C., 765 F. Supp. 2d 719 (D. Md. 2011) (collection attempt by unlicensed collector was assertion of right known not to exist, a UDAP violation); Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358 (D. Md. 2010) (allowing UDAP claim to proceed against collector that filed collection suit without being licensed in the state); Russey v. Rankin, 911 F. Supp. 1449, 1459–1450 (D.N.M. 1995) (unlicensed debt collection activity is UDAP violation; violations met UDAP statute's requirement that they be "knowing" where attorney designed system of form letters, even though he did not approve sending of each letter). *Cf.* Sambor v. Omnia Credit Services, Inc., 183 F. Supp. 2d 1234 (D. Haw. 2002) (failure to register was per se UDAP violation, but denying UDAP claim because of failure to show actual damages); Cach, L.L.C. v. Echols, 506 S.W.3d 217 (Ark. 2016) (affirming grant of class certification in action alleging that unlicensed collection is UDAP violation). *But see* Hrivnak v. NCO Portfolio Mgmt., 994 F. Supp. 2d 889 (N.D. Ohio 2014) (collector's failure to register fictitious name is not UDAP violation). *But cf.* Wensley v. First Nat'l Bank, 874 F. Supp. 2d 957 (D. Nev. 2012) (foreclosing on deed of trust does not require license to do business in Nevada, so not violation of UDAP prohibition of engaging in a business without a required license); Paris v. Steinberg & Steinberg, 828 F. Supp. 2d 1212 (W.D. Wash. 2011) (unlicensed collection activity not UDAP violation in absence of showing of injury). *See generally* § 16.3, *infra* (application of UDAP statutes to debt collection abuses).

322 *See, e.g.*, Mellish v. CACH, L.L.C., 2020 WL 1472405 (W.D. Penn. Mar. 26, 2020) (lender that was licensed to make loans at more than the statutory rate sold loan to debt buyer that was not licensed to do so; buyer's attempt to collect sums to which it was not entitled violated FDCPA and Pennsylvania statutes). *See generally* National Consumer Law Center, Consumer Credit Regulation § 3.11.7.2 (whether assignee must be licensed), § 7.8.5.1 (remedies for creditor's nonlicensure) (3d ed. 2020), *updated at* www.nclc.org/library.

323 LVNV Funding v. Finch, 207 A.3d 202 (Md. 2019).

324 LVNV Funding, L.L.C. v. Trice, 32 N.E.3d 553 (Ill. 2015). *Accord* Johnson v. Pushpin Holdings, 821 F.3d 871 (7th Cir. 2016) (failure to register under Illinois Collection Agency Act does not invalidate judgments that debt collector obtained).

the statute,[325] but others have refused to do so.[326] In Arizona, at least one court has implied a private remedy,[327] but other courts disagree.[328] Whether or not there is a private cause of action under the state debt collection statute itself, a violation may be actionable under a general state consumer protection statute that prohibits unfair and deceptive acts and practices.[329]

In Connecticut, the legislature amended the state debt collection statute in 2007 to provide a private cause of action for statutory damages, actual damages, and attorney fees.[330] This amendment legislatively overruled a series of cases that had found no private cause of action under the statute.[331] Even before the amendment, however, many decisions recognized that a UDAP claim could be based on a violation of the debt collection statute.[332]

Certain violations of state debt collection laws may amount to threats to take illegal action, which may be actionable as

325 Kim v. Riscuity, Inc., 2006 WL 2192121 (N.D. Ill. July 31, 2006) (implying private right of action under Illinois statute); Trull v. G.C. Services, Inc., 961 F. Supp. 1199 (N.D. Ill. 1997) (implied private cause of action exists under Illinois Collection Agency Act, but consumer failed to show required actual damages); Czap v. Credit Bureau of Santa Clara Valley, 86 Cal. Rptr. 417, 420 (Cal. Ct. App. 1970) (violation of collection agency act is actionable as it is intended to benefit public even though it does not provide an explicit private cause of action); Sherman v. Field Clinic & Collection Accounts Terminal, 392 N.E.2d 154 (Ill. App. Ct. 1979) (inferring private right of action from state collection statute that provides administrative and criminal penalties, but does not indicate that these are were exclusive sanctions). *See also* Barr v. NCB Mgmt. Services, Inc., 711 S.E.2d 577 (W. Va. 2011) (West Virginia statute provides private remedy against collector who violates statute; remedy provision refers only to creditor, but remedial statute must be liberally construed, and substantive prohibitions apply to collectors as well as creditors). *But see* Skinner v. LVNV Funding, L.L.C., 2018 WL 319320 (N.D. Ill. Jan. 8, 2018) (no implied private right of action for violation of Illinois Collection Agency Act; predicting that Illinois courts will overrule decision that implied private right of action); Eul v. Transworld Systems, 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017) (same). *But cf.* McCabe v. Crawford & Co., 272 F. Supp. 2d 736 (N.D. Ill. 2003) (questioning whether Illinois Collection Agency Act provides private right of action).

326 Merril v. Dyck-O'Neal, Inc., 745 Fed. Appx. 844 (11th Cir. 2018) (Florida statute that provided right of action for violations of specified section did not provide right of action for violation of later-enacted section imposing notice requirements for assigned debts); Conboy v. AT&T Corp., 241 F.3d 242 (2d Cir. 2001) (no private cause of action for violation of New York debt collection statute, and its prohibitions cannot be enforced via UDAP statute); Rodolakis v. Safety Ins. Co., 327 F. Supp. 3d 274 (D. Mass. 2018) (Massachusetts debt collection statute does not provide private right of action); Ayres v. Portfolio Recovery Assoc., 2018 WL 5849472 (D. Utah Nov. 8, 2018) (Utah Collection Agency Act does not confer private right of action); Schmidt v. Synergentic Communications, Inc., 2015 WL 248635 (M.D. Fla. Jan. 20, 2015) (list of violations for which Florida statute provides private right of action is exclusive, and does not include failure to provide certain notices, or unregistered collection); Valle v. First Nat'l Collection Bur., Inc., 252 F. Supp. 3d 1332 (S.D. Fla. 2017) (Florida statute that provides private right of action for violations of specified sections provides no right of action for violation of later-added section requiring notice of assignment); Edeh v. Midland Credit Mgmt., 748 F. Supp. 2d 1030 (D. Minn. 2010) (no private right of action under Minnesota debt collection statute), *aff'd on other grounds*, 413 Fed. Appx. 925 (8th Cir. 2011); Ishaq v. Wachovia Mortg., 2010 WL 1380386 (D. Mass. Apr. 2, 2010) (no private cause of action to enforce regulations adopted under state debt collection statute); Thomas v. Commercial Recovery Sys., Inc., 2008 WL 5246296 (M.D. Fla. Dec. 16, 2008) (Fla. Stat. § 559.77 provides private right of action only for prohibited practices listed in § 559.72; refusing to imply private right of action for violating notice requirements in another section of statute); Hunter v. Washington Mut. Bank, 2008 WL 4206604 (E.D. Tenn. Sept. 10, 2008) (no private right of action for violation of Tennessee Collection Services Act); Ramos v. CACH, L.L.C., 183 So. 3d 1149 (Fla. Dist. Ct. App. 2015) (where Florida statute explicitly provides private right of action for violation of the prohibited practices section, Fla. Stat. § 559.72, private right of action for violation of later-enacted § 559.715 setting standards for assignment of debt cannot be implied); Capital One Bank v. Taylor, 873 N.W.2d 551 (Iowa Ct. App. 2015) (unreported) (no private right of action for violation of section requiring out-of-state collector to notify attorney general before collecting debt in Iowa); Varela v. Investors Ins. Holding Corp., 615 N.E.2d 218 (N.Y. 1993) (no private cause of action for violation of Gen. Bus. Law art. 29-H, which regulates debt collection practices). *See also* Baldwin v. Monterey Fin. Services, Inc., 2016 WL 5723734 (M.D. Pa. Sept. 30, 2016) (Pa. debt collection statute is enforceable only through UDAP statute); Trant v. Wells Fargo Bank, 2012 WL 2871642 (S.D. Cal. July 12, 2012) (refusing to allow negligence per se claim for violation of state debt collection statute that includes an explicit private remedy); McNichols v. Moore Law Group, 2012 WL 667760 (S.D. Cal. Feb. 28, 2012) (refusing to allow tort *in se* claim where state debt collection statute provides explicit private cause of action); Glazer v. Chase Home Fin., L.L.C., 2013 WL 7869273 (Ohio App. Dec. 19, 2013) (unpublished) (consumer cannot bring suit pursuant to Ohio Rev. Code Ann. § 1319.12 (West), which regulates suits on assigned debts, because it does not explicitly provide for private cause of action). *See generally* § 16.2.4.5, *supra* (private cause of action for violation of licensure requirement).

327 Kost v. Scott Lowery Law Office, PC, 2014 WL 3368467 (D. Ariz. July 10, 2014) (implying private right of action for violation of statute forbidding unlicensed debt collection; noting that no Arizona court has spoken on this issue, but that Arizona standard for implying private right of action is more liberal than federal standard).

328 Warren v. LJM Acquisitions, L.L.C., 2012 WL 4903588 (D. Ariz. Mar. 26, 2013) (no private right of action for violation of Collection Agency Act); Sparlin v. Select Portfolio Servicing, Inc., 2012 WL 527486 (D. Ariz. Feb. 17, 2012) (same); Rolle v. Law Office of Samuel Streeter, P.L.L.C., 2010 WL 729022 (D. Ariz. Mar. 2, 2010) (Arizona statute requiring licensed collectors to act fairly and honestly did not confer private right of action against unlicensed collector; where Arizona statute providing private right of action for criminal conduct was unconstitutionally overbroad, no private right of action for extortion); Grismore v. RJM Acquisitions, L.L.C., 2009 WL 806627 (D. Ariz. Mar. 26, 2009) (no private right of action for violation of Ariz. Admin. Code regulating collection agencies).

329 *See* § 16.3.6, *infra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices § 3.2 (9th ed. 2016), *updated at* www.nclc.org/library.

330 Conn. Gen. Stat. § 36a-648.

331 *See, e.g.*, Jones v. Midland Funding, L.L.C., 755 F. Supp. 2d 393 (D. Conn. 2010) (no private right of action for violations occurring before July 1, 2007, the effective date of the amendment); Holtman v. Citifinancial Mortgage Co. Inc., 2006 WL 1699589 (D. Conn. June 19, 2006) (no private right of action under state debt collection law, although some violations may support UDAP or negligence claims); Krutchkoff v. Fleet Bank, 960 F. Supp. 541 (D. Conn. 1996) (state debt collection statute does not provide for private remedy).

332 *See, e.g.*, Bruce v. Home Depot, U.S.A., 308 F. Supp. 2d 72 (D. Conn. 2004); Pabon v. Recko, 122 F. Supp. 2d 311 (D. Conn. 2000) (no private right of action under collection agency statute, but agency misconduct that violates public policy, here violation of banking regulations, is actionable under Connecticut Unfair Trade Practices Act).

FDCPA violations.[333] In Maine, which is exempt from the substantive provisions, but not the remedies, of the FDCPA, a violation of the state debt collection law can be asserted as an FDCPA violation.[334]

Some state debt collection statutes explicitly provide that a violation is a violation of the state UDAP statute, and some courts also imply this remedy. Nonetheless, claims alleging clear violations of the debt collection statute may fail because they do not meet UDAP criteria. For example, the UDAP statute may afford a private cause of action only to a consumer who suffers a loss of money or property,[335] and some courts have required UDAP plaintiffs to show reliance.[336] Other UDAP statutes exclude attorneys, other professionals, or specified entities such as banks.[337] Even if a state debt collection statute applies to a defendant and provides that a violation is a UDAP violation, a UDAP claim may not be available if the defendant is exempted from the UDAP statute.[338] Since many state UDAP statutes do not apply to non-consumer transactions, the consumer may also have to show that the underlying transaction was incurred for consumer purposes.[339]

16.2.5.2 Relief Available

16.2.5.2.1 Actual damages

When a private cause of action is available, it universally allows the consumer to recover actual damages.[340] Damages may be awarded for the reasonably foreseeable harm caused by the violation regardless of whether the defendant intended to cause injury.[341] Actual damages may include payments the debtor made in response to harassment or a false threat[342] and expenses incurred in defending against an unfounded collection action.[343]

Symptoms of stress may be compensable,[344] and the court may not require the claimant to establish that a physical injury

333 *See* §§ 7.2.5, 16.2.4.5, *supra*. *But see* Voris v. Resurgent Capital Services, L.P., 494 F. Supp. 2d 1156 (S.D. Cal. 2007) (violation of state debt collection law, here provision prescribing type size for notices, not per se FDCPA violation); Luna v. Alliance One Receivables Mgmt., Inc., 2006 WL 357823 (N.D. Cal. Feb. 16, 2006) (failure to include notice required by state debt collection statute but not by FDCPA is not FDCPA violation).

334 Maxwell v. Arrow Fin. Services, 2004 WL 719278 (N.D. Ill. Mar. 31, 2004).

335 *See* § 16.3.8, *infra*. *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.2 (9th ed. 2016), *updated at* www.nclc.org/library.

336 *See* § 16.3.8, *infra*. *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.12 (9th ed. 2016), *updated at* www.nclc.org/library.

337 *See* § 16.3.3.4, *infra*. *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 2.2.1, 2.3.3, 2.3.9, 2.3.11 (9th ed. 2016), *updated at* www.nclc.org/library.

338 *See, e.g.*, Hawkins v. Kilberg, 165 F. Supp. 3d 386 (D. Md. 2016) (where UDAP statute exempts attorneys, UDAP claim cannot be asserted even though debt collection statute applies to attorneys and provides that any violation is a UDAP violation).

339 *See, e.g.*, Aldaya v. Encore Capital Group, Inc., 2017 WL 1055961 (D. Haw. Mar. 20, 2017).

340 *See, e.g.*, Sweetland v. Stevens & James, Inc., 563 F. Supp. 2d 300 (D. Me. 2008) (statutory remedies of FDCPA and Maine statute are identical; here, $2500 actual and $250 statutory damages for two offensive phone calls to debtor who was recovering from heart attack); Heib v. Arches Fin., 2008 WL 4601602 (E.D. Wash. Oct. 14, 2008) ($157,900 damages for vicious and persistent telephone harassment of disabled older debtors whose only income was SSI); *In re* Naffis, 2019 WL 470199 (Bankr. D. Md. Feb. 6, 2019) (servicer coerced debtor into post-petition consolidation that made loans non-dischargeable, at time when debtor had been pursuing adversary proceeding seeking hardship discharge; loss of this cause of action is actual damages if debtor can show he would have prevailed).

341 Brown v. Oaklawn Bank, 718 S.W.2d 678, 680–681 (Tex. 1986) (plaintiffs are entitled to damages for harm that is reasonably foreseeable, regardless of whether defendant intended to injure them).

342 *See, e.g.*, Alonso v. Blackstone Fin. Group, L.L.C., 962 F. Supp. 2d 1188 (E.D. Cal. 2013) (payment made in response to false threat of arrest is actual damages).

343 Crawley v. CACH, L.L.C., 2019 WL 6841803 (W.D. Pa. Dec. 16, 2019) (attorney fees incurred to defend against unauthorized collection attempt are ascertainable loss, sufficient to support Pennsylvania debt collection act claim); Dawson v. Genesis Credit Mgmt., L.L.C., 2017 WL 5668073 (W.D. Wash. Nov. 27, 2017) (must show direct connection between statutory violation—here demand for unauthorized amounts—and damage; lost time and attorney fees incurred in investigating existence of alleged debt are sufficient); Jarzyna v. Home Prop., L.P., 2015 WL 4385299 (E.D. Pa. July 17, 2015) (cost of hiring a lawyer to dispute illegal charge is actual damages); Lowe v. Elite Recovery Solutions, L.L.P., 2008 WL 324777 (E.D. Cal. Feb. 5, 2008) (actual damages include attorney fees incurred in defending against collection action by debt buyer); Monahan Loan Services, Inc. v. Janssen, 349 N.W.2d 752 (Iowa 1984) (consumers could recover as actual damages under debt collection statute their attorney fees in obtaining dismissal of suit unlawfully filed in distant forum). *See also* Peters v. Quinney, 2001 WL 1627650 (Tex. App. Dec. 20, 2001) (actual damages include cost of expunging record of unfounded criminal charges filed by lender). *Cf.* Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870 (N.D. Ill. 2009) (filing of time-barred actions; consumer's attorney fees not actual damages, but appearance fee, which consumer must pay before defending against claim, is).

344 McCaig v. Wells Fargo Bank, 788 F.3d 463, 474–475 (5th Cir. 2015) (Tex. law; affirming award of mental anguish damages under Texas debt collection statute); Croft v. ALD, L.L.C., 2017 WL 762255 (E.D. Mich. Jan. 23, 2017) (calculating damages after default by payday lender who made unauthorized withdrawals from consumer's account; awarding emotional distress damages, in an amount less than requested, and trebling them); Kowalski v. Seterus, Inc., 2017 WL 79949 (D. Me. Jan. 9, 2017) (Maine UCCC allows emotional distress damages; here servicer violated settlement agreement by dunning for deficiency it had waived, and threatening to take consumer's current home); Peckey v. Bank of Am., 2015 WL 1622967 (D. Md. Apr. 10, 2015) (emotional distress and damage to credit rating are actual damages); Alonso v. Blackstone Fin. Group, L.L.C., 962 F. Supp. 2d 1188 (E.D. Cal. 2013) (fact issues as to emotional distress; consumer testified that she suffered flare-up of preexisting condition, but did not seek medical help because she had been taught how to deal with them); Fini v. Dish Network, L.L.C., 955 F. Supp. 2d 1288 (M.D. Fla. 2013) (emotional distress supports claim for actual damages under Florida statute); Vanderbilt Mortgage & Fin., Inc. v. Flores, 746 F. Supp. 2d 819 (S.D. Tex. 2010) (where statute gives right to recover for harassment and abuse, injury is likely to be "essentially mental and subjective); Fausto v. Credigy Services Corp., 598 F. Supp. 2d 1049 (N.D. Cal. Feb. 17, 2009) (fact issues as to emotional distress damages for FDCPA and Rosenthal Act violations); Rodriquez v. Florida First Fin. Group, Inc., 2009 WL 535980 (M.D. Fla. Mar. 3, 2009) ($1000 emotional distress damages for false threats of arrest, leading to panic attacks for which consumer neither sought medical

occurred.[345] Some courts require emotional distress damages to meet the criteria for the tort of intentional infliction of emotional distress,[346] but others recognize that state debt collection statutes are designed to go beyond common law tort rules and do not impose such a requirement.[347] The consumer should take care to establish a causal link between the violation and the symptoms of emotional distress, especially where there are other potential causes.[348]

16.2.5.2.2 Statutory damages

Some state debt collection statutes provide for statutory damages.[349] Under some of these statutes, actual damages are not a prerequisite to recovering such statutory damages.[350]

treatment nor missed work); Sweetland v. Stevens & James, Inc., 563 F. Supp. 2d 300 (D. Me. 2008) ($2500 emotional distress damages for two offensive calls to debtor recovering from heart attack); Sweetland v. Stevens & James, Inc., 563 F. Supp. 2d 300 (D. Me. 2008) ($2500 emotional distress damages for two frightening and abusive calls to vulnerable older consumer; no evidence of medical expenses or long-term injury); Myers v. LHR, Inc., 543 F. Supp. 2d 1215 (S.D. Cal. 2008) ($90,000 compensatory damages for "continuous, systematic and outrageous" harassment for debt not owed; consumer presented evidence of damage to her credit, and medical expenses for physical effects of stress); Heib v. Arches Fin., 2008 WL 4601602 (E.D. Wash. Oct. 14, 2008) ($75,000 per plaintiff for emotional distress; vicious telephone harassment, which caused health problems for older debtors); Fisher v. T.C.I., 2000 U.S. Dist. LEXIS 7150 (N.D. Ill. Apr. 19, 2000) ("distress, indignation and loss of time" alleges sufficient injury to state claim under Illinois Collection Agency Act); *In re* Davis, 377 B.R. 827 (Bankr. E.D. Tex. 2007) (actual damages may include mental anguish); Steiner & Munach, P.A. v. Williams, 334 So. 2d 39 (Fla. Dist. Ct. App. 1976); Williams v. HomeEq Servicing Corp., 646 S.E.2d 381 (N.C. Ct. App. 2007) (emotional distress resulting from telephone harassment is actual damages); Monroe v. Frank, 936 S.W.2d 654 (Tex. App. 1996) (mental anguish damages available); Ledisco Fin. Serv. v. Viracola, 533 S.W.2d 951 (Tex. App. 1976); Cent. Adjustment Bur., Inc. v. Gonzalez, 528 S.W.2d 314 (Tex. App. 1975) ($3500 awarded for profane and abusive language, misrepresentations as to involvement of attorney, false threats of criminal charges, and accusations of fraud). *See also* Creditors Protective Ass'n v. Britt, 648 P.2d 414 (Or. Ct. App. 1982) (emotional distress sufficient to show injury and actual damage); Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (affirming compensatory damage award of $5 million where plaintiff suffered emotional and physical symptoms due to defendant's abusive collection tactics), *vacated on other grounds*, 2003 Tex. LEXIS 50 (Apr. 24, 2003) (vacating decision pursuant to parties' settlement); § 2.5, *supra*. *But cf.* Guthrie v. J.D. Enter. & Fin. Services, 2013 WL 2244337 (S.D. Cal. May 21, 2013) (denying emotional distress damages where only evidence was debtor's testimony that he suffered sleeplessness, pessimism, restlessness, anxiety, worry and irritability); Lowe v. Elite Recovery Solutions, L.L.P., 2008 WL 324777 (E.D. Cal. Feb. 5, 2008) (denying emotional distress damages where consumer alleged only "transitory" symptoms: stress, worry, feelings of helplessness, loss of sleep); Montgomery v. Florida First Fin. Group, Inc., 2008 WL 3540374 (M.D. Fla. Aug. 12, 2008) (denying actual damages for emotional distress, because consumers' testimony of sleeplessness and fear was insufficient to show severe distress); Costa v. Nat'l Action Fin. Services, 634 F. Supp. 2d 1069 (E.D. Cal. 2007) (no recovery for emotional distress where collector's conduct did not rise to level of "extreme and outrageous" and where plaintiff could not demonstrate suffering extreme emotional distress); Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15 (Tex. App. 2000) (no recovery, under debt collection or UDAP statutes, for mental anguish and related physical symptoms, where consumer alleged neither pecuniary loss, nor damage to credit reputation). *See generally* § 15.2.6, *supra* (recovery of emotional distress damages on various collection claims).

345 *See, e.g.*, McCaig v. Wells Fargo Bank, 788 F.3d 463 (5th Cir. 2015) (Tex. law; affirming emotional distress damages of $75,000 per plaintiff for egregious mishandling of mortgage); Crider v. Pacific Acquisitions & Assoc., 2015 WL 6689391 (N.D. Cal. Nov. 3, 2015) (FDCPA and Rosenthal Act claims; $5000 emotional distress damages where conduct was such as would be expected to cause distress: repeated workplace calls, threats to visit workplace and contact supervisor); Campbell v. Beneficial Fin. Co., 616 S.W.2d 373 (Tex. App. 1981) (physical injury unnecessary to recover for emotional distress caused by violation).

346 *See, e.g.*, Branco v. Credit Collection Services, Inc., 2011 WL 3684503 (E.D. Cal. Aug. 23, 2011) (plaintiff seeking emotional distress damages under state debt collection law must establish elements of intentional infliction of emotional distress). *See also* Sherrell v. L&P Fin. Adjusters, Inc., 2018 WL 3753359 (N.D. Ill. Aug. 8, 2018) (emotional distress will support claim for actual damages only if distress is severe; not shown here where distress resulted from single collection letter). *See generally* § 15.2, *supra*.

347 *See, e.g.*, Fausto v. Credigy Services Corp., 598 F. Supp. 2d 1049 (N.D. Cal. Feb. 17, 2009) (emotional distress damages need not meet criteria for intentional infliction of emotional distress; may be shown by medical or non-expert testimony, corroboration not needed if "circumstances make it obvious that a reasonable person would suffer significant emotional harm").

348 Ross v. Fed. Deposit Ins. Corp., 625 F.3d 808 (4th Cir. 2010) (affirming summary judgment for defendant on North Carolina debt collection act claim because consumer failed to establish that debt collection harassment was proximate cause of her emotional distress); Fisher v. Am. Gen. Fin. Co., 2002 WL 31760189 (4th Cir. Dec. 11, 2002) (denying claim under West Virginia debt collection statute because consumer failed to show that emotional distress was caused by violation); Searcy v. Citimortgage, Inc., 733 Fed. Appx. 735 (5th Cir. Apr. 25, 2018) (Tex. law; denying emotional distress damages because borrowers did not show that cause of their emotional distress was letter that falsely stated that no foreclosure sale would occur for 30 days, as opposed to foreclosure itself); Ugarte v. Sunset Constr., Inc., 2008 WL 4723600 (M.D. Fla. Oct. 21, 2008) (denying emotional distress damages; consumer was being treated for depression and failed to show that debt collection misconduct worsened her condition); Ross v. Washington Mut. Bank, 566 F. Supp. 2d 468 (E.D.N.C. 2008) (debt collection harassment not shown to be proximate cause of emotional distress and physical symptoms where debtor had other serious problems during relevant period).

349 Heib v. Arches Fin., 2008 WL 4601602 (E.D. Wash. Oct. 14, 2008) ($1000 statutory damages against both collector and law firm); McGraw v. Discover Fin. Services, 2005 WL 1785259 (S.D. W. Va. July 26, 2005) (West Virginia debt collection statutory penalties of $100 to $1000 adjusted for inflation; $300 to $3700 in 2005); *In re* Machnic, 271 B.R. 789 (Bankr. S.D. W. Va. 2002) (awarding statutory damages); Harris v. Beneficial Fin. Co., 338 So. 2d 196 (Fla. 1976) (statutory damages do not violate Fourteenth Amendment proscription against taking property without due process, by analogy to liquidated damages); Monahan Loan Services, Inc. v. Janssen, 349 N.W.2d 752 (Iowa 1984) (construing cross-references in debt collection practices law to allow statutory damages for any prohibited act, here venue abuse). *Cf.* Harrington v. Nat'l Enter. Sys., Inc., 2010 WL 890176 (E.D. Tex. Mar. 9, 2010) (Texas debt collection act authorizes statutory damages only for failure to register, refusing to correct inaccuracies in credit file, or threat of false reporting; not shown here).

350 Barnett v. Creditors' Specialty Serv., Inc., 2013 WL 1629090 (W.D.N.C. Apr. 16, 2013) (awarding statutory damages even though consumer failed to prove actual damages); Townsend v. Nat'l Arbitration Forum,

Other state debt collection statutes, however, require a showing of actual injury or damages as a precondition of any action, whether for statutory damages or otherwise.[351]

Courts may be willing to award both FDCPA statutory damages and statutory damages under a state debt collection statute for the same acts.[352] However, some state debt collection statutes allow statutory damages only if the consumer does not recover statutory damages under the FDCPA.[353]

Inc., 2012 WL 12736, at *9–10 (C.D. Cal. Jan. 4, 2012); Carrigan v. Cent. Adjustment Bureau, 502 F. Supp. 468 (N.D. Ga. 1980) (awarding $500 minimum statutory damages in absence of actual damage); Dattilio v. HSBC Bank, 2012 WL 695458 (Conn. Super. Ct. Feb. 1, 2012) (need not show actual damages; must show "harm," but annoyance, worry, etc. are sufficient); Laughlin v. Household Bank, Ltd., 969 So. 2d 509 (Fla. Dist. Ct. App. 2007) (if violations of statute shown, actual damages not required); Tester v. Nat'l Credit Exch., Inc., 299 So. 2d 46 (Fla. Dist. Ct. App. 1974) (no allegation of actual damage necessary to state cause of action); Pub. Fin. Co. v. Van Blaricome, 324 N.W.2d 716 (Iowa 1982) (actual damages not prerequisite to statutory damages); Simmons v. Kross, Lieberman & Stone, Inc., 746 S.E.2d 311 (N.C. Ct. App. 2013) (actual damages not required for statutory damages pursuant to collection agency act; distinguishing cases imposing this requirement for debt collection act claim); Marauder Corp. v. Beall, 301 S.W.3d 817 (Tex. App. 2009) (consumer was successful, and thus entitled to statutory damages, where she obtained injunction against collector, but failed to show actual damages); Vanderbilt Mortgage & Fin. Co. v. Cole, 740 S.E.2d 562 (W. Va. 2013) (actual damages not required for award of statutory damages pursuant to WVCCPA).

351 Kaymark v. Bank of Am., 789 F.3d 168 (3d Cir. 2015) (because violations of Pennsylvania Fair Credit Extension Uniformity Act are remedied by action pursuant to UDAP statute, plaintiff must satisfy UDAP requirements, including showing of ascertainable loss); Whatley v. AHF Fin. Services, L.L.C., 2012 WL 7159707 (E.D. Tex. Dec. 17, 2012) (must show actual damages resulting from the violation), *adopted in part by* 2013 WL 617050 (E.D. Tex. Feb. 19, 2013); *In re* McCrary, 2011 WL 3566279 (E.D. Mich. Aug. 15, 2011) (remanding to Bankruptcy Court to determine whether consumers suffered damages from false statements that violated Michigan Collection Practices Act); Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358 (D. Md. 2010) (damaged credit, emotional distress, and attorney fees incurred by defendants to defend collection suits wrongfully filed by unlicensed collector are sufficient damage to support Maryland Debt Collection Act and UDAP claims); Johnson v. MBNA Am. Bank, 2006 WL 618077 (M.D.N.C. Mar. 9, 2006) (damaged credit and emotional distress sufficient to show actual damages); Davis v. Suran, 1998 WL 378420 (N.D. Ill. July 1, 1998) (pleading nominal damages of $1 per letter does not satisfy state debt collection statute's requirement of actual damages); Trull v. G.C. Services, Inc., 961 F. Supp. 1199 (N.D. Ill. 1997) (Illinois Collection Agency Act requires showing of actual damages); Borysewicz v. Target Nat'l Bank, 2011 WL 6989859 (Conn. Super. Ct. Dec. 15, 2011) (interpreting "harm" in state debt collection statute to require more than deprivation of a right); Williams v. HomeEq Servicing Corp., 646 S.E.2d 381 (N.C. Ct. App. 2007) (allegations of emotional distress sufficient to meet injury requirement for debt collection act claim); Davis Lake Cmty. Ass'n v. Feldmann, 530 S.E.2d 865 (N.C. Ct. App. 2000) (emotional distress and injury to credit rating satisfy requirement); Creditors Protective Ass'n v. Britt, 648 P.2d 414 (Or. Ct. App. 1982) (emotional distress was injury sufficient to sustain award of statutory damages); Elston v. Resolution Services, Inc., 950 S.W.2d 180 (Tex. App. 1997) (proof of actual damages is prerequisite to recovery of statutory damages); Rusk County Elec. Co-op., Inc. v. Flanagan, 538 S.W.2d 498 (Tex. App. 1976); Hilke v. Short, 343 N.W.2d 829 (Wis. Ct. App. 1983) (absence of proof of pecuniary or emotional injury requires dismissal of claim for statutory damages under debt collection provisions of Wisconsin Consumer Act). *See generally* § 16.3.8, *infra* (similar requirements under state UDAP statutes).

352 *See, e.g.*, Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055 (9th Cir. 2011) (where collector's deceptive letter violated both FDCPA and California's Rosenthal Act, statutory damages could be awarded pursuant to each act); Waddell v. Capital Accounts, L.L.C., 2019 WL 5792865 (W.D. W. Va. Nov. 5, 2019) (consumer who recovered under FDCPA may also recover under West Virginia statute that allows statutory damages for each violation); Leto v. World Recovery Serv., L.L.C., 2015 WL 1897060 (W.D.N.C. Apr. 27, 2015) (awarding $1000 FDCPA damages and $1000 per violation in North Carolina Debt Collection Act damages for attempts to collect discharged debt); Barnett v. Creditors' Specialty Serv., Inc., 2013 WL 1629090 (W.D.N.C. Apr. 16, 2013) (awarding statutory damages under both FDCPA and North Carolina debt collection statute for same acts); Gamboa v. Carruthers, 2010 WL 4823671 (M.D. Fla. Nov. 19, 2010) (awarding maximum statutory damages pursuant to FDCPA and Florida statute; $1000 per statute for deceptive and harassing collection letters); Silva v. Jason Head, P.L.C., 2010 WL 4593704 (N.D. Cal. Nov. 4, 2010) (where conduct violates both FDCPA and Rosenthal Act, consumer may recover one award of up to $1000 statutory damages under each act); Ugarte v. Sunset Constr., Inc., 2008 WL 4723600 (M.D. Fla. Oct. 21, 2008) (awarding statutory damages under both FDCPA and Florida statute, where collector's demand for attorney fees to which it was not entitled violated both statutes); Clark v. Universal Debt Solutions, Inc., 2007 WL 2386581 (D. Haw. Aug. 16, 2007) (statutory damages pursuant to both FDCPA and state statute, in addition to actual damages); *In re* Baie, 2011 WL 1257148 (Bankr. E.D.N.C. Mar. 30, 2011) (awarding $2000 per violation of North Carolina debt collection act, plus $1000 statutory and $10,000 actual damages for FDCPA violation against collector who impersonated county law enforcement officer and made harassing calls). *Cf.* Hunter v. Oasis Fin. Solutions, L.L.C., 2010 WL 6210035 (S.D. Cal. Dec. 21, 2010) (award of maximum statutory damages under both FDCPA and Rosenthal Act not double recovery, where collector violated provisions of Rosenthal Act not found in FDCPA), *adopted*, 2011 WL 997375 (S.D. Cal. Mar. 21, 2011). *But see* Napier v. Titan Mgmt. Services, 2008 WL 2949274 (N.D. Cal. July 25, 2008) (provision of Rosenthal Act making FDCPA violation per se violation does not entitle consumer to second award of statutory damages for FDCPA violation; consumer also failed to show that collector knew she was older consumer, so damages not multiplied pursuant to Cal. Civ. Code § 3345(b)). *But cf.* Abby v. Paige, 2013 WL 141145, at *10 (S.D. Fla. Jan. 11, 2013) (declining to make a second award of "additional damages" under state debt collection law), *aff'd*, 553 Fed. Appx. 970 (11th Cir. 2014).

353 *COLORADO*: Colo. Rev. Stat. § 5-16-113(7). *See* Georgopulous v. PPM Capital, Inc., 2019 WL 6065617 (D. Colo. Oct. 21, 2019) (Colorado statute forbids recovery by consumer who has recovered on "like claims" under FDCPA; denying recovery where state and federal claims relied on same facts), *adopted*, 2019 WL 6053333 (D. Colo. Nov. 15, 2019); Artesaga v. Vero Beach Fin. Group, Inc., 2015 WL 3799579 (D. Colo. June 17, 2015) (awarding statutory damages pursuant to both FDCPA and certain provisions of Colorado statute was permissible because FDCPA has no provisions analogous to Colorado provisions); Peterson-Hooks v. First Integral Recovery, Inc., 2013 WL 2295449 (D. Colo. May 24, 2013) (Colorado debt collection act forbids recovery if debtor has already recovered pursuant to "like provisions" of FDCPA, but debtor who shows violation of non-overlapping provisions may recover statutory damages under both).

PENNSYLVANIA: Pa. Stat. tit. 73, § 2270.5 (remedies under FDCPA and state debt collection statute are not cumulative).

WISCONSIN: Assoc. Fin. Serv. Co. of Wis. v. Hornik, 336 N.W.2d 395, 400 (Wis. 1983) (interpreting Wisconsin Consumer Act, which

In some states, statutory damages may be awarded per violation.[354] Some Florida decisions adopt this position,[355] but others disagree.[356] Often the court has discretion to select the appropriate amount of statutory damages within a range.[357] Some indicia of wrongdoing, such as knowledge or willfulness, may be required.[358]

16.2.5.2.3 Punitive damages

Some debt collection statutes authorize punitive damages.[359] These statutes may be interpreted to require the elements necessary to establish punitive damages under the common law.[360] When debt collection statutes are silent about the availability of punitive damages, some courts look to common law to determine whether punitive damages are available.[361]

includes the debt collection statute, not to allow statutory damages under both state debt collection statute and FDCPA).

354 *See, e.g.*, Leto v. World Recovery Serv., L.L.C., 2015 WL 1897060 (W.D.N.C. Apr. 27, 2015); Clements v. HSBC Auto Fin., Inc., 2011 WL 2976558 (S.D. W. Va. July 21, 2011) ($204,000 penalties for over 800 autodialed calls); Clements v. HSBC Auto Fin., Inc., 2010 WL 4281697 (S.D. W. Va. Oct. 19, 2010) (statute allows statutory penalty for each violation; question whether this could add up to unconstitutionally excessive amount not ripe for decision); Stover v. Fingerhut Direct Mktg., Inc., 2010 WL 1050426 (W.D. W. Va. Mar. 17, 2010) (statute allows one penalty for each violation); Maxwell v. Wells Fargo Bank, 2009 WL 3293871 (S.D. W. Va. Oct. 9, 2009) (one penalty per act); Gilroy v. Ameriquest Mortgage Co., 632 F. Supp. 2d 132 (D.N.H. 2009) (awarding $200 statutory damages for each of 200 harassing late-evening calls to older debtor), *later decision at* 2009 WL 2169858 (D.N.H. July 21, 2009) (denying creditor's motion for new trial). *Cf.* Knott v. HSBC Card Services, Inc., 2010 WL 3522105 (N.D. W. Va. Sept. 8, 2010) (one penalty per act, even if it violates more than one section of statute); Lowe v. Elite Recovery Solutions, L.L.P., 2008 WL 324777 (E.D. Cal. Feb. 5, 2008) (FDCPA allows only one award of statutory damages per action, but Rosenthal act allows damages against "any debt collector"; awarding $1000 Rosenthal Act statutory damages against each defendant). *But see* Marseglia v. JP Morgan Chase Bank, 750 F. Supp. 2d 1171 (S.D. Cal. 2010) (denying per-violation statutory damages; reading FDCPA restriction on multiple statutory damages (discussed in § 11.9.8.3, *supra*) into California debt collection statute; ignoring provision of Cal. Civ. Code § 1788.32 that state remedies are cumulative and in addition to remedies under other laws); Pub. Fin. Co. v. Van Blaricome, 324 N.W.2d 716 (Iowa 1982) (statutory damages are limited to one recovery per action); Assoc. Fin. Services Co. v. Hornik, 336 N.W.2d 395 (Wis. Ct. App. 1983) (stating in dicta that statutory damages limited to one award per suit).

355 Lehr v. Secure Capital Mgmt., Inc., 2014 WL 5810487 (M.D. Fla. Nov. 7, 2014) (awarding $5000 statutory damages, $1000 for violation of each of five sections of Florida debt collection statute).

356 Arianas v. LVNV Funding, L.L.C., 54 F. Supp. 3d 1308 (M.D. Fla. 2014) ($1000 per action, not per violation); Tacoronte v. Tate & Kirlin Assoc., 2013 WL 5970720 (M.D. Fla. Nov. 8, 2013) ($1000 per action); Peters v. Collision Clinics Int'l, Inc., 404 So. 2d 116 (Fla. Dist. Ct. App. 1981) (statute does not authorize multiple statutory damages for multiple violations).

357 *See, e.g.*, McKibben v. Collection Prof'l Services, 2010 WL 2025319 (E.D. Cal. May 18, 2010) (maximum statutory damages not appropriate where some claims failed, and conduct not egregious; awarding $400 for FDCPA and $400 for Rosenthal Act violation); Rodriquez v. Florida First Fin. Group, Inc., 2009 WL 535980 (M.D. Fla. Mar. 3, 2009) (awarding maximum statutory damages $1000 for FDCPA plus $1000 for Florida Creditors Collection Practices Act violations against collector with history of similar misconduct).

358 *See, e.g.*, Molina v. Creditors Specialty Services, Inc., 2010 WL 235042 (E.D. Cal. Jan. 21, 2010) (must show willful and knowing violation; here, awarding maximum $1000 statutory damages for harassing calls and false threats).

359 Goodin v. Bank of Am., 114 F. Supp. 3d 1197 (M.D. Fla. 2015) (affirming $100,000 punitive damages where bank stonewalled attempts to correct problem, and its lack of procedure for bankruptcy matters led to filing of foreclosure at time when it knew that the necessary funds were in the court registry and would be paid as soon as it filed a form); Rodriquez v. Florida First Fin. Group, Inc., 2009 WL 535980 (M.D. Fla. Mar. 3, 2009) ($2500 punitive damages for willful and malicious false threats by collector with history of similar misconduct); Adams v. A & S Collection Assoc., Inc., 2007 WL 2206936 (D. Conn. July 30, 2007) (awarding $10,000 punitive damages against collector who tried to evade restriction on fees added by collector by contractually requiring creditor to add 49% collection fee and 18% interest to accounts sent for collection); Montgomery v. Florida First Fin. Group, Inc., 2008 WL 3540374 (M.D. Fla. Aug. 12, 2008) ($1000 punitive damages for false threats of arrest by collector who had history of prior misconduct); Lauderback v. Master Collectors, Inc., 1991 U.S. Dist. LEXIS 21817 (D. Or. Oct. 22, 1991) (upholding constitutionality of Oregon punitive damage provision); Waterfield Mortg. Co. v. Rodriguez, 929 S.W.2d 641 (Tex. App. 1996) (upholding punitive damages of $15,000 where lender violated Texas debt collection statute by foreclosing and selling family home despite full tender of arrearage on loan). *But see* Varnardo v. Midland Funding L.L.C., 43 F. Supp. 2d 985 (N.D. Cal. 2014) (finding punitive damages unavailable under Rosenthal Act); Bruesewitz v. Law Offices of Gerald Moore & Assoc., 2006 WL 3337361 (W.D. Wis. Nov. 15, 2006) (punitive damages not available for violation of debt collection provisions of Wisconsin Consumer Act); Cilento v. B.I. Credit Co., 424 F. Supp. 1 (D. Md. 1977) (statutory provision for "damages proximately caused" does not permit punitive damages).

360 *See, e.g.*, Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087, 1108 (D. Or. 2000) (looking to general punitive damages statute where debt collection statute authorized punitive damages, but was silent about standards; collector's deceptive website, other misrepresentations, and obnoxious debt collection style were sufficient to require submission of punitive damages issue to jury). *See also* Ugarte v. Sunset Constr., Inc., 2008 WL 4723600 (M.D. Fla. Oct. 21, 2008) (denying punitive damages because malicious intent not shown; creditor demanded attorney fees in mistaken belief that debt was commercial, and failed to withdraw demand upon learning it was consumer); Barker v. Tomlinson, 2006 WL 1679645 (M.D. Fla. June 7, 2006) (punitive damages may be awarded under debt collection statute if conduct is wanton, malicious, or gross and outrageous; affirming $10,000 award where collector misrepresented self as pre-trial diversion program and claimed to have arrest warrant); Tallahassee Title Co. v. Dean, 411 So. 2d 204 (Fla. Dist. Ct. App. 1982) (required malice not shown); Story v. J.M. Fields, Inc., 343 So. 2d 675 (Fla. Dist. Ct. App. 1977) (repeated telephone calls did not support punitive damages if language was not invective); Steiner & Munach, P.A. v. Williams, 334 So. 2d 39 (Fla. Dist. Ct. App. 1976) (reversing $12,000 punitive damages verdict because evidence failed to show wanton, malicious, gross, or outrageous conduct). *Cf.* Wilson v. Edenfield, 968 F. Supp. 681 (M.D. Fla. 1997) (claim for punitive damages under state debt collection statute may be filed only with leave of court after finding reasonable basis for claim). *See generally* Appx. D, *infra*.

361 Gunkel v. Secure One, Inc., 2006 WL 3524479 (E.D. Tenn. Dec. 6, 2006) (allowing claim for punitive damages to go forward; reasonable jury could find reckless conduct if seller overcharged consumer

Courts may decline to award punitive damages against a corporation for its employee's acts unless the plaintiff shows authorization, recklessness, or ratification by the corporation, or shows that the employee was a manager and was acting within the scope of their employment.[362] There are constitutional limits on the amount of a punitive damage award, and a number of states have enacted statutory limits.[363]

16.2.5.2.4 Attorney fees

Some collection statutes provide for an award of the consumer's attorney fees in order to make assertion of claims under the statute economically feasible.[364] However, some of these statutes, unlike the FDCPA, provide for fee awards to the prevailing party, which could be either the consumer or the debt collector.[365]

16.2.5.2.5 Other relief under state debt collection statutes

Injunctive and declaratory relief may be available under state debt collection statutes.[366] Washington's Collection Agency Act provides that a licensee that commits one of the practices prohibited by the statute is forever barred from recovering any interest, fees, or other charges on the claim, but is limited to the amount of the original claim.[367] Class actions are typically allowed.[368] Courts may impose individual liability on collection agency employees who participate in a violation[369]

then hired collector); Sherman v. Field Clinic & Collection Accounts Terminal, 392 N.E.2d 154 (Ill. App. Ct. 1979).

362 Greenpoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002), *vacated on other grounds*, 2003 Tex. LEXIS 50 (Apr. 24, 2003) (vacating decision pursuant to parties' settlement). *See generally* National Consumer Law Center, Automobile Fraud § 8.10.5 (6th ed. 2018), *updated at* www.nclc.org/library.

363 *See, e.g.*, Lithia Medford LM, Inc. v. Yovan, 295 P.3d 642 (Or. Ct. App. 2012) (reversing order of remittitur; $100,000 punitive damages in case with $500 actual damages is not unconstitutionally excessive in light of defendant car dealer's reprehensible debt collection acts, consumer's financial vulnerability, defendant's ability to pay, and the need for deterrence). *See generally* National Consumer Law Center, Automobile Fraud §§ 8.10.6, 8.11 (6th ed. 2018), *updated at* www.nclc.org/library.

364 *See* McCaig v. Wells Fargo Bank, 788 F.3d 463 (5th Cir. 2015) (Tex. law; affirming award of $156,725 in attorney fees); Panahiasl v. Gurney, 2007 WL 738642 (N.D. Cal. Mar. 8, 2007) (awarding costs and attorney fees pursuant to state and federal debt collection statutes); Thompson v. CIT Group/Consumer Fin., Inc., 2005 WL 2562606 (M.D. Fla. Oct. 11, 2005) (applying federal lodestar analysis to fees under Florida act); Hartman v. Meridian Fin. Services, 191 F. Supp. 2d 1031, 1050–1051 (W.D. Wis. 2002) (costs and attorney fees available under Wisconsin Consumer Act); Akins v. Enterprise Rent-A-Car Co., 94 Cal. Rptr. 2d 448 (Cal. Ct. App. 2000) (where plaintiff prevailed on one state debt collection claim and on related tort claim, but lost on another state debt collection claim, trial court acted within its discretion in awarding fees without requiring counsel to allocate time among various claims); Conley v. Greenwood Trust Co., 923 P.2d 307 (Colo. App. 1996) (consumer could recover attorney fees under Colorado U.C.C.C. provision forbidding unconscionable debt collection conduct); Salzgeber, D.D.S., P.A. v. Kelly, 826 So. 2d 366 (Fla. Dist. Ct. App. 2002) (upholding attorney fee award in Florida Collection Act case based on lodestar that exceeded 40% cap in contingent fee agreement between consumer and lawyer where it is "public policy enforcement" case); City Fin. Co. v. Boykin, 358 S.E.2d 83 (N.C. Ct. App. 1987) (attorney fees should be awarded to consumer for defending against creditor claims in order to protect consumer's judgment under statute for $500 damages and $850 attorney fees); Marauder Corp. v. Beall, 301 S.W.3d 817 (Tex. App. 2009) (consumer was successful, and entitled to attorney fees, where she obtained injunction against unbonded collector, even though she failed to show actual damages); Monroe v. Frank, 936 S.W.2d 654 (Tex. App. 1996) (consumer could recover attorney fees under Texas debt collection act); Vanderbilt Mortgage & Fin. Co. v. Cole, 740 S.E.2d 562 (W. Va. 2013) (awarding prevailing party attorney fees, but reducing lodestar amount, where mobile home borrower prevailed on debt collection claims but lost eviction action); Cmty. Credit Plan, Inc. v. Johnson, 586 N.W.2d 77 (Wis. Ct. App. 1998) (consumers were prevailing parties and entitled to fees under Wisconsin Consumer Act where creditor voluntarily dismissed replevin actions after they sued to reopen default judgments). *But cf.* Barnett v. Creditors' Specialty Serv., Inc., 2013 WL 1629090 (W.D.N.C. Apr. 16, 2013) (must show actual damages in order to obtain attorney fees for violation of North Carolina collection agency statute). *See generally* Appx. D, *infra*.

365 *See* Clark v. Capital Credit & Collection Services, 2006 WL 2460796 (9th Cir. Aug. 24, 2006) (Or. law; affirming denial of attorney fees; court below sufficiently discussed statutory criteria); Alcorn v. Perry, 2018 WL 1788075 (D. Or. Mar. 12, 2018) (Oregon statute makes prevailing party fees discretionary; declining to award fees against unsuccessful consumer because claims were neither bad faith nor meritless, and fee award could discourage bringing of valid claims), *adopted*, 2019 WL 1786813 (D. Or. Apr. 13, 2018); Sanchez v. Thomas, Thomas, Wichterman & Assoc., L.L.C., 2012 WL 683532 (D. Colo. Mar. 2, 2012) (noting that consumer may have abandoned state debt collection act claim, leaving only FDCPA claim, in order to avoid risk of "prevailing party" fees, but declining to condition abandonment on payment of defense fees incurred to date); Thomas v. U.S. Bank, 2008 WL 974734 (D. Or. Apr. 8, 2008) (award of prevailing party fees discretionary; awarding defense fees under both state debt collection statute and UDAP statute where consumer's claim "objectively unreasonable"; UDAP statute has since been amended to allow fees to prevailing defendant only if suit was objectively unreasonable), *aff'd*, 325 Fed. Appx. 592 (9th Cir. 2009); Hooper v. Capital Credit & Collection Services, Inc., 2005 WL 2297062 (D. Or. Sept. 20, 2005) (unsuccessful claim against collector's employee was "objectively reasonable," and award of attorney fees could discourage assertion of good faith claims). *See also* § 16.2.5.3, *infra* (defense fees for frivolous claims).

366 *See* § 16.7, *infra*.

367 Wash. Rev. Code § 19.16.450.

368 *See, e.g.*, Gonzales v. Arrow Fin. Services, L.L.C., 660 F.3d 1055 (9th Cir. 2011) (amendment to Rosenthal act, § 1788.18, making collectors subject to remedies of § 1692k of FDCPA, authorizes class actions); Jordan v. Commonwealth Fin. Sys., Inc., 237 F.R.D. 132 (E.D. Pa. 2006) (certifying class for FDCPA and state debt collection act claims arising from collection letters); Fuller v. Becker & Poliakoff, P.A. 197 F.R.D. 697 (M.D. Fla. 2000) (allowing class action under FDCPA and Florida Consumer Collection Practices Act to go forward, with allegations that collector threatened lawsuit, attorney fees, and costs, which were neither intended nor legally possible); Tenuto v. Transworld Sys., 2000 U.S. Dist. LEXIS 14344 (E.D. Pa. Sept. 29, 2000) (splitting class action into subclasses; subclass members who received letters within four years have claims under Pennsylvania statute, even though FDCPA claims are time-barred).

369 *See, e.g.*, Henggeler v. Brumbaugh & Quandahl, P.C., 2012 WL 2855104 (D. Neb. July 5, 2012) (state debt collection statute applies to attorneys who were actively involved in their firm's debt collection activities); Weakley v. Redline Recovery Services, L.L.C., 723 F. Supp. 2d 1341 (S.D. Cal. 2010) (individual employees of collector, who made improper calls to workplace, were debt collectors subject to Rosenthal Act); Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (employee of debt buyer, who actively participated in

id on corporate officers, shareholders, or directors who par-
ipate in the corporation's wrongdoing.[370]

Some courts hold that a consumer sued by a collector to cover a debt may assert as a defense the collector's failure to ıtain a required license.[371] In case of a willful violation of the est Virginia statute with respect to an unsecured debt, the urt may, in its discretion, cancel the debt.[372]

16.2.5.3 Defenses

Collectors may attempt to have a state debt collection practices claim dismissed by claiming that a judgment on the underlying debt is *res judicata* or that the debtor gave up their rights in a settlement agreement with the collector. Courts have usually rejected these arguments.[373] The fact that the underlying debt is valid is not a defense to a claim that the collector violated a state debt collection statute.[374] The economic loss rule does not bar claims under state debt collection statutes.[375]

Some state debt collection statutes require the consumer to prove that the violation was willful,[376] or allow collectors a "bona fide error" defense.[377] A 2010 U.S. Supreme Court

debt collection, was third-party debt collector covered by Texas Debt Collection Act); Robinson v. Managed Accounts Receivable Corp., 654 F. Supp. 2d 1051, 1060 n.8 (C.D. Cal. 2009). *See also* Fuller v. Pac. Med. Collections, Inc., 891 P.2d 300 (Haw. Ct. App. 1995) (employees of collection agency may be liable under UDAP statute for violations of debt collection statute, depending on their level of personal involvement). *But see* Campion v. Credit Bureau Services, Inc., 2000 WL 33255504 (E.D. Wash. Sept. 19, 2000) (employees of licensed collector are exempt by statute).

) *See, e.g.*, Commonwealth of Pa. by Shapiro v. Think Fin., Inc., 2019 WL 6217376 (E.D. Pa. Nov. 20, 2019) (individual principal who has some degree of control over collection activity can be liable under state debt collection statute); London v. Gums, 2014 WL 546914 (S.D. Tex. Feb. 10, 2014) (owners of creditor-bail bond company and collection agency liable for misconduct of their employees; but owner of creditor not liable for misconduct of collector's employees; good discussion of agency and vicarious liability). *See, e.g.*, Alonso v. Blackstone Fin. Group, L.L.C., 962 F. Supp. 2d 1188 (E.D. Cal. 2013) (consumer stated claim against director who was actively involved in day-to-day operation of collection agency); Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (owner of debt buyer, who actively participated in debt collection, was third party debt collector covered by Texas Debt Collection Act); Mejia v. Marauder Corp., 2007 WL 806486 (N.D. Cal. Mar. 15, 2007) (fact question whether officer/director of corporate debt collector was debt collector); Chan v. N. Am. Collectors, Inc., 2006 WL 778642 (N.D. Cal. Mar. 24, 2006) (allegation that individual defendants were joint venturers, officers, directors, or employees of collection agency and set, approved, or directed its practices sufficient to support vicarious liability); Blair v. Supportkids, Inc., 2003 WL 21799933 (N.D. Ill. July 25, 2003) (allowing claim to go forward against CEO and board chairman who personally participated in choosing deceptive company name, but not regarding simulated process, where no evidence that CEO wrote or caused use of deceptive forms). *See also* Fuller v. Pac. Med. Collections, Inc., 891 P.2d 300 (Haw. Ct. App. 1995) (officers of collection agency may be liable under UDAP statute for violations of debt collection statute, depending on their level of personal involvement). *But cf.* Semper v. JBC Legal Group, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005) (corporate officer not involved in collection activities not liable for corporation's violations of Washington collection agency statute).

See § 7.2.5, 16.2.4.5, *supra*; National Consumer Law Center, Collection Actions Ch. 3 (5th ed. 2020), *updated at* www.nclc.org/library; National Consumer Law Center, Consumer Credit Regulation § 7.8.5 (3d ed. 2020), *updated at* www.nclc.org/library (remedies for creditor's nonlicensure).

W. Va. Code § 46A-5-105. *See* Bailey v. Branch Banking and Trust Co., 2011 WL 2517253 (S.D. W. Va. June 23, 2011) (denying creditor's counterclaim for the amount of the debt, because debt may be voided if consumer prevails on claims alleging willful violation); CashCall, Inc. v. Morrisey, 2014 WL 2404300, at *10 (W. Va. May 30, 2014) (unpublished) (affirming cancellation of debtors' unsecured debts where creditor engaged in debt collection harassment). *But cf.* Biser v. Manufacturers' & Traders Trust Co., 211 F. Supp. 3d 845 (S.D. W. Va. Sept. 29, 2016) (provision allowing cancellation of debt for willful violation makes exception for debt secured by security interest, here real estate mortgage); Pannell v. Green Tree Servicing, L.L.C., 2014 WL 3361984 (S.D. W. Va. July 18 2014) (provision authorizing loan cancellation does not apply to secured debts).

373 Sprinkle v. SB&C Ltd., 472 F. Supp. 2d 1235 (W.D. Wash. 2006) (state action, which held military pay not automatically exempt under Washington law, not *res judicata* or claim preclusion as to claims that creditor's violation of Servicemembers Civil Relief Act violated FDCPA, Washington Collection Agency Act, and UDAP statute); Cameron v. Safeway Fin. Corp., Clearinghouse No. 36,953 (Bankr. M.D.N.C. 1984) (debtor's claim under state debt collection practices statute not barred by *res judicata* after default in debt action); Wagner v. Strickland, 908 So. 2d 549 (Fla. Dist. Ct. App. 2005) (state debt collection statute claim and common law tort claims not compulsory counterclaims in action to collect debt, so not barred by *res judicata*). *See also* Wiginton v. Pac. Credit Corp., 634 P.2d 111 (Haw. Ct. App. 1981) (question of fact whether release of creditor and its assigns released assignee collection agency). *But see* Green v. Ford Motor Credit Co., 828 A.2d 821 (Md. Ct. Spec. App. 2003) (consent judgment in deficiency action was *res judicata* as to common law and statutory claims arising from repossession and sale procedure, as these were compulsory counterclaims). *But cf.* Pederson v. Allied Credit Cos., 2002 WL 1732572 (Wash. Ct. App. July 26, 2002) (*res judicata* barred Wash. UDAP and collection agency act claims that attacked fees awarded in prior state judgment on underlying check). *See generally* § 12.6, *supra*.

374 Cooke v. Carrington Mortg. Services, 2019 WL 3241128, at *6 (D. Md. July 18, 2019).

375 McCaig v. Wells Fargo Bank, 788 F.3d 463, 474–475 (5th Cir. 2015) (Tex. law).

376 *See, e.g.*, Baylor v. Mitchell, Rubenstein & Assoc., 857 F.3d 939 (D.D.C. 2017) (concluding that collector's acts did not meet willfulness requirement of D.C. collection practices law).

377 *See* Marchisio v. Carrington Mortg. Services, L.L.C., 919 F.3d 1288 (11th Cir. 2019) (Fla. law; two-step procedure: has collector actually implemented a procedure to avoid errors, and is it reasonably adapted to avoid the specific error at issue; fact question here whether procedures were reasonably adapted); Soria v. U.S. Bank, 2019 WL 8167925, at *11 (C.D. Cal. Apr. 25, 2019) (sheer number of calls, 232 over seven-month period, suggests lack of a reasonable procedure to avoid harassment); Adkins v. Midland Credit Mgmt., Inc., 2019 WL 1562124 (S.D. W. Va. Apr. 10, 2019) (unintentional error defense fails where debt buyer's legal department knew of legislative change requiring specific language about time-barred debts, but failed to adequately communicate with marketing; even if mistake was unintentional, procedure to avoid errors was inadequate); Grey v. Suttell & Assoc., 2019 WL 96225 (E.D. Wash. Jan. 3, 2019) (good faith defense protects unlicensed debt collector, because application of the statute to passive debt buyers was unclear); *In re* Thomas, 2018 WL 4323927 (S.D. W. Va. Sept. 10, 2018) (construing West Virginia's unintentional mistake defense and requirement for procedure to avoid error to require same showing as FDCPA bona fide error defense; defense fails because defendant produced no evidence of procedure to avoid errors); Bell v. Northland Group, 2018 WL 1792368 (E.D. Mich. Apr. 16, 2018) (denying summary judgment;

fact issue whether collector who relied on incorrect information from creditor failed to implement a procedure designed to prevent a violation); Currier v. PDL Recovery Group, L.L.C., 2017 WL 712887 (E.D. Mich. Feb. 23, 2017) (fact issue as to adequacy of error-prevention procedures); Frankowski v. Nathanson, 2016 WL 7337247 (E.D. Mich. Dec. 19, 2016) (fact issue whether collection firm had adequate procedures to prevent error, here premature filing of lawsuit during grace period provided by bad check law); Long v. Nationwide Legal File and Serve, Inc., 2013 WL 5219053 (N.D. Cal. Sept. 17, 2013) (general quality control not enough; defendant fails to allege any system to prevent error alleged here—deliberate falsification by its process server); Ansari v. Elec. Document Processing, Inc., 2013 WL 4547621 (N.D. Cal. Aug. 29, 2013) (bona fide error defense not sufficiently alleged; failed to show procedure designed to prevent the specific kind of error alleged here: deliberate falsification by process server); Basich v. Patenaude & Felix, APC, 2013 WL 1755484 (N.D. Cal. Apr. 24, 2013) (fact issue as to bona fide error defense; law firm levied bank account of non-debtor with same first name and SSN that differed by one digit from that of judgment debtor, after skip-tracing service concluded that her name was judgment debtor's alias); Pasquale v. Law Offices of Nelson and Kennard, 940 F. Supp. 2d 1151 (N.D. Cal. Apr. 15, 2013) (bona fide error shown; detailed description of training, testing, scripts and supervision); Fini v. Dish Network, L.L.C., 955 F. Supp. 2d 1288 (M.D. Fla. 2013) (fact issue whether creditor had procedure to prevent the specific error alleged here—calls to non-debtor resulting from debtor's provision of wrong number to creditor); Santos v. LVNV Funding, L.L.C., 2012 WL 3985527 (N.D. Cal. Sept. 11, 2012) (no bona fide error, where law firm offered no explanation of how it obtained default judgment, with bank account execution and wage garnishment, at a time when it had agreed to payment plan and debtor was current); Walter v. Palisades Collection, L.L.C., 2011 WL 1666869 (E.D. Pa. May 2, 2011) (fact issue whether dunning cardholder's spouse was bona fide error), *order entered by* 2011 WL 1694432 (E.D. Pa. May 2, 2011); Liu v. Arrow Fin. Services, L.L.C., 2010 WL 1994190 S.D. Tex. May 17, 2010) (debt buyer failed to inform counsel when it learned that debt was result of identity theft; issues whether error was clerical, and whether error prevention procedure was adequate); Clements v. HSBC Auto Fin., Inc., 2010 WL 4281697 (S.D. W. Va. Oct. 19, 2010) (bona fide error defense fails; no showing of procedure to catch problem, if person who takes contact information for debtor's attorney fails to pass it on to collector); MFP, Inc., 729 F Supp. 2d 1328 (M.D. Fla. 2010) (fact issues as to bona fide error, where creditor sent claim to collector after receiving notice of bankruptcy); Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870 (N.D. Ill. 2009) (declining to reach question whether error of law may be bona fide, because procedures to avoid filing of time-barred claims were inadequate); Berg v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., 2009 WL 901011 (N.D. Ill. Mar. 31, 2009) (computer error resulted in confusing and inaccurate statements of amounts due, but defense fails because no showing of reasonable procedure to prevent error); Niven v. Nat'l Action Fin. Services, Inc., 2008 WL 4190961 (M.D. Fla. Sept. 10, 2008) (message left on office answering machine and picked up by debtor's assistant; fact issue as to bona fide error); Ruthenberg v. Bureaus, Inc., 2008 WL 3979507 (E.D. Mich. Aug. 25, 2008) (sending one non-abusive letter after request to cease communication on disputed debt was clerical error; no violation); Sigala v. Arrow Fin. Services, L.L.C., 2007 WL 642955 (S.D. Cal. Feb. 22, 2007) (bona fide error defense where collector had procedure to place hold on workplace calls if informed of rule forbidding them); Navarro v. Eskanos & Adler, 2007 WL 549904 (N.D. Cal. Feb. 20, 2007) (bona fide error sufficiently alleged where law firm sent one letter after consumer requested no further contact; had procedure to prevent this but someone erred); Krutchkoff v. Fleet Bank, 960 F. Supp. 541 (D. Conn. 1996) (no violation where innocent clerical errors were corrected and caused no damage); Chrysler Fin. Co. v. Bergstrom, 703 N.W.2d 415 (Iowa 2005) (using postal service directory reasonably adapted to avoid suing in wrong county); CA Partners v. Spears, 274 S.W.3d 51 (Tex. App. 2008) (bona fide error not shown; no procedure to prevent errors, and experienced debt buyer should have known that real estate foreclosure did not give rights to personal property); Cent. Adjustment Bureau Inc. v. Gonzalez, 528 S.W.2d 314 (Tex. App. 1975) (collection agencies' multiple attempts to collect debt from wrong person not clearly bona fide error). *Cf.* Kett v. Cmty. Credit Plan, Inc., 596 N.W.2d 786 (Wis. 1999), *aff'g* 586 N.W.2d 68 (Wis. Ct. App. 1998) (rejecting creditor's argument, based on general principles rather than a statutory bona fide error defense, that employee's ignorance of venue requirements was a defense; company engaging in consumer credit transactions should be "intimately familiar" with them, and statute clearly placed risk of error on creditor). *See generally* § 12.2, *supra* (similar provision of FDCPA).

decision holds that the comparable bona fide error provision of the Fair Debt Collection Practices Act does not excuse errors based on mistaken legal interpretations of the FDCPA.[378] Prior to the Supreme Court's ruling, some courts interpreted state debt collection statutes' bona fide error provisions to apply to errors of law,[379] but decisions after 2010 are likely to give weight to the Supreme Court's view. A state statute's "computation error" defense will protect only errors in calculating the amount of an authorized fee, not the charging of an unauthorized fee.[380]

California recognizes an unclean hands defense, allowing a creditor to defend on the grounds that consumer never intended to pay.[381] California also provides a safe harbor for collectors who correct an error within fifteen days of being notified.[382]

A few statutes allow the collector to recover its attorney fees from a consumer who brings a frivolous or ill-founded

378 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010). *See* §§ 12.2.2, 12.2.3, *supra*.

379 *See, e.g.*, FIA Card Services v. Gachiengu, 571 F. Supp. 2d 799 (S.D. Tex. 2008) (bona fide error defense available where action was time-barred, but statute of limitations question was subject of split among federal circuits); Richburg v. Palisades Collection, L.L.C., 247 F.R.D. 457 (E.D. Pa. 2008) (bona fide error defense may apply to mistake of law; fact issue where law firm that developed fifty-state chart erred as to Pennsylvania statute of limitations). *Cf.* Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870 (N.D. Ill. 2009) (declining to reach question whether error of law may be bona fide, because procedures to avoid filing of time-barred claims were inadequate).

380 Pruden v. CitiMortgage, Inc., 2014 WL 2142155 (D.N.H. May 23, 2014).

381 Cal. Civ. Code § 1788.30(g). *See* Mejia v. Marauder Corp., 2007 WL 806486 (N.D. Cal. Mar. 15, 2007) (unclean hands defense not shown; fact that consumer was heavily in debt when he filed bankruptcy seven months after payday loan not probative of his state of mind on date of loan).

382 Cal. Civ. Code § 1788.30(d). *See* Afewerki v. Anaya Law Group, 868 F.3d 771 (9th Cir. 2017) (defense is available where FDCPA violation is basis for Rosenthal Act claim; section making FDCPA violations *per se* Rosenthal Act violations did not eliminate this defense); Timlick v. Nat'l Enterprise Systems, Inc., 247 Cal. Rptr. 3d 575 (Cal. Ct. App. 2019) (this defense was not impliedly repealed by amendment making FDCPA remedies available for violations, and violation of type-size requirement was cured when collector sent revised collection letter within 15 days after complaint was served, but picking off named plaintiff this way does not defeat class action).

private action,[383] and some provide for prevailing party fees.[384] Some collection agencies carry insurance to protect themselves from liability.[385]

16.3 General State Consumer Protection Statutes Prohibiting Unfair and Deceptive Acts and Practices (UDAP)

16.3.1 Nature and Advantages of a UDAP Claim

Every state has passed at least one law protecting consumers from deceptive sales practices.[386] These statutes, most of which were passed in the late 1960s and early 1970s, are typically referred to as "Little FTC Acts," "Consumer Protection Acts," or "UDAP" (unfair and deceptive acts and practices) statutes. They are often interpreted to prohibit unfair or deceptive practices by debt collectors.

UDAP statutes offer various advantages over other debt collection claims. They generally cover creditors as well as collectors. Most have attractive remedies such as treble damages, statutory damages, and attorney fees. In addition, the state UDAP statute may include broader prohibitions against unfair and deceptive conduct than the state debt collection statute. Many offer a longer statute of limitations than the FDCPA.[387]

UDAP statutes usually have more relaxed proof requirements than tort claims. Although there are exceptions,[388] UDAP statutes generally do not require proof that the defendant acted knowingly or intentionally.[389]

On the other hand, the coverage of some UDAP statutes is patchy. Some exclude certain types of creditors such as banks or utility companies.[390] Some UDAP statutes also have special preconditions to suit or create special statutory defenses.[391]

Most UDAP statutes prohibit both deception and unfair or unconscionable practices.[392] However, a few prohibit only deceptive practices, so are not well-suited to challenge non-deceptive abuse such as telephone harassment and invasion of privacy.[393] Some states also require a showing that the consumer relied on the collector's wrongful acts,[394] a

383 *See* Lacayo v. Wells Fargo Bank, 2020 WL 2488377 (S.D. Fla. Apr. 13, 2020) (comparing FDCPA and Florida standards: denying FDCPA fees because defendant failed to show that consumers knew claims were frivolous or brought for purposes of harassment; denying Florida fees because court simply dismissed complaint as "shotgun pleading" without finding that claims failed to raise justiciable controversy), *aff'd*, ___ Fed. Appx. ___, 2021 WL 71791 (11th Cir. Jan. 8, 2021); Scroggin v. Credit Bur. of Jonesboro, Inc., 973 F. Supp. 2d 961 (E.D. Ark. 2013) (consumer who proved violations, but was awarded zero damages, was not prevailing party; awarding lodestar attorney fees for bad faith action, where consumer had boasted on the web how he set up collector and sought to maximize costs and attorney fees), *aff'd*, 576 Fed. Appx. 632 (8th Cir. 2014); Lee v. Wells Fargo Bank, 2013 WL 754053 (S.D. Tex. Feb. 27, 2013) (requiring *pro se* plaintiff to pay defense fees for bad faith debt collection claims), *later decision* 2013 WL 2151680 (S.D. Tex. May 16, 2013) (denying reconsideration and setting amount of fees); O'Connor v. Check Rite, 973 F. Supp. 1010 (D. Colo. 1997) (granting attorney fees to debt collector under Colorado debt collection law where consumer, an attorney, should have known his action was substantially frivolous and groundless); Kass Shuler, P.A. v. Borchard, 120 So. 3d 165 (Fla. Dist. Ct. App. 2013) (affirming award of fees; unsuccessful FDCPA and FCCPA claims were unsupported in law and brought in bad faith for purpose of harassment). *See also* Perry v. Stewart Title Co., 761 F.2d 237 (5th Cir. 1985) (Tex. law; court should consider on remand whether it was inequitable or unreasonable for creditor to collect contractual attorney fees for defending statutory debt collection abuse claim). *But cf.* Kennedy v. Wells Fargo Bank, 2012 WL 4343295 (N.D. Cal. Sept. 20, 2012) (denying attorney fees for time-barred Rosenthal Act claim; bad faith not shown where consumer made reasonable argument for equitable estoppel); Wilson v. Transworld Sys., 2003 WL 21488206 (M.D. Fla. June 10, 2003) (denying attorney fees; summary judgment for defendant not sufficient to show that suit "failed to raise a justiciable issue of law or fact"); Lee v. Am. Agencies, 2013 WL 3353895 (Cal. Ct. App. July 2, 2013) (good faith standard is subjective; denying fees where debtor had at least one colorable claim); Heard v. Mathis, 344 So. 2d 651 (Fla. Dist. Ct. App. 1977) (consumer's failure to prove one of three elements of statutory provision did not mean consumer's suit was ill-founded); Creditors Protective Ass'n v. Britt, 648 P.2d 414 (Or. Ct. App. 1982) (dismissed counterclaim not frivolous); Assoc. Fin. Services Co. v. Hornik, 336 N.W.2d 395 (Wis. Ct. App. 1983) (counterclaim and defense not frivolous where statute not extensively interpreted by courts). *See generally* § 12.10.1, *supra*.

384 *See* § 16.2.5.2.4, *supra*.

385 *See* § 2.8, *supra*.

386 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices Appx. A (9th ed. 2016), *updated at* www.nclc.org/library (citing and summarizing each state's UDAP statute).

387 *See* § 16.1.1, *supra*. *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.2 (9th ed. 2016), *updated at* www.nclc.org/library.

388 *See, e.g.*, Goshon v. I.C. Sys., Inc., 2016 WL 742873 (D. Kan. Feb. 24, 2016) (granting summary judgment for collector; no liability under Kan. UDAP statute, which court interprets as requiring "reason to know," where demand for amount not owed was a mistake), *later op. at* 2016 WL 1069048 (D. Kan. Mar. 17, 2016) (granting summary judgment to creditor on same ground).

389 National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 4.2.4, 4.2.5 (9th ed. 2016), *updated at* www.nclc.org/library.

390 *See* § 16.3.3.1, *infra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 2.2.1, 2.3.2, 2.3.3 (9th ed. 2016), *updated at* www.nclc.org/library.

391 *See* § 16.3.8, *infra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4 (9th ed. 2016), *updated at* www.nclc.org/library.

392 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 4.2 to 4.4 (9th ed. 2016), *updated at* www.nclc.org/library; National Consumer Law Center, Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws (Mar. 2018), *available at* www.nclc.org.

393 *See, e.g.*, Mascoll v. Strumpf, 2006 WL 2795175 (E.D.N.Y. Sept. 26, 2006) (UDAP statute confers private right of action for debt collection violations only where consumer was deceived; not shown here where creditor continued collection action after learning of identity theft).

394 *See, e.g.*, Bainbridge v. Ocwen Loan Servicing, L.L.C., 2017 WL 1178047, at *22–24 (M.D. Pa. Mar. 30, 2017) (denying claim where consumers did not rely on collection attorney's false statement to court that they were delinquent); Ali v. Ocwen Loan Servicing, 2017 WL 1163924 (E.D. Pa. Mar. 29, 2017) (justifiable reliance and ascertainable loss shown; various fees plus double payment of taxes and insurance after consumer acted in reliance on servicer's misstatements about modification); Hall v. Equifax Info. Services, 204 F. Supp. 3d

showing that can be difficult when the gist of the claim is unfair practices.[395]

In a number of states, a violation of the FDCPA or a state debt collection statute is a *per se* violation of the UDAP statute.[396] However, state UDAP statutes can go beyond the FDCPA and prohibit acts that the federal statute does not.[397] At least two states have promulgated detailed debt collection regulations under their UDAP statutes, applicable to both creditors and collection agencies.[398]

A UDAP judgment for debt collection harassment may represent a "willful and malicious injury" that is nondischargeable in bankruptcy.[399]

16.3.2 Validity and Interpretation of State UDAP Statutes in the Debt Collection Context

Many courts have held that UDAP statutes do not unconstitutionally impinge on the First Amendment's protection of speech.[400] The *Noerr-Pennington* doctrine, which bars antitrust liability for petitions to the government, does not protect a collector from UDAP liability for unfair and deceptive prelitigation collection activity.[401]

In construing the scope, substantive prohibitions, and remedies of a UDAP statute, it is important to remember that UDAP statutes are to be liberally construed.[402] Decisions holding that debt collection abuses violate the FTC Act's prohibition of unfair or deceptive acts or practices[403] are particularly relevant to the interpretation of the substantive prohibitions of state UDAP statutes[404] and are cited throughout this chapter. The Consumer Financial Protection Bureau's determinations that certain debt collection practices are unfair, deceptive, or abusive should be entitled to similar weight.[405]

16.3.3 UDAP Coverage of Debt Collection Activities

16.3.3.1 Generally

The typical UDAP statute has a broad initial scope section, covering "trade or commerce" or "consumer transactions," but then goes on to exempt certain sellers or types of transactions. Many UDAP statutes do not mention debt collection specifically, so courts must construe these general terms to determine whether debt collection is covered. If the UDAP statute in the debtor's home state does not cover the debt collection activity in question, the consumer should explore whether a claim can be made under the law of the collector's home state.[406]

Some UDAP statutes exempt heavily-regulated entities or certain acts by such entities.[407] A federal court held, however, that a collection agency's licensure was insufficient for it to fall within this exemption in Nebraska's UDAP statute.[408]

A UDAP statute's scope may exceed that of a state debt collection statute.[409] Unless one of the statutes explicitly provides to the contrary,[410] the existence of a state debt collection law does not prevent application of a more general UDAP statute to a collector.[411]

807 (E.D. Pa. 2016) (justifiable reliance and ascertainable loss shown; accident victim agreed to pay specified amount out of tort settlement; hospital accepted that amount then dunned and reported debt resulting in increased interest rates and costs to dispute debt with credit bureau). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.12 (9th ed. 2016), *updated at* www.nclc.org/library.

395 *See, e.g.*, Warren v. Wells Fargo Bank, 2016 WL 693121 (W.D. Pa. Feb. 22, 2016) (severe harassment leading to serious health effects; claim fails because no showing of justifiable reliance).

396 *See* § 16.3.6, *infra*. *See also* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 3.2 (9th ed. 2016), *updated at* www.nclc.org/library.

397 Harrington v. CACV of Colorado, L.L.C., 508 F. Supp. 2d 128, 137 (D. Mass. 2007); Hage v. Gen. Serv. Bureau, 2002 WL 1796575 (D. Neb. Aug. 5, 2002) (Neb. UDAP statute not inconsistent with FDCPA and not preempted). *See also* § 16.1.2, *supra*.

398 940 Mass. Code Regs. §§ 7.01 to 7.10 (1979); 3 Vt. Code R. § 3-2-103:CP 104 (comprehensive debt collection regulations, apparently modeled after National Consumer Law Center, Model Consumer Credit Act (1974)).

399 *See, e.g.*, Siemer v. Nangle (*In re* Nangle), 274 F.3d 481 (8th Cir. 2001). *See generally* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 18.5.4.2.1 (12th ed. 2020), *updated at* www.nclc.org/library.

400 National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.9.2 (9th ed. 2016), *updated at* www.nclc.org/library.

401 DirecTV, Inc. v. Cephas, 294 F. Supp. 2d 760 (M.D.N.C. 2003); Pepper v. Routh Crabtree, APC, 219 P.3d 1017 (Alaska 2009).

402 *See, e.g., In re* Western Acceptance Corp., 788 P.2d 214 (Idaho 1990). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 3.1.2 (9th ed. 2016), *updated at* www.nclc.org/library.

403 15 U.S.C. § 45(a)(1).

404 *See, e.g.*, Gilmore v. Account Mgmt., Inc., 2009 WL 4826953 (11th Cir. Dec. 16, 2009).

405 *See* § 16.3.7, *infra*.

406 *See* § 16.3.3.5, *infra*.

407 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.3.3 (9th ed. 2016), *updated at* www.nclc.org/library.

408 Hage v. Gen. Serv. Bur., 306 F. Supp. 2d 883, 889 (D. Neb. 2003).

409 Magness v. Walled Lake Credit Bur., L.L.C., 2013 WL 1311093 (E.D. Pa. Apr. 1, 2013) (collection of debt that is outside state debt collection law's scope can violate state UDAP statute).

410 *See, e.g.*, Johnson v. MBNA Am. Bank, 2006 WL 618077 (M.D.N.C. Mar. 9, 2006) (by statute, UDAP violations by debt collectors are limited to acts specified in debt collection statute); DirecTV, Inc. v. Cephas, 294 F. Supp. 2d 760 (M.D.N.C. 2003) (if state debt collection law covers activity then there is no separate UDAP liability).

411 Thomas v. Arrow Fin. Services, L.L.C., 2006 WL 2438346, at *6 (N.D. Ill. Aug. 17, 2006).

Collection Is in Trade or mmerce

. that cover "trade or commerce" are gener-
cover debt collection.[412] Pennsylvania[413] and
i have held that debt collection activities are
nerce" even where this term is defined as the
offering for sale, or distribution of services,
:r things of value. Courts have reached the same result in interpreting similar language in the Florida,[415] South Carolina,[416] and Connecticut[417] UDAP statutes.

16.3.3.3 Coverage Under Statutes Requiring a "Consumer Transaction" or Acts in Connection with the Sale of Merchandise

A number of UDAP statutes apply only to "consumer transactions"—typically defined as those for personal, family, or household use.[418] Many courts recognize that, as long as the underlying transaction is a "consumer transaction," the UDAP statute applies to all phases of the transaction, including collection.[419] Likewise, debt collection is in connection with the sale of merchandise where the underlying transaction arose from such a sale.[420] The Missouri Supreme Court holds that a loan transaction lasts until the last service is performed or the loan is paid off, so any misconduct that occurs in the course

ese Law Group, 2010 WL 2698819 (W.D. Wash. July 7,
atic inflation of garnishment fees is in trade or commerce
it occurs in litigation); Hage v. Gen. Serv. Bur., 306 F.
. 889 (D. Neb. 2003) (holding that UDAP statute, which
s "in the conduct of any trade or commerce," applies to
on; rejecting argument that UDAP statute is limited to
ations); Asch v. Teller, Levit & Silvertrust, P.C., 2003 WL
*6 (N.D. Ill. Sept. 26, 2003) (Ill. DTPA), Pabon v. Recko,
2d 311 (D. Conn. 2000) (creditor's collection of its own
ade or commerce); Brown v. C.I.L., Inc., 1996 WL 164294
or. I. 1996); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M.
ring New Mexico UDAP statute, which has trade or com-
rement, to debt collection by third party); Wagner v. Am.
Corp., 1983 U.S. Dist. LEXIS 10287 (D. Conn. Dec. 30,
party collector covered even though debtor entered into
ion with it); *In re* Scrimpsher, 17 B.R. 999 (Bankr. N.D.N.Y.
r's collection of bad check is part of its business, trade, or
or furnishing of service); State v. O'Neill Investigations,
2d 520 (Alaska 1980) (state UDAP statute, which covers
mmerce, applies to debt collection agencies despite another
llection agency statute); *In re* Western Acceptance Corp.,
14 (Idaho 1990) (third party collection of dishonored check
ıy goods or services is in trade or commerce); People v.
Sys., Corp., 585 N.E.2d 51 (Ill. 1991) (private agency col-
or government entity covered by UDAP statute); Davis
y. Ass'n v. Feldman, 530 S.E.2d 865 (N.C. Ct. App. 2000)
ners association's collection of assessments is in trade or
e); Franks v. Sykes, 600 S.W.3d 908 (Tenn. 2020) (confining
First Am. Nat'l Bank, 93

415 Schauer v. GMAC, 819 So. 2d 809 (Fla. Dist. Ct. App. 2002) (debt collection harassment of car loan co-signer was in trade or commerce). *See also* Williams v. Edelman, 408 F. Supp. 2d 1261 (S.D. Fla. 2005) (UDAP statute covers collection of condo fees, even though consumers did not enter into transaction with collector). *But see* Acosta v. Gustino, 2012 WL 4052245 (M.D. Fla. Sept. 13, 2012) (homeowners association was not engaged in trade or commerce in exercising legal remedies to collect debt).

416 *In re* Daniel, 137 B.R. 884 (D.S.C. 1992) (repossession of manufactured home).

417 Pabon v. Recko, 122 F. Supp. 2d 311 (D. Conn. 2000).

418 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 2.1.8, 2.4.5.2 (9th ed. 2016), *updated at* www.nclc.org/library.

419 Wess v. Storey, 2009 WL 2835371 (S.D. Ohio Sept. 1, 2009) (where underlying transaction is consumer transaction, UDAP statute covers attorney collector even though debt had been assigned to entity that is exempt from UDAP statute); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783, 809 (S.D. Ohio 2006); Blevins v. Hudson & Keyse

ler the original loan agreement
vicer is "in connection with"
JDAP statute.[421] A few courts,
rs do not fall within the UDAP
nsumer has not entered into a
[22] or because collection is too
ction.[423] Another issue is that
a requirement of a sale or lease
r transaction," so they may not
hat did not arise from a sale or

itors, Collectors, and
d

me state debt collection laws,[425]
er creditors themselves, not just
[26] The UDAP statute may pro-
ditor liable not only for its own
r those of the collectors it hires.
gument that a creditor is respon-
law for its debt collection agen-
l Fair Debt Collection Practices
right to control the collection
esponsible as if the agency were

.3d 263 (Mo. 2018) (applying statute to
onway v. CitiMortgage, Inc., 438 S.W.3d

ices, Inc., 2011 WL 2971085 (S.D. Miss.
te inapplicable to collector because con-
ase goods or services from it); State *ex rel.*

an employee.[428] Ratification of the collector's acts may also make the creditor liable.[429] Creditors may also be responsible under the state UDAP statute for hiring collectors known to engage in harassing debt collection methods.[430] An individual employee of a debt collection agency may also be liable under the UDAP statute.[431]

A UDAP statute may apply to collection of types of debts that are excluded from FDCPA coverage.[432] For example, a UDAP statute that applies to "trade or commerce" may apply to collection of tort debts.[433] A UDAP statute is likely to apply to a company that purchases dishonored checks for collection, as long as the underlying transaction falls within the statute's scope.[434]

Most UDAP statutes apply to credit transactions.[435] However, the Texas UDAP statute does not apply to loans that are not used to purchase goods or services.[436] Other UDAP statutes exempt

428 Douyon v. NY Med. Health Care, P.C., 894 F. Supp. 2d 245 (E.D.N.Y. 2012) (creditor is liable for acts of collection agent committed within actual or apparent scope of authority); Knapp v. Am. Gen. Fin., 111 F. Supp. 2d 758 (S.D. W. Va. Aug. 16, 2000). *But cf.* Lowe v. Surpas Res. Corp., 253 F. Supp. 2d 1209 (D. Kan. 2003) (bank not vicariously liable for actions of collector who was independent contractor); Stephens v. Omni Ins. Co., 159 P.3d 10, 26 (Wash. Ct. App. 2007) (creditor not liable where collector was independent contractor and it did not review collector's letters), *aff'd on other grounds sub nom.* Panag v. Farmers Ins. Co., 204 P.3d 885 (Wash. 2009).

429 National Consumer Law Center, Automobile Fraud § 10.4.3 (6th ed. 2018), *updated at* www.nclc.org/library; National Consumer Law Center, Federal Deception Law § 6.9.2.5 (3d ed. 2017), *updated at* www.nclc.org/library.

430 *See* Flamm v. Sarner & Assoc., P.C., 2002 WL 31618443 (E.D. Pa. Nov. 6, 2002) (creditor liable under Pa. UDAP statute and debt collection statute for hiring collectors known to engage in harassing debt collection methods).

certain creditors such as banks,[437] certain vendors such as utility companies,[438] or certain types of debts.[439] The Sixth Circuit held that, since the Ohio UDAP statute is inapplicable to certain entities such as banks when they originate credit obligations, it is also inapplicable to third party collectors when they are collecting those debts, as long as the exempt entity still owns the obligation.[440] A court held that a process server fell within the Connecticut UDAP statute's exemption for transactions or actions permitted by other law, even if the process server utilized a method of service that was not permitted by law.[441]

Even if a UDAP statute generally covers debt collection, restrictions may be embedded in particular substantive prohibitions. For example, a court refused to apply a UDAP statute prohibiting representations that "goods or services have characteristics . . . they do not have" to debt collection, because the collectors were not offering goods or services to the debtors.[442]

Courts in some states have held collection attorneys' activities subject to the state UDAP statute.[443] However, in some states the UDAP statute explicitly exempts attorneys,[444] or

2018 WL 456031 (W.D. Tex. Jan. 16, 2018) (loan broker provides services and is subject to UDAP statute even if lender is not). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 2.2.1.2, 2.2.1.3 (9th ed. 2016), *updated at* www.nclc.org/library.

437 Lewis v. ACB Bus. Services, Inc., 135 F.3d 389 (6th Cir. 1998) (credit card company was not "supplier" within meaning of Ohio Consumer Sales Practices Act, and thus was not covered by Act's restrictions on choice of forum); King v. Cashland, Inc., 2000 WL 1232768 (Ohio Ct. App. Sept. 1, 2000) (payday lender was exempt from state UDAP statute as "dealer in intangibles," so its collection activities were not covered). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.2.1.4 (9th ed. 2016), *updated at* www.nclc.org/library.

438 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.3.2 (9th ed. 2016), *updated at* www.nclc.org/library.

439 Wright v. Linebarger Googan Blair & Sampson, 782 F. Supp. 2d 593 (W.D. Tenn. 2011) (UDAP statute inapplicable to collection of delinquent property taxes); Reno v. Supportkids, Inc., 2004 WL 828150 (D. Minn. Apr. 13, 2004) (child support not covered because not in connection with sale); Friday v. United Dominion Realty Trust, Inc., 575 S.E.2d 532 (N.C. Ct. App. 2003) (court judgment does not constitute covered "debt" under state debt collection or UDAP statutes, so landlord not liable for demanding $45 for attorney fees, when fee was actually for eviction court costs); Teel v. Panarella, 16 Pa. D. & C.4th 271 (Pa. Ct. Com. Pl. 1993) (local wage taxes not debt under former UDAP debt collection regulation; note that regulation has been replaced by statute, Pa. Stat. tit. 73, § 2270.3, that does cover third party collection of local tax debts). *See also* Alger v. Ganick, O'Brien & Sarin, 35 F. Supp. 2d 148 (D. Mass. 1999) (declining supplemental jurisdiction over UDAP debt collection claim because of questions whether it applies to defendant, a state-created student loan guarantee corporation).

440 Wise v. Zwicker & Assoc., 780 F.3d 710 (6th Cir. 2015) (UDAP statute does not apply to credit card lender, nor to its attorney collectors where exempt lender still owns obligation). *See also* Clark v. Lender Processing Serv., Inc., 562 Fed. Appx. 460 (6th Cir. 2014) (attorney who represents financial institution that is exempt from Ohio UDAP statute is also exempt); Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856, 869 (S.D. Ohio 2005) (credit card lender is exempt from Ohio UDAP statute, so third party collector of its debt is not covered), *aff'd on other grounds*, 2007 WL 1654357 (6th Cir. June 6, 2007).

441 Garcia v. Fry, ___ F. Supp. 3d ___, 2016 WL 2944517 (D. Conn. May 12, 2016).

442 State of Minn. *ex rel.* Hatch v. JBC Legal Group, P.C., 2006 WL 1388453 (Minn. Dist. Ct. Apr. 13, 2006). *See also* Thinesen v. JBC Legal Group, P.C., 2005 WL 2346991 (D. Minn. Sept. 26, 2005) (defendant's collection activities are not similar to substantive prohibitions in Minnesota Deceptive Trade Practices Act, so no violation).

443 Kaymark v. Bank of Am., 783 F.3d 168, 180 n.4 (3d Cir. 2015) ("While [defendant] is correct that attorneys are exempt from liability under the [UDAP statute] if the alleged misconduct concerns the adequacy of their legal representation, attorneys engaged in debt collection—considered an "act of trade or commerce" within the definition of the UTPCPL—are not"); Hagy v. Demers & Adams, L.L.C., 2011 WL 6091797 (S.D. Ohio Dec. 7, 2011) (UDAP statute applies to misrepresentation made to debtor in course of lawsuit that creditor would not attempt to collect any deficiency); Machles v. McCabe, Weisberg & Conway, P.C., 2017 WL 5172516 (E.D. Pa. Nov. 7, 2017) (attorney is exempt from UDAP statute only when practicing law, not when engaging in debt collection, here by filing foreclosure complaint); Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 655, 661 (S.D. Ohio 2004) (collection attorneys are covered by Ohio UDAP statute, and coverage does not invade state supreme court's province to regulate practice of law); Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 662 (S.D. Ohio 2004) (there is no litigation privilege that protects collection attorneys from liability under Ohio UDAP statute); Daniels v. Baritz, 2003 WL 21027238 (E.D. Pa. Apr. 30, 2003) (attorney's debt collection activities are covered even if sufficiency of legal representation is not); Edwards v. McCormick, 136 F. Supp. 2d 795 (S.D. Ohio 2001) (attorney collecting debts for health care provider was "supplier" covered by Ohio Consumer Sales Practices Act); Smith v. Short Term Loans, L.L.C., 2001 WL 127303 (N.D. Ill. Feb. 9, 2001) (consumer stated claim against attorney who sent out dunning letters on his own letterhead, leading unsophisticated consumer to think third party was involved); Campos v. Brooksbank, 120 F. Supp. 2d 1271 (D.N.M. 2000) (alleged misconduct of creditor's lawyer subject to New Mexico Unfair Practices Act; exemption for actions or transactions permitted under laws administered by regulatory body did not apply where acts complained of, i.e., filing false affidavit and abusing discovery, were not permitted by rules of professional conduct); Rachoza v. Gallas & Schultz, 1998 WL 171280 (D. Kan. Mar. 23, 1998) (attorneys may be liable under Kansas Consumer Protection Act for same actions which would subject creditor or another debt collector to liability); Pepper v. Routh Crabtree, APC, 219 P.3d 1017 (Alaska 2009). *See also* Seyfarth v. Reese Law Group, 2010 WL 2698819 (W.D. Wash. July 7, 2010) (systematic inflation of garnishment fees is in trade or commerce even though it occurs in litigation); Andrews & Lawrence Prof. Services, L.L.C. v. Mills, 223 A.3d 947 (Md. 2020) (UDAP statute's professional services exemption does not apply to lawyer who engages in debt collection activity that requires collection agency license or which would be prohibited under state debt collection act); Brow v. Stanton, 429 N.E.2d 60 (Mass. App. Ct. 1981) (applying attorney general's debt collection rule, which explicitly covers attorneys collecting for creditors). *But see* O'Connor v. Nantucket Bank, 992 F. Supp. 2d 24 (D. Mass. 2014) (non-client can make UDAP claim against attorney only if the attorney was acting in a business context vis-à-vis the non-client; debt collection does not qualify); Genschork v. Suttell & Hammer, 2013 WL 6118678 (E.D. Wash. Nov. 21, 2013) (after judgment was vacated and case dismissed, attorneys obtained garnishment order by misrepresenting that judgment was valid; debt collection claim fails because it arose from attorney's "competence or strategy," not the entrepreneurial aspects of practice). *But cf.* Schroyer v. Frankel, 197 F.3d 1170 (6th Cir. 1999) (Ohio UDAP statute applies to debt collection, but debt collection was incidental to defendant attorney's law practice, not regular and usual part of his business, so he was not covered).

444 *See, e.g.*, Culver v. JBC Legal Group, P.C., 2005 WL 5621875 (E.D.N.C. June 28, 2005) (statutory exemption for members of learned

courts have held that the state supreme court's regulation of the practice of law displaces the UDAP statute.[445] In other states, courts draw a distinction between the professional aspects of an attorney's practice, to which the UDAP statute does not apply, and the commercial aspects, to which the statute applies.[446] In these states, the UDAP statute will likely apply to some, but not all, of a collection attorney's activities.[447] The litigation privilege may also be an obstacle when the claim involves an attorney's litigation activities.[448] But even when a state statute exempts attorneys, the creditor on whose behalf an attorney pursues collection may be vicariously liable for the attorney's unfair or deceptive practices.[449]

16.3.3.5 What Consumers Are Protected?

A UDAP statute may protect out-of-state residents,[450] although some UDAP statutes are limited to acts that occur in the state.[451] Some courts have applied their UDAP statutes to actions that occur outside the state, but that affect state residents.[452] Some state UDAP statutes protect businesses as well as consumers, but others protect only consumers.[453]

A consumer who was dunned for a credit card debt incurred by an identity thief was allowed to pursue a claim under the Tennessee UDAP statute.[454] The court held that the use of the consumer's identity to enter into the transaction was sufficient to make him a "consumer" as defined by the statute. It also held that the creditor, having treated the consumer as the actual debtor, could not now argue the contrary. Several other decisions apply the state UDAP statute to debt collection against a non-debtor.[455] On the other hand, some courts have held that the state UDAP statute does not apply where the creditor or collector is harassing someone who has not actually entered into a transaction with it.[456]

professions excludes collection attorneys even if they are not licensed in jurisdiction); Bennett & DeLoney, P.C. v. State *ex rel.* McDaniel, 388 S.W.3d 12 (Ark. 2012). *See also* Andrews & Lawrence Prof. Services, L.L.C. v. Mills, 223 A.3d 947 (Md. 2020) (UDAP statute exempts professional services of lawyer, but this exemption does not protect lawyer who engages in debt collection activity for which state debt collector licensing statute requires license, or which that statute prohibits); Davis Lake Cmty. Ass'n v. Feldman, 530 S.E.2d 865 (N.C. Ct. App. 2000) (contrasting coverage of creditor's own collection activities with exemption for attorneys as members of learned profession).

445 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.3.9 (9th ed. 2016), *updated at* www.nclc.org/library.

446 *Id.*

447 *UDAP statute inapplicable*: Glover v. Udren Law Offices, P.C., 92 A.3d 24 (Pa. Super. Ct. 2014) (attorney's actions in connection with filing of foreclosure complaint amount to practicing law and are exempt from UDAP statute), *rev'd in part on other grounds*, 139 A.3d 195 (Pa. 2016) (reversing dismissal of claims under state lending law); Gray v. Suttell & Assoc., 2012 WL 1067962 (E.D. Wash. Mar. 28, 2012) (filing petitions for attorney fees in collection actions is professional rather than entrepreneurial and is not in trade or commerce); Wright v. Linebarger Googan Blair & Sampson, 782 F. Supp. 2d 593 (W.D. Tenn. 2011) (post-filing demand letter is practice of law to which UDAP statute is inapplicable); Collins v. Sparacio, 2003 WL 21254256 (N.D. Ill. May 30, 2003) (UDAP statute inapplicable to attorney's filing of collection suit; this is practice of law); Evanauskas v. Strumpf, 2001 WL 777477 (D. Conn. June 27, 2001) (Connecticut UDAP statute applies only to commercial aspects of legal practice; no cause of action against lawyer who sent improper dunning letter on behalf of client-creditor); Campion v. Credit Bureau Services, 2000 WL 33255504 (E.D. Wash. Sept. 19, 2000) (lawyer who failed to follow proper garnishment procedure when collecting debt for client not liable under Washington UDAP statute, which covers only entrepreneurial aspects of law practice); Suffield Dev. Assoc. v. Nat'l Loan Investors, L.P., 802 A.2d 44 (Conn. App. Ct. 2002) (party may not sue opponent's attorney under Connecticut UDAP statute, which applies only to "entrepreneurial aspects" of law practice, not to "the representation of a client in a legal capacity"); Carter v. Suttell & Assoc., 2011 WL 396038 (Wash. Ct. App. Jan. 13, 2011) (unpublished) (collection attorney's garnishment of judgment debtor's bank account is professional, not entrepreneurial, so UDAP statute is inapplicable); Medialdea v. Law Office of Evan L. Loeefler P.L.L.C., 2009 WL 1767185 (W.D. Wash. June 19, 2009) (collection attorney's misrepresentation about fees in motion to court not in trade or commerce).

UDAP statute applies: Seyfarth v. Reese Law Group, 2010 WL 2698819 (W.D. Wash. July 7, 2010) (inflation of garnishment fee beyond maximum allowed by law may be entrepreneurial, so covered by UDAP statute).

See generally National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.3.9 (9th ed. 2016), *updated at* www.nclc.org/library.

448 *See* § 6.2.7, *supra*.

449 Andrews & Lawrence Prof. Services, L.L.C. v. Mills, 223 A.3d 947, 967–971 (Md. 2020).

450 Davis v. Suran, 1998 WL 378420 (N.D. Ill. July 1, 1998) (territorial reach of Wisconsin Consumer Act is not statutorily limited to Wisconsin residents; in absence of conflict of law, court is obliged to apply local state law to pendent statutory claims).

451 Padilla v. Payco Gen. Am. Credits, Inc., 161 F. Supp. 2d 264 (S.D.N.Y. 2001) (no cause of action under New York UDAP statute and debt collection provisions that cover acts "in this state," where acts complained of took place in Massachusetts).

452 *See, e.g.*, Yu v. Signet Bank, 82 Cal. Rptr. 2d 304 (Cal. Ct. App. 1999) (applying California UDAP statute to out-of-state creditor's practice of filing suit in Virginia against California debtors). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.2.11 (9th ed. 2016), *updated at* www.nclc.org/library.

453 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.4.5.2 (9th ed. 2016), *updated at* www.nclc.org/library.

454 Wolfe v. MBNA Am. Bank, 485 F. Supp. 2d 874 (W.D. Tenn. 2007).

455 *See* Heard v. Bonneville Billing & Collections, 2000 WL 825721 (10th Cir. June 26, 2000) (Utah law); Reid v. LVNV Funding, L.L.C., 2016 WL 247571 (D. Utah Jan. 20, 2016); Singleton v. Montgomery Ward Credit Corp., 2000 WL 1810012 (N.D. Ill. Dec. 11, 2000).

456 Wright v. Enhanced Recovery Co., 227 F. Supp. 3d 1207 (D. Kan. 2016) (recipient of wrong-number debt collection calls is not consumer under UDAP statute where collector never claimed that he owed debt); Hayes v. Find Track Locate, Inc., 60 F. Supp. 3d 1144 (D. Kan. 2014) (relatives who were not obligated on contract, but were contacted by collector to learn whereabouts of collateral, did not enter into a consumer transaction, so do not have standing under UDAP statute); DirecTV v. Shea, 2003 WL 23200250 (W.D. Mich. May 21, 2003) (one of series of seven related cases) (debtor who allegedly pirated television signals cannot assert UDAP claim for cable television company's collection acts); DirecTV, Inc. v. Karpinsky, 269 F. Supp. 2d 918 (E.D. Mich. 2003) (UDAP statute did not apply to collection activities against person who had not entered into transaction, but was falsely accused of intercepting satellite transmissions), *vacated in part on other grounds*, 274 F. Supp. 2d 918 (E.D. Mich. 2003); Walker v. Gallegos, 167 F. Supp. 2d 1105 (D. Ariz. 2001) (Arizona UDAP statute would apply to loan for purchase of manufactured home, but repossession from occupant who was not party

Occasionally consumers have made UDAP claims against debt collectors they hired to collect debts. For example, one UDAP statute was applied to protect a spouse who was misled about the fee of a collection agency that was hired to collect child support from the other spouse.[457]

16.3.3.6 State-by-State Survey of UDAP Statute's Coverage of Debt Collection

The following is a state-by-state summary of each state UDAP statute's coverage of debt collection.

Alabama: Alabama courts have not addressed the question whether the UDAP statute covers debt collection. In light of the statute's broad definition of "trade or commerce,"[458] its broad prohibition of unconscionable, false, misleading, or deceptive acts,[459] and the general rule that UDAP statutes are to be interpreted liberally, it is likely that Alabama courts will conclude that post-sale acts such as debt collection are covered.

Alaska: Alaska's UDAP statute applies to acts and practices in "trade or commerce."[460] The Alaska Supreme Court has ruled that the state UDAP statute covers debt collection.[461]

Arizona: There has not been a dispositive ruling as to whether Arizona's UDAP statute covers debt collection, but the statutory language, which requires only that a prohibited practice be "in connection with" the sale of merchandise,[462] is clearly broad enough to cover debt collection. Despite this broad definition, in *Walker v. Gallegos*,[463] a federal district court held that the UDAP statute did not cover repossession of a manufactured home from an occupant who was not a party to the contract, because it was too attenuated from the underlying sale of merchandise. It is an open question whether Arizona courts will apply this ruling to debt collection, or even follow it as to repossession.[464] Arizona's UDAP statute formerly prohibited only deceptive acts, not unfair or unconscionable acts, and so was less than ideal for addressing non-deceptive debt collection abuse. However, in 2013, it was amended to add a prohibition of any "unfair act or practice."[465]

Arkansas: Ark. Code § 4-88-107(a)(10), prohibits "any other unconscionable, false, or deceptive act or practice in business, commerce, or trade." While Arkansas courts have not ruled on the question, nothing in the statute excludes post-sale acts such as debt collection from the definition of "business, commerce, or trade." The Arkansas Supreme Court has, however, held that the UDAP statute is inapplicable to the practice of law by attorneys, including attorney collectors.[466]

California: The California Unfair Competition Law applies to debt collection.[467] California's other UDAP statute, the Consumers Legal Remedies Act, covers "transactions," broadly defined to include not only the making but also the performance of the agreement,[468] and courts have applied it to debt collection.[469]

Colorado: Colorado's UDAP statute prohibits certain practices that occur "in the course of such person's business, vocation, or occupation."[470] Although the courts have not specifically addressed coverage of debt collection, this language is clearly broad enough to cover post-sale acts,[471] so it is likely that debt collection is covered. The UDAP statute's application to abusive debt collection was significantly enhanced by a 2019 amendment adding a prohibition of knowing or reckless unfair or unconscionable acts or practices.[472]

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to contract not covered because too remote from underlying sale); Beecy v. Pucciarelli, 441 N.E.2d 1035 (Mass. 1982) (unobligated consumer who was erroneously subject of debt collection was not protected by UDAP statute since consumer did not purchase goods or services from collector; goods or services requirement has since been removed from statute); Cady v. Marcella, 729 N.E.2d 1125 (Mass. App. Ct. 2000) (no UDAP claim against creditor who seized half of consumers' modular home to collect debt owed by contractor installing home, as consumers had not engaged in trade or commerce with creditor); SWA, Inc. v. Straka, 2003 WL 21434637 (Ohio Ct. App. June 19, 2003); Dodeka, L.L.C. v. Garcia, 2011 WL 4825893 (Tex. App. Oct. 12, 2011) (person who was twice sued for debt she did not owe not covered by Texas UDAP statute because she never acquired or sought to acquire goods or services).

457 Ulberg v. Seattle Bonded, Inc., 626 P.2d 522 (Wash. Ct. App. 1981).

458 Ala. Code § 8-19-3(8).

459 Ala. Code § 8-19-5(27).

460 Alaska Stat. § 45.50.471(a).

461 State v. O'Neill Investigations, 609 P.2d 520 (Alaska 1980). *See also* Merdes & Merdes, P.C. v. Leisnoi, Inc., 410 P.3d 398, 411–412 (Alaska 2017) (where transaction begins as provision of services governed by UDAP statute, UDAP statute applies to later stages, including consumer's attempt to recover overpayment for those services); Cozzetti v. Madrid, 2017 WL 6395736 (Alaska Dec. 13, 2017) (unpublished) ("in connection with" the sale means about or relating to the sale; it encompasses post-sale acts such as misrepresentation in eviction complaint that manufactured home buyer was a mere renter); Alaska Tr., L.L.C. v. Ambridge, 372 P.3d 207, 226 (Alaska 2016) (applying UDAP statute to debt collection violations in course of non-judicial foreclosure where consumer also pleaded FDCPA claims; even though UDAP statute does not encompass real property transactions, FDCPA violations are UDAP violations); Pepper v. Routh Crabtree, APC, 219 P.3d 1017 (Alaska 2009) (applying UDAP statute to attorney debt collector). *But cf.* Alaska Tr., L.L.C. v. Bachmeier, 332 P.3d 1 (Alaska 2014) (UDAP statute does not apply to real estate transactions, so does not cover real estate foreclosure).

462 Ariz. Rev. Stat. § 44-1522(A).

463 167 F. Supp. 2d 1105, 1107 (D. Ariz. 2001).

464 *See* Pete v. U.S. Bank, 2009 WL 532611 (Ariz. Ct. App. Mar. 3, 2009) (upholding default judgment against lender for wrongful repossession without addressing UDAP scope issues).

465 Ariz. Rev. Stat. § 44-1522(A).

466 Bennett & DeLoney, P.C. v. State *ex rel.* McDaniel, 388 S.W.3d 12 (Ark. 2012).

467 Barquis v. Merchants Collection Ass'n, 496 P.2d 817 (Cal. 1972); Yu v. Signet Bank/Virginia, 82 Cal. Rptr. 2d 304 (App. 1999). *See, e.g.*, People v. Persolve, L.L.C., 160 Cal. Rptr. 3d 841 (Cal. Ct. App. 2013) (applying Unfair Competition Law to debt collection; litigation privilege does not bar claim).

468 Cal. Civil Code § 1761(e) (West).

469 *See, e.g.*, Hood v. Santa Barbara Bank & Trust, 49 Cal. Rptr. 3d 369 (Cal. Ct. App. 2007) (reversing judgment on pleadings for creditor in case raising CLRA and other claims regarding tactics for collecting defaulted refund anticipation loans).

470 Colo. Rev. Stat. § 6-1-105(1).

471 Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47 (Colo. 2001) (UDAP statute applies to insurer's post-sale unfair or bad faith conduct).

472 Colo. Rev. Stat. § 6-1-105(1)(kkk), *as amended effective* July 1, 2020.

Connecticut: The state UDAP statute broadly prohibits unfair or deceptive acts or practices "in the conduct of any trade or commerce,"[473] and a number of decisions have applied it to post-sale acts such as debt collection.[474]

Delaware: Del. Code Ann. tit. 6, § 2513 prohibits deception "in connection with the sale, lease, or advertisement of any merchandise." This language is broad enough to encompass post-sale acts, and one decision, while not a debt collection case, has so held.[475]

District of Columbia: Post-sale acts such as debt collection appear to be covered under D.C.'s UDAP statute. In a case closely analogous to debt collection, the D.C. Court of Appeals reversed summary judgment for a mortgage company that had misrepresented the payoff amount on a loan.[476] The D.C. Circuit has, however, held the statute inapplicable to debt collection on the theory that it is not sufficiently connected to the supply side of the transaction, and the collector does not meet the definition of "merchant" in its own right.[477]

Florida: Florida prohibits unfair or deceptive acts or practices "in the conduct of any trade or commerce."[478] "Trade or commerce" is broadly defined as "advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity or thing of value, wherever situated."[479] Some Florida courts have held that harassing collection efforts fall within this broad definition.[480] However, other courts have disagreed, on the theory that debt collection activities do not involve advertising, soliciting, providing, offering, or distributing anything.[481]

Georgia: Ga. Code Ann. § 10-1-393 prohibits unfair or deceptive acts "in the conduct" of consumer transactions. This broad language does not confine its scope to the initial sale. In *Garner v. Academy Collection Service, Inc.*,[482] a federal court held that collection activities were covered under the state UDAP statute "because they involved the sale and purchase of a service—the extension of credit and the associated administration and collection of the debt—for Plaintiff's personal or household purposes."

Hawaii: Haw. Rev. Stat. § 480-2 forbids unfair or deceptive acts in trade or commerce. Trade or commerce is not defined, so there is no basis for narrowing its scope to exclude debt collection, and Hawaii courts have applied the statute to post-sale acts such as debt collection.[483]

473 Conn. Gen. Stat. § 42-110b(a).

474 *See, e.g.*, Pabon v. Recko, 122 F. Supp. 2d 311 (D. Conn. 2000) (creditor's collection of its own debts is in trade or commerce).

475 Lony v. E.I. du Pont de Nemours & Co., 821 F. Supp. 956 (D. Del. 1993). *But cf.* Ayers v. Quillen, 2004 WL 1965866 (Del. Super. Ct. June 30, 2004) (statute does not apply to post-sale practices, but ads viewed soon after sale were in connection with the sale); Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of N. Am., Inc., 558 A.2d 1066 (Del. Super. Ct. 1989) (statute inapplicable to post-sale misrepresentations dealing with car repair).

476 Osbourne v. Capital City Mortg. Corp., 667 A.2d 1321 (D.C. 1995).

477 Baylor v. Mitchell Rubenstein & Assoc., 857 F.3d 939 (D.C. Cir. 2017). *See also* Osinubepi-Alao v. Plainview Fin. Serv., Ltd., 44 F. Supp. 3d 84 (D.D.C. 2014) (D.C. UDAP statute applies to seller of consumer debt, but not to debt buyer that attempts to collect debt and does not extend additional credit to debtor); Busby v. Capital One, 772 F. Supp. 2d 268 (D.D.C. 2011) (D.C. UDAP law does not apply to mortgage loan servicer, because it did not hold itself out as supplying any goods or services to homeowner; mistakenly inserting element of privity of contract into District's UDAP law, which requires only that UDAP claim arise out of consumer-merchant relationship, not that defendant must have entered into such relationship directly with consumer); Edmond v. Am. Educ. Services, 2010 WL 4269129 (D.D.C. Oct. 28, 2010) (D.C. UDAP law does not cover student loan servicing).

478 Fla. Stat. § 501.204(1).

479 Fla. Stat. § 501.203(8).

480 Nazario v. Prof'l Account Services, Inc., 2017 WL 1179917 (M.D. Fla. Mar. 30, 2017) (while legitimate debt collection may not be within scope of "trade or commerce," illegal or unscrupulous debt collection is); N. Star Capital Acquisitions, L.L.C. v. Krig, 611 F. Supp. 2d 1324 (M.D. Fla. 2009) (banks and their attorney debt collectors who sent proposed confession of judgment along with service of complaint are subject to Florida's UDAP statute and not immune under Florida's litigation privilege); Losure v. Capital One Services, Inc., 2006 WL 166520 (M.D. Fla. Jan. 23, 2006) (harassment by debt collector is in trade or commerce); Schauer v. Gen. Motors Acceptance Corp., 819 So. 2d 809, 812 (Fla. Dist. Ct. App. 2002). *See also* Williams v. Edelman, 408 F. Supp. 2d 1261 (S.D. Fla. 2005).

481 *See, e.g.*, Mendez v. JFK Med. Ctr. L.P., 2018 WL 6448384 (S.D. Fla. Oct. 19, 2019) (UDAP statute does not apply to debt collection activities); Schaefer v. Seattle Serv. Bur., Inc., 2015 WL 9031511 (M.D. Fla. Dec. 16, 2015) (pre-suit demand letter by subrogee of other driver's insurance company is not in trade or commerce); Economakis v. Butler & Hosch, P.A., 2014 WL 820623 (M.D. Fla. Mar. 3, 2014) (pre-suit demand letter is not in trade or commerce); Acosta v. James A. Gustino, P.A., 2012 WL 4052245 (M.D. Fla. Sept. 13, 2012) (sending demand letters and other debt collection efforts does not involve advertising, soliciting, providing, offering, or distributing property, so is not in trade or commerce); Kelly v. Palmer, Reifler, & Assoc., P.A., 681 F. Supp. 2d 1356, 1373–1377 (S.D. Fla. 2010). *See also* Cornette v. I.C. Sys., Inc., 280 F. Supp. 3d 1362, 1373–1374 (S.D. Fla. 2017); Benjamin v. CitiMortgage, Inc., 2013 WL 1891284 (S.D. Fla. May 6, 2013) (mortgage servicer that seeks to enforce note is not acting in trade or commerce); Law Office of David J. Stern, P.A. v. State, 83 So. 3d 847 (Fla. Dist. Ct. App. 2011) (law firm's preparation of forgeries and fraudulent documents for clients in foreclosure cases is not acting in trade or commerce); State *ex rel.* Attorney Gen. v. Shapiro & Fishman, L.L.P., 59 So. 3d 353 (Fla. Dist. Ct. App. 2011) (foreclosure firm's pursuit of legal remedies not in trade or commerce); City of Cars, Inc. v. Simms, 526 So. 2d 119 (Fla. Dist. Ct. App 1988) (repossession not covered under version of statute that was limited to consumer transactions; statute now applies to "trade or commerce").

482 2005 WL 643680 (N.D. Ga. Mar. 11, 2005). *Accord* Carlisle v. Nat'l Commercial Services, Inc., 2017 WL 1075088, at *7 (N.D. Ga. Feb. 22, 2017), *adopted*, 2017 WL 1049454 (N.D. Ga. Mar. 20, 2017); Beeler v. Ditech Fin., L.L.C., 2016 WL 4136513, at *13 (M.D. Ga. Aug. 1, 2016) (applies to debt collection as long as debt was incurred in consumer transaction); 1st Nationwide Collection Agency, Inc. v. Werner, 654 S.E.2d 428 (Ga. Ct. App. 2007).

483 *See, e.g.*, King v. Int'l Data Services, 2002 WL 32345923 (D. Haw. Aug. 5, 2002) (denying plaintiff's motion for summary judgment on UDAP claim against debt collector, but allowing issue to go to trial); Ai v. Frank Huff Agency, Ltd., 607 P.2d 1304 (Haw. 1980) (violation of debt collection agency law is *per se* UDAP claim); Wiginton v. Pac. Credit Corp., 634 P.2d 111 (Haw. Ct. App. 1981) (upholding trial court's injunction against debt collection agency). *But cf.* Hungate v. Law Office of David B. Rosen, 391 P.3d 1 (Haw. 2017) (stating that defendant need not have provided goods and services to plaintiff in order to be liable under UDAP statute, but holding that allowing homeowner to assert UDAP claim against foreclosure attorney, other

Idaho: The Idaho UDAP statute applies to acts and practices "in the conduct of any trade or commerce,"[484] and defines "trade or commerce" to include collection of debts arising out of the sale, lease, or distribution of goods or services.[485] It also provides that an unconscionable act is a violation whether it occurs "before during, or after the transaction."[486] The Idaho Supreme Court has ruled that collection of debts that arise from sales of goods and services falls within the UDAP statute's definition of "trade or commerce."[487]

Illinois: The definition of "trade" and "commerce" at 815 Ill. Comp. Stat. § 505/1(f) focuses primarily on the initial sale, but is broad enough to cover post-sale matters such as debt collection. In addition, the statute includes substantive prohibitions of certain debt collection practices that would be meaningless if the statute did not cover debt collection.[488] The Illinois Supreme Court held in *People ex rel. Daley v. Datacom Systems Corp.*,[489] that collection of a debt fell within the definition.

Indiana: Indiana's UDAP statute applies to "consumer transactions," explicitly defined to include the collection of, or attempt to collect, a debt by a debt collector.[490] "Debt collector" is defined the same as the FDCPA definition, except that Indiana excludes any attorney who is admitted to practice in Indiana and is acting within the course and scope of the person's practice as an attorney.[491] The statute also defines any violation of the FDCPA as a violation,[492] but it denies the right to bring a private cause of action for this violation.[493]

Iowa: The Iowa UDAP statute applies broadly to acts or practices "in connection with" the lease, sale, or advertisement of any merchandise.[494] "Merchandise" is also broadly defined.[495] The state supreme court has applied Iowa's statute to post-sale collection.[496] Debt collectors are not excluded from the private cause of action that Iowa added to its UDAP statute in 2009.

Kansas: Kan. Stat. § 50-624(l) defines "supplier" to include those who enforce consumer transactions, and the state supreme court has held that this definition encompasses independent debt collectors.[497] The application of the statute to debt collection is particularly clear since Kan. Stat. § 50-627(a) provides that an unconscionable act is a violation whether it occurs before, during, or after the transaction. The underlying transaction may have to be a consumer transaction as defined by the statute.[498]

Kentucky: In *Hamilton v. York*,[499] a federal district court found the Kentucky UDAP statute applicable to false statements a creditor made in an attempt to collect a debt. However, intermediate appellate and federal decisions in Kentucky depart from the clear weight of nationwide authority and hold that a UDAP plaintiff must be in privity with the defendant.[500] Federal court decisions have applied these rulings to hold that a consumer cannot assert a UDAP claim against a third-party debt collector.[501]

Louisiana: Louisiana prohibits unfair or deceptive acts and practices as long as they are "in the conduct of any trade or commerce."[502] The state defines "trade" or "commerce" very broadly as "advertising, offering for sale, sale, or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article, commodity, or

than for "patently illegal activities," would interfere too much with his duties toward the mortgage holder; declining to address effect of 2012 amendments to foreclosure statute on these issues).

484 Idaho Code Ann. § 48-603.

485 Idaho Code Ann. § 48-602(2).

486 Idaho Code Ann. § 48-603C(1).

487 *In re* Western Acceptance Corp., 788 P.2d 214 (Idaho 1990) (third party collection of dishonored check used to buy goods or services is in trade or commerce). *See also* Carroll v. Wilson McColl & Rasmussen, 2010 WL 1904779 (D. Idaho May 11, 2010) (statute covers collection of balance transfer debt that arose from use of credit card to purchase goods and services).

488 815 Ill. Comp. Stat. §§ 505/2H, 505/2I.

489 585 N.E.2d 51 (Ill. 1991). *See also* Fleischer v. Acceslex Inst., 2018 WL 4489583 (N.D. Ill. Sept. 19, 2018) (applying UDAP statute to student loan servicer and collector); Thrasher-Lyon v. Ill. Farmers Ins. Co., 861 F. Supp. 2d 898, 909 (N.D. Ill. 2012); Thomas v. Arrow Fin. Services, L.L.C., 2006 WL 2438346 (N.D. Ill. Aug. 17, 2006) (collector's letter seeking information from debtors' employer is in trade or commerce, even if it does not seek money); Brown v. C.I.L., Inc., 1996 WL 164294 (N.D. Ill. Apr. 1, 1996); Garland v. Mobil Oil Co., 340 F. Supp. 1095, 1099 (N.D. Ill. 1972).

490 Ind. Code § 24-5-0.5-2(1)(C).

491 Ind. Code § 24-5-0.5-2(13) (incorporating definition of debt collection in 15 U.S.C. § 1692a(6)).

492 Ind. Code § 24-5-0.5-3(b)(20).

493 Ind. Code § 24-5-0.5-4(a), (b).

494 Iowa Code § 714.16(2)(a).

495 Iowa Code § 714.16(1)(*i*) ("any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or services").

496 State *ex rel.* Miller v. Cutty's Des Moines Camping Club, Inc., 694 N.W.2d 518 (Iowa 2005).

497 State v. Midwest Serv. Bur., Inc., 623 P.2d 1343 (Kan. 1981) (independent debt collector is "supplier" as defined by UDAP statute, which includes those who enforce consumer transactions). *Accord* Caputo v. Prof'l Recovery Services, Inc., 261 F. Supp. 2d 1249 (D. Kan. 2003); Griffin v. Sec. Pac. Auto. Fin. Services Corp., 995 F. Supp. 1266 (D. Kan. 1998) (Kansas Consumer Protection Act applies to debt collection activities of creditor or its agent). *See also* Hayes v. Find Track Locate, Inc., 60 F. Supp. 3d 1144 (D. Kan. 2014) (company that locates collateral and arranges for its repossession is engaged in enforcing consumer transactions, even though debtor did not enter into consumer transaction with it, but UDAP statute does not apply to non-parties that company contacted in effort to locate collateral); Bethea v. Wells Fargo Bank, 2010 WL 4868180 (D. Kan. Nov. 23, 2010) (UDAP statute covers negotiation of forbearance agreement to resolve collection of debt arising from consumer transaction).

498 *See, e.g.*, Kalebaugh v. Cohen, McNeile & Pappas, P.C., 76 F. Supp. 3d 1251, 1259–1260 (D. Kan. 2015) (UDAP statute inapplicable to collection of debt originated by exempt lender); State *ex rel.* Miller v. Midwest Serv. Bur. of Topeka, Inc., 623 P.3d 1343 (Kan. 1981).

499 987 F. Supp. 953, 958 (E.D. Ky. 1997).

500 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.20.3 (9th ed. 2016), *updated at* www.nclc.org/library.

501 Tallon v. Lloyd & McDaniel, 497 F. Supp. 2d 847 (W.D. Ky. 2007); Todd v. Capital One Fin. Corp., 2007 WL 3306097 (W.D. Ky. Nov. 6, 2007).

502 La. Rev. Stat. Ann. § 51:1405(A).

thing of value wherever situated. . . ."[503] Although the courts have not addressed whether the UDAP statute covers debt collection, wrongful repossession appears to be covered,[504] so it is likely that courts will apply the same reasoning to debt collection.

Maine: Maine broadly defines "trade" and "commerce" to include "the advertising, offering for sale, sale or distribution of any services and any property, tangible, or intangible, real, personal or mixed, and any other article, commodity, or thing of value. . . ."[505] An unfair or deceptive act or practice is a violation as long as it is committed "in the conduct of any trade or commerce."[506] While there are no reported decisions applying the statute to debt collection, in *Newcombe v. Mooers*[507] a trial court found that improper repossession violated the statute.

Maryland: Md. Code Ann., Com. Law § 13-301(14)(iii) explicitly makes a violation of the state debt collection law a UDAP violation. Another part of the UDAP statute, Md. Code Ann., Com. Law § 13-303(5), provides that a person may not engage in any unfair, abusive, or deceptive trade practice in the collection of consumer debts. The state's highest court holds that the statute is intended to protect consumers from, *inter alia*, unfair and deceptive practices in the collection of consumer debts.[508] The UDAP statute exempts the "professional services of . . . a lawyer."[509] However, if a lawyer engages in debt collection activity for which the state debt collector licensing statute requires a license, or which that statute prohibits, the UDAP statute applies to the lawyer.[510] In addition, even when a collection attorney's activities are exempt, the exemption does not extend to the attorney's client.[511]

Massachusetts: The statute prohibits unfair and deceptive acts and practice "in the conduct of any trade or commerce,"[512] which is broadly defined.[513] The state's highest court has had no difficulty applying this broad statute to debt collection.[514] In addition, the attorney general has adopted a debt collection regulation under the statute.[515]

Michigan: Michigan's UDAP statute, Mich. Comp. Laws § 445.903, prohibits unfair, unconscionable, or deceptive acts that occur "in the conduct of trade or commerce." "Trade or commerce" is broadly defined as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity."[516] This language is broad enough to cover debt collection, and, in *DIRECTV, Inc. v. Cavanaugh*,[517] a district court allowed a UDAP claim to go to trial based on the collection activities of a vendor of satellite TV service. Another question, however, is the effect of the Michigan statutes that license and regulate debt collectors.[518] Michigan courts have construed the UDAP statute's exemption for regulated industries extremely broadly,[519] and it is conceivable that courts could find that even debt collectors are exempt.

Minnesota: The scope section of Minnesota's Prevention of Consumer Fraud Act requires that the unlawful practice must be "in connection with the sale of any merchandise."[520] The broad language "in connection with" would appear to cover post-sale acts such as debt collection as long as the transaction is in "trade or commerce" and involves "merchandise."[521] Nonetheless, although their rationale is not strong, several courts have construed this or other language in the statute to exclude post-sale acts.[522] Several decisions also hold that

503 La. Rev. Stat. Ann. § 51:1402(10).

504 *See* Slayton v. Davis, 901 So. 2d 1246 (La. Ct. App. 2005) (upholding finding of unfair act where defendant wrongfully repossessed plaintiff's car); Pelican Point Operations, L.L.C. v. Carroll Childers Co., 807 So. 2d 1171 (La. Ct. App. 2002) (upholding award of attorney fees under UDAP statute where defendant wrongfully repossessed plaintiff's property); Bryant v. Sears Consumer Fin. Corp., 617 So. 2d 1191 (La. Ct. App. 1993) (Louisiana's UDAP statute applies to wrongful repossession).

505 Me. Rev. Stat. tit. 5, § 206(3).

506 Me. Rev. Stat. tit. 5, § 207.

507 2000 WL 33675662 (Me. Super. Ct. Oct. 13, 2000).

508 Andrews & Lawrence Prof. Services, L.L.C. v. Mills, 223 A.3d 947, 950 (Md. 2020). *See also* Scull v. Groover, Christie & Merritt, P.C., 76 A.3d 1186 (Md. 2013) (applying statute to medical billing practices; rejecting contention that these practices fall within exemption for professional services).

509 Md. Code Ann., Comm. Law § 13-104(1).

510 Andrews & Lawrence Prof. Services, L.L.C. v. Mills, 223 A.3d 947 (Md. 2020). Earlier federal court decisions had held the statute inapplicable to attorneys who filed writs of garnishment seeking excess postjudgment interest and to a law firm that made calls to the consumer's workplace. Ben-Davies v. Blibaum & Assoc., P.A., 421 F. Supp. 3d 94 (D. Md. 2019); Hawkins v. Kilberg, 165 F. Supp. 3d 386 (D. Md. 2016).

511 *Id.*

512 Mass. Gen. Laws ch. 93A, § 2(a).

513 Mass. Gen. Laws ch. 93A, § 1(b) ("the advertising, the offering for sale, rent or lease, the sale rent, lease or distribution of any services and any property, tangible or intangible, real, personal, or mixed, . . . and any other article, commodity, or thing of value wherever situate").

514 *See, e.g.*, Kattar v. Demoulas, 739 N.E.2d 246, 257–258 (Mass. 2000); Schubach v. Household Fin. Co., 376 N.E.2d 140 (Mass. 1978). *But cf.* Beecy v. Pucciarelli, 441 N.E.2d 1035 (Mass. 1982) (unobligated consumer who was erroneously subject of debt collection was not protected by UDAP statute since consumer did not purchase goods or services from collector; goods or services requirement has since been removed from statute).

515 940 Mass. Code Regs. §§ 7.01 to 7.10.

516 Mich. Comp. Laws § 445.902(g).

517 321 F. Supp. 2d 825 (E.D. Mich. 2003). *But cf.* Rodriguez v. Due Process of Mich., Inc., 2008 WL 4449651, at *10 (E.D. Mich. Sept. 30, 2008) (UDAP statute does not apply to process servers who executed postjudgment execution, as they were not engaged in providing goods, property, or services to plaintiff).

518 Mich. Comp. Laws §§ 339.901 to 339.920 and 445.251 to 445.258.

519 Liss v. Lewiston-Richards, Inc., 732 N.W.2d 514 (Mich. 2007). *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.3.3.3.2 (9th ed. 2016).

520 Minn. Stat. § 325F.69.

521 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.2.2.1.2 (9th ed. 2016), *updated at* www.nclc.org/library.

522 *See* Thinesen v. JBC Legal Group, P.C., 2005 WL 2346991 (D. Minn. Sept. 26, 2005) (dismissing claims under Minn. Stat. § 325F.69, subdiv. 1, because there was insufficient relationship between sale of goods and attempts, six years later, to collect on check that buyer had used to

Minnesota's Deceptive Trade Practices Act[521] and its Unlawful Trade Practices Act[524] do not apply to debt collection.

Mississippi: Mississippi's UDAP statute prohibits unfair and deceptive practices as long as they are "in or affecting" commerce.[525] The statute defines "trade or commerce" broadly to include "advertising, offering for sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated."[526] However, one court held that the statute's private cause of action, which extends only to a person who "purchases or leases goods or services . . . and thereby suffers" a loss, is inapplicable to claims against a debt collector that did not itself provide goods or services to the consumer.[527] In any event, Mississippi's UDAP statute is extremely weak in many other respects, so is unlikely to provide a helpful remedy for deceptive or abusive debt collection tactics.

Missouri: A prohibited practice must be "in connection with the sale or advertisement of any merchandise in trade or commerce."[528] In 2018, the Missouri Supreme Court held that this language encompasses a third-party debt collector's attempts to enforce an alleged debt for dental services.[529] This conclusion is particularly clear, since the statute also provides that an unfair or deceptive practice is a violation "whether committed before, during or after the sale."[530]

A Missouri UDAP regulation declares it an unfair practice to threaten or file a civil suit on a consumer debt that is time-barred, that has been discharged in bankruptcy or declared void by a court, or that is fully satisfied.[531]

Montana: The Supreme Court of Montana held that the state's UDAP statute applies to "consumer loans by banks in the lending and collecting of such loans."[532]

Nebraska: The Nebraska Consumer Protection Act statute applies to acts "in the conduct of any trade or commerce."[533] A federal court has ruled that the statute applies to debt collection.[534] The court rejected arguments that the statute should be confined to antitrust issues and that debt collectors were exempt because they were subject to the licensing provisions of the state debt collection law.

Nevada: Nev. Rev. Stat. § 598.0915 prohibits deceptive trade practices in the course of the defendant's "business or occupation"—terms broad enough to include post-sale matters such as debt collection. Several of the substantive prohibitions, such as "us[ing] coercion, duress or intimidation in a transaction,"[535] "knowingly misrepresent[ing] the legal rights, obligations or remedies of a party to a transaction,"[536] and "knowingly mak[ing] any other false representation in a transaction"[537] would be applicable to abusive debt collection. A series of federal district court decisions[538] hold that the entire UDAP statute is limited to sales of goods and services, so does not apply to debt collection. However, this view has no support in the statute, which prohibits such practices as caller ID blocking, misrepresentation and non-disclosure in connection with investments, misrepresentation of the rights of the parties to a transaction, fraud in land installment contract sales, and many other topics that are inconsistent with a restriction of the entire statute to sales of goods and services.[539] The statute's limitation of certain prohibitions to sales of goods of services, while prohibiting knowingly taking advantage of a person's illiteracy, infirmity, or incapacity,[540] knowingly misrepresenting the rights of the parties to a transaction,[541] conducting a

pay for them); Baribeau v. Orthopedic Surgeons, Ltd., 1997 U.S. Dist. LEXIS 23426 (D. Minn. Feb. 18, 1997) (collection too attenuated from sale to be covered by Consumer Fraud Act).

523 Maneval v. Jon R. Hawks, Ltd., 1999 WL 33911242 (D. Minn. Oct. 13, 1999) (dismissing claim under Minn. Stat. § 325D.44, because debt collection is not similar to the Act's list of prohibited conduct); State *ex rel.* Swanson v. Messerli & Kramer, P.A., 2009 WL 1046869 (Minn. Ct. App. Apr. 21, 2009) (Minn. Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43 to 325D.48, does not apply to debt collection).

524 Thinesen v. JBC Legal Group, P.C., 2005 WL 2346991 (D. Minn. Sept. 26, 2005) (dismissing claims under Minn. Stat. § 325D.11 subdiv. 1 because defendant's collection letters do not make representations regarding goods or services so are not similar to statute's list of prohibited activities).

525 Miss. Code Ann. § 75-24-5(1).

526 Miss. Code Ann. § 75-24-3(b).

527 Lockey v. CMRE Fin. Services, Inc., 2011 WL 2971085 (S.D. Miss. July 20, 2011).

528 Mo. Rev. Stat. § 407.020(1).

529 Jackson v. Barton, 548 S.W.3d 263 (Mo. 2018). *See also* Conway v. Citimortgage, Inc., 438 S.W.3d 410 (Mo. 2014) (party's right to collect loan is part of credit transaction and is therefore "in connection with" loan).

530 Mo. Rev. Stat. § 407.020(1).

531 Mo. Code Regs. Ann. tit. 15, § 60-8.100.

532 Baird v. Norwest Bank, 843 P.2d 327, 334 (Mont. 1992). *See also* Jacobson v. Bayview Loan Servicing, L.L.C., 371 P.3d 397, 409–410 (Mont. 2016) (applying UDAP statute to collection and non-judicial foreclosure of mortgage loan); Curtis v. Citibank, 261 P.3d 1059 (Mont. 2011) (reversing decision that FCRA preempted UDAP claim against bank for referring debt to collection agency when it knew that consumer did not owe it); Entriken v. Motor Coach Fed. Credit Union, 845 P.2d 93 (Mont. 1992) (affirming UDAP treble damage award for wrongful repossession).

533 Neb. Rev. Stat. § 59-1602.

534 Hage v. Gen. Serv. Bur., 306 F. Supp. 2d 883 (D. Neb. 2003) (declining to grant defendant's motion for summary judgment because although defendant collection agency was generally regulated, its specific acts were not). *See also* Henggeler v. Brumbaugh & Quandahl, P.C., 2012 WL 2855104 (D. Neb. July 5, 2012) (applying state UDAP statute to deceptive debt collection by collection firm and creditor).

535 Nev. Rev. Stat. § 598.0923(4).

536 Nev. Rev. Stat. § 598.092(8). *But see* Carter v. Richland Holdings, Inc., 2018 WL 4566667 (D. Nev. Sept. 24, 2018) (mistakenly reading this prohibition to apply only to defendant who is original party to transaction, not to debt buyers or collection attorneys who misrepresent debtor's rights).

537 Nev. Rev. Stat. § 598.0915(15).

538 Carter v. Richland Holdings, Inc., 2018 WL 4566667 (D. Nev. Sept. 24, 2018) (prohibition against making false representations in transaction is inapplicable to debt buyer and collection attorney who did not enter into transaction with debtor); Marshall v. CBE Grp., Inc., 2018 WL 1567852 (D. Nev. Mar. 30, 2018); Gage v. Cox Commc'ns, Inc., 2017 WL 1536219 (D. Nev. Apr. 27, 2017); Peatrowsky v. Persolve, 2014 WL 1215061 (D. Nev. Mar. 24, 2014).

539 Nev. Rev. Stat. § 598.0918(4) (caller ID blocking), § 598.092(5) (investment opportunities), § 598.092(6) (investment fees), § 598.0923(5) (land contracts).

540 Nev. Rev. Stat. § 598.092(14).

541 Nev. Rev. Stat. § 598.092(8).

business or occupation without a required license,[542] and using coercion, duress, or intimidation in a transaction,[543] without limiting these prohibitions to sales of goods or services, is a strong indication that these more general prohibitions are not so limited. The fact that the statute defines wrongful repossession as an unfair act[544] should be sufficient in itself to establish that the statute applies to post-sale enforcement of the obligation.

New Hampshire: New Hampshire's UDAP statute broadly defines unfair and deceptive practices[545] and trade or commerce,[546] and there is no statutory exemption for post-sale acts. An unpublished state supreme court decision affirms a UDAP judgment against a car dealer for its collection practices, without mentioning any concerns about the scope of the statute.[547]

New Jersey: N.J. Stat. Ann. § 56:8-2 prohibits unlawful acts "in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of" the defendant. This broad language easily covers debt collection, and some courts have so ruled.[548] However, a number of decisions, some based on *dicta* in a non-germane state supreme court decision,[549] hold that debt collectors fall outside the statute's scope because they are not selling merchandise.[550]

New Mexico: N.M. Stat. Ann. § 57-12-2(C) defines "trade or commerce" to include "distribution" of "any property," "any services," or "any thing of value." Construing this language in light of N.M. Stat. Ann. § 57-12-2(D), which defines "unfair or deceptive trade practice" to include false or misleading statements "in connection with . . . the collection of debts," it is clear that that the statute applies to debt collection, and a number of cases have so ruled.[551] The private cause of action[552] is also not limited in a way that would exclude debt collection.

New York: N.Y. Gen. Bus. Law § 349(a) prohibits deception "in the conduct of any business, trade or commerce." This language is broad enough to include debt collection and other post-sale acts, and a number of courts have applied the statute to debt collection.[553] In addition, a practice that is a normal part of the collector's business meets the requirement imposed by New York courts that the defendant's acts be shown to have a broader impact on consumers at large.[554] The weakness of New York's UDAP statute, however, is that it only prohibits deception, not unfair practices, so a number of cases have refused to apply it to non-deceptive debt collection harassment.[555] Courts also hold that a violation of the state debt collection law, for which there is no private cause of action, cannot be framed as a UDAP violation.[556] Nonetheless, a free-standing claim of

542 Nev. Rev. Stat. § 598.0923(1).

543 Nev. Rev. Stat. § 598.0923(4).

544 Nev. Rev. Stat. § 598.092(10).

545 N.H. Rev. Stat. Ann. § 358-A:2.

546 N.H. Rev. Stat. Ann. § 358-A:1(II).

547 Rowe v. Condodemetraky, 2017 WL 1367208 (N.H. Feb. 15, 2017). *See also* Harris Wayside Furn. Co. v. Idearc Media Corp., 2007 WL 1847313 (D.N.H. June 25, 2007) (applying UDAP statute to debt collection).

548 Pollitt v. DRS Towing, L.L.C., 2011 WL 1466378, at *4 n.5 (D.N.J. Apr. 18, 2011) (statute applies to purchasers of defaulted debt); Whittingham v. Amended Mortgage Elec. Registration Services, Inc., 2007 WL 1456196, at *7–8 (D.N.J. May 15, 2007) (imposition of unjustified charges on mortgage loan). *See also* Manahawkin Convalescent v. O'Neill, 85 A.2d 947, 962 (N.J. 2014) (noting that nursing home's billing and collection functions likely do not fall within "learned professional" exception to UDAP statute, without otherwise addressing coverage of debt collection activity).

549 Gennari v. Weichert Co. Realtors, 691 A.2d 350, 365 (N.J. 1997) (stating in dicta that "the misrepresentation has to be one which is material to the transaction . . . made to induce the buyer to make the purchase"; case did not involve post-sale activities or examine the provision extending the statute to "subsequent performance").

550 Chulsky v. Hudson Law Offices, 777 F. Supp. 2d 823 (D.N.J. Mar. 22, 2011) (UDAP statute does not apply to debt buyers); Nicholls v. Portfolio Recovery Assoc., L.L.C., 2010 WL 1257738 (D.N.J. Mar. 29, 2010) (giving insufficient weight to broad "in connection with" language and construing statute to require that unlawful act induce consumer to enter into transaction); Boyko v. Am. Int'l Group, Inc., 2009 WL 5194431 (D.N.J. Dec. 23, 2009) (debt collection on behalf of person who sold merchandise is not sale of merchandise, so UDAP statute inapplicable); Joe Hand Promotions, Inc. v. Mills, 567 F. Supp. 2d 719, 723–724 (D.N.J. 2008) (collection activities are not "in connection with" underlying transaction); Depolink Court Reporting & Litig. Support Services v. Rochman, 64 A.3d 579 (N.J. Super. Ct. App. Div. 2013); Hoffman v. Encore Capital Group, Inc., 2008 WL 5245306 (N.J. Super. Ct. App. Div. Dec. 18, 2008) (affirming dismissal of claim regarding debt buyer's collection activities, on ground that it did not sell anything or induce consumers to incur any obligation).

551 Campos v. Brooksbank, 120 F. Supp. 2d 1271 (D.N.M. 2000) (refusing to dismiss UDAP claim against attorney for unfair collection practices); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995) (awarding treble damages where attorney sent false and misleading letter to debtors); Page & Wirtz Const. Co. v. Solomon, 794 P.2d 349, 353 (N.M. 1990) (phone call might have been covered by state UDAP statute if it "was an attempt to collect a debt").

552 N.M. Stat. Ann.§ 57-12-10.

553 *See* Fritz v. Resurgent Capital Serv., L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013); Rozier v. Fin. Recovery Sys., Inc., 2011 WL 2295116 (E.D.N.Y. June 7, 2011) (refusing to dismiss claim regarding deceptive debt collection letter); Boyd v. J.E. Robert Co., 2010 WL 5772892 (E.D.N.Y. Mar. 31, 2010), *adopted*, 2011 WL 477547 (E.D.N.Y. Feb. 2, 2011); Serin v. Northern Leasing Sys., Inc., 2009 WL 7823216 (S.D.N.Y. Dec. 18, 2009) (filing of frivolous lawsuits); Cyphers v. Litton Loan Servicing, L.L.P., 503 F. Supp. 2d 547 (N.D.N.Y. 2007) (denying defendant's motion for summary judgment on plaintiff's UDAP suit for unfair debt collection practices); Fontana v. C. Barry & Assoc., 2007 WL 2580490 (W.D.N.Y. Sept. 4, 2007) (awarding attorney fees to plaintiffs in successful UDAP suit for unfair debt collection practices); *In re* Scrimpsher, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) (seller's collection of bad check is part of its business, trade, or commerce or furnishing of service); Midland Funding, L.L.C. v. Giraldo, 961 N.Y.S.2d 743 (N.Y. Dist. Ct. 2013). *See also* Erdman v. HSBC Auto Fin., 2011 WL 3420849 (W.D.N.Y. Aug. 4, 2011) (refusing to dismiss UDAP claim against auto financing entity that dishonestly induced car buyer to settle his debt, but then sold balance of obligation to third parties).

554 Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013); Rozier v. Fin. Recovery Sys., Inc., 2011 WL 2295116 (E.D.N.Y. June 7, 2011) (deceptive letter mailed to many debtors). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.3.6 (9th ed. 2016), *updated at* www.nclc.org/library.

555 *See, e.g.*, Mascoll v. Strumpf, 2006 WL 2795175 (E.D.N.Y. Sept. 26, 2006) (no private right of action under state debt collection statute, and UDAP statute confers private right of action for debt collection violations only where consumer was deceived; not shown here where creditor continued collection action after learning of identity theft).

556 Conboy v. AT&T Corp., 241 F.3d 242, 257–258 (2d Cir. 2001).

deceptive debt collection is actionable under the UDAP statute, even if it overlaps with a possible violation of the debt collection statute.[557] Any other interpretation would be contrary to the UDAP statute's explicit statement that it "shall apply to all deceptive acts or practices declared unlawful, whether or not subject to any other law of this state."[558]

North Carolina: A portion of North Carolina's UDAP statute explicitly addresses debt collection.[559] If the debt collection provisions apply to the activity, however, then the consumer cannot make a separate claim under the general provisions of the UDAP statute.[560]

North Dakota: Although North Dakota courts have not addressed the question, it is reasonable to conclude that the statute applies to post-sale acts since they would occur "in connection with the sale . . . of any merchandise."[561] "Merchandise" is broadly defined as "any objects, wares, goods, commodities, intangibles, real estate, charitable contributions, or services."[562]

Ohio: Ohio Rev. Code Ann. § 1345.02(A) provides that unfair or deceptive acts are UDAP violations whether they occur before, during, or after the transaction. In 2016, the state supreme court held that the UDAP statute applies to a debt buyer and the law firm it hired to collect a debt, including their litigation activity.[563] The court held that the debt buyer and the collection firm met the statute's definition of "supplier" because their efforts to obtain payment from the debtor amounted to solicitation of a consumer transaction. It also rejected the defendants' argument that, since the transaction creating the debt—a credit card debt between the consumer and a bank—is exempt from the UDAP statute, then a non-bank's collection of that debt is also exempt. The court distinguished a 2013 decision[564] that had held the UDAP statute inapplicable to mortgage servicers. Many earlier decisions also hold that the statute applies to debt collection.[565]

Oklahoma: A number of federal district court decisions hold that the UDAP statute does not apply to debt collection and other post-sale acts.[566] These decisions appear to be inconsistent with Okla. Stat. tit. 15, § 752(13), which says that a prohibited deceptive trade practice "may occur before, during, or after a consumer transaction is entered into." In 2011, the legislature resolved the question by amending the UDAP statute to prohibit two specific practices on the part of debt collectors.[567] These prohibitions would be meaningless if the statute did not apply to debt collection. However, one decision mistakenly construes the amendment to subject debt collectors to the UDAP statute only if they commit the two specifically prohibited practices.[568] This view is untenable, because the specific prohibitions can apply to a debt collector only if the collector falls within the statute's general scope requirements. In 2017, the Oklahoma Supreme Court applied the statute to a creditor's post-sale collection activities, including false statements about whether it had received the debtor's payments,

557 Nick's Garage v. Progressive Cas. Ins. Co., 875 F.3d 107 (2d Cir. 2017) (N.Y. law) (UDAP claim is viable where plaintiff makes free-standing claim of deceptiveness even if it overlaps with a possible claim under another statute that is not independently actionable); Samms v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, L.L.P., 163 F. Supp. 3d 109 (S.D.N.Y. 2016) (demand for unauthorized fees violated UDAP statute; claim not barred by fact that this conduct was also forbidden by debt collection statute that provides no private remedy).

558 N.Y. Gen. Bus. Law § 349(g) (McKinney).

559 N.C. Gen. Stat. §§ 75-50 to 75-56. *See* Eley v. Mid/East Acceptance Corp., 614 S.E.2d 555 (N.C. Ct. App. 2005) (applying UDAP statute to repossession).

560 N.C. Gen. Stat. § 75-50(3). *See* DirecTV, Inc. v. Cephas, 294 F. Supp. 2d 760 (M.D.N.C. 2003) (exclusive remedy provision of debt collection act does not bar UDAP claim arising from collection of an obligation, here payment for alleged signal theft, that is not debt covered by debt collection statute).

561 N.D. Cent. Code § 51-15-02.

562 N.D. Cent. Code § 51-15-01(3).

563 Taylor v. First Resolution Inv. Corp., 72 N.E.3d 573 (Ohio 2016). *See also* Carlo v. Midwest Recovery Sys., L.L.C., 2018 WL 5267163 (N.D. Ohio Oct. 23, 2018) (UDAP statute applies to debt buyer even if it has no direct contact with consumer, but merely reports debt to credit reporting agency). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.2.2.1.3 (9th ed. 2016), *updated at* www.nclc.org/library (further discussion of Ohio issues).

564 Anderson v. Barclay's Capital Real Estate, Inc., 989 N.E.2d 997 (Ohio 2013) (mortgage servicing is not consumer transaction but is incidental to mortgage lending, which is exempt; also holding that mortgage servicer is not "supplier" as defined by UDAP statute because it does not affect or solicit consumer transactions).

565 *See, e.g.*, Turner v. Lerner, Sampson & Rothfuss, 776 F. Supp. 2d 498 (N.D. Ohio 2011) (applies to law firm's deceptive institution of foreclosure suit); Hagy v. Demers & Adams, L.L.C., 2011 WL 6091797 (S.D. Ohio Dec. 7, 2011); Edwards v. Velocity Invs., L.L.C., 2011 WL 4007394 (N.D. Ohio Sept. 8, 2011) (UDAP statute applies to attorney debt collectors); Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961 (N.D. Ohio 2009), *as modified by* 2009 WL 3086560 (N.D. Ohio Sept. 23, 2009); Evans v. Midland Funding L.L.C., 574 F. Supp. 2d 808, 817 (S.D. Ohio 2008); Delawder v. Platinum Fin. Services Corp., 443 F. Supp. 2d 942 (S.D. Ohio 2005) (denying motion to dismiss UDAP claim against collection firm); Havens-Tobias v. Eagle, 2003 WL 1601461 (Ohio Ct. App. Mar. 28, 2003); Celebrezze v. United Research, Inc., 482 N.E.2d 1260 (Ohio Ct. App. 1984); Santiago v. S.S. Kresge Co., 2 Ohio Op. 3d 54 (Ohio C.P. Cuyahoga Cty. 1976); Liggins v. May Co., 337 N.E.2d 816 (Ohio Ct. Com. Pl. 1975). *See also* Couto v. Gibson, Inc., 1992 WL 37800 (Ohio Ct. App. Feb. 26, 1992) (post-sale settlement practices).

566 Oklahoma *ex rel.* Bd. of Regents of U. of Oklahoma v. Greer, 205 F. Supp. 2d 1273 (W.D. Okla. 2001) (state UDAP statute does not apply to debt collectors); Melvin v. Credit Collections, Inc., 2001 WL 34047943 (W.D. Okla. Apr. 5, 2001); Melvin v. Nationwide Debt Recovery, 2000 WL 33950122 (W.D. Okla. Aug. 24, 2000). *See also* Terry v. Nuvell Credit Corp., 2007 WL 2746919 (W.D. Okla. Sept. 20, 2007) (unlawful repossession does not constitute consumer transaction within meaning of act).

567 Okla. Stat. tit. 15, § 753(31), (32).

568 Walkabout v. Midland Funding L.L.C., 2015 WL 2345308 (W.D. Okla. May 14, 2015) (grafting onto statute limiting statement from pre-amendment case; holding, without support in the statutory language, that it applies to debt collectors only when they violate one of two new specific prohibitions). *See also* Denton v. Seterus, Inc., 2019 WL 6721643, at *8–9 (N.D. Okla. Mar. 14, 2019) (holding statute inapplicable to debt collection; noting this amendment in footnote, but failing to consider its implications for scope of statute).

and obstruction of the debtor's attempts to catch up and avoid repossession.[569]

Oregon: Or. Rev. Stat. § 646.607(1) specifically prohibits unconscionable tactics in "collection or enforcement of an obligation." The state supreme court has held that this prohibition applies to third-party collectors, even though the consumer is not their "customer."[570] However, the statute does not provide a private cause of action to enforce this prohibition.[571] On the other hand, Or. Rev. Stat. § 646.639, part of the UDAP statute, prohibits certain specific unlawful debt collection practices and is subject to a separate private cause of action.[572]

Pennsylvania: Pennsylvania's UDAP statute applies to trade or commerce, defined broadly.[573] A number of decisions have held that the statute applies to debt collection.[574] The state debt collection statute provides that a debt collector's violation of any of its provisions constitutes a violation of the UDAP statute.[575]

Rhode Island: R.I. Gen. Laws § 6-13.1-2 prohibits unfair or deceptive acts or practices "in the conduct of any trade or commerce." "Trade or commerce" is broadly defined by R.I. Gen. Laws § 6-13.1-1(5) to include "the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real personal, or mixed, and any other article, commodity, or thing of value." These terms are broad enough to cover post-sale practices such as debt collection. The only issue is the extremely broad interpretation that Rhode Island courts have given to the statutory exemption for regulated industries at R.I. Gen. Laws § 6-13.1-4.[576] Since Rhode Island has a debt collection practices statute that requires debt collectors to register, and imposes a number of restrictions on their practices,[577] it is conceivable that courts might find that the existence of this statute exempts debt collectors from the UDAP statute. However, since the debt collection practices statute does not apply to creditors collecting their own debts, the debt collection practices statute would not be a basis to exempt them.

South Carolina: South Carolina's UDAP statute applies to practices "in the conduct of any trade or commerce,"[578] a term that is broadly defined.[579] Debt collection appears to be covered by the statute, and several courts have applied the statute to debt collection.[580]

South Dakota: S.D. Codified Laws § 37-24-6(1) prohibits deceptive acts "in connection with the sale . . . of any merchandise." The term "merchandise" is broadly defined.[581] Although South Dakota courts have not addressed the issue, the broad language "in connection with" would appear to cover post-sale acts such as debt collection as long as the transaction involves "merchandise."

Tennessee: The Tennessee Supreme Court has held that the state UDAP statute, which prohibits unfair or deceptive acts "affecting" the conduct of any trade or commerce,[582] applies to debt collection as long as the underlying transaction falls within the statute's scope.[583] The court distinguished its earlier decision, *Pursell v. First American National Bank*,[584] which held that a repossession dispute did not fall within the UDAP statute's definition of "trade" or "commerce," as confined to its particular facts.

Texas: Tex. Bus. & Com. Code § 17.45(6), defining trade or commerce, is broad enough to include post-sale acts such as debt collection. However, the underlying debt must fall within the statute's scope, so the statute does not apply to collection of a debt that arises from a credit transaction that is not connected to the purchase of goods or services.[585] The statute's

569 Green Tree Servicing L.L.C. v. Dalke, 405 P.3d 676 (Okla. 2017). *See also* Hurt v. Vanderbilt Mortg. & Fin., Inc., 2019 WL 3069437 (W.D. Okla. July 12, 2019) (refusing to dismiss claim based on collection of debt arising from credit sale of manufactured home). *But cf.* Denton v. Seterus, Inc., 2019 WL 6721643 (N.D. Okla. Mar. 14, 2019) (holding statute inapplicable to debt collection, without citing *Green Tree*).

570 Gordon v. Rosenblum, 393 P.3d 1122 (Or. 2017). *Accord* Russell v. Ray Klein, Inc., 2019 WL 6137455 (D. Or. Nov. 19, 2019) (UDAP statute applies to debt buyer and its in-house attorney who issued garnishment to debtor's employer that sought unauthorized attorney fee).

571 Or. Rev. Stat. § 646.638(1) (creating private cause of action only for violation of § 646.608, not § 646.607). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.2.1 (9th ed. 2016), *updated at* www.nclc.org/library.

572 Or. Rev. Stat. § 646.641. *See also* Or. Rev. Stat. § 646.607(6) (collection practice that is unlawful under Or. Rev. Stat. § 646.639 is UDAP violation).

573 73 Pa. Stat. Ann. § 201-2(3) (West).

574 *See, e.g.*, Trunzo v. Citi Mortgage, 876 F. Supp. 2d 521 (W.D. Pa. 2012) (UDAP statute applies to assignee's collection efforts); Daniels v. Baritz, 2003 WL 21027238, at *5 (E.D. Pa. Apr. 30, 2003); Flores v. Shapiro & Kreisman, 246 F. Supp. 2d 427 (E.D. Pa. 2002); Pennsylvania Bankers Ass'n v. Commonwealth, 427 A.2d 730 (Pa. Commw. Ct. 1981); Pennsylvania Retailers Ass'n v. Lazin, 426 A.2d 712 (Pa. Commw. Ct. 1981).

575 73 Pa. Stat. Ann. § 2270.5 (West). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 3.2.6 (9th ed. 2016), *updated at* www.nclc.org/library.

576 *See, e.g.*, Chavers v. Fleet Bank, 844 A.2d 666 (R.I. 2004). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.3.3.3.2 (9th ed. 2016), *updated at* www.nclc.org/library.

577 R.I. Gen. Laws §§ 19-14.9-1 through 19-14.9-14.

578 S.C. Code Ann. § 39-5-20.

579 S.C. Code Ann. § 39-5-10(b).

580 Beattie v. Nations Credit Fin. Services Corp., 69 Fed. Appx. 585 (4th Cir. 2003) (UDAP statute applies to defendant that pursued collection and foreclosure on an account that had been satisfied; exemption for transactions permitted under laws administered by regulatory body inapplicable since no state agency had approved this practice); Craig v. Andrew Aaron & Assoc., Inc., 947 F. Supp. 208 (D.S.C. 1996) (refusing to grant summary judgment to collector on UDAP claim involving harassing collection calls); *In re* Daniel, 137 B.R. 884 (D.S.C. 1992).

581 S.D. Codified Laws § 37-24-1(7).

582 Tenn. Code Ann. § 47-18-104(a).

583 Franks v. Sykes, 600 S.W.3d 908, 915 (Tenn. 2020).

584 937 S.W.2d 838 (Tenn. 1996).

585 *See, e.g.*, Marquez v. Fed. Nat'l Mortgage Ass'n, 2011 WL 3714623, at *4 (N.D. Tex. Aug. 23, 2011) (UDAP statute is limited to goods and services and does not apply to collection of mortgage loan); Henry v. CitiMortgage, Inc., 2011 WL 2261166 (E.D. Tex. May 10, 2011) (UDAP statute inapplicable to collection of debt arising from loan), *adopted*, 2011 WL 2214007 (E.D. Tex. June 7, 2011); Cushman v. GC Services, L.P., 657 F. Supp. 2d 834 (S.D. Tex. 2009) (UDAP statute inapplicable to credit card, so does not cover collection of credit card debt), *aff'd*, 397 Fed. Appx. 24 (5th Cir. 2010); Mitchell v. Chase Home Fin., L.L.C., 2008 WL 623395 (N.D. Tex. Mar. 4, 2008) (UDAP statute, which is

prohibitions against deception and unconscionability are also broad. In *EMC Mortgage Corp. v. Jones*, a Texas appellate court upheld an award for damages based in part on a UDAP claim for unreasonable collection practices.[586]

Utah: Utah Code Ann. §§ 13-11-4(1) and 13-11-5(1) define deceptive and unconscionable acts or practices as violations whether they occur before, during, or after the transaction. The statute also defines a "supplier" subject to the statute to include a person who "enforces consumer transactions."[587] A Tenth Circuit decision holds that the statute covers debt collection.[588]

Vermont: Vt. Stat. Ann. tit. 9, § 2453 broadly prohibits unfair or deceptive acts or practices "in commerce." There is no language in the statute that would limit "commerce" to exclude post-sale acts. Further, Vt. Stat. Ann. tit. 9, § 2451a(a) broadly defines "consumer" as "any person who purchases, leases, contracts for, or otherwise agrees to pay consideration for" goods or services. The language "agrees to pay consideration for" also suggests coverage of post-sale collection practices. The private cause of action set forth at Vt. Stat. Ann. tit. 9, § 2461(b) is not limited in any way that would preclude suit based on post-sale acts. In addition, the Vermont Attorney General has adopted regulations under the UDAP statute regarding debt collection practices.[589]

Virginia: Virginia courts have not ruled on the question whether the UDAP statute applies to debt collection. The statute's prohibitions apply to acts "in connection with" a consumer transaction,[590] which would seem to cover post-sale matters such as debt collection. However, the exclusion at Va. Code § 59.1-199(C) for aspects of consumer transactions that are regulated by the federal Consumer Credit Protection Act could be construed to exempt debt collectors who are subject to the Fair Debt Collection Practices Act, which is a subchapter of the CCPA. Even in that case, the statute would still apply to collection activities by the original creditor, since the FDCPA does not apply when the original creditor is collecting its own debt in its own name.[591]

Washington: Wash. Rev. Code §§ 19.86.010(2) and 19.86.010(3), which define "trade," "commerce," and "asset" broadly, are clearly broad enough to include post-sale acts, and neither the section prohibiting unfair and deceptive acts, nor the section creating a private cause of action, is worded in a way that would exclude post-sale acts. The state supreme court has held the statute applicable to collection activities.[592] The state debt collection statute also provides that a violation of it constitutes a violation of the UDAP statute.[593]

West Virginia: Both the state UDAP statute and a set of specific debt collection protections[594] are part of the West Virginia Consumer Credit and Protection Act. The state supreme court has held that these protections apply regardless of whether a creditor is collecting its own debt or is using an independent collection agency.[595]

Wisconsin: One of Wisconsin's UDAP statutes, Wis. Stat. Ann. § 100.18, only forbids false advertising (although it defines advertising quite broadly).[596] A second UDAP statute, Wis. Stat. Ann. § 100.20, applies to "business and trade," which is clearly broad enough to include debt collection. However, a private cause of action is available only if the defendant violated one of the specific UDAP regulations, and none of the UDAP regulations target debt collection practices. As a result, section 100.20 is not usually of use to consumers in debt collection matters.

Wyoming: Under Wyo. Stat. Ann. § 40-12-105(a), a deceptive act need only be "in connection with" a consumer transaction, and the private cause of action is not worded in a way that would exclude post-sale acts.[597] However, Wyoming courts have not yet addressed this question.

16.3.4 Deceptive Debt Collection Activities

Numerous collection activities have been found to be "deceptive" under state UDAP statutes, including:

- Sending consumers dunning letters that appear to have been issued by the government;[598]

limited to goods and services, does not cover collection of home mortgage debt).

586 252 S.W.3d 857 (Tex. App. 2008). *See also* Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705 (Tex. 1984) (applies to foreclosure); Kheir v. Progressive County Mut. Ins. Co., 2006 WL 1594031 (Tex. App. June 13, 2006) (upholding UDAP damages award for wrongful repossession); Nelson v. Schanzer, 788 S.W.2d 81 (Tex. App. 1990) (UDAP statute applies to moving and storage company hired by sheriff to move evicted tenant's belongings, because underlying transaction was consumer transaction).

587 Utah Code Ann. § 13-11-3(6) (West).

588 Heard v. Bonneville Billing & Collections, 216 F.3d 1087 (10th Cir. 2000) (Utah law) (debt collector's practice was deceptive and unconscionable in violation of Utah Code Ann. §§ 13-11-4 and 13-11-5). *Accord* Sexton v. Poulsen & Skousen P.C., 372 F. Supp. 3d 1307 (D. Utah 2019); Reid v. LVNV Funding, L.L.C., 2016 WL 247571 (D. Utah Jan. 20, 2016); Martinez v. Johnson, 2013 WL 1031363 (D. Utah Mar. 14, 2013) (applies to attorney collector); Brown v. Constantino, 2009 WL 3617692 (D. Utah Oct. 27, 2009) (UDAP statute applies to attorney collector). *See also* Naranjo v. Cherrington Firm, L.L.C., 285 F. Supp. 3d 1242, 1246 (D. Utah 2018) (application of UDAP statute to debt collection is not displaced by FDCPA).

589 Vt. Consumer Protection Rules, Vt. Admin. Code 3-2-103:CP104.

590 Va. Code Ann. § 59.1-200.

591 *See* § 4.8.1, *supra*.

592 Panag v. Farmers Ins. Co., 204 P.3d 885 (Wash. 2009) (UDAP statute applies to attempts by collection agency for other driver's insurance company to collect subrogated debt from alleged tortfeasor); Evergreen Collectors v. Holt, 803 P.2d 10, 14 (Wash. Ct. App. 1991) (violation of collection agency act is *per se* UDAP violation).

593 Wash. Rev. Code § 19.16.440.

594 W. Va. Code §§ 46A-2-122 to 46A-2-129a.

595 Thomas v. Firestone Tire & Rubber Co., 266 S.E.2d 905 (W. Va. 1980). *See also* State *ex rel.* McGraw v. Telecheck Services, Inc., 582 S.E.2d 885, 897 n.20 (W. Va. 2003).

596 Scheunemann v. J.C. Christensen & Assoc., Inc., 802 F. Supp. 2d 981 (E.D. Wis. 2011) (section 100.18 applies only to sales promotions, not debt collection).

597 Wyo. Stat. Ann. § 40-12-108.

598 State v. O'Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980) (false threats of suit, arrest and credit reports; simulated legal documents); Thomas v. Sun Furniture Co., 399 N.E.2d 567 (Ohio Ct. App. 1978) ("Notice of Court Action to Collect Debt" designed to be sent after

- Misrepresenting the imminence of suit;[599]
- Falsely implying that a referral to an attorney had occurred or would occur;[600]
- Deceptively implying that an obligation is already fixed beyond reasonable dispute and that immediate payment is the only reasonable course of action;[601]
- Threatening to enforce illegal or unenforceable contracts;[602]
- False threats of criminal prosecution;[603]
- Threatening to invoke criminal or civil penalties for dishonored checks under inapplicable statutes;[604]
- Exaggerating the creditor's contractual or legal remedies;[605]

judgment was simulated process when sent prior to suit); Liggins v. May Co., 373 N.E.2d 404 (Ohio Ct. Com. Pl. 1977). *See also* §§ 7.2.9, 7.2.13, 16.2.4.4, *supra*.

599 Caputo v. Prof'l Recovery Services, Inc., 261 F. Supp. 2d 1249 (D. Kan. 2003) (denying collector's motion for summary judgment; representing that debtor would be summoned to court in twenty-four hours was unconscionable); Wright v. Asset Acceptance Corp., 2000 WL 33216031 (S.D. Ohio Dec. 30, 1999) (threat to sue debtor could be misrepresentation of imminence of suit if collector did not own debt); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995) (statement that agency could file suit within thirty days was deceptive where agency was not licensed in New Mexico and its usual practice of taking assignments of debts and suing on them was forbidden by New Mexico law; attorney's violations were "knowing" where he designed form letters, even though he did not approve sending of each letter); Wagner v. Am. Nat'l Educ. Corp., 1983 U.S. Dist. LEXIS 10287 (D. Conn. Dec. 30, 1983) (misrepresenting meaning of "final" demand letters may be UDAP violation); *In re* Belile, 209 B.R. 658 (Bankr. E.D. Pa. 1997) (letter threatening referral to collection agency's legal department falsely implied imminent legal action, in violation of UDAP statute, because agency's lawyer was not admitted in consumer's home state and had not affiliated with local lawyer); State v. O'Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980) (false threats of suit, arrest and credit reports; simulated legal documents); Liggins v. May Co., 373 N.E.2d 404 (Ohio Ct. Com. Pl. 1977). *See also* Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007) (affirming judgment under FTC Act and FDCPA against collector who threatened consumers who wrote dishonored checks but never in fact prosecuted); Trans World Accounts, Inc. v. Fed. Trade Comm'n, 594 F.2d 212 (9th Cir. 1979) (threat of suit unfair and deceptive under FTC Act); *In re* Capax, Inc., 91 F.T.C. 1048 (F.T.C. 1978), *aff'd per curiam*, 607 F.2d 493 (D.C. Cir. 1979) ("exhaust every legal avenue" and "all possible legal means"; flat rate collector lacked authority from creditors to sue). *But cf.* Madonna v. Academy Collection Serv., Inc., 1997 WL 530101 (D. Conn. Aug. 12, 1997) (threat of legal action was not deceptive where creditor sometimes sued under similar circumstances and litigation had not been ruled out though probability of suit was low). *See generally* §§ 7.2.2, 7.2.4, 7.2.5, 7.2.10, 7.3, 7.3.5, *supra*.

600 Spicer v. Lenahan, 2004 WL 3112554 (D. Conn. Sept. 14, 2004) (attorney violated UDAP statute by allowing collector to use his letterhead); Caputo v. Prof'l Recovery Services, Inc., 261 F. Supp. 2d 1249 (D. Kan. 2003) (denying collector's motion for summary judgment; misrepresenting that attorney had considered specific actions and was ready to take them was unconscionable); Smith v. Short Term Loans, L.L.C., 2001 WL 127303 (N.D. Ill. Feb. 9, 2001) (consumers stated claim against in-house attorney who sent out collection letters on his letterhead, leading unsophisticated consumer to think third party was involved); Irwin v. Mascott, 112 F. Supp. 2d 937 (N.D. Cal. 2000) (misrepresentation of attorney involvement violates California Unfair Competition Law); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995) (collection agency and attorney liable under state UDAP statute for sending letter falsely purporting to be from attorney); Bennett v. Tri-State Collection Serv., 1976 WL 38806 (Ohio Ct. Com. Pleas Aug. 24, 1976). *But cf.* Waters v. J.C. Christensen & Assoc., Inc., 2011 WL 1344452 (D. Mass. Mar. 4, 2011) (Mag. recommendation) (collector's threat to refer matter to attorney was truthful), *adopted*, 2011 WL 1344544 (D. Mass. Mar. 22, 2011).

601 Panag v. Farmers Ins. Co., 204 P.3d 885 (Wash. 2009) (driver's obligation to pay a motor vehicle tort claim). *See generally* §§ 7.2.5, 7.3, *supra*.

602 CFPB v. NDG Fin. Corp., 2016 WL 7188792, at *13 (S.D.N.Y. Dec. 2, 2016) (refusing to dismiss claim that representing to consumers that they owed repayment of loans that were actually void under state's usury and lender licensing laws is unfair practice); CFPB v. CashCall, Inc., 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (granting CFPB's motion for summary judgment on claim that defendant's conduct in servicing and collecting loans that were void or unenforceable was deceptive because it created impression that loans were enforceable and that borrowers were obligated to repay them); O'Rourke v. Lahda, 2000 WL 1624833 (Conn. Super. Ct. Sept. 22, 2000) (fact question whether state UDAP statute violated by attempt to foreclose mortgage that was unenforceable because lender and broker were unlicensed); Peel v. Credit Acceptance Corp., 408 S.W.3d 191 (Mo. Ct. App. 2013) (upholding punitive damage award against assignee of retail installment contract that continued to demand payment and threaten to disable vehicle, even though debt was void and FTC holder notice made assignee liable for dealer's fraud). *See also* Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783, 810 (S.D. Ohio 2006) (filing debt collection suits while lacking legal authority because of failure to comply with state fictitious name laws or obtain valid assignment of debt). *But cf.* DuFour v. Be L.L.C., 291 F.R.D. 413 (N.D. Cal. 2013) (unknowingly seeking collection on contracts that are voidable rather than void is not UDAP violation); Lalande Air & Water Corp. v. Pratt, 795 A.2d 1233 (Vt. 2002) (manufactured home park's attempt to collect rent, to which it believed itself entitled, not oppressive enough to be unfair practice, where Commissioner had denied full amount of rent increase, but decision was on appeal, and statute was being challenged as unconstitutional).

603 *See, e.g.*, Caputo v. Prof'l Recovery Services, Inc., 261 F. Supp. 2d 1249 (D. Kan. 2003); DirecTV, Inc. v. Cephas, 294 F. Supp. 2d 760 (M.D.N.C. 2003); Brown v. C.I.L., Inc., 1996 WL 164294 (N.D. Ill. Apr. 1, 1996); Tex. Bus. & Comm. Code § 17.46(b)(28)(B).

604 *See, e.g.*, Jones v. Kunin, 2000 WL 34402017 (S.D. Ill. May 1, 2000) (payday lender threatened to seek damages under civil bad check statute, which did not apply to postdated checks known to be bad when written); Irwin v. Mascott, 112 F. Supp. 2d 937 (N.D. Cal. 2000) (collector of NSF checks sought damages under statute aimed at shoplifters and under civil bad check law without following required procedure); Hartke v. Illinois Payday Loans, Inc., 1999 U.S. Dist. LEXIS 14937 (C.D. Ill. Sept. 13, 1999) (payday lender's reference to "statutory penalties, attorney fees and costs" was misleading enough to state claim under Illinois Consumer Fraud Act, where Illinois bad check statute inapplicable to postdated checks which payee knew were bad when written); Turner v. E-Z Check Cashing, 35 F. Supp. 2d 1042, 1051 (M.D. Tenn. 1999) (threat to prosecute under bad check law, which was inapplicable to postdated checks which payee knew to be bad when written, violated Tennessee Consumer Protection Act); Hamilton v. York, 987 F. Supp. 953 (E.D. Ky. 1997) (threatening criminal prosecution under bad check laws, where "check cashing" transaction was really usurious loan). *See generally* National Consumer Law Center, Collection Actions Ch. 8 (5th ed. 2020), *updated at* www.nclc.org/library (criminal and civil penalties for dishonored checks).

605 Davis v. Hunt, Leibert, Jacobson, P.C., 2014 WL 5798585, at *7 (D. Conn. Nov. 7, 2014) (refusing to dismiss claim that collection firm violated state UDAP statute by demanding that family vacate home, without advising them that it had not obtained the court order necessary to give it the right to possession); Harrington v. CACV of Colorado, L.L.C., 508 F. Supp. 2d 128 (D. Mass. 2007) (denying motion to dismiss claim that collector took action that could not legally be taken by filing suit in distant forum and without having registered as foreign

- Misrepresenting that ownership of a debt had been transferred to the collector;[606]
- Making false statements in documents filed in court;[607]
- Collecting or demanding an amount greater than actually owed;[608]

corporation); Spicer v. Lenahan, 2004 WL 3112554 (D. Conn. Sept. 14, 2004) (misrepresenting that simple collection action was "federal matter"); Calabrese v. CSC Holdings, Inc., 283 F. Supp. 2d 797 (E.D.N.Y. 2003) (accusing consumer of stealing cable program, and representing that ordering or possessing decoder can be basis of civil claim); Caputo v. Prof'l Recovery Services, Inc., 261 F. Supp. 2d 1249 (D. Kan. 2003) (denying collector's motion for summary judgment; threat to prosecute debtor criminally and put lien on everything he owned was unconscionable); Gervais v. O'Connell, Harris & Assoc., 297 F. Supp. 2d 435 (D. Conn. 2003) (misrepresenting that debtor had made token payment that restarted statute of limitations was CUTPA violation); Littledove v. JBC & Assoc., 2001 WL 42199 (E.D. Cal. Jan. 11, 2001) (allowing California § 17200 class action to go forward against large volume collector whose form letters allegedly threatened loss of driver's license and excessive fees, not permitted by California law); Edwards v. McCormick, 136 F. Supp. 2d 795 (S.D. Ohio 2001) (threat to foreclose, when foreclosure was forbidden by statute, was UDAP violation); Tenuto v. Transworld Sys., 2000 U.S. Dist. LEXIS 14344 (E.D. Pa. Sept. 29, 2000) (allowing class action under Pennsylvania UDAP statute to go forward with allegations that creditor threatened garnishment, which Pennsylvania law forbids in most consumer cases); Dixon v. Brooks, 604 S.W.2d 330 (Tex. App. 1980) (seller under contract for deed threatened to terminate contract without providing statutorily required notice); Evergreen Collectors v. Holt, 803 P.2d 10 (Wash. Ct. App. 1991) (threatening to collect attorney fees, when not entitled to them, is violation of collection agency law and therefore also UDAP violation). *See also* Tomlinson v. Ocwen Loan Servicing, L.L.C., 2017 WL 3873754, at *3 (D. Kan. Sept. 5, 2017) (noting in *dicta* that asserting that creditor can garnish wages that are exempt is violation of UDAP statute); Clarkson v. DeCaceres, 105 B.R. 266 (Bankr. E.D. Pa. 1989) (landlord's sale of tenant's property without any legal right to do so was false representation of character of debt and that action could be taken); Cais v. Citizens Sav. Bank, 2001 WL 1200870 (Conn. Super. Ct. Sept. 17, 2001) (allegation that bank brought foreclosure in effort to coerce payment of sums not yet due stated UDAP claim for CUTPA violation as well as abuse of process); Peel v. Credit Acceptance Corp., 408 S.W.3d 191 (Mo. Ct. App. 2013) (upholding punitive damage award against assignee of retail installment contract that continued to demand payment and threaten to disable vehicle even though debt was void and FTC holder notice made assignee liable for dealer's fraud); Leal v. Furniture Barn, Inc., 571 S.W.2d 864 (Tex. 1978) (threats to retain funds in layaway account, contrary to contract, were deceptive); CFPB, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, CFPB Bulletin 2013-07 (July 13, 2013), *available at* http://files.consumerfinance.gov (threats of actions that are not intended or that collector does not have authorization to pursue are examples of unfair, deceptive, or abusive practices). *But cf.* Smith v. Butler & Assoc. (*In re* Smith), 2008 WL 4148923 (Bankr. D. Kan. Aug. 29, 2008) (where UDAP statute requires willfulness or knowledge, attempting to collect debt not UDAP violation where collector was unaware of bankruptcy stay). *See generally* § 7.4.1, *supra*.

606 Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013) (denying motion to dismiss claim that misrepresentation of ownership of debt and licensure was deceptive); Wright v. Asset Acceptance Corp., 2000 WL 33216031 (S.D. Ohio Dec. 30, 1999) (denial of summary judgment); Communications Sys., Inc. v. Ceruzzi, 2002 WL 207557 (Conn. Super. Ct. Jan. 17, 2002) (collector, who was not current holder of note, claimed that it was, and began sending invoices; fraudulent nondisclosure sufficiently alleged). *See also* Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783, 810 (S.D. Ohio 2006) (filing debt collection suits while lacking legal authority because of failure to comply with state fictitious name laws or obtain valid assignment of debt). *But cf.* Trent v. Mortgage Elec. Registration Sys., Inc., 2007 WL 2120262 (M.D. Fla. July 20, 2007) (not deceptive to identify foreclosure plaintiff, which was merely nominee for note holder, as creditor), *aff'd*, 288 Fed. Appx. 571 (11th Cir. 2008).

607 Morales v. Kavulich & Assoc., 294 F. Supp. 3d 193 (S.D.N.Y. 2018) (false statement in bank account garnishment notice that consumer was judgment debtor violates UDAP statute); Guzman v. Mel S. Harris & Assoc., 2018 WL 1665252, at *12 (S.D.N.Y. Mar. 22, 2018) (allowing consumer to proceed to trial on claim that collector violated UDAP statute by submitting false affidavits of service and of merit); Maxwell v. St. Francis Health Ctr., 2017 WL 4037732 (D. Kan. Sept. 13, 2017) (refusing to dismiss claim that defendants committed deceptive act by filing false affidavits re whether debtor was in military, but holding that this act did not rise to level of unconscionability); Winslow v. Forster & Garbus, L.L.P., 2017 WL 6375744, at *13 (E.D.N.Y. Dec. 13, 2017) (falsely stating in complaint that plaintiff was original creditor); DeWan v. Seideman, 2017 WL 6048816 (S.D.N.Y. Dec. 5, 2017) (allowing debtor to amend complaint to allege that creditor committed deceptive practice by falsely stating in collection action that it was authorized to do business in New York); Reynolds v. Credit Mgmt. Services, Inc., 2016 WL 756469 (D. Neb. Feb. 25, 2016) (UDAP liability is fact question where collector's attorney filed wage garnishment affidavit stating that she had good reason to believe and did believe that debtor was not head of household who would be entitled to protection of greater amount of his wages from garnishment; collector may have had policy of filing such affidavits without any knowledge of facts); Osborn v. J.R.S.-I., Inc., 949 F. Supp. 2d 807 (N.D. Ill. 2013) (refusing to dismiss claim that collector committed unfair act by submitting affidavit to court stating that debt buyer's employee was familiar with the facts and that identity theft victim owed the debt, when debt buyer had acquired only a list of debts with minimal information); Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013) (misrepresentation of ownership of debt and licensure); Sykes v. Mel Harris & Assoc., 757 F. Supp. 2d 413 (S.D.N.Y. 2010) (refusing to dismiss claim that collection firm violated UDAP statute by filing robosigned affidavits of merit that falsely claimed personal knowledge); Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961 (N.D. Ohio 2009), *as modified by* 2009 WL 3086560 (N.D. Ohio Sept. 23, 2009) (filing affidavit in collection suit that falsely stated that it was based on personal knowledge is UDAP violation); Midland Funding, L.L.C. v. Giraldo, 961 N.Y.S.2d 743 (N.Y. Dist. Ct. 2013) (filing collection suit containing false allegations of liability is deceptive); Estrada v. Mendoza, 275 P.3d 1024 (Utah Ct. App. 2012) (reversing judgment for payday lenders that misrepresented amounts due when they obtained writs of garnishment from small claims court; claim not barred by debtors' failure to file objections in small claims court). *But see* McCarthy v. WPB Partners, L.L.C., 2016 WL 4014581 (D.N.H. July 26, 2016) (lender not engaged in trade or commerce in its communications with bankruptcy court, so UDAP statute inapplicable). *But cf.* Healy v. BWW Law Group, L.L.C., 2017 WL 281997 (D. Md. Jan. 23, 2017) (collection firm's filing of robosigned foreclosure complaint did not amount to attempting to enforce right with knowledge that right did not exist, because robosigning affected only manner of collecting debt, not right to do so).

608 Sanchez v. Ehrlich, 2018 WL 2084147 (S.D.N.Y. Mar. 29, 2018) (demanding rent not owed); Scott v. Greenberg, 2017 WL 1214441 (E.D.N.Y. Mar. 31, 2017) (collection firm's repeated filing of fraudulent collection actions); Douyon v. NY Med. Health Care, P.C., 894 F. Supp. 2d 245 (E.D.N.Y. 2012) (demanding interest that is not owed is UDAP violation; fact that parties could have agreed that debt would bear interest is no defense); Adams v. A. & S. Collection Assoc., Inc., 2007 WL 2206936 (D. Conn. July 30, 2007) (recommending award of $10,000 punitive damages on UDAP claim where collector required creditor to

- Misstating the amount owed;[609]
- Representing or implying that a non-debtor is responsible for a debt;[610]
- Falsely promising that a lump-sum payment will settle the entire debt;[611]
- Impersonating a law enforcement officer;[612]
- Sending simulated telegrams;[613]
- Misrepresenting that a call to a stated telephone number would reach the creditor, when calls were actually routed to a debt collector;[614]
- Repeatedly re-reporting a disputed debt as undisputed;[615]

add illegal 49% collection fee and 18% interest to claims before sending them to collection), *adopted*, 2007 WL 9747652 (D. Conn. Aug. 30, 2007); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783, 810 (S.D. Ohio 2006) (suing for attorney fees to which creditor was not entitled, and attempting to recover court costs in absence of valid judgment); Garner v. Academy Collection Serv., 2005 WL 643680 (N.D. Ga. Mar. 11, 2005) (allowing plaintiff to proceed on claim that defendant attempted to collect debt that had been paid); Williams v. Edelman, 408 F. Supp. 2d 1261 (S.D. Fla. 2005) (allowing plaintiff to proceed on claim that defendants attempted to collect condo fees that she did not owe); Hage v. Gen. Serv. Bureau, 2002 WL 1796575 (D. Neb. Aug. 5, 2002) (collecting postjudgment costs and collection attorney fees prejudgment in violation of Neb. law stated claim under Neb. UDAP statute); Ballard v. Equifax Check Services, Inc., 27 F. Supp. 2d 1201 (E.D. Cal. 1998) (UDAP violation to attempt to collect $20 bad check fee that was not authorized by contract or law), *summary judgment for class granted by* 158 F. Supp. 2d 1163 (E.D. Cal. 2001); Garland v. Mobil Oil Co., 340 F. Supp. 1095 (N.D. Ill. 1972) (threatening to assess monthly service charge on past due accounts, when in fact none was charged, violates Illinois UDAP statute); Jungkurth v. Eastern Fin. Services, Inc., 74 B.R. 323 (Bankr. E.D. Pa. 1987); People v. Datacom Sys. Corp., 585 N.E.2d 51 (Ill. 1991); Panag v. Farmers Ins. Co., 204 P.3d 885 (Wash. 2009) (demanding full amount of insured's loss from alleged tortfeasor even though insurer had concluded she was only 40% liable is UDAP violation). *See also* Fed. Trade Comm'n v. Check Enforcement, 2005 WL 1677480 (D.N.J. July 18, 2005) (collector violated FTC Act by inflating amount of dishonored check claim), *aff'd*, 502 F.3d 159 (3d Cir. 2007); Estrada v. Mendoza, 275 P.3d 1024 (Utah Ct. App. 2012) (allowing consumers to proceed on claim that payday lenders obtained garnishments for more than amounts owed; these claims are not collateral attacks on the underlying judgments); CFPB, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, CFPB Bulletin 2013-07 (July 13, 2013), *available at* http://files.consumerfinance.gov (collecting debts, interest, fees, or charges not authorized by the agreement or permitted by law and misrepresenting character, amount, or legal status of a debt are examples of unfair, deceptive, or abusive practices). *But cf.* Goshon v. I.C. Sys., Inc., 2016 WL 742873 (D. Kan. Feb. 24, 2016) (granting summary judgment for collector; no liability under Kan. UDAP statute's general prohibition of deception, which court interprets as requiring "reason to know," where demand for amount not owed was mistake), *later op. at* 2016 WL 1069048 (D. Kan. Mar. 17, 2016) (granting summary judgment to creditor on same ground); Ianelli v. U.S. Bank, 996 A.2d 722 (Vt. 2010) (bank did not violate UDAP statute by representing to debtor's mother that it would repurchase debt from collection agency if she paid $150, when both were unaware that debtor had independently agreed to resolve the same debt by paying $200 to collection agency). *See generally* §§ 7.2.2, 8.4, *supra*, § 16.3.5, *infra* (collecting amounts that are not owed as unfair practice).

609 Bowen v. Ditech Fin. L.L.C., 2017 WL 4183081, at *20 (D. Me. Sept. 20, 2017); Marchese v. JPMorgan Chase Bank, 917 F. Supp. 2d 452 (D. Md. 2013) (refusing to dismiss claim that servicer violated UDAP statute by misstating amount needed to reinstate mortgage loan).

610 Heard v. Bonneville Billing & Collections, 2000 U.S. App. LEXIS 14625 (10th Cir. June 26, 2000); Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017) (granting summary judgment against creditor that filed suit on time-barred debt that consumer did not owe, and took a default judgment in violation of bankruptcy stay); Gallegos v. LVNV, 169 F. Supp. 3d 1235 (D. Utah 2016) (finding that collector acted deceptively by filing suit twice; it filed second suit and obtained default judgment even though it knew at that point that it had sued the wrong person); Reid v. LVNV Funding, L.L.C., 2016 WL 247571 (D. Utah Jan. 20, 2016) (garnishing identity theft victim's wages, after informing her employer without any basis that she was also known by judgment debtor's name, may violate state UDAP statute); Grimaldi v. Bank of Am., 2013 WL 1050549 (M.D. Pa. Mar. 14, 2013) (refusing to dismiss claim that lender violated UDAP statute by misrepresenting that widow owed husband's debt, thereby inducing her to make a payment); Donnachie v. Frank S. Falzone & Assoc., P.P.L.C., 2010 WL 3191891 (M.D. Pa. Aug. 11, 2010); Wolfe v. MBNA Am. Bank, 485 F. Supp. 2d 874 (W.D. Tenn. 2007) (issuing card without verification and pursuing victim after being informed of theft were unfair acts); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783, 810 (S.D. Ohio 2006) (routine practice of suing spouses, without obtaining any information suggesting they were liable, is violation). *See also* Curtis v. Citibank, 261 P.3d 1059 (Mont. 2011) (reversing decision that FCRA preempted UDAP claim against bank for referring debt to collection agency when it knew that consumer did not owe it). *But cf.* Lowe v. Surpas Res. Corp., 253 F. Supp. 2d 1209 (D. Kan. 2003) (bank not liable for misrepresenting that consumer owed debt, where this was communicated only to collectors, not to consumer); Beecy v. Pucciarelli, 441 N.E.2d 1035 (Mass. 1982) (unobligated consumer was not protected by UDAP statute since consumer did not purchase goods or services from collector; goods or services requirement has since been removed from statute).

611 Erdman v. HSBC Auto Fin., 2011 WL 3420849 (W.D.N.Y. Aug. 4, 2011); Gervais v. O'Connell, Harris & Assoc., 297 F. Supp. 2d 435 (D. Conn. 2003). *See also* Dorr v. Sacred Heart Hosp., 597 N.W.2d 462 (Wis. Ct. App. 1999) (hospital violated UDAP statute by representing that it would accept HMO payments in full satisfaction of hospital bills, but then trying to recover from patient's tort recovery); CFPB, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, CFPB Bulletin 2013-07 (July 13, 2013), *available at* http://files.consumerfinance.gov (misrepresentation that a debt will be forgiven if a settlement offer is accepted is an example of an unfair, deceptive, or abusive practice).

612 Boyce v. Attorney's Dispatch Serv., 1999 WL 33495605 (S.D. Ohio Apr. 27, 1999). *See also* Douyon v. NY Med. Health Care, P.C., 894 F. Supp. 2d 245, 265–266 (E.D.N.Y. 2012) (fact question whether displaying badge would lead reasonable consumer to believe that collection agent was associated with law enforcement, and whether collector's statement that he was sending "inspector" to consumer's home was deceptive); CFPB, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, CFPB Bulletin 2013-07 (July 13, 2013), *available at* http://files.consumerfinance.gov (misrepresentation that communication is from government or government-affiliated entity is example of unfair, deceptive, or abusive practice).

613 *In re* Scrimpsher, 17 B.R. 999 (Bankr. N.D.N.Y. 1982).

614 Wood v. Capital One Services, L.L.C., 718 F. Supp. 2d 286 (N.D.N.Y. 2010).

615 Turner v. Gene Dencker Buick-Pontiac, Inc., 623 N.W.2d 151 (Wis. Ct. App. 2000) (applying specific prohibition in statute). *But cf.* Herbert v. Monterey Fin. Services, 2001 WL 1266299 (D. Conn. Sept. 28, 2001) (collector ceased reporting disputed debt after being told of its error); Oak Hill Inv. Co. v. Jablonski, 605 N.E.2d 998 (Ohio Ct. App. 1992) (landlord's report of debt to credit bureau not consumer transaction; note that landlords themselves are not subject to Ohio UDAP statute).

- Disguising usurious lending as a "check cashing service," failing to disclose the interest rate, and threatening to prosecute debtors under NSF check laws;[616] and
- Attempting to collect a debt barred by the statute of limitations,[617] at least if the collector threatens a lawsuit.[618]

A lender that made refund anticipation loans committed a fraudulent and unfair practice in violation of the state UDAP statute by obtaining consumers' authorizations to withhold the loan proceeds in order to pay other alleged debts, without first informing consumers that there was a claim of debt against them.[619]

Many of the deceptive acts listed in this section are also found to be unfair, as discussed in the next section.

16.3.5 Unfair and Unconscionable Debt Collection Activities Under UDAP Statutes

Many, but not all,[620] state UDAP statutes prohibit "unfair" or "unconscionable" as well as deceptive acts. Courts have held the following debt collection activities to be actionable under these statutes:

- Filing suit in a forum far from the consumer's residence or from where the contract was signed;[621]
- Attempting to collect a debt that has been paid;[622]
- Collecting or attempting to collect an amount, a charge, or attorney fees that are not owed or before they are due[623] (an

See generally National Consumer Law Center, Fair Credit Reporting § 10.7 (9th ed. 2018), *updated at* www.nclc.org/library (FCRA preemption issues).

616 Hamilton v. York, 987 F. Supp. 953 (E.D. Ky. 1997). *See also* Hartke v. Illinois Payday Loans, Inc., 1999 U.S. Dist. LEXIS 14937 (C.D. Ill. Sept. 15, 1999) (UDAP violation where payday lender referred to inapplicable penalty provisions of civil bad check law); Boyce v. Attorney's Dispatch Serv., 1999 WL 33495605 (S.D. Ohio Apr. 27, 1999) (collector for payday lender impersonated law enforcement officer and threatened criminal prosecution); Turner v. E-Z Check Cashing, 35 F. Supp. 2d 1042 (M.D. Tenn. 1999) (threat to prosecute under bad check law, inapplicable to postdated checks which payee knew to be bad when written). *See also* Brown v. C.I.L., Inc., 1996 WL 164294 (N.D. Ill. Apr. 1, 1996).

617 Morgan v. Vogler Law Firm, P.C., 2017 WL 4387351 (E.D. Mo. Oct. 3, 2017) (granting summary judgment against creditor that filed suit on time-barred debt that consumer did not owe, and took default judgment in violation of bankruptcy stay); Commonwealth by Fisher v. Richard A. Cole, M.D., Inc., 709 A.2d 994 (Pa. Commw. Ct. 1998). *See also* Gervais v. O'Connell, Harris & Assoc., 297 F. Supp. 2d 435 (D. Conn. 2003) (misrepresenting that debtor had made token payment that restarted statute of limitations was UDAP violation).

618 Taylor v. Unifund Corp., 2001 WL 1035717 (N.D. Ill. Aug. 31, 2001) (fact question whether dunning letter threatened time-barred action).

619 People v. JTH Tax, Inc., 151 Cal. Rptr. 3d 728 (Cal. Ct. App. 2013) (UCL and CLRA).

620 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 4.3, 4.4 (9th ed. 2016), *updated at* www.nclc.org/library.

621 Harrington v. CACV of Colorado, L.L.C., 508 F. Supp. 2d 128, 138–139 (D. Mass. 2007) (denying collector's motion to dismiss); Yu v. Signet Bank/Virginia, 82 Cal. Rptr. 2d 304 (Cal. Ct. App. 1999); Schubach v. Household Fin. Corp., 376 N.E.2d 140 (Mass. 1976); Celebrezze v. United Research, Inc., 482 N.E.2d 1260 (Ohio Ct. App. 1984); Santiago v. S.C. Kresge Co., 2 Ohio Op. 3d 54 (Ct. Com. Pl. 1978). *See also* Spiegel, Inc. v. Fed. Trade Comm'n, 540 F.2d 287 (7th Cir. 1976) (upholding FTC decision that practice of suing in distant venue is unfair); Aguchak v. Montgomery Ward Co., 520 P.2d 1352 (Alaska 1974) (summons from distant forum violated due process by failing to inform consumer that appearance could be written). *But cf.* Rodolakis v. Safety Ins. Co., 327 F. Supp. 3d 274 (D. Mass. 2018) (filing suit in county where defendant consumer did not live is not unfair practice; no discussion of rationale); Vargas v. Allied Fin. Co., 545 S.W.2d 231 (Tex. App. 1977) (filing suits in distant forums not proscribed by state UDAP statute; statute was subsequently amended to prohibit this practice). *See generally* §§ 10 2.4.3, 16.2.4.4, *supra*.

622 Edwards v. Velocity Invs., L.L.C., 2011 WL 4007394 (N.D. Ohio Sept. 8, 2011) (issuing wage garnishment for debt that has been satisfied is UDAP violation); Garner v. Academy Collection Serv., 2005 WL 643680 (N.D. Ga. Mar. 11, 2005) (allowing plaintiff to proceed on claim that defendant attempted to collect debt that had been paid); Chiverton v. Fed. Fin. Group, Inc., 399 F. Supp. 2d 96 (D. Conn. 2005) (awarding $7500 in punitive damages where collector repeatedly called debtor at work to collect debt that had been paid, without informing debtor of right to dispute debt). *See also* Connecticut Light & Power Co. v. Clark, 1996 Conn. Super. LEXIS 1299 (Conn. Super. Ct. May 16, 1996) (denying motion to strike claim that creditor violated UDAP statute by suing on debt it knew consumer did not owe; single incident sufficient).

623 Russell v. Ray Klein, Inc., 2019 WL 6137455 (D. Or. Nov. 19, 2019) (interpreting state statute to allow attorney fee to be charged only if outside counsel prepares writ of garnishment; refusing to dismiss claim that deduction of fee for in-house counsel's work is violation of UDAP statute); Nance v. Citimortgage, Inc., 2014 WL 3882081 (M.D.N.C. Aug. 7, 2014) (refusing to dismiss claim that creditor committed unfair and deceptive acts by making harassing calls for a debt that was not delinquent and for attorney fees and late fees that were not owed, and by wrongfully force-placing insurance and initiating foreclosure); Wenner v. Bank of Am., 637 F. Supp. 2d 944 (D. Kan. June 12, 2009) (refusing to dismiss claim that bank violated UDAP statute by failing to stop auto-pay deductions when consumers closed their account, failing to investigate their dispute of resulting charges, demanding payment, and sending claim to debt collectors); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783, 810 (S.D. Ohio 2006) (suing for attorney fees to which creditor was not entitled, and attempting to recover court costs in absence of valid judgment); Patzka v. Viterbo College, 917 F. Supp. 654 (W.D. Wis. 1996) (collection fee not permitted by Wisconsin Consumer Act); Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995) (demand for "legal notice" and other fees violated California law where collector misrepresented fees as necessary to avoid lawsuit, but lawsuit was in fact highly unlikely; "service charge" also unlawful where it was based on agency's own costs, not "commercially reasonable incidental damages"); Smith v. Keycorp Mortgage Inc., 151 B.R. 870 (N.D. Ill. 1993) (attempt to collect late charges not allowed because of debtor's bankruptcy reorganization); *In re* Hill, 213 B.R. 934 (Bankr. D. Md. 1996) (creditor violated Maryland Consumer Protection Act by charging twice for prepaid interest and failing to disclose what it had done), *aff'd*, 213 B.R. 943 (D. Md. 1997); Cais v. Citizens Sav. Bank, 2001 WL 1200870 (Sept. 17, 2001) (allegation that bank brought foreclosure in effort to coerce payment of sums not yet due stated UDAP claim); Dist. Cablevision Ltd. v. Bassin, 828 A.2d 714 (D.C. 2003) (collecting late fees in violation of common law was UDAP violation); Case v. Ameritech Services, 2004 WL 73524 (Ill. Cir. Ct. Jan. 15, 2004) (denial of motion to dismiss) (failure to establish system for customers to dispute charges, and sending disputed debts to one collection agency after another, may be unfair); Talbert v. Mauney, 343 S.E.2d 5 (N.C. Ct. App. 1986) (improperly demanding full payment of loan when credit agreement allowed installment payments, and then slandering borrower's

abuse that is also often found to be deceptive);[624]

- Attempting to obtain collection fees in excess of actual expenses;[625]
- Dunning a consumer for an illegal loan, such as a payday loan made in a jurisdiction that outlaws them;[626]
- Attempting to collect from a person that the collector knows or should know is not obligated;[627]
- Inducing a person to pay her deceased mother's debt by telling her that her mother would not be able to rest in peace while the debt was outstanding;[628]
- Initiating or threatening time-barred lawsuits;[629]
- Threatening criminal prosecution without cause;[630]
- Excessive calls[631] or personal visits;[632]
- Contacting the debtor's employer or unobligated third parties;[633]

credit reputation, violates statute prohibiting unfair coercion to collect debts); Evergreen Collectors v. Holt, 803 P.2d 10 (Wash. Ct. App. 1991) (threatening to collect attorney fees when not entitled to them violates collection agency law and therefore also UDAP statute). *See also* Harris Wayside Furn. Co. v. Idearc Media Corp., 2007 WL 1847313 (D.N.H. June 25, 2007) (restricting future services as way of coercing payment of charges that had been forgiven as part of settlement); Hart v. GMAC Mortgage Co. (*In re* Hart), 246 B.R. 709 (D. Mass. 2000) (creditor misapplied debtor's mortgage payment and proceeded with foreclosure after becoming aware that the debtor had complied with his payment obligations under a forbearance agreement). *But cf.* Swartz v. UST Corp., 2001 WL 1809798 (Dec. 13, 2002) (bank admitted its mistake and restored misapplied funds, with small payment for borrower's trouble; other basis existed for foreclosure); Wornat Dev. Corp. v. Vakalis, 529 N.E.2d 1329 (Mass. 1988) (suit for full amount of note, without deduction for foreclosed real estate valued at over $68,000, not UDAP violation because consumer could assert deduction as defense); Havens-Tobias v. Eagle, 2003 WL 1601461 (Ohio Ct. App. Mar. 28, 2003) (filing collection suit not unfair where attorney did not know of debtor's possible defenses). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 6.7.5 (9th ed. 2016), *updated at* www.nclc.org/library (UDAP claims regarding loan modification attempts).

624 *See* § 16.3.4, *supra*.

625 Ballard v. Equifax Check Services, Inc., 158 F. Supp. 2d 1163 (E.D. Cal. 2001) (creditor attempted to apportion all its collection costs to accounts successfully collected); Bondanza v. Peninsula Hosp. & Med. Ctr., 590 P.2d 22 (Cal. 1979). *See also In re* Western Acceptance Corp., 788 P.2d 214, 217–218 (Idaho 1990) (concurring opinion) (charging exorbitant collection charges for NSF checks).

626 *See, e.g., In re* Delbert Services Corp. (Mass. Comm'r of Banks Apr. 4, 2013), *available at* www.mass.gov (ordering Massachusetts-licensed debt collector to discontinue collection efforts for payday loans that were illegally made to Massachusetts residents). *See also* § 16.3.4, *supra* (threatening to enforce illegal or unenforceable contract as deceptive practice).

627 Heard v. Bonneville Billing & Collections, 2000 WL 825721 (10th Cir. June 26, 2000); Wolfe v. MBNA Am. Bank, 485 F. Supp. 2d 874 (W.D. Tenn. 2007) (refusing to dismiss claim that creditor violated UDAP statute by declaring account delinquent without investigating whether identity theft victim was actually liable, reporting delinquency to credit bureaus, and turning account over to debt collector); Losure v. Capital One Services, Inc., 2006 WL 166520 (M.D. Fla. Jan. 23, 2006) (claim stated by allegation that collector intentionally attempted to collect debt that did not exist). *But see* Gallegos v. LVNV, 169 F. Supp. 3d 1235 (D. Utah 2016) (finding that collector acted deceptively but not unconscionably by filing suit twice; it filed second suit and obtained default judgment even though it knew at that point that it had sued the wrong person). *But cf.* Goshon v. I.C. Sys., Inc., 2016 WL 742873 (D. Kan. Feb. 24, 2016) (granting summary judgment for collector; no liability under Kan. UDAP statute's general prohibition of deception, which court interprets as requiring "reason to know," where demand for amount not owed was a mistake), *later op. at* 2016 WL 1069048 (D. Kan. Mar. 17, 2016) (granting summary judgment to creditor on same ground). *See generally* § 16.3.4, *supra* (misrepresentation that non-debtor is responsible for debt as deceptive practice).

628 Isla Fin. Services v. Sablan, 6 N. Mar. I. 338 (N. Mar. I. Dec. 14, 2001).

629 Janti v. Encore Capital Group, Inc., 2010 WL 3058260 (S.D. Cal. Aug. 3, 2010); Taylor v. Unifund Corp., 2001 WL 1035717 (N.D. Ill. Aug. 31, 2001) (fact question whether dunning letter threatened time-barred suit); N.M. Code R. §§ 12.2.12.1 to 12.2.12.11 (LexisNexis). *See also* § 16.3.4, *supra* (threatening suit on time-barred debt as deceptive practice).

630 Clodfelter v. United Processing, Inc., 2008 WL 4225557 (C.D. Ill. Sept. 12, 2008) (awarding $100,000 in emotional distress damages and $250,000 in punitive damages against collector that threatened criminal prosecution); Chiverton v. Fed. Fin. Group, Inc., 399 F. Supp. 2d 96 (D. Conn. 2005) (awarding $7500 punitive damages where collector threatened criminal prosecution); Calabrese v. CSC Holdings, Inc., 2004 WL 3186787 (E.D.N.Y. July 19, 2004) (allowing consumers to proceed on claim that defendants violated UDAP statute by accusing them of stealing cable programming without any definitive proof and telling them that mere possession of decoder can be basis for civil claim); Caputo v. Prof'l Recovery Services, Inc., 261 F. Supp. 2d 1249 (D. Kan. 2003) (accusing debtor of committing crime and threatening to place lien on all his property may be UDAP violation); Turner v. E-Z Check Cashing, 35 F. Supp. 2d 1042, 1051 (M.D. Tenn. 1999) (threat to prosecute under inapplicable bad check law); Hamilton v. York, 987 F. Supp. 953 (E.D. Ky. 1997) (threatening criminal prosecution under bad check laws, where "check cashing" transaction was really usurious loan); Brown v. C.I.L., Inc., 1996 WL 164294 (N.D. Ill. Apr. 1, 1996); Demelash v. Ross Stores, Inc., 20 P.3d 447 (Wash. Ct. App. 2001) (knowingly filing misleading criminal complaint may be UDAP violation). *See also* § 16.3.4, *supra* (false threats of criminal prosecution as deceptive practice).

631 Bruce v. Home Depot, 308 F. Supp. 2d 72 (D. Conn. 2004) (harassing calls over four-month period). *See also* Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007) (affirming judgment under FTC Act against collector who used "saturation phoning" and abusive language to collect dishonored checks). *But cf.* Whittum v. Acceptance Now, 2019 WL 4781846 (D. Nev. Sept. 30, 2019) (prohibition against repeated sales solicitations does not apply to repeat debt collection calls); Fleece v. Recovery Zone Unltd., Inc., 2005 WL 8161379 (S.D. Ohio Apr. 8, 2005) (five calls not undue frequency); Harris v. Am. Gen. Fin., Inc., 2005 WL 1593673 (D. Kan. July 6, 2005) (allegation of seventeen calls in a week insufficient where debtors did not provide evidence of substance of calls); Udell v. Kansas Counselors, Inc., 313 F. Supp. 2d 1135, 1145–1146 (D. Kan. 2004) (not UDAP violation to contact debtors on accounts newly placed for collection, despite their earlier letter asking collector to cease communication).

632 Harrington v. Fay Servicing, L.L.C., 2019 WL 4750140 (N.D. Ill. Sept. 30, 2019) (refusing to dismiss claim that repeat personal visits to debtor's home were unfair practice).

633 Fisher v. Quality Hyundai Motor Fin. Co., 2002 WL 47968 (N.D. Ill. Jan. 8, 2002) (contacts with co-workers would violate specific provision of Illinois UDAP statute that prohibits contact with employer about obligation; harassment of debtor and calls to co-workers and relatives would also violate general UDAP prohibitions); Tillquist v. Ford Motor Credit Co., 714 F. Supp. 607 (D. Conn. 1989) (discussion of debt with debtor's children violated state banking agency regulations now found at Conn. Agency Regs. §§ 36a-647-2 to 36a-647-7, prohibiting such calls); State v. O'Neill Investigations, Inc., 609 P.2d

- Repeatedly calling a debtor at work and threatening to contact his supervisor;[634]
- Using rude and abusive language;[635]
- Including in a consumer credit contract a provision waiving the consumer's statutory right to be free of third party collection contacts;[636]
- Contacting a consumer known to be represented by an attorney;[637]
- Taking or threatening to take illegal acts to collect a debt;[638]
- Making misrepresentations to a court;[639]
- Improper repossession;[640]
- Obtaining private financial information through deception and trickery;[641]
- Seizing exempt property[642] or wrongfully garnishing wages;[643] and
- Arranging for a consumer to deposit her paycheck directly into an account from which it would be transferred to the lender and causing her to sign a waiver of her Electronic Funds Transfer Act right to cancel the transfer, where the EFTA forbids such a waiver.[644]

A parallel claim alleging deception will often be appropriate for these same acts.[645]

On the other hand, a court held that a debt seller did not commit an unfair act under the state UDAP statute when it sold a debt without doing due diligence, which would have revealed that the debt buyer was a disbarred attorney who lacked a debt collector's license.[646]

16.3.6 Violation of Another Debt Collection Statute or Regulation As UDAP Violation

In a number of states, a violation of another debt collection statute—the FDCPA, a state debt collection statute, or another law or regulation dealing with collection—is a *per se* UDAP violation.[647] The UDAP statute itself,[648] or a UDAP

520, 536 (Alaska 1980) (harassment of debtors by calls to their relatives or employers is UDAP violation); Bennett v. Tri-State Collection Serv., 1976 WL 38806 (Ohio Ct. Com. Pl. Aug. 24, 1976). *See also* CFPB, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, CFPB Bulletin 2013-07 (July 13, 2013), *available at* http://files.consumerfinance.gov (revealing debt to consumer's employer or coworkers is example of unfair, deceptive, or abusive practice). *See generally* §§ 5.6, 16.2.4.2, *supra*.

634 Chiverton v. Fed. Fin. Group, Inc., 399 F. Supp. 2d 96 (D. Conn. 2005) (awarding $7500 in UDAP punitive damages). *See also* Tillquist v. Ford Motor Credit Co., 714 F. Supp. 607 (D. Conn. 1989) (awarding debtor $500 punitive damages and attorney fees for, *inter alia*, calling debtor at place of employment after he asked collector to stop). *See also In re* Navy Fed. Credit Union, Administrative Proceeding, File No. 2016-CFPB-0024, Consent Order (CFPB Oct. 11, 2016), *available at* https://files.consumerfinance.gov (false threats to contact military debtor's commanding officer are deceptive).

635 Chiverton v. Fed. Fin. Group, Inc., 399 F. Supp. 2d 96 (D. Conn. 2005) (abuse included being called "liar" and "old and senile"). *See also* Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007) (affirming judgment under FTC Act against collector who used "saturation phoning" and abusive language to collect dishonored checks).

636 U.S. Life Corp. v. Wilson, 301 S.E.2d 169 (W. Va. 1982).

637 Duarte v. Convergent Outsourcing, Inc., 2018 WL 3427910 (N.D. Ill. July 16, 2018) (refusing to dismiss claim that creditor violated UDAP statute's unfairness prohibition by switching debt collectors in order to undermine consumer's right to force collector to communicate solely with her attorney); Spicer v. Lenahan, 2004 WL 3112554 (D. Conn. Sept. 14, 2004); Hager v. Am. Gen. Fin., Inc., 37 F. Supp. 2d 778 (S.D. W. Va. 1999) (denying summary judgment for lender on claim that it was unconscionable, in violation of specific statutory prohibition, for creditor to contact debtors about past-due account after they retained attorney); Tillquist v. Ford Motor Credit Co., 714 F. Supp. 607 (D. Conn. 1989) (debtor entitled to $500 punitive damages and attorney fees for contact with debtor known to be represented by lawyer); Brow v. Stanton, 429 N.E.2d 60 (Mass. App. Ct. 1981) (state regulations prohibit contacting represented consumer and apply to creditor's attorney). *But see* Gros v. Midland Credit Mgmt., Inc., 2008 WL 4671717 (N.D. Ill. Oct. 20, 2008) (single call to represented debtor does not meet definition of unfairness). *See generally* § 5.5, *supra*.

638 Clarkson v. DeCaceres, 105 B.R. 266 (Bankr. E.D. Pa. 1989) (landlord's illegal sale of tenant's property); State v. Grogan, 628 P.2d 570 (Alaska 1981) (aircraft repairmen's vandalizing of repaired aircraft); Ekl v. Knecht, 585 N.E.2d 156 (Ill. App. Ct. 1991) (plumber's practice of employing wrongful threats to undo work and to cut off water to collect his fees). *See generally* § 6.2.7, *supra* (misrepresentations to court as deceptive practice).

639 Osborn v. J.R.S.-I., Inc., 949 F. Supp. 2d 807 (N.D. Ill. 2013) (refusing to dismiss claim that collector committed unfair act in violation of state UDAP statute by submitting affidavit to court stating that debt buyer's employee was familiar with the facts and that identity theft victim owed the debt, when debt buyer had acquired only a list of debts with minimal information); Harrington v. CACV of Colorado, L.L.C., 508 F. Supp. 2d 128, 139–140 (D. Mass. 2007) (denial of motion to dismiss) (lying to court may be unconscionable and misleading representation).

640 *See* National Consumer Law Center, Repossessions § 13.4.3 (9th ed. 2017), *updated at* www.nclc.org/library.

641 Commonwealth v. Source One Assoc., Inc., 763 N.E.2d 42 (Mass. 2002). *See also* Ralston v. Zats, 2000 U.S. Dist. LEXIS 16377 (E.D. Pa. Nov. 7, 2000) (approving settlement of class action raising UDAP and other claims against collector who obtained debtors' financial information by falsely claiming to be conducting survey).

642 Marengo v. First Massachusetts Bank, 152 F. Supp. 2d 92 (D. Mass. 2001) (consumers stated Mass. UDAP claim against bank that set off account containing only exempt Social Security and SSI funds); Petersen v. State Employees Credit Union (*In re* Kitrell), 115 B.R. 873 (Bankr. M.D.N.C. 1990). *But cf.* Parker v. Wetsch & Abbott, P.L.C., 2006 WL 4846042 (S.D. Iowa July 11, 2006) (no violation to issue garnishment against exempt funds where creditor's attorney had reasonable basis to believe account also contained nonexempt funds).

643 Smith v. Collection Tech., Inc., 2016 WL 1169529 (S.D. W. Va. Mar. 22, 2016) (refusing to dismiss claim that collector violated UDAP statute by garnishing student loan debtor's wages instead of performing its duty to assist him in rehabilitating the loan).

644 Cobb v. Monarch Fin. Corp., 913 F. Supp. 1164 (N.D. Ill. 1995) (violation of Illinois Consumer Fraud Act).

645 *See* § 16.3.4, *supra*.

646 Cacares v. Jackson, 2011 WL 99003 (D. Mass. Jan. 11, 2011).

647 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 3.2.7 (9th ed. 2016), *updated at* www.nclc.org/library.

648 *CALIFORNIA*: Cal. Bus. & Prof. Code § 17200. *See, e.g.*, Del Campo v. AM Corrective Counseling Serv., Inc., 718 F. Supp. 2d 1116 (N.D. Cal. 2010); Ballard v. Equifax Check Services, Inc., 27 F. Supp. 2d 1201 (E.D. Cal. 1998) (practices forbidden by FDCPA violate Cal. Bus. & Prof. Code § 17200), *summary judgment for class granted by* 158 F. Supp. 2d 1163 (E.D. Cal. Aug. 17, 2001).

DISTRICT OF COLUMBIA: D.C. Code § 28-3905(k)(1).

regulation,[649] may explicitly provide that a violation of another law is a UDAP violation. Or the state debt collection statute may state that a violation is a UDAP violation.[650]

Other states reach the same conclusion as a matter of judicial interpretation.[651] Persuading a court that a violation of another consumer protection statute or rule is a UDAP violation is easiest under the almost forty state unfair and deceptive acts and practices statutes that prohibit "unfair" and/or "unconscionable" practices.[652] In states where the UDAP statute prohibits only "deceptive" practices, a potential argument is that is deceptive for a creditor to make false threats that it will utilize remedies that are outlawed.[653] The collector's acts may also amount to implicit representations that a debt is valid.[654]

Even if a violation of the FDCPA is not a *per se* UDAP violation, cases decided under the FDCPA, the Federal Trade Commission Act, and the Consumer Financial Protection Act, which prohibits unfair, deceptive, and abusive acts or practices in connection with transactions with consumers for consumer financial products or services,[655] may be persuasive when a court is deciding what collection activities are unfair or deceptive under state UDAP statutes.[656] Interpretations of a state debt collection statute may also be persuasive.[657] Other sources, such as federal regulations governing servicing and

NEVADA: Nev. Rev. Stat. § 598.0923. *But cf.* Peatrowsky v. Persolve, 2014 WL 1215061 (D. Nev. Mar. 24, 2014) (calls to collect credit card debt that violate FDCPA do not violate UDAP statute's prohibition of knowingly violating a statute relating to sale or lease of goods or services).

But see Tex. Bus. & Com. Code § 17.43 (West). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 3.2.7.3 (9th ed. 2016), *updated at* www.nclc.org/library.

649 *MASSACHUSETTS*: Massachusetts Consumer Prot. Regulations, 940 Mass. Reg. § 3.16. *See, e.g.*, Masciarelli v. Richard J. Boudreau & Assoc., L.L.C., 529 F. Supp. 2d 183 (D. Mass. 2007); Harrington v. CACV of Colorado, L.L.C., 508 F. Supp. 2d 128, 137 (D. Mass. 2007); Martin v. Sands, 62 F. Supp. 2d 196 (D. Mass. 1999); *In re* Schwartz, 2011 WL 1331963 (Bankr. D. Mass. Apr. 7, 2011) (private remedy for violation of Massachusetts collection agency act is UDAP claim, but debtor must comply with UDAP statute's demand letter requirement); Baldassari v. Pub. Fin. Trust, 337 N.E.2d 701 (Mass. 1975). *Cf.* McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 775 F.3d 109 (1st Cir. 2014) (Mass. law) (regulation cannot expand UDAP liability, but violation of FDCPA is per se violation of Mass. UDAP statute). *See also* McKusker v. Ocwen Loan Services, L.L.C., 2015 WL 4529986 (D. Mass. July 27, 2015) (violation of provision of debt collection statute forbidding contact with represented consumer is sufficient to support UDAP claim).

MISSOURI: 15 Mo. Code Regs. Ann. § 60-8.090.

650 *See, e.g.*, Dicesari v. Asset Acceptance L.L.C., 2012 WL 4108944, at *4 (E.D. Pa. Sept. 18, 2012); Keli v. Universal Fid. Corp., 1997 WL 33820142 (D. Haw. Feb. 25, 1997) (applying statutory provision that violation of debt collection statute is actionable under UDAP statute); Sprinkle v. SB&C Ltd., 472 F. Supp. 2d 1235 (W.D. Wash. 2006); *In re* Klein, 2010 WL 2680334 (Bankr. E.D. Pa. June 29, 2010); Ai v. Frank Huff Agency, Ltd., 607 P.2d 1304 (Haw. 1980); Tex. Fin. Code § 392.404; Evergreen Collectors v. Holt, 803 P.2d 10 (Wash. Ct. App. 1991). *See generally* Appx. D, *infra*.

651 *See, e.g.*, Hagy v. Demers & Adams, L.L.C., 2013 WL 434053 (S.D. Ohio Feb. 5, 2013); Becker v. Montgomery, Lunch, 2003 WL 23335929 (N.D. Ohio Feb. 26, 2003) (FDCPA violations are UDAP violations); Bradley v. Fairbanks Capital Corp., 2003 WL 21011801 (N.D. Ill. May 5, 2003); Hansen v. Ticket Track, Inc., 280 F. Supp. 2d 1196 (W.D. Wash. 2003); Irwin v. Mascott, 112 F. Supp. 2d 937 (N.D. Cal. 2000); D.A.N. Joint Venture III, L.P. v. Armstrong, 2007 WL 634457 (Ohio Ct. App. Mar. 2, 2007). *Cf.* Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783, 810 n.45 (S.D. Ohio 2006) (declining to decide whether all FDCPA violations are UDAP violations; these are). *But see* Conboy v. AT&T Corp., 241 F.3d 242 (2d Cir. 2001) (violation of N.Y. debt collection statute is not N.Y. UDAP violation); McLaughlin v. LVNV Funding, L.L.C., 971 F. Supp. 2d 796 (N.D. Ill. 2013) (dismissing claim on ground that UDAP statute does not list violation of collection agency act as per se violation); Mascoll v. Strumpf, 2006 WL 2795175 (E.D.N.Y. Sept. 26, 2006) (UDAP statute does not confer private right of action for violation of debt collection statute; it does confer private right of action for deceptive acts, but not shown here where creditor continued collection action after learning of identity theft); Johnson v. MBNA Am. Bank, 2006 WL 618077 (M.D.N.C. Mar. 9, 2006) (denying UDAP claim where unfair and deceptive conduct occurred during debt collection; state debt collection statute is exclusive remedy); Lamb v. M&M Assoc., 1998 WL 34288694 (S.D. Ohio Sept. 1, 1998) (failure to include verification notice required by FDCPA is not UDAP violation). *But cf.* King v. Int'l Data Services, 2002 WL 32345923 (D. Haw. Aug. 5, 2002) (noting that violation of state debt collection statute is, by statute, a violation of UDAP statute, but questioning whether FDCPA violation is necessarily a UDAP violation); Lamb v. M&M Assoc., Inc., 1998 WL 34288694 (S.D. Ohio Sept. 1, 1998) (not all FDCPA violations are UDAP violations; violation of verification notice requirements is not, but others may be); Perperas v. United Recovery Sys., Inc., 1997 WL 136326 (N.D. Ill. Mar. 13, 1997) (Illinois UDAP statute does not incorporate FDCPA even though it states that it is to be construed in light of FTC Act). *See generally* § 16.2.5.1, *supra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 3.2.7.3.4, 3.2.7.4 (9th ed. 2016), *updated at* www.nclc.org/library.

652 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 3.2.7.3.6, 3.2.7.4.1 (9th ed. 2016), *updated at* www.nclc.org/library.

653 *See* § 16.3.4, *supra*; National Consumer Law Center, Unfair and Deceptive Acts and Practices § 3.2.7.4.2 (9th ed. 2016), *updated at* www.nclc.org/library.

654 *See, e.g.*, Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 126–127 (2d Cir. 2007) (N.Y. law; inclusion of illegal fee on closing statement may be UDAP violation; consumer may reasonably assume that all fees charged by respected financial institution are lawful), *on remand*, 608 F. Supp. 2d 330 (E.D.N.Y. 2009) (if fee violated RESPA, then collecting it, even with proper disclosure, would be "misleading" within meaning of UDAP statute).

655 12 U.S.C. § 5531(a). *See* § 16.3.7, *infra*.

656 *See* Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783, 810 n.45 (S.D. Ohio 2006) (finding FDCPA violation to be UDAP violation in this case, but declining to adopt general rule); Celebrezze v. United Research, 482 N.E.2d 1261 (Ohio Ct. App. 1984) (decisions under FTC Act are persuasive). *But cf.* Berrios v. Sprint Corp., 1998 WL 199842 (E.D.N.Y. Mar. 16, 1998) (standard under state UDAP statute is whether reasonable consumer would have been misled by defendant's conduct, rather than FDCPA's "least sophisticated consumer" standard; UDAP claim also requires proof of injury due to reliance on deception). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 3.4.5 (9th ed. 2016), *updated at* www.nclc.org/library.

657 DirecTV, Inc. v. Cephas, 294 F. Supp. 2d 760 (M.D.N.C. 2003) (standards of state debt collection act relevant to question of whether misstatements in demand letter alleging theft of signals—not debt under North Carolina law—were unfair and deceptive within meaning of UDAP statute; dismissing debt collection count, allowing UDAP count to go forward). *See also* § 16.2, *supra*.

collection of student loans, may serve as standards for determining whether a practice is a UDAP violation.[658]

Even where the state debt collection statute explicitly states that a violation is a UDAP violation, courts may interpret the statutes to require plaintiffs to meet the scope requirements of the UDAP statute,[659] and possibly also any injury precondition[660] or pre-suit notice requirement.[661]

Whether a violation of the licensing or registration requirements of a state debt collection statute results in a UDAP violation is discussed in § 16.2.4.5, *supra*.

16.3.7 CFPB Examples of Unfair, Deceptive, or Abusive Debt Collection Practices; Rulemaking

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act[662] gives the Consumer Financial Protection Bureau (CFPB) the authority to write rules to prevent unfair, deceptive, and abusive practices in connection with consumer financial services and products.[663] While consumers do not have a private right of action to enforce any rules the CFPB issues under this general rulemaking authority,[664] courts are likely to give the CFPB's rules and interpretations significant weight when interpreting similar language in state UDAP statutes.

A July 10, 2013, CFPB bulletin on collection of consumer debts describes general standards as to unfair, deceptive, or abusive practices,[665] the bulletin provides a non-exhaustive list of ten examples of conduct related to the collection of consumer debts that could constitute an unfair, deceptive, or abusive practice:

- Collecting debts, interest, fees, or charges not authorized by the agreement or permitted by law;
- Failing to timely post payments and then charging late fees;
- Taking property without the legal right to do so;
- Revealing the consumer debt to the consumer's employer or co-workers;
- Misrepresenting the character, amount, or legal status of a debt;
- Misrepresenting that a communication is from an attorney;
- Misrepresenting that a communication is from the government or an entity affiliated with the government;
- Misrepresenting whether information will be reported to a reporting agency;
- Misrepresenting that a debt will be forgiven if a settlement offer is accepted; or
- Threatening actions that are not intended or where the person does not have authorization to pursue, including false threats of lawsuits, arrest, prosecution, or imprisonment.

A December 16, 2015, CFPB bulletin on in-person collection of consumer debt warns creditors, debt buyers, and third-party collectors that in-person debt collection visits, such as collection attempts to collect at a consumer's home or place

658 *See* Fleischer v. Acceslex Inst., 2018 WL 4489583 (N.D. Ill. Sept. 19, 2018) (refusing to dismiss claim that failing to inform debtor about important changes to his student loan account and to respond to communications, in violation of federal student loan regulations, was unfair practice).

659 *See, e.g.*, Cole v. Wells Fargo Bank, 2016 WL 737943 (W.D.N.C. Feb. 23, 2016) (UDAP requirements satisfied: lender bank's activities affect commerce and borrower relied on bank's misstatements as to payoff amount); Sailola v. Municipal Serv. Bur., 2014 WL 3389395 (D. Haw. July 9, 2014) (collection of fine and criminal court fees not covered, because underlying transaction not for consumer purpose); Porter v. Countrywide Home Loans, 2014 WL 4450043 (D.N.H. Sept. 10, 2014) (exception for regulated financial institution); Brush v. Wells Fargo Bank, 911 F. Supp. 2d 445, 476–477 (S.D. Tex. 2012); Cushman v. GC Services, L.P., 657 F. Supp. 2d 834 (S.D. Tex. 2009) (individual who alleges UDAP violation pursuant to tie-in provision that makes violation of Texas Debt Collection Act a UDAP violation must still show status as a consumer, e.g., that she acquired or sought to acquire goods or services), *aff'd*, 397 Fed. Appx. 24 (5th Cir. 2010).

660 *See* Kaymark v. Bank of Am., 783 F.3d 168 (3d Cir. 2015) (Pa. law; consumer who brings UDAP claim based on state debt collection statute that provides that a violation is a UDAP violation must meet UDAP statute's ascertainable loss requirement); Levy-Tatum v. Navient, 2016 WL 75231 (E.D. Pa. Jan.7, 2016) (dismissing UDAP claim for violation of state debt collection statute, on theory that only viable claim of ascertainable loss, reduction in debtor's credit limit, is preempted by FCRA); Hall v. Equifax Info. Services, L.L.C., 204 F. Supp. 3d (E.D. Pa. 2016) (reliance shown when patient paid settlement amount in belief that hospital would then cease collection efforts; after patient paid the agreed-upon sum and was told that balance was zero, hospital sent debt to collection); Walkup v. Santander Bank, 147 F. Supp. 349 (E.D. Pa. 2015) (justifiable reliance not shown where sub-servicer's statement that consumers must miss payments to qualify for mortgage loan modification program was true, even though sub-servicer also knew that consumers were not eligible for the program); Cortelessa v. Udren Law Offices, PC, 2016 WL 4554539 (E.D. Pa. Sept. 1, 2016) (reliance shown where borrowers paid the unauthorized fees and overcharges); Cole v. Wells Fargo Bank, 2016 WL 737943 (W.D. N.C. Feb. 23, 2016) (loss shown if consumer sold house quickly for less than it was worth, in reliance on bank's misrepresentations); Baltierra v. Orlans Associates, PC, 2015 WL 5836047 (E.D. Mich. Oct. 7, 2015) (must show either actual damage or that money was collected by a method forbidden by the act); Biggers v. BAC Home Loans Servicing, L.P., 767 F. Supp. 2d 725 (N.D. Tex. 2011) (violation of state debt collection statute is, by statute, a UDAP violation, but for the UDAP claim debtor must show damages); Kern v. Lehigh Valley Hosp., 108 A.3d 1281 (Pa. Super. Ct. 2015) (UDAP claim based on creditor's violation of state debt collection statute must meet UDAP statute's requirements, including ascertainable loss and justifiable reliance). *See generally* § 16.3.8, *infra*.

661 *See* O'Connor v. Nantucket Bank, 992 F. Supp. 2d 24 (D. Mass. 2014) (claim against bank fails because required pre-suit notice not sent); *In re* Schwartz, 2011 WL 1331963 (Bankr. D. Mass. Apr. 7, 2011) (private remedy for violation of Massachusetts collection agency act is UDAP claim, but debtor must comply with UDAP statute's demand letter requirement).

662 Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

663 12 U.S.C. § 5531. *See generally* National Consumer Law Center, Federal Deception Law Ch. 3 (3d ed. 2017), *updated at* www.nclc.org/library.

664 National Consumer Law Center, Federal Deception Law § 3.7 (3d ed. 2017), *updated at* www.nclc.org/library.

665 CFPB, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, CFPB Bulletin 2013-07 (July 13, 2013), *available at* http://files.consumerfinance.gov.

of employment, may constitute unfair acts or practices.[666] A July 31, 2017, CFPB compliance bulletin on phone pay fees lists examples of conduct related to phone pay fees that may constitute unfair, deceptive, or abusive acts or practices (UDAAPs).[667] This may involve:

- Failing to disclose the prices of all available phone pay fees when different phone pay options carry materially different fees;
- Failing to disclose that a phone pay fee would be added to a consumer's payment, which could create the misimpression that there was no service fee; or
- Lack of employee monitoring or service provider oversight, which may lead to misrepresentations or failure to disclose available options and fees.[668]

In two separate *Federal Register* notices, in November 2020 and January 2021, the Consumer Financial Protection Bureau published Regulation F under the FDCPA to regulate third-party debt collectors.[669] Regulation F, effective November 30, 2021, deals with a number of topics other than those addressed by the CFPB guidance bulletins, including deceptive, unfair and abusive practices, and practices involving the frequency of communications, use of email and text messages, and validation of debts.

16.3.8 UDAP Remedies for Debt Collection Violations

All UDAP statutes provide a private cause of action for at least actual damages resulting from a violation.[670] Relief may include return of funds wrongfully collected.[671] Emotional distress damages are recoverable in many jurisdictions.[672]

Many UDAP statutes provide for multiple or punitive damages[673] and reasonable attorney fees[674] in successful consumer actions. Some statutes allow consumers to obtain

666 CFPB, In Person Collection of Consumer Debt, CFPB Bulletin 2015-07 (Dec. 16, 2015), *available at* https://library.nclc.org.

667 CFPB, Phone Pay Fees, CFPB Bulletin 2017-01 (July 31, 2017), *available at* https://files.consumerfinance.gov.

668 CFPB, Phone Pay Fees, CFPB Bulletin 2017-01 (July 31, 2017), *available at* https://files.consumerfinance.gov.

669 85 Fed. Reg. 76,734 (Nov. 30, 2020); 86 Fed. Reg. 5766 (Jan. 19, 2021).

670 National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 12.2, 12.3 (9th ed. 2016), *updated at* www.nclc.org/library.

671 Tourgeman v. Collins Fin. Services, Inc., 2011 WL 5025152 (S.D. Cal. Oct. 21, 2011) (certifying class action on UDAP claim; where class is defined as those who received deceptive collection letter, court can award as restitution the amounts they paid in response, without individual proof of reliance); Irwin v. Mascott, 112 F. Supp. 2d 937 (N.D. Cal. 2000) (California Unfair Business Practices Act entitles consumers to restitution of any funds acquired as result of illegal practices, with prejudgment interest). *Cf.* Palmer v. Stassinos, 348 F. Supp. 2d 1070, 1088–1089 (N.D. Cal. 2004) (restitution is available under § 17200, but only to extent plaintiffs made payments; not shown here). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 12.2, 12.3 (9th ed. 2016), *updated at* www.nclc.org/library.

672 *See, e.g.*, Gervais v. O'Connell, Harris & Assoc., 297 F. Supp. 2d 435 (D. Conn. 2003) (awarding $1500 for emotional and mental distress); *In re* Belile, 209 B.R. 658 (Bankr. E.D. Pa. 1997) (awarding $100 per letter for emotional distress); Bank of New Orleans & Trust Co. v. Phillips, 415 So. 2d 973 (La. Ct. App. 1982) (actual damages include damages for humiliation and mental anguish); Ausley v. Bishop, 515 S.E.2d 72 (N.C. Ct. App. 1999) (emotional distress damages recoverable for UDAP violation, where distress resulted in hospital visit); Whitaker v. M.T. Auto., Inc., 855 N.E.2d 825 (Ohio 2006) (emotional distress damages may be recovered; *Editor's Note*: after this decision, legislature amended Ohio Rev. Code Ann. § 1345.09 (West) to cap non-economic damages). *See also* Caputo v. Prof'l Recovery Services, Inc., 2003 WL 21058289 (D. Kan. Apr. 21, 2003) (consumer who suffered emotional and intangible injuries was "aggrieved" by abusive debt collection). *But see* Wenrich v. Robert E. Cole, P.C., 2001 WL 4994 (E.D. Pa. Dec. 22, 2000) (emotional distress damages not available under state UDAP statute or former debt collection regulations); Ashley v. Edwards, 626 S.W.2d 107 (Tex. App. 1981). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.3.3.9 (9th ed. 2016), *updated at* www.nclc.org/library.

673 *See* Siemer v. Nangle (*In re* Nangle), 274 F.3d 481 (8th Cir. 2001) (punitive damages available under Illinois UDAP statute for debt collector's willful and wanton misconduct); Clodfelter v. United Processing, Inc., 2008 WL 4225557 (C.D. Ill. Sept. 12, 2008) (awarding $100,000 in emotional distress damages and $250,000 in punitive damages against collector that threatened criminal prosecution); Adams v. A. & S. Collection Assoc., Inc., 2007 WL 2206936 (D. Conn. July 30, 2007) (recommending award of $10,000 punitive damages on UDAP claim where collector required creditor to add illegal 49% collection fee and 18% interest to claims before sending them to collection), *adopted*, 2007 WL 9747652 (D. Conn. Aug. 30, 2007); Cooper v. Ellis Crosby & Assoc., 2007 WL 1322380 (D. Conn. May 2, 2007) (awarding $5000 punitive damage award on UDAP claim against unlicensed collector who threatened to arrest payday loan borrower and contact her employer); Chiverton v. Fed. Fin. Group, Inc., 399 F. Supp. 2d 96 (D. Conn. 2005) (awarding $7500 punitive damages to each of two plaintiffs for debt collection violations); Spicer v. Lenahan, 2004 WL 3112554 (D. Conn. Sept. 14, 2004) (awarding $5000 punitive damages for collection violations); Gervais v. O'Connell, Harris & Assoc., 297 F. Supp. 2d 435 (D. Conn. 2003) (awarding $4000 actual and $8000 punitive damages); Caputo v. Prof'l Recovery Services, Inc., 261 F. Supp. 2d 1249 (D. Kan. 2003) (debtor entitled to special statutory damage award as disabled person); Boyce v. Attorney's Dispatch Serv., 1999 WL 33495605 (S.D. Ohio Apr. 27, 1999) (allowing punitive damages under common law for "egregious" violations of Ohio UDAP statute); Dist. Cablevision Ltd. v. Bassin, 828 A.2d 714 (D.C. 2003) (awarding treble damages for collection of illegal late charges; no need to show egregious conduct or malice). *See also* Lowe v. Surpas Res. Corp., 253 F. Supp. 2d 1209 (D. Kan. 2003) (debtor may be entitled to enhanced statutory damages as older person). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.4 (9th ed. 2016), *updated at* www.nclc.org/library.

674 *See, e.g.*, Cooper v. Ellis Crosby & Assoc., 2007 WL 1322380 (D. Conn. May 2, 2007) (awarding fees at $350/hour); Hanner v. Classic Auto Body, Inc., 406 N.E.2d 686 (Mass. App. Ct. 1980) (increasing $25 attorney fee award for 38.25 hours of work to $250 to avoid heroic sacrifice inconsistent with spirit of consumer protection act); Evergreen Collectors v. Holt, 803 P.2d 10 (Wash. Ct. App. 1991) (consumers entitled to reasonable attorney fee under UDAP statute for defending their judgment on appeal). *Cf.* Chevy Chase Bank v. McCamant, 512 S.E.2d 217 (W. Va. 1998) (attorney fee award discretionary under state UDAP statute). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.8 (9th ed. 2016), *updated at* www.nclc.org/library.

injunctive relief.[675] UDAP class actions are allowed in most jurisdictions.[676]

Most UDAP statutes require a showing of that a violation injured the consumer in some way, and some require a loss of money or property as a precondition of suit.[677] A number of courts have applied these requirements even where the claim is that the defendant violated a state debt collection statute that provides that a violation is a UDAP violation.[678] In states that merely require the consumer to be "aggrieved," it may be sufficient to show that the collection activities imposed a burden or obligation on the consumer.[679]

Emotional distress will meet the injury requirement in a number of states.[680] In other states, the loss must be of money or property, or must be "pecuniary," so a debtor who has

675 *See, e.g.*, Palmer v. Stassinos, 348 F. Supp. 2d 1070, 1087–1088 (N.D. Cal. 2004) (allowing plaintiffs to proceed with claim for injunctive relief); Asch v. Teller, Levit & Silvertrust, P.C., 2003 WL 22232801, at *6 (N.D. Ill. Sept. 26, 2003) (Ill. DTPA); Irwin v. Mascott, 112 F. Supp. 2d 937 (N.D. Cal. 2000) (California § 17200 allows declaratory and injunctive relief; provision for injunction not preempted by FDCPA); Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995) (California § 7200 provides for injunction against unfair and deceptive debt collection activities); Hennessey v. Connecticut Valley Fitness Ctrs., 2001 WL 1199840 (Conn. Super. Ct. Sept. 12, 2001) (CUTPA allows injunctive relief). *But see* Zanni v. Lippold, 119 F.R.D. 32 (C.D. Ill. 1988) (refusing to find private injunctions authorized despite statutory authorization of any other appropriate relief because that construction would make superfluous requirement that private litigants give notice of suit to attorney general). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.6 (9th ed. 2016), *updated at* www.nclc.org/library.

676 *See, e.g.*, Tourgeman v. Collins Fin. Services, Inc., 2011 WL 5025152 (S.D. Cal. Oct. 21, 2011) (certifying class action on UDAP claim; where class is defined as those who received deceptive collection letter, court can award as restitution the amounts they paid in response, without individual proof of reliance); Zanni v. Lippold, 119 F.R.D. 32 (C.D. Ill. 1988); Firstcollect, Inc. v. Armstrong, 976 S.W.2d 294 (Tex. App. 1998) (affirming class certification order in suit claiming that collection agency's addition of 32% collection fee violated Texas debt collection statute). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.5 (9th ed. 2016), *updated at* www.nclc.org/library.

677 *See, e.g.*, Veach v. Sheeks, 316 F.3d 690 (7th Cir. 2003) (Ind. law; denying UDAP claim where misstatement of amount of debt did not cause pecuniary loss to debtor who did not incur attorney fees or pay any of disputed judgment); Dawson v. Genesis Credit Mgmt., L.L.C., 2017 WL 5668073 (W.D. Wash. Nov. 27, 2017) (must show direct connection between statutory violation—here demand for unauthorized amounts—and damage; lost time and attorney fees incurred in investigating the existence of the alleged debt are sufficient); Humphreys v. Budget Rent-a-Car Systems, 2017 WL 6497285 (E.D. Pa. Dec. 19, 2017) (loss of sleep insufficient where UDAP statute requires loss of money or property); Lannan v. Levy & White, 186 F. Supp. 3d 77 (D. Mass. 2016) (including unauthorized amounts in small claims complaints is likely to have negative impact, so meets injury requirement); Cortellessa v. Udren Law Offices P.C., 2016 WL 4554539 (E.D. Pa. Sept. 2, 2016) (paying tax overcharges demanded by mortgage servicer meets UDAP statute's requirement of ascertainable loss of money or property); Conteh v. Shamrock Cmty. Ass'n, Inc., 2015 WL 5177752 (D. Md. Sept. 3, 2015) (dismissing UDAP claim; plaintiffs who paid only the lesser amount that they agreed that they owed failed to show reliance on collector's exaggeration of amount owed); McLaughlin v. LVNV Funding, L.L.C., 971 F. Supp. 2d 796 (N.D. Ill. 2013) (dismissing UDAP claim where only alleged damages were annoyance and loss of time); Goray v. Unifund CCR Partners, 2007 WL 4260017 (D. Haw. Dec. 4, 2007) (collector's lack of licensure did not cause damage to consumer, so no UDAP claim); Gervais v. Riddle & Assoc., P.C., 479 F. Supp. 2d 270 (D. Conn. 2007) (collector's false threat of litigation not sufficient in and of itself to meet ascertainable loss requirement of Connecticut UDAP statute); Flamm v. Sarner & Assoc., P.C., 2006 WL 43770 (E.D. Pa. Jan. 3, 2006); Sambor v. Omnia Credit Services, Inc., 183 F. Supp. 2d 1234 (D. Haw. 2002) (denying summary judgment where actual damages not shown); Gonzalez v. Old Kent Mortgage Co., 2000 WL 1469313 (E.D. Pa. Sept. 19, 2000) (consumer failed to state UDAP claim for unfair debt collection, because she failed to allege ascertainable loss); Berrios v. Sprint Corp., 1998 WL 199842 (E.D.N.Y. Mar. 16, 1998) (UDAP claim requires proof of injury due to reliance on deception); Davis v. Suran, 1998 WL 378420 (N.D. Ill. July 1, 1998) (pleading nominal damages of $1 per letter insufficient to satisfy UDAP requirement that actual damages be pleaded); Flores v. Rawlings Co., L.L.C., 177 P.3d 341 (Haw. 2008) (consumer suffered no injury as result of collector's lack of licensure, so cannot maintain UDAP claim); Hedrick v. Spear, 907 P.2d 1123 (Or. Ct. App. 1995) (reversing UDAP recovery for collection violations where consumer did not show ascertainable loss of money or property); Dernier v. Mortgage Network, Inc., 87 A.3d 465 (Vt. 2013) (must show either reliance on a deceptive statement in purchasing goods or services, or damages or injury resulting from the act; neither shown here where assignee's letter asserting right to enforce mortgage was sent long after borrowers contracted for mortgage, and borrowers showed no damage resulting from letter). *But see* Singleton v. Montgomery Ward Credit Corp., 2000 WL 1810012 (N.D. Ill. Dec. 11, 2000) (consumer who alleges intentional violation of Illinois Consumer Fraud Act need not allege actual damages; may recover nominal damages). *But cf.* Bruce v. Home Depot, 308 F.Supp. 2d 72 (D. Conn. 2004) (plaintiff need not show ascertainable loss for collection harassment if suffered loss due to other aspects of transaction). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.2 (9th ed. 2016), *updated at* www.nclc.org/library.

678 *See, e.g.*, Kaymark v. Bank of Am., 783 F.3d 168, 180–181 (3d Cir. 2015) (Pa. UDAP claim based on violation of state debt collection statute must plead ascertainable loss of money or property and causation); Keenan v. Wells Fargo Bank, 246 F. Supp. 3d 518 (D. Mass. 2017) (although violation of state debt collection statute is *per se* UDAP violation, plaintiff must meet UDAP statute's injury requirement; not met here, because allegations that defendant's contact with represented debtor caused emotional distress and pecuniary losses such as copying and mailing charges are too vague); Baldwin v. Monterey Fin. Services, Inc., 2017 WL 4767696 M.D. Pa. Oct. 20, 2017) (claims of abusive phone calls and third party contacts, in violation of state debt collection statute, fail because no showing of ascertainable loss of money or property as required by UDAP statute). *Cf.* Yelin v. Swartz, 790 F. Supp. 2d 331 (E.D. Pa. 2011) (UDAP action based on violation of state debt collection act requires showing of loss of money or property, but allegation of "actual damages" is sufficient in pleadings; even if consumer never paid disputed debt, he may have suffered other pecuniary losses).

679 Lowe v. Surpas Res. Corp., 253 F. Supp. 2d 1209 (D. Kan. 2003) (consumer was aggrieved by having to obtain assistance of third parties to respond to collection calls, even though she herself did not hear the calls). *See also* Caputo v. Prof'l Recovery Services, Inc., 261 F. Supp. 2d 1249 (D. Kan. 2003) (consumer who suffered emotional and intangible injuries was "aggrieved").

680 *See, e.g.*, Douyon v. NY Med. Health Care, P.C., 894 F. Supp. 2d 245, 264–265 (E.D.N.Y. 2012); Davis Lake Cmty. Ass'n v. Feldman, 530 S.E.2d 865 (N.C. Ct. App. 2000) (injury to credit reputation and emotional distress meet injury requirement). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.2.8.1 (9th ed. 2016), *updated at* www.nclc.org/library.

suffered only emotional distress may have difficulty making a UDAP claim.[681] Even in these states, however, the loss of money or property may be small in amount,[682] and it may not be necessary to prove the exact amount.[683] Costs incurred to investigate or defend against inaccurate debt claims may satisfy the requirement.[684]

In a few statutes the UDAP plaintiff must show that the action affects the public interest,[685] but most courts have no trouble concluding that deceptive or abusive debt collection practices, unless they are very specific to the individual plaintiff, meet this requirement.[686] Some UDAP statutes also require notice to the defendant a certain number of days prior to suit,[687] and many courts require the plaintiff to plead a UDAP claim with at least some level of particularity.[688] While intent is generally not a prerequisite for UDAP liability, some states require a showing of intent for certain violations or

681 *See, e.g.*, Poulin v. Thomas Agency, 746 F. Supp. 2d 200, 206 (D. Me. 2010) (mental distress insufficient). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.2.8.1 (9th ed. 2016), *updated at* www.nclc.org/library.

682 Moritz v. Daniel M. Gordon, P.C., 895 F. Supp. 2d 1097 (W.D. Wash. 2012) (must show some pecuniary damage, but minimal amount will suffice; here, price of sending a certified letter). *But cf.* Poulin v. Thomas Agency, 746 F. Supp. 2d 200 (D. Me. 2010) (possible monetary losses due to reduced credit score are too speculative). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.2.7 (9th ed. 2016), *updated at* www.nclc.org/library.

683 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.2.6 (9th ed. 2016), *updated at* www.nclc.org/library.

684 Schore v. Renton Collections, Inc., 2018 WL 2018417 (W.D. Wash. May 1, 2018) (cost of hiring an attorney to figure out whether anything was owed after consumer was dunned for already-paid debt satisfied the damages requirement of the UDAP statute); Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163 (E.D.N.Y. 2013) (time spent and costs incurred to defend against lawsuits in which debt buyers misrepresented ownership of debt meet injury requirement); Panag v. Farmers Ins. Co., 204 P.3d 885 (Wash. 2009) (requirement of injury to business or property satisfied where plaintiffs spent time and money to consult attorney and investigate whether defendant had made damaging credit reports). *See also* Hauk v. LVNV Funding, L.L.C., 749 F. Supp. 2d 358 (D. Md. 2010) (damaged credit, emotional distress, and attorney fees incurred by defendants to defend collection suits wrongfully filed by unlicensed collector are sufficient damage to support UDAP claim). *Cf.* Wiginton v. Pac. Credit Corp., 634 P.2d 111 (Haw. Ct. App. 1981) (consumer must prove damages to recover under UDAP statute for debt collection violations; fact question whether transportation costs to consult with attorney were caused by debt collection violation). *But see* Weir v. Med. Data Sys., Inc., 2018 WL 1532853 (S.D. Ill. Mar. 29, 2018) (consumer's costs for gas to and from her attorney's office, loss of work time to meet with attorney, and phone minutes to reply to collector's letter and discuss case with her attorney do not satisfy requirement to show pecuniary loss); Holland v. Draper, 2013 WL 1914388 (W.D. Wash. May 8, 2013) (costs of defending a collection action or filing a UDAP claim not pecuniary damages for purposes of UDAP requirement); Poulin v. Thomas Agency, 746 F. Supp. 2d 200, 206 (D. Me. 2010) (holding that expense of retaining attorney after UDAP defendant asserted false claim of debt is not ascertainable loss; failing to distinguish between these fees and those incurred in affirmative UDAP suit). *But cf.* Brooks v. Cama Self Directed IRA, L.L.C., 2019 WL 418412, at *11 (D. Md. Jan. 31, 2019) (dismissing claim in absence of evidence that defendant's misrepresentations about interest and late fees substantially induced plaintiffs, who had defaulted on their mortgage, to incur costs to defend against foreclosure);. *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.2.8.7 (9th ed. 2016), *updated at* www.nclc.org/library (whether debts and litigation expenses meet UDAP statutes' injury requirements).

685 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.3 (9th ed. 2016), *updated at* www.nclc.org/library.

686 Gilmore v. Account Mgmt., Inc., 2009 WL 4826953 (11th Cir. Dec. 16, 2009) (where debt collector is part of consumer credit and debt collection industry, its abuses have potential to harm general public so are actionable as Georgia UDAP violations); Sanchez v. Ehrlich, 2018 WL 2084147 (S.D.N.Y. Mar. 29, 2018) (denying motion to dismiss UDAP claim where plaintiff alleged pattern of commencing housing court proceedings against tenants for rent they did not owe); Scott v. Greenberg, 2017 WL 1214441, at *17–18 (E.D.N.Y. Mar. 31, 2017) (allegation of generic misrepresentations in connection with thousands of debt collection lawsuits is sufficient); Mayfield v. Asta Funding, Inc., 95 F. Supp. 3d 685 (S.D.N.Y. 2015) (fraudulent wage garnishments are consumer-oriented and affect the public interest, even if the false statements are directed to employers and courts rather than directly to debtors); Fritz v. Resurgent Capital Services, L.P., 955 F. Supp. 2d 163 (E.D.N.Y. July 24, 2013) (practices that are a normal part of collector's business meet N.Y. requirement of impact on consumers at large); Moritz v. Daniel N. Gordon, P.C., 895 F. Supp. 2d 1097, 1114 (W.D. Wash. 2012) (proof that unlicensed collector attempted to collect debts from others may be sufficient); Boyd v. J.E. Robert Co., 2010 WL 5772892 (E.D.N.Y. Mar. 31, 2010) (practice of demanding and collecting improper fees for resolution of municipal liens from large segment of the population affects public interest so is actionable under N.Y. UDAP statute), *adopted*, 2011 WL 477547 (E.D.N.Y. Feb. 2, 2011); Garner v. Academy Collection Serv., 2005 WL 643680 (N.D. Ga. Mar. 11, 2005) (denial of motion to dismiss) (deceptive collection tactics for alleged credit card debt affect public interest); Hage v. Gen. Serv. Bur., 306 F. Supp. 2d 883, 889 (D. Neb. 2003) (finding public interest requirement satisfied where plaintiffs filed debt collection case as class action and alleged widespread effects); Stephens v. Omni Ins. Co., 159 P.3d 10, 24–25 (Wash. Ct. App. 2007) (deceptive debt collection notices meet public impact test because of potential for repetition), *aff'd on other grounds sub nom.* Panag v. Farmers Ins. Co., 204 P.3d 885 (Wash. 2009). *But cf.* Campbell v. MBI Assoc., Inc., 98 F. Supp. 3d 568 (E.D.N.Y. Mar. 31, 2015) (no UDAP claim for "conduct unique to the parties," here mistakenly sending letter directly to represented consumer; but inclusion of unauthorized fee in form letter affects all consumers, and will support a claim; Karp v. Siegel, 1998 WL 314769 (S.D.N.Y. June 12, 1998) (no UDAP claim where debt collection misdeeds were fact-specific and did not have broader impact on consumers at large).

687 Padilla v. Payco Gen. Am. Credits, 161 F. Supp. 2d 264 (S.D.N.Y. 2001) (no cause of action under Mass. UDAP statute where consumer failed to send thirty-day demand letter before filing suit); *In re* Schwartz, 2011 WL 1331963 (Bankr. D. Mass. Apr. 7, 2011) (private remedy for violation of Massachusetts collection agency act is UDAP claim, but debtor must comply with UDAP statute's demand letter requirement). *But cf.* Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997) (Wisconsin UDAP statute requires notice to defendant thirty days before commencing class action, but this requirement is procedural and therefore inapplicable in federal class action); Hernandez v. Vanderbilt Mortgage & Fin., Inc., 2010 WL 2598368 (S.D. Tex. June 24, 2010) (UDAP statute's pre-suit notice requirement inapplicable where complaint seeks remedies only under state debt collection statute, even though complaint notes that violations are also UDAP violations). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.4.4 (9th ed. 2016), *updated at* www.nclc.org/library.

688 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.6.5 (9th ed. 2016), *updated at* www.nclc.org/library.

for enhanced damages, or make the defendant's good faith a defense.[689] Whether a litigation privilege affects a UDAP or other statutory claim is discussed at § 16.1.3, *supra*.

16.4 State Credit Repair Organization Statutes

16.4.1 Overview

Most states have passed statutes to deal with abuses by credit repair organizations.[690] These statutes, often termed the state Credit Services Organization Act, offer strong remedies and have the potential of applying to certain debt collection activities. They typically follow the federal Credit Repair Organizations Act[691] closely in some respects, but differ in significant ways, often imposing additional requirements such as registration and bonding.

State credit repair organization statutes are discussed in detail in NCLC's Fair Credit Reporting Ch. 17 (9th ed. 2018), *updated at* www.nclc.org/library.

16.4.2 Scope

Like the federal Credit Repair Organizations Act, all or nearly all state credit repair statutes apply to organizations that offer to improve an individual's credit rating in return for the payment of money or other valuable consideration. This language should be interpreted consistently with the federal statute to encompass debt collectors who represent to debtors that payment will improve their credit records.[692]

In addition, most state credit repair statutes cover organizations that assist or offer to assist consumers in obtaining extensions of credit. These statutes may cover debt collectors who offer to assist the consumer in obtaining credit to pay the debt. They would also cover creditors who make such offers, provided the creditor does not fall within a specific exemption.[693] The assistance must be offered or provided in return for the payment of money or other valuable consideration, but the collector's receipt of the proceeds of the extension of credit may meet this requirement.[694]

State credit repair laws typically exempt non-profit organizations, licensed real estate brokers and attorneys when acting within the scope of their licenses, broker-dealers registered with the SEC or the Commodity Futures Trading Commission (CFTC), consumer reporting agencies, credit unions, banks and other lenders authorized under federal or state law, and lenders approved by HUD for participation in federal mortgage insurance.[695] A smaller number of state credit repair laws exempt debt collectors, debt adjusters, mortgage brokers, accountants, holders of other licenses, or other entities.

16.4.3 Substantive Prohibitions

Debt collectors that fall under state credit repair statutes are likely to have made no attempt to comply with the statute's substantive requirements. Typical requirements of state credit repair statutes include:

- Registration and bonding;
- Disclosures to the consumer about rights available under the FCRA;
- Written contracts with specified provisions, including a description of the services to be provided;
- A prohibition against charging the consumer for a referral to a retail seller who will, or may, extend credit to the consumer on the same terms as those available to the general public; or
- A three- or five-day right to cancel any contract for services.

Most, like the federal statute, also prohibit certain misrepresentations and deceptive acts. A number of state statutes explicitly prohibit waivers of the statutory protections.

Some state credit repair statutes, like the federal statute, prohibit organizations from accepting payment from the buyer before performing services. Many allow advance payment once the organization has posted a bond, however.

16.4.4 Private Remedies

Almost all state credit repair statutes provide a private right of action to consumers. Some do so both by making a violation actionable under the state UDAP statute and by creating a special cause of action.

The special causes of action offered by state credit repair laws are often broader than those authorized by the state UDAP statute or the state debt collection practices statute. Usually the statutes that create special causes of action authorize punitive damages and attorney fees. Many, like the federal statute,[696] set as minimum damages the total amount paid by

689 *See, e.g.*, Watkins v. Peterson Enters., 57 F. Supp. 2d 1102 (E.D. Wash. 1999) (collector established good faith defense to UDAP liability). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 4.2.4, 4.2.6, 12.4.2.3 (9th ed. 2016), *updated at* www.nclc.org/library.

690 *See* National Consumer Law Center, Fair Credit Reporting § 15.3, Appx. H (9th ed. 2018), *updated at* www.nclc.org/library.

691 15 U.S.C. §§ 1679 to 1679j. *See* § 14.9, *infra* (summary of debt collection applications of federal Act). *See generally* National Consumer Law Center, Fair Credit Reporting § 17.2 (9th ed. 2018), *updated at* www.nclc.org/library.

692 *See* § 14.9.2, *supra* (decisions under federal Credit Repair Organizations Act).

693 *See* Brown v. Mortgagestar, Inc., 194 F. Supp. 2d 473 (S.D. W. Va. 2002) (state credit services organizations act would apply to entity that brokered loan, but this defendant was exempt as lender regulated by state and approved by HUD for participation in mortgage insurance program).

694 *See generally* National Consumer Law Center, Fair Credit Reporting § 17.2.2 (9th ed. 2018), *updated at* www.nclc.org/library.

695 *See generally* National Consumer Law Center, Fair Credit Reporting § 17.3.3, Appx. H (9th ed. 2018), *updated at* www.nclc.org/library.

696 15 U.S.C. § 1679g(a)(1)(B).

the consumer.[697] A few set a dollar amount, such as $1000, as minimum damages.

16.5 Unauthorized or Unethical Practice of Law by Creditors, Lawyers, and Collection Agencies

16.5.1 Unauthorized Practice of Law by Creditors

Every state has laws restricting the practice of law to licensed lawyers. While most unauthorized practice of law cases in the debt collection context have involved unauthorized practice of law by collection agencies, some cases have involved creditors.

Many jurisdictions do not allow a corporate creditor's officer or employee to represent the creditor in court unless they are authorized to practice law in that jurisdiction.[698] Courts will closely scrutinize assignments of debts to individuals, especially if they are owners or managers of the corporation, to determine whether the assignment is a subterfuge to permit unauthorized practice.[699]

16.5.2 Unauthorized Practice of Law by Collection Agencies

States have taken very different positions as to what activities of a collection agency constitute unauthorized practice of law.[700] Alabama considers demands for payment that do not threaten suit not to constitute the practice of law.[701] Rhode Island prohibited any debt collection activities by third parties unless they were admitted to practice in the state, but this restriction was found to be an unconstitutional burden on interstate commerce.[702]

Some states prohibit a contingent fee collector from filing suit in its own name.[703] A collection agency may be engaging in the unauthorized practice of law if it has a contingent fee arrangement with a creditor and hires and controls the attorney filing suit.[704] However, a collection agency may avoid a finding

697 *See, e.g.*, Barker v. Allegra Corp. (*In re* Barker), 251 B.R. 250 (Bankr. E.D. Pa. 2000) (amount paid must be awarded regardless of amount of actual damages).

698 *See* National Consumer Law Center, Collection Actions Ch. 3 (5th ed. 2020), *updated at* www.nclc.org/library.

699 *See, e.g.*, *In re* Reed, 532 B.R. 82 (Bankr. N.D. Ill. 2015) (key issue is whether assignee is officer or employee of creditor corporation; conduct here was suspicious but not sufficient to require dismissal); Zapata v. McHugh, 893 N.W.2d 720 (Neb. 2017) (assignee of business entity that may sue only by licensed attorney stands in shoes of assignor, and thus may sue only by licensed attorney; noting that this rule "protects the public from irresponsible behavior by lay advocates"). *See also* Iowa Supreme Court Commission on the Unauthorized Practice of Law v. Sullins, 893 N.W.2d 864 (Iowa 2017) (articulating criteria for subterfuge assignments; here disbarred attorney was practicing law when he took assignment of debt from person who owed him money and sued in his own name; lawyer here was representing assignor as well as himself).

700 *See generally* Annot., *Operations of Collection Agency As Unauthorized Practice of Law*, 27 A.L.R.3d 1152 (1969); *In re* Morales, 151 A.3d 333 (Vt. 2016) (overview of Vermont law defining practice of law).

701 Porter v. Alabama Ass'n of Credit Executives, 338 So. 2d 812 (Ala. 1976).

702 Nat'l Revenue Corp. v. Violet, 807 F.2d 285 (1st Cir. 1986).

703 Conn. Gen. Stat. § 36a-805(a)(3) (collection agency may not "receive assignments as a third party of claims for the purpose of collection or institute suit thereon in any court"); Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. A-1 Assoc., 623 N.W.2d 803 (Iowa 2001) (company that took assignments, sued in small claims court, then kept agreed percentage and forwarded rest to creditor was rendering legal services for profit "under the guise of trying its own case"); N.Y. Judiciary Law § 489 (McKinney) (forbidding collector from taking assignment of debt for purposes of filing suit); Roberts v. LaConey, 650 S.E.2d 474 (S.C. 2007) (purported assignee engaged in unauthorized practice where it paid nothing for assignment, would receive nothing unless successful, and must split proceeds 1/3 to "assignee" and 2/3 to creditor); State v. Isner, 285 S.E.2d 641 (W. Va. 1981) (collection agency may not sue on debt assigned to it for collection). *See also* Withers v. Eveland, 988 F. Supp. 942 (E.D. Va. 1997) (under Virginia law, non-lawyer was not authorized to file suit to collect debt owed by another, so threat to sue violated FDCPA as it was a threat to take action that cannot legally be taken or is not intended to be taken); State v. Hunt, 880 P.2d 96 (Wash. Ct. App. 1994) (affirming conviction of non-lawyer on charge of operating unlicensed collection agency; he took assignments of debts and brought *pro se* suits, some naming original creditor as plaintiff). *But see* Green Tree Servicing L.L.C. v. Sanders, 2006 WL 2033668 (Ky. Ct. App. July 21, 2006) (debt collector to whom debt assigned for purposes of collection may sue in its own name; distinguishing cases in which non-assignee collector prepared legal papers for creditor); Idaho Code § 26-2243 (permit holder shall have property right in any account assigned to it for collection; provided, however, no right herein granted shall authorize such permit holder to engage in practice of law). *But cf. In re* UPL Advisory Op. No. 2001-1, 591 S.E.2d 822 (Ga. 2004) (if suit on assigned debt is in creditor's interest, i.e., if creditor gets paid only if agency wins, this is unauthorized practice; if creditor makes "actual and legal transfer of all interest in the account" then collector is lawfully representing itself); Hauge Assoc., Inc. v. McGriff, 666 N.W.2d 151 (Iowa 2003) (collection agency to which debt was assigned for collection could sue as real party in interest if represented by Iowa attorney); Asset Acceptance Corp. v. Robinson, 625 N.W.2d 804 (Mich. Ct. App. 2001) (successor creditor, who purchased debt outright, was not collection agency as defined by Mich. Comp. Laws § 339.901(b), and thus did not violate Mich. Comp. Laws § 339.915a, nor engage in unauthorized practice of law, when it sued on purchased debt in its own name).

704 *See, e.g.*, Kolker v. Duke City Collection Agency, 750 F. Supp. 468 (D.N.M. 1990); J.H. Marshall & Assoc. v. Burleson, 313 A.2d 587 (D.C. 1973); Bump v. Barnett, 16 N.W.2d 579 (Iowa 1944); State *ex rel.* Norvell v. Credit Bureau, 514 P.2d 40 (N.M. 1973); State *ex rel.* State Bar of Wis. v. Bonded Collections, 154 N.W.2d 250 (Wis. 1967). *See also* Brees v. Sweet, 2011 WL 3687610 (Wash. Ct. App. Aug. 23, 2011) (non-lawyer cannot act *pro se* to collect a judgment assigned to him unless assignment is absolute and supported by consideration). *Cf.* Collection Ctr., Inc. v. State *ex rel.* Collection Agency Bd., 809 P.2d 278 (Wyo. 1991) (collection agency not permitted to advertise that it offered legal services since agency was prohibited by statute from rendering legal services; agency may advertise that it would accept assignment of debts and proceed as party in interest on those debts). *But cf.* Lewis v. ACB Bus. Services, Inc., 135 F.3d 389 (6th Cir. 1998) (Ohio law) (consumer failed to state claim for unauthorized practice of law in absence of evidence that collector rather than creditor had hired and would pay attorney); Asset Acceptance Corp. v. Robinson, 625 N.W.2d 804 (Mich. Ct. App. 2001) (assignee did not engage in unauthorized practice where it purchased debts outright).

of unauthorized practice of law if it obtains written authority from the creditor to forward the creditor's accounts to an attorney for collection and does not interfere in the attorney-client relationship between the creditor and lawyer.[705]

Some states have statutes permitting collection agencies to file debt collection suits, and some courts have given effect to these statutes.[706] However, courts may hold that it is their inherent or constitutional right—not the legislature's—to determine policy regarding the practice of law,[707] so may not view these statutes as controlling. An intermediate appellate court in Arizona, relying on the absence of a prohibition in the state debt collection statutes and some state regulations that regulated the manner of filing suit, concluded that a debt collector could take assignments of debts and file suit on them in its own name.[708]

The West Virginia Supreme Court narrowly construed a statute allowing non-lawyers to appear for others in a magistrate's court to avoid constitutional questions, holding that it did not permit a collection agency to represent a creditor.[709] The South Carolina Supreme Court held that third party managers hired by condominium or homeowners' associations engaged in unauthorized practice when they appeared in court, filed judgments in court, prepared and filed lien documents, and advertised that they could perform these services.[710]

California courts have ruled that an individual to whom a debt has been assigned may bring a *pro se* suit on the debt, as long as the assignment is absolute, even if the proceeds of the suit will be split with the assignor.[711] Another California decision holds that a corporation does not engage in unauthorized practice of law when its in-house counsel files collection actions on behalf of a related corporation, a debt buyer.[712]

Some courts hold that collection agency letters threatening legal action constitute unauthorized practice of law.[713] Unauthorized practice of law may also occur when a collection

705 *See, e.g.*, Eager v. Credit Bur. Collection Services, Inc., 2013 WL 5719224 (W.D. Mich. Oct. 18, 2013) (collector did not engage in unauthorized practice when it retained law firm to sue on debt where agreement with creditor authorized it to do so); State *ex rel.* Porter v. Alabama Ass'n of Credit Executives, 338 So. 2d 812 (Ala. 1976). *See also* Asset Acceptance Corp. v. Robinson, 625 N.W.2d 804 (Mich. Ct. App. 2001) (reciting similar Michigan statutory provisions); Patterson v. Pritchard, 2011 WL 3371545 (Tex. App. Aug. 4, 2011) (construing contract with non-lawyer not to require unauthorized practice, so it is not illegal). *Cf.* Jones v. Vest, 2000 WL 33797103 (E.D. Va. Nov. 7, 2000) (collector engaged in unauthorized practice of law and violated FDCPA by retaining attorney and filing garnishment summons when its collection services agreement with creditor was no longer in force).

706 *COLORADO*: Colo. Rev. Stat. § 5-16-125(3). *See* People v. Adams, 243 P.3d 256 (Colo. 2010) (affirming criminal conviction for unauthorized practice; claims may be assigned and assignees may sue, but assignment not shown here; non-lawyer who filed claims in bankruptcies, and split recovery 50/50 with creditor, was "acting in a representative capacity" and thus practicing law); Thibodeaux v. Creditors Serv., Inc., 551 P.2d 714 (Colo. 1976) (construing earlier version of predecessor to this statute, to allow collectors to bring suit on assigned claims).

OHIO: Ohio Rev. Code Ann. § 1319.12(C) (West). *See* Capital One Bank v. Reese, 2015 WL 5728642, at *12 (Ohio Ct. App. Sept. 30, 2015) (unpublished) (collection agency did not engage in unauthorized practice where it forwarded case to collection firm but suit was filed in name of creditor, even though firm's records listed agency as client); Recovery Sys., Ltd. v. Coburn, 2008 WL 4801641 (Ohio Ct. App. Nov. 4, 2008) (fact issue whether assignment complied with statute); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (unauthorized practice where agency sued on debt that had not been assigned to it in compliance with Ohio Rev. Code Ann. § 1319.12(C) (West) procedure);.

OREGON: Or. Rev. Stat. § 697.045. *Cf.* Messmer v. Carter, 578 P.2d 788 (Or. 1978) (construing former statute to allow licensed collectors to bring suit on claims assigned to them; declining to reach constitutional questions).

TENNESSEE: Tenn. Code Ann. § 62-20-124 (agency may take assignment of debts and sue in own name if licensed attorney appears for it; statute establishes procedural requirements for suits on assigned debts). *See* Dickerson v. CBET, Inc., 2016 WL 7799578 (E.D. Tenn. Mar. 14, 2016) (collection agency, acting as agent for creditor, may retain counsel to represent it in collection action; agency's non-lawyer employee, who prepared paperwork, did not engage in unauthorized practice, because lawyer read and approved his work before signing it).

707 *See, e.g.*, Merco Constr. Eng'rs, Inc. v. Mun. Ct. for Long Beach Judicial Dist., 581 P.2d 636 (Cal. 1978) (invalidating statute that extended right of lay person to represent corporations beyond cases in small claims courts). *See generally* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.3.9.3 (9th ed. 2016), *updated at* www.nclc.org/library.

708 Cruz v. Lusk Collection Agency, 580 P.2d 1210 (Ariz. Ct. App. 1978) (giving effect to statute allowing collectors to bring suit on assigned debts).

709 State v. Isner, 285 S.E.2d 641 (W. Va. 1981).

710 Rogers, Townsend & Thomas, P.C. v. Peck, 797 S.E.2d 396 (S.C. 2017).

711 Fink v. Shemtov, 148 Cal. Rptr. 3d 570 (Cal. Ct. App. 2012) (non-lawyer assignee, who agreed to sue on debt and split recovery with assignor, was not engaged in unauthorized practice when he sued *pro se* in his own name; assignment was valid; key issue is degree of control that assignor can exercise over the litigation). *See also* LeDoux v. Credit Research Corp., 125 Cal. Rptr. 166 (Cal. Ct. App. 1977) (reaching similar conclusion under former state statute; not unauthorized practice for collection agency to which claim had been assigned to bring suit through its attorney and split the proceeds with the assignor).

712 McMinn v. Midland Credit Mgmt., Inc., 2015 WL 867335 (S.D. Cal. Mar. 2, 2015) (state law does not prohibit representation of creditor by in-house counsel of related corporation).

713 Withers v. Eveland, 988 F. Supp. 942 (E.D. Va. 1997) (under Virginia law, non-lawyer was not authorized to file suit to collect debt owed by another, so non-lawyer collector who threatened to sue violated FDCPA); State *ex rel.* Porter v. Alabama Ass'n of Credit Executives, 338 So. 2d 812 (Ala. 1976) (letters threatening legal action constitute unauthorized practice of law). *But cf.* Porter v. Dunn & Bradstreet, 352 F. Supp. 1226 (N.D. Ala. 1972) (notices stating that claimant will "take steps to enforce collection" or will "forward this account to an attorney" do not fall outside sphere of activity preserved for lawyers and do not threaten legal action), *aff'd mem.* 472 F.2d 1049 (5th Cir. 1973); State *ex rel.* Norvell v. Credit Bureau, 514 P.2d 40 (N.M. 1973) (letters warning of effects of adverse judgment, sent prior to suit, were permissible); Chevy Chase Bank v. McCamant, 512 S.E.2d 217 (W. Va. 1998) (interpreting West Virginia debt collection law, which prohibits a debt collector that is not an attorney licensed in West Virginia from sending letters on an attorney's letterhead to West Virginia debtors, not to prohibit out-of-state attorney from sending dunning letter to state resident on behalf of out-of-state creditor). *See generally* § 16.5.3, *infra*.

agency offers legal advice to a debtor or a creditor,[714] prepares pleadings[715] or garnishment or attachment forms,[716] or assists an attorney in collecting an account.[717] The activity of a loan servicer may also cross the line into unauthorized practice if it goes beyond demanding payment or advising the borrower that the lender intends to foreclose.[718] Some bar associations and bar committees have issued advisory opinions defining activities of collection agencies or creditors that may constitute unauthorized practice of law.[719]

Low-income consumers who lack access to competent legal representation may seek advice from self-styled foreclosure consultants, paralegals, or other non-lawyers. These entities are often held to have engaged in unauthorized practice.[720] Bankruptcy petition preparers may go beyond their legitimate document preparation work and offer legal advice—sometimes disastrously wrong—to petitioners. Courts can enjoin this unauthorized practice, require disgorgement of fees, and in some cases seek criminal prosecution.[721] Such acts are also UDAP violations.[722] Credit counseling programs, debt

714 *See* Patrick v. Teays Valley Trs., L.L.C., 2012 WL 5993163 (N.D. W. Va. Nov. 30, 2012) (allowing debtors to proceed with claim that owner of trustee company violated state debt collection statute's prohibition against unlicensed practice of law by discussing legal matters with them); Florida Bar v. Florida First Fin. Services Group, Inc., 695 So. 2d 275 (Fla. 1997) (issuing permanent injunction against agency and individuals; unauthorized practice of law for non-lawyer collection agency employees to hold themselves out as lawyers and advise debtors as to the legal consequences of their actions); Pisarello v. Administrator's Serv. Corp., 464 So. 2d 917 (La. Ct. App. 1985) (collection agency precluded from giving advice regarding statute of limitations running on claims because it would constitute practice of law); Roberts v. LaConey, 650 S.E.2d 474 (S.C. 2007) (unauthorized practice shown where collector's letter to debtor included legal opinion as to individual liability for corporate debts, and threats of possible legal consequences); Crain v. Unauthorized Practice of Law Comm. of the Supreme Court of Texas, 11 S.W.3d 328 (Tex. App. 1999) (non-lawyer debt collector engaged in unauthorized practice of law by offering advice on filing of liens). *Cf. In re* Dunklin, 2006 WL 2806234 (Bankr. D.N.J. Sept. 27, 2006) (out-of-state firm, not admitted to practice in N.J., filed proof of claim including "bankruptcy fee"; proof of claim was administrative act, not practice of law; fee was closer question, not reached because fee request withdrawn). *But see* Unauthorized Practice of Law Comm. v. Paul Mason & Assoc., 46 F.3d 469 (5th Cir. 1995) (Tex. law; not unauthorized practice of law where Creditors Bankruptcy Service, acting as creditors' agent, filed proofs of claim, monitored progress of bankruptcies, attended creditors' meetings, contacted debtors' lawyers to discuss reaffirmation, and filled out reaffirmation forms; if state law on unauthorized practice was inconsistent with this holding, it was preempted by bankruptcy law) *But cf.* Laccinole v. Assad, 2016 WL 868511 (D. R.I. Mar. 7, 2016) (process server did not engage in unauthorized practice when he pointed to creditor's phone number and told debtor to call her if he wanted to negotiate out-of-court settlement); Metz v. HCSC-Credit & Collections, 1985 WL 3368 (E.D. Pa. Oct. 29, 1985) (threat to recommend suit to creditor not threat to engage in unauthorized practice of law as it involved no knowledge of law beyond that possessed by average person); LoPresti, FTC Informal Staff Letter (May 4, 1992) (FDCPA does not prohibit collection agencies from counseling their clients to litigate against consumers).

715 *See* Sanz v. Fernandez, 633 F. Supp. 2d 1356 (S.D. Fla. 2009) (landlord services company prepared and filed eviction complaint); Barbanti v. Quality Loan Serv. Co., 2007 WL 26775 (E.D. Wash. Jan. 3, 2007) (unauthorized practice of law where non-lawyer employee of mortgage servicer signed declaration of foreclosure); Cleveland Metro Bar Ass'n. v. Wooten, 10 N.E.3d 703 (Ohio 2014) (non-attorney debt collector engaged in unauthorized practice by preparing pleadings and filing small-claims actions for payday lenders); Cleveland Metro Bar Ass'n. v. McGinnis, 998 N.E.2d 474 (Ohio 2013) (using the words law or "law office" in advertising by non-lawyer; preparing and filing pleadings); Roberts v. LaConey, 650 S.E.2d 474 (S.C. 2007) (purported assignee of judgment engaged in unauthorized practice of law by filing pleadings); Crain v. Unauthorized Practice of Law Comm. of the Supreme Court of Texas, 11 S.W.3d 328 (Tex. App. 1999) (non-lawyer debt collector engaged in unauthorized practice of law by filing lien affidavits for mechanics' liens and supplying legal forms).

716 Blair v. Supportkids, Inc., 222 F. Supp. 2d 1038 (N.D. Ill. 2002) (unauthorized practice for private child support collector to send document that purported to be income withholding notice to obligor's employer); Marchant v. U.S. Collections, West, Inc., 12 F. Supp. 2d 1001 (D. Ariz. 1998) (non-lawyer employee of collection agency who signed application for writ of garnishment was engaged in unauthorized practice of law and violated FDCPA); State v. Milliman, 802 N.W.2d 776 (Minn. Ct. App. 2011) (non-attorney collector engaged in unauthorized practice when he prepared and served garnishment forms, even though creditor had given him power of attorney); Crain v. Unauthorized Practice of Law Comm. of the Supreme Court of Texas, 11 S.W.3d 328 (Tex. App. 1999) (non-lawyer debt collector engaged in unauthorized practice of law by filing lien affidavits for mechanics' liens). *But see* Mitchell v. J&M Sec., L.L.C., ___ S.W.3d ___, 2019 WL 5382515 (Mo. Ct. App. Oct. 22, 2019) (filling in blanks on garnishment forms, along with interrogatory form required by court rule, and filing them, does not require legal skill or knowledge and is not practice of law). *But cf.* Cruson v. A.A.A.A., Inc., 2007 WL 2363475 (Wash. Ct. App. Aug. 20, 2007) (non-lawyer did not commit unauthorized practice by filling out garnishment forms for attorney to review and sign).

717 State *ex rel.* Porter v. Alabama Ass'n of Credit Executives, 338 So. 2d 812 (Ala. 1976) (affirming injunction prohibiting agency from accepting employment from any attorney to recover amounts owed to another).

718 Barbanti v. Quality Loan Serv. Co., 2007 WL 26775 (E.D. Wash. Jan. 3, 2007) (issuing declaration of forfeiture as preliminary step in non-judicial foreclosure is practice of law). *But cf.* Wells Fargo Bank v. New Orleanian Ltd. P'ship, 855 So. 2d 388 (La. Ct. App. 2003) (servicer not engaged in unauthorized practice where it did not provide legal advice, file suit in its own name, threaten that it (as opposed to lender) would take legal action, or secure attorney for lender in exchange for percentage of amounts recovered).

719 *See, e.g.*, Opinion 245, 6 Ariz. B.J. 39 (Dec. 1970); *In re* UPL Advisory Op. 2003-1, 623 S.E.2d 464 (Ga. 2005) (mediation company and its non-lawyer owner, who represented consumers in negotiations with creditors' lawyers, who had already filed suit, were engaged in unauthorized practice of law; firm located prospective customers by searching court records); *In re* UPL Advisory Op. No. 2001-1, 591 S.E.2d 822 (Ga. 2004) (if suit on assigned debt is in creditor's interest, i.e., if creditor gets paid only if agency wins, this is unauthorized practice; if creditor makes "actual and legal transfer of all interest in the account" then collector is lawfully representing itself); New York County Lawyer's Assoc. Op. Nos. 510, 555, 1968 N.Y. Co. Y.B. 258 (1980).

720 *See* National Consumer Law Center, Federal Deception Law Ch. 10 (3d ed. 2017), *updated at* www.nclc.org/library (regulation of debt relief services); National Consumer Law Center, Home Foreclosures Chs. 15, 16 (2019), *updated at* www.nclc.org/library; National Consumer Law Center, Unfair and Deceptive Acts and Practices §§ 9.4.2, 9.4.3 (9th ed. 2016), *updated at* www.nclc.org/library.

721 National Consumer Law Center, Consumer Bankruptcy Law and Practice § 16.6 (12th ed. 2020), *updated at* www.nclc.org/library.

722 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 13.6 (9th ed. 2016), *updated at* www.nclc.org/library;

settlement companies, and debt elimination scams are discussed in NCLC's Federal Deception Law Ch. 10 (3d ed. 2017), *updated at* www.nclc.org/library.

16.5.3 Unethical Practice of Law by Lawyers Engaging in Debt Collection

The collection activities of a lawyer may be unethical. Examples of collection activities for which attorneys have been sanctioned include:

- Allowing collection employees to act in the attorney's name;[723]
- Routinely signing pleadings and other documents prepared by attorneys not licensed to practice in the state;[724]
- Designing a dunning letter simulating legal process for use by a collection agency;[725]
- Filing false affidavits, obtained by a debt buyer when it purchased the debts, that implied that bank officers had personal knowledge about specific debtors' debts, without having reviewed them;[726]
- Threatening actions that the attorney does not have authority to take or does not intend to take;[727]
- Giving legal advice to an unrepresented debtor;[728]
- Threatening criminal prosecution in an attempt to collect a debt for a client;[729]
- Filing suit in the name of the collection agency rather than in the name of the true creditor;[730]
- Permitting a collection agency client to obtain a judgment against a party for a debt that was not owed;[731]
- Attempting to collect the same debt twice, by dunning an estate for a debt which the testator had paid in full while alive, and refusing to cooperate with the estate's attorney's efforts to clarify the problem;[732]
- Repeatedly dunning or suing non-debtors with names or Social Security numbers similar to those of debtors, and carrying on after being made aware of the problem;[733]
- Allowing a non-lawyer, who failed to provide required disclosures, to negotiate reaffirmation agreements with debtors;[734] and
- Staging a media event under the guise of serving a writ of execution on a judgment debtor.[735]

National Consumer Law Center, Consumer Bankruptcy Law and Practice § 16.6 (12th ed. 2020), *updated at* www.nclc.org/library.

723 In re Hastert, Cal. State Bar Op./04-0-10070 (Dec. 11, 2006) (reprimanding collection lawyer; allowing collection employee to file complaints and default judgments without supervision was aiding unauthorized practice), *available at* http://members.calbar.ca.gov; *In re* Wall, 73 N.E.3d 170 (Ind. 2017) (imposing 30-day suspension on local lawyer who enabled unauthorized practice by out-of-state foreclosure rescue firm; firm's paralegals did all the work; warning that court takes this practice very seriously, and could impose heavier sanctions, but this lawyer's misconduct, though "quite ill-advised" was well-intentioned); Kentucky Bar Ass'n v. Tiller, 641 S.W.2d 421 (Ky. 1982); *In re* DeVinny, 255 N.W.2d 832 (Minn. 1977) (publicly censuring attorney who lent his name to collection agency's letterhead and failed to authorize or personally supervise court proceedings brought by collection agency in his name); *In re* Lenahan, 824 N.Y.S.2d 826 (N.Y. App. Div. 2006) (two-year suspension for lending name to collection agency); *In re* Scheck, 574 N.Y.S.2d 372 (N.Y. App. Div. 1991) (allowing collection employees to act in lawyer's name and violate FDCPA was considered in one-year suspension of lawyer for violating N.Y. Code of Professional Responsibility); N.Y. Ethic Op. No. 813 (N.Y. State Bar Assoc. May 7, 2007) (lawyer should not use law firm letterhead for debt collection letters sent by debt collectors without meaningful involvement and legal supervision), *available at* https://nysba.org. *See also* United States v. Cent. Adjustment Bureau, Inc., 667 F. Supp. 370 (N.D. Tex. 1986) (such behavior unethical and proscribed by FDCPA), *aff'd as modified on other grounds*, 823 F.2d 880 (5th Cir. 1987); ABA Formal Op. 469 (Nov. 12, 2014), *available at* www.americanbar.org (prosecutor who provides official letterhead to debt collector for use in sending letters threatening dishonored check prosecution, when no lawyer from prosecutor's office has reviewed letter or case file to determine if prosecution is warranted, violates Model Rule 8.4(c) by falsely implying that prosecutor has determined that check transaction is prosecutable, and Model Rule 5.5(a) by aiding and abetting collection agency's unauthorized practice of law). *See also* N.J. Advisory Comm. on Professional Ethics Op. 506 (Oct. 1982), *available at* http://njlaw.rutgers.edu. *Cf. In re* Disciplinary Action Against McCray, 755 N.W.2d 835 (N.D. 2008) (six-month suspension for misconduct in course of credit repair scam; attorney responsible for unauthorized practice and fraud by non-lawyer leased employees who sent out form dispute letters containing false statements).

724 *In re* DuBre, 656 S.E.2d 343 (S.C. 2007) (public reprimand); *In re* Wall, 73 N.E.3d 170 (Ind. 2017) (pleadings prepared by paralegals at out-of-state foreclosure rescue firm).

725 *In re* Dows, 209 N.W. 627 (Minn. 1926).

726 People v. Standley, 2015 WL 4944101 (Colo. July 30, 2015).

727 *See* ABA Comm. on Ethics & Pro. Resp., Informal Op. C-734 (1964).

728 Model Rules of Pro. Conduct r. 4.3 (Am. Bar Ass'n 1983), *available at* https://www.americanbar.org; Maru, State Bar of Texas Op. 380 (1975), *available at* https://www.legalethicstexas.com ("a collection letter sent to an unrepresented party may not contain a detailed explanation of the legal consequences of nonpayment, for such would constitute advising the party of the law").

729 Comm. on Prof'l Ethics & Conduct v. Michelson, 345 N.W.2d 112 (Iowa 1984). *See also* Roberts v. LaConey, 650 S.E.2d 474 (S.C. 2007) (threat of arrest, made by collector engaged in unauthorized practice, was "inappropriate" and would violate rules of professional conduct if made by licensed lawyer). *See generally* §§ 7.2.4.1, 15.6, 16.2.4.5, *supra*.

730 Kolker v. Sanchez, 1991 WL 11691589 (D.N.M. Dec. 10, 1991) (finding violations of New Mexico UDAP statute and FDCPA; rejecting attorney's preemption defense based on state supreme court's exclusive regulation of lawyer conduct, because attorney violated state court's standards as well).

731 Kentucky Bar Ass'n v. Banks, 769 S.W.2d 760 (Ky. 1989).

732 Hanzelik v. Bd. of Prof'l Responsibility of the Supreme Court, 380 S.W.3d 669 (Tenn. 2012) (thirty-day suspension; problem originated from haphazard recordkeeping).

733 *In re* Cohen & Slamowitz, L.L.P., 981 N.Y.S.2d 100 (N.Y. App. Div. 2014) (censuring large volume collection firm and senior partner for conduct prejudicial to the administration of justice, and conduct adversely reflecting on fitness as a lawyer).

734 *In re* Carlos, 227 B.R. 535 (Bankr. C.D. Cal. 1998) (sanctioning attorney who violated Cal. Rule of Professional Conduct 1-300(A) by willfully aiding unauthorized practice of law; attorney allowed non-lawyer, who failed to provide disclosures required by bankruptcy law, to negotiate reaffirmation agreements).

735 Whitehead v. Food Max of Mississippi, Inc., 332 F.3d 796 (5th Cir. 2003) (affirming Rule 11 sanctions; timing and highly dramatic manner of serving writ of execution were sufficient to show improper purpose).

Lawyers whose collection letters misrepresent their authority to sue where they are not admitted to practice may run afoul of unauthorized practice rules and state UDAP statutes.[736] The California Supreme Court refused to allow contractual attorney fees for activities constituting the unauthorized practice of law, i.e., making demands, preparing for arbitration, and negotiating a settlement, which were carried out in California by lawyers not admitted to practice there.[737]

Intermingling the activities of a collection agency and an attorney may violate professional standards.[738] A court held that a New Jersey statute barring professional corporations from engaging in side businesses prevents a law firm from buying and suing on defaulted debts.[739] The South Carolina Supreme Court publicly reprimanded an inexperienced lawyer for his involvement with a collection agency that paid him a monthly fee and provided him with an office for his private practice. The agency hired, fired, and supervised a staff of telephone collectors, who used the lawyer's name while repeatedly and egregiously violating the state debt collection statute and the FDCPA.[740] A lawyer who fails to properly supervise non-lawyer employees will be responsible for their unauthorized practice or other misconduct.[741]

In a number of states, the legislature has specifically prohibited collection activities by judges and law enforcement officials.[742] A New York statute allows an injured party to seek treble damages against any attorney who is guilty of deceit or collusion with intent to deceive the court or any party.[743] This statute can be applied to practices such as falsely assuring a debtor that they did not have to respond to a summons as long as they made payments, then taking a default judgment and failing to credit them for the payments made.[744]

736 *See, e.g.*, Bencosme v. Stillman Law Offices, L.L.C., 2018 WL 4539224 (D.N.J. Sept. 27, 2018) (declining to dismiss; noting unresolved issues whether dunning letter, which did not threaten lawsuit, on letterhead of Massachusetts firm not licensed to practice in New Jersey, misrepresented attorney involvement or constituted unauthorized practice); Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995) (threat to file suit "NOW" deceptive, where collectors' lawyers were neither admitted in California nor associated with local counsel). *See also* Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995) (statement that agency could file suit within thirty days was deceptive where agency was not licensed to operate in New Mexico, and its usual practice of taking assignments of debts and suing on them was forbidden by New Mexico law; UDAP violations were "knowing" where attorney designed system of form letters, even though he did not approve sending of each letter); Florida Bar v. Moran, 273 So. 2d 390 (Fla. 1973) (attorney commits unauthorized practice through use of a business card that falsely suggests that she is licensed in state); *In re* Charges of Unprofessional Conduct in Panel File No. 39302, 884 N.W.2d 661 (Minn. 2016) (privately reprimanding Colorado-licensed attorney, who engaged in telephone negotiations with Minnesota attorney, seeking to settle Minnesota family members' debt to Minnesota condo association; negotiating settlement is clearly practice of law; noting that result would be different if lawyer negotiated with out-of-state attorney on behalf of in-state client).

737 Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998). *But cf.* Olson v. Cohen, 131 Cal. Rptr. 2d 620 (Cal. Ct. App. 2003) (denying injunctive relief and disgorgement of fees on equitable grounds against law firm that had incorporated but failed to register as corporation; purpose of incorporation is to obtain tax advantages and limit personal liability, not to protect consumers).

738 *See* Cleveland Bar Ass'n v. Nosan, 840 N.E.2d 1073 (Ohio 2006) (sanctioning lawyer for aiding unauthorized practice of law and splitting fees with non-lawyer; debt counseling company provided lawyer with office space, advertising, and support services; non-lawyer intake worker advised consumers whether to choose payment plan or bankruptcy and designed payment plans; lawyer's name used on all documents and fees split with debt counseling company). *But see* State *ex rel.* State Bar Ass'n v. Israel, 25 P.3d 909 (Okla. 2001) (lawyer who represented mothers in child support matters was part-owner of agency that helped them collect; not improper, provided that interest was properly disclosed, interests of obligee and collector were not in conflict, agency handled only "ministerial" aspects of collection, legal services were subject of separate contract with law firm, and funds were properly accounted for).

739 Chulsky v. Hudson Law Offices, 777 F. Supp. 2d 823 (D.N.J. 2011) (concluding that law firm may violate FDCPA by representing that it has authority to enforce a debt that it acquired as part of illegal side business of debt-buying).

740 *In re* Zenner, 560 S.E.2d 406 (S.C. 2002).

741 *In re* Allegro Law, L.L.C., 2010 WL 2712256 (Bankr. M.D. Ala. July 6, 2010) (describing business plan of deceptive debt settlement service; lawyer recruited clients and allowed his name to be used, but all work was done by non-lawyers; lawyer was deceiving consumers, and non-lawyers were engaged in unauthorized practice); *In re* Lustig, 2001 Ariz. LEXIS 160 (Ariz. Sept. 7, 2001) (non-lawyer employees held selves out as lawyers, and assisted in "dishonesty, fraud, deceit, or misrepresentation and conduct prejudicial to the administration of justice"; attorney publicly censured); *In re* Suspended Member of the Arizona Bar, Klahr, 2002 Ariz. LEXIS 71 (Ariz. May 1, 2002) (allowing office manager to make threatening calls to collect debts); People v. Standley, 2015 WL 4944101 (Colo. July 30, 2015) (allowing non-lawyer employee to threaten garnishment where there was no judgment to support it, in a state where attorney was not licensed to practice); Cincinnati Bar Ass'n v. Fernandez, 119 N.E.3d 377 (Ohio 2018) (indefinitely suspending attorney who accepted referrals from debt settlement provider and unquestioningly accepted fees provider collected while providing no services to clients).

742 *See, e.g.*, Ind. Code Ann. § 25-11-1-11 (judges and law enforcement officials); Mont. Code Ann. § 3-1-602 (justices of peace); Tex. Gov't Code § 27.006 (justices of peace). *See also* Hill v. Priority Fin. Services, 2001 WL 1155152 (S.D. Ind. Sept. 28, 2001) (deputy prosecutor who served as counsel to debt collector and brought debt collection suits violated state statute forbidding law enforcement officers to engage in business of debt collection); *In re* Fuselier, 837 So. 2d 1257 (La. 2003) (suspending judge for "abandoning his role as neutral arbiter" and "creating an appearance of impropriety" by, *inter alia*, his bad check collection program for local merchants); Mississippi Comm'n on Judicial Performance v. Willard, 788 So. 2d 736 (Miss. 2001) (removing judge from office for misconduct, including improper use of criminal process to collect civil debt); Disciplinary Counsel v. Medley, 819 N.E.2d 273 (Ohio 2004) (judge violated judicial canons where small claims defendant who failed to pay default judgment was arrested on bench warrant, with bail set at amount of debt, which was then forwarded to creditor; running free collection service showed predisposition in favor of creditors and disregard for law governing collection of judgments). *See generally* §§ 8.1, 16.4, *supra*.

743 N.Y. Judiciary Law § 487.

744 Scott v. Greenberg, 2017 WL 1214441 (E.D.N.Y. Mar. 31, 2017).

16.5.4 Attorneys' Unethical Practices When Collecting Their Own Fees

Lawyers may also violate legal ethics when attempting to collect their own fees. Lawyers have been sanctioned for debt collection harassment,[745] for revealing client secrets in the course of a fee dispute,[746] and for taking a claimed fee out of funds held for a client.[747] A lawyer's retainer agreement which called for a 1% per month late fee, plus costs and attorney fees if collection efforts were required, was held unenforceable because it was unfair and violated the rules of professional conduct.[748] A client stated a claim for negligence, malicious prosecution, and UDAP violations against a lawyer who swore out a bad check complaint against her, and then neglected to tell the authorities when she covered the check, resulting in her arrest.[749]

745 *In re* Suspended Member of the Arizona Bar, Klahr, 2002 Ariz. LEXIS 71 (May 1, 2002) (allowing office manager to make threatening phone calls to collect debt, verbally abusing and threatening to sue client who took business to another attorney, requiring client to sign release to get back half of unearned retainer when whole amount was owed); Iowa Supreme Ct. Disciplinary Bd. v. Powell, 726 N.W.2d 397 (Iowa 2007) (six-month suspension for debt collection misconduct: finance charges added without prior agreement, collection harassment, misstatements of tax law when threatening to report forgiven debts to IRS, real estate lien in violation of state law); *In re* Vaughan, 368 P.3d 1088 (Kan. 2016) (sanctioning attorney for lack of diligence and billing misconduct; attorney refused to file settlement agreement until client paid disputed bill); *In re* Simpson, 959 So. 2d 836 (La. 2007) (excessive fee and harassing litigation; lawyer negotiated 1/3 contingent fee in case involving multi-million dollar estate, at time when he knew contingency no longer existed, and vigorously prosecuted meritless defamation action against heir who challenged fee); *In re* Boydell, 760 So. 2d 326 (La. 2000) (three-year suspension for lawyer who viciously harassed client in dispute over fee which lawyer had improperly calculated and disbursed to self); State *ex rel.* Counsel for Discipline, Nebraska Supreme Court v. Sipple, 660 N.W.2d 502 (Neb. 2003) (two-year suspension for "campaign of intimidation"). *See also In re* Odo, 375 P.3d 320 (Kan. 2016) (attorney violated client disclosure, conflict of interest, and action adverse to client rules: provided litigation loan without advising client of need for independent advice, then after client changed attorneys, took action adverse to client in seeking apportionment of settlement); Ratcliff v. Boydell, 674 So. 2d 272 (La. Ct. App. 1996).

746 Gaylor v. Hobdy, 2003 WL 23024802 (Cal. Ct. App. Dec. 30, 2003) (client stated claim for breach of fiduciary duty against former counsel who disclosed privileged information in course of lawsuit over fees; attorney self-defense exception did not apply, where subject of communication was not relevant to issues in suit); *In re* Huffman, 983 P.2d 534 (Or. 1999) (lawyer's angry letter to client's new lawyer, threatening criminal prosecution over matters which first lawyer could only have learned about while representing client, violated rules forbidding disclosure of client secrets and threatening criminal prosecution to gain advantage in civil matter).

747 People v. Hassan, 45 P.3d 1283 (Colo. 2002) (attorney withheld funds from settlements, incorrectly believing that clients owed him for previous legal services; if knowing, this conduct would require disbarment; lawyer suspended where evidence of deplorable management and accounting skills suggested negligence); People v. Gray, 35 P.3d 611 (Colo. 2001) (attorney's lien statute must be strictly construed; attorney who claimed lien but did not follow procedures and simply disbursed disputed fee to self publicly censured); *In re* Bernstein, 774 A.2d 309 (D.C. 2001) (lawyer suspended for taking $9000 fee out of $30,000 workers' compensation award after Workers' Compensation Commission rejected fee above $6000); *In re* Hailey, 792 N.E.2d 851 (Ind. 2003) (attorney took excessive fee off top of structured personal injury settlement, leaving insufficient funds to pay accrued medical expenses; client suffered dunning from medical providers; attorney publicly reprimanded); Iowa Supreme Court Disciplinary Bd. v. Lubinus, 869 N.W.2d 546 (Iowa 2015) (thirty-day suspension of attorney who withdrew his fee from trust fund before it was fully earned; attorney had self-reported the problem and cleaned up his accounting and cash-handling procedures to prevent recurrence); Matter of Buckner, 421 P.3d 226 (Kansas 2018) (disbarring attorney who kept a portion of a settlement to which he was not entitled). *See also* Attorney Grievance Comm'n of Maryland v. Seiden, 818 A.2d 1108 (Md. 2003) (taking fee out of escrow account without following proper court procedure not "theft or misappropriation" sufficient to justify disbarment, but did justify suspension); State *ex rel.* State Bar Ass'n v. Israel, 25 P.3d 909 (Okla. 2001) (lawyer who was also part owner of collection agency that collected child support continued to prosecute contempt action against slow-paying obligor after he was requested to withdraw; lawyer publicly censured); *In re* Disciplinary Proceedings against Marks, 665 N.W.2d 836 (Wis. 2003) (attorney suspended for misrepresenting to insurance company that he had lien on client's settlement funds; attorney had been discharged by client).

748 Lustig v. Horn, 732 N.E.2d 613 (Ill. App. Ct. 2000). *See also In re* Burton, 442 B.R. 421 (Bankr. W.D.N.C. 2009) (sanctioning attorney for, *inter alia*, improper fee practices in bankruptcy cases); *In re* Suspended Member of the Arizona Bar, Klahr, 2002 Ariz. LEXIS 71 (May 1, 2002) (inclusion of non-refundable retainer provisions in contracts, refusing to return unearned retainers); People v. Feather, 180 P.3d 437 (Colo. 2007) (fee was unreasonable, because neither consistent with fee agreement, nor related to amount of work performed); *In re* Hefron, 771 N.E.2d 1157 (Ind. 2002) (attorney suspended for misconduct in fee negotiation; agreed to hourly fee, then discovered that substantial recovery could be had with little effort, and refused to go forward until clients agreed to contingent fee); *In re* Taylor, 741 N.E.2d 1239 (Ind. 2001) (suspending attorney who required penniless disabled client to sign over her interest in marital home to him; value of home exceeded amount owed; fees greatly exceeded initial estimate, and lawyer did not warn her of escalating fees); Iowa Supreme Ct. Disciplinary Bd. v. Powell, 726 N.W.2d 397 (Iowa 2007) (six-month suspension for improper debt collection conduct, including adding finance charges without prior agreement and providing in fee agreement that client had only ten days to challenge bills and that she must indemnify lawyer if she brought complaint that was resolved favorably to him); *In re* Charges of Unprofessional Conduct in Panel Case No. 44387 (Minn. 2019) 932 N.W.2d 310 (Minn. 2019) (privately admonishing attorney who refused to turn over deed and abstract of title to client he had represented in real estate matter, who owed fees; attorney's lien statute does not supersede rule of professional conduct requiring attorney to turn over property belonging to client when representation terminates); State *ex rel.* Counsel for Discipline of Nebraska Supreme Ct. v. Wintroub, 765 N.W.2d 482 (Neb. 2009) (suspended lawyer's misconduct included refusal to return any part of "non-refundable" retainer, after clients dismissed him before he had done significant work); *In re* Conduct of Campbell, 202 P.3d 871 (Or. 2009) (late fee exceeded statutory rate of interest, and there was no written agreement for higher rate); Long v. Ethics and Disciplinary Comm. of the Utah Supreme Court, 256 P.3d 206 (Utah 2011) (reprimanding attorney for charging excessive fees, and bringing frivolous action in attempt to collect); Cotton v. Kronenberg, 44 P.3d 878 (Wash. Ct. App. 2002) (fee agreement that violated Rules of Professional Responsibility and breached fiduciary duty was unenforceable and void; may also be UDAP violation if impact on public interest can be shown).

749 Papadoupolos v. Josem, 2002 WL 194494 (Jan. 11, 2002).

An attorney's fee agreements must be fair and reasonable. As the New Jersey Supreme Court observed:

> A retainer agreement between a lawyer and a client is not an ordinary contract subject to the rules of the marketplace. It is a contract that must conform to the Rules of Professional Conduct that guide lawyers in their dealings with prospective clients. A lawyer stands in a fiduciary relationship with a prospective client and must act within the ethical constraints commanded by professional standards of responsibility. A retainer agreement must be fair and understandable, and the fee arrangement must be reasonable. The oral assurances that the attorney gives the client should not be different from the written words in the retainer agreement. Those general principles are key to the resolution of this appeal.[750]

A lawyer was publicly reprimanded and required to give a full refund to a client who withdrew from his debt pooling program. His non-refundable retainer contract allowed him to debit her bank account for $500 per month up to $1500. The client withdrew at a time when the lawyer had sent a few form letters and "done nothing to advance the goals of the representation."[751]

16.5.5 Remedies

16.5.5.1 Remedies for Unauthorized Practice of Law

Courts are divided as to what remedies are available to consumers affected by a collection agency's or creditor's unauthorized practice of law. Most suits involving these issues are brought by bar associations or state attorneys general. Several courts have held that a consumer sued by a collection agency has no implied private right of action under a statute prohibiting unauthorized practice of law, because the statute was designed to protect the creditor, not the consumer.[752]

Some courts, however, have allowed class action suits by consumers to enjoin debt collectors' unauthorized practice of law.[753] Pennsylvania's unauthorized practice statute[754] provides a private right of action for injunction and attorney fees, and also makes a violation a UDAP violation.[755] A Kansas statute makes unlicensed practice a UDAP violation.[756] An Ohio statute allows a private right of action for unauthorized practice, but only if the state supreme court has made a finding that the defendant committed such a practice.[757] Common law claims for unauthorized practice are barred in Ohio by the state supreme court's exclusive jurisdiction over the practice of law.[758] Tennessee law provides a private right of action for persons who suffer loss of money or property as a result of violation of the unauthorized practice of law statute.[759] Violation of this statute may also support a negligence *per se* claim.[760]

A federal court decision from Illinois allows a debtor a private right of action for damages against a collection agency that engages in the unauthorized practice of law while attempting to collect a debt.[761] But a later Illinois Supreme Court decision, involving borrowers who sued their lender for having engaged in the unauthorized practice of law by preparing loan documents and charging a fee for this service, holds that only an injunction, not damages, is available.[762] Judgments obtained by unauthorized practice of law may be void.[763]

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750 Balducci v. Cige, 223 A.3d 1229 (N.J. 2020) (invalidating fee agreement; attorney verbally assured clients that they would owe nothing if they did not prevail, but written agreement required them to pay an hourly rate). *See also* Moore v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 576 S.W.3d 341 (Tenn. 2019) (making agreement for, and attempting to collect, unreasonable fee violates rules of professional responsibility; affirming public censure of attorney who required personal injury plaintiff to agree that if she refused settlement offer that attorney regarded as reasonable, she would be liable for contingent fee based on settlement offer).

751 *In re* Sinnott, 845 A.2d 373 (Vt. 2004). *See also In re* Disciplinary Action Against McCray, 755 N.W.2d 835 (N.D. 2008) (fee for "credit repair" was excessive where lawyer did no work; form dispute letters purporting to be signed by clients and containing false representations were sent out by non-lawyer leased employees).

752 Fontell v. Hassett, 2011 WL 4632579 (D. Md. Oct. 3, 2011) (Maryland law provides no civil remedy for unauthorized practice of law); Reliable Collection Agency, Ltd. v. Cole, 584 P.2d 107 (Haw. 1978); Watson v. Auto Advisors, Inc., 822 N.E.2d 1017 (Ind. Ct. App. 2005); Miami Valley Hosp. v. Combs, 695 N.E.2d 308 (Ohio Ct. App. 1997) (no private right of action under statute forbidding unauthorized practice of law, so it cannot be raised as defense or counterclaim to hospital's collection action); Linder v. Ins. Claims Consultants, Inc., 560 S.E.2d 612 (S.C. 2002) (no private right of action for unauthorized practice of law). *See also* Hambrick v. GMAC Mortgage Co., 634 S.E.2d 5 (S.C. Ct. App. 2006) (no private right of action for money damages for unauthorized practice of law).

753 *See, e.g.*, Pennington, Benson & Elliot v. Harris, Clearinghouse No. 19,953 (Ariz. Super. Ct. 1976) (Clearinghouse materials include pleadings and memoranda); J.H. Marshall & Assoc. v. Burleson, 313 A.2d 587 (D.C. 1973); Emmert v. Am. Creditmen's Serv. Ass'n, Pov. L. Rep. ¶ 15,510 (Pa. Ct. Com. Pl.) (consent decree).

754 42 Pa. Cons. Stat. § 2524(c).

755 *See* Srein v. Nat'l Legal Research Group, 2002 WL 31819638 (E.D. Pa. Dec. 16, 2002); Haymond v. Lundy, 2001 WL 15956 (E.D. Pa. Jan. 5, 2001) (plaintiff must meet all usual requirements of UDAP statute, so case must involve transaction for personal, family, or household purposes).

756 Kan. Stat. Ann. § 50-6,142(b), (c).

757 Ohio Rev. Code Ann. § 4705.07 (West). *See* Greenspan v. Third Fed. Sav. & Loan, 912 N.E.2d 567 (Ohio 2009) (stating in dicta that statutory cause of action will not conflict with state supreme court's exclusive jurisdiction over practice of law, because claim must be based on state supreme court finding).

758 Greenspan v. Third Fed. Sav. & Loan, 912 N.E.2d 567 (Ohio 2009).

759 Tenn. Code Ann. § 23-3-112. *See In re* Elrod, 2017 WL 5499714 (E.D. Tenn. Nov. 14, 2017) (consumer stated claim against foreclosure consultant who advised him not to pay the $1000 requested by lender to bring mortgage current; noting that causation is the weakest point in this claim).

760 *In re* Elrod, 2017 WL 5499714 (E.D. Tenn. Nov. 14, 2017).

761 Blair v. Supportkids, Inc., 222 F. Supp. 2d 1038 (N.D. Ill. 2002) (private right of action if person falsely holds self out as attorney or acts negligently; child support obligors stated claim against non-lawyer private collector who sent purported income withholding notices to obligors' employers).

762 King v. First Capital Fin. Services Corp., 828 N.E.2d 1155 (Ill. 2005).

763 *See, e.g.*, Bennie v. Triangle Ranch Co., 216 P. 718 (Colo. 1923); Remole Soil Serv., Inc. v. Benson, 215 N.E.2d 678 (Ill. App. Ct. 1966); Colton

The FTC staff considers unauthorized practice of law (as determined by state law) by a debt collector to violate the provision of the Fair Debt Collection Practices Act (FDCPA) prohibiting "unfair" practices.[764] Adopting this position, a federal court held that a non-lawyer's application for writ of garnishment, which was unauthorized practice of law under Arizona's broad definition, was both a threat to take action which could not be taken, and a false representation that the employee was a lawyer, in violation of the FDCPA.[765] Under this theory, unauthorized practice of law may also violate the state's UDAP or debt collection statute.[766]

16.5.5.2 Remedies for Ethical Violations

Some courts have held that a violation of an ethical rule, particularly by an adverse party's attorney, does not, in and of itself, give rise to a private cause of action.[767] Some even hold that violation of an ethical rule cannot be used as an element of a cause of action, for example, by establishing the standard of care for a negligence claim[768] or by showing outrageous conduct for a claim of intentional infliction of emotional distress.[769]

On the other hand, a Washington decision allows an attorney's violation of an ethical rule to serve as evidence of breach of fiduciary duty.[770] A breach of ethical rules may also be relevant in determining whether the attorney has committed another tort such as abuse of process.[771] A New York statute makes any attorney who has engaged in "any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party," guilty of a misdemeanor and liable for damages.[772]

The Tenth Circuit, in an unpublished opinion, has held that a debtor lacks standing to challenge a collection attorney's unethical splitting of his fee with the collection agency that hired him.[773] The attorney collected the fee from the debtor

v. Oshrin, 278 N.Y.S. 146 (N.Y. Super. Ct. 1934). *See also* Chulsky v. Hudson Law Offices, 777 F. Supp. 2d 823 (D.N.J. 2011) (debt is unenforceable if it is owned by a law firm that is engaging in a side business of debt-buying, which is illegal for a professional corporation). *Cf.* Watson v. Auto Advisors, Inc., 822 N.E.2d 1017 (Ind. Ct. App. 2005) (judgment is voidable, not void, so must be appealed rather than attacked in separate suit). *But cf.* Jones v. Brooks, 97 A.3d 97 (D.C. 2014) (landlord's non-lawyer daughter, who had power of attorney and letter of authorization from landlord, violated rule against unauthorized practice when she sued former tenant, but because there is no evidence that bench trial was unfair, judgment will not be vacated); Kelly Adjustment Co. v. Boyd, 342 A.2d 361 (D.C. 1975) (declining to void judgments obtained prior to decision that suits by collectors were unauthorized practice of law).

764 *See* § 8.1, *supra*.

765 Marchant v. U.S. Collections, West, Inc., 12 F. Supp. 2d 1001 (D. Ariz. 1998). *See also* Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (collection agency's unauthorized practice of law—filing suits on claims that had not been properly assigned to it—constituted action that could not legally be taken and violated FDCPA); Withers v. Eveland, 988 F. Supp. 942 (E.D. Va. 1997) (under Virginia law, non-lawyer was not authorized to file suit to collect debt owed by another; non-lawyer collector who threatened to sue violated FDCPA by threatening to take action that cannot legally be taken or is not intended to be taken). *But see* Anderson v. Gamache & Myers, P.C., 2007 WL 1577610 (E.D. Mo. May 31, 2007) (allegation of unauthorized practice, here assisting "mediation service" in unauthorized practice, is matter for state courts, not cognizable under FDCPA); Reade-Alvarez v. Eltman, Eltman & Cooper, 369 F. Supp. 2d 353 (E.D.N.Y. 2005) (agency's unauthorized practice of law, here causing law firm to send out form letters without actual attorney involvement, not cognizable under FDCPA).

766 Patrick v. Teays Valley Trs., L.L.C., 2012 WL 5993163 (N.D. W. Va. Nov. 30, 2012) (borrowers stated claim that owner of trustee company, who was not authorized to practice law in West Virginia, violated state debt collection statute by discussing legal matters with them); Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (collection agency's unauthorized practice of law—filing suits on claims that had not been properly assigned to it—constituted action that could not legally be taken and violated UDAP statute); Kolker v. Sanchez, 1991 WL 11691589 (D.N.M. Dec. 10, 1991); Campbell v. Asbury Auto., Inc., 381 S.W.3d 21 (Ark. 2011) (separation of powers does not bar legislature from punishing unauthorized practice by non-lawyers; unauthorized practice may be UDAP violation; shown here where car dealer charged document preparation fee for drafting motor vehicle installment contracts). *See also* Steinbach v. Credigy Receivables, Inc., 2006 WL 782477 (E.D. Ky. Mar. 27, 2006) (allowing consumer to go forward with claim for money damages pursuant to Kentucky statute allowing cause of action for violation of statute; unauthorized practice is crime in Kentucky).

767 Ross v. Creel Printing & Publishing Co., 122 Cal. Rptr. 2d 787 (Cal. Ct. App. 2002) (suit by debtor against creditor's attorney; no private right of action for breach of attorney discipline rule); Noble v. Marshall, 579 A.2d 574 (Conn. Ct. App. 1990) (violation of ethics rule against unreasonable fee does not give rise to cause of action and cannot be basis for UDAP claim); Green v. Morgan Props., 73 A.3d 478, 494 (N.J. 2013) (non-client cannot sue opposing party's attorney for fee-sharing); Baxt v. Liloia, 714 A.2d 271 (N.J. 1998) (adverse party cannot sue attorney for breach of ethical rules).

768 Malone v. Abraham, Watkins, Nichols & Friend, 2004 WL 1120005, at *5 (Tex. App. May 20, 2004) (suit by former clients against attorneys for disclosing confidential information; violations of ethical rules do not give rise to private cause of action, so not enforceable through negligence claim).

769 Ross v. Creel Printing & Publishing Co., 122 Cal. Rptr. 2d 787 (Cal. Ct. App. 2002) (suit by debtor against creditor's attorney). *But see* Kinnamon v. Staitman & Snyder, 136 Cal. Rptr. 321 (Cal. Ct. App. 1977) (violation of ethical rule can establish outrageous conduct for purposes of intentional infliction of emotional distress claim).

770 Cotton v. Kronenberg, 44 P.3d 878 (Wash. Ct. App. 2002) (suit by former client against attorney; violation of professional rules cannot be used as evidence of malpractice but may be considered in claim of breach of fiduciary duty; deceptive negotiation and collection of fee may be UDAP violation).

771 Baxt v. Liloia, 714 A.2d 271, 277 (N.J. 1998) (violation of ethical rule, standing alone, does not create cause of action, but courts may refer to the rules in determining whether a duty to a third party exists or in measuring the minimum standard of care). *See also* Ratcliff v. Boydell, 674 So 2d 272 (La. Ct. App. 1996) (allowing tort action for breach of legal ethics where lawyer disbursed to his firm disputed fee he should have known was excessive, and engaged in various kinds of harassment when client sued him).

772 N.Y. Jud. L. § 487. *See* Sykes v. Mel Harris & Assoc., L.L.C., 757 F. Supp. 2d 413 (S.D.N.Y. 2010) (refusing to dismiss debtor's claim under this statute against collection firm that filed robosigned affidavits of merit that falsely claimed personal knowledge).

773 Heard v. Bonneville Billing & Collections, 216 F.3d 1087 (10th Cir. June 26, 2000) (consumer does not have standing to raise UDAP and FDCPA claims challenging collection attorney's splitting of his fee with collection agency in violation of ethical rules, where consumer did

as part of the judgment, and the amount was set by statute. The court stated that it would find standing only if the debtor claimed that the fee itself was too high. This decision, however, fails to take into account the deception inherent in claiming an amount as an attorney fee when a substantial portion of the payment is actually for some other purpose. Another court certified a class in an action alleging that attorney fees were wrongfully charged to borrowers because the fees were unethically split with non-lawyer entities,[774] but at trial the class failed to prove that fee-splitting in violation of ethical rules had actually occurred.[775]

16.6 State Criminal Statutes

A debt collector's misconduct may be so extreme that it violates state criminal statutes or local criminal ordinances. Local criminal law may prohibit telephone abuse, unauthorized practice of law, larceny by trick, or simulation of official documents.[776] Courts have convicted debt collectors of extortion and other crimes, even though the debts were legally due.[777]

Criminal statutes may not provide a private right of action.[778] However, some states have statutes that allow a civil recovery for anyone damaged by a criminal act.[779]

not claim that fee itself was too high). *Accord* Haymond v. Bonneville Billing & Collections, Inc., 89 P.3d 171 (Utah 2004) (affirming dismissal of all claims based on unethical fee-splitting by collection attorney; finding no standing where amount of fee is within legal limits).

774 Mazzei v. Money Store, 288 F.R.D. 45 (S.D.N.Y. 2012).

775 Mazzei v. Money Store, 308 F.R.D. 92 (S.D.N.Y. 2015), *aff'd*, 656 Fed. Appx. 558 (2d Cir. 2016).

776 People v. Globe Jewelers, 291 N.Y.S. 362 (N.Y. App. Div. 1936) (convicting collectors for simulating legal process). *Cf.* People v. Horvath, 2005 WL 287536 (Cal. Ct. App. Jan. 27, 2005) (private collector's use of logo cut and pasted from real district attorney's check restitution program brochure is not counterfeiting of "official seal" because letterhead logo is not required by law to be affixed to documents, but may be crime of simulated process).

777 *See, e.g.*, Page v. Runnels, 2006 WL 2925690 (N.D. Cal. Oct. 12, 2006) (California's "claim of right" defense not applicable to acts of violence while attempting to collect unliquidated and disputed debt); Cobbs v. State, 417 N.E.2d 310 (Ind. 1981) (debt collector, who used gun on victim who denied owing debt, convicted of robbery); State v. Ross, 573 N.W.2d 906 (Iowa 1998); People v. Maranian, 102 N.W.2d 568 (Mich. 1960) (even though debt may be valid and enforceable, use of malicious threats of injury to debtor's person, loved ones, or property to exact payments is criminal); Pierce v. State, 218 S.W.3d 211 (Tex. App. 2007) (affirming conviction; "a creditor who collects on a debt by the use of force can commit the offense of robbery"); State v. Richards, 167 P. 47 (Wash. 1917).

778 *See, e.g.*, DirecTV, Inc. v. Karpinsky, 274 F. Supp. 2d 918 (E.D. Mich. 2003) (no private right of action under federal extortion statute), *vacated in part on other grounds*, 274 F. Supp. 2d 918 (E.D. Mich. 2003). *See generally* § 15.7.5, *supra* (whether there is private cause of action for extortion).

779 *See, e.g.*, Ohio Rev. Code Ann. § 2307.60 (West). *See also* Steinbach v. Credigy Receivables, Inc., 2006 WL 782477 (E.D. Ky. Mar. 27, 2006) (allowing consumer to go forward with claim for money damages pursuant to Kentucky statute allowing cause of action for violation of any statute, here unauthorized practice of law). *See generally* National Consumer Law Center, Federal Deception Law Ch. 8 (3d ed. 2017), *updated at* www.nclc.org/library (state RICO and similar statutes).

16.7 Enjoining Abusive Debt Collection Practices

Injunctive relief is available in most states to persons suffering or about to suffer irreparable injury for which there is no adequate remedy at law. Class relief is more likely to be available through injunction than through damage actions because damage actions are more likely to involve individual issues.

The Supreme Court of California has held that injunctive relief is available to a consumer class that alleged statutory venue violations or abuse of process by a collection agency.[780] The court premised its holding on the inadequacy of other legal relief for "a mass abuse of process"[781] and noted that:

> [A]n effective remedy is particularly necessary under the present allegations for several reasons. First, we recognize that the "pattern or practice" of knowingly filing actions in distant counties in order to gain unconscionable advantage is not a unique or isolated practice, but instead has been identified in both the legal literature and in public hearings, as a widespread and common abuse in the debt collection field. . . . Second, the widespread misuse of the courts in this manner contributes to the undermining of confidence in the judiciary by reinforcing the unfortunate image of courts as "distant" entities, available only to wealthy or large interests—an image evidently subscribed to by a significant proportion of our citizenry. . . . Under these conditions, courts have a strong interest in ensuring that abuses of the legal process by collection agencies are not perpetuated.[782]

A number of other courts have granted injunctive relief against debt collection abuses.[783]

780 Barquis v. Merchants Collection Ass'n, 496 P.2d 817 (Cal. 1972). *Accord* Yu v. Signet Bank, 82 Cal. Rptr. 2d 304 (Cal. Ct. App. 1999) (reversing grant of summary judgment against plaintiffs on claim for injunctive relief and restitution against company that filed collection suits in distant state).

781 Barquis v. Merchants Collection Ass'n, 496 P.2d 817, 820 (Cal. 1972).

782 *Id.* at 826 (footnotes omitted).

783 London v. Gums, 2014 WL 546914, at *7 (S.D. Tex. Feb. 10, 2014) (granting permanent injunction, as authorized by state debt collection statute, against debt collection harassment by bail bondsman); Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (refusing to dismiss claim for injunction requiring debt buyer to post bond as required by state statute; fact that it posted bond after consumer sued did not moot claim for injunction); Sanz v. Fernandez, 633 F. Supp. 2d 1356 (S.D. Fla. July 7, 2009) (tenants stated claim for injunctive and declaratory relief against unregistered collector); Berg v. Merchants Ass'n Collection Div., 586 F. Supp. 2d 1336 (S.D. Fla. 2008) (Florida statute, unlike FDCPA, authorizes injunctive relief for private litigants); Wiginton v. Pac. Credit Corp., 634 P.2d 111 (Haw. Ct. App. 1981); Marauder Corp. v. Beall, 301 S.W.3d 817 (Tex. App. 2009) (consumer need not show irreparable harm where debt collection act authorizes injunction to prevent or restrain violation, here failure to post bond); CA Partners v. Spears, 274 S.W.3d 51 (Tex. App. 2008) (debt buyer enjoined from collection activity until it posts bond required by collection agency act, and registers its assumed name). *But see* Klewer v. Cavalry Invs., 2002 U.S. Dist. LEXIS 3379 (W.D. Wis. Jan. 18,

The Maine Supreme Court affirmed a protection from harassment order, arising from an arguably lawful repossession, noting that "the performance of a lawful act in an inappropriate manner can be harassment."[784] The South Dakota Supreme Court considered "a history of using inappropriate collection practices" for a disputed debt in finding a pattern of conduct sufficient to support an anti-stalking order.[785]

Injunctive relief may also be available for unauthorized practice of law[786] and violations of state statutes prohibiting unfair and deceptive acts and practices.[787] Many states' UDAP statutes explicitly authorize injunctive relief or include a general authorization of equitable relief.[788] Attorneys general have obtained a number of injunctions against unfair and deceptive collection practices.[789] Most courts do not allow injunctive relief under the Fair Debt Collection Practices Act, but many allow declaratory relief.[790]

16.8 Other State Limitations on Debt Collection

16.8.1 State Laws Governing Specific Businesses

State law governing specific businesses may provide relief for abusive debt collection. For example, when a California funeral director transported a widow to a bank instead of the cemetery, and made a loud scene when tellers refused to cash her check, this was not only false imprisonment, but also a breach of the implied covenant to provide a dignified burial service.[791] Collection of debts for most types of utility service is governed by specific state laws and regulations.[792]

16.8.2 Usury Laws

A collection agency may be liable for statutory penalties for usury.[793] Usury laws are discussed in detail in NCLC's Consumer Credit Regulation (3d ed. 2020), *updated at* www.nclc.org/library. Several cases have held, however, that state laws that require licensure before collection of interest above a certain rate do not require debt buyers to be licensed, as long as the rate was legal for the originating creditor.[794]

16.8.3 Privacy Laws

State laws and regulations protecting privacy may protect consumers from misuse of information by creditors and collectors.[795] These statutes and regulations may protect privacy in general, or specific kinds of information, such as banking, health care, or receipt of public benefits.[796] Privacy laws are

2002) (no provision for injunctive or declaratory relief for violation of Wisconsin Consumer Act). *But cf.* Martinez v. Scott, 2011 WL 3566970 (S.D. Tex. Aug. 12, 2011) (although Texas Debt Collection Act does not require showing of irreparable harm, must show imminent harm and lack of adequate remedy at law; not shown here where no showing that suit in wrong venue was likely to recur, or that remedies of FDCPA and Texas act were inadequate). *See generally* § 16.2.4.5, *supra* (injunctive relief against unlicensed collection activity).

784 Cates v. Donahue, 916 A.2d 941 (Me. 2007).

785 White v. Bain, 752 N.W.2d 203 (S.D. 2008).

786 *See* § 16.5, *supra*.

787 *See, e.g.*, Murphy v. McNamara, 416 A.2d 170 (Conn. Super. Ct. 1979); Santiago v. S.S. Kresge Co., 2 Ohio Op. 3d 54 (Ohio Ct. Com. Pl. 1978). *See also* Klewer v. Cavalry Ins., L.L.C., 2002 WL 1058753 (W.D. Wis. May 17, 2002) (permanently enjoining actions to collect time-barred debt, which violated Wis. Consumer Act). *See generally* § 16.3.8, *supra*.

788 *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices § 12.6 (9th ed. 2016), *updated at* www.nclc.org/library.

789 *See, e.g.*, People *ex rel.* Daley v. Datacom Sys. Corp., 585 N.E.2d 51 (Ill. 1991) (state's attorney may seek injunctive relief under UDAP statute by alleging that acts violated Collection Agency Act); Commonwealth v. Source One Assoc., Inc., 763 N.E.2d 42 (Mass. 2002) (affirming permanent injunction against information brokers who obtained confidential banking information by impersonating customers and other subterfuge in violation of Massachusetts banking and privacy statutes and FTC rule); People *ex rel.* Spitzer v. Applied Card Sys., Inc., 805 N.Y.S.2d 175 (N.Y. App. Div. 2005) (affirming order enjoining subprime credit card issuer from deceptive acts and debt collection violations, including rude and obscene language, persistent calling after requests to cease, misrepresentation of identity, and unauthorized debits from consumers' accounts); Cavalry SPV I, L.L.C. v. Morrissey, 752 S.E.2d 356 (W. Va. 2013) (affirming grant of attorney general's motion for temporary injunction forbidding debt buyer from collecting debts acquired before it obtained license).

790 *See* § 11.12, *supra*.

791 Wilson v. Houston Funeral Home, 50 Cal. Rptr. 2d 169 (Cal. Ct. App. 1996).

792 *See* National Consumer Law Center, Access to Utility Service Chs. 2, 5, 6, 13, 14 (6th ed. 2018), *updated at* www.nclc.org/library.

793 Lupo v. Equity Collection Serv., 808 S.W.2d 122 (Tex. App. 1991) (attempt to collect twice authorized interest makes collection agency liable to borrower for statutory penalties for usury).

794 Olvera v. Blitt & Gaines, P.C., 431 F.3d 285 (7th Cir. 2005); Niemiec v. NCO Fin. Sys., Inc., 2006 WL 1763643 (N.D. Ind. June 27, 2006). *See also* Rainey v. Nat'l Check Bur., Inc., 849 N.E.2d 776 (Ind. Ct. App. 2006) (licensure requirement applies only if assignee is both in business of taking assignments and undertaking direct collection of payments). *But see* Walters v. PDI Mgmt. Services, 2004 WL 2137513 (S.D. Ind. June 14, 2004), *modifying* 2004 WL 1622217 (S.D. Ind. Apr. 6, 2004) (licensure may be required if assignee is in business of taking assignments of such loans and directly collects payments). *See generally* National Consumer Law Center, Consumer Credit Regulation §§ 3.11.7.2, 8.11.1 (3d ed. 2020), *updated at* www.nclc.org/library.

795 *See, e.g.*, Mass. Gen. Laws. ch. 214, § 1B (providing cause of action for "unreasonable, substantial or serious interference with privacy"); Davis v. Diversified Consultants, Inc., 36 F. Supp. 3d 217 (D. Mass. 2014) (fact issue whether 60 calls, by predictive dialer to non-debtor's cellphone, violated this statute).

796 *See, e.g.*, Commonwealth v. Source One Assoc., Inc., 763 N.E.2d 42 (Mass. 2002) (consumers' financial information protected by privacy statute, banking statutes and FTC rule). *See also* § 16.2.4.2.1, *supra*.

discussed in detail in NCLC's Fair Credit Reporting Ch. 18 (9th ed. 2018), *updated at* www.nclc.org/library.

16.8.4 State Loan Broker Laws

Sometimes a collector will encourage the debtor to take out a loan—particularly a home equity loan—to pay the debt in question. The collector may even refer the debtor to a specific lender, or act as a go-between, for example by setting up a three-way call with the debtor, the lender, and the collector. In this situation, the collector may be violating state laws that require loan brokers to be licensed. The definitions and exemptions in these statutes vary widely, however, so the specific statutory language should be parsed carefully. Mortgage broker laws are listed in NCLC's Mortgage Lending Appx. A (3d ed. 2019), *updated at* www.nclc.org/library, and are discussed in Mortgage Lending Ch. 7 (3d ed. 2019), *updated at* www.nclc.org/library. State credit repair organization laws may also apply in this scenario.[797]

797 *See* § 16.4, *supra*; National Consumer Law Center, Fair Credit Reporting Ch. 17 (9th ed. 2018), *updated at* www.nclc.org/library.

16.8.5 State Laws Regulating Telemarketing, Autodialing, and Artificial Voice Messages

Most states have laws regulating telemarketing.[798] These laws may, however, apply only to solicitations for the sale of goods or services, not to debt collection.[799]

In addition, many states have laws similar to the federal Telephone Consumer Protection Act[800] that restrict the use of autodialers and artificial voice messages. These laws may apply to at least some debt collection situations.

16.8.6 State Garnishment Laws

Laws allowing creditors to obtain court orders garnishing judgment debtors' wages or other property create a significant potential for misuse and abuse. Some states, recognizing this, provide specific statutory remedies when debtors are subjected to wrongful garnishment.[801]

798 *See* § 16.4, *supra*; National Consumer Law Center, Federal Deception Law Appx. D (3d ed. 2017), *updated at* www.nclc.org/library.

799 *See, e.g.*, Jenkins v. Allied Interstate, Inc., 2009 WL 3157399 (W.D.N.C. Sept. 28, 2009).

800 47 U.S.C. § 227. *See* § 14.3.2, *supra*; National Consumer Law Center, Federal Deception Law Ch. 6 (3d ed. 2017), *updated at* www.nclc.org/library.

801 *See* National Consumer Law Center, Collection Actions § 14.2.1.6 (remedies for wrongful wage garnishment), § 12.6.6 (remedies for wrongful bank account garnishment) (5th ed. 2020), *updated at* www.nclc.org/library.

Appendix A Text of the Fair Debt Collection Practices Act

A.1 Cross-Reference Table of Public Law 95–109 Section Numbers with 15 U.S.C. Section Numbers

The Fair Debt Collection Practices Act, as currently codified at 15 U.S.C. §§ 1692–1692p, is reprinted in this appendix. Because many cases, articles, and the Federal Trade Commission refer to the Public Law 95–109 section numbers, the following table is provided. The Public Law 95–109 section numbers are also in brackets following each heading of the Act reprinted in this appendix.

Codified Heading at 15 U.S.C.	Treatise Section	Public Law Section	U.S.C. Section
Congressional findings and declaration of purpose	§ 3.1	§ 802	§ 1692
Definitions	Ch. 4	§ 803	§ 1692a
Acquisition of location information	§ 5.2	§ 804	§ 1692b
Communication in connection with debt collection	Ch. 5	§ 805	§ 1692c
Harassment or abuse	Ch. 6	§ 806	§ 1692d
False or misleading representations	Ch. 7	§ 807	§ 1692e
Unfair practices	Ch. 8	§ 808	§ 1692f
Validation of debts	Ch. 9	§ 809	§ 1692g
Multiple debts	§ 10.2	§ 810	§ 1692h
Legal actions by debt collectors	§ 10.3	§ 811	§ 1692*i*
Furnishing certain deceptive forms	§ 10.4	§ 812	§ 1692j
Civil liability	Chs. 11, 12	§ 813	§ 1692k
Administrative enforcement	§§ 3.2.1.1, 3.4.2.5, 3.4.4	§ 814	§ 1692*l*
Reports to Congress by the Commission	§ 3.4.4.1	§ 815	§ 1692m
Relation to State laws	§ 11.16	§ 816	§ 1692n
Exemption for State regulation	§§ 3.1, 3.4.4.2	§ 817	§ 1692o
Exception for certain bad check enforcement programs operated by private entities.	§ 4.8.11	§ 818	§ 1692p

A.2 Fair Debt Collection Practices Act

15 U.S.C. §§ 1692–1692p; Pub. L. No. 95–109, 91 Stat. 874 (Sept. 20, 1977); Pub. L. No. 95–473, 92 Stat. 1466 (Oct. 17, 1978); Pub. L. No. 95–630, 92 Stat. 3680 (Nov. 10, 1978); Pub. L. No. 98–443, 98 Stat. 1708 (Oct. 4, 1984); Pub. L. No. 99–361, 100 Stat. 768 (July 9, 1986); Pub. L. No. 101–73, 103 Stat. 440 (Aug. 9, 1989); Pub. L. No. 102–242, 105 Stat. 2301 (Dec. 19, 1991); Pub. L. No. 102–550, 106 Stat. 4082 (Oct. 28, 1992); Pub. L. No. 104–88, 109 Stat. 949 (Dec. 29, 1995); Pub. L. No. 104–208, 110 Stat. 3009–425 (Sept. 30, 1996); Pub. L. No. 109–351, tit. VIII, §§ 801(a)(2), 802(a)–(c), 120 Stat. 2006 (Oct. 13, 2006); Pub. L. No. 111–203, tit. X, § 1089(1)–(4), 124 Stat. 2092 (July 21, 2010).[1]

15 U.S.C. § 1692. Congressional findings and declaration of purpose [FDCPA § 802]

(a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

1 A note in 15 U.S.C. § 1601 cites section 801 of Pub. L. 95–109, 91 Stat. 874 (Sept. 20, 1977) which provided: "This title [enacting subchapter V of this chapter, section 1692 *et seq.* of this title] may be cited as the 'Fair Debt Collection Practices Act.'" A note in 15 U.S.C. § 1692 cites section 818 of Pub. L. 95–109, which provided: "This title [this subchapter] takes effect upon the expiration of six months after the date of its enactment [Sept. 20, 1977], but section 809 [section 1692g of this title] shall apply only with respect to debts for which the initial attempt to collect occurs after such effective date."

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692a. Definitions [FDCPA § 803]

As used in this subchapter—

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(G) *Redesignated (F).*[2]

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

[Pub. L. No. 111–203, tit. X, § 1089(2), 124 Stat. 2092 (July 21, 2010)]

15 U.S.C. § 1692b. Acquisition of location information [FDCPA § 804]

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

15 U.S.C. § 1692c. Communication in connection with debt collection [FDCPA § 805]

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

2 15 U.S.C. § 1692a(6)(E), (F), (G) *amended by* Pub. L. No. 99–361, 100 Stat. 768 (July 9, 1986). *See* § 3.4.2, *supra*.

(b) Communication with third parties
Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication
If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined
For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

15 U.S.C. § 1692d. Harassment or abuse [FDCPA § 806]

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

15 U.S.C. § 1692e. False or misleading representations [FDCPA § 807]

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.[3]

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. § 1692f. Unfair practices [FDCPA § 808]

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

3 15 U.S.C. § 1692e(11) *amended by* Pub. L. No. 104–208, § 2305, 110 Stat. 3009 (Sept. 30, 1996). *See* § 3.4.2, *supra*.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.
(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.
(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.
(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
(B) there is no present intention to take possession of the property; or
(C) the property is exempt by law from such dispossession or disablement.
(7) Communicating with a consumer regarding a debt by post card.
(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

15 U.S.C. § 1692g. Validation of debts [FDCPA § 809]

(a) Notice of debt; contents
Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
(1) the amount of the debt;
(2) the name of the creditor to whom the debt is owed;
(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts
If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability
The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal pleadings
A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a) of this section.

(e) Notice provisions
The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, title V of Gramm-Leach-Bliley Act [15 U.S.C. § 6801 et seq.], or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

[Pub. L. No. 109–351, tit. VIII, § 802(a)–(c), 120 Stat. 2006 (Oct. 13, 2006)]

15 U.S.C. § 1692h. Multiple debts [FDCPA § 810]

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

15 U.S.C. § 1692*i*. Legal actions by debt collectors [FDCPA § 811]

(a) Venue
Any debt collector who brings any legal action on a debt against any consumer shall—
(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—
(A) in which such consumer signed the contract sued upon; or
(B) in which such consumer resides at the commencement of the action.

(b) Authorization of actions
Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

15 U.S.C. § 1692j. Furnishing certain deceptive forms [FDCPA § 812]

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.

15 U.S.C. § 1692k. Civil liability [FDCPA § 813]

(a) Amount of damages
Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B) of this section of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Bureau

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

[Pub. L. No. 111–203, tit. X, § 1089(1), 124 Stat. 2092 (July 21, 2010)]

15 U.S.C. § 1692*l*. Administrative enforcement [FDCPA § 814]

(a) Federal Trade Commission

The Federal Trade Commission shall be authorized to enforce compliance with this title, except to the extent that enforcement of the requirements imposed under this title is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this title, in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law[4]

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with any requirements imposed under this subchapter shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;

(2) the Federal Credit Union Act [12 U.S.C. §§ 1751 et seq.], by the National Credit Union Administration with respect to any Federal credit union;

(3) subtitle IV of Title 49, by the Secretary of Transportation with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(4) the Federal Aviation Act of 1958 [part A of subtitle VII of Title 49], by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act; and

(5) the Packers and Stockyards Act, 1921 [7 U.S.C. § 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. §§ 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act; and

(6) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d) of this section.

(d) Rules and regulations

Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010 [12 U.S.C. § 5519(a)], the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this title.

[Pub. L. No. 111–203, tit. X, § 1089(3), (4), 124 Stat. 2092 (July 21, 2010)]

4 15 U.S.C. § 1692*l amended by* Pub. L. No. 95–473, § 3(b), 92 Stat. 1466 (Oct. 17, 1978); Pub. L. No. 95–630, Title V, § 501, 92 Stat. 3680 (Nov. 10, 1978); Pub. L. No. 98–443, § 9n, 98 Stat. 1708 (Oct. 4, 1984); Pub. L. No. 101–73, Title VII, § 744(n), 103 Stat. 440 (Aug. 9, 1989); Pub. L. No. 102–242, Title II, § 212(e), 105 Stat. 2301 (Dec. 19, 1991); Pub. L. No. 102–550, Title XVI, § 1604(a)(8), 106 Stat. 4082 (Oct. 28, 1992); Pub. L. No. 104–88, Title III, § 316, 109 Stat. 949 (Dec. 29, 1995).

15 U.S.C. § 1692m. Reports to Congress by the Bureau; views of other Federal agencies [FDCPA § 815]

(a) Not later than one year after the effective date of this subchapter and at one-year intervals thereafter, the Bureau shall make reports to the Congress concerning the administration of its functions under this subchapter, including such recommendations as the Bureau deems necessary or appropriate. In addition, each report of the Bureau shall include its assessment of the extent to which compliance with this subchapter is being achieved and a summary of the enforcement actions taken by the Bureau under section 1692*l* of this title.

(b) In the exercise of its functions under this subchapter, the Bureau may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 1692*l* of this title.

[Pub. L. No. 111–203, tit. X, § 1089(I), 124 Stat. 2092 (July 21, 2010)]

15 U.S.C. § 1692n. Relation to State laws [FDCPA § 816]

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

15 U.S.C. § 1692o. Exemption for State regulation [FDCPA § 817]

The Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

[Pub. L. No. 111–203, tit. X, § 1089(I), 124 Stat. 2092 (July 21, 2010)]

15 U.S.C. § 1692p. Exception for certain bad check enforcement programs operated by private entities [FDCPA § 818]

(a) In general—

(1) Treatment of certain private entities

Subject to paragraph (2), a private entity shall be excluded from the definition of a debt collector, pursuant to the exception provided in section 1692a(6) of this title, with respect to the operation by the entity of a program described in paragraph (2)(A) under a contract described in paragraph (2)(B).

(2) Conditions of applicability

Paragraph (1) shall apply if—

(A) a State or district attorney establishes, within the jurisdiction of such State or district attorney and with respect to alleged bad check violations that do not involve a check described in subsection (b) of this section, a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such program to avoid criminal prosecution;

(B) a private entity, that is subject to an administrative support services contract with a State or district attorney and operates under the direction, supervision, and control of such State or district attorney, operates the pretrial diversion program described in subparagraph (A); and

(C) in the course of performing duties delegated to it by a State or district attorney under the contract, the private entity referred to in subparagraph (B)—

(i) complies with the penal laws of the State;

(ii) conforms with the terms of the contract and directives of the State or district attorney;

(iii) does not exercise independent prosecutorial discretion;

(iv) contacts any alleged offender referred to in subparagraph (A) for purposes of participating in a program referred to in such paragraph—

(I) only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for purposes of participation in the program is appropriate; and

(II) the alleged offender has failed to pay the bad check after demand for payment, pursuant to State law, is made for payment of the check amount;

(v) includes as part of an initial written communication with an alleged offender a clear and conspicuous statement that—

(I) the alleged offender may dispute the validity of any alleged bad check violation;

(II) where the alleged offender knows, or has reasonable cause to believe, that the alleged bad check violation is the result of theft or forgery of the check, identity theft, or other fraud that is not the result of the conduct of the alleged offender, the alleged offender may file a crime report with the appropriate law enforcement agency; and

(III) if the alleged offender notifies the private entity or the district attorney in writing, not later than 30 days after being contacted for the first time pursuant to clause (iv), that there is a dispute pursuant to this subsection, before further restitution efforts are pursued, the district attorney or an employee of the district attorney authorized to make such a determination makes a determination that there is probable cause to believe that a crime has been committed; and

(vi) charges only fees in connection with services under the contract that have been authorized by the contract with the State or district attorney.

(b) Certain checks excluded

A check is described in this subsection if the check involves, or is subsequently found to involve—

(1) a postdated check presented in connection with a payday loan, or other similar transaction, where the payee of the check knew that the issuer had insufficient funds at the time the check was made, drawn, or delivered;

(2) a stop payment order where the issuer acted in good faith and with reasonable cause in stopping payment on the check;

(3) a check dishonored because of an adjustment to the issuer's account by the financial institution holding such account without providing notice to the person at the time the check was made, drawn, or delivered;

(4) a check for partial payment of a debt where the payee had previously accepted partial payment for such debt;

(5) a check issued by a person who was not competent, or was not of legal age, to enter into a legal contractual obligation at the time the check was made, drawn, or delivered; or

(6) a check issued to pay an obligation arising from a transaction that was illegal in the jurisdiction of the State or district attorney at the time the check was made, drawn, or delivered.

(c) Definitions

For purposes of this section, the following definitions shall apply:

(1) State or district attorney

The term "State or district attorney" means the chief elected or appointed prosecuting attorney in a district, county (as defined in section 2 of title 1, United States Code), municipality, or comparable jurisdiction, including State attorneys general who act as chief elected or appointed prosecuting attorneys in a district, county (as so defined), municipality or comparable jurisdiction, who may be referred to by a variety of titles such as district attorneys, prosecuting attorneys, commonwealth's attorneys, solicitors, county attorneys, and state's attorneys, and who are responsible for the prosecution of State crimes and violations of jurisdiction-specific local ordinances.

(2) Check

The term "check" has the same meaning as in section 5002(6) of Title 12.[5]

(3) Bad check violation

The term "bad check violation" means a violation of the applicable State criminal law relating to the writing of dishonored checks.

[Pub. L. No. 109–352, tit. VIII, § 801(a)(2), 120 Stat. 2004 (Oct. 13, 2006)]

A.3 Senate Report No. 95–382 on the Fair Debt Collection Practices Act

[Editor's Note.[6]]

Report of the Committee on Banking, Housing and Urban Affairs
U.S. Senate
Aug. 2, 1977

[*Page 1*]

The Committee on Banking, Housing, and Urban Affairs, to which was referred the bill (H.R. 5294) to amend the Consumer Credit Protection Act to prohibit abuses by debt collectors, having considered same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

History of the Legislation

On May 12 and 13, 1977, the Consumer Affairs Subcommittee held hearings on four bills to regulate debt collection practices: S. 656, introduced by Senator Biden; S. 918, introduced by Senator Riegle; S. 1130, introduced by Senator Garn for himself and Senators Schmitt and Tower; and H.R. 5294, passed by the House of Representatives on April 4, 1977. After these hearings and before markup by the committee, Senator Riegle offered a composite bill, designated Committee Print No. 1, as a substitute for S. 918.

The Committee met in open markup sessions on June 30 and July 26, 1977, and approved Committee Print No. 1, with amendments, by voice vote. The committee substituted the text of its bill for that of H.R. 5294, which is herewith reported without objection.

Nature and Purpose of the Bill

This legislation would add a new title to the Consumer Credit Protection Act entitled the Fair Debt Collection Practices Act. Its purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary [*Page 2*] restrictions on ethical debt collectors. This bill was strongly supported by consumer groups, labor unions, State and Federal law enforcement officials, and by both national organizations which represent the debt collection profession, the American Collectors Association and Associated Credit Bureaus.

Need for This Legislation

The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

Debt collection by third parties is a substantial business which touches the lives of many Americans. There are more than 5,000 collection agencies across the country, each averaging 8 employees. Last year, more than $5 billion in debts were turned over to collection agencies. One trade association which represents approximately half of the Nation's independent collectors states that in 1976 its members contacted 8 million consumers.

Hearings before the Consumer Affairs Subcommittee revealed that independent debt collectors are the prime source of egregious collection practices. While unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial. Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them. Collection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means.

The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level. While debt collection agencies have existed for decades, there are 13 States, with 40 million citizens, that have no debt collection laws. These States are Alabama, Delaware, Georgia, Kansas, Kentucky, Mississippi, Missouri, Montana, Ohio, Oklahoma, Rhode Island, South Carolina, and South Dakota. Another 11 States (Alaska, Arkansas, Indiana, Louisiana, Nebraska, New Jersey, Oregon, Pennsylvania, Utah, Virginia and Wyoming), with another 40 million citizens, have laws which in the committee's opinion provide little or no effective protection. Thus, 80 million Americans, nearly 40 percent of our population, have no meaningful protection from debt collection abuse.

While 37 States and the District of Columbia do have laws regulating debt collectors, only a small number are comprehensive statutes which provide a civil remedy. As an example of ineffective State laws, of the 16 states which regulate by debt collection boards, 12 require by law that a majority of the board be comprised of debt collectors.

The Committee has found that collection abuse has grown from a State problem to a national problem. The use of WATS lines by debt collectors has led to a dramatic increase in interstate collections. State [*Page 3*] law enforcement officials have pointed to this development as a prime reason why federal legislation is necessary, because State officials are unable to act against unscrupulous debt collectors who harass consumers from another State.

One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule. Prof. David Caplovitz, the foremost authority on debtors in default, testified that after years of research he has found that only 4 percent of all defaulting debtors fit the

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5 **(6) Check**

The term "check"—

(A) means a draft, payable on demand and drawn on or payable through or at an office of a bank, whether or not negotiable, that is handled for forward collection or return, including a substitute check and a traveler's check; and

(B) does not include a noncash item or an item payable in a medium other than United States dollars.

12 U.S.C. § 5002 (6).

6 § 3.4.2, *supra*, describes the legislative history for the Fair Debt Collection Practices Act, and the key place of Senate Report No. 95–382 in that process.

description of "deadbeat." This conclusion is supported by the National Commission on Consumer Finance which found that creditors list the willful refusal to pay as an extremely infrequent reason for default.

The Commission's findings are echoed in all major studies: the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.

The committee believes that the serious and widespread abuses in this area and the inadequacy of existing State and Federal laws make this legislation necessary and appropriate.

Explanation of the Legislation

Scope of the act

This bill applies only to debts contracted by consumers for personal, family, or household purposes; it has no application to the collection of commercial accounts.

The committee intends the term "debt collector," subject to the exclusions discussed below, to cover all third persons who regularly collect debts for others. The primary persons intended to be covered are independent debt collectors. The requirement that debt collection be done "regularly" would exclude a person who collects a debt for another in an isolated instance, but would include those who collect for others in the regular course of business. The definition would include "reciprocal collections" whereby one creditor regularly collects delinquent debts for another pursuant to a reciprocal service agreement, unless otherwise excluded by the act.

The term debt collector is not intended to include the following: "in house" collectors for creditors so long as they use the creditor's true business name when collecting; Government officials, such as marshals and sheriffs, while in the conduct of their official duties; process servers; nonprofit consumer credit counseling services which assist consumers by apportioning the consumer's income among his creditors pursuant to a prior arrangement; and attorneys-at-law while acting in that capacity. One subsidiary or affiliate which collects debts for another subsidiary or affiliate is not a "debt collector" so long as the collecting affiliate collects only for other related entities and its principal business is not debt collection.

Finally, the committee does not intend the definition to cover the activities of trust departments, escrow companies, or other bona fide fiduciaries; the collection of debts, such as mortgages and student loans, by persons who originated such loans; mortgage service com- [*Page 4*] panies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing; and the collection of debts owed to a creditor when the collector is holding the receivable account as collateral for commercial credit extended to the creditor.

Obtaining location information

While this legislation strongly protects the consumer's right to privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons, the committee also recognizes the debt collector's legitimate need to seek the whereabouts of missing debtors. Accordingly, this bill permits debt collectors to contact third persons for the purpose of obtaining the consumer's location. In seeking this information, however, the debt collector must observe certain guidelines: he may not state that the consumer owes a debt nor contact third persons more than once unless necessary to obtain complete information. In addition, a debt collector may not place language or symbols on mail to third persons indicating that the mail relates to debt collection nor continue to contact third parties after learning the name and address of the consumer's attorney, unless the attorney fails to respond to the debt collector's communications.

Prohibited practices

This legislation expressly prohibits a host of harassing, deceptive, and unfair debt collection practices. These include: threats of violence; obscene language; the publishing of "shame lists;" harassing or anonymous telephone calls; impersonating a government official or attorney; misrepresenting the consumer's legal rights; simulating court process; obtaining information under false pretenses; collecting more than is legally owing; and misusing postdated checks. In addition to these specific prohibitions, this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.

In addition, this legislation adopts an extremely important protection recommended by the National Commission on Consumer Finance and already the law in 15 States: it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs.

Validation of debts

Another significant feature of this legislation is its provision requiring the validation of debts. After initially contacting a consumer, a debt collector must send him or her written notice stating the name of the creditor and the amount owed. If the consumer disputes the validity of the debt within 30 days, the debt collector must cease collection until he sends the consumer verification.

This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid. Since the current practice of most debt collectors is to send similar information to consumers, this provision will not result in additional expense or paperwork. [*Page 5*]

Legal actions by debt collectors

This legislation also addresses the problem of "forum abuse," an unfair practice in which debt collectors file suit against consumers in courts which are so distant or inconvenient that consumers are unable to appear. As a result, the debt collector obtains a default judgment and the consumer is denied his day in court.

In response to this practice, the bill adopts the "fair venue standards" developed by the Federal Trade Commission. A debt collector who files suit must do so either where the consumer resides or where the underlying contract was signed. When an action is against real property, it must be brought where such property is located.

More than 1,000 collection agencies in all 50 States have already voluntarily agreed to follow these standards. The Commission reports that this standard is effective in curtailing forum abuse without unreasonably restricting debt collectors.

Furnishing deceptive forms

Another common collection abuse is known colloquially as "flatrating." A "flat-rater" is one who sells to creditors a set of dunning letters bearing the letter-head of the flat-rater's collection agency and exhorting the debtor to pay the creditor at once. The creditor sends these letters to his debtors, giving the impression that a third party debt collector is collecting the debt. In fact, however, the flat-rater is not in the business of debt collection, but merely sells dunning letters.

This bill prohibits the practice of flat-rating because of its inherently deceptive nature. The prohibition on furnishing such forms does not apply, however, to printers and custom stationery sellers who innocently print or sell such forms without knowledge of their intended use.

Civil liability

The committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance.

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A debt collector who violates the act is liable for any actual damages he caused as well as any additional damages the court deems appropriate, not exceeding $1,000. In assessing damages, the court must take into account the nature of the violation, the degree of willfulness, and the debt collector's persistence. A debt collector has no liability, however, if he violates the act in any manner, including with regard to the act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations. A debt collector also has no liability if he relied in good faith on an advisory opinion issued by the Federal Trade Commission.

As in all other Federal consumer protection legislation, a consumer who obtains judgment on his behalf is entitled to attorney's fees and costs. In order to protect debt collectors from nuisance lawsuits, if the court finds that an action was brought by a consumer in bad faith and for harassment, the court may award the debt collector reasonable attorney's fees and costs.

Administrative enforcement

This legislation is enforced administratively primarily by the Federal Trade Commission. If a depository institution subject to regulation by another Federal agency engages in debt collection, administrative enforcement authority is lodged with that agency. [*Page 6*]

All enforcement agencies are authorized to utilize all their functions and powers to enforce compliance. The Federal Trade Commission is authorized to treat violations of the act as violations of a trade regulation rule, which empowers the Commission to obtain restraining orders and seek fines in federal district court.

Because the committee regards this as comprehensive legislation which fully addresses the problem of collection abuses, the administrative agencies charged with enforcement are specifically prohibited from issuing additional rules or regulations applicable to persons covered by this legislation.

Relation to State law

The Committee believes that this law ought not to foreclose the States from enacting or enforcing their own laws regarding debt collection. Accordingly, this legislation annuls only "inconsistent" State laws, with stronger State laws not regarded as inconsistent. In addition, States with substantially similar laws may be exempted from the act's requirements (but not its remedies) by applying to the Federal Trade Commission.

Cost of This Legislation

Enactment of this legislation will result in no new or additional costs to the Federal Government. The Congressional Budget Office analysis of this bill is contained in the following letter:

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., July 27, 1977.

HON. WILLIAM PROXMIRE,
Chairman, Committee on Banking, Housing, and Urban Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 5294, a bill to amend the Consumer Credit Protection Act to prohibit abusive practices by debt collectors, as ordered reported by the Senate Committee on Banking, Housing and Urban Affairs, July 26, 1977.

Based on this review, it appears that no additional cost to the Government would be incurred as a result of enactment of this bill.

Sincerely,

Alice M. Rivlin, *Director.*

Changes in Existing Law

In the opinion of the Committee, it is necessary to dispense with the requirements of subsection 4 of Rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate. [*Page 7*]

Section-by-Section Summary

Section 801. Short title.—The act may be cited as the "Fair Debt Collection Practices Act."

Section 802. Findings and purpose.—The Congress finds that collection abuses by independent debt collectors are serious and widespread and that existing State laws are inadequate to curb these abuses. The purpose of the title is to eliminate abusive practices, not disadvantage ethical debt collectors, and promote consistent state action.

Section 803. Definitions.—The term "debt collector" is defined to include all third parties who regularly collect consumer debts for others, except for the following persons: "in house" collectors for creditors; affiliates collecting for one another, providing that collection is not the principal business of the affiliate; Government officials collecting in their official capacities; process servers; bona fide consumer credit counseling services; and attorneys-at-law. The term also does not include trust companies and other bona fide fiduciaries; persons collecting loans which they originated; persons who service debts for others; and persons holding receivables as collateral for commercial credit transactions.

Section 804. Acquisition of location information.—When contacting third persons to establish a consumer's whereabouts, a debt collector may not: state that the consumer owes a debt; contact the third person more than once unless reasonably necessary; or use language symbols on mail indicating that it pertains to debt collection. A debt collector may not contact a third person if the debt collector knows that the consumer is represented by an attorney and has the attorney's name and address.

Section 805. Communication in connection with debt collection.—Without the consumer's consent, a debt collector may not (a) contact a consumer at any unusual or inconvenient time or place (8 a.m. to 9 p.m. is considered convenient); (b) contact a consumer if he is represented by an attorney; or (c) call a consumer at work if the debt collector knows the consumer's employer prohibits such calls.

There is a general prohibition on contacting any third parties (other than to obtain location information) except for: the consumer's attorney; a credit reporting agency; the creditor; the creditor's or debt collector's attorney; or any other person to the extent necessary to effectuate a post-judgment judicial remedy.

If a consumer notifies a debt collector in writing that he refuses to pay a debt or wishes the debt collector to cease further contacts, the debt collector must cease communications except to notify the consumer of the debt collector's or creditor's possible further actions.

Section 806. Harassment or abuse.—A debt collector is prohibited from engaging in any conduct the natural consequence of which is to harass, oppress or abuse any person. The following enumerated practices are violations: threats of violence; use of profane or obscene language; publishing "shame lists"; repeated telephone calls intended [*Page 8*] to annoy or harass; and making telephone calls without disclosing the caller's identity.

Section 807. False or misleading representations.—A debt collector is prohibited from using any false, deceptive or misleading representations to collect debts. The following enumerated practices are violations: misrepresenting that a debt collector is a government official; misrepresenting the amount or nature of a debt; impersonating an attorney; misrepresenting that a consumer will be arrested or his property seized; misrepresenting a consumer's legal rights; deliberately communicating false credit information; utilizing bogus legal documents; and misrepresenting a collection agency as a credit bureau.

Section 808. Unfair practices.—A debt collector is prohibited from using any unfair or unconscionable means to collect debts. The following enumerated practices are violations: collecting amounts in excess of the debt or interest owed; causing charges for communications to be billed to a consumer; repossessing property if there is no valid security interest

or if it is exempt by law from repossession; communicating information about a debt by postcard; and using symbols on envelopes indicating that the contents pertain to debt collection.

Section 809. Validation of debts.—Within 5 days after contacting a consumer, the debt collector must in writing notify the consumer of the amount of the debt and the name of the creditor and advise the consumer of the debt collector's duty to verify the debt if it is disputed. If a consumer disputes a debt within 30 days, the debt collector must stop collection until verification is sent to the consumer.

Section 810. Multiple debts.—A debt collector is prohibited from applying payments to disputed debts and, where applicable, must apply payments in accordance with the consumer's directions.

Section 811. Legal actions by debt collectors.—Actions on real property are required to be brought in the judicial district in which the property is located. In personal actions, suits must be brought either where the contract was signed or where the consumer resides.

Section 812. Furnishing certain deceptive forms.—It is made unlawful to compile, design, and furnish forms knowing that they will be used to create the false impression that a third person is collecting a debt.

Section 813. Civil liability.—A debt collector who violates the Act is liable for actual damages plus costs and reasonable attorney's fees. The court may award additional damages of up to $1,000 in individual actions, and in class actions, up to $500,000 or 1 percent of the debt collector's net worth, whichever is less.

Two defenses are provided: good faith reliance on an F.T.C. advisory opinion; and bona fide error notwithstanding procedures to avoid the error. Where a court finds that a suit was brought by a consumer in bad faith and for harassment, the court may award reasonable attorney's fees to the defendant.

Jurisdiction for actions is conferred on U.S. district and state courts; there is a 1 year statute of limitations.

Section 814. Administrative enforcement.—The Act is administratively enforced by the F.T.C. and the Federal bank regulatory agencies. The agencies are empowered to use all their functions and powers to enforce compliance. The agencies are prohibited from promulgating any additional rules or regulations pertaining to debt collectors.

[*Page 9*]

Section 815. Reports to Congress by the Commission.—The F.T.C. shall provide annual reports to Congress on the Act's effectiveness and administrative enforcement.

Section 816. Relation to State laws.—The act annuls state laws only if inconsistent; a state law is not inconsistent if it provides greater protection than this title.

Section 817. Exemption for State regulation.—The F.T.C. may exempt from the Act any collection practices within any State if subject to substantially similar requirements.

Section 818. Effective date.—The act is effective 6 months from enactment.

Additional Views of Messrs. Schmitt, Garn and Tower

It is our view that the Fair Debt Collection Practices Act is an unwarranted Federal intrusion into an area best left to the States. Although we recognize that some debt collectors employ unconscionable practices in collecting debts, we do not feel that the hearings in either the House or Senate subcommittees produced substantial evidence that there is a serious national problem which justifies such detailed Federal regulation of the operation of the business of collecting debts. A far better approach is that contained in S. 1130 which would preserve the States' prerogative of providing a mechanism for the resolution of disputes between debtors and creditors while correcting identified abuses in irresponsible debt collectors operating in interstate commerce. According to an American Bar Association committee, 33 States have already adopted debt collection practices regulation and others are moving in that direction.

Of particular concern to us is the impact that the proliferation of Federal consumer credit regulation is having on small business and on the cost and availability of credit to the consumer. A Federal Fair Debt Collection Practice Act will be one more regulatory burden on small business, the cost of which will be borne by the consumer.

Although we would not take the approach chosen by the majority of the committee, the committee report is a vast improvement over H.R. 5294 passed by the House. We are pleased that the committee included in its final version of the bill many provisions contained in S. 1130. Most important, it dropped the $100 minimum civil penalty provision which courts have construed as requiring the award of the penalty and attorneys fees when a violation of the Act has been established.

This should go a long way in avoiding the type of nuisance suits so prevalent under the Truth in Lending Act.

Harrison Schmitt.
Jake Garn.
John Tower.

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Appendix B CFPB Regulations and Interpretations

B.1 Regulation F

B.1.1 Introduction; Regulation F Table

Effective November 30, 2021, the Consumer Financial Protection Bureau (CFPB) significantly expanded its Regulation F, 12 C.F.R. § 1006, to set out extensive rules relating to the Fair Debt Collection Practices Act (FDCPA). Those rules were released in the *Federal Register* in two parts—one appearing on November 30, 2020[1] and the other on January 19, 2021.[2] Regulation F also includes Supplement I, the Official Interpretations. In addition, supplemental information found in those two *Federal Register* notices is helpful in understanding both the Regulation and its Official Interpretations. The November 30, 2020, and January 19, 2021, notices, as well as other documents related to this rulemaking are available as Primary Sources included with this treatise.

Regulation F, prior to those extensive additions, set out procedures for state application for exemptions from the Act,[3] that were previously codified at 12 C.F.R. §§ 1006.1 to 1006.8. These procedures have been amended and relocated to 12 C.F.R. § 1006.108 and Appendix A to Part 1006.[4]

On April 22, 2021, the CFPB also issued Interim Final Rules on Debt Collection Practices in Connection With the Global COVID–19 Pandemic (Regulation F).[5] The rule took effect on May 3, 2021 and is codified at 12 C.F.R. §1006.9. The Rule was temporary, and only applied during the effective period of the Centers for Disease Control and Prevention's Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19. That order is no longer in effect, and thus this rule provision is also no longer in effect.[6]

Regulation F and its Official Interpretations are reprinted at Appx. B.1.2, *infra*. For the reader's convenience, Official Interpretations are integrated with corresponding regulation provisions, instead of placed at the end of the regulation, as found, for example, in the Code of Federal Regulations. In addition, the CFPB maintains a website with debt collection regulations and official interpretations at https://www.consumerfinance.gov. This website shows current, historical, and future (if there are regulations that have not yet taken effect) views of Regulation F.

Below is a Regulation F Table indicating corresponding treatise sections where a regulation provision is discussed. The table also shows, where applicable, FDCPA provisions corresponding to a regulation provision—using both the Act numbering and the United States Code numbering.

Regulation F Table

Reg. F Section	Treatise Section	Act Section	U.S.C. Section
1006.1(a), Authority	§ 3.4.4	814(d)	1692*l*(d)
1006.1(b), Purpose	§ 3.1	802	1692
1006.1(c), Coverage	§ 4.8.12	803(6)	1692a(6)
1006.2, Definitions	Ch. 4	803	1692a
§1006.2(b), Attempt to communicate	§ 4.2	n/a	n/a
§1006.2(d) Communicate or communication	§ 4.2	803(2)	1692a(2)
§1006.2(j) Limited-content message	§ 4.9	n/a	n/a
§ 1006.6, Communications in connection with debt collection	§§ 5.3 to 5.9	805	1692c
§ 1006.6(a). Definition (including deceased consumer)	§ 5.3.1	805(d)	1692c(d)
§1006.6(b)(1), Prohibitions regarding unusual or inconvenient times or places.	§ 5.4	805(a)(1)	1692c(a)(1)
§1006.6(b)(2), Prohibitions regarding consumer represented by an attorney.	§ 5.5	805(a)(2)	1692c(a)(2)
§1006.6(b)(3), Prohibitions regarding consumer's place of employment	§ 5.6	805(a)(3)	1692c(a)(3)
§ 1006(c), Communications with a consumer—after refusal to pay or cease communication notice	§ 5.8	805(c)	1692c(c)
1006.6(d), Communications with third parties—	§ 5.7	805(b)	1692c(b)
1006.6(e), Opt-out notice for electronic communications or attempts to communicate	§ 5.9	n/a	n/a
§1006.9, Debt collection practices in connection with the global COVID-19 pandemic	§ 7.4.11.2	n/a	n/a
§ 1006.10, Acquisition of location information	§ 5.2	804	1692b
§ 1006.14, Harassing, oppressive, or abusive conduct	Ch. 6	806	1692d

1 Debt Collection Practices (Regulation F), 85 Fed. Reg. 76,734 (Nov. 30, 2020).

2 Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766 (Jan. 19, 2021).

3 The CFPB has authority under 15 U.S.C. § 1692o to regulate the exemption of states from FDCPA requirements. *See* § 3.4.2.4, *supra*.

4 85 Fed. Reg. 76,734 at 76,893–76,895 (Nov. 30, 2020).

5 Debt Collection Practices (Regulation F), 86 Fed. Reg. 21,163 (April 22, 2021). *See* § 7.4.11.2, *supra*.

6 Debt Collection Practices (Regulation F), 86 Fed. Reg. 21,163 (April 22, 2021). *See* § 7.4.11.2, *supra*.

Reg. F Section	Treatise Section	Act Section	U.S.C. Section
§ 1006.14(b), Repeated or continuous telephone calls or telephone conversations	§ 6.7.2	806(5)	1692d(5)
§ 1006.14(h), Prohibited communication media	§ 6.9	n/a	n/a
§ 1006.18, False, deceptive, or misleading representations or means	Ch. 7	807	1692e
§ 1006.18(d), Social media	§ 7.4.2	n/a	n/a
§ 1006.18(e), Disclosures required	§ 7.4.11	807(11)	1692e(11)
§ 1006.18(f), Assumed names	§ 7.4.14	807(14)	1692e(14)
§ 1006.22, Unfair or unconscionable means	Ch. 8	808	1692f
§ 1006.22(f)(3), Restrictions on use of certain media (emails sent to employer email addresses)	§ 8.10	n/a	n/a
§ 1006.22(f)(4), Restrictions on use of certain media (social media)	§ 8.11	n/a	n/a
§1006.22(g), Safe harbor for certain emails and text messages relating to the collection of a debt	§ 8.9	n/a	n/a
§ 1006.26, Collection of time-barred debts	§ 7.4.9	n/a	n/a
§ 1006.30(a), Required actions prior to furnishing information	§ 8.12	n/a	n/a
§ 1006.30(b), Prohibition on the sale, transfer for consideration, or placement for collection of certain debts	§ 8.13	n/a	n/a
§ 1006.30(c), Multiple debts	§ 10.2	810	1692h
§ 1006.30(d), Legal actions by debt collectors	§ 10.3	811	1692i
§ 1006.30(e), Furnishing certain deceptive forms	§ 10.4	812	1692j
§ 1006.34, Notice for validation of debts	Ch. 9	809	1692g
§ 1006.34(a)(3), Itemization date	§ 9.4.2	n/a	n/a
§ 1006.34(c), Validation information	§ 9.4	809(a)	1692g(a)
§ 1006.34(d)(2), Safe harbor	§ 9.5.2	n/a	n/a
§ 1006.34(d)(3), Optional disclosures	§ 9.6	809(a)	1692g(a)
§ 1006.34(d)(4), Validation notices delivered electronically.	§ 9.5.3	n/a	n/a
§ 1006.34(e), Translation into other languages	§ 9.5.4	n/a	n/a
§ 1006.38, Disputes and requests for original-creditor information	§ 9.10, 9.11	809(b)	1692g(b)
§ 1006.42, Sending required disclosures	§ 9.3	n/a	n/a
§ 1006.100, Record retention	§ 11.5.4.3	n/a	n/a
§ 1006.104, Relation to State laws	§ 11.16.1	816	1692n
§ 1006.108, Exemption for State regulation	§ 3.4.4	817	1692o
Appendix A to Part 1006—Procedures for State Application for Exemption from the Provisions of the Act	§ 3.4.4	817	1692o
Appendix B to Part 1006—Model Forms. B-1 Model Form for Validation Notice	§ 9.5.2	n/a	n/a
Appendix C to Part 1006—Issuance of Advisory Opinions	§ 3.4.4.3	813(e)	1692k(e)

B.1.2 Regulation F and Its Official Interpretations

Regulation F, 12 C.F.R. pt. 1006, is reprinted below with its Official Interpretations integrated with corresponding regulation provisions. The regulation is effective November 30, 2021, and includes provisions announced by 85 Fed. Reg. 76,734 (Nov. 30, 2020), 86 Fed. Reg. 5766 (Jan. 19, 2021), and 86 Fed. Reg. 21,163 (April 22, 2021). For more detail, see Appx. B.1.1, *supra*.

§ 1006.1 Authority, purpose, and coverage.

(a) Authority. This part, known as Regulation F, is issued by the Bureau of Consumer Financial Protection pursuant to sections 814(d) and 817 of the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692*l*(d), 1692o; title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. 5481 *et seq.*; and paragraph (b)(1) of section 104 of the Electronic Signatures in Global and National Commerce Act (E-SIGN Act), 15 U.S.C. 7004.

(b) Purpose. This part carries out the purposes of the FDCPA, which include eliminating abusive debt collection practices by debt collectors, ensuring that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and promoting consistent State action to protect consumers against debt collection abuses. This part also prescribes requirements to ensure that certain features of debt collection are disclosed fully, accurately, and effectively to consumers in a manner that permits consumers to understand the costs benefits, and risks associated with debt collection, in light of the fact and circumstances. Finally, this part imposes record retention requirements to enable the Bureau to administer and carry out the purposes o

the FDCPA, the Dodd-Frank Act, and this part, as well as to prevent evasions thereof. The record retention requirements also will facilitate supervision of debt collectors and the assessment and detection of risks to consumers.

(c) **Coverage.**

(1) Except as provided in § 1006.108 and appendix A of this part regarding applications for State exemptions from the FDCPA, this part applies to debt collectors, as defined in § 1006.2(i), other than a person excluded from coverage by section 1029(a) of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Act (12 U.S.C. 5519(a)).

(2) Section 1006.34(c)(2)(iii) and (3)(iv) applies to debt collectors only when they are collecting debt related to a consumer financial product or service as defined in § 1006.2(f).

§ 1006.2 Definitions.

For purposes of this part, the following definitions apply:

(a) **Act** or **FDCPA** means the Fair Debt Collection Practices Act (15 U.S.C. 1692 *et seq.*).

(b) **Attempt to communicate** means any act to initiate a communication or other contact about a debt with any person through any medium, including by soliciting a response from such person. An attempt to communicate includes leaving a limited-content message, as defined in paragraph (j) of this section.

Official interpretation of 2(b) Attempt to communicate.

1. Examples. Section 1006.2(b) defines an attempt to communicate as any act to initiate a communication or other contact about a debt with any person through any medium, including by soliciting a response from such person. An act to initiate a communication or other contact about a debt is an attempt to communicate regardless of whether the attempt, if successful, would be a communication that conveys information regarding a debt directly or indirectly to any person. For example:

i. Assume that a debt collector places a telephone call to a person about a debt. Regardless of whether the debt collector reaches the person, the debt collector has attempted to communicate with the person.

ii. Assume that a debt collector places a telephone call to a person about a debt and leaves a voicemail message. Regardless of whether the voicemail message consists solely of a limited-content message or includes content that conveys, directly or indirectly, information about a debt, the debt collector has attempted to communicate with the person.

(c) **Bureau** means the Bureau of Consumer Financial Protection.

(d) **Communicate** or **communication** means the conveying of information regarding a debt directly or indirectly to any person through any medium.

Official interpretation of 2(d) Communicate or communication.

1. Any medium. Section 1006.2(d) provides, in relevant part, that a communication can occur through any medium. Any medium includes any oral, written, electronic, or other medium. For example, a communication may occur in person or by telephone, audio recording, paper document, mail, email, text message, social media, or other electronic media.

2. Information regarding a debt. Section 1006.2(d) provides, in relevant part, that a communication means conveying information regarding a debt. A debt collector does not convey information regarding a debt directly or indirectly to any person if the debt collector leaves only a limited-content message, as defined in § 1006.2(j). A debt collector who provides marketing or advertising that does not contain information about a specific debt or debts has not communicated under § 1006.2(d), even if the debt collector transmits the marketing or advertising message to a consumer, because the debt collector has not conveyed information regarding a debt.

(e) **Consumer** means any natural person, whether living or deceased, obligated or allegedly obligated to pay any debt. For purposes of § 1006.6, the term *consumer* includes the persons described in § 1006.6(a).

(f) **Consumer financial product or service** has the same meaning given to it in section 1002(5) of the Dodd-Frank Act (12 U.S.C. 5481(5)).

(g) **Creditor** means any person who offers or extends credit creating a debt or to whom a debt is owed. The term creditor does not, however, include any person to the extent that such person receives an assignment or transfer of a debt in default solely to facilitate collection of the debt for another.

(h) **Debt** means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes, whether or not the obligation has been reduced to judgment.

Official interpretation of 2(h) Debt.

1. Consumer. Section 1006.2(h) defines debt to mean, in part, any obligation or alleged obligation of a consumer to pay money arising out of a transaction. Section 1006.2(e), in turn, defines consumer to mean any natural person obligated or allegedly obligated to pay any debt. Only natural persons, therefore, can incur debts as defined in § 1006.2(h).

(i)

(1) **Debt collector** means any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another. Notwithstanding paragraph (i)(2)(vi) of this section, the term debt collector includes any creditor that, in the process of collecting its own debts, uses any name other than its own that would indicate that a third person is collecting or attempting to collect such debts. For purposes of § 1006.22(e), the term also includes any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the enforcement of security interests.

Official interpretation of 2(i) Debt collector.

1. In general. Section 1006.2(i) provides, in part, that a debt collector is any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another. A person who collects or attempts to collect defaulted debts that the person has purchased, but who does not collect or attempt to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another, and who does not have a business the principal purpose of which is the collection of debts, is not a debt collector as defined in § 1006.2(i).

(2) The term debt collector excludes:

(i) Any officer or employee of a creditor while the officer or employee is collecting debts for the creditor in the creditor's name;

(ii) Any person while acting as a debt collector for another person if:

(A) The person acting as a debt collector does so only for persons with whom the person acting as a debt collector is related by common ownership or affiliated by corporate control; and

(B) The principal business of the person acting as a debt collector is not the collection of debts;

(iii) Any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt

is in the performance of the officer's or employee's official duties;

(iv) Any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(v) Any nonprofit organization that, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in liquidating their debts by receiving payment from such consumers and distributing such amounts to creditors;

(vi) Any person collecting or attempting to collect any debt owed or due, or asserted to be owed or due to another, to the extent such debt collection activity:

(A) Is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;

(B) Concerns a debt that such person originated;

(C) Concerns a debt that was not in default at the time such person obtained it; or

(D) Concerns a debt that such person obtained as a secured party in a commercial credit transaction involving the creditor; and

(vii) A private entity, to the extent such private entity is operating a bad check enforcement program that complies with section 818 of the Act.

(j) Limited-content message means a voicemail message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content.

Official interpretation of 2(j) Limited-content message.

1. In general. Section 1006.2(j) provides that a limited-content message is a voicemail message for a consumer that includes all of the content described in § 1006.2(j)(1), that may include any of the content described in § 1006.2(j)(2), and that includes no other content. Any other message is not a limited-content message. If a voicemail message includes content other than the specific items described in § 1006.2(j)(1) and (2), and such other content directly or indirectly conveys any information about a debt, the message is a communication, as defined in § 1006.2(d). For example, a voicemail message that includes a statement that the message is from a debt collector and a request to speak to a particular consumer is not a limited-content message because it includes more than the required or permitted content.

2. Message for a consumer. Section 1006.2(j) provides, in part, that a limited-content message is a voicemail message for a consumer. A message knowingly left for a third party is not a limited-content message because it is not for a consumer. For example, assume that a debt collector has a telephone number that the debt collector knows belongs to the consumer's friend. A voicemail message left after calling that number is not a limited-content message, even if the message includes no more than the content described in § 1006.2(j)(1) and (2) because the debt collector knowingly left the message for someone other than the consumer. Other provisions of this part may, in certain circumstances, restrict a debt collector from leaving a limited-content message or otherwise attempting to communicate with a consumer. See §§ 1006.6(b) and (c) and 1006.22(f) and their related commentary for further guidance regarding when a debt collector is prohibited from attempting to communicate with a consumer.

3. Meaningful disclosure of identity. A debt collector who leaves only a limited-content message for a consumer does not violate § 1006.14(g)'s requirement to meaningfully disclose the caller's identity with respect to that voicemail message.

(1) Required content. A limited-content message is a voicemail message for a consumer that includes:

Official interpretation of 2(j)(1) Required content.

1. Example. The following example illustrates a limited-content message that includes only the content described in § 1006.2(j)(1): This is Robin Smith calling from ABC Inc. Please contact me or Jim Johnson at 1-800-555-1212.

(i) A business name for the debt collector that does not indicate that the debt collector is in the debt collection business;

(ii) A request that the consumer reply to the message;

(iii) The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; and

(iv) A telephone number or numbers that the consumer can use to reply to the debt collector.

(2) Optional content. In addition to the content described in paragraph (j)(1) of this section, a limited-content message may include one or more of the following:

Official interpretation of 2(j)(2) Optional content.

1. In general. Section 1006.2(j)(2)(iv) provides that a limited-content message may include a statement that, if the consumer replies, the consumer may speak to any of the company's representatives or associates. A message that includes a more detailed description of the representative or associate group is not a limited-content message. For example, a reference to an agent with the credit card receivables group is not a limited-content message because it includes more than a statement that the consumer's reply may be answered by a representative or associate.

2. Example. The following example illustrates a limited-content message that includes the content described in both § 1006.2(j)(1) and (2): Hi, this is Robin Smith calling from ABC Inc. It is 4:15 p.m. on Wednesday, September 1. Please contact me or any of our representatives at 1-800-555-1212 today until 6:00 p.m. Eastern time, or any weekday from 8:00 a.m. to 6:00 p.m. Eastern time.

(i) A salutation;

(ii) The date and time of the message;

(iii) Suggested dates and times for the consumer to reply to the message; and

(iv) A statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates.

(k) Person includes natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

(l) State means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 1006.6 Communications in connection with debt collection.

(a) Definition. For purposes of this section, the term *consumer* includes:

(1) The consumer's spouse;

Official interpretation of Paragraph 6(a)(1).

1. Spouse. Section 1006.6(a)(1) provides that, for purposes of § 1006.6, the term consumer includes a consumer's spouse. The surviving spouse of a deceased consumer is a spouse as that term is used in § 1006.6(a)(1).

(2) The consumer's parent, if the consumer is a minor;

Official interpretation of Paragraph 6(a)(2).

1. Parent. Section 1006.6(a)(2) provides that, for purposes of § 1006.6, the term consumer includes a consumer's parent, if the consumer is a minor. A parent of a deceased minor consumer is a parent as that term is used in § 1006.6(a)(2).

(3) The consumer's legal guardian;

(4) The executor or administrator of the consumer's estate, if the consumer is deceased; and

Official interpretation of Paragraph 6(a)(4).

1. Personal representative. Section 1006.6(a)(4) provides that, for purposes of § 1006.6, the term consumer includes the executor or administrator of the consumer's estate, if the consumer is deceased. The terms executor or administrator include the personal representative of the consumer's estate. A personal representative is any person who is authorized to act on behalf of the deceased consumer's estate. Persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's financial assets or other assets of monetary value extrajudicially.

(5) A confirmed successor in interest, as defined in Regulation X, 12 CFR 1024.31, or Regulation Z, 12 CFR 1026.2(a)(27)(ii).

(b) **Communications with a consumer—**

(1) Prohibitions regarding unusual or inconvenient times or places. Except as provided in paragraph (b)(4) of this section, a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt:

Official interpretation of 6(b)(1) Prohibitions regarding unusual or inconvenient times or places.

1. Designation of inconvenience. Section 1006.6(b)(1) prohibits a debt collector from, among other things, communicating or attempting to communicate with a consumer in connection with the collection of any debt at a time or place that the debt collector knows or should know is inconvenient to the consumer, unless an exception in § 1006.6(b)(4) applies. For example, a debt collector knows or should know that a time or place is inconvenient to a consumer if the consumer uses the word inconvenient to notify the debt collector. In addition, depending on the facts and circumstances, the debt collector knows or should know that a time or place is inconvenient even if the consumer does not specifically state to the debt collector that a time or place is inconvenient. The debt collector may ask follow-up questions regarding whether a time or place is convenient to clarify statements by the consumer. For example:

i. Assume that a creditor places a debt for collection with a debt collector. To facilitate collection of the debt, the creditor provides the debt collector a file that includes recent notes stating that the consumer cannot be disturbed on Tuesdays and Thursdays through the end of the calendar year. Based on these facts, the debt collector knows or should know that Tuesdays and Thursdays through the end of the calendar year are inconvenient to the consumer. Unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from communicating or attempting to communicate with the consumer on those days through the end of the calendar year.

ii. Assume that a debt collector calls a consumer. The consumer answers the call but states I am busy or I cannot talk now. The debt collector asks the consumer when would be a convenient time. The consumer responds, on weekdays, except from 3:00 p.m. to 5:00 p.m. The debt collector asks the consumer whether there would be a convenient time on weekends. The consumer responds no. Based on these facts, the debt collector knows or should know that the time period between 3:00 p.m. and 5:00 p.m. on weekdays, and all times on weekends, are inconvenient to the consumer. Thereafter, unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from communicating or attempting to communicate with the consumer at those times.

iii. Assume that a consumer tells a debt collector not to communicate with the consumer at a particular place, such as the consumer's home. The debt collector asks whether the consumer intends to prohibit the debt collector from communicating with the consumer through all media associated with the consumer's home, including, for example, mail. Absent such additional information, the debt collector knows or should know that communications to the consumer at home, including mail to the consumer's home address and calls to the consumer's home landline telephone number, are inconvenient. Thereafter, unless the consumer informs the debt collector that the place is no longer inconvenient, § 1006.6(b)(1)(ii) prohibits the debt collector from communicating or attempting to communicate with the consumer at the consumer's home. See comment 6(b)(1)(ii)-1 for additional guidance regarding communications or attempts to communicate at an inconvenient place.

2. Consumer-initiated communication. If a consumer initiates a communication with a debt collector at a time or from a place that the consumer previously designated as inconvenient, the debt collector may respond once at that time or place through the same medium of communication used by the consumer. (For more on medium of communication, see § 1006.14(h) and its associated commentary.) After that response, § 1006.6(b)(1) prohibits the debt collector from communicating or attempting to communicate further with the consumer at that time or place until the consumer conveys that the time or place is no longer inconvenient, unless an exception in § 1006.6(b)(4) applies. For example:

i. Assume the same facts as in comment 6(b)(1)-1.ii, except that, after the consumer tells the debt collector that weekdays from 3:00 p.m. to 5:00 p.m. and weekends are inconvenient, the consumer sends an email message to the debt collector at 3:30 p.m. on Wednesday. Based on these facts, § 1006.6(b)(1)(i) does not prohibit the debt collector from responding once by email message before 5:00 p.m. on that day. Unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from future communications or attempts to communicate with the consumer on weekdays between 3:00 p.m. and 5:00 p.m. and on weekends. Additionally, if the consumer responds to the debt collector's email message, the debt collector may continue to respond once to each consumer-initiated email message before 5:00 p.m. on that day.

ii. Assume the same facts as in comment 6(b)(1)-1.iii, except that, after the consumer tells the debt collector not to communicate with the consumer at home, the consumer calls the debt collector from the consumer's home landline telephone number. Based on these facts, § 1006.6(b)(1)(ii) does not prohibit the debt collector from responding once by communicating with the consumer on that telephone call. Unless the consumer informs the debt collector that the place is no longer inconvenient, § 1006.6(b)(1)(ii) prohibits the debt collector from future communications or attempts to communicate with the consumer at home.

iii. Assume that a consumer tells a debt collector that all communications to the consumer on Friday every week are inconvenient to the consumer. On a Friday, the consumer visits the debt collector's website and uses the debt collector's mobile application. Based on these facts, while the consumer navigates the website or uses the mobile application, § 1006.6(b)(1)(i) does not prohibit the debt collector from conveying information to the consumer about the debt through the website or mobile application. Once the consumer stops navigating the website or using the mobile application, however, § 1006.6(b)(1)(i) prohibits the debt collector from further communications or attempts to communicate on that day. And unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from future communications or attempts to communicate with the consumer on Fridays.

iv. Assume the same facts as in comment 6(b)(1)-2.iii, except that after the consumer visits the debt collector's website and uses the debt collector's mobile application, the consumer sends an email

message to the debt collector at 8:30 p.m. on Friday. Based on these facts, § 1006.6(b)(1)(i) does not prohibit the debt collector from responding once, such as by sending an automated email message reply generated in response to the consumer's email message. Unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from future communications or attempts to communicate with the consumer on Fridays.

(i) At any unusual time, or at a time that the debt collector knows or should know is inconvenient to the consumer. In the absence of the debt collector's knowledge of circumstances to the contrary, a time before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location is inconvenient; or

Official interpretation of Paragraph 6(b)(1)(i).

1. Time of electronic communication. Section 1006.6(b)(1)(i) prohibits a debt collector from communicating or attempting to communicate, including through electronic communication media, at any unusual time, or at a time that the debt collector knows or should know is inconvenient to the consumer. For purposes of determining the time of an electronic communication, such as an email or text message, under § 1006.6(b)(1)(i), an electronic communication occurs when the debt collector sends it, not, for example, when the consumer receives or views it.

2. Consumer's location. Under § 1006.6(b)(1)(i), in the absence of a debt collector's knowledge of circumstances to the contrary, an inconvenient time for communicating with a consumer is before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location. If a debt collector has conflicting or ambiguous information regarding a consumer's location, then, in the absence of knowledge of circumstances to the contrary, the debt collector complies with § 1006.6(b)(1)(i) if the debt collector communicates or attempts to communicate with the consumer at a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located. The following examples, which assume that the debt collector has no information about times the consumer considers inconvenient or other information about the consumer's location, illustrate the rule.

i. Assume that a debt collector's information indicates that a consumer has a mobile telephone number with an area code associated with the Eastern time zone and a residential address in the Pacific time zone. The convenient times to communicate with the consumer are after 11:00 a.m. Eastern time (8:00 a.m. Pacific time) and before 9:00 p.m. Eastern time (6:00 p.m. Pacific time).

ii. Assume that a debt collector's information indicates that a consumer has a mobile telephone number with an area code associated with the Eastern time zone and a landline telephone number with an area code associated with the Mountain time zone. The convenient times to communicate with the consumer are after 10:00 a.m. Eastern time (8:00 a.m. Mountain time) and before 9:00 p.m. Eastern time (7:00 p.m. Mountain time).

(ii) At any unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer.

Official interpretation of Paragraph 6(b)(1)(ii).

1. Communications or attempts to communicate at unusual or inconvenient places. Section 1006.6(b)(1)(ii) prohibits a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of any debt at any unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer. Some communication media, such as mailing addresses and landline telephone numbers, are associated with a place. Pursuant to § 1006.6(b)(1)(ii), a debt collector must not communicate or attempt to communicate with a consumer through media associated with an unusual place, or with a place that the debt collector knows or should know is inconvenient to the consumer. Other communication media, such as email addresses and mobile telephone numbers, are not associated with a place. Section 1006.6(b)(1)(ii) does not prohibit a debt collector from communicating or attempting to communicate with a consumer through such media unless the debt collector knows that the consumer is at an unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer. For example:

i. Assume the same facts as in comment 6(b)(1)-1.iii. Unless the debt collector knows that the consumer is at home, a telephone call to the consumer's mobile telephone number or an electronic communication, including, for example, an email message or a text message to the consumer's mobile telephone, does not violate § 1006.6(b)(1)(ii) even if the consumer receives or views the communication while at home.

(2) Prohibitions regarding consumer represented by an attorney. Except as provided in paragraph (b)(4) of this section, a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to such debt and knows, or can readily ascertain, the attorney's name and address, unless the attorney:

Official interpretation of 6(b)(2) Prohibitions regarding consumer represented by an attorney.

1. Consumer-initiated communications. A consumer-initiated communication from a consumer represented by an attorney constitutes the consumer's prior consent to that communication under § 1006.6(b)(4)(i); therefore, a debt collector may respond to that consumer-initiated communication. However, the consumer's act of initiating the communication does not negate the debt collector's knowledge that the consumer is represented by an attorney and does not revoke the protections afforded the consumer under § 1006.6(b)(2). After the debt collector's response, the debt collector must not communicate or attempt to communicate further with the consumer unless the debt collector knows the consumer is not represented by an attorney with respect to the debt, either based on information from the consumer or the consumer's attorney, or unless an exception under § 1006.6(b)(2)(i) or (ii) or § 1006.6(b)(4) applies.

(i) Fails to respond within a reasonable period of time to a communication from the debt collector; or

(ii) Consents to the debt collector's direct communication with the consumer.

(3) Prohibitions regarding consumer's place of employment. Except as provided in paragraph (b)(4) of this section, a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

Official interpretation of 6(b)(3) Prohibitions regarding consumer's place of employment.

1. Communications at consumer's place of employment. Section 1006.6(b)(3) prohibits a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication. A debt collector knows or has reason to know that a consumer's employer prohibits the consumer from receiving such communication if, for example, the consumer tells the debt collector that the consumer cannot take personal calls at work. The debt collector may ask follow-up questions regarding the employer's prohibitions or limitations on contacting the consumer at the place of employment or clarify statements by the consumer.

2. **Employer-provided email.** For special rules regarding employer-provided email addresses, see § 1006.22(f)(3) and its associated commentary.

(4) **Exceptions.** The prohibitions in paragraphs (b)(1) through (3) of this section do not apply when a debt collector communicates or attempts to communicate with a consumer in connection with the collection of any debt with:

(i) The prior consent of the consumer, given directly to the debt collector during a communication that does not violate paragraphs (b)(1) through (3) of this section; or

Official interpretation of Paragraph 6(b)(4)(i).

1. **Prior consent—in general.** Section 1006.6(b)(4)(i) provides, in part, that the prohibitions in § 1006.6(b)(1) through (3) on a debt collector communicating or attempting to communicate with a consumer in connection with the collection of any debt do not apply if the debt collector communicates or attempts to communicate with the prior consent of the consumer. If the debt collector learns during a communication that the debt collector is communicating with the consumer at an inconvenient time or place, for example, the debt collector may ask the consumer during that communication what time or place would be convenient. However, § 1006.6(b)(4)(i) prohibits the debt collector from asking the consumer to consent to the continuation of that inconvenient communication.

2. **Directly to the debt collector.** Section 1006.6(b)(4)(i) requires the prior consent of the consumer to be given directly to the debt collector. For example, a debt collector cannot rely on the prior consent of the consumer given to a creditor or to a previous debt collector.

(ii) The express permission of a court of competent jurisdiction.

(c) Communications with a consumer—after refusal to pay or cease communication notice

(1) **Prohibition.** Except as provided in paragraph (c)(2) of this section, if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wants the debt collector to cease further communication with the consumer, the debt collector must not communicate or attempt to communicate further with the consumer with respect to such debt.

Official interpretation of 6(c)(1) Prohibitions.

1. **Notification complete upon receipt.** If, pursuant to § 1006.6(c)(1), a consumer notifies a debt collector in writing or electronically using a medium of electronic communication through which a debt collector accepts electronic communications from consumers that the consumer either refuses to pay a debt or wants the debt collector to cease further communication with the consumer, notification is complete upon the debt collector's receipt of that information. The following example illustrates the rule.

i. Assume that on August 3, a consumer places in the mail a written notification to a debt collector that the consumer either refuses to pay a debt or wants the debt collector to cease further communication with the consumer pursuant to § 1006.6(c)(1). On August 4, the debt collector sends the consumer an email message. The debt collector receives the consumer's written notification on August 6. Because the consumer's notification is complete upon the debt collector's receipt of that information on August 6, the debt collector's email message communication on August 4 does not violate § 1006.6(c)(1).

2. **Interpretation of the E-SIGN Act.** Comment 6(c)(1)-1 constitutes the Bureau's interpretation of section 101 of the E-SIGN Act as applied to FDCPA section 805(c). Under this interpretation, section 101(a) of the E-SIGN Act enables a consumer to satisfy the requirement in FDCPA section 805(c) that the consumer's notification of the debt collector be in writing through an electronic request. Further, because the consumer may only satisfy the writing requirement using a medium of electronic communication through which a debt collector accepts electronic communications from consumers, section 101(b) of the E-SIGN Act is not contravened.

(2) **Exceptions.** The prohibition in paragraph (c)(1) of this section does not apply when a debt collector communicates or attempts to communicate further with a consumer with respect to such debt:

Official interpretation of 6(c)(2) Exceptions.

1. **Written early intervention notice for mortgage servicers.** The Bureau has interpreted the written early intervention notice required by 12 CFR 1024.39(d)(3) to fall within the exceptions to the cease communication provision in FDCPA section 805(c)(2) and (3). See 12 CFR 1024.39(d)(3), its commentary, and the Bureau's 2016 FDCPA Interpretive Rule (81 FR 71977 (Oct. 19, 2016)).

2. **Other mortgage servicing rule provisions.** Notwithstanding a consumer's cease communication request pursuant to § 1006.6(c)(1), a mortgage servicer who is subject to the FDCPA with respect to a mortgage loan is not liable under the FDCPA for complying with certain servicing rule provisions, including requirements to provide a consumer with disclosures regarding the forced placement of hazard insurance as required by 12 CFR 1024.37, a disclosure regarding an adjustable-rate mortgage's initial interest rate adjustment as required by 12 CFR 1026.20(d), and a periodic statement for each billing cycle as required by 12 CFR 1026.41. See CFPB Bulletin 2013-12 (Oct. 15, 2013) providing implementation guidance for certain mortgage servicing rules.

(i) To advise the consumer that the debt collector's further efforts are being terminated;

(ii) To notify the consumer that the debt collector or creditor may invoke specified remedies that the debt collector or creditor ordinarily invokes; or

(iii) Where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

(d) Communications with third parties—

(1) **Prohibitions.** Except as provided in paragraph (d)(2) of this section, a debt collector must not communicate, in connection with the collection of any debt, with any person other than:

(i) The consumer;

(ii) The consumer's attorney;

(iii) A consumer reporting agency, if otherwise permitted by law;

(iv) The creditor;

(v) The creditor's attorney; or

(vi) The debt collector's attorney.

(2) **Exceptions.** The prohibition in paragraph (d)(1) of this section does not apply when a debt collector communicates, in connection with the collection of any debt, with a person:

Official interpretation of 6(d)(2) Exceptions.

1. **Prior consent.** See the commentary to § 1006.6(b)(4)(i) for guidance concerning a consumer giving prior consent directly to a debt collector.

(i) For the purpose of acquiring location information, as provided in § 1006.10;

(ii) With the prior consent of the consumer given directly to the debt collector;

(iii) With the express permission of a court of competent jurisdiction; or

(iv) As reasonably necessary to effectuate a postjudgment judicial remedy.

(3) **Reasonable procedures for email and text message communications.** A debt collector maintains procedures that are reasonably adapted, for purposes of FDCPA section 813(c), to avoid a bona fide error in sending an email or text message communication that would result in a violation of paragraph (d)(1) of this section if those procedures include steps to reasonably confirm and document that:

(i) The debt collector communicated with the consumer by sending an email to an email address described in paragraph (d)(4) of this section or a text message to a telephone number described in paragraph (d)(5) of this section; and

(ii) The debt collector did not communicate with the consumer by sending an email to an email address or a text message to a telephone number that the debt collector knows has led to a disclosure prohibited by paragraph (d)(1) of this section.

Official interpretation of Paragraph 6(d)(3)(ii).

1. Knowledge of prohibited disclosure. For purposes of § 1006.6(d)(3)(ii), a debt collector knows that sending an email to an email address or a text message to a telephone number has led to a disclosure prohibited by § 1006.6(d)(1) if any person has informed the debt collector of that fact.

(4) Procedures for email addresses. For purposes of paragraph (d)(3)(i) of this section, a debt collector may send an email to an email address if:

(i) Procedures based on communication between the consumer and the debt collector.

(A) The consumer used the email address to communicate with the debt collector about the debt and the consumer has not since opted out of communications to that email address; or

(B) The debt collector has received directly from the consumer prior consent to use the email address to communicate with the consumer about the debt and the consumer has not withdrawn that consent; or

Official interpretation of Paragraph 6(d)(4)(i)(B).

1. Prior consent—in general. Section 1006.6(d)(4)(i)(B) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send an email to an email address if, among other things, the debt collector has received directly from the consumer prior consent to use the email address to communicate with the consumer about the debt. For purposes of § 1006.6(d)(4)(i)(B), a consumer may provide consent directly to a debt collector through any medium of communication, such as in writing, electronically, or orally.

2. Prior consent—consumer-provided email address. If a consumer provides an email address to a debt collector (including on the debt collector's website or online portal), the debt collector may treat the consumer as having consented directly to the debt collector's use of the email address to communicate with the consumer about the debt for purposes of § 1006.6(d)(4)(i)(B) if the debt collector discloses clearly and conspicuously that the debt collector may use the email address to communicate with the consumer about the debt.

(ii) Procedures based on communication by the creditor.

(A) A creditor obtained the email address from the consumer;

(B) The creditor used the email address to communicate with the consumer about the account and the consumer did not ask the creditor to stop using it;

Official interpretation of Paragraph 6(d)(4)(ii)(B).

1. Communications about the account. Section 1006.6(d)(4)(ii)(B) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send an email to an email address if, among other things, the creditor used the email address to communicate with the consumer about the account giving rise to the debt. For purposes of § 1006.6(d)(4)(ii)(B), communications about the account include, for example, required disclosures, bills, invoices, periodic statements, payment reminders, and payment confirmations. Communications about the account do not include, for example, marketing or advertising materials unrelated to the consumer's account.

(C) Before the debt collector used the email address to communicate with the consumer about the debt, the creditor sent the consumer a written or electronic notice, to an address the creditor obtained from the consumer and used to communicate with the consumer about the account, that clearly and conspicuously disclosed:

Official interpretation of Paragraph 6(d)(4)(ii)(C).

1. Clear and conspicuous. Clear and conspicuous means readily understandable. In the case of written and electronic disclosures, the location and type size also must be readily noticeable and legible to consumers, although no minimum type size is mandated.

2. Sample language. Section 1006.6(d)(4)(ii)(C) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send an email to an email address if, among other things, the creditor sent the consumer a written or electronic notice that clearly and conspicuously disclosed that the debt would be transferred to the debt collector; that the debt collector might use the email address to communicate with the consumer about the debt; that, if others have access to this email address, then it is possible they may see the emails; instructions for a reasonable and simple method by which the consumer could opt out of such communications; and the date by which the debt collector or creditor must receive the consumer's request to opt out.

i. When a creditor sends the notice in writing, the creditor may use, but is not required to use, the following language to satisfy § 1006.6(d)(4)(ii)(C): We are transferring your account to ABC debt collector, and we are providing ABC debt collector with the following email address for you: [email address]. ABC debt collector may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by ABC debt collector to [email address], please fill out the enclosed form and return it in the enclosed envelope so that we receive it by [date].

ii. When a creditor sends the notice electronically, the creditor may use, but is not required to use, the following language to satisfy § 1006.6(d)(4)(ii)(C): We are transferring your account to ABC debt collector, and we are providing ABC debt collector with the following email address for you: [email address]. ABC debt collector may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by ABC debt collector to [email address], please click here by [date].

3. Combined notice. A notice provided by the creditor under § 1006.6(d)(4)(ii)(C) may be contained in a larger communication that conveys other information, as long as the notice is clear and conspicuous.

(1) That the debt has been or will be transferred to the debt collector;

Official interpretation of Paragraph 6(d)(4)(ii)(C)(1).

1. Identification of the debt collector. Under § 1006.6(d)(4)(ii)(C)(1), the notice must clearly and conspicuously disclose, among other things, that the debt has been or will be transferred to the debt collector. To satisfy this requirement, the notice must identify the name of the specific debt collector to which the debt has been or will be transferred.

(2) The email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt;

(3) That, if others have access to the email address, then it is possible they may see the emails;

(4) Instructions for a reasonable and simple method by which the consumer could opt out of such communications; and

Official interpretation of Paragraph 6(d)(4)(ii)(C)(4).

1. Reasonable and simple method to opt out. Under § 1006.6(d)(4)(ii)(C)(4), the notice must clearly and conspicuously disclose instructions for a reasonable and simple method by which the consumer can opt out of the debt collector's use of the email address to communicate about the debt. The following examples illustrate the rule.

i. When the creditor sends the notice in writing, reasonable and simple methods for opting out include providing a reply form and a pre-addressed envelope together with the opt-out notice. Requiring a consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice, does not meet the requirement to provide a reasonable and simple method for opting out.

ii. When the creditor sends the notice electronically, reasonable and simple methods for opting out include providing an electronic means to opt out, such as a hyperlink, or allowing the consumer to opt out by replying to the communication with the word stop. Requiring a consumer who receives the opt-out notice electronically to opt out by postal mail, telephone, or visiting a website without providing a link does not meet the requirement to provide a reasonable and simple method for opting out.

(*5*) The date by which the debt collector or the creditor must receive the consumer's request to opt out, which must be at least 35 days after the date the notice is sent;

Official interpretation of Paragraph 6(d)(4)(ii)(C)(5).

1. Recipient of opt-out request. Under § 1006.6(d)(4)(ii)(C)(5), the notice must clearly and conspicuously disclose the date by which a debt collector or creditor must receive a consumer's request to opt out, which must be at least 35 days after the date the notice is sent. The notice may instruct the consumer to respond to the debt collector or to the creditor but not to both.

(D) The opt-out period provided under paragraph (d)(4)(ii)(C)(*5*) of this section has expired and the consumer has not opted out; and

Official interpretation of Paragraph 6(d)(4)(ii)(D).

1. Effect of opt-out request after expiration of opt-out period. If a consumer requests after the expiration of the opt-out period that the debt collector not communicate using the email address identified in the opt-out notice, such as by returning the notice or opting out under § 1006.6(e), § 1006.14(h)(1) prohibits the debt collector from communicating or attempting to communicate with the consumer using that email address. If the consumer requests after the expiration of the opt-out period that the debt collector not communicate with the consumer by email, § 1006.14(h)(1) prohibits the debt collector from communicating or attempting to communicate with the consumer by email, including by using the specific email address identified in the notice. For more on prohibited communication media and certain exceptions, see § 1006.14(h) and its associated commentary. If after the expiration of the opt-out period the consumer notifies the debt collector in writing or electronically using a medium of electronic communication through which a debt collector accepts electronic communications from consumers that the consumer refuses to pay the debt or wants the debt collector to cease further communication with the consumer, § 1006.6(c)(1) prohibits the debt collector from communicating or attempting to communicate with the consumer with respect to the debt, subject to the exceptions in § 1006.6(c)(2). For more on communications with a consumer after refusal to pay or a cease communication notice, see § 1006.6(c) and its associated commentary.

2. Scope of opt-out request. In the absence of evidence that the consumer refuses to pay the debt or wants the debt collector to cease all communication with the consumer, a consumer's request under § 1006.6(d)(4)(ii)(D) to opt out of a debt collector's use of a particular email address to communicate with the consumer by email does not constitute a notification to cease further communication with respect to the debt under § 1006.6(c)(1).

(E) The email address has a domain name that is available for use by the general public, unless the debt collector knows the address is provided by the consumer's employer.

Official interpretation of Paragraph 6(d)(4)(ii)(E).

1. Domain name available for use by the general public. Under § 1006.6(d)(4)(ii)(E), the domain name of an email address is available for use by the general public when multiple members of the general public are permitted to use the same domain name, whether for free or through a paid subscription. Such a name does not include one that is reserved for use by specific registrants, such as a domain name branded for use by a particular commercial entity (e.g., john.doe@springsidemortgage.com) or reserved for particular types of institutions (e.g., john.doe@agency.gov, john.doe@university.edu, or john.doe@nonprofit.org).

2. Knowledge of employer-provided email address. For purposes of § 1006.6(d)(4)(ii)(E), a debt collector knows that an email address is provided by the consumer's employer if any person has informed the debt collector that the address is employer provided. However, § 1006.6(d)(4)(ii)(E) does not require a debt collector to conduct a manual review of consumer accounts to determine whether an email address might be employer provided.

(iii) Procedures based on communication by the prior debt collector.

Official interpretation of 6(d)(4)(iii) Procedures based on communication by the prior debt collector.

1. Immediately prior debt collector. Section 1006.6(d)(4)(iii) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send an email to an email address if, among other things, the immediately prior debt collector used the email address to communicate with the consumer about the debt. For purposes of § 1006.6(d)(4)(iii), the immediately prior debt collector is the debt collector immediately preceding the current debt collector. For example, if ABC debt collector returns a debt to the creditor and the creditor places the debt with XYZ debt collector, ABC debt collector is the immediately prior debt collector for purposes of § 1006.6(d)(4)(iii).

2. Examples. The following examples illustrate the rule.

i. After obtaining a consumer's email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), ABC debt collector communicates with the consumer about the debt using that email address and the consumer does not opt out. ABC debt collector returns the debt to the creditor, who places it with XYZ debt collector. XYZ debt collector communicates with the consumer about the debt using the email address obtained by ABC debt collector. Assuming that the requirements of § 1006.6(d)(3)(ii) are satisfied, XYZ debt collector may have a bona fide error defense to civil liability for any unintentional third-party disclosure that occurs during that communication because a prior debt collector (i.e., ABC debt collector) obtained the email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), the immediately prior debt collector (i.e., ABC debt collector) used the email address to communicate with the consumer about the debt, and the consumer did not opt out of such communications by ABC debt collector.

ii. After obtaining a consumer's email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), ABC debt collector communicates with the consumer about the debt using that email address and the consumer does not opt out. ABC debt collector returns the debt to the creditor, who places it with EFG debt collector. EFG debt collector communicates with the consumer about the debt using the email address obtained by ABC debt collector, and the consumer does not opt out. EFG debt collector returns the debt to the creditor, who places it with XYZ

debt collector. XYZ debt collector communicates with the consumer about the debt using the email address obtained by ABC debt collector and used by EFG debt collector. Assuming that the requirements of § 1006.6(d)(3)(ii) are satisfied, XYZ debt collector may have a bona fide error defense to civil liability for any unintentional third-party disclosure that occurs during that communication because a prior debt collector (i.e., ABC debt collector) obtained the email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), the immediately prior debt collector (*i.e.*, EFG debt collector) used the email address to communicate with the consumer about the debt, and the consumer did not opt out of such communications by EFG debt collector.

iii. After obtaining a consumer's email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), ABC debt collector communicates with the consumer about the debt using that email address and the consumer does not opt out. ABC debt collector returns the debt to the creditor, who places it with EFG debt collector, who chooses not to communicate with the consumer by email. EFG debt collector returns the debt to the creditor, who places it with XYZ debt collector. XYZ debt collector communicates with the consumer about the debt using the email address obtained by ABC debt collector. Section 1006.6(d)(4)(iii) does not provide XYZ debt collector with a bona fide error defense to civil liability for any unintentional third-party disclosure that occurs during that communication because the immediately prior debt collector (*i.e.*, EFG debt collector) did not use the email address to communicate with the consumer about the debt.

(A) Any prior debt collector obtained the email address in accordance with paragraph (d)(4)(i) or (ii) of this section;

(B) The immediately prior debt collector used the email address to communicate with the consumer about the debt; and

(C) The consumer did not opt out of such communications.

(5) Procedures for telephone numbers for text messages. For purposes of paragraph (d)(3)(i) of this section, a debt collector may send a text message to a telephone number if:

Official interpretation of 6(d)(5) Procedures for telephone numbers for text messages.

1. Complete and accurate database. Section 1006.6(d)(5)(i) and (ii) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send a text message to a telephone number if, among other things, the debt collector confirms, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user. For purposes of § 1006.6(d)(5)(i) and (ii), the database established by the FCC in In re Advanced Methods to Target & Eliminate Unlawful Robocalls (33 FCC Rcd. 12024 (Dec. 12, 2018)) qualifies as a complete and accurate database, as does any commercially available database that is substantially similar in terms of completeness and accuracy to the FCC's database.

(i) The consumer used the telephone number to communicate with the debt collector about the debt by text message, the consumer has not since opted out of text message communications to that telephone number, and within the past 60 days either:

Official interpretation of Paragraph 6(d)(5)(i).

1. Response to telephone call by consumer. Section 1006.6(d)(5)(i) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send a text message to a telephone number if, among other things, the consumer used the telephone number to communicate by text message with the debt collector about the debt. Section 1006.6(d)(5)(i) does not apply if the consumer used the telephone number to communicate only by telephone call with the debt collector about the debt.

(A) The consumer sent the text message described in paragraph (d)(5)(i) of this section or a new text message to the debt collector from that telephone number; or

(B) The debt collector confirmed, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent text message to the debt collector from that telephone number; or

(ii) The debt collector received directly from the consumer prior consent to use the telephone number to communicate with the consumer about the debt by text message, the consumer has not since withdrawn that consent, and within the past 60 days the debt collector either:

Official interpretation of Paragraph 6(d)(5)(ii).

1. Prior consent. See comment 6(d)(4)(i)(B)-1 for guidance concerning how a consumer may provide prior consent directly to a debt collector. See comment 6(d)(4)(i)(B)-2 for guidance concerning when a debt collector may treat a consumer who provides a telephone number for text messages as having consented directly to the debt collector.

(A) Obtained the prior consent described in paragraph (d)(5)(ii) of this section or renewed consent from the consumer; or

(B) Confirmed, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent consent to use that telephone number to communicate about the debt by text message.

(e) Opt-out notice for electronic communications or attempts to communicate. A debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address must include in such communication or attempt to communicate a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. The debt collector may not require, directly or indirectly, that the consumer, in order to opt out, pay any fee to the debt collector or provide any information other than the consumer's opt-out preferences and the email address, telephone number for text messages, or other electronic-medium address subject to the opt-out request.

Official interpretation of 6(e) Opt-out notice for electronic communications or attempts to communicate.

1. In general. Section 1006.6(e) requires a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address to include in such communication or attempt to communicate a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. See comment 6(d)(4)(ii)(C)-1 for guidance on the meaning of clear and conspicuous. See comment 6(d)(4)(ii)(C)(4)-1 for guidance on the meaning of reasonable and simple. The following examples illustrate the rule.

i. Assume that a debt collector sends a text message to a consumer's mobile telephone number. The text message includes the following instruction: Reply STOP to stop texts to this telephone number. Assuming that it is readily noticeable and legible to consumers, this instruction constitutes a clear and conspicuous statement describing a reasonable and simple method to opt out of receiving further text messages from the debt collector to that telephone number consistent with § 1006.6(e). No minimum type size is mandated.

ii. Assume that a debt collector sends the consumer an email that includes a hyperlink labeled: Click here to opt out of further emails to this email address. Assuming that it is readily noticeable and legible to consumers, this instruction constitutes a clear and conspicuous statement describing a reasonable and simple method to opt out of receiving further emails from the debt collector to that email address consistent with § 1006.6(e). No minimum type size is mandated.

iii. Assume that a debt collector sends the consumer an email that includes instructions in a textual format explaining that the consumer may opt out of receiving further email communications from the debt collector to that email address by replying with the word stop in the subject line. Assuming that it is readily noticeable and legible to consumers, this instruction constitutes a clear and conspicuous statement describing a reasonable and simple method to opt out of receiving further emails from the debt collector to that email address consistent with § 1006.6(e). No minimum type size is mandated.

§ 1006.9 Debt Collection Practices in Connection with the Global COVID-19 Pandemic

(a) Purpose and coverage.[7] The purpose of this subpart is to eliminate certain abusive debt collection practices by debt collectors related to the global COVID-19 pandemic, to ensure that debt collectors who refrain from using such abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against such debt collection abuses. This subpart applies to debt collectors, as defined in FDCPA section 803(6), 15 U.S.C. 1692(a)(6), other than a person excluded from coverage by section 1029(a) of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Act, 12 U.S.C. 5519(a).

(b) Definitions. For purposes of this subpart, the following definitions apply:

(1) The terms *consumer*, *debt*, and *debt collector* have the same meaning given to them in FDCPA section 803, 15 U.S.C. 1692a.

(2) The term CDC Order means the order issued by the Centers for Disease Control and Prevention titled *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19* (86 FR 16731 (Mar. 31, 2021)), as extended by the Centers for Disease Control and Prevention.

(3) The term *eviction notice* means the earliest of any written notice that the laws of any State, locality, territory, or tribal area require to be provided to a consumer before an eviction action against the consumer may be filed.

Official interpretation of Paragraph 9(b)(3).

1. Examples. Section 1006.9(b)(3) defines eviction notice as the earliest of any written notice that the laws of any State, locality, territory, or tribal area require to be provided to a consumer before an eviction action against the consumer may be filed. The term eviction notice includes, for example, notices to quit, notices to pay rent or quit, and notices to terminate tenancy.

(c) *Prohibitions.* During the effective period of the CDC Order, a debt collector collecting a debt in any jurisdiction in which the CDC Order applies must not, in connection with the collection of that debt:

(1) File an eviction action for non-payment of rent against a consumer to whom the CDC Order reasonably might apply without disclosing to that consumer clearly and conspicuously in writing, on the date that the debt collector provides the consumer with an eviction notice or, if no eviction notice is required by applicable law, on the date that the eviction action is filed, that the consumer may be eligible for temporary protection from eviction under the CDC Order; or

Official interpretation of Paragraph 9(c)(1).

1. Eviction action for non-payment of rent. Section 1006.9(c)(1) provides that, during the effective period of the CDC Order, a debt collector collecting a debt in any jurisdiction in which the CDC Order applies must not file an eviction action for non-payment of rent against a consumer to whom the CDC Order reasonably might apply without making the disclosure described in § 1006.9(c)(1). A debt collector does not file an eviction action for non-payment of rent if the debt collector files the eviction action based solely on the consumer engaging in one or more of the following actions: criminal activity while on the premises; threatening the health or safety of other residents; damaging or posing an immediate and significant risk of damage to property; violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).

2. Reasonably might apply. Section 1006.9(c)(1) requires a debt collector to provide the disclosure described in § 1006.9(c)(1) to any consumer to whom the CDC Order reasonably might apply. A consumer to whom the CDC Order reasonably might apply is a consumer who reasonably might be eligible to be a covered person as defined in the CDC Order. A consumer is not reasonably eligible to be a covered person if the debt collector has knowledge that a consumer is not eligible for protection under the CDC Order. However, nothing in § 1006.9(c)(1) prohibits a debt collector from providing the disclosure to a consumer even if the consumer might not reasonably be eligible to be a covered person. A debt collector therefore may comply with the requirement to provide the disclosure to any consumer to whom the CDC Order reasonably might apply by, for example, providing the disclosure to each consumer against whom the debt collector files an eviction action for non-payment of rent. A debt collector does not violate FDCPA sections 807 (15 U.S.C. 1692e) or 808 (15 U.S.C. 1692f) merely because the debt collector provides the disclosure to consumers as described in this comment 9(c)(1)–2 even if the consumer is not reasonably eligible to be a covered person.

3. Provision of disclosure. Section 1006.9(c)(1) requires a debt collector to disclose to the consumer, on the date that the debt collector provides the consumer with an eviction notice or, if no eviction notice is required by applicable law, on the date that the eviction action is filed, that the consumer may be eligible for temporary protection from eviction under the CDC Order. A debt collector may satisfy this requirement by, for example, delivering the disclosure to the address that is the subject of eviction proceedings; the debt collector is not required to ensure that the consumer actually receives the disclosure. A debt collector may, but is not required to, provide the disclosure at the same time that the debt collector provides the consumer with any eviction notice or serves the consumer with any eviction action. For example, a debt collector may, but is not required to, include the disclosure in an envelope either on or with the eviction notice or in the same mailing in which the debt collector serves the consumer with an eviction action.

4. Frequency of disclosure. Section 1006.9(c)(1) does not require a debt collector to provide the disclosure described in § 1006.9(c)(1) more than once. However, nothing in § 1006.9(c)(1) prohibits a debt collector from providing the disclosure more than once, such as in each subsequent communication with the

7 Section 1006.9 took effect on May 3, 2021, as a temporary rule, applying only during the effective period of the Centers for Disease Control and Prevention's Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19. That order is no longer in effect and thus this rule provision also is no longer in effect. *See* § 7.4.11.2, *supra*.

consumer. In addition, a debt collector does not violate FDCPA sections 807 (15 U.S.C. 1692e) or 808 (15 U.S.C. 1692f) merely because the debt collector provides the disclosure more than once.

5. Sample language. Section 1006.9(c)(1) requires a debt collector to disclose that the consumer may be eligible for temporary protection from eviction under the CDC Order.

i. A debt collector may use, but is not required to use, the following language to satisfy § 1006.9(c)(1): "Because of the global COVID-19 pandemic, you may be eligible for temporary protection from eviction under Federal law. Learn the steps you should take now: visit www.cfpb.gov/eviction or call a housing counselor at 800-569-4287." A debt collector does not violate FDCPA sections 807 (15 U.S.C. 1692e) or 808 (15 U.S.C. 1692f) merely because the debt collector provides the sample language in this comment 9(c)(1)–5.i to a consumer in a jurisdiction in which the CDC Order does not apply.

ii. Alternatively, a debt collector may use, but is not required to use, the following language to satisfy § 1006.9(c)(1): "Because of the global COVID-19 pandemic, you may be eligible for temporary protection from eviction under the laws of your State, territory, locality, or tribal area, or under Federal law. Learn the steps you should take now: visit www.cfpb.gov/eviction or call a housing counselor at 800-569-4287." A debt collector does not violate FDCPA sections 807 (15 U.S.C. 1692e) or 808 (15 U.S.C. 1692f) merely because the debt collector provides the sample language in this comment 9(c)(1)–5.ii to a consumer in a jurisdiction in which only the CDC Order applies or in which the CDC Order does not apply.

6. Clear and conspicuous. A debt collector must provide the disclosure described in § 1006.9(c)(1) clearly and conspicuously in writing. Clear and conspicuous means readily understandable. The location and type size also must be readily noticeable and legible to consumers, although no minimum type size is mandated.

(2) Falsely represent or imply to a consumer that the consumer is ineligible for temporary protection from eviction under the CDC Order.

§ 1006.10 Acquisition of location information.

(a) Definition. The term *location information* means a consumer's:

Official interpretation of 10(a) Definition.

1. Location information about deceased consumers. If a consumer obligated or allegedly obligated to pay any debt is deceased, location information includes the information described in § 1006.10(a) for a person who is authorized to act on behalf of the deceased consumer's estate, as described in § 1006.6(a)(4) and its associated commentary.

(1) Place of abode and telephone number at such place; or
(2) Place of employment.

(b) Form and content of location communications. A debt collector communicating with a person other than the consumer for the purpose of acquiring location information must:

(1) Identify himself or herself individually by name, state that he or she is confirming or correcting the consumer's location information, and, only if expressly requested, identify his or her employer;
(2) Not state that the consumer owes any debt;

Official interpretation of Paragraph 10(b)(2).

1. Executors, administrators, or personal representatives of a deceased consumer's estate. Section 1006.10(b)(2) prohibits a debt collector who is communicating with any person other than the consumer for the purpose of acquiring location information about the consumer from stating that the consumer owes any debt. If the consumer obligated or allegedly obligated to pay the debt is deceased, and the debt collector is attempting to locate the person who is authorized to act on behalf of the deceased consumer's estate, the debt collector does not violate § 1006.10(b)(2) by stating that the debt collector is seeking to identify and locate the person who is authorized to act on behalf of the deceased consumer's estate. The debt collector may also state that the debt collector is seeking to identify and locate the person handling the financial affairs of the deceased consumer. For more on executors, administrators, and personal representatives, see § 1006.6(a)(4) and its associated commentary.

(3) Not communicate by postcard;
(4) Not use any language or symbol on any envelope or in the contents of any communication by mail indicating that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and
(5) After the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond to the debt collector's communication within a reasonable period of time.

(c) Frequency of location communications. In addition to complying with § 1006.14(b)(1), a debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer must not communicate more than once with such person unless requested to do so by such person, or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information.

§ 1006.14 Harassing, oppressive, or abusive conduct.

(a) In general. A debt collector must not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, including, but not limited to, the conduct described in paragraphs (b) through (h) of this section.

Official interpretation of 14(a) In general.

1. General prohibition. Section 1006.14(a), which implements FDCPA section 806 (15 U.S.C. 1692d), sets forth a general standard that prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. The general prohibition covers the specific conduct described in § 1006.14(b) through (h), as well as any conduct by the debt collector that is not specifically prohibited by § 1006.14(b) through (h) but the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Such conduct can occur regardless of the communication media the debt collector uses, including in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, social media, or other electronic media, even if not specifically addressed by § 1006.14(b) through (h). The following example illustrates the rule.

i. Assume that, in connection with the collection of a debt, a debt collector sends a consumer numerous, unsolicited text messages per day for several consecutive days. The consumer does not respond. Assume further that the debt collector does not communicate or attempt to communicate with the consumer using any other communication medium and that, by sending the text messages, the debt collector has not violated § 1006.14(b) through (h). Even though the debt collector's conduct does not violate any specific prohibition under § 1006.14(b) through (h), it is likely that the natural consequence of the debt collector's text messages is to harass, oppress, or abuse the person receiving the

text messages: when such natural consequence occurs, the debt collector has violated § 1006.14(a) and FDCPA section 806.

2. Cumulative effect of conduct. Whether a debt collector's conduct violates the general standard in § 1006.14(a) may depend on the cumulative effect of the debt collector's conduct through any communication medium the debt collector uses, including in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, social media, or other electronic media. Depending on the facts and circumstances, conduct that on its own would violate neither the general prohibition in § 1006.14(a), nor any specific prohibition in § 1006.14(b) through (h), nonetheless may violate § 1006.14(a) when such conduct is evaluated cumulatively with other conduct. The following example illustrates the rule as applied to a debt collector who uses multiple communication media to communicate or attempt to communicate with a person.

i. Assume that a debt collector places seven unanswered telephone calls within seven consecutive days to a consumer in connection with the collection of a debt. During this same period, the debt collector also sends multiple additional unsolicited emails about the debt to the consumer. The consumer does not respond. The frequency of the debt collector's telephone calls during the seven-day period does not exceed the telephone call frequencies described in § 1006.14(b)(2)(i), so the debt collector is presumed to comply with § 1006.14(b)(1). Assume further that no evidence is offered to rebut the presumption of compliance, such that the debt collector complies with § 1006.14(b)(1). Also assume that, for purposes of this illustrative example only, the frequency of the debt collector's emails alone does not violate § 1006.14(a). It nevertheless is likely that the cumulative effect of the debt collector's telephone calls and emails is harassment; when such natural consequence occurs, the debt collector has violated § 1006.14(a) and FDCPA section 806.

(b) Repeated or continuous telephone calls or telephone conversations—

Official interpretation of 14(b) Repeated or continuous telephone calls or telephone conversations.

1. Placing telephone calls repeatedly or continuously. Section 1006.14(b) prohibits a debt collector from, in connection with the collection of a debt, placing telephone calls or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number, and it describes when a debt collector is presumed to have complied with or violated that prohibition. For purposes of § 1006.14(b)(1) through (4), placing a telephone call includes conveying a ringless voicemail but does not include sending an electronic message (*e.g.*, a text message or an email) that may be received on a mobile telephone.

(1) In general. In connection with the collection of a debt, a debt collector must not place telephone calls or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

Official interpretation of 14(b)(1) In general.

1. Effect of compliance. A debt collector who complies with § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5) complies with § 1006.14(a) and FDCPA section 806 (15 U.S.C. 1692d) solely with respect to the frequency of its telephone calls. The debt collector nevertheless could violate § 1006.14(a) and FDCPA section 806 if the natural consequence of another aspect of the debt collector's telephone calls, unrelated to frequency, is to harass, oppress, or abuse any person in connection with the collection of a debt. See also comment 14(a)-2 regarding the cumulative effect of the debt collector's conduct.

2. Example. Assume that a debt collector communicates or attempts to communicate with a consumer about a particular debt only by telephone. The debt collector does not exceed either of the telephone call frequencies described in § 1006.14(b)(2)(i). Under § 1006.14(b)(2)(i), the debt collector is presumed to comply with § 1006.14(b)(1). Assume, further, that no evidence is offered to rebut that presumption of compliance. Pursuant to § 1006.14(b)(1), the debt collector complies with § 1006.14(a) and FDCPA section 806, but only with respect to the frequency of its telephone calls. Assume, however, that one of the debt collector's telephone calls results in the debt collector leaving a voicemail that contains obscene language. Even though the debt collector does not violate § 1006.14(a) and FDCPA section 806 based solely on the frequency of the telephone calls, the debt collector's obscene voicemail would violate § 1006.14(a) and (d) and FDCPA section 806 and 806(2) (15 U.S.C. 1692, 1692d(2)).

(2) Telephone call frequencies; presumptions of compliance and violation.

(i) Subject to the exclusions in paragraph (b)(3) of this section, a debt collector is presumed to comply with paragraph (b)(1) of this section and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt neither:

Official interpretation of Paragraph 14(b)(2)(i).

1. Presumption of compliance; examples. Section 1006.14(b)(2)(i) provides that a debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt neither: more than seven times within seven consecutive days (§ 1006.14(b)(2)(i)(A)); nor within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt (§ 1006.14(b)(2)(i)(B)). For the presumption of compliance to apply, the debt collector's telephone call frequencies must not exceed either prong of § 1006.14(b)(2)(i). The telephone call frequencies are subject to the exclusions in § 1006.14(b)(3). In addition, for purposes of § 1006.14(b)(2)(i)(B), the date of the telephone conversation is the first day of the seven-consecutive-day period. The following examples illustrate the rule.

i. On Wednesday, April 1, a debt collector first attempts to communicate with a consumer in connection with the collection of a credit card debt by placing a telephone call and leaving a limited-content message. Between Thursday, April 2, and Tuesday, April 7, the debt collector places six more telephone calls to the consumer about the debt, all of which go unanswered. As of Tuesday, April 7, the debt collector has placed seven telephone calls to the consumer in connection with the collection of the credit card debt within the period of seven consecutive days that started on Wednesday, April 1. Assume the debt collector does not place any additional telephone calls about the debt until Wednesday, April 8. Under § 1006.14(b)(2)(i), the debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5).

ii. On Thursday, August 13, a consumer places a telephone call to, and initiates a telephone conversation with, a debt collector regarding a particular debt. Assume that the debt collector does not place a telephone call to the consumer in connection with the collection of that debt again prior to Thursday, August 20. The debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5).

iii. On Tuesday, October 6, a debt collector first attempts to communicate with a particular third party for the purpose of acquiring location information about a consumer by placing a telephone call to that third party. The call is unanswered. The debt collector places up to six more unanswered telephone calls to that third party for the purpose of acquiring location information about the consumer through Monday, October 12. The debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5). See § 1006.10(c) for further guidance concerning when a debt collector is prohibited from communicating with

a person other than the consumer for the purpose of acquiring location information.

2. Factors to rebut the presumption of compliance. To rebut the presumption of compliance, it must be proven that a debt collector who did not place a telephone call in excess of either of the telephone call frequencies described in § 1006.14(b)(2)(i) nevertheless placed a telephone call or engaged a person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. For purposes of determining whether the presumption of compliance has been rebutted, it is assumed that debt collectors intend the natural consequence of their actions. Comments 14(b)(2)(i)-2.i through .iv provide a non-exhaustive list of factors that may rebut the presumption of compliance. The factors may be considered either individually or in combination with one another (or other non-specified factors). The factors may be viewed in light of any other relevant facts and circumstances and therefore may apply to varying degrees. Factors that may rebut the presumption of compliance include:

i. The frequency and pattern of telephone calls the debt collector places to a person, including the intervals between them. The considerations relevant to this factor include whether the debt collector placed telephone calls to a person in rapid succession (*e.g.*, two unanswered telephone calls to the same telephone number within five minutes) or in a highly concentrated manner (*e.g.*, seven telephone calls to the same telephone number within one day). For example, assume the same facts as in comment 14(b)(2)(i)-1.i, except assume that, after the debt collector placed the first telephone call to the consumer about the credit card debt on Wednesday, April 1, the debt collector placed six additional telephone calls to the consumer about that debt on Friday, April 3. Under § 1006.14(b)(2)(i), the debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5), but the high concentration of telephone calls on Friday, April 3, is a factor that may rebut the presumption of compliance.

ii. The frequency and pattern of any voicemails that the debt collector leaves for a person, including the intervals between them. The considerations relevant to this factor include whether the debt collector left voicemails for a person in rapid succession (*e.g.*, two voicemails within five minutes left at the same telephone number) or in a highly concentrated manner (*e.g.*, seven voicemails left at the same telephone number within one day).

iii. The content of a person's prior communications with the debt collector. Among the considerations relevant to this factor are whether the person previously informed the debt collector, for example, that the person did not wish to be contacted again about the particular debt, that the person was refusing to pay the particular debt, or that the person did not owe the particular debt. This factor also includes a consumer's cease communication notification described in § 1006.6(c) and a consumer's request under § 1006.14(h) that the debt collector not use telephone calls to communicate or attempt to communicate with the consumer. The amount of time elapsed since any such prior communications also may be relevant to this factor.

iv. The debt collector's conduct in prior communications or attempts to communicate with the person. Among the considerations relevant to this factor are whether, during a prior communication or attempt to communicate with a person, the debt collector, for example, used obscene, profane, or otherwise abusive language (*see* § 1006.14(d)), used or threatened to use violence or other criminal means to harm the person (*see* § 1006.14(c)), or called at an inconvenient time or place (*see* § 1006.6(b)(1)). The amount of time elapsed since any such prior communications or attempts to communicate also may be relevant to this factor.

3. Misdirected telephone calls. Section 1006.14(b)(2)(i) provides that a debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector's telephone call frequencies do not exceed the telephone call frequencies described in § 1006.14(b)(2)(i). If, within a period of seven consecutive days, a debt collector attempts to communicate with a particular person by placing telephone calls to a particular telephone number, and the debt collector then learns that the telephone number is not that person's number, the telephone calls that the debt collector made to that number are not considered to have been telephone calls placed to that person during that seven-consecutive-day period for purposes of § 1006.14(b)(2)(i). For example:

i. Assume that a debt collector first attempts to communicate with a consumer on Monday, and again on Wednesday, by placing one unanswered telephone call to a particular telephone number on each of those days. On Thursday, the debt collector learns that the telephone number belongs to someone else and that the consumer does not answer telephone calls to that number. For purposes of § 1006.14(b)(2)(i), the debt collector has not yet placed any telephone calls to that consumer during that seven-consecutive-day period.

(A) More than seven times within seven consecutive days; nor

(B) Within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. The date of the telephone conversation is the first day of the seven-consecutive-day period.

(ii) Subject to the exclusions in paragraph (b)(3) of this section, a debt collector is presumed to violate paragraph (b)(1) of this section and FDCPA section 806(5) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt in excess of either of the telephone call frequencies described in paragraph (b)(2)(i) of this section.

Official interpretation of Paragraph 14(b)(2)(ii).

1. Presumption of a violation; examples. Section 1006.14(b)(2)(ii) provides that a debt collector is presumed to violate § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt in excess of either of the telephone call frequencies described in § 1006.14(b)(2)(i). The telephone call frequencies are subject to the exclusions in § 1006.14(b)(3). The following examples illustrate the rule.

i. On Wednesday, April 1, a debt collector first attempts to communicate with a consumer in connection with the collection of a mortgage debt by placing a telephone call and leaving a limited-content message. On each of the next three business days (*i.e.*, on Thursday, April 2, Friday, April 3, and Monday, April 6), the debt collector places two additional telephone calls to the consumer about the debt, all of which go unanswered. On Tuesday, April 7, the debt collector places an additional telephone call to the consumer about the debt. The debt collector has placed a total of eight telephone calls to the consumer about the debt during the seven-day period starting Wednesday, April 1. None of the calls was subject to the exclusions in § 1006.14(b)(3). The debt collector is presumed to violate § 1006.14(b)(1) and FDCPA section 806(5).

ii. On Tuesday, August 11, a debt collector first attempts to communicate with a consumer in connection with the collection of a credit card debt by placing a telephone call to the consumer that the consumer does not answer. On Friday, August 14, the debt collector again places a telephone call to the consumer and has a telephone conversation with the consumer in connection with the collection of the debt. Subject to the exclusions in § 1006.14(b)(3), the debt collector is presumed to violate § 1006.14(b)(1) and FDCPA section 806(5) if the debt collector places a telephone call to the consumer in connection with the collection of that debt again prior to Friday, August 21.

2. Factors to rebut the presumption of a violation. To rebut the presumption of a violation, it must be proven that a debt collector who placed telephone calls in excess of either of the frequencies described in § 1006.14(b)(2)(i) nevertheless did not place a telephone call or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. For purposes of determining whether the presumption of a violation has been rebutted, it is assumed that debt collectors intend the natural consequence of their actions. Comments 14(b)(2)(ii)-2.i through .iv provide a non-exhaustive list of factors that may rebut the presumption of a violation. The factors may be considered either individually or in combination with one another (or other non-specified factors). The factors may be viewed in light of any other relevant facts and circumstances and therefore may apply to varying degrees. Factors that may rebut the presumption of a violation include:

i. Whether a debt collector placed a telephone call to comply with, or as required by, applicable law. For example, assume the same facts as in comment 14(b)(2)(ii)-1.i, except assume that the debt collector placed the final telephone call of the seven-consecutive-day period to inform the consumer of available loss mitigation options in compliance with the Bureau's mortgage servicing rules under Regulation X, 12 CFR 1024.39(a). The debt collector's compliance with applicable law is a factor that may rebut the presumption of a violation.

ii. Whether a debt collector placed a telephone call that was directly related to active litigation involving the collection of a particular debt. For example, assume the same facts as in comment 14(b)(2)(ii)-1.ii, except assume that, after the debt collector and the consumer had a telephone conversation about the credit card debt on Friday, August 14, the debt collector placed another telephone call to the consumer before Friday, August 21, to complete a court-ordered communication with the consumer about the debt, or as part of negotiations to settle active debt collection litigation regarding the debt. The direct relationship between the additional telephone call and the active debt collection litigation is a factor that may rebut the presumption of a violation.

iii. Whether a debt collector placed a telephone call in response to a consumer's request for additional information when the exclusion in § 1006.14(b)(3)(i) for telephone calls made with the consumer's prior consent given directly to the debt collector did not apply. For example, assume the same facts as in comment 14(b)(2)(ii)-1.ii, except assume that, during the telephone conversation about the credit card debt on Friday, August 14, the consumer told the debt collector that the consumer would like more information about the amount of the debt but that the consumer could not talk at that moment. The consumer ended the telephone call before the debt collector could seek prior consent under § 1006.14(b)(3)(i) to call back with the requested information. The debt collector placed another telephone call to the consumer prior to Friday, August 21, to provide the requested information. The fact that the debt collector placed the additional telephone call in response to the consumer's request is a factor that may rebut the presumption of a violation.

iv. Whether a debt collector placed a telephone call to convey information to the consumer that, as shown through evidence, would provide the consumer with an opportunity to avoid a demonstrably negative effect relating to the collection of the particular debt, where the negative effect was not in the debt collector's control, and where time was of the essence. For example, in each of the following three scenarios, assume the same facts as in comment 14(b)(2)(ii)-1.ii, and also assume that:

A. During the telephone conversation about the credit card debt on Friday, August 14, the debt collector and the consumer engaged in a lengthy conversation regarding settlement terms, and, toward the end of the conversation, the telephone call dropped. The debt collector immediately placed an additional telephone call to the consumer to complete the conversation. The fact that the debt collector placed the telephone call to permit the debt collector and the consumer to complete the conversation about settlement terms, which provided the consumer an opportunity to avoid a demonstrably negative effect that was not in the debt collector's control (i.e., having to repeat a substantive conversation with a potentially different representative of the debt collector) and where time was of the essence (i.e., to prevent the delay of settlement negotiations by seven days) is a factor that may rebut the presumption of a violation.

B. The consumer previously entered into a payment plan with the debt collector regarding the credit card debt. The conditions for the payment plan were set by the creditor, and among those conditions is that only the creditor, in its sole discretion, may approve waivers of late fees. On Monday, August 17, the debt collector learned that the consumer's payment failed to process, and the applicable grace period was set to expire on Tuesday, August 18. The debt collector placed a telephone call to the consumer on Monday to remind the consumer that a late fee would be applied by the creditor for non-payment unless the consumer made the payment by the next day. The fact that the debt collector placed the telephone call to alert the consumer to the pending penalty, giving the consumer an opportunity to avoid a demonstrably negative effect that was not in the debt collector's control and where time was of the essence, is a factor that may rebut the presumption of a violation.

C. On Monday, August 17, the debt collector placed a telephone call to the consumer to offer the consumer a one-time only discount on the payment of the credit card debt. The debt collector stated that the offer would expire the next day when, in fact, the debt collector could have offered the same or a similar discount through the end of August. Because the negative effect on the consumer was in the debt collector's control, the discount offer is not a factor that may rebut the presumption of a violation.

(3) Certain telephone calls excluded from the telephone call frequencies. Telephone calls placed to a person do not count toward the telephone call frequencies described in paragraph (b)(2)(i) of this section if they are:

(i) Placed with such person's prior consent given directly to the debt collector and within a period no longer than seven consecutive days after receiving the prior consent, with the date the debt collector receives prior consent counting as the first day of the seven-consecutive-day period;

Official interpretation of Paragraph 14(b)(3)(i).

1. Prior consent. Section 1006.14(b)(3)(i) excludes from the telephone call frequencies described in § 1006.14(b)(2) certain telephone calls placed to a person who gives prior consent. See § 1006.6(b)(4)(i) and its associated commentary for guidance about giving prior consent directly to a debt collector. Nothing in § 1006.14(b)(3)(i) regarding prior consent for telephone call frequencies permits a debt collector to communicate, or attempt to communicate, with a consumer as prohibited by §§ 1006.6(b) and 1006.14(h).

2. Duration of prior consent. For purposes of § 1006.14(b)(3)(i), if a person gives prior consent for additional telephone calls about a particular debt directly to a debt collector, any telephone calls that the debt collector thereafter places to the person about that particular debt do not count toward the telephone call frequencies described in § 1006.14(b)(2) for a period of up to seven consecutive days. A person's prior consent may expire before the conclusion of the seven-consecutive-day period. A person's prior consent expires when any of the following occurs: (1) the person consented to the additional telephone calls for a shorter time period and such time period has ended; (2) the person revokes such prior consent; or (3) the

debt collector has a telephone conversation with the person regarding the particular debt.

3. Examples. The following examples illustrate how § 1006.14(b)(3)(i) applies:

i. On Friday, April 3, a debt collector places a telephone call to a consumer. During the ensuing telephone conversation in connection with the collection of a debt, the consumer tells the debt collector to call back on Monday. Absent an exception, under § 1006.14(b)(2)(ii), the debt collector would be presumed to violate § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector called the consumer on Monday, April 6, because the additional telephone call would exceed the frequency described in § 1006.14(b)(2)(i)(B). Under § 1006.14(b)(3)(i), however, in the scenario described (and absent any other facts), the debt collector could, pursuant to the consumer's prior consent, place telephone calls to the consumer on Monday, April 6, and not lose a presumption of compliance with § 1006.14(b)(1) and FDCPA section 806(5).

ii. Assume the same facts as in the preceding example, except that the consumer does not specify a particular day the debt collector may call back. Assume further that, on Monday, April 6, the debt collector calls the consumer back and has a telephone conversation with the consumer. The exception in § 1006.14(b)(3)(i) does not apply to subsequent telephone calls placed by the debt collector to the consumer, absent additional prior consent from the consumer. For example, if the debt collector, without additional prior consent, placed a telephone call to the consumer on Wednesday, April 8, that telephone call would count toward the telephone call frequencies described in § 1006.14(b)(2), and, pursuant to § 1006.14(b)(2)(ii), the debt collector would be presumed to violate § 1006.14(b)(1) and FDCPA section 806(5).

iii. Between Monday, June 1, and Wednesday, June 3, a debt collector places three unanswered telephone calls to a consumer in connection with the collection of a debt. Also on Wednesday, June 3, the debt collector sends the consumer an email message in connection with the collection of the debt. The consumer responds by email on Thursday, June 4, requesting additional information about available repayment options related to the debt and writes, You can call me at 123-456-7891 to discuss the repayment options. The debt collector receives the consumer's prior consent by email on Thursday, June 4, and thereafter places eight unanswered telephone calls to the consumer between Monday, June 8, and Wednesday, June 10. Because the consumer provided prior consent directly to the debt collector, the exclusion in § 1006.14(b)(3)(i) applies to the eight telephone calls placed by the debt collector during the seven-consecutive-day period that began with receipt of the consumer's consent on Thursday, June 4. Those telephone calls therefore do not count toward the telephone call frequencies described in § 1006.14(b)(2)(i). However, any telephone calls placed by the debt collector after the end of the seven-day period (*i.e.*, on or after Thursday, June 11) would count toward the telephone call frequencies described in § 1006.14(b)(2)(i), unless the consumer again gives prior consent directly to the debt collector.

(ii) Not connected to the dialed number; or

Official interpretation of Paragraph 14(b)(3)(ii).

1. Unconnected telephone calls. Section 1006.14(b)(3)(ii) provides that telephone calls placed to a person do not count toward the telephone call frequencies described in § 1006.14(b)(2)(i) if they do not connect to the dialed number. A debt collector's telephone call does not connect to the dialed number if, for example, the debt collector receives a busy signal or an indication that the dialed number is not in service. Conversely, a telephone call placed to a person counts toward the telephone call frequencies described in § 1006.14(b)(2)(i) if it connects to the dialed number, unless an exclusion in § 1006.14(b)(3) applies. A debt collector's telephone call connects to the dialed number if, for example, the telephone call is answered, even if it subsequently drops; if the telephone call causes a telephone to ring at the dialed number but no one answers it; or if the telephone call is connected to a voicemail or other recorded message, even if it does not cause a telephone to ring and even if the debt collector is unable to leave a voicemail.

(iii) Placed to the persons described in § 1006.6(d)(1)(ii) through (vi).

(4) Definition. For purposes of this paragraph (b), particular debt means each of a consumer's debts in collection. However, in the case of student loan debts, the term particular debt means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by a debt collector.

Official interpretation of 14(b)(4) Definition.

1. Particular debt. Section 1006.14(b)(2) establishes presumptions of compliance and violation with respect to § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) based on the frequency with which a debt collector places telephone calls to, or engages in telephone conversation with, a person in connection with the collection of a particular debt. Section 1006.14(b)(4) provides that, except in the case of student loan debt, the term particular debt means each of a consumer's debts in collection. For student loan debt, § 1006.14(b)(4) provides that the term particular debt means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by a debt collector.

i. Placing a telephone call in connection with the collection of a particular debt. Under § 1006.14(b)(2)(i)(A), if a debt collector places a telephone call to a person and initiates a conversation or leaves a voicemail about one particular debt, the debt collector counts the telephone call as a telephone call in connection with the collection of the particular debt, subject to the exclusions in § 1006.14(b)(3). If a debt collector places a telephone call to a person and initiates a conversation or leaves a voicemail about more than one particular debt, the debt collector counts the telephone call as a telephone call in connection with the collection of each such particular debt, subject to the exclusions in § 1006.14(b)(3). If a debt collector places a telephone call to a person but neither initiates a conversation about a particular debt nor leaves a voicemail that refers to a particular debt, or if the debt collector's telephone call is unanswered, the debt collector counts the telephone call as a telephone call in connection with the collection of at least one particular debt, unless an exclusion in § 1006.14(b)(3) applies.

ii. Engaging in a telephone conversation in connection with the collection of a particular debt. Under § 1006.14(b)(2)(i)(B), if a debt collector and a person discuss one particular debt during a telephone conversation, the debt collector has engaged in a telephone conversation in connection with the collection of the particular debt, regardless of which party initiated the discussion about the particular debt, subject to the exclusions in § 1006.14(b)(3). If a debt collector and a person discuss more than one particular debt during a telephone conversation, the debt collector has engaged in a telephone conversation in connection with the collection of each such particular debt, regardless of which party initiated the discussion about the particular debts, subject to the exclusions in § 1006.14(b)(3). If no particular debt is discussed during a telephone conversation between a debt collector and a person, the debt collector counts the conversation as a telephone conversation in connection with the collection of at least one particular debt, unless an exclusion in § 1006.14(b)(3) applies.

2. Examples. The following examples illustrate the rule.

i. A debt collector is attempting to collect a medical debt and two credit card debts (denominated A and B for this example) from the same consumer. Under § 1006.14(b)(2)(i)(A), a debt collector may count an unanswered telephone call as one telephone call placed toward any one particular debt, even if the debt collector intended to discuss more than one particular debt had the telephone call resulted in a telephone conversation. Therefore, if the debt collector, within a period of seven consecutive days, places a total of 21 unanswered telephone calls, seven of which the debt collector counted as unanswered telephone calls to the consumer in connection with the collection of the medical debt, seven of which the debt collector counted as unanswered telephone calls to the consumer in connection with the collection of credit card debt A, and seven of which the debt collector counted as unanswered telephone calls to the consumer in connection with the collection of credit card debt B, the debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5), even if, for example, the debt collector intended to discuss both credit card debt A and credit card debt B had any of the telephone calls with respect to the credit card debts resulted in a telephone conversation.

ii. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. The debt collector places a telephone call to the consumer, intending to discuss both particular debts, but the consumer does not answer, and the telephone call goes to voicemail. The debt collector leaves a limited-content message, as defined in § 1006.2(j). Because the limited-content message does not specifically refer to any particular debt, under § 1006.14(b)(2)(i)(A), a debt collector may count the voicemail as one telephone call placed toward either of the particular debts, even though the debt collector intended to discuss both particular debts if the telephone call had resulted in a telephone conversation.

iii. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. On Monday, November 9, the debt collector places a telephone call to, and engages in a telephone conversation with, the consumer solely in connection with the collection of the medical debt. The debt collector does not place any telephone calls to the consumer in connection with the collection of the credit card debt. Regarding the medical debt, under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has placed a telephone call to, and has and engaged in a telephone conversation with, the consumer in connection with the collection of the particular debt, unless an exclusion in § 1006.14(b)(3) applies. Regarding the credit card debt, under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has neither placed a telephone call to, nor engaged in a telephone conversation with, the consumer in connection with the collection of the particular debt.

iv. Assume the same facts as in the preceding example, except that on Monday, November 9, the debt collector engages in a telephone conversation with the consumer in connection with the collection of both the medical debt and the credit card debt. Under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has placed a telephone call to, and has engaged in a telephone conversation with, the consumer in connection with the collection of both the medical debt and the credit card debt, unless an exclusion in § 1006.14(b)(3) applies.

v. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. Beginning on Monday, November 9, and through Wednesday, November 11, the debt collector places two unanswered telephone calls to the consumer which the debt collector counts as telephone calls in connection with the collection of the medical debt, and four unanswered telephone calls to the consumer which the debt collector counts as telephone calls in connection with the collection of the credit card debt. On Thursday, November 12, the debt collector places a telephone call to, and engages in a general telephone conversation with, the consumer, but the debt collector and the consumer do not discuss either particular debt. Under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector may count the November 12 telephone call and ensuing conversation toward either the medical debt or the credit card debt. For example, if the debt collector counts the November 12 telephone call and ensuing conversation toward the collection of only the medical debt, then, during this time period, the debt collector has placed three telephone calls and has had one conversation in connection with the collection of the medical debt, and has placed four telephone calls and has had no conversations in connection with the collection of the credit card debt.

vi. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. On Monday, November 9, the debt collector places a telephone call to, and initiates a telephone conversation with, the consumer about the collection of the medical debt. The consumer states that the consumer does not want to discuss the medical debt, and instead initiates a discussion about the credit card debt. Under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has both placed a telephone call to, and engaged in a telephone conversation with, the consumer in connection with the collection of the medical debt, even though the consumer was unwilling to engage in the discussion initiated by the debt collector regarding the medical debt. Under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has not placed a telephone call to the consumer in connection with the credit card debt, but the debt collector has engaged in a telephone conversation in connection with the collection of the credit card debt, even though the consumer, not the debt collector, initiated the discussion about the credit card debt.

vii. A debt collector is attempting to collect three student loan debts that were serviced under a single account number at the time that they were obtained by a debt collector and that are owed or allegedly owed by the same consumer. All three debts are treated as a single debt for purposes of § 1006.14(b)(2). The debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5) if the debt collector places seven or fewer telephone calls within seven consecutive days to the consumer in connection with the collection of the three student loan debts, and the debt collector does not place a telephone call within a period of seven consecutive days after having had a telephone conversation with the consumer in connection with the collection of any one of the three student loan debts, unless an exclusion in § 1006.14(b)(3) applies.

(c) Violence or other criminal means. In connection with the collection of a debt, a debt collector must not use or threaten to use violence or other criminal means to harm the physical person, reputation, or property of any person.

(d) Obscene or profane language. In connection with the collection of a debt, a debt collector must not use obscene or profane language, or language the natural consequence of which is to abuse the hearer or reader.

(e) Debtor's list. In connection with the collection of a debt, a debt collector must not publish a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of sections 603(f) or 604(a)(3) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f) or 1681b(a)(3)).

(f) Coercive advertisements. In connection with the collection of a debt, a debt collector must not advertise for sale any debt to coerce payment of the debt.

(g) Meaningful disclosure of identity. In connection with the collection of a debt, a debt collector must not place telephone calls without meaningfully disclosing the caller's identity, except as provided in § 1006.10.

(h) Prohibited communication media—

(1) In general. In connection with the collection of any debt, a debt collector must not communicate or attempt to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.

Official interpretation of 14(h)(1) In general.

1. Communication media designations. Section 1006.14(h)(1) prohibits a debt collector from communicating or attempting to communicate with a person in connection with the collection of any debt through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person. The debt collector may ask follow-up questions regarding preferred communication media to clarify statements by the person. For examples of communication media, see comment 2(d) 1.

2. Specific address or telephone number. Within a medium of communication, a person may request that a debt collector not use a specific address or telephone number. For example, if a person has two mobile telephone numbers, the person may request that the debt collector not use one or both mobile telephone numbers.

3. Examples. The following examples illustrate the prohibition in § 1006.14(h)(1).

i. Assume that a person tells a debt collector to stop calling the person. Based on these facts, the person has requested that the debt collector not use telephone calls to communicate with the person and, thereafter, § 1006.14(h)(1) prohibits the debt collector from communicating or attempting to communicate with the person through telephone calls.

ii. Assume that, in response to receipt of either the opt-out procedures described in § 1006.6(d)(4)(ii) or the opt-out notice in § 1006.6(e), a consumer requests to opt out of receiving electronic communications from a debt collector at a particular email address or telephone number. Based on these facts, the consumer has requested that the debt collector not use that email address or telephone number to electronically communicate with the consumer for any debt and, thereafter, § 1006.14(h)(1) prohibits the debt collector from electronically communicating or attempting to communicate with the consumer through that email address or telephone number.

(2) Exceptions. Notwithstanding the prohibition in paragraph (h)(1) of this section:

Official interpretation of 14(h)(2) Exceptions.

1. Legally required communication media. Under § 1006.14(h)(2)(iii), if otherwise required by applicable law, a debt collector may communicate or attempt to communicate with a person in connection with the collection of any debt through a medium of communication that the person has requested the debt collector not use to communicate with the person. For example, assume that a debt collector who is also a mortgage servicer subject to the periodic statement requirement for residential mortgage loans under Regulation Z, 12 CFR 1026.41, is engaging in debt collection communications with a person about the person's residential mortgage loan. The person tells the debt collector to stop mailing letters to the person, and the person has not consented to receive statements electronically in accordance with 12 CFR 1026.41(c). Although the person has requested that the debt collector not use mail to communicate with the person, § 1006.14(h)(2)(iii) permits the debt collector to mail the person periodic statements, because the periodic statements are required by applicable law.

(i) If a person opts out of receiving electronic communications from a debt collector, a debt collector may send an electronic confirmation of the person's request to opt out, provided that the electronic confirmation contains no information other than a statement confirming the person's request and that the debt collector will honor it;

(ii) If a person initiates contact with a debt collector using a medium of communication that the person previously requested the debt collector not use, the debt collector may respond once through the same medium of communication used by the person; or

(iii) If otherwise required by applicable law, a debt collector may communicate or attempt to communicate with a person in connection with the collection of any debt through a medium of communication that the person has requested the debt collector not use to communicate with the person.

§ 1006.18 False, deceptive, or misleading representations or means.

(a) In general. A debt collector must not use any false, deceptive, or misleading representation or means in connection with the collection of any debt, including, but not limited to, the conduct described in paragraphs (b) through (d) of this section.

(b) False, deceptive, or misleading representations.

(1) A debt collector must not falsely represent or imply that:

(i) The debt collector is vouched for, bonded by, or affiliated with the United States or any State, including through the use of any badge, uniform, or facsimile thereof.

(ii) The debt collector operates or is employed by a consumer reporting agency, as defined by section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

(iii) Any individual is an attorney or that any communication is from an attorney.

(iv) The consumer committed any crime or other conduct in order to disgrace the consumer.

(v) A sale, referral, or other transfer of any interest in a debt causes or will cause the consumer to:

(A) Lose any claim or defense to payment of the debt; or

(B) Become subject to any practice prohibited by this part.

(vi) Accounts have been turned over to innocent purchasers for value.

(vii) Documents are legal process.

(viii) Documents are not legal process forms or do not require action by the consumer.

(2) A debt collector must not falsely represent:

(i) The character, amount, or legal status of any debt.

(ii) Any services rendered, or compensation that may be lawfully received, by any debt collector for the collection of a debt.

(3) A debt collector must not represent or imply that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(c) False, deceptive, or misleading collection means. A debt collector must not:

(1) Threaten to take any action that cannot legally be taken or that is not intended to be taken.

(2) Communicate or threaten to communicate to any person credit information that the debt collector knows or should know is false, including the failure to communicate that a disputed debt is disputed.

(3) Use or distribute any written communication that simulates or that the debt collector falsely represents to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or that creates a false impression about its source, authorization, or approval.

(4) Use any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(d) False representations or deceptive means. A debt collector must not use any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

Official interpretation of 18(d) False representations or deceptive means.

1. Social media. Under § 1006.18(d), a debt collector may not use any false representation or deceptive means to collect any debt or to obtain information concerning a consumer. In the social media context, the following examples illustrate the rule:

i. Assume that a debt collector sends a private message, in connection with the collection of a debt, requesting to be added as one of the consumer's contacts on a social media platform marketed for social or professional networking purposes. A debt collector makes a false representation or implication if the debt collector does not disclose his or her identity as a debt collector in the request.

ii. Assume that a debt collector communicates privately with a friend or coworker of a consumer on a social media platform, for the purpose of acquiring location information about the consumer. Pursuant to § 1006.10(b)(1), the debt collector must identify himself or herself individually by name when communicating for the purpose of acquiring location information. To avoid violating § 1006.18(d), the debt collector must communicate using a profile that accurately identifies the debt collector's individual name. (But see § 1006.18(f) and its associated commentary regarding use of assumed names.) The debt collector also must comply with the other applicable requirements for obtaining location information in § 1006.10 (*e.g.*, with respect to stating that the debt collector is confirming or correcting location information concerning the consumer and, only if expressly requested, identifying the name of the debt collector's employer), for communicating with third parties in § 1006.6(d)(1), and for communicating through social media in § 1006.22(f)(4).

(e) Disclosures required—

Official interpretation of 18(e) Disclosures required.

1. Communication. A limited-content message, as defined in § 1006.2(j), is not a communication, as that term is defined in § 1006.2(d). Thus, a debt collector who leaves only a limited-content message for a consumer need not make the disclosures required by § 1006.18(e)(1) and (2). However, if a debt collector leaves a voicemail message for a consumer that includes content in addition to the content described in § 1006.2(j)(1) and (2) and that directly or indirectly conveys any information regarding a debt, the voicemail message is a communication, and the debt collector is required to make the § 1006.18(e) disclosures. See the commentary to § 1006.2(d) and (j) for additional clarification regarding the definitions of communication and limited-content message.

(1) Initial communications. A debt collector must disclose in its initial communication with a consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. If the debt collector's initial communication with the consumer is oral, the debt collector must make the disclosure required by this paragraph again in its initial written communication with the consumer.

Official interpretation of 18(e)(1) Initial communications.

1. Example. A debt collector must make the disclosure required by § 1006.18(e)(1) in the debt collector's initial communication with a consumer, regardless of the medium of communication and regardless of whether the debt collector or the consumer initiated the communication. For example, assume that a debt collector who has not previously communicated with a consumer attempts to communicate with the consumer by leaving a limited-content message, as defined in § 1006.2(j). After listening to the debt collector's limited-content message, the consumer initiates a telephone call to, and communicates with, the debt collector. Pursuant to § 1006.18(e)(1), because the consumer-initiated call is the initial communication between the debt collector and the consumer, the debt collector must disclose to the consumer during that telephone call that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

(2) Subsequent communications. In each communication with the consumer subsequent to the communications described in paragraph (e)(1) of this section, the debt collector must disclose that the communication is from a debt collector.

(3) Exception. Disclosures under paragraphs (e)(1) and (2) of this section are not required in a formal pleading made in connection with a legal action.

(4) Translated disclosures. A debt collector must make the disclosures required by paragraphs (e)(1) and (2) of this section in the same language or languages used for the rest of the communication in which the debt collector conveyed the disclosures. Any translation of the disclosures a debt collector uses must be complete and accurate.

Official interpretation of 18(e)(4) Translated disclosures.

1. Example. Section 1006.18(e)(4) provides that a debt collector must make the disclosures required by § 1006.18(e)(1) and (2) in the same language or languages used for the rest of the communication in which the disclosures are conveyed. The following example illustrates the rule:

i. ABC debt collector is collecting a debt. ABC debt collector's initial communication with the consumer takes place in Spanish. Section 1006.18(e)(4) requires ABC debt collector to provide in Spanish the disclosure required by § 1006.18(e)(1). Thereafter, ABC debt collector has a communication with the consumer that takes place partly in English and partly in Spanish. During this communication, the debt collector must provide the disclosure required by § 1006.18(e)(2) in both English and Spanish.

(f) Assumed names. This section does not prohibit a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided that the employee uses the assumed name consistently and that the debt collector can readily identify any employee using an assumed name.

Official interpretation of 18(f) Assumed names.

1. Readily identifiable by the employer. Section 1006.18(f) provides, in part, that § 1006.18 does not prohibit a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided that the debt collector can readily identify any employee using an assumed name. A debt collector may use any method of managing assumed names that enables the debt collector to determine the true identity of any employee using an assumed name. For example, a debt collector may require an employee to use the same assumed name when communicating or attempting to communicate with any person and may prohibit any other employee from using the same assumed name.

§ 1006.22 Unfair or unconscionable means.

(a) In general. A debt collector must not use unfair or unconscionable means to collect or attempt to collect any debt, including, but not limited to, the conduct described in paragraphs (b) through (f) of this section.

(b) Collection of unauthorized amounts. A debt collector must not collect any amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law. For purposes of this paragraph, the term any amount includes any interest, fee, charge, or expense incidental to the principal obligation.

(c) Postdated payment instruments. A debt collector must not:

(1) Accept from any person a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten, nor less than three, days (excluding legal public holidays identified in 5 U.S.C. 6103(a), Saturdays, and Sundays) prior to such deposit.

(2) Solicit any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.
(3) Deposit or threaten to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(d) Charges resulting from concealment of purpose. A debt collector must not cause charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(e) Nonjudicial action regarding property. A debt collector must not take or threaten to take any nonjudicial action to effect dispossession or disablement of property if:
(1) There is no present right to possession of the property claimed as collateral through an enforceable security interest;
(2) There is no present intention to take possession of the property; or
(3) The property is exempt by law from such dispossession or disablement.

(f) Restrictions on use of certain media. A debt collector must not:
(1) Communicate with a consumer regarding a debt by postcard.
(2) Use any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by mail, except that a debt collector may use the debt collector's business name on an envelope if such name does not indicate that the debt collector is in the debt collection business.

Official interpretation of Paragraph 22(f)(2).

1. Language or symbol. Section 1006.22(f)(2) provides, in relevant part, that a debt collector must not use any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by mail. For purposes of § 1006.22(f)(2), the phrase language or symbol does not include language and symbols that facilitate communications by mail, such as: the debtor's name and address; postage; language such as forwarding and address correction requested; and the United States Postal Service's Intelligent Mail barcode.

(3) Communicate or attempt to communicate with a consumer by sending an email to an email address that the debt collector knows is provided to the consumer by the consumer's employer, unless the email address is one described in § 1006.6(d)(4)(i) or (iii).

Official interpretation of Paragraph 22(f)(3).

1. Email addresses described in § 1006.6(d)(4). Section 1006.22(f)(3) generally prohibits a debt collector from communicating or attempting to communicate with a consumer by sending an email to an email address that the debt collector knows is provided to the consumer by the consumer's employer. The prohibition does not apply if the debt collector sends the email to an email address described in § 1006.6(d)(4)(i) or (iii), which specifically contemplate debt collectors sending emails to any email address—including an email address that a debt collector knows is employer provided—if the consumer has used the email address to communicate with the debt collector about a debt (§ 1006.6(d)(4)(i)(A)), has provided prior consent directly to the debt collector to use the email address (§ 1006.6(d)(4)(i)(B)), or has obtained the email address from a prior debt collector who satisfied either § 1006.6(d)(4)(i) or (ii). A debt collector who sends an email to an email address described in § 1006.6(d)(4)(ii) complies with the prohibition in § 1006.22(f)(3) because the procedures in § 1006.6(d)(4)(ii) do not permit debt collectors to send emails to email addresses that the debt collector knows are employer provided.

(4) Communicate or attempt to communicate with a person in connection with the collection of a debt through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts.

Official interpretation of Paragraph 22(f)(4).

1. Social media. Section 1006.22(f)(4) prohibits a debt collector from communicating or attempting to communicate with a person in connection with the collection of a debt through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts. For example, § 1006.22(f)(4) prohibits a debt collector from posting, in connection with the collection of a debt, any message for a person on a social media webpage if that webpage is viewable by the general public or the person's social media contacts. Section 1006.22(f)(4) does not prohibit a debt collector from sending a message to a person if the message is not viewable by the general public or the person's social media contacts. Section 1006.6(b) or § 1006.14(h) nonetheless may prohibit the debt collector from sending such a message, and a debt collector who communicates by sending such a message about the debt to the wrong person violates § 1006.6(d)(1). See also comment 18(d)-1 with respect to communications and attempts to communicate with consumers and third parties on social media platforms.

(g) Safe harbor for certain emails and text messages relating to the collection of a debt. A debt collector who communicates with a consumer by sending an email or text message in accordance with the procedures described in § 1006.6(d)(3) does not violate paragraph (a) of this section by revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt.

§ 1006.26 Collection of time-barred debts.

(a) Definitions. For purposes of this section:
(1) **Statute of limitations** means the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt.
(2) **Time-barred debt** means a debt for which the applicable statute of limitations has expired.

(b) Legal actions and threats of legal actions prohibited. A debt collector must not bring or threaten to bring a legal action against a consumer to collect a time-barred debt. This paragraph (b) does not apply to proofs of claim filed in connection with a bankruptcy proceeding.

§ 1006.30 Other prohibited practices.

(a) Required actions prior to furnishing information.
(1) In general. Except as provided in paragraph (a)(2) of this section, a debt collector must not furnish to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)), information about a debt before the debt collector:

Official interpretation of 30(a)(1) In general.

1. About the debt. Section 1006.30(a)(1) provides, in relevant part, that a debt collector must not furnish to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)), information about a debt before taking one of the actions described in § 1006.30(a)(1)(i) or (ii). Each of the actions includes conveying information about the debt to the consumer. The validation information required by § 1006.34(c), including such information if provided in a validation notice, is information about the debt.

2. Reasonable period of time. Section 1006.30(a)(1)(ii) provides, in relevant part, that a debt collector who places a letter about a debt in the mail, or who sends an electronic message about a debt to the consumer, must wait a reasonable period of time to receive a notice of undeliverability before furnishing information about the debt to a consumer reporting agency. The reasonable period of time begins on the date that the debt collector places the letter in the mail or sends the electronic message. A period of 14 consecutive days after the date that the debt collector places a letter in the mail or sends an electronic message is a reasonable period of time.

3. Notices of undeliverability. Section 1006.30(a)(1)(ii) provides, in relevant part, that, if a debt collector who places a letter about

a debt in the mail, or who sends an electronic message about a debt to the consumer, receives a notice of undeliverability during the reasonable period of time, the debt collector must not furnish information about the debt to a consumer reporting agency until the debt collector otherwise satisfies paragraph (a)(1) of this section. A debt collector who does not receive a notice of undeliverability during the reasonable period and who thereafter furnishes information about the debt to a consumer reporting agency does not violate paragraph (a)(1) of this section even if the debt collector subsequently receives a notice of undeliverability. The following examples illustrate the rule:

i. Assume that, on May 1, a debt collector mails the consumer a validation notice as described in § 1006.34(a)(1)(i)(A). On May 10, the debt collector receives a notice of undeliverability and, without taking any additional action described in § 1006.30(a)(1), subsequently furnishes information regarding the debt to a consumer reporting agency. The debt collector has violated § 1006.30(a)(1).

ii. Assume that, on May 1, a debt collector mails the consumer a validation notice as described in § 1006.34(a)(1)(i)(A). On May 10, the debt collector receives a notice of undeliverability. On May 11, the debt collector mails the consumer another validation notice as described in § 1006.34(a)(1)(i)(A). From May 11 to May 24, the debt collector permits receipt of, monitors for, and does not receive, a notice of undeliverability and thereafter furnishes information regarding the debt to a consumer reporting agency. The debt collector has not violated § 1006.30(a)(1).

iii. Assume that, on May 1, a debt collector mails the consumer a validation notice as described in § 1006.34(a)(1)(i)(A). From May 1 to May 14, the debt collector permits receipt of, monitors for, and does not receive, a notice of undeliverability and thereafter furnishes information regarding the debt to a consumer reporting agency. After furnishing the information, the debt collector receives a notice of undeliverability. The debt collector has not violated § 1006.30(a)(1) and, without taking any further action, may furnish additional information about the debt to a consumer reporting agency.

(i) Speaks to the consumer about the debt in person or by telephone; or

(ii) Places a letter in the mail or sends an electronic message to the consumer about the debt and waits a reasonable period of time to receive a notice of undeliverability. During the reasonable period, the debt collector must permit receipt of, and monitor for, notifications of undeliverability from communications providers. If the debt collector receives such a notification during the reasonable period, the debt collector must not furnish information about the debt to a consumer reporting agency until the debt collector otherwise satisfies paragraph (a)(1) of this section.

(2) Special rule—information furnished to certain specialty consumer reporting agencies. Paragraph (a)(1) of this section does not apply to a debt collector's furnishing of information about a debt to a nationwide specialty consumer reporting agency that compiles and maintains information on a consumer's check writing history, as described in section 603(x)(3) of the Fair Credit Reporting Act (15 U.S.C. 1681a(x)(3)).

(b) Prohibition on the sale, transfer for consideration, or placement for collection of certain debts—

(1) In general. Except as provided in paragraph (b)(2) of this section, a debt collector must not sell, transfer for consideration, or place for collection a debt if the debt collector knows or should know that the debt has been paid or settled or discharged in bankruptcy.

Official interpretation of 30(b)(1) In general.

1. Transfer for consideration. Section 1006.30(b)(1) prohibits, among other things, a debt collector from transferring for consideration a debt that has been paid or settled or discharged in bankruptcy. A debt collector transfers a debt for consideration when the debt collector receives or expects to receive compensation for the transfer of the debt. A debt collector does not transfer a debt for consideration when the debt collector sends information about the debt, as opposed to the debt itself, to another party. For example, a debt collector does not transfer a debt for consideration when the debt collector sends a file with data about the debt to another person for analytics, scrubbing, or archiving. A debt collector also does not transfer a debt for consideration when the debt collector reports to a credit reporting agency information that a debt has been paid or settled or discharged in bankruptcy.

2. Debt that resulted from identity theft. Section 615(f)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681m(f)(1)) states that no person shall sell, transfer for consideration, or place for collection a debt if such person has been notified under section 605B of the Fair Credit Reporting Act (15 U.S.C. 1681c-2) that the debt has resulted from identity theft. Nothing in § 1006.30(b)(1) alters a debt collector's obligation to comply with the prohibition set forth in section 615(f)(1) of the Fair Credit Reporting Act.

(2) Exceptions—

(i) In general. A debt collector may transfer for consideration a debt described in paragraph (b)(1) of this section if the debt collector:

(A) Transfers the debt to the debt's owner;

Official interpretation of Paragraph 30(b)(2)(i)(A).

1. In general. Under § 1006.30(b)(2)(i)(A), a debt collector who is collecting a debt described in § 1006.30(b)(1) may transfer the debt to the debt's owner. However, unless another exception under § 1006.30(b)(2) applies, the debt collector may not transfer the debt or the right to collect the debt to another entity on behalf of the debt owner.

(B) Transfers the debt to a previous owner of the debt, if the transfer is authorized under the terms of the original contract between the debt collector and the previous owner; or

(C) Transfers the debt as a result of a merger, acquisition, purchase and assumption transaction, or a transfer of substantially all of the debt collector's assets.

(ii) Secured claims in bankruptcy. A debt collector may sell, transfer for consideration, or place for collection a debt that has been discharged in bankruptcy if the debt is secured by an enforceable lien and the debt collector notifies the transferee that the consumer's personal liability for the debt was discharged in bankruptcy.

(iii) Securitizations and pledges of debt. Paragraph (b)(1) of this section does not prohibit the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing.

(c) Multiple debts. If a consumer makes any single payment to a debt collector with respect to multiple debts owed by the consumer to the debt collector, the debt collector:

(1) Must not apply the payment to any debt that is disputed by the consumer; and

(2) If applicable, must apply the payment in accordance with the consumer's directions.

(d) Legal actions by debt collectors—

(1) Action to enforce interest in real property. A debt collector who brings a legal action against a consumer to enforce an interest in real property securing the consumer's debt must bring the action only in a judicial district or similar legal entity in which such real property is located.

(2) Other legal actions. A debt collector who brings a legal action against a consumer other than to enforce an interest in real property securing the consumer's debt must bring such action only in the judicial district or similar legal entity in which the consumer:

(i) Signed the contract sued upon; or
(ii) Resides at the commencement of the action.

(3) Authorization of actions. Nothing in this part authorizes debt collectors to bring legal actions.

(e) Furnishing certain deceptive forms. A debt collector must not design, compile, and furnish any form that the debt collector knows would be used to cause a consumer falsely to believe that a person other than the consumer's creditor is participating in collecting or attempting to collect a debt that the consumer allegedly owes to the creditor.

§ 1006.34 Notice for validation of debts.

(a) Validation information required.

(1) In general. Except as provided in paragraph (a)(2) of this section, a debt collector must provide a consumer with the validation information required by paragraph (c) of this section either:

Official interpretation of 34(a)(1) In general.

1. Deceased consumers. Section 1006.34(a)(1) generally requires a debt collector to provide the validation information required by § 1006.34(c) either by sending the consumer a validation notice in the manner required by § 1006.42, or by providing the information orally in the debt collector's initial communication. If the debt collector knows or should know that the consumer is deceased, and if the debt collector has not previously provided the validation information to the deceased consumer, a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of § 1006.34(a)(1). In such circumstances, to comply with § 1006.34(a)(1), a debt collector must provide the validation information to an individual that the debt collector identifies by name who is authorized to act on behalf of the deceased consumer's estate.

(i) By sending the consumer a validation notice in the manner required by § 1006.42:
(A) In the initial communication, as defined in paragraph (b)(2) of this section; or
(B) Within five days of that initial communication; or
(ii) By providing the validation information orally in the initial communication.

(2) Exception. A debt collector who otherwise would be required to send a validation notice pursuant to paragraph (a)(1)(i)(B) of this section is not required to do so if the consumer has paid the debt prior to the time that paragraph (a)(1)(i)(B) of this section would require the validation notice to be sent.

(b) Definitions. For purposes of this section:

(1) Clear and conspicuous means readily understandable. In the case of written and electronic disclosures, the location and type size also must be readily noticeable and legible to consumers, although no minimum type size is mandated. In the case of oral disclosures, the disclosures also must be given at a volume and speed sufficient for the consumer to hear and comprehend them.

(2) Initial communication means the first time that, in connection with the collection of a debt, a debt collector conveys information, directly or indirectly, regarding the debt to the consumer, other than a communication in the form of a formal pleading in a civil action, or any form or notice that does not relate to the collection of the debt and is expressly required by:

Official interpretation of 34(b)(2) Initial communication.

1. Bankruptcy proofs of claim. Section 1006.34(b)(2) defines initial communication and states that the term does not include a communication in the form of a formal pleading in a civil action. A proof of claim that a debt collector files in a bankruptcy proceeding in accordance with the requirements of the United States Bankruptcy Code (Title 11 of the U.S. Code) is a communication in the form of a formal pleading in a civil action and therefore is not an initial communication for purposes of § 1006.34.

(i) The Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*);
(ii) Title V of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 through 6827); or
(iii) Any provision of Federal or State law or regulation mandating notice of a data security breach or privacy risk.

(3) Itemization date means any one of the following five reference dates for which a debt collector can ascertain the amount of the debt:

Official interpretation of 34(b)(3) Itemization date.

1. In general. Section 1006.34(b)(3) defines itemization date for purposes of § 1006.34. Section 1006.34(b)(3) states that the itemization date is any one of five reference dates for which a debt collector can ascertain the amount of the debt. The reference dates are the last statement date, the charge-off date, the last payment date, the transaction date, and the judgment date. A debt collector may select any of these dates as the itemization date to comply with § 1006.34. Once a debt collector uses a reference date for a debt in a communication with a consumer, the debt collector must use that reference date for that debt consistently when providing the information required by § 1006.34(c) to that consumer. For example, if a debt collector uses the last statement date to determine and disclose the account number associated with the debt pursuant to § 1006.34(c)(2)(iv), the debt collector may not use the charge-off date to determine and disclose the amount of the debt pursuant to § 1006.34(c)(2)(vii).

2. Subsequent debt collectors. When selecting an itemization date pursuant to § 1006.34(b)(3), a debt collector may use a different reference date than a prior debt collector who attempted to collect the debt.

(i) The last statement date, which is the date of the last periodic statement or written account statement or invoice provided to the consumer by a creditor;

Official interpretation of Paragraph 34(b)(3)(i).

1. Last statement date. Under § 1006.34(b)(3)(i), the last statement date is the date of the last periodic statement or written account statement or invoice provided to the consumer by a creditor. For purposes of § 1006.34(b)(3)(i), the last statement may be provided by a creditor or a third party acting on the creditor's behalf, including a creditor's service provider. However, a statement or invoice provided by a debt collector is not a last statement for purposes of § 1006.34(b)(3)(i), unless the debt collector is also a creditor.

(ii) The charge-off date, which is the date the debt was charged off;
(iii) The last payment date, which is the date the last payment was applied to the debt;

Official interpretation of Paragraph 34(b)(3)(iii).

1. Last payment date. Under § 1006.34(b)(3)(iii), the last payment date is the date the last payment was applied to the debt. A third-party payment applied to the debt, such as a payment from an auto repossession agent or an insurance company, can be a last payment for purposes of § 1006.34(b)(3)(iii).

(iv) The transaction date, which is the date of the transaction that gave rise to the debt; or

Official interpretation of Paragraph 34(b)(3)(iv).

1. Transaction date. Section 1006.34(b)(3)(iv) provides that the itemization date may be the date of the transaction that gave rise to the debt. The transaction date is the date that the good or service that gave rise to the debt was provided or made available to the consumer. For example, the transaction date for a debt arising from a medical procedure may be the date the medical procedure was performed, and the transaction date for a consumer's gym membership may be the date the membership contract was executed. In some cases,

a debt may have more than one transaction date. This could occur, for example, if a contract for a service is executed on one date and the service is performed on another date. If a debt has more than one transaction date, a debt collector may use any such date as the transaction date for purposes of § 1006.34(b)(3)(iv), but the debt collector must use whichever transaction date is selected consistently, as described in comment 34(b)(3)-1.

(v) The judgment date, which is the date of a final court judgment that determines the amount of the debt owed by the consumer.

(4) Validation notice means a written or electronic notice that provides the validation information required by paragraph (c) of this section.

(5) Validation period means the period starting on the date that a debt collector provides the validation information required by paragraph (c) of this section and ending 30 days after the consumer receives or is assumed to receive the validation information. For purposes of determining the end of the validation period, the debt collector may assume that a consumer receives the validation information on any date that is at least five days (excluding legal public holidays identified in 5 U.S.C. 6103(a), Saturdays, and Sundays) after the debt collector provides it.

Official interpretation of 34(b)(5) Validation period.

1. Assumed receipt of validation information. Section 1006.34(b)(5) defines the validation period as the period starting on the date that a debt collector provides the validation information required by § 1006.34(c) and ending 30 days after the consumer receives or is assumed to receive it. Section 1006.34(c)(3)(i) through (iii) requires statements that specify the end date of the validation period. If a debt collector provides the validation information in writing or electronically, then, at the time that the debt collector calculates the validation period end date, the debt collector will know only the date on which the consumer is assumed to receive the validation information. In such cases, the debt collector may use that date to calculate the validation period end date even if the debt collector later learns that the consumer received the validation information on a different date.

2. Updated validation period. If a debt collector sends a subsequent validation notice to a consumer because the consumer did not receive the original validation notice and the consumer has not otherwise received the validation information required by § 1006.34(c), the debt collector must calculate the end date of the validation period specified in the § 1006.34(c)(3) disclosures based on the date the consumer receives or is assumed to receive the subsequent validation notice. For example, assume a debt collector sends a consumer a validation notice on January 1, and that notice is returned as undeliverable. After obtaining accurate location information, the debt collector sends the consumer a subsequent validation notice on January 15. Pursuant to § 1006.34(b)(5), the end date of the validation period specified in the § 1006.34(c)(3) disclosures is based on the date the consumer receives or is assumed to receive the validation notice sent on January 15.

(c) Validation information. Pursuant to paragraph (a)(1) of this section, a debt collector must provide the following validation information.

(1) Debt collector communication disclosure. The statement required by § 1006.18(e).

Official interpretation of 34(c)(1) Debt collector communication disclosure.

1. Statement required by § 1006.18(e). Section 1006.34(c)(1) provides that validation information includes the statement required by § 1006.18(e). Section 1006.18(e)(1) requires a debt collector to disclose in its initial communication that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. Section 1006.18(e)(2) requires a debt collector to disclose in each subsequent communication that the communication is from a debt collector. A debt collector who provides a validation notice as described in § 1006.34(a)(1)(i)(A) complies with § 1006.34(c)(1) by providing on the validation notice the disclosure required by § 1006.18(e)(1). A debt collector who provides a validation notice as described in § 1006.34(a)(1)(i)(B) complies with § 1006.34(c)(1) by providing either the disclosure required by § 1006.18(e)(1) or the disclosure required by § 1006.18(e)(2). The following example illustrates the rule:

i. ABC debt collector has an initial communication with the consumer by telephone. Within five days of that initial communication, ABC debt collector sends the consumer a validation notice using Model Form B-1 in appendix B to this part. ABC debt collector has complied with § 1006.34(c)(1) even though Model Form B-1 includes the disclosure described in § 1006.18(e)(1) rather than the disclosure described in § 1006.18(e)(2).

(2) Information about the debt. Except as provided in paragraph (c)(5) of this section:

(i) The debt collector's name and the mailing address at which the debt collector accepts disputes and requests for original-creditor information.

Official interpretation of Paragraph 34(c)(2)(i).

1. Debt collector's name. Section 1006.34(c)(2)(i) provides, in part, that validation information includes the debt collector's name. A debt collector may disclose its trade or doing-business-as name, instead of its legal name.

2. Debt collector's mailing address. Section 1006.34(c)(2)(i) provides, in part, that validation information includes the mailing address at which the debt collector accepts disputes and requests for original-creditor information. A debt collector may disclose a vendor's mailing address, if that is an address at which the debt collector accepts disputes and requests for original-creditor information.

(ii) The consumer's name and mailing address.

Official interpretation of Paragraph 34(c)(2)(ii).

1. Consumer's name. Section 1006.34(c)(2)(ii) provides, in part, that validation information includes the consumer's name. To satisfy the requirement to provide this validation information, a debt collector must disclose the version of the consumer's name that the debt collector reasonably determines is the most complete and accurate version of the name about which the debt collector has knowledge. A debt collector does not disclose the most complete and accurate version of the consumer's name if the debt collector omits known name information in a manner that creates a false, misleading, or confusing impression about the consumer's identity. For example, assume the creditor provides the consumer's first name, middle name, last name, and name suffix to the debt collector. In this scenario, the debt collector would reasonably determine that the most complete and accurate version of the consumer's name about which the debt collector has knowledge includes the first name, middle name, last name, and name suffix. If the debt collector omits any of this information, the debt collector has not satisfied the requirement to provide the consumer's name pursuant to § 1006.34(c)(2)(ii).

(iii) If the debt collector is collecting a debt related to a consumer financial product or service as defined in § 1006.2(f), the name of the creditor to whom the debt was owed on the itemization date.

Official interpretation of Paragraph 34(c)(2)(iii).

1. Creditor's name. Section 1006.34(c)(2)(iii) provides that, if a debt collector is collecting debt related to a consumer financial product or service as defined in § 1006.2(f), validation information includes the name of the creditor to whom the debt was owed on the itemization date. Pursuant to § 1006.34(c)(2)(iii), a debt collector may disclose this creditor's trade or doing-business-as name, instead of its legal name.

(iv) The account number, if any, associated with the debt on the itemization date, or a truncated version of that number.

Official interpretation of Paragraph 34(c)(2)(iv).

1. Account number truncation. Section 1006.34(c)(2)(iv) provides that validation information includes the account number, if any, associated with the debt on the itemization date, or a truncated version of that number. If a debt collector uses a truncated account number, the account number must remain recognizable. For example, a debt collector may truncate a credit card account number so that only the last four digits are provided.

(v) The name of the creditor to whom the debt currently is owed.

Official interpretation of Paragraph 34(c)(2)(v).

1. Creditor's name. Section 1006.34(c)(2)(v) provides that validation information includes the name of the creditor to whom the debt currently is owed. A debt collector may disclose this creditor's trade or doing-business-as name, instead of its legal name.

(vi) The itemization date.

(vii) The amount of the debt on the itemization date.

Official interpretation of Paragraph 34(c)(2)(vii).

1. Amount of the debt on the itemization date. Section 1006.34(c)(2)(vii) provides that validation information includes the amount of the debt on the itemization date. The amount of the debt on the itemization date includes any fees, interest, or other charges owed as of that date.

(viii) An itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date. A debt collector may disclose the itemization on a separate page provided in the same communication with a validation notice, if the debt collector includes on the validation notice, where the itemization would have appeared, a statement referring to that separate page.

Official interpretation of Paragraph 34(c)(2)(viii).

1. Itemization of the debt. Section 1006.34(c)(2)(viii) provides that validation information includes an itemization of the current amount of the debt reflecting interest, fees, payments, and credits since the itemization date. If providing a validation notice, a debt collector must include fields in the notice for all of these items even if none of the items have been assessed or applied to the debt since the itemization date. A debt collector may indicate that the value of a required field is 0, none, or may state that no interest, fees, payments, or credits have been assessed or applied to the debt; a debt collector may not leave a required field blank.

2. Itemization required by other applicable law. If a debt collector is required by other applicable law to provide an itemization of the current amount of the debt with the validation information, the debt collector may comply with § 1006.34(c)(2)(viii) by disclosing the itemization required by other applicable law in lieu of the itemization described in § 1006.34(c)(2)(viii), if the itemization required by other applicable law is substantially similar to the itemization that appears on Model Form B-1 in appendix B to this part.

3. Itemization on a separate page. Section 1006.34(c)(2)(viii) provides that a debt collector may disclose the itemization of the current amount of the debt on a separate page provided in the same communication with a validation notice if the debt collector includes on the validation notice, where the itemization would have appeared, a statement referring to that separate page. A debt collector may comply with the requirement to refer to the separate page by, for example, including on the validation notice the statement, See the enclosed separate page for an itemization of the debt, situated next to the information about the current amount of the debt required by § 1006.34(c)(2)(ix).

4. Debt collectors collecting multiple debts. A debt collector who combines multiple debts on a single validation notice complies with § 1006.34(c)(2)(viii) by disclosing either a single, cumulative itemization on the validation notice or a separate itemization of each debt on a separate page or pages provided in the same communication as the validation notice.

(ix) The current amount of the debt.

Official interpretation of Paragraph 34(c)(2)(ix).

1. Current amount of the debt. Section 1006.34(c)(2)(ix) provides that validation information includes the current amount of the debt (i.e., the amount as of when the validation information is provided). For residential mortgage debt subject to Regulation Z, 12 CFR 1026.41, a debt collector may comply with the requirement to provide the current amount of the debt by providing the consumer the total balance of the outstanding mortgage, including principal, interest, fees, and other charges.

2. Debt collectors collecting multiple debts. A debt collector who combines multiple debts on a single validation notice complies with § 1006.34(c)(2)(ix) by disclosing on the validation notice a single cumulative figure that is the sum of the current amount of all the debts.

(3) Information about consumer protections.

(i) The date that the debt collector will consider the end date of the validation period and a statement that, if the consumer notifies the debt collector in writing on or before that date that the debt, or any portion of the debt, is disputed, the debt collector must cease collection of the debt, or the disputed portion of the debt, until the debt collector sends the consumer either verification of the debt or a copy of a judgment.

(ii) The date that the debt collector will consider the end date of the validation period and a statement that, if the consumer requests in writing on or before that date the name and address of the original creditor, the debt collector must cease collection of the debt until the debt collector sends the consumer the name and address of the original creditor, if different from the current creditor.

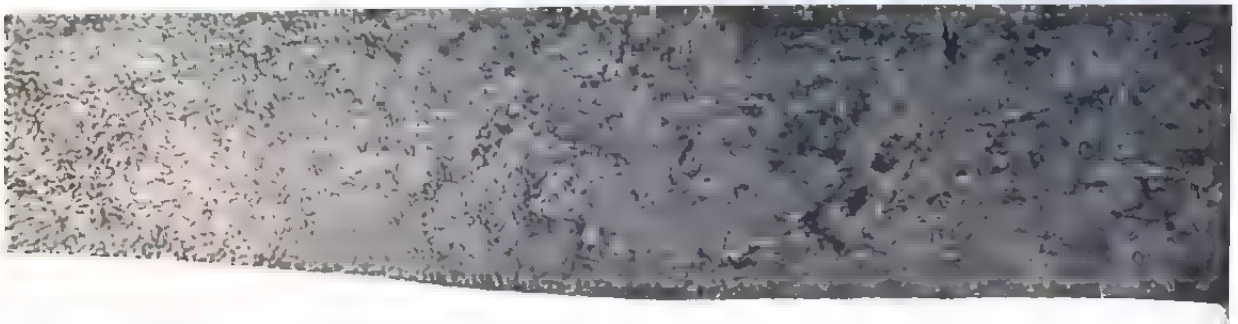
(iii) The date that the debt collector will consider the end date of the validation period and a statement that, unless the consumer contacts the debt collector to dispute the validity of the debt, or any portion of the debt, on or before that date, the debt collector will assume that the debt is valid.

(iv) If the debt collector is collecting debt related to a consumer financial product or service as defined in § 1006.2(f), a statement that informs the consumer that additional information regarding consumer protections in debt collection is available on the Bureau's website at *www.cfpb.gov/debt-collection.*

(v) If the debt collector sends the validation notice electronically, a statement explaining how a consumer can, as described in paragraphs (c)(4)(i) and (ii) of this section, dispute the debt or request original-creditor information electronically.

Official interpretation of Paragraph 34(c)(3)(v).

1. Electronic communication media. Section 1006.34(c)(3)(v) provides that, if the debt collector provides the validation notice electronically, validation information includes a statement explaining how a consumer can, as described in paragraphs (c)(4)(i) and (ii) of this section, dispute the debt or request original-creditor information electronically. A debt collector may provide the information required by § 1006.34(c)(3)(v) by including the statements, We accept disputes electronically at, using that phrase or a substantially similar phrase, followed by an email address or website portal that a consumer can use to take the action described in § 1006.34(c)(4)(i), and We accept original creditor information requests electronically, using that phrase or a substantially similar phrase, followed by an email address or website portal that a consumer can use to take the action described in § 1006.34(c)(4)(ii). If a debt collector accepts electronic communications from consumers through more than one medium, such as by email and through a website portal, the debt collector is required to provide information regarding only



t may provide information on any additional

ıse information. The following information, alidation information required by paragraphs ıis section and from any optional information paragraphs (d)(3)(i), (ii), (iii)(A), (iv), (v), (vi) this section, and, if provided on a validation ottom of the notice under the headings, How do and Check all that apply::

n of 34(c)(4) Consumer-response information.

ılidation information is provided in writing or ıpt required by § 1006.34(c)(4) may be format- n Model Form B-1 in appendix B to this part.

ıpts. The following statements, listed in the fol- ıd using the following phrasing or substantially „ each next to a prompt:
o dispute the debt because I think:;
not my debt.;
ıount is wrong.; and
(please describe on reverse or attach additional n).

reditor information prompt. The statement, I ıd me the name and address of the original cred- phrase or a substantially similar phrase, next to

ıddresses. Mailing addresses for the consumer llector, which are the debt collector's and the con- ; and mailing addresses as disclosed pursuant to)(i) and (ii).

- certain residential mortgage debt. For residen- , if a periodic statement is required under Regu- 1026.41, at the time a debt collector provides the a debt collector need not provide the validation ed by paragraphs (c)(2)(vi) through (viii) of this collector:

ıtion of 34(c)(5) Special rule for certain residen- '.

Official interpretation of 34(d)(2) Safe harbor.

1. In general. A debt collector who provides a validation notice that is neither a notice described in § 1006.34(d)(2)(i) or (ii), nor a substantially similar notice as described in § 1006.34(d)(2)(iii), does not receive a safe harbor for compliance with the information and form requirements of § 1006.34(c) and (d)(1).

(i) In general. Model Form B-1 in appendix B to this part contains the validation information required by paragraph (c) of this section and certain optional disclosures permitted by paragraph (d)(3) of this section. A debt collector who uses Model Form B-1 complies with the information and form requirements of paragraphs (c) and (d)(1) of this section, including if the debt collector:

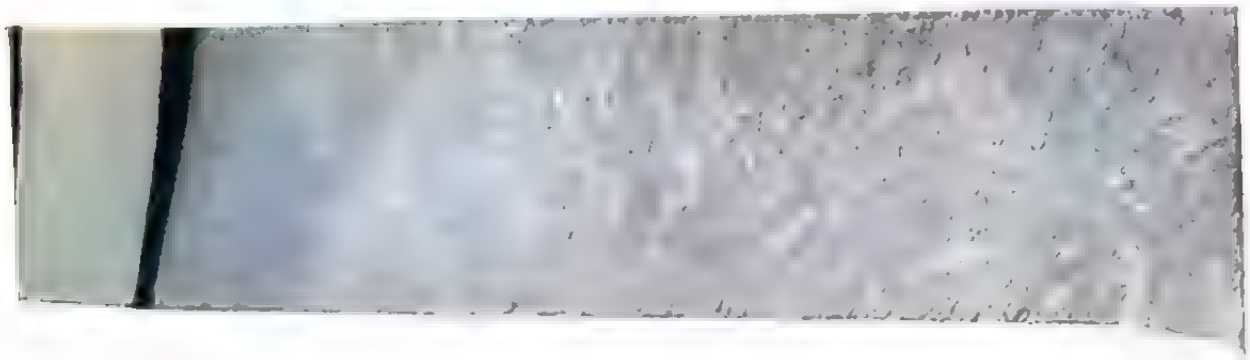
Official interpretation of 34(d)(2)(i) In general.

1. Disclosure required by § 1006.18(e). Section 1006.18(e)(1) requires a debt collector to disclose in its initial communication that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. Section 1006.18(e)(2) requires a debt collector to disclose in each subsequent communication that the communication is from a debt collector. Model Form B-1 in appendix B to this part includes the disclosure required by § 1006.18(e)(1). A debt collector who uses Model Form B-1 to provide a validation notice as described in § 1006.34(a)(1)(i)(B) may replace the disclosure required by § 1006.18(e)(1) with the disclosure required by § 1006.18(e)(2) without losing the safe harbor described in § 1006.34(d)(2). See comment 34(c)(1)-1 for further guidance related to providing the disclosure required by § 1006.18(e) on a validation notice.

(A) Omits any or all of the optional disclosures shown on Model Form B-1; or

(B) Adds any or all of the optional disclosures described in paragraph (d)(3) of this section that are not shown on Model Form B-1, provided that any such optional disclosures are no more prominent than any of the validation information required by paragraph (c) of this section.

(ii) Certain disclosures on a separate page. A debt collector who uses Model Form B-1 as described in paragraph (d)(2)(i)



collector may use the name of the deceased consumer
f you;
ating the consumer-response information required by
4(c)(4) to facilitate mailing;
ng barcodes or QR codes, as long as the inclusion of
is does not violate § 1006.38(b);
ig the date the form is generated; and
dding hyperlinks, if delivering the form electronically.

disclosures. A debt collector may include any of the
information when providing the validation informa-
l by paragraph (c) of this section. A debt collector who
of the following information receives the safe harbor
paragraph (d)(2) of this section, provided that the debt
erwise uses Model Form B-1 in appendix B to this part,
n of Model Form B-1, as described in paragraph (d)(2) of

phone contact information. The debt collector's tele-
contact information.

rpretation of 34(d)(3)(i) Telephone contact information.

al. Section 1006.34(d)(3)(i) permits a debt collector to
phone contact information. Telephone contact informa-
include, for example, a telephone number as well as the
he debt collector accepts consumer telephone calls.

ference code. A number or code that the debt collector
identify the debt or the consumer.
ayment disclosures. Either or both of the following
s:
A) The statement, Contact us about your payment options.,
sing that phrase or a substantially similar phrase; and
B) Below the consumer-response information required by
aragraphs (c)(4)(i) and (ii) of this section, the statement, I
nclosed this amount:, using that phrase or a substantially
imilar phrase, payment instructions after that statement,
nd a prompt.
isclosures under applicable law.
A) Disclosures on the reverse of the validation notice.
On the reverse of the validation notice, any disclosures
hat are specifically required by, or that provide safe har-
ors under, applicable law and, if any such disclosures
are included, a statement on the front of the validation
notice referring to those disclosures. A sufficient disc

must include a statement on the front of the validation notice referring to those disclosures. A debt collector may comply with the requirement to refer to the disclosures by including on the front of the validation notice the statement, Notice: See reverse side for important information, or a substantially similar statement. If, as permitted by comment 34(d)(3)(iv)(A)-1, a debt collector places the disclosures below the content of the validation notice, the debt collector may comply with the requirement to refer to the disclosures by stating, Notice: See below for important information, or a substantially similar statement.

(B) Disclosures on the front of the validation notice. If a debt collector is collecting time-barred debt, on the front of the validation notice below the disclosure required by paragraph (c)(2)(ix) of this section, any time-barred debt disclosure that is specifically required by, or that provides a safe harbor under, applicable law, provided that applicable law specifies the content of the disclosure.

Official interpretation of 34(d)(3)(iv)(B) Disclosures on the front of the validation notice.

1. In general. Section 1006.34(d)(3)(iv)(B) provides, in relevant part that, if a debt collector is collecting time-barred debt, the debt collector may include on the front of the validation notice any time-barred debt disclosure that is specifically required by, or that provides a safe harbor under, applicable law, provided that applicable law specifies the content of the disclosure. For example, if applicable State law requires a debt collector who is collecting time-barred debt to disclose to the consumer that the law limits how long a consumer can be sued on a debt and that the debt collector cannot or will not sue the consumer to collect it, the debt collector may include that disclosure on the front of the validation notice. See § 1006.26(a)(2) for the definition of time-barred debt. For purposes of § 1006.34(d)(3)(iv)(B), time-barred debt disclosures may include disclosures about revival of debt collectors' right to bring a legal action to enforce the debt.

(v) Information about electronic communications. The following information:

(A) The debt collector's website and email address.

(B) If the validation information is not provided electronically, a statement explaining how a consumer can, as described in paragraphs (c)(4)(i) and (ii) of this section

formulario en español (which means I want this form in Spanish), using that phrase or a substantially similar phrase in Spanish, next to a prompt.

(vii) The merchant brand, affinity brand, or facility name, if any, associated with the debt.

Official interpretation of Paragraph 34(d)(3)(vii).

1. Merchant brand. Section 1006.34(d)(3)(vii) permits a debt collector to include the merchant brand, if any, associated with debt. For example, assume that a debt collector is attempting to collect a consumer's credit card debt. The credit card was issued by ABC Bank and was co-branded XYZ Store. XYZ Store is the merchant brand.

2. Affinity brand. Section 1006.34(d)(3)(vii) permits a debt collector to include the affinity brand, if any, associated with the debt. For example, assume that a debt collector is attempting to collect a consumer's credit card debt. The credit card was issued by ABC Bank, and the logo for the College of Columbia appears on the credit card. College of Columbia is the affinity brand.

3. Facility name. Section 1006.34(d)(3)(vii) permits a debt collector to include the facility name, if any, associated with the debt. For example, assume that a debt collector is attempting to collect a consumer's medical debt. The medical debt relates to a treatment that the consumer received at ABC Hospital. ABC Hospital is the facility name.

(viii) If a debt collector is collecting debt other than debt related to a consumer financial product or service as defined in § 1006.2(f), the information specified in paragraphs (c)(2)(iii) or (c)(3)(iv) of this section.

(4) Validation notices delivered electronically. If a debt collector delivers a validation notice electronically, a debt collector may, at its option, format the validation notice as follows:

(i) Prompts. Any prompt required by paragraphs (c)(4)(i) or (ii) or paragraphs (d)(3)(iii)(B) or (vi)(B) of this section may be displayed electronically as a fillable field.

(ii) Hyperlinks. Hyperlinks may be embedded that, when clicked:

(A) Connect a consumer to the debt collector's website;

(B) Connect a consumer to the Bureau's debt collection website as disclosed pursuant to paragraph (c)(3)(iv) of this section; or

(C) Permit a consumer to respond to the dispute and original-creditor information prompts required by paragraphs (c)(4)(i) and (ii) of this section.

e) Translation into other languages.

Official interpretation of 34(e) Translation into other languages.

1. Safe harbor for complete and accurate translation. Section 1006.34(e) provides, among other things, that, if a debt collector sends a consumer a validation notice translated into a language other than English, the translation must be complete and accurate. The language of a validation notice that a debt collector obtains from the Bureau's website is considered a complete and accurate translation. Debt collectors are permitted to use other validation notice translations if they are complete and accurate.

(1) In general. A debt collector may send a consumer a validation notice completely and accurately translated into any language if the debt collector:

(i) Sends the consumer an English-language validation notice in the same communication as the translated validation notice; or

(ii) Previously provided the consumer an English-language validation notice, in which case the debt collector need not send the consumer an English-language validation notice in the same communication as the translated validation notice.

(2) Spanish-language validation notice—requirement to provide after optional disclosure. A debt collector who includes in the validation information either or both of the optional disclosures described in paragraph (d)(3)(vi) of this section, and who thereafter receives a request from the consumer for a Spanish-language validation notice, must provide the consumer a validation notice completely and accurately translated into Spanish.

§ 1006.38 Disputes and requests for original-creditor information.

Official interpretation

1. In writing. Section 1006.38 contains requirements related to a dispute or request for the name and address of the original creditor timely submitted in writing by the consumer. A consumer has disputed the debt or requested the name and address of the original creditor in writing for purposes of § 1006.38(c) or (d)(2) if the consumer, for example:

i. Mails the written dispute or request to the debt collector;

ii. Returns to the debt collector the consumer-response form that § 1006.34(c)(4) requires to appear on the validation notice and indicates on the form the dispute or request;

iii. Provides the dispute or request to the debt collector using a medium of electronic communication through which the debt collector accepts electronic communications from consumers, such as an email address or a website portal; or

iv. Delivers the written dispute or request in person or by courier to the debt collector.

2. Interpretation of the E-SIGN Act. Comment 38-1.ii constitutes the Bureau's interpretation of section 101 of the E-SIGN Act as applied to section 809(b) of the FDCPA. Under this interpretation, section 101(a) of the E-SIGN Act enables a consumer to satisfy through an electronic request the requirement in section 809(b) of the FDCPA that the consumer's notification of the debt collector be in writing. Further, because the consumer may only use a medium of electronic communication through which a debt collector accepts electronic communications from consumers, section 101(b) of the E-SIGN Act is not contravened.

3. Deceased consumers. If the debt collector knows or should know that the consumer is deceased, and if the consumer has not previously disputed the debt or requested the name and address of the original creditor, a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of § 1006.38. In such circumstances, to comply with § 1006.38(c) or (d)(2), respectively, a debt collector must respond to a request for the name and address of the original creditor or to a dispute timely submitted in writing by a person who is authorized to act on behalf of the deceased consumer's estate.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Duplicative dispute means a dispute submitted by the consumer in writing within the validation period that:

Official interpretation of 38(a)(1) Duplicative dispute.

1. Substantially the same. Section 1006.38(a)(1) provides that a dispute is a duplicative dispute if, among other things, the dispute is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector has already satisfied the requirements of § 1006.38(d)(2)(i). A later dispute can be substantially the same as an earlier dispute even if the later dispute does not repeat verbatim the language of the earlier dispute.

2. New and material information. Section 1006.38(a)(1) provides that a dispute that is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector has already satisfied the requirements

of § 1006.38(d)(2)(i) is not a duplicative dispute if the consumer provides new and material information to support the dispute. Information is new if the consumer did not provide the information when submitting an earlier dispute. Information is material if it is reasonably likely to change the verification the debt collector provided or would have provided in response to the earlier dispute. The following example illustrates the rule:

i. ABC debt collector is collecting a debt from a consumer and sends the consumer a validation notice. In response, the consumer submits a written dispute to ABC debt collector within the validation period asserting that the consumer does not owe the debt. The consumer does not include any information in support of the dispute. Pursuant to § 1006.38(d)(2)(i), ABC debt collector provides the consumer a copy of verification of the debt. The consumer then sends a cancelled check showing the consumer paid the debt. The cancelled check is new and material information.

(i) Is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector already has satisfied the requirements of paragraph (d)(2)(i) of this section; and

(ii) Does not include new and material information to support the dispute.

(2) Validation period has the same meaning given to it in § 1006.34(b)(5).

(b) Overshadowing of rights to dispute or request original-creditor information.

(1) Prohibition. During the validation period, a debt collector must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's rights to dispute the debt and to request the name and address of the original creditor.

(2) Safe harbor. A debt collector who uses Model Form B-1 in appendix B to this part in a manner described in § 1006.34(d)(2) has not thereby violated paragraph (b)(1) of this section.

(c) Requests for original-creditor information. Upon receipt of a request for the name and address of the original creditor submitted by the consumer in writing within the validation period, a debt collector must cease collection of the debt until the debt collector:

(1) In general. Sends the name and address of the original creditor to the consumer in writing or electronically in the manner required by § 1006.42; or

(2) Special rule if the current creditor and the original creditor are the same. In lieu of taking the actions described in paragraph (c)(1) of this section, reasonably determines that the original creditor is the same as the current creditor, notifies the consumer of that fact in writing or electronically in the manner required by § 1006.42, and refers the consumer to the validation information previously provided pursuant to § 1006.34(a)(1).

(d) Disputes—

(1) Failure to dispute. The failure of a consumer to dispute the validity of a debt does not constitute a legal admission of liability by the consumer.

(2) Response to disputes. Upon receipt of a dispute submitted by the consumer in writing within the validation period, a debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector:

(i) Sends a copy either of verification of the debt or of a judgment to the consumer in writing or electronically in the manner required by § 1006.42; or

(ii) In the case of a dispute that the debt collector reasonably determines is a duplicative dispute, either:

Official interpretation of Paragraph 38(d)(2)(ii).

1. Duplicative dispute notice. Section 1006.38(d)(2)(ii) provides that, in the case of a dispute that a debt collector reasonably determines is a duplicative dispute, the debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector either notifies the consumer that the dispute is duplicative (§ 1006.38(d)(2)(ii)(A)) or provides a copy either of verification of the debt or of a judgment to the consumer (§ 1006.38(d)(2)(ii)(B)). If the debt collector notifies the consumer that the dispute is duplicative, § 1006.38(d)(2)(ii)(A) requires that the notice provide a brief statement of the reasons for the debt collector's determination that the dispute is duplicative and refer the consumer to the debt collector's response to the earlier dispute. A debt collector complies with the requirement to provide a brief statement of the reasons for its determination if the notice states that the dispute is substantially the same as an earlier dispute submitted by the consumer and the consumer has not included any new and material information in support of the earlier dispute. A debt collector complies with the requirement to refer the consumer to the debt collector's response to the earlier dispute if the notice states that the debt collector responded to the earlier dispute and provides the date of that response.

(A) Notifies the consumer in writing or electronically in the manner required by § 1006.42(a)(1) that the dispute is duplicative, provides a brief statement of the reasons for the determination, and refers the consumer to the debt collector's response to the earlier dispute; or

(B) Satisfies paragraph (d)(2)(i) of this section.

§ 1006.42 Sending required disclosures.

(a) Sending required disclosures—

(1) In general. A debt collector who sends disclosures required by the Act and this part in writing or electronically must do so in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later.

Official interpretation of 42(a)(1) In general.

1. Relevant factors. Section 1006.42(a)(1) provides, in part, that a debt collector who sends disclosures required by the Act or this part in writing or electronically must, among other things, do so in a manner that is reasonably expected to provide actual notice. In determining whether a debt collector has complied with this requirement, relevant factors include whether the debt collector:

i. Identified the purpose of the communication by including, in the subject line of an electronic communication transmitting the disclosure, the name of the creditor to whom the debt currently is owed or allegedly is owed and one additional piece of information identifying the debt, other than the amount, such as a truncated account number; the name of the original creditor; the name of any store brand associated with the debt; the date of sale of a product or service giving rise to the debt; the physical address of service; and the billing or mailing address on the account;

ii. Permitted receipt of notifications of undeliverability from communications providers, monitored for any such notifications, and treated any such notifications as precluding a reasonable expectation of actual notice for that delivery attempt; and

iii. Identified itself as the sender of the communication by including a business name that the consumer would be likely to recognize, such as the name included in the notice described in § 1006.6(d)(4)(ii)(C), or the name that the debt collector has used in a prior limited-content message left for the consumer or in an email message sent to the consumer.

2. Notice of undeliverability. A debt collector who sends a required disclosure in writing or electronically and who receives a notice that the disclosure was not delivered has not sent the disclosure in a manner that is reasonably expected to provide actual notice under § 1006.42(a)(1).

3. Safe harbor for notices sent by mail. Subject to comment 42(a)(1)-2, a debt collector satisfies § 1006.42(a)(1) if the debt collector mails a printed copy of a disclosure to the consumer's last known address, unless the debt collector, at the time of mailing, knows or should know that the consumer does not currently reside at, or receive mail at, that location.

4. Effect of consumer opt out. If a consumer has opted out of debt collection communications to a particular email address or telephone number by, for example, following the instructions provided pursuant to § 1006.6(e), then a debt collector cannot use that email address or telephone number to send required disclosures.

(2) Exceptions. A debt collector need not comply with paragraph (a)(1) of this section when sending the disclosure required by § 1006.6(e) or § 1006.18(e) in writing or electronically, unless the disclosure is included on a notice required by § 1006.34(a)(1)(i) or § 1006.38(c) or (d)(2).

(b) Requirements for certain disclosures sent electronically. To comply with paragraph (a) of this section, a debt collector who sends the notice required by § 1006.34(a)(1)(i)(B), or the disclosures described in § 1006.38(c) or (d)(2)(i), electronically must do so in accordance with section 101(c) of the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) (15 U.S.C. 7001(c)).

§ 1006.100 Record retention.

Official interpretation

1. Three-year retention period. Section 1006.100 requires a debt collector to maintain records that are evidence of compliance or noncompliance with the FDCPA and this part starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt or, in the case of telephone call recordings, until three years after the dates of the telephone calls. Nothing in § 1006.100 prohibits a debt collector from retaining records that are evidence of compliance or noncompliance with the FDCPA and this part for more than three years after the applicable date.

(a) In general. Except as provided in paragraph (b) of this section, a debt collector must retain records that are evidence of compliance or noncompliance with the FDCPA and this part starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt.

Official interpretation of 100(a) In general.

1. Records that evidence compliance. Section 1006.100(a) provides, in part, that a debt collector must retain records that are evidence of compliance or noncompliance with the FDCPA and this part. Thus, under § 1006.100(a), a debt collector must retain records that evidence that the debt collector performed the actions and made the disclosures required by the FDCPA and this part, as well as records that evidence that the debt collector refrained from conduct prohibited by the FDCPA and this part. If a record is of a type that could evidence compliance or noncompliance depending on the conduct of the debt collector that is revealed within the record, then the record is one that is evidence of compliance or noncompliance, and the debt collector must retain it. Such records include, but are not limited to, records that evidence that the debt collector's communications and attempts to communicate in connection with the collection of a debt complied (or did not comply) with the FDCPA and this part. For example, a debt collector must retain:

i. Telephone call logs as evidence of compliance or noncompliance with the prohibition against harassing telephone calls in § 1006.14(b)(1); and

ii. Copies of documents provided to consumers as evidence that the debt collector provided the information required by §§ 1006.34 and 1006.38 and met the delivery requirements of § 1006.42.

2. No requirement to create additional records. A debt collector need not create and maintain additional records, for the sole purpose of evidencing compliance, that the debt collector would not have created in the ordinary course of its business in the absence of the record retention requirement set forth in § 1006.100(a). For example, § 1006.100(a) does not require a debt collector to create call logs showing that it has not attempted to communicate with any consumers at times that the consumers designated as inconvenient. However, if the debt collector maintains call logs, the call logs are evidence of compliance or noncompliance with the FDCPA and this part and the collector must retain them.

3. Methods of retaining evidence. Section 1006.100(a) does not require a debt collector to retain actual paper copies of documents. Records may be retained by any method that reproduces the records accurately (including computer programs) and that ensures that the debt collector can easily access the records (including a contractual right to access records possessed by another entity).

4. When the three-year record retention clock starts to run. Section 1006.100(a) provides, in part, that a debt collector must retain records that are evidence of compliance or noncompliance until three years after the debt collector's last collection activity on a debt. An event such as the debt collector transferring the debt for consideration to another party would start the running of the debt collector's three-year record retention clock with respect to the debt, provided that the transfer of the debt represents the debt collector's last collection activity on the debt. In contrast, the debt's discharge in bankruptcy, or the consumer's curing of default on the debt, would not represent the time at which the three-year record-retention clock starts to run if the debt collector continues collection activity on the debt after that time, which might occur when the debt is secured and an enforceable lien on the collateral that secured the debt survives the bankruptcy discharge (and collection activity pursuant to the lien continues after the discharge).

(b) Special rule for telephone call recordings. If a debt collector records telephone calls made in connection with the collection of a debt, the debt collector must retain the recording of each such telephone call for three years after the date of the call.

Official interpretation of 100(b) Special rule for telephone call recordings.

1. Recorded telephone calls. Nothing in § 1006.100 requires a debt collector to record telephone calls. However, if a debt collector records telephone calls, the recordings are evidence of compliance or noncompliance with the FDCPA and this part, and, under § 1006.100(b), the debt collector must retain the recording of each such telephone call for three years after the date of the call.

§ 1006.104 Relation to State laws.

Official interpretation

1. State law disclosure requirements. The Act and the corresponding provisions of Regulation F do not annul, alter, or affect, or exempt any person subject to these requirements from complying with a disclosure requirement under applicable State law that describes additional protections under State law that are not inconsistent with the Act and Regulation F. A disclosure required by State law is not inconsistent with the FDCPA or Regulation F if the disclosure describes a protection that such law affords any consumer that is greater than the protection provided by the FDCPA or Regulation F.

Neither the Act nor the corresponding provisions of this part annul, alter, affect, or exempt any person subject to the provisions of the Act

or the corresponding provisions of this part from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of the Act or the corresponding provisions of this part, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with the Act or the corresponding provisions of this part if the protection such law affords any consumer is greater than the protection provided by the Act or the corresponding provisions of this part.

§ 1006.108 Exemption for State regulation.

(a) Exemption for State regulation. Any State may apply to the Bureau for a determination that, under the laws of that State, any class of debt collection practices within that State is subject to requirements that are substantially similar to those imposed under sections 803 through 812 of the Act (15 U.S.C. 1692a through 1692j) and the corresponding provisions of this part, and that there is adequate provision for State enforcement of such requirements.

(b) Procedures and criteria. The procedures and criteria whereby States may apply to the Bureau for exemption of a class of debt collection practices within the applying State from the provisions of the Act and the corresponding provisions of this part as provided in section 817 of the Act (15 U.S.C. 1692o) are set forth in appendix A of this part.

Appendix A to Part 1006—Procedures for State Application for Exemption from the Provisions of the Act

I. Purpose and Definitions

(a) This appendix establishes procedures and criteria whereby States may apply to the Bureau for exemption of a class of debt collection practices within the applying State from the provisions of the Act and the corresponding provisions of this part as provided in section 817 of the Act (15 U.S.C. 1692o).

(b) For purposes of this appendix:

(1) Applicant State law means the State law that, for a class of debt collection practices within that State, is claimed to contain requirements that are substantially similar to the requirements that relevant Federal law imposes on that class of debt collection practices, and that contains adequate provision for State enforcement.

(2) Class of debt collection practices includes one or more such classes of debt collection practices referred to in paragraph I(b)(1) of this appendix.

(3) Relevant Federal law means sections 803 through 812 of the Act (15 U.S.C. 1692a through 1692j) and the corresponding provisions of this part.

(4) State law includes State statutes, any regulations that implement State statutes, and formal interpretations of State statutes or regulations by a court of competent jurisdiction or duly authorized State agency.

II. Application

Any State may apply to the Bureau pursuant to the terms of this appendix for a determination that the applicant State law contains requirements that, for a class of debt collection practices within that State, are substantially similar to the requirements that relevant Federal law imposes on that class of debt collection practices, and that the applicant State law contains adequate provision for State enforcement. The application must be in writing, addressed to the Assistant Director, Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552, signed by the Governor, Attorney General, or State official having primary enforcement responsibility under the State law that applies to the class of debt collection practices, and must be supported by the documents specified in this appendix.

III. Supporting Documents

The application must be accompanied by the following, which may be submitted in paper or electronic form:

(a) A copy of the applicant State law.

(b) A comparison of each provision of relevant Federal law with the corresponding provisions of the applicant State law, together with reasons supporting the claim that the corresponding provisions of the applicant State law are substantially similar to the provisions of relevant Federal law, and an explanation as to why any differences between the State statute or regulation and Federal law are not inconsistent with the provisions of relevant Federal law and do not result in a diminution in the protection otherwise afforded consumers; and a statement that no other State laws (including administrative or judicial interpretations) are related to, or would have an effect upon, the State law that is being considered by the Bureau in making its determination.

(c) A comparison of the provisions of the State law that provide for enforcement with the provisions of section 814 of the Act (15 U.S.C. 1692*l*), together with reasons supporting the claim that the applicant State law provides for adequate administrative enforcement.

(d) A statement identifying the office designated or to be designated to enforce the applicant State law. The statement must show how the office provides for adequate enforcement of the applicant State law, including by showing that the office has necessary facilities, personnel, and funding. The statement must include, for example, complete information regarding the fiscal arrangements for administrative enforcement (including the amount of funds available or to be provided), the number and qualifications of personnel engaged or to be engaged in enforcement, and a description of the procedures under which the applicant State law is to be enforced by the State.

IV. Criteria for Determination

The Bureau will consider the criteria set forth below, and any other relevant information, in determining whether the applicant State law is substantially similar to relevant Federal law and whether there is adequate provision for enforcement of the applicant State law. In making that determination, the Bureau primarily will consider each provision of the applicant State law in comparison with each corresponding provision in relevant Federal law, and not the State law as a whole in comparison with the Act as a whole.

(a)

(1) In order for the applicant State law to be substantially similar to relevant Federal law, the applicant State law at least must provide that:

(i) Definitions and rules of construction, as applicable, import a meaning and have an application that are substantially similar to those prescribed by relevant Federal law.

(ii) Debt collectors provide all of the applicable notices required by relevant Federal law, with the content and in the terminology, form, and time periods prescribed pursuant to relevant Federal law. The Bureau may determine whether additional notice requirements under the applicant State law affect a determination that the applicant State law is substantially similar to relevant Federal law.

(iii) Debt collectors take all affirmative actions and abide by obligations substantially similar to those prescribed by relevant Federal law under substantially similar conditions and within substantially similar time periods as are prescribed under relevant Federal law;

(iv) Debt collectors abide by prohibitions that are substantially similar to those prescribed by relevant Federal law;

(v) Consumers' obligations or responsibilities are no more costly, lengthy, or burdensome than consumers' corresponding obligations or responsibilities under relevant Federal law; and

(vi) Consumers' rights and protections are substantially similar to those provided by relevant Federal law under conditions or within time periods that are substantially similar to those prescribed by relevant Federal law.

(2) In applying the criteria set forth in paragraph IV(a)(1) of this appendix, the Bureau will not consider adversely any additional requirements of State law that are not inconsistent with the purpose of the Act or the requirements imposed under relevant Federal law.

(b) In determining whether provisions for enforcement of the applicant State law are adequate, consideration will be given to the extent to which, under the applicant State law, provision is made for administrative enforcement, including necessary facilities, personnel, and funding.

V. Public Comment

In connection with any application that has been filed in accordance with the requirements of parts II and III of this appendix and following initial review of the application, a proposed rule concerning the application for exemption will be published by the Bureau in the *Federal Register*, and a copy of such application will be made available for examination by interested persons during business hours at the Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552. A comment period will be allowed from the date of such publication for interested parties to submit written comments to the Bureau regarding that application.

VI. Exemption from Requirements

If the Bureau determines on the basis of the information before it that, under the applicant State law, a class of debt collection practices is subject to requirements substantially similar to those imposed under relevant Federal law and that there is adequate provision for State enforcement, the Bureau will exempt the class of debt collection practices in that State from the requirements of relevant Federal law and section 814 of the Act in the following manner and subject to the following conditions:

(a) A final rule granting the exemption will be published in the *Federal Register*, and the Bureau will furnish a copy of such rule to the State official who made application for such exemption, to each Federal authority responsible for administrative enforcement of the requirements of relevant Federal law, and to the Attorney General of the United States. Any exemption granted will be effective 90 days after the date of publication of such rule in the *Federal Register*.

(b) Any State that receives an exemption must, through its appropriate official, take the following steps:

(i) Inform the Assistant Director, Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552 in writing within 30 days of any change in the applicant State law. The report of any such change must contain copies of the full text of that change, together with statements setting forth the information and opinions regarding that change that are specified in paragraph III.

(ii) Provide, not later than two years after the date the exemption is granted, and every two years thereafter, a report to the Bureau in writing concerning the manner in which the State has enforced the applicant State law in the preceding two years and an update of the information required under paragraph III(d) of this appendix.

(c) The Bureau will inform any State that receives such an exemption, through its appropriate official, of any subsequent amendments of the Act or this part that might necessitate the amendment of State law for the exemption to continue.

(d) After an exemption is granted, the requirements of the applicable State law constitute the requirements of relevant Federal law, except to the extent such State law imposes requirements not imposed by the Act or this part.

VII. Adverse Determination

(a) If, after publication of a proposed rule in the *Federal Register* as provided under part V of this appendix, the Bureau finds on the basis of the information before it that it cannot make a favorable determination in connection with the application, the Bureau will notify the appropriate State official of the facts upon which such findings are based and will afford that State authority a reasonable opportunity to submit additional materials that demonstrate the basis for granting an exemption.

(b) If, after having afforded the State authority such opportunity to demonstrate the basis for granting an exemption, the Bureau finds on the basis of the information before it that it still cannot make a favorable determination in connection with the application, the Bureau will publish in the *Federal Register* a final rule containing its determination regarding the application and will furnish a copy of such rule to the State official who made application for such exemption.

VIII. Revocation of Exemption

(a) The Bureau reserves the right to revoke any exemption granted under the provisions of the Act or this part, if at any time it determines that the State law does not, in fact, impose requirements that are substantially similar to relevant Federal law or that there is not, in fact, adequate provision for State enforcement.

(b) Before revoking any such exemption, the Bureau will notify the State of the facts or conduct that, in the Bureau's opinion, warrant such revocation, and will afford that State such opportunity as the Bureau deems appropriate in the circumstances to demonstrate continued eligibility for an exemption.

(c) If, after having been afforded the opportunity to demonstrate or achieve compliance, the Bureau determines that the State has not done so, a proposed rule to revoke such exemption will be published in the *Federal Register*. A comment period will be allowed from the date of such publication for interested persons to submit written comments to the Bureau regarding the intention to revoke.

(d) If such exemption is revoked, a final rule revoking the exemption will be published by the Bureau in the *Federal Register*, and a copy of such rule will be furnished to the State, to the Federal authorities responsible for enforcement of the requirements of the Act, and to the Attorney General of the United States. The revocation becomes effective, and the class of debt collection practices affected within that State become subject to the requirements of sections 803 through 812 of the Act and the corresponding provisions of this part, 90 days after the date of publication of the final rule in the *Federal Register*.